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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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 REPLY 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

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I. LYNDON PRESERVED ALL ISSUES FOR APPELLATE REVIEW

Respondents contend that Lyndon failed to preserve any issues for appellate review because it did not file a motion for reconsideration pursuant to Rule 59(e), SCRCP, following the circuit court's denial of Lyndon's post-trial motions. (Resp. Br. at 19-24.) Such a motion, however, would have been improper because the circuit court's denial of Lyndon's post-trial motions, which included a request for relief under Rule 59(e), "[did] not result in a substantial alteration of the original judgment." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004). Accordingly, Lyndon was not required to file a successive Rule 59(e) motion. *See id.*

Rule 203(b)(1), SCACR, provides:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. . . . .

As our Supreme Court explained in *Elam*, Rule 59(e) motions serve a critical role in ensuring that matters are properly presented on appeal:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam, 361 S.C. at 24, 602 S.E.2d at 780. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "[T]his preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* Raising an issue in a Rule 59(e) motion preserves it for appellate review even if the trial court does not explicitly address the issue in its order denying the motion:

> Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.

Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996)).

Here, Lyndon filed post-trial motions seeking relief under, *inter alia*, Rule 59(e). (R. pp. 109-121 (Post-Trial Motions).) The circuit court denied Lyndon's motions in a lengthy written order. (R. pp. 15-39 (Order Denying Post-Trial Motions).) The Order specifically addressed all of the arguments raised by Lyndon in its Post-Trial Motions. Thus, Lyndon preserved its issues for appellate review by presenting them to the circuit court and obtaining a ruling on them.

Contrary to Respondents' contention, there was no need for Lyndon to file a *second* Rule 59(e) motion seeking reconsideration of the circuit court's order denying, in a written order, Lyndon's *first* Rule 59(e) motion. In fact, multiple decisions make clear that

such a motion is prohibited and, if filed, would not have tolled the time for Lyndon to file its notice of appeal. A second Rule 59(e) motion is permitted only for the purpose of "seek[ing] relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment." *Collins Music Co. v. IGT*, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002). Where the order denying a Rule 59(e) motion does not make a new ruling or otherwise change the judgment, a second Rule 59(e) motion is improper and will not toll the time for filing a notice of appeal under Rule 203(b)(1). *See Elam*, 361 S.C. at 20, 602 S.E.2d at 778; *Coward Hund*, 336 S.C. at 4, 518 S.E.2d at 58.

Collins Music illustrates the application of this rule in a procedural context similar to this case. Following the jury's verdict, the defendant IGT "timely filed and served post-trial motions pursuant to Rules 50(b) and 59, SCRCP." *Collins Music*, 353 S.C. at 560, 579 S.E.2d at 524. After the circuit court denied IGT's motions, IGT filed a Rule 59(e) motion that "restated the arguments it made in . . . its first post-trial motions and requested the circuit judge to 'make specific rulings . . . as to each ground raised' in the earlier motions." *Id.* at 561, 579 S.E.2d at 524. The circuit court denied the motion, noting in its order that IGT had "failed to raise any issue not already considered." *Id.* IGT filed its notice of appeal within 30 days of the entry of this order. This Court dismissed IGT's appeal as untimely, explaining that because the trial court's ruling on IGT's post-trial motions resolved all issues and made them ripe for appellate review, its subsequent Rule 59(e) motion did not toll the time to file a notice of appeal. *See id.* at 564-65, 579 S.E.2d at 526-27.

Like IGT in *Collins Music*, Lyndon filed post-trial motions pursuant to Rules 50 and

59, SCRCP following the jury's verdict. The circuit court's order denying Lyndon's post-trial motions addressed the issues raised in the post-trial motions and did not make any changes to the previously entered judgment. If Lyndon had filed a second Rule 59(e) motion, therefore, it would merely have been repeating arguments previously made to, and rejected by, the circuit court. *Collins Music* teaches that such a motion would be both unnecessary and improper. Accordingly, all of Lyndon's arguments have been preserved for appellate review.

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

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

In arguing that Lyndon's "post-trial motions" were not timely filed, Respondents make the same error as the circuit court by failing to distinguish between the different timing requirements applicable to a motion for reconsideration under Rule 59(e), on the one hand, and motions for judgment as a matter of law or a new trial under Rules 50(e) and 59(b), SCRCP, on the other. Unlike Rule 50(e) and Rule 59(b), the plain language of Rule 59(e) does not require the court's permission to file a motion within 10 days of entry of judgment. *See* Rule 59(e), SCRCP; *Newsmall Clemson, LLC v. Earth Mgmt. Sys., Inc.*, No. 2008-UP-430, 2008 WL 9844679, at *3 (S.C. Ct. App. July 31, 2008) ("Unlike a motion for a new trial, a motion to alter or amend does not require the court's permission to file the motion.").

Respondents failed to respond to Lyndon's argument that regardless of the timeliness of its motions for JNOV and/or a new trial, its motion to alter or amend was timely filed. By failing to present any argument on this point, Respondents have

conceded that Lyndon's motion under Rule 59(e) was timely. *See Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008).

