IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0768

James D. Fowler, ...Respondent,

v.

Nationwide Mutual Fire Insurance Company and Andrew Flanagan, ..Defendants,

Of Whom,
Nationwide Mutual Fire Insurance Company, ...Appellant.

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Both before the lower court and here, Respondent fails to point to evidence presented at trial that supports the contractual damages verdict in the amount of $501,444. Rather, Respondent asserts – after the trial – that he sought special consequential damages in the breach of contract action. However, neither the relief sought in his Complaint nor the arguments presented to the jury even hint that he sought special damages. Moreover, the fact that Respondent doesn't even attempt to point to any evidence at trial to support the contractual damages verdict of $501,444 highlights the fact that no such evidence exists. Therefore, the verdict is grossly excessive and the lower court erred when it failed to award a new trial absolute.

Respondent was allowed to rely on the testimony of local fire chief to refute Nationwide's cause and origin evidence that demonstrated an intentionally set fire. Although Chief Wright testified about certain factual observations, his damning testimony came in the form of his opinions and conclusions that the fire was unintentional, started at the kerosene heater, and that the kerosene heater was the source of ignition. These conclusions were not based upon personal observations because he was not present when the fire started. Moreover, they require "special knowledge, skill, experience or training" in fire cause and origin. Because the lower court held that Chief Wright was not an expert, his testimony on these matters was erroneously admitted. Although Respondent attempts to dilute the improper nature of Chief Wright's testimony by pointing to his factual testimony, Nationwide did not object to his factual testimony. Rather, Nationwide objected to – and the Trial Court erroneously admitted – Chief Wright's opinions and conclusions. Because that testimony was improperly admitted and

was then utilized repeatedly at trial by Respondent to Nationwide's detriment, Nationwide is entitled a new trial absolute free from the improper influence of Chief Wright's non-expert opinions.

As Respondent notes, the lower court left the charge on contractual damages to the parties. Respondent then accurately argued to the jury that they could not award $523,444 because they had to subtract the $156,125 in payments from Nationwide to Respondent and his mortgagees and the jury had to evaluate the damages actually presented. Because Respondent adequately explained the rule for contractual damages, Nationwide had no need to elaborate. The jury failed to follow those instructions and the verdict is erroneous.

The Supreme Court's holding in Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986) did ***not*** hold that post-denial conduct was admissible as evidence of bad faith. However, the holding in Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 45 S.E.2d 582 (1994) is clear and unequivocal. The analysis in a claim for bad faith failure to pay policy benefits focuses on the information available to the insurance company at the time that it makes the coverage decision, not post-denial conduct. All of the evidence cited in Respondent's brief in support of the bad faith claim is comprised of post-denial conduct. Because this evidence has no effect on whether Nationwide had a reasonable basis to deny coverage, it is irrelevant on the bad faith analysis. Therefore, the Trial Court erred when it failed to grant a directed verdict on the bad faith cause of action or a JNOV after the verdict.

I. Both Nationwide and Respondent presented the offset issue to the jury and the jury failed to award the offset.

Respondent fails to cite a single case that justifies affirming the failure to correct the contractual damages by offsetting the amount of payments made to Respondent's mortgagees and the past payment to Respondent. In spite of his unsupported contention that the verdict does not result in a double recovery, that is exactly what results from the lower court's error.

A. Nationwide presented uncontested testimony evidence of the past payments to Respondent and Respondent himself argued to the jury that they must reduce damages by the amount of the past payments.

Respondent argues that Nationwide did not present offset evidence at trial or assure that the jury heard that it was required to reduce damages by the amount of the past payments. This statement is false. First, Nationwide presented uncontested testimony of the past payments. (Trial Tr. 305:2-12; 525:25-526:7). In fact, the testimony came – in part – straight from Respondent's mouth on cross-examination:

> Q. Early on you were given a $2,000 advance while the investigation was pending?
>
> A. That's correct.
>
> * * *
>
> Q. Okay. Nationwide did pay your first mortgage off in full?
>
> A. Yes, sir.
>
> Q. And Nationwide did pay the majority of the second mortgage off, leaving a much smaller balance than had been there because the limits on your policy was $154,000?
>
> A. Yes, sir.

(Trial Tr. 525:17-526:7). This testimony came in without objection and clearly goes to Respondent's damages.

Moreover, ***Respondent's counsel*** instructed the jury that they had to offset damages by the amount of the past payments: "[T]he total costs payable is $523,333 if all the conditions are met. ***That's not the right number to start with because they paid $154,000 to the mortgage companies, so if you subtract that*** . . . ." (Trial Tr. 951:7-18) (emphasis added). Therefore, not only did Respondent not object to the offset, but Respondent conceded and instructed the jury in closing arguments that Nationwide was entitled to the offset.

