RECEIVED
Dec 30 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2023-001289

Tasha Jones and Shaniqua Thompson, ... Respondents,

v.

Lyndon Southern Insurance Company,
Safe Choice Insurance, LLC, and
Jupiter Managing General Agency, Inc, Defendants,

Of which

Lyndon Southern Insurance Company is the ..... Appellant.

APPELLANT'S FINAL OPENING BRIEF

MAYNARD NEXSEN, PC
Kirsten E. Small, SC Bar No. 75681
Susan P. McWilliams, SC Bar No. 3918
104 S. Main Street, 9th Floor
Greenville, South Carolina 29601
(864) 370-2211
KSmall@maynardnexsen.com
SMcwilliams@maynardnexsen.com

RANSOME H. HELMLY, LLC
Ransome H. Helmly, SC Bar No. 78081
409 Coleman Blvd., Suite 200
Mount Pleasant, SC 29464
Tel.: 843.884.0184
rhh@helmlylaw.com

Attorneys for Appellant Lyndon Southern Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court err in ruling that Lyndon's motions for reconsideration under Rule 59(e), SCRCP, for JNOV under Rule 50(b), SCRCP, and for a new trial under Rule 59(a), SCRCP were untimely, where (1) the court's permission is not required to file a Rule 59(e) motion ten days after the jury's verdict, and (2) the filing of the JNOV and new trial motions along with the Rule 59(e) motion presented no new issues and could not have prejudiced Respondents?

2. Did the circuit court err in ruling that Ms. Thompson, who was neither a contracting party nor a "named insured," had standing to pursue breach of contract and first-party bad faith claims against Lyndon?

3. Was Lyndon entitled to judgment in its favor on Ms. Jones's breach of contract and first-party bad faith claims, where (1) Lyndon promptly and fairly processed and responded to her claims for property damage and bodily injury; (2) Ms. Jones was required to obtain a judgment against the unknown tortfeasor in order to establish entitlement to benefits under the uninsured motorist ("UM") policy issued by Lyndon; and (3) Lyndon never had a reasonable opportunity to settle within policy limits?

4. Is Lyndon entitled to either (1) a new trial *nisi remittitur* to correct the excessive damages award, or (2) a new trial absolute based on personal attacks by opposing counsel?

5. Did the circuit court err in failing to apply the statutory cap on punitive damages, where there are no facts to support an exemption from the cap?

STATEMENT OF THE CASE

This appeal arises out of a claim for uninsured motorist ("UM") benefits under an automobile insurance policy issued by Appellant Lyndon Southern Insurance Company ("Lyndon"). Respondents are Tasha Jones, the contracting party and "named insured" under the policy, and Shaniqua Thompson, an "insured person" under the Policy's UM provision.

I. FACTUAL BACKGROUND

A. Accident and Initial Above-Limits Demands

On June 15, 2017, a vehicle driven by Ms. Jones was rear-ended by an unknown driver who fled the scene. (R. p. 60 (Am. Compl. ¶¶ 14-17).) Ms. Jones and her passengers—Ms. Thompson and a third individual—were injured in the accident. (R. p. 61 (Am. Compl. ¶¶ 17, 19, 21); R. p. 238 (Trial Tr. 73:19-22).) At the time of the accident, Ms. Jones's vehicle was covered by an automobile insurance policy (the "Policy") issued by Lyndon, for which Ms. Jones had elected the statutory minimum UM coverage of $25,000 per person and $50,000 per accident. (R. p. 553 (Renewal Declaration at 2).) Ms. Jones is the "named insured" on the Policy. (R. p. 558 (Policy at 3).) At trial, Ms. Jones testified that the parties to the insurance contract are "me and Lyndon." (R. p. 240 (Trial. Tr. 75:11-15).) She also agreed that the coverage limits for UM claims were "$25,000 per person for bodily injury" and "up to $50,000 total." (R. p. 241 (Trial Tr. 76:1-5).) Ms. Thompson is neither a named insured nor is she otherwise a contracting party; according to her own testimony, she was "just a ride[r]" in the vehicle at the time of the accident. (R. pp. 287-288 (Trial Tr. 122:22-123:6).)

Respondents and the third passenger initiated a claim for UM benefits under the Policy on June 16, 2017, the day after the accident. (R. p. 258-259 (Trial Tr. 93:19-94:3).) Lyndon responded that same day, including by arranging a rental car for Ms. Jones and scheduling an appraisal and estimate of her vehicle. (R. p. 259 (Trial Tr. 94:4-9).) By July 24, a mere 38 days after submission of the UM claim, Lyndon determined Ms. Jones's vehicle was a total loss and issued payment to her and the lienholder. (R. pp. 260-261 (Trial Tr. 95:11-96:7).)

Ms. Jones, Ms. Thompson, and the third individual were all injured in the accident and incurred medical expenses. (R. p. 238 (Trial Tr. 73:11-24).) After the third individual accepted an offer of settlement from Lyndon, approximately $42,000 remained under the $50,000-per-accident coverage limit. (R. p. 312 (Trial Tr. 147:13-19); R. p. 409 (Trial Tr. 244:15-16).) On October 18, 2017, Respondents' counsel transmitted a demand letter and damages package to Lyndon via its claims administrator. (R. pp. 715-716 (Demand Letter of Oct. 18, 2017).) The demand letter was not a time-limited demand for policy limits. Rather, stated that Ms. Jones had incurred medical bills in the amount of $9,586.95 and that Ms. Thompson had incurred $9,780.71 in medical bills. (R. pp. 715-716 (Demand Letter at 1-2).) They demanded $65,000.00 each to settle the case, an amount far in excess of the remaining UM coverage available under the Policy. (R. p. 716 (Demand Letter at 2).) Following review of the medical records, Lyndon extended settlement offers of $7,500 to Ms. Jones and $8,660 to Ms. Thompson. (R. p. 246 (Trial Tr. 81:2-13); R. p. 552 (Offer Letter of Oct. 31, 2017).) Although Ms. Jones acknowledged that the purpose of sending the demand letter was to initiate a process of negotiation with Lyndon, Respondents did

not answer Lyndon's offer letter with a revised demand. (R. p. 245 (Trial Tr. 80:21-24); R. p. 268-269 (Trial Tr. 103:14-104:4).)

B. John Doe Action

On January 18, 2018, Respondents filed a "John Doe" action against the unknown driver who had hit Ms. Jones's vehicle.[1] (R. pp. 636-639 (John Doe Complaint).) Lyndon was served with the Summons and Complaint. (R. p. 78 (Am. Compl. ¶¶ 23-24).) No appearance was made by the unknown driver. On September 28, 2018, the circuit court granted default judgment against John Doe and scheduled a damages hearing for January 30, 2019. (R. p. 709 (Order of Judgment of Aug. 4, 2020); R. p. 645 (Notice of Hearing).)

Counsel for Lyndon attended the damages hearing and appeared on the record on behalf of John Doe, as permitted by statute.[2] (R. p. 696 (Affidavit of Ransome H. Helmly ("Helmly Aff.") ¶¶ 2-3).) After discussions with the court and Respondents' counsel, a continuance was granted so Lyndon's counsel could gain familiarity with the matter. (R. p. 696 (Helmly Aff. ¶ 3).) The court instructed counsel to file a notice of appearance along with the appropriate motion for continuance and filing fee. (R. p. 696 (Helmly Aff. ¶ 4).) The damages hearing was subsequently rescheduled for June 6, 2019. (R. p. 696.) On June 5, Respondents' counsel and counsel for Lyndon discussed that neither of them would be able to attend the scheduled damages hearing and that both would be sending substitute

[1] When a UM claim arises from a hit-and-run accident, the insured has a statutory cause of action against the unknown driver. *See* S.C. CODE ANN. § 38-77-180.

[2] Pursuant to S.C. CODE ANN. § 38-77-180, "[t]he insurer has the right to defend in the name of John Doe."

counsel to appear. (R. p. 697 (Helmly Aff. ¶ 7).)