B. Offset is not an affirmative defense because it only goes to reduce the ultimate damages owed.

Without citing to a single case to support the position, Respondent claims that the deduction in damages for amounts paid under the policy to Respondent's mortgagees must be pled affirmatively as a defense. However, the South Carolina Supreme Court held that this argument is "without merit." See Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995). "First, Rule 8(c) does not list set-off as an affirmative defense which must be pled in order to be pursued at trial. Second, the set-off which was granted in this case does not fall within the 8(c) catchall of 'any other matter constituting an avoidance or affirmative defense." *Id.* Therefore, the question has already been addressed by South Carolina's Supreme Court and that decision is compelling in this case.

Respondent cites to numerous treatises in his attempt to overcome the clear holding in Broome. However, those citations – with the exception of Couch – do not refer to the setoff at issue in this case. For example, Respondent cites American

Jurisprudence Payment for the proposition that payment must be affirmatively pled. (Initial Brief of Resp't p. 9). However, that treatise goes on to note that, at common law, "a part payment was provable under a general denial." 60 Am. Jur. 2d Payment § 103. Although the treatise mentions possible deviations from this general rule under certain statutes, South Carolina has no such statute. Likewise, the citation to American Jurisprudence Counterclaim, Recoupment, Etc. relates to a completely different legal theory of offset. Under that treatise, "The doctrine of setoff . . . is essentially an equitable one requiring that the demands of ***mutually indebted parties*** be set off against each other and that only the balance be recovered . . . ." 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 6. Nationwide never asserted that Fowler was indebted to it. Therefore, that treatise is inapplicable.

Although Couch adds a comment that offset should be affirmatively pled after plainly stating that insurers are entitled to the offset for payments to mortgagees, it does not cite a single case in support of the proposition that offset must be affirmatively pled. See 12 Couch on Ins. § 178:60. Moreover, the caselaw from other jurisdictions aligns with the Supreme Court's holding in Broome. This issue was addressed in Howard v. Abernathy, 751 S.W.2d 432 (Tenn. Ct. App. 1988). The defendant made a "post-judgment motion to reduce the judgment by the amount of medical expenses paid by defendant's insurer to plaintiff, which expenses were proven by plaintiff and presumably included in the verdict of the jury." Id. at 433. The plaintiff alleged that by failing to affirmatively plead the partial payment, the defendant waived its right to seek the set-off. The Court of Appeals disagreed, holding:

> The money received by plaintiff was an advance payment or partial satisfaction of the claim of the plaintiff. [Civil Rule 8], cited by plaintiff contains a reference to payment as an affirmative defense which must be specifically pleaded. However, the circumstances of the case excuse the defendant from pleading or proving partial payment by his insurer, ***which was not a defense as to liability, but a mitigation in event of liability***.

Id. at 434-35 (emphasis added); see also Flowers v. Turner, 2003 WL 135055 (Tenn. Ct. App. 2003) (applying the same rule to award a post-verdict offset for payments made by defendant's liability insurer to plaintiff's former employer under a worker's compensation lien); Washington v. Atchison, Topeka and Santa Fe Railway Co., 114 N.M. 56, 834 P.2d 433 (Ct. App. 1992) (allowing post-verdict set-off over plaintiff's objections and finding that set-off for partial payments is not an affirmative defense); Hamm v. City of Milton, 358 So.2d 121 (Fla. Ct. App. 1978) (advance payments made by defendant's insurer to plaintiff need not be affirmatively pled, failure to allow set-off would result in double recovery and unjust enrichment); see generally Marketos v. American Employers Ins. Co., 465 Mich. 407, 633 N.W.2d 371 (2001) (affirming trial court's reduction of amount paid to mortgagee from amount awarded under fire insurance policy). The jurisdictions that have addressed this question apparently unanimously hold that the reduction in damages based upon payments to the mortgagees goes to the total amount of damages and does not constitute an affirmative defense.