In an email sent at approximately 10:00 p.m. on the eve of the damages hearing, Respondents' asked if Lyndon "[could] get at least 30K apiece to settle the case" and stating that if Lyndon were to make such an offer, substitute counsel for Respondents would recommend they accept it. (R. p. 653 (Email of June 5, 2019).) This demand, for a total of $60,000, exceeded both the policy limits of $50,000 and the remaining coverage of $42,000. Again, Respondents did not demand policy limits. Moreover, Ms. Jones testified that at the time this demand was made, she would not have accepted an offer to settle within policy limits. (R. p. 273 (Trial Tr. 108:9-24).)

Inadvertently, the notice of appearance for Lyndon's counsel was not filed until June 5, 2019, the day before the hearing. (R. pp. 697, 702 (Helmly Aff. ¶ 8 & Ex. B).) On the morning of June 6, counsel confirmed that his appearance had been entered and was reflected on the docket. (R. pp. 697, 703 (Helmly Aff. ¶ 10 & Ex. C).) Notwithstanding this, at the outset of the hearing the court was unable to confirm entry of counsel's appearance and consequently prohibited substitute counsel from appearing. (R. p. 617 (Helmly Aff. ¶ 11).)

On June 19, 2019, the court entered judgment against John Doe. (R. pp. 670-673 (Order of Judgment of June 19, 2019).) The court found that Ms. Jones had incurred medical costs of $9,586.95 and that Ms. Thompson had incurred medical costs of $9,780.71. (R. p. 670 (Order of Judgment ¶¶ 3-4).) The court further noted that both Ms. Jones and Ms. Thompson "testified how their quality of life was affected by this accident and that they still experience difficulties they associate with this accident." (R. pp. 670-

671 (Order of Judgment ¶ 5).) With no further analysis of the evidence or discussion of the law, the court awarded Ms. Jones and Ms. Thompson $50,000 each against John Doe. (R. p. 672 (Order of Judgment at 3).) The total judgment amount of $100,000 was double the $50,000 per-incident coverage limit of Ms. Jones's UM policy. (R. p. 554 (Renewal Declarations at 2).)

The following day, counsel for Ms. Jones and Ms. Thompson wrote to Lyndon's counsel demanding payment of the entire John Doe judgment amount and threatening to bring a bad faith action if payment was not made within 15 days. (R. p. 674 (Letter of June 20, 2019).) Because this demand exceeded policy limits, Lyndon declined to pay the judgment as demanded. (R. p. 79 (Am. Compl. ¶ 36).)

II. PROCEDURAL HISTORY

On August 22, 2019, Respondents filed a first-party breach of contract and bad faith action against Lyndon and two other defendants.[3] (R. pp. 46-56 (Complaint).) Respondents alleged, in relevant part, that Lyndon breached its contractual obligations under the Policy and engaged in bad faith by (1) failing to appear and defend the John Doe action; (2) failing to exercise good faith and fair dealing in handling the UM claim;

[3] The other two defendants were Safe Choice Insurance LLC, the agency which brokered the insurance agreement, and Jupiter Managing General Agency, Inc., the claims administrator. (R. pp. 74-75 (Am. Compl. ¶¶ 4-8).) Safe Choice entered into a settlement with Respondents on June 19, 2023. (R. p. 108 (Notice of Settlement).) The circuit court entered a default judgment against Jupiter on March 18, 2022. (R. p. 97 (Form 4 Order of Default Judgment).) Jupiter subsequently moved to set aside the default. (R. pp. 100-101 (Motion to Set Aside Entry of Default).) It is not clear from the online docket whether this motion has been resolved.

and (3) refusing, in bad faith and without reasonable basis, to pay the entire judgment awarded against John Doe. (R. pp. 82, 87-88 (Am. Compl. ¶¶ 52, 79-84).)

On June 8, 2023, Lyndon moved for summary judgment. (R. pp. 106-107 (Lyndon Motion for Summary Judgment).) The circuit court heard argument on Lyndon's motion on June 21, 2022, prior to selection of the jury. Lyndon argued it was entitled to summary judgment as to Ms. Thompson because she was not a contracting party or a named insured; while she could receive UM benefits under the Policy as an "insured person," she did not have standing to assert either a breach of contract or a first-party bad faith claim against Lyndon. (R. p. 172-173 (Trial Tr. 7:3-8:13).) As to both Ms. Jones and Ms. Thompson, Lyndon argued that it was entitled to summary judgment because the undisputed facts established that Lyndon had neither breached the Policy nor acted in bad faith. (R. pp. 174-187 (Trial Tr. 9:14-22:19).) Lyndon specifically argued that it had reasonably handled the UM claim, that it had no duty to appear in or defend the John Doe action, and that it never had an opportunity to settle within policy limits. (*Id.*) The circuit court denied the motion and the case proceeded to jury selection and trial.

The case was tried before a jury on June 21-22, 2023. (R. pp. 212-549 (Trial Transcript).) At the conclusion of Respondents' case-in-chief, the court directed a verdict in their favor on the breach of contract claim, despite the unambiguous terms of the Policy excluding Ms. Thompson as a named insured, and her own testimony that she was not a contracting party. (R. p. 487-488 (Trial Tr. 322:18-323:1) (granting directed verdict against Lyndon "based on the order of judgment" against John Doe "and the clear testimony in the record that an insurance contract was entered into").) Lyndon moved for a directed

verdict on the bad faith claim, arguing that since Lyndon never had a reasonable opportunity to settle within policy limits, it could not have acted in bad faith. (R. pp. 489-490 (Trial Tr. 324:21-325:16).) The court denied the motion. (R. p. 495 (Trial Tr. 330:12-20).)

At the conclusion of the trial, the jury found in favor of Ms. Jones and Ms. Thompson on the bad faith claim. (R. pp. 10-11 (Verdict).) The jury awarded damages for breach of contract for Ms. Jones in the amount of $50,300 and for Ms. Thompson in the amount of $50,000.[4] (R. p. 10 (Verdict).) The jury further awarded each $75,000 on the bad faith claim. (R. p. 11.) Finally, the jury awarded Ms. Jones and Ms. Thompson $350,000 each in punitive damages. (*Id.*) The total judgment against Lyndon amounted to $950300.

After the jury was discharged but before court adjourned, Lyndon renewed its directed verdict motion. (R. p. 547 (Trial Tr. 382:19-23).) The circuit court responded, "We'll indicate that it was properly made, directed verdict motion[.]" (R. p. 547 (Trial Tr. 382:24-25).)

On July 3, 2023, within 10 days of the jury's verdict, Lyndon filed consolidated post-trial motions seeking judgment notwithstanding the verdict, *see* Rule 50(b), SCRCP; a new trial, *see* Rule 59(a), SCRCP; and/or for reconsideration, *see* Rule 59(e), SCRCP. (R. pp. 109-121 (Post-Trial Motions).) Lyndon argued, as it had at summary judgment and at the close of Respondents' case, that Ms. Thompson lacked standing to bring a breach of contract or bad-faith claim against Lyndon because she was neither a contracting party

[4] The additional $300 awarded to Ms. Jones resulted from Lyndon's admitted error in applying the incorrect deductible amount (the $500 deductible for liability claims instead of the $200 deductible for UM claims). (R. p. 361 (Trial Tr. 196:14-19).)

nor a named insured. (R. p. 114-115 (Post-Trial Motions at 6-7).) Lyndon also re-asserted its arguments that the breach of contract and bad faith claims failed as a matter of law because its handling of Respondents' UM claims was objectively reasonable, it had no duty to appear in the John Doe action; and it never had an opportunity to settle within policy limits. (R. p. 115-117 (Post-Trial Motions at 7-9).) In the alternative, Lyndon maintained it was entitled to a new trial *nisi remittitur* because the jury's award of damages for both the breach of contract claim and the bad faith claim constituted an impermissible double recovery and because the damages award on the breach of contract claim was plainly excessive. (R. p. 118-119 (Post-Trial Motions at 10-11).) Further, Lyndon sought a new trial absolute on the basis that Lyndon was prejudiced by Respondents' counsel's tactic of personally attacking Lyndon's counsel on irrelevant and improper grounds in full view of the jury. Additionally, Lyndon argued it was entitled to a new trial because the jury's verdict was wholly unsupported by the evidence and was fatally inconsistent. (R. p. 120 (Post-Trial Motions at 12).) Finally, Lyndon argued that the punitive damages award violated the statutory cap on punitive damages and must be reformed. (R. p. 121 (Post-Trial Motions at 13).) The same day it filed its post-trial motions, Lyndon wrote to the court enclosing a copy of the motions and requesting a hearing. (R. p. 109 (Letter to Court of July 3, 2023).)