Not only did Nationwide present uncontested evidence of past payments that the jury failed to calculate the offset in its determination of damages, but the lower court never held that Nationwide failed to affirmatively plead an offset. In its Order Denying Defendant's Post Trial Motions, the lower court specifically found that "[t]he evidence was undisputed that Nationwide paid $154,125.00 to the two mortgagees in outright

satisfaction of the first mortgage and *partial* satisfaction of the second mortgage and only 'a $2,000.00 advance [to its insured, the Plaintiff] under Coverage C – Contracts [sic]." (Order Denying Defendant's Post Trial Motions, p. 5) (emphasis and alterations in original). Therefore, Nationwide presented the offset issue at trial. Moreover, even if payments made on behalf of Respondent must be pled as an affirmative defense – which they do not – Respondent failed to object to evidence of the payments made to his lienholders. In fact, he admitted that the first lien was paid in full and a large portion of the second lien was paid off. Moreover, counsel instructed the jury in closing arguments to account for the offset. Therefore, the issue of setoff was tried by consent. See McCurry v. Keith, 325 S.C. 441, 447, 481 S.E.2d 166, 169 (Ct. App. 1997) (ultimately finding that setoff need not be affirmatively pled, but even if the issue of setoff should have been affirmatively pled, the issue was tried by implied consent pursuant to Rule 15(b), SCRCP); Lee v. Thermal Eng' Corp., 352 S.C. 81, 85, 572 S.E.2d 298, 300 (Ct. App. 2002). Unlike the evidence of consequential and/or special damages, Nationwide's payments to the lienholders could go to no other issue other than damages and offset, Respondent did not object to this evidence and was fully aware of its admission and thereby tried these issues by consent and cannot now challenge their admissibility.

II. Nationwide objected to Chief Wright's erroneously admitted opinion testimony and Respondent fails to provide an argument as to why those opinions were not prejudicial.

Respondent fails to present any argument showing that Chief Wright's erroneously admitted opinion testimony did not prejudice Nationwide. Instead, he spends an inordinate amount of time going over the non-objectionable factual testimony from Chief Wright. However, Nationwide did not object to Chief Wright's factual

observations when he arrived at the scene or thereafter. Rather, Nationwide consistently objected to the conclusions that Chief Wright drew from those observations, specifically that the cause of the fire was "unintentional," that the fire started in the area of the kerosene heater, and that the cause of the fire was the kerosene heater.

The determinations that the fire was unintentional and where and what started the fire are not mere "factual matters" as Respondent suggests. Chief Wright did not observe the start of the fire. Therefore, these are opinions and conclusions based upon the evidence at the fire. Such opinions and conclusions require expertise – such as that provided by Nationwide's expert Jerry Byers – and cannot be reached without "special knowledge, skill, experience or training." SCRE Rule 701.

Respondent does make one correct statement in his brief: Chief Wright did not hold himself out as an expert. (Initial Brief of Resp't p. 14). However, that didn't stop Respondent from treating him as an expert in closing arguments to the jury. As discussed in detail in Nationwide's primary brief, Respondent relied heavily on the Chief's conclusions contrasting them with those of Nationwide's expert Jerry Byers. The arguments culminated in the conclusion that Chief Wright was experienced and qualified to reach the ultimate conclusion in the case that the fire was unintentionally caused by the kerosene heater: "he has plenty of experience to do his job, plenty of common sense and experience to make this report, ***and plenty of common sense and experience to answer the key question in this case.***" (Trial Tr. 936:4-937:8) (emphasis added).

The admission of Chief Wright's written report was also erroneous. The statement is hearsay because it is a written report completed by Chief Wright "other than one made by the declarant while testifying at the trial . . . ." SCRE Rule 801(c).

Moreover, the report does not fall under the exception set forth in Rule 803(8). Rule 803(8) specifically provides that Chief Wright's "opinions, judgments, or conclusions are not admissible." As noted above, Chief Wright did not observe the start of the fire. Therefore, the statement that the fire was "unintentional," that the heater was involved in ignition and the power source for the fire, or that the fire started in the living room are all "opinions, judgments, or conclusions" and are therefore inadmissible. Moreover, because the statements were not even appropriately made from Chief Wright on the stand, the lower court compounded its error by admitting the report and allowing the chief's statements to go back to the jury room for the jury to consider during deliberation.

The effect of the local fire chief's opinions and the report that he was required to fill out by SLED is unquestionably prejudicial in this case. Chief Wright's conclusions and opinions became the theme of Respondent's closing arguments both as a means of pitting the local volunteer fire chief against Nationwide's retained cause and origin expert and as a way of pitting Oconee County against Nationwide. As the Supreme Court held in Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010), when erroneously admitted evidence becomes the theme of a plaintiff's closing argument, the effect can – and in this case did – deprive the defendant of a fair trial. Respondent persistently argued that Chief Wright was required to complete the Truck Report and that he concluded that the fire was unintentional. (Trial Tr. 925:2-9; 935:24-936:936-19). In doing so, Respondent placed the imprimatur of the State upon Chief Wright's improperly admitted conclusions and opinions. His opinions addressed the key question in the case and, coming from the local fire chief and with the apparent backing of SLED, had an

immeasurable impression on the jury. The prejudicial effect of this evidence was massive.

III. Respondent fails to cite to the trial transcript to show any evidence that supports the jury's contractual damages award of $501,444 because no such evidence exists.

Nationwide has already set out with great detail the damages evidence presented at trial and why the evidence does not support a verdict in excess of $187,431. Rather than attempt to show in the trial testimony where he presented evidence to support the contractual damages verdict of $501,444, Respondent resorts first to arguing that Nationwide somehow had an obligation to argue to the jury that it could not award more damages than what was permitted by the law. Second, Respondent claims – post-trial and contrary to his own closing arguments and concessions to the trial court – that he sought hardship or special damages for the breach of contract all along. The first statement is an incorrect statement of the law and the second statement is an incorrect statement of the facts.

Respondent makes a grand claim that Nationwide has been somehow dilatory in asserting the fact that damages cannot exceed the amount permitted by the law. It seems that Respondent takes the position that Nationwide is required to affirmatively plead that Respondent's damages cannot exceed the amount proven at trial. However, Nationwide has no more obligation to plead or argue that Respondent cannot receive more damages than the amount he presents and proves at trial than it has to argue that Plaintiff must prove a breach of an insurance contract. These are the basic elements of his cause of action for which he bears the burden. With exceptions noted in Nationwide's primary brief, Nationwide did not dispute every figure of Respondent's damages. However, this

does not relieve Respondent of ***his*** burden of proving that he suffered damages and it does not permit Respondent to suddenly recover more damages than he has proved at trial.

For example, if only the contents coverage were at issue in the case and Respondent presented damages of $50,000 with limits of $100,000, Nationwide would have no duty to tell the jury "you can't award $300,000." It is the law that the jury can't award more than the $50,000 presented. Even if Nationwide failed to answer the complaint, default damages for a breach of contract – without a request for special damages – could not exceed $50,000. Because the jury in the present case awarded more than the amount of damages presented at trial, the verdict must be set aside or remitted. However, because the award so greatly exceeded the amount presented at trial – by over 265% – the award grossly exceeds any amount supported by the evidence and reflects the impact of the erroneously admitted testimony throughout the trial. Therefore, a new trial absolute is the only remedy that can purge the taint of the erroneously admitted testimony and assure that Nationwide receives a fair trial.

A. Contractual damages were limited to the amount due under the policy.

Nationwide thoroughly cites the contractual damages evidence at trial in its primary brief. That evidence simply cannot support a contractual damages award in excess of $187,431. Respondent doesn't even make the effort to show where in the record additional damages could be found. Instead, Respondent claims that the jury awarded special damages. However, Respondent never sought special "hardship" damages. Moreover, the trial transcript is absolutely barren of any reference to consequential damages under Respondent's breach of contract cause of action. In order

to avoid the risk of having to elect between the contractual damages award and a bad faith award, Respondent very carefully segregated the amounts owed under the contract in his contractual damages claim from any and all consequential damages under his bad faith claim.

"Damages for breach of an obligation to pay money are generally limited to the amount due [under the terms of the contract] plus interest." Cook v. Mack's Transfer & Storage, 291 S.C. 84, 89, 532 S.E.2d 296, 299 (Ct. App. 1986) (citation omitted). Respondent claims that Nationwide's summary of this Court's statement of the law in Cook in Nationwide's primary brief was "highly misleading." (Initial Brief of Resp't, p. 28-29). Specifically, he claims that Nationwide is deceptive by paraphrasing the term "If, and only if," in stating that an insured cannot recover consequential damages unless he proves bad faith. The paraphrase is a correct statement of the law as this Court summarized it in Cook and as the Supreme Court held in Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983). The Supreme Court in Nichols, changed the general rule by allowing consequential damages in tort for the bad faith failure to pay benefits due under an insurance contract. Id. Explaining the change, the Supreme Court stated:

> Heretofore, the ***only*** compensation a successful insured could expect through litigation was the belated payment of his claim and the possibility of recovering attorney fees up [the amount allowed by the predecessor to South Carolina Code § 38-59-40].
>
> We hold today 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. 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.

Id. at 340, 306 S.E.2d at 619. Reading the Nichols case, this Court made an accurate statement of the law in Cook that "***if an insured can demonstrate bad faith*** or unreasonable refusal by an insurer to pay first party benefits due under a mutually binding contract, ***he can*** recover damages ***not limited to the face amount of the policy.***" Id. at 89. Therefore, unless an insured demonstrates bad faith, he is limited to the amount due under the policy – i.e. ***if, and only if,*** there is bad faith, then the insured can recover consequential damages.

As the Nichols court makes clear, breach of contract damages in first-party insurance cases are limited to the amount due under the policy. Consequential damages are properly pled under Plaintiff's bad faith claim. That is exactly how Respondent pled his claim in this case.