On July 8, 2023, Lyndon again wrote to the court, enclosing a clocked copy of its post-trial motions and again requesting a hearing. (R. p. 136 (Letter of July 8, 2023).) Without responding to this request, on July 14, 2023, the circuit court entered an electronic Form 4 Order. (R. p. 12 (Form 4 Order of July 14, 2023).) The Form 4 Order contained

checkmarks in the box for "jury verdict" and the box for "See attached order (formal order to follow)," and it contained the following additional text:

> The Court directed verdict in favor of the Plaintiffs as to Breach of Contract and submitted to the jury the issue of the amount of actual damages as to Breach of Contract.
>
> The jury awarded the following relief:
>
> As to Breach of Contract, the jury awarded actual damages to Plaintiff Jones in the amount of $50,300 and to Plaintiff Thompson in the amount of $50,000.
>
> As to Bad Faith Refusal to Pay, the jury awarded consequential damages to Plaintiff Jones in the amount of $75,000 and to Plaintiff Thompson in the amount of $75,000.
>
> As to Punitive Damages, the jury awarded punitive damages in the sum of $350,000 to Plaintiff Jones and $350,000 to Plaintiff Thompson.

(*Id.*) The Form 4 Order also contained a checkmark in the box for "This order ends the case." (*Id.*). However, the Order did not refer to or resolve Lyndon's pending post-trial motions.

Lyndon filed its Notice of Appeal on July 11, 2023, less than 30 days after entry of the Form 4 Order. (R. p. 165 (Notice of Appeal).) Respondents moved to remand, contending that the appeal was not ripe because Lyndon's post-trial motions remained pending. (Motion to Remand, Appellate Case No. 2023-001289 (filed August 21, 2023).) In its return to the motion, Lyndon agreed with Respondents that "a limited remand to the circuit court is necessary to clarify the status of Lyndon's post-trial motion—and for a ruling on that motion, if necessary—so that this Court will have appellate jurisdiction." (Return to Motion to Remand, Appellate Case No. 2023-001289 (filed October 9, 2023).)

On January 2, 2024, this Court remanded the case to the circuit court for the limited

purpose of ruling on Lyndon's post-trial motions. (Order, Appellate Case No. 2023-001289 (filed Jan. 2, 2024).) The Court directed the parties to provide periodic status reports. (*Id.*).

On January 30, 2024, the circuit court conducted a post-trial motions hearing via Zoom. Subsequently, Respondents filed additional briefing in opposition to Lyndon's post-trial motions. On March 27, 2024, without the benefit of further briefing from Lyndon, the circuit court denied Lyndon's post-trial motions. (R. p. 15-39 (Order Denying Post-Trial Motions).) After being informed of the denial of Lyndon's post-trial motions, this Court set a deadline for Lyndon to file its initial brief and designation of matter to the record on appeal, which deadline was subsequently extended to June 27, 2024.

SUMMARY OF THE ARGUMENT

Insurance is a matter of contract. In this case, as in any action involving an alleged breach of an insurance contract and first-party bad faith claim, the threshold question is whether the defendant—here, Lyndon—owes a contractual duty to the plaintiffs—here, Ms. Jones and Ms. Thompson. Only the actual parties to an insurance contract (the named insured and his or her spouse if living in the same household) can enforce an insurance contract duties through an action for breach of contract or a first-party claim for bad faith. An outsider to the contract, including even one entitled to benefits as an additional insured, cannot bring such claims.

The judgment in favor of Ms. Thompson violates these settled principles. Under the plain and unambiguous language of the Policy, which must be applied as written, she is neither a contracting party nor a named insured. Indeed, Ms. Thompson has never contended otherwise, as the allegations of the Amended Complaint and her own trial testimony demonstrate. As a matter of law, therefore, this Court should vacate the judgment as to Ms. Thompson.

An insurer owes duties to its insured both to fulfil its contractual obligations and to meet the standard of good faith and fair dealing inherent in every contract. The parameters of these obligations have been defined through multiple decisions of our State courts, as well as federal courts applying South Carolina law.

As a matter of law, Lyndon met its contractual obligations under to provide UM coverage to Ms. Jones and her passengers and acted in good faith in its treatment of her claim. Above all, the *sine qua non* of insurer bad faith—an unreasonable refusal to settle

within policy limits—did not occur here because there was never an opportunity for a policy-limits settlement. The undisputed evidence is that three settlement demands were made to Lyndon, each of which was well above the limits of the UM coverage under the Policy. None of the demands sought payment of the policy limits within a certain limited time period. Moreover, Ms. Jones testified at trial that she would not have accepted a policy-limits offer from Lyndon. Because Ms. Jones never made a policy-limits demand and would not have accepted a policy-limits offer, Lyndon never had an opportunity to settle for policy limits. As a matter of law, therefore, it did not act in bad faith.

For the foregoing reasons, the claims against Lyndon should never have been submitted to the jury. Aside from this, Lyndon should be entitled to a new trial *nisi remittitur* to remedy basic flaws in the jury's verdict. To begin, the award of damages on both the breach of contract and the bad faith claims is a prohibited double recovery. Additionally, the breach of contract damages improperly exceed the maximum amount Lyndon could owe under the Policy, *i.e.*, the remaining UM coverage.

Alternatively, Lyndon should be entitled to a new trial absolute because the trial was permeated with sustained personal attacks on Lyndon's counsel, excoriating him for missing the damages hearing in the John Doe action. These attacks persisted even though the insurer never has a duty to appear in a John Doe action; Lyndon's counsel arranged for another attorney to attend the hearing but the court refused to allow him to participate; and Ms. Jones's counsel also failed to attend the hearing.

Lastly, Lyndon is entitled to reformation of the punitive damages award, which greatly exceeds the applicable statutory cap on punitive damages.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the denial of Lyndon's Rule 59(e) motion for abuse of discretion. *See Pollard v. Florence County*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994)."An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

When ruling on a motion for directed verdict, the trial court must view the evidence and inferences therefrom in the light most favorable to the non-moving party. *See Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). The motion should be denied "when either the evidence yields more than one inference or its inference is in doubt." *Magnolia N. Prop. Owners Ass'n, Inc. v. Heritage Communities Inc.*, 397 S.C. 348, 368, 725 S.E.2d 112, 123 (Ct. App. 2012).

Similarly, "[t]he grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (citing *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989)). "In deciding whether to assess error to a court's denial of a motion for a new trial," the Court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297.

II. LYNDON'S POST-TRIAL MOTIONS WERE TIMELY FILED

Lyndon's post-trial motions sought JNOV under Rule 50(b), SCRCP; a new trial under Rule 59(a), SCRCP; and reconsideration under Rule 59(e), SCRCP. Each of these Rules establishes an outer limit of ten days for filing the motion. Rule 50(e), SCRCP, provides that a "motion for judgment n.o.v. [under Rule 50(b)] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." Similarly, Rule 59(b), SCRCP provides that a "motion for a new trial [under Rule 59(a)] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." In contrast, Rule 59(e) provides that a "A motion to alter or amend the judgment [under Rule 59(e)] shall be served not later than 10 days after receipt of written notice of the entry of the order."

The circuit court found that Lyndon filed its post-trial motions within ten days of the jury being discharged. (R. p. 17 (Order at 3).) Nevertheless, the court ruled that all three of Lyndon's post-trial motions were untimely filed because Lyndon did not make its post-trial motions when the jury was discharged and did not request additional time to file its motions. (R. p. 17 (Order at 3).) This ruling was erroneous and should be reversed.

As to Lyndon's motion for reconsideration under Rule 59(e), the court's untimeliness finding was controlled by an error of law in that the court failed to recognize that there is no requirement to obtain the court's permission to file a Rule 59(e) motion ten days after entry of judgment. With respect to Lyndon's motion for JNOV under Rule 50(b) or a new trial under Rule 59(a), the ruling constituted an abuse of discretion because

it reflects a needless formalism incompatible with the principle that the Rules of Civil Procedure should be construed liberally in favor of resolving matters on their merits rather than on technicalities.