The principle that damages for breach of an insurance contract are limited to the amount owed under the policy is irrefutably laid out in Holmes v. Nationwide Life Ins. Co., 273 S.C. 711, 714, 258 S.E.2d 924, 926 (1979), where the Supreme Court held that the damages awarded by a jury in breach of an insurance contract to pay money must be reduced to "the amount actually stipulated by the terms of the policy." Although Holmes dealt with a policy of health insurance, both health insurance and property insurance are contracts to pay money for specified covered losses. Therefore, the holding in Holmes is directly applicable in this case.

The cases cited by Respondent as supporting a claim for special damages in this case are inapplicable. See Kline Iron Steel Co. v. Superior Trucking Co., Inc., 261 S.C. 542, 201 S.E.2d 388 (1973) and Hobbs v. Carolina Coca-Cola Bottling Co., 194 S.C.

543, 10 S.E.2d 25 (1940). The Supreme Court in Kline addressed special damages in the context of a performance contract to provide goods. The law regarding damages for a contract to provide goods is different from the law regarding a contract for the payment of money. In contracts to pay money, courts award interest in lieu of consequential damages. Because Holmes is on point and deals with a contract to pay money, it is controlling on the issue. The claim at issue on Hobbs sounded in ***tort*** and therefore is clearly inapplicable to the present action.

Furthermore, Respondent refers to the New Hampshire case of Lawton v. Great South West Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978) in support of his claim that special damages are available in a claim for breach of a policy of fire insurance. However, this Court has no reason to look to other jurisdictions when the South Carolina Supreme Court has already addressed the issue. Because Holmes states that damages are limited to the amount owed under the policy, it is controlling. Moreover, even if special damages could be awarded if Respondent proved that such damages were within the contemplation at the parties at the time they entered into the contract, Respondent presented absolutely no evidence regarding communications relating to the creation of the insurance contract. Therefore, there was no evidence of what was in the contemplation of the parties at the time they entered into the contract.

Absent the exception set out in Nichols for bad faith, the general rule stated by the Supreme Court in Holmes controls damages for a breach of an insurance contract to pay money. Absent bad faith, damages are limited to the amount owed under the terms of the policy and do not include special or consequential damages. Respondent recognized this rule while arguing the charges before the judge and in his treatment of damages in both

his pleadings and before the jury. Therefore, the jury's verdict which exceeded the covered damages presented at trial by nearly three-fold is highly excessive and requires a new trial absolute.

B. If the Supreme Court in Lemoine had the facts of this case before it, the Court would have granted a new trial.

Respondent cites Lemoine v. Hollingsworth, 273 S.C. 477, 257 S.E.2d 713 (1979), a case in which the Supreme Court upheld a jury verdict of $8,375.00 in a contractual breach of warranty case as being supported by the evidence. In that case, the Supreme Court reviewed the record and found testimony that repairs to correct the defects would cost between $7,000 and $8,000, not including certain supplies, which another witness estimated to cost an additional $840. Therefore, the jury's verdict was within the range of damage supported by the evidence presented at trial, $8,840. Id. at 478-79, 257 S.E.2d at 714. However, if the Supreme Court had dealt with the facts of this case under its approach in Lemoine, it would have reached the opposite conclusion. Even when every doubt is construed in Respondent's favor, the testimony on damages simply doesn't add up to $501,444. Rather, it adds up to – at most – $187,431.

This Court followed the same approach in Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984), which is addressed in Nationwide's primary brief. (Initial Brief of Appellant, p. 33). Because the verdict grossly exceeded the highest possible damages presented at trial, this Court reversed and granted a new trial. Importantly, the ratio between the actual verdict and the amount awarded in both Hutson and the present case is extremely close and a new trial absolute is likewise appropriate in this case.

C. Respondent chose to only seek consequential damages in his bad faith cause of action to avoid having to elect between contractual and bad faith damages.

In Nichols, the trial court required that the insured elect between his contractual remedy and his bad faith remedy because the damages were duplicative. 279 S.C. at 340-41, 306 S.E.2d at619. Because the jury awarded punitive damages, the trial court threw out the contractual remedy. Moreover, the Supreme Court ruled that the insured could not recover his statutory attorney fees under what is now South Carolina Code § 38-59-40 because he had elected recovery under the bad faith cause of action. Id. at 342, 306 S.E.2d at 620.

In an attempt to avoid this problem, Respondent intentionally chose not to plead special consequential damages in his breach of contract cause and agreed to a verdict form that delineated between bad faith consequential damages and contractual damages. Respondent further chose not to submit any evidence relating to attorney's fees. This assured that no part of the two verdicts would represent recovery for the same damages and allowed Respondent to theoretically "maximize" his recovery. Now, after receiving less than he desired for the bad faith cause and more than was warranted under the evidence in his breach of contract cause, Respondent retroactively claims he sought special damages all along. However, Respondent's own pleadings, arguments to the lower court, and instructions to the jury reveal a very intentional delineation between contractual damages and consequential damages.

D. Respondent failed to plead special damages and cannot rely upon an erroneous jury verdict to claim he is now entitled to such damages.

A party must particularly allege and prove special damages in a breach of contract action. Kline Iron & Steel Co. v. Superior Trucking Co., Inc., 261 S.C. 542, 546, 201

S.E.2d 388, 390 (1973); see also Holmes v. Nationwide Life Ins. Co., 273 S.C. 711, 258 S.E.2d 924 (1979) (holding that trial judge erred in charging that insured could recover consequential damages on breach of insurance contract cause of action; where special damages were not pled, judge should have charged the jury that the amount recovered in the policy was the only amount recoverable).

In his general statement of facts, Respondent alleged damage for debris removal and loss of use of his house. (Complaint, ¶¶ 24-25). He did not seek special damages in his cause of action for breach of contract:

> On information and belief, Defendant Nationwide's failure to pay the claim, in breach of the contract, entitled plaintiff to judgment against Nationwide for the amount of his losses covered by the policy.

(Complaint, ¶ 31). Respondent did plead consequential damages in his bad faith cause of action which is set out in a separate enumerated cause of action in the Complaint:

> The Defendant Nationwide's wrongful actions have damaged the plaintiff, in that he has not received the benefits to which he is entitled under the said policy, causing consequential damages.

(Complaint, ¶ 40).

Furthermore, Respondent's responses to interrogatories never put Nationwide on notice of any claim for special damages under the breach of contract claim. Nationwide requested that Respondent "[s]et forth a statement of all damages claimed to have been sustained by the party." (Defendant's Interrogatories, ¶ 3). Respondent responded (in relevant part):

> Plaintiff has been unable to repair or return to his residence; has been forced to live in an out building on the property without proper heat, running water, toilet or laundry

> facilities; and has suffered inconvenience and discomfort thereby.
>
> Plaintiff has lost the use of his personal property and the enjoyment of his real and personal property, including the landscaping.

(Plaintiff's Answers to Defendant's Interrogatories ¶ 3). Respondent never asserts that these are special damages or in any other way suggests that these claims are anything other than bad faith consequential damages. He does not set out his claimed damages in subsections for breach of contract, bad faith, and/or slander. Nationwide does not have a duty to read Respondent's mind and divine that Respondent asserts special damages rather than consequential damages. This is exactly why the caselaw requires that special damages be specifically alleged and proved.

Respondent failed to specifically plead special damages as required by Kline, but instead chose to seek these consequential damages in his bad faith claim. Therefore, any amount of the jury verdict for breach of contract constituting special damages is not recoverable. Most importantly, Respondent instructed the judge ***and*** jury that he was only entitled to what he calls "hardship" damages for the bad faith claim. Without re-quoting the language from Nationwide's primary brief, Respondent conceded during the arguments regarding the jury charges that contractual damages were limited to the policy limits. (Trial Tr. 906:14-907:12).

Although he claims that this discussion was "confusing," there was no confusion in either the courtroom or in the written transcript that Nationwide argued that damages for the breach of contract cause of action were limited to the amount due under the contract. Respondent conceded, stating: "I agree with Mr. Murphy that on Cause of

Action Number 1, Breach of Contract, that's the most that we could probably get, but on the bad faith, you can get consequential damages." (Trial Tr. 906:14-907:1).

As Respondent notes, the Trial Court advised the parties that he was going to have counsel for the parties instruct the jury on contractual damages in the closing arguments. Respondent did so. Specifically, Respondent instructed the jury: "there are no cumulative damages under a simple breach of contract case." (Trial Tr. 941:23-24). When speaking about the contents loss, which Respondent presented evidence that the value of lost contents was $142,610.75, Respondent instructed the jury that the highest amount available was the policy limits: "The total testified is $142,610.65. That is more than the coverage. The coverage is only $114,692. It's on this form. I can't remember, if you can't remember it, that's where you find it. So he's entitled to that $114,692 plus the 5 percent debris removal . . . ." (Trial Tr. 954:13-18). Again, he states that the amount of damages must be less than the policy limits of $523,000: "how much should Mr. Fowler be paid under the first cause of action, which is the biggest contract. It's not $523,000, it's less than that, but it's certainly more than nothing." (Trial Tr. 954:1-4).