A. Lyndon's Rule 59(e) Motion for Reconsideration Was Timely

As noted above, there is no dispute that Lyndon filed its post-trial motions, including its Rule 59(e) motion for reconsideration, within ten days of the jury being discharged on June 23, 2023. As a matter of law, therefore, the Rule 59(e) motion was timely filed. Under the plain language of Rule 59(e), a motion for reconsideration is timely so long as it is "served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. "Unlike a motion for a new trial, a motion to alter or amend does not require the court's permission to file the motion." *Newsmall Clemson, LLC v. Earth Mgmt. Sys., Inc.*, No. 2008-UP-430, 2008 WL 9844679, at *3 (S.C. Ct. App. July 31, 2008).

In finding Lyndon's Rule 59(e) motion untimely, the circuit court reasoned that under "[b]oth Rule 50 and Rule 59, SCRCP," a post-trial motion must be filed immediately unless the court exercises its discretion to allow filing not more than ten days after the jury is discharged. (R. p. 17 (Order at 3).). This analysis failed to account for the fact that the text of Rule 59(e) differs from that of Rule 50(e) and Rule 59(b), in that the ten-day filing period under Rule 59(e) is not subject to the court's discretion. *See Newsmall Clemson*, 2008 WL 9844679, at *3. The circuit court was required to give effect to the different language of Rule 59(e). *See Ex Parte Travelers Home & Marine Ins. Co. v.*

Stringfellow, 427 S.C. 238, 241, 830 S.E.2d 718, 720 (Ct. App. 2019) (holding that interpretation of a Rule of Civil Procedure is a question of law reviewed *de novo*); *see also Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (recognizing that the court's role in interpreting a court rule is to determine what the legislature intended to accomplish). At the very least, therefore, Lyndon's Rule 59(e) motion for reconsideration was timely filed, and the circuit court's ruling to the contrary should be reversed.

The errors of law asserted in Lyndon's post-trial motions are proper subjects of relief on a Rule 59(e) motion. *See Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). Under South Carolina law, "it is proper to view a rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21–22, 602 S.E.2d 772, 778 (2004). "There is nothing inherently unfair in allowing a party one final chance to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id.* at 22, 602 S.E. 2d at 779. Thus, a Rule 59(e) motion is appropriate when a litigant "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue." *Id.* at 24, 602 S.E.2d at 780.

Additionally, arguments raised in an untimely or mislabeled motion for new trial may be construed as a motion for reconsideration under Rule 59(e). *See Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005), *overruled on other grounds by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023) ("We conclude Plaintiff's written motion [for a new trial] is properly viewed as a motion for reconsideration under Rule 59(e), SCRCP to the extent it addressed the trial court's evidentiary rulings which Plaintiff challenged in her

briefly stated oral motion at the end of the trial."). Thus, even if the circuit court correctly ruled that Lyndon's motions under Rule 50(b) and Rule 59(a) were untimely, Lyndon is entitled to seek the same relief under Rule 59(e).

B. The Circuit Court Abused Its Discretion in Refusing to Consider Lyndon's Motions for JNOV and for a New Trial

The circuit court's ruling that Lyndon's post-trial motions under Rule 50(b) and Rule 59(a) were untimely should be reversed as an abuse of discretion. Nothing in the text of either Rule justifies the Draconian interpretation adopted by the circuit court, under which there is discretion to extend the filing time only if such relief is specifically requested immediately after the jury is discharged.

Although Rule 50(e) and Rule 59(b) have been construed as requiring that a specific request for a ten-day filing period be made at the time the jury is discharged, no such strict requirement is found in the text of either Rule. Both Rules simply state that the trial court has discretion to permit the filing of such motions up to ten days after the jury is discharged. A specific request made when the jury is discharged is certainly one way to obtain additional filing time, and it may even be the preferred way, but nothing in either Rule suggests that it is the *only* way. In fact, the generalized discretion conferred by both Rules allows for a variety of circumstances, including a post-hoc exercise of discretion when, as in this case, motions under Rule 50(b) and/or Rule 59(a) are presented along with a motion under Rule 59(e). Such an interpretation comports with the settled principle that "[o]ur courts have read rules setting time limits in the light of common sense." *Ex Parte Travelers*, 427 S.C. at 242-43, 830 S.E.2d at 720 (citing *Hamm v. S.C. Pub.*

Serv. Comm'n, 287 S.C. 180, 181–82, 336 S.E.2d 470, 471 (1985)); *see also* Rule 1, SCRCP (emphasizing that the Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action").

Moreover, it bears noting here that after the jury was excused but before court adjourned, Lyndon stated that it was renewing its motion for a directed verdict, and the circuit court responded, "We'll indicate that it was properly made, directed verdict motion[.]" (R. p. 547 (Trial Tr. 382:24-25).) At the very least, therefore, the circuit court recognized that Lyndon had preserved its position that Respondents' claims failed as a matter of law.

As a matter of "common sense," *Ex Parte Travelers*, 427 S.C. at 242-43, 830 S.E.2d at 720, where a timely Rule 59(e) motion is accompanied by a Rule 50(b) motion for JNOV and/or a Rule 59(a) motion for a new trial, all three motions ordinarily should be treated as timely and decided on their merits, regardless of whether the moving party jumped through the procedural hoop of specifically requesting leave to file the latter two motions at the same time as the Rule 59(e) motion. There may be circumstances in which it is necessary to require immediate submission of JNOV and new trial motions, in which case the court could, in the exercise of its discretion, appropriately refuse to consider those motions. Indeed, the possibility of such circumstances indicates that the better practice would be for counsel to proactively request a ten-day filing period.

In this case, however, nothing in the record suggests that the circuit court would have denied a ten-day filing period if Lyndon's counsel had made such a request. Additionally, the grounds for Lyndon's Rule 50(b) motion for JNOV and its Rule 59(a)

motion for new trial were well known to Respondents and the circuit court. Lyndon presented those same arguments at least three times: in its motion for summary judgment, in arguments to the court immediately prior to jury selection, and in arguments following the close of Respondents' case. Under analogous circumstances, this Court rejected an argument that a Rule 59(e) motion was not sufficiently particularized to toll the time for appeal, where "the issue asserted was addressed repeatedly at trial and the parties were not prejudiced by the general nature of the motion." *Nexstar Media Grp., Inc. v. Davis Roofing Grp., LLC*, 431 S.C. 593, 601, 848 S.E.2d 597, 601 (Ct. App. 2020); *see Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) ("The particularity requirement [of Rule 7(b)(1), SCRCP] should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized.")

As this Court has recognized, "[w]hen the trial court is able to discern the relief requested, *it is the substance of the requested relief that matters* regardless of the form in which the request for relief was framed." *Lucey v. Meyer*, 401 S.C. 122, 132, 736 S.E.2d 274, 279 (Ct. App. 2012) (internal quotation marks & alterations omitted). Here, the relief requested, and the grounds for such relief, were known to the circuit court and the parties well before Lyndon filed its post-trial motions. Under these circumstances, therefore, the circuit court abused its discretion in rejecting Lyndon's motions for JNOV and for a new trial as untimely.

III. THE BREACH OF CONTRACT AND BAD FAITH CLAIMS FAIL AS A MATTER OF LAW

As Lyndon articulated in its post-trial motions, the circuit court made multiple

errors of law that fatally undermine the judgment. Most critically, neither the breach of contract claim nor the bad faith claim should ever have reached the jury. First, settled South Carolina law demonstrates that Ms. Thompson, a non-party to the Policy, lacks standing to bring *either* a breach of contract claim or a first-party bad faith claim. Second, while Ms. Jones is the proper plaintiff for these claims, they nevertheless fail as a matter of law. The evidence presented at trial, even when viewed in the light most favorable to Ms. Jones, fails to demonstrate either a breach of contract or bad faith.

A. Ms. Thompson Is Not in Privity of Contract with Lyndon and Cannot Bring a First- Party Action

There is no dispute that Ms. Thompson is neither a contracting party nor a "named insured" under the Policy; she is merely an "insured person" under the Policy's UM coverage. The settled law of South Carolina is that "a third person not in privity of contract with the contracting parties does not have a right to enforce the contract." *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). This fundamental principle applies equally to first-party claims for breach of contract and bad faith in the insurance context. South Carolina recognizes that a named insured has a cause of action for "bad faith refusal to pay first party benefits due under an insurance contract." *Carter v. Am. Mut. Fire Ins. Co.*, 279 S.C. 368, 370, 307 S.E.2d 227, 227 (1983) (citing *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983)). However, "this cause of action does not extend to a person who is not a party to or a named insured under the insurance contract." *Id.*; *see also Hill v. Canal Ins. Co.*, No. 7:12-cv-330-TMC, 2012 WL 3135402, at *2 (D.S.C. Aug. 1, 2012) ("The South Carolina

Supreme Court and the South Carolina Court of Appeals 'have repeatedly denied actions for bad faith refusal to pay claims to third parties who are not named insureds.'") (quoting *Kleckley v. Northwestern Nat'l Cas. Co.*, 338 S.C. 131, 135, 526 S.E.2d 218, 219 (2000); citing numerous additional cases).

In its order denying Lyndon's post-trial motions, the circuit court rejected the challenge to Ms. Thompson's standing on the basis that Lyndon "[did] not offer any evidence" to show that Ms. Thompson was not a named insured entitled to directly enforce the terms of the Policy. (R. p. 19 (Order at 5).) This is simply incorrect; in fact, the uncontradicted evidence shows beyond doubt that Ms. Thompson is not a contracting party or a "named insured."

1. *The Unambiguous Policy Language Excludes Ms. Thompson as a Named Insured*

First, the terms of the Policy establish that Ms. Thompson is not a named insured. "Insurance policies are subject to the general rules of contract construction." *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (Ct. App. 2015) (internal quotation marks omitted). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.*

The Policy begins by describing the nature of the agreement:

> The Personal Auto Policy is a binding contract between **You** and **us**. **Your** policy consists of the Personal Auto Policy contract, **Your** insurance application, the **Declarations**, and all endorsements and attachments to this policy. …

(R. p. 558 (Policy at 3) (emphasis in original).) The Policy goes on to define certain terms, including "You and Your" and "named insured":

> 1. **You** and **Your** refer to:
>
> a. the **named insured** shown in the **Declarations**; and
>
> b. the spouse of the **named insured** shown in the **Declarations**, if a **resident** of the same household, unless the spouse is an excluded driver.
>
> …
>
> 10. **Named insured** means the person or persons listed in the **Declarations** as insured.

(R. pp. 558-559 (Policy at 3-4) (emphasis in original).) The Declarations page identifies "Tasha Jones"—and *only* Tasha Jones—as the named insured. (R. p. 553 (Renewal Declaration).) Ms. Thompson's name does not appear on the Declarations page, or for that matter, anywhere else in the Policy. Additionally, it is undisputed that Ms. Thompson is not Ms. Jones's spouse. Because Ms. Thompson is neither "the person … listed in the Declarations as insured" nor "the spouse of the named insured," under the plain and unambiguous language of the Policy, she is not a "named insured."

Ms. Thompson's status under the UM/UIM provisions of the Policy is that of an "insured person," which the Policy defines as follows:

> I. **Insured person** means:
>
> a. **You**, any **family member** or any other person listed as an additional driver in the **Declarations**;
>
> b. Any other person while occupying **Your covered auto**, provided the actual use thereof is with the permission of the **named insured**; and
>
> c. Any person entitled to recover damages for **bodily injury** covered under Part C of this policy sustained by

> a person meeting the definition of an insured person in I.a. or I.b. above.

(R. p. 564 (Policy at 9) (emphasis in original).) Under this definition, Ms. Thompson is an "insured person" because she was occupying Ms. Jones's vehicle with her permission at the time of the accident.

2. The Amended Complaint Alleges that Ms. Jones, Not Ms. Thompson, Is the Contracting Party

Second, the Amended Complaint repeatedly alleges that Ms. Jones is the person who contracted for insurance with Lyndon:

> The Defendants entered into an insurance contract with the Plaintiff Tasha Jones under Policy Number CH4154345-00 ... .
>
> The Plaintiff Tasha Jones' insurance agreement also provided for physical damage coverage to her 2006 Kia Sedona LX … .
>
> The Plaintiff Tasha Jones paid a premium of over $2200.00 for this insurance agreement plus a fee for the policy.

(R. p. 75-76 (Am. Complaint ¶¶ 10-12).) Similar allegations appear throughout the Amended Complaint. (R. pp. 80, 82 (Am. Compl. ¶¶ 41, 42, 43, and 51).) In contrast, the Amended Complaint never describes Ms. Thompson as having "entered into a contract with" Lyndon or as having any "agreement" with Lyndon. Rather, the Amended Complaint alleges that Ms. Thompson "is defined as an insured under the policy as she was a passenger in [Ms. Jones's] vehicle at the time of the accident which gives rise to this action." (R. p. 80 (Am. Complaint ¶ 44); *see* R. p. 564 (Policy at 9) (defining "insured person").) Thus, Respondents' own factual allegations in their Amended Complaint establish that Ms. Thompson is neither a party to the contract nor a named insured.

3. Ms. Thompson Testified She Is Not a Named Insured

Finally, Ms. Thompson's own testimony establishes that she is not a contracting party or the named insured under the Policy:

> Q. The insurance policy—let me ask you this. Did you ever go to SafeCo and, and get a contract for a policy of insurance?
>
> A. No, sir.
>
> Q. So, you don't have a contract of insurance with Lyndon Southern?
>
> A. I don't.
>
> Q. That, that contract, that policy is, is Ms. Jones's policy, correct?
>
> A. Correct. I was just a ride[r].

(R. pp. 287-288 (Trial Tr. 122:22-123:6).)

In short, everything in the record demonstrates that Ms. Thompson is not a party to the insurance contract with Lyndon and does not otherwise qualify as a "named insured." Because she is not a contracting party, Ms. Thompson cannot seek to enforce the Policy through a breach of contract action. And, because she is not a named insured, Ms. Thompson cannot assert a claim for bad faith. *See Kleckley*, 338 S.C. at 134-35, 526 S.E.2d at 219 ("A tort action for bad faith refusal to pay benefits does not extend to third parties who are not named insureds."). Accordingly, Lyndon is entitled to reversal of the judgment in Ms. Thompson's favor.

B. As a Matter of Law, Lyndon Neither Breached the Policy Nor Acted in Bad Faith

Ms. Jones, as the contracting party and the named insured under the Policy, had standing to assert claims for breach of contract and bad faith. *See Tadlock Painting Co. v.*

Maryland Cas. Co., 322 S.C. 498, 502-03, 473 S.E.2d 52, 54-55 (1996). Nevertheless, the judgment must be reversed. As a matter of law, Lyndon's conduct with respect to Ms. Jones's UM claim did not breach the terms of the Policy and did not constitute bad faith.

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little*, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019). Insurance policies are subject to general rules of contract construction. *See Auto Owners Ins.*, 415 S.C. at 143, 781 S.E.2d at 141. In adjudicating claims for breach of insurance contracts, courts "must give policy language its plain, ordinary and popular meaning" and must not "torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 579, 757 S.E.2d 399, 406 (2014) (quoting *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 70, 310 S.E.2d 814, 816 (1983)). "To be clear, the insurer's duty under a policy of insurance is set forth by the terms of the policy and cannot be enlarged by judicial construction." *State Farm Fire & Cas. Co. v. Morningstar Consultants, Inc.*, No. 6:16-cv-01685-MGL, 2017 WL 2265919, at *2 (D.S.C. May 24, 2017) (citing *S.C. Ins. Co. v. White*, 390 S.E.2d 471, 474 (S.C. 1990)).

A claim for bad faith rises out of the implied covenant of good faith and fair dealing that is inherent in every contract. *See Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, No. 2:13-cv-03035-DCN, 2016 WL 3219538, at *5 (D.S.C. June 8, 2016). To establish a claim for bad faith failure to pay benefits under the UM provision of the Policy, Ms. Jones was required to prove:

> (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 359-60, 415 S.E.2d 393, 396–97 (1992). "[A]n insurer acts in bad faith when there is no reasonable basis to support the insurer's decision [for contesting a claim]." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). However, where an insurer has a reasonable ground for contesting a claim, there is no bad faith. *Id.*

The circuit court's order denying Lyndon's post-trial motions reiterated throughout that Lyndon breached the conduct and acted in bad faith by failing to pay benefits under the UM provisions of the Policy, by "requir[ing] Ms. Jones "to file suit [*i.e.*, the John Doe action] to recover benefits," and then by refusing to pay the entire amount of the John Doe judgment upon Ms. Jones's demand. (R. p. 24 (Order at 10); *see* R. p. 21 (Order at 7).)[5] As a matter of law, however, none of these alleged actions either breached the Policy or constituted bad faith.