Based upon Respondent's explanation of contractual damages to the jury, and the verdict form itself, Nationwide had no need to further expound upon those damages. What better source for the jury to hear that damages are limited to the amounts due under the contract than straight from the plaintiff seeking a recovery?

Lastly, the verdict form provided separate locations for the allocation of breach of contract damages and bad faith damages. The issue of punitive damages was not reached by the jury. Therefore, the blank for bad faith damages could only represent the jury's determination of the amount of consequential damages resulting from Nationwide's

alleged wrongful breach of the policy. It was Respondent's responsibility to specifically plead and prove special damages, but instead he chose to seek his consequential damages in the bad faith cause of action. The jury awarded $3,000.00 and no more for Respondent's consequential damages. This is the limit of his extra-contractual damages.

Respondent's conduct reveals a consistent and intentional distinction between his contractual claim for the amount of covered loss under the policy and his bad faith claim for consequential damages. Ironically, the evidence that he points to in his brief as supporting the excessive contractual damages verdict, such as the extended loss of use of the house and living in his gazebo without running water (Initial Brief of Resp't, p.30), is the exact evidence that he instructed and argued to the jury to consider in determining the bad faith award:

> The last thing I want to talk about is the ***damages for bad faith***. Listen closely when the Judge reads the instruction about insurance bad faith, because if you find that the Defendant is guilty of insurance bad faith because of all the reasons we've talked about, too much, you can give Mr. Fowler extra damages as long as he – because those are called ***consequential damages, not just the direct damages, the lack of payment of the contract***, if you think it's been a ***hardship*** for him to be in that gazebo for 34 months already, with some more time to come, if he gets the money to build it, he testified he thought he would take about another six or seven months or he thought it would take a year to build that house. So you can give him, I think the figure is $1,400 a month for a similar house in this community, multiply $1,400 a month times however many months you think it would be between January of 2009 and when you think he's likely he'll get back in the house. It's already been 34 months. It'll be 34 months plus 12. You do the math.

(Trial Tr. 954:7-955:1).

Based upon his own pleadings, discovery responses, statements to the judge, arguments to the jury, and the verdict form, the record unmistakably shows that Respondent did not seek special contractual damages and the jury's erroneous excessive verdict cannot be explained or justified in that way. The only explanation for the amount of the verdict is that the jury awarded more damages than are allowed under the law.

IV. The Supreme Court held in Howard that post-denial conduct is irrelevant to the bad faith analysis and Respondent's reliance on Varnadore is misplaced.

"Evidence that arises after the denial of a claim is not relevant to the propriety of the conduct of the insurer at the time of its refusal." Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 45, 448, 450 S.E.2d 582, 584 (1994). The Supreme Court's holding in Howard needs no further explanation. Post-denial conduct is not relevant to the bad faith analysis and, therefore, should be excluded pursuant to the South Carolina Rules of Evidence. In an attempt to avoid this unambiguous holding, Respondent relies upon Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986). The holding in Varnadore is inapplicable for two reasons.

First, Varnodore is absolutely silent on the issue of post-denial conduct. The issue in Varnadore was whether the jury could look beyond the carrier's own investigation in a bad faith claim. In other words, if information was available to the insurer at the time of the coverage decision but not considered by the insurer, is that information relevant to the bad faith analysis? The Supreme Court held that such information was relevant. Nationwide never took a contrary position in this case. Absent another rule of evidence, all information that Nationwide could have obtained during its investigation, whether considered by Nationwide or not, was admissible. However, Respondent did not rely upon such information to prove his bad faith claim. Rather, he

relied upon post-denial conduct occurring after Respondent had hired an attorney and the adversarial positions of the parties had become readily apparent. Nothing in the very brief discussion from Varnadore even suggests that such evidence is relevant to the bad faith analysis. Therefore, Varnadore simply doesn't stand for the proposition stated by Respondent.

Second, Varnadore was issued eight years ***before*** the Supreme Court's clear holding in Howard. The holding in Howard not only speaks to the exact issue before this Court, but it is a more recent statement of the law from the South Carolina Supreme Court. Therefore, it is controlling in this matter and the lower court erred by admitting evidence of post-denial conduct.

Moreover, the rule set forth in Howard is more compelling. The date that an insured files suit is arbitrary. There is no magic switch that somehow changes the adversarial position between the insured and the insurer after a denial of coverage when suit is filed. Therefore, cutting off evidence of conduct upon the initiation of legal action has no connection to the claim alleged. On the other hand, the point of denial of the claim clearly establishes the adversarial positions between the carrier and the insured. Moreover, if the denial was made in bad faith, that bad faith is determined at the time of the denial. The insured can file suit immediately. Therefore, the logical point at which conduct and information is relevant on the bad faith analysis is at the time of the denial, not thereafter. The Supreme Court's holding in Howard wisely recognizes this principle and states the rule with unmistakable clarity.