[5] The circuit court also noted Lyndon's purported failure to establish policies for the prompt resolution of claims. (R. p. 21 (Order at 7).) However, there was no evidence to show any causal connection between the supposed lack of policies and any damages claimed by Ms. Jones. To the contrary, Ms. Jones testified that Lyndon arranged a rental car for her on the same day she reported the accident and "immediately" arranged for an evaluation of the damage to her vehicle. (R. p. 259 (Trial Tr. 94:4-9).) Ms. Jones also testified that her property damage claim was fully resolved within 40 days of notifying Lyndon of the claim. (R. p. 261 (Trial Tr. 96:8-11).)

1. Lyndon Promptly and Reasonably Handled the UM Claim

Even when viewed in the light most favorable to Ms. Jones, the evidence here establishes that Lyndon's handling of the claim for UM benefits was objectively reasonable and not in bad faith. Thus, there was no denial of benefits, much less an unreasonable denial, and Lyndon is entitled to judgment as a matter of law on Ms. Jones's breach of contract and bad faith claims.

Lyndon responded promptly to submission of the UM claim by Ms. Jones. The claim was submitted on June 16, the day after the accident. Ms. Jones testified that the same day she submitted her claim, Lyndon arranged a rental car for her and scheduled an appraisal and estimate of the vehicle. (R. p. 759 (Trial Tr. 94:4-9).) She further testified that Lyndon issued checks to her and the lienholder on her vehicle on or about July 24, 2017 (38 days after submission of the claim), and that Lyndon explained to her the details regarding the valuation and the amounts to be paid to her and to the lienholder. (R. p. 261 (Trial Tr. 96:5-24).)

Lyndon was equally prompt in responding to the bodily injury claims. Upon filing of the UM claim, Lyndon paid Ms. Jones's and Ms. Thompson's MedPay claims in the amount of $1,000.00 each. (R. p. 276 (Trial Tr. 111:13-23) (payment of Ms. Jones's MedPay claim); R. p. 287 (Trial Tr. 122:17-18) (payment of Ms. Thompson's MedPay claim).) Lyndon also acted quickly and reasonably following its receipt of the October 18, 2017 demand letter and damages package from Respondents' counsel. Less than two weeks later, on October 31, 2017, Lyndon had completed its review of the medical records and made a reasonable settlement offer of nearly the entire amount of Respondents' medical

costs. (R. p. 552 (Offer Letter of Oct. 31, 2017).)

Respondents' experts hypothesized that Lyndon's offer of less than the full amount of Respondents' claimed medical costs was facially unreasonable and in bad faith. (R. p. 439 (Trial Tr. 274:13-19).) However, neither expert had medical training or knowledge that would qualify them to make such judgments, nor did they explain how Lyndon's analysis of the claims was flawed. (R. p. 299 (Trial Tr. 134:6-7); R. p. 432 (Trial Tr. 267:18-20).) In essence, the experts' view was that any offer of less than the full amount of claimed medical bills is *ipso facto* unreasonable and in bad faith. Such a view is contrary to South Carolina law, which recognizes that even an incorrect assessment of the value of a claim is not necessarily a breach of contract or bad faith. *See, e.g.*, *Henry v. Government Employees Ins. Co.*, 275 F. Supp. 3d 750, 754 (D.S.C. 2017) (where insurer evaluates a demand and denies the demand based on its own reasonable valuation or makes a settlement offer based on its own reasonable valuation, the insurer will not be found liable for bad faith); *see also Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 458 (D.S.C. 2008) (duty to deal in good faith does not necessarily entail a duty to make a settlement offer).

Both Ms. Jones and Ms. Thompson testified that they understood that resolving their claims was a matter for negotiation with Lyndon. (R. p. 245 (Trial Tr. 80:21-24); R. p. 288 (Trial Tr. 123:18-19).) However, neither of them could explain why they did not challenge Lyndon's evaluation of the medical bills and did not make any kind of counter-offer. (R. pp. 268-269 (Trial Tr. 103:18-104:17); R. p. 288 (Trial Tr. 123:20-25).)

Thus, the record contains no evidence—not even from Respondents' experts—that

Lyndon's handling of the claim was inappropriate in any way. As a matter of law, therefore, Lyndon's claims handling practices provide no support for a breach of contract or a bad faith claim.

2. *The John Doe Action Was a Statutory Prerequisite to UM Coverage Under the Policy*

The circuit court also held that Lyndon breached the Policy and acted in bad faith by requiring Ms. Jones to file suit and obtain a judgment against the unknown driver who caused the accident. (R. p. 22 (Order at 8).) But the law of South Carolina is clear that an insurer does not have a contractual obligation to pay UM benefits until the insured has obtained a judgment against the unknown driver in a statutory "John Doe" action. *See* S.C. CODE ANN. § 38-77-180 (providing for claim against unknown driver); *Lawson v. Porter*, 256 S.C. 65, 68-69, 180 S.E.2d 643, 644 (1971). This principle is plainly recognized in *The Law of Automobile Insurance in South Carolina*, of which Respondents' expert Constance Anastopoulo is one of the editors:

> In order for an insured to recover his/her UM coverage for a claim in a hit-and-run or miss-and-run accident, the claimant is required to establish, as in all UM cases, the legal liability of the uninsured motorist, and the amount of his damages. *South Carolina requires the insured to file an action against the defendant as "John Doe"* and service of process may be made by delivery of a copy of the summons and complaint or other pleadings to the clerk of the court in which the action is brought.

The Law of Automobile Insurance in South Carolina at 157 (Constance A. Anastopoulo *et al.*, eds. 8th ed. 2024) (footnotes omitted) (emphasis added) (citing S.C. CODE ANN. § 38-77-180). This requirement is echoed in the Policy, which provides that Lyndon is responsible only for "damages an **insured person** is *legally entitled* to recover from the owner or

operator of an **uninsured motor vehicle** because of **bodily injury**" sustained in an accident. (R. p. 563 (Policy at 8) (bold emphasis in original; italics emphasis added).) The Supreme Court of South Carolina has held that:

> the phrase "legally entitled to recover" is wholly unambiguous: it means a plaintiff has a viable claim that is able to be reduced to judgment against an at-fault defendant after overcoming any defenses the defendant may have presented. After all, it is only then that the plaintiff becomes legally entitled to recover against that defendant. We reject the lower courts' interpretation of the UM statute as requiring a plaintiff to show only fault and resulting damages.

Connelly v. Main St. Am. Grp., 439 S.C. 81, 92, 886 S.E.2d 196, 202 (2023). Importantly, § 38-77-180 gives the insurer the right, but not the obligation, to appear in the action and "defend in the name of John Doe." S.C. CODE ANN. § 38-77-180.

Likewise, the Policy contains no "duty to defend" a John Doe action. The Policy imposes a contractual duty to appear and defend only if there is a claim of liability *against an insured*. (R. p. 563 (Policy at 5).) The obligation to defend the insured from liability under Part A (liability coverage) of the Policy does not establish or even imply the existence of a duty under Part C (UM/UIM coverage) to defend an action against a John Doe under § 38-77-180. Because no statutory or contractual obligation to appear and defend the John Doe action existed, as a matter of law Lyndon's purported "failure" to do so cannot amount to a breach of contract or bad faith.

3. Lyndon Never Had an Opportunity to Settle for Policy Limits

Finally and perhaps most importantly, as a matter of law Lyndon did not act in bad faith by refusing to pay the entire amount of the John Doe judgment upon Respondents' demand.

Respondents' expert, Constance A. Anastopoulo, testified repeatedly that an insurer acts in bad faith when it has an opportunity to settle a claim *within policy limits* but fails to do so. (*E.g.*, R. p. 441 (Trial Tr. 276:12-14) (testifying that an insurer may be liable for a judgment in excess of policy limits when "they fail to offer the insured the [policy] limits *when they have an opportunity to do that*" (emphasis added)); R. p. 442 (Trial Tr. 277:4-6 ("*When you have an opportunity* to settle a case within the limits and you don't do it, you're liable for the excess judgment" (emphasis added)).) This is the law in South Carolina. *See Nichols*, 279 S.C. at 340, 306 S.E.2d at 619; *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346, 349 (1933).