Even in Respondent's brief on appeal, he continues to rely solely upon post-denial conduct to show evidence of bad faith. Nationwide denied the claim on February 11,

2009. From that point forward, Nationwide's position was unwavering. In spite of Respondent's contention that the claim process was a "continuum of actions" thereafter, the actions were all unilateral moves taken by Respondent and cannot be used to move the denial date. Respondent cites what he claims to be "abundant evidence" of bad faith, but all of the evidence consists of post-denial conduct. (Initial Brief of Resp't, p. 40). Because all of the post-denial conduct was erroneously admitted, there is no evidence to support the jury's verdict on the bad faith claim or the lower court's determination of bad faith for purposes of attorney's fees. Therefore, the lower court erred when it failed to grant a directed verdict or award a JNOV on the issue and further erred when it awarded attorney's fees in this case.

V. It is impossible to reconcile the breach of contract verdict with the policy limits.

This Court's role in considering whether the verdict is excessive is simple. Can the verdict be reconciled with the evidence? The policy limits were $523,333. Importantly, ***policy limits are not evidence of damages***, but set a cap on damages in a claim for breach of an insurance contract. The jury heard undisputed evidence that Nationwide paid $154,125 under the dwelling coverage to Respondent's mortgagees and $2,000 directly to Respondent. In spite of this uncontested testimony from Respondent and instructions from Respondent's counsel in closing arguments that the jury was required to subtract those funds from any damages award, the contractual damages awarded were $501,444. It is impossible to reconcile that number with undisputed policy limits of $523,333. No matter what way Respondent tries to spin it, the jury undeniably failed to offset the prior payments and awarded a double recovery.

Importantly, this is not the proper focus of the analysis. The focus must be on the evidence of covered property damage presented. In other words, Respondent's damages start at zero at the beginning of the trial and he bears the burden of proving covered losses. Nationwide painstakingly searched the entire trial transcript, and the evidence when viewed in Respondent's favor cannot support a contractual damages verdict in excess of $187,431. Respondent fails to point to any other evidence presented at trial to support a damages award in excess of that number and no such evidence was ever admitted. This grossly excessive verdict requires a new trial absolute. Even if the Court determines that no new trial is required by a verdict that exceeds the evidence at trial by over 260%, a remittitur is absolutely necessary to avoid manifest injustice.

CONCLUSION

The law establishes what remedies are available for the breach of an insurance contract to pay money and a verdict that awards damages in excess of the amount permitted under the law must be set aside. Respondent cannot point to evidence that supports the jury's excessive verdict. However, when the excessive verdict can't be justified by the evidence presented at trial, the excessive verdict should heighten the Court's alertness for other improper influences.

In this case, the Court doesn't have to look very hard for the source of the improper influence. The lower court erroneously admitted improper testimony in the form of the local fire chief's opinions on the key issues in the case and evidence of post-denial conduct after Respondent had already hired an attorney. This erroneously admitted evidence prejudiced Nationwide with the ultimate effect of depriving Nationwide of a fair trial. Respectfully, the lower court's numerous errors can only be

corrected by a new trial. However, should this Court affirm the lower court on the issue of a new trial absolute, it must reverse on the new trial *nisi* remittitur and reduce the contractual damages verdict to the highest amount supported by the evidence at trial.

Both the jury and the lower court found bad faith based upon post-denial conduct. In his brief, Respondent only relies upon post-denial conduct as evidence of bad faith. Under Howard, such evidence was both irrelevant and inadmissible. Because the only evidence at trial on the bad faith question was of post-denial conduct, the verdict and the award of attorney's fees must be reversed.

Respectfully submitted,

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September 9, 2013

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0768

James D. Fowler, ...Respondent,

v.

Nationwide Mutual Fire Insurance Company and Andrew Flanagan, ..Defendants,

Of Whom,
Nationwide Mutual Fire Insurance Company, ...Appellant.

CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Appellant, certify that the Reply Brief of Appellant complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant Nationwide Mutual Fire Insurance Company, in addition to those items previously designated, proposes the following to be included in the Record on Appeal:

1. Defendants' Interrogatories to Plaintiff dated July 16, 2009.

I certify that this designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant and Designation of Matter on James D. Fowler by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2013, addressed to his attorney of record, Clinch H. Belser, Esquire, 1901 Main Street, Suite 1550, Columbia, South Carolina 29202.

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