South Carolina law is abundantly clear, however, that there can be no bad faith where an insurer does not have a reasonable opportunity to settle for policy limits. For example, the court in *Founders* held that South Carolina law did not support a bad-faith claim where the evidence did not show that "Founders ever had a reasonable opportunity to settle within the policy limits" because the insured's demands were always *above* policy limits. *Founders*, 2016 WL 3219538, at *7. *Accord Snyder*, 586 F. Supp. 2d at 459-60 (no bad faith where plaintiff would not have accepted a within-policy-limits offer of settlement). The rule in South Carolina is the same as the nationwide standard for bad-faith claims, which requires a showing that the insurer had a reasonable opportunity to settle within policy limits. *See, e.g.*, *Kropilak v. 21st Cent. Ins. Co.*, 806 F.3d 1062, 1068-69 (11th Cir. 2105); *Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co.*, 912 F. Supp. 2d 321, 342-43 (D. Md. 2012).

The undisputed evidence in the record is that Lyndon never had a reasonable

opportunity to settle within policy limits because Respondents would not have accepted such an offer. Respondents' very first demand to Lyndon was for $65,000 each, an amount far in excess of the approximately $42,000 in UM coverage remaining after payment of the third passenger's claim. (R. pp. 715-716 (Demand Letter of Oct. 18, 2017).) On the eve of the damages hearing in the John Doe action, Respondents' counsel indicated that if Lyndon would offer his clients $30,000—again, an amount substantially more than policy limits—he would try to persuade them to accept it. (R. p. 653 (Email of June 5, 2019).) Following entry of the John Doe judgment, Respondents demanded payment of the full amount of that judgment, *i.e.*, $100,000. (R. p. 674 (Demand Letter of June 20, 2019).) Finally, Ms. Jones testified at the trial in this matter that she would not have settled for policy limits. (R. p. 273 (Trial Tr. 108:9-24).) At no time did Respondents ever make a demand for policy limits.

Simply put, Lyndon could not have acted in bad faith for "failing" to offer a settlement within policy limits when Respondents' own actions, as well as sworn testimony, made it inescapably clear that they never would have accepted such an offer. The Policy obliged Lyndon to pay a *maximum* of $42,000 (the amount of UM coverage remaining after settlement with the third passenger). Every demand made by Respondents was for substantially more than this amount. Therefore, Lyndon never had a reasonable opportunity to settle within policy limits, and as a matter of law it did not act in bad faith.

IV. LYNDON IS ENTITLED TO A NEW TRIAL

For the reasons set forth above, there are no grounds to hold Lyndon liable for breach of contract or bad faith, and the judgment must be reversed in its entirety. Even if that were not so, Lyndon is entitled to a new trial *nisi remittitur* to remedy the jury's excessive damages award. Alternatively, Lyndon is entitled to a new trial absolute due to Respondents' counsel's persistent, vitriolic, personal attacks on Lyndon's counsel, which poisoned the trial atmosphere and severely prejudiced Lyndon.

The appropriate remedy for an excessive damages award is a new trial, whether *nisi remittitur* or absolute. *See Wright v. Craft*, 372 S.C. 1, 35-36, 640 S.E.2d 486, 504-05 (Ct. App. 2006). "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam*, 361 S.C. at 27, 602 S.E.2d at 781. A new trial *nisi remittitur* is appropriate "when the verdict indicates the jury was unduly liberal in determining damages" and the award is "excessive, although not motivated by considerations such as passion, caprice or prejudice." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 217, 528 S.E.2d 682, 687 (Ct. App. 2000) (internal quotation marks & citations omitted). Denial of a new trial is an abuse of discretion, and should be reversed, "when the trial court's findings are wholly

unsupported by the evidence or the conclusions reached are controlled by an error of law." *Wright*, 372 S.C. at 36, 640 S.E.2d at 505.

A. Lyndon Is Entitled to a New Trial *Nisi Remittitur* to Avoid Double Recovery

"It is well settled in this state that 'there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once.'" *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) (quoting *Taylor v. Hoppin' Johns, Inc.*, 304 S.C. 471, 475, 405 S.E.2d 410, 412 (Ct. App. 1991)). Pursuant to this bedrock principle, Lyndon is entitled to a new trial *nisi remittitur*. The jury found in favor of Respondents, and awarded damages, on *both* the breach of contract claim and the bad faith claim. This was improper. Even if the evidence supported a finding of liability in favor of Ms. Jones (it does not, for the reasons discussed above), she may only recover once for her actual damages.[6]

The Supreme Court of South Carolina addressed this very issue in *Nichols*. In that case, the Court rejected the insurer's argument that the plaintiff should be required elect between his breach of contract claim and his bad faith claim, holding that because different showings were required to prevail on each claim, a jury could find in favor of the insured on one and in favor of the insurer on the other. *Nichols*, 279 S.C. at 340-41, 306 S.E.2d at 619. However, even if the jury finds in the insured's favor on both claims, the

[6] Again, Ms. Thompson cannot recover for either breach of contract or bad faith refusal to pay as she did not and cannot establish that she had a mutually binding contract with Lyndon.

insured "may only recover once for [his] actual damages." *Id.*

Here, the jury found in Respondents' favor, and awarded damages, on both the breach of contract claim and the bad faith claim. However, the evidence of damages was the same for both claims. By awarding damages for both claims, therefore, the jury necessarily gave Respondents an impermissible double recovery. *See Nichols*, 279 S.C. at 340-41, 306 S.E.2d at 619. As a matter of law, Lyndon is entitled to a new trial *nisi remittitur*.

B. Lyndon Is Entitled to a New Trial *Nisi Remittitur* as to the Breach of Contract Claim

Apart from the double recovery, Lyndon is entitled to a new trial *nisi remittitur* on the breach of contract claim on the grounds that the damages awarded by the jury on that claim are plainly excessive. Under the Policy, Ms. Jones was entitled to UM coverage of $25,000 per person and $50,000. Thus, $50,000 is the outermost limit of Lyndon's potential contractual liability. Due to Lyndon's previous settlement with the third occupant of the vehicle, the remaining UM coverage at the time of trial was approximately $42,000. The jury's award of $50,300 to Ms. Jones on the breach of contract claim exceeds the remaining policy limits of $42,000, *i.e.*, the limit of Lyndon's potential liability under the Policy.[7] Accordingly, Lyndon is entitled to a new trial *nisi remittitur* on the breach of contract claim.

[7] The jury's award of $50,000 to Ms. Thompson is excessive for the same reason, but more fundamentally is erroneous because Ms. Thompson is not a party to the Policy and therefore lacks standing to assert a breach of contract claim against Lyndon.

C. Lyndon Is Entitled to a New Trial Absolute Because the Relentless Attacks on Lyndon's Counsel Prejudiced the Jury

A new trial absolute is warranted when the conduct of counsel "infects" the trial with unfairness thereby making the jury's verdict a denial of due process. *See, e.g.*, *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Moreover, each act of misconduct cannot be considered in a vacuum; rather, the Court must consider the cumulative effect of the misconduct. *See State v. Freeman*, 319 S.C. 110, 123, 459 S.E.2d 867, 875 (Ct. App. 1995) (holding that counsel's conduct in interrogating witnesses and in argument to jury had a substantial, prejudicial influence on verdict so as to justify granting a new trial)).

Lyndon is entitled to a new trial on the basis of the prejudicial effect of Respondents' counsel's tactic of attacking Lyndon's counsel on irrelevant and improper grounds throughout the course of the trial. *See, e.g.*, 58 Am. Jur. 2d *New Trial* § 112 ("Where an attorney for one party attacks opposing counsel in the presence of the jury, such conduct constitutes ground for a new trial if it appears that it has a tendency to result in prejudice to the opposing party or to the accused."). Throughout the trial, Respondents' counsel and the witnesses repeatedly castigated Lyndon's counsel for not attending the damages hearing in the John Doe action—even though there was no statutory or contractual obligation to do so and notwithstanding that Respondents' counsel *himself* did not attend the hearing. Additionally, Respondent's counsel encouraged the jury to rule against Lyndon on non-merits grounds by disrespectfully referring to Lyndon's counsel by his first name, prompting the trial court to twice ask who "Randy"—Lyndon's trial counsel, Mr. Helmly—was. (R. p. 374 (Trial Tr. 209:9-19);

R. p. 415 (Trial Tr. 250:3-8).) Respondents' counsel also sarcastically noted that Mr. Helmly missed the John Doe damages hearing to attend a "fundraiser," ignoring that Mr. Helmly arranged for substitute counsel to be present and that Respondents' counsel himself failed to attend the damages hearing. (R. p. 373-374 (Trial Tr. at 208:17-209:8).)

None of these facts had any bearing whatsoever on the issues involved in the trial. Despite this, Respondents' counsel engaged in a running commentary on these matters and even went so far as to call another lawyer to the stand to testify regarding Lyndon's counsel's absence from the John Doe damages hearing. Such testimony had no bearing on the merits of Respondents' claims and plainly was elicited solely for the purpose of prejudicing the jury against Lyndon.

The prejudice resulting from the personal attacks on Lyndon's counsel was compounded by the persistent misrepresentation of the law by Respondents' counsel and at least one of the expert witnesses. They repeatedly asserted or implied, falsely, that the judgment in the John Doe action was against Lyndon, even though Lyndon was not a named defendant and had no duty to appear in or defend the John Doe action. (*E.g.*, R. p. 220 (Trial Tr. 55:23-24) (telling the jury that Lyndon "[got] themselves into default" in the John Doe action); R. p. 318 (Trial Tr. p. 153:4-6) (expert testimony that "the judgments are against John Doe, but they are really against Lyndon"); R. pp. 318-319 (Trial Tr. 153:18-154:15) (expert testimony that Lyndon was responsible for paying the judgment against John Doe); R. pp. 323-324 (Trial Tr. 158:19-159:1) (testifying that if "there's a judgment

against" John Doe, "then Lyndon owes this money").)[8] The effect of these misrepresentations was to leave the jury with the false and misleading impression that Respondents had obtained a judgment against Lyndon which Lyndon had refused to pay. The jury's verdict—especially the extremely high punitive damages award—shows the prejudicial effect of these improper tactics.

V. The Punitive Damages Award Must Be Reduced to Comply with the Statutory Cap

In addition to the excessive compensatory damages awards, the jury awarded $350,000 in punitive damages to each Respondent on the bad faith claim. (R. p. 11 (Verdict).) As an initial matter, because Lyndon's conduct did not constitute bad faith, *see supra*, there should have been no damages awarded at all, much less punitive damages. Apart from this, and leaving aside the utter lack of evidence to support the required finding that Lyndon acted willfully, the punitive damages award exceeds South Carolina's statutory cap on punitive damages and must be reduced.

By statute, punitive damages awards in South Carolina "may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or [$500,000.00]" unless certain exemptions (not relevant here) apply. S.C. CODE ANN. § 15-32-530(A). The Supreme Court of South Carolina has held that this language "unambiguously reveals the legislature's intent to require trial courts to reduce

[8] Notably, both Ms. Jones and Ms. Thompson recognized that the judgment was against John Doe, not against Lyndon. (R. p. 276 (Trial Tr. 111:10-12); R. p. 289 (Trial Tr. 124:6-13).)

punitive damages awards in excess of" the statutory cap. *Garrison v. Target Corp.*, 435 S.C. 566, 581, 869 S.E.2d 797, 805 (2022). The Court further recognized that it is the duty of the trial court, whenever punitive damages are awarded, to review the award under the statute and reduce it, if necessary, to conform to the applicable cap. *See id.*

In its post-trial motions, Lyndon argued that under the statute and *Garrison*, the court was required to reduce the punitive damages award to no more than three times the actual damages award on the bad faith claim, *i.e.*, to $225,000 per Respondent. The circuit court, however, held that pursuant to S.C. CODE ANN. § 15-32-530(C), the punitive damages award was not subject to the statutory cap. (R. p. 36-37 (Order at 22-23).) This ruling is contrary to the plain statutory language and must be reversed.

Section 15-32-530 establishes a presumptive punitive damages cap of three times the amount of compensatory damages or $500,000, whichever is greater. S.C. CODE ANN. § 15-32-530(A). The circuit court must reduce a punitive damages award to meet this cap unless it determines that "the wrongful conduct … was motivated primarily by unreasonable financial gain" or "could subject the defendant to conviction of a felony," in which case the cap is increased to the greater of four times actual damages or $2 million. S.C. CODE ANN. § 15-32-530(B). Finally, no statutory cap applies if the circuit court determines that one of the following three factors is present:

> (1) at the time of injury the defendant had an intent to harm and [the court] determines that the defendant's conduct did in fact harm the claimant; or
>
> (2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct …; or

> (3) the defendant acted or failed to act while under the influence of alcohol, [illegal] drugs, … or … toxic vapor … .

S.C. CODE ANN. § 15-32-530(C).

Here, the circuit court rejected Lyndon's contention that the punitive damages award was subject to the basic cap set forth in subsection (A). (R. p. 36 (Order at 22).) Instead, the court found that the award was exempt from the cap under subsection (C)(1) because Lyndon "had the intent to harm" Respondents when it "intentionally failed to pay … any benefits without a reasonable basis for doing so." (R. p. 36-37 (Order at 22-23).) This ruling violates the plain language of the statute and must be reversed.

Whether the exemption set forth in subsection (C)(1) applies is a question of statutory construction that this Court considers *de novo*. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *See Greene v. S.C. Election Comm'n*, 314 S.C. 449, 452, 445 S.E.2d 451, 453 (1994). In doing so, the Court must in the first instance attempt to construe the statute according to its plain language. *See Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310–11, 831 S.E.2d 429, 432 (2019). If the statutory language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007).

Subsection (C)(1)'s exemption from the statutory cap applies when "at the time of

the *injury* the defendant had an intent to harm … ." S.C. CODE ANN. § 15-32-530(C)(1) (emphasis added). Any interpretation of subsection (C)(1) must take into account and give effect to its use of two distinct terms: "injury" and "harm." The plain and ordinary meaning of "injury" generally refers to physical or bodily harm. *See, e.g.*, BLACK'S LAW DICTIONARY 541 (abridged 6th ed.1991) (defining "injury" as "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property"). This understanding of "injury" is consistent with the serious misconduct identified in subsections (C)(2) and (C)(3) as justifying removal of the statutory cap. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (in construing statutory language, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect"). Here, it is undisputed that Respondents suffered no physical injury as a result of Lyndon's alleged non-payment of benefits, nor is there any evidence whatsoever suggesting that Lyndon intended to cause bodily harm. To the extent either Respondent suffered any harm due to Lyndon's alleged conduct—which Lyndon vehemently denies—such harm was solely economic in nature. The text of subsection (C)(1), considered in its ordinary meaning and in the context of the statute as a whole, plainly was not intended to apply to mere economic harms of the kind alleged here. Accordingly, the circuit court erred in refusing to apply the statutory cap, and it should be instructed on remand to reduce the punitive damages awards—to the extent either award survives Lyndon's other grounds for reversal—to no more than $225,000.00 each.

CONCLUSION

For the reasons set forth herein, Lyndon respectfully requests that the Court vacate the judgment and remand with instructions to dismiss all claims against it. Alternatively, Lyndon requests that the matter be remanded for a new trial *nisi remittitur* or absolute, and for reformation of the punitive damages award.

Respectfully submitted,

s/ Kirsten E. Small

Kirsten E. Small, SC Bar No. 75681
Susan P. McWilliams, SC Bar No. 3918
MAYNARD NEXSEN, P.C.
104 S. Main Street, 9th Floor
Greenville, SC 29601
Ksmall@maynardnexsen.com
Smcwilliams@maynardnexsen.com
Tel.: 864.370.2211

Ransome H. Helmly, SC Bar No. 78081
RANSOME H. HELMLY, LLC
409 Coleman Blvd., Suite 200
Mount Pleasant, SC 29464
Tel.: 843.884.0184
rhh@helmlylaw.com

Attorneys for Appellant Lyndon Southern Insurance Company

Greenville, South Carolina
December 30, 2024