Respondents also failed to respond to Lyndon's argument regarding the broad scope of relief available under Rule 59(e). (Appellant's Br. at 17-18.) While a Rule 59(e) motion is formally one to alter or amend a judgment, our Supreme Court has made clear that as used in South Carolina, Rule 59(e) serves a much broader purpose:

> [I]t 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. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

Elam, 361 S.C. at 21–22, 602 S.E.2d at 778–79 (citations omitted). Of particular importance to this appeal, a Rule 59(e) motion is appropriate to "correct a clear error of law or prevent manifest injustice." *Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994) (applying Fed. R. Civ. P. 59(e), upon which the SC Rule 59(e) is modeled).

B. The Circuit Court Abused Its Discretion in Refusing to Consider Lyndon's Motions for Judgment as a Matter of Law and for a New Trial

In *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994), the Supreme Court refused to apply the holding of *Buxton v. Thompson Dental Co.*, 307 S.C. 523, 415 S.E.2d 844 (Ct. App. 1992), that the trial court has discretion to consider a Rule 59(b) motion even in the

absence of a specific request. *See Boone*, 314 S.C. at 376, 444 S.E.2d at 525.[1] However, the *Boone* court did not address or explain how its ruling comported with the plain text of Rules 50(e) and 59(b), neither of which says anything about a motion or request being required as a predicate to the exercise of the court's discretion to consider a post-trial motion filed within 10 days of the jury's verdict. Rather, *Boone* relied on the commentary to the rule, rather than its plain text, contrary to established rules of construction. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." (citations omitted)).

It is not correct, as Respondents claim, that Lyndon said nothing about any post-trial motions following the jury's return of its verdict. (Resp. Br. at 14-15.) Immediately after the jury was excused, Respondents' counsel engaged the court in a colloquy regarding a damages hearing against defaulting Defendant Jupiter Managing General

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[1] In reaching this decision, the *Boone* court noted that the South Carolina version of Rule 59(b) differs from the federal version of that rule. *See id.* at 376, 444 S.E.2d at 525. Notably, however, the commentary to South Carolina's Rule 59 suggests that the federal version of the rule is relevant with respect to the equitable application of state Rule 59(b):

> Rule 59(b) provides that if the motions are not made and heard during the term, the more precise and definite Federal practice of allowing 10 days after the entry of judgment to make the motion is more equitable.

Rule 59, SCRCP, advisory committee's note. *But cf. id.*, note to 1986 Amendments (stating that the court "upon motion," may allow an additional 10 days to file post-trial motions).

Agency, Inc. (R. pp. 543-545 (Trial Tr. 378:1-380:9).) The discussion then shifted to a question about the verdict just returned by the jury, at the conclusion of which Lyndon's counsel re-asserted its motion for judgment as a matter of law:

> MR. HELMLY: Your Honor, we, we obviously haven't adjourned. I just—I know you mentioned post-trial motions in, in front of the jury. I didn't know if we were to hear those in front of the jury or—I just want to renew my directed verdict motion.
>
> THE COURT: Yes. We'll indicate that it was properly made, directed verdict motion, but no post-trial motions were made.

(R. pp. 547-548 (Trial Tr. 382:19-383:1).) It is not clear why the court stated that "no post-trial motions were made," since the renewal of a directed verdict motion is, in substance, a post-trial motion for judgment as a matter of law under Rule 50(b), SCRCP. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion."). Moreover, the court clearly acknowledged that Lyndon's counsel was re-asserting its position that Respondents' claims failed as a matter of law for all of the reasons asserted in the summary judgment arguments immediately preceding trial and in Lyndon's motion for a directed verdict made at the conclusion of Respondents' case.

Respondents fail to identify any prejudice caused by Lyndon's alleged failure to jump through the procedural hoop of requesting permission in advance to file its motions for judgment as a matter of law and a new trial within 10 days of the verdict. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, SCRCP. The issues and Lyndon's arguments were well known to the parties and were all matters of law, so

the content of Lyndon's post-trial motions could not have surprised or disadvantaged Respondents in any way.

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

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

Respondents attempt to confuse the Court by asserting that Lyndon's opening brief "clearly does not allege that there was no binding insurance contract" in this case. (Resp. Br. at 26.) There clearly was a binding insurance contract—between Lyndon and *Ms. Jones*. There is not and has never been any contractual relationship between Lyndon and *Ms. Thompson*, as the allegations of the complaint and Ms. Thompson's own testimony establish. (R. pp. 59-60 (Am. Compl. ¶¶ 8-10 (allegations that Ms. Jones entered into an insurance contract with Lyndon)); R. pp. 287-288 (Trial Tr. 122:22-123:6 (Ms. Thompson's testimony that she did not have a contract of insurance with Lyndon)).)

Respondents contend that because Ms. Thompson is *an* insured under the policy, she is in the same position as Ms. Jones, who is the *named* insured. (Resp. Br. at 30.) But this is not the law of South Carolina. Only a first party—*i.e.*, a person in a "mutually binding contractual relationship" with the insurer—can bring a bad faith claim. *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983); *see Kleckley v. Nw. Nat. Cas. Co.*, 330 S.C. 277, 286, 498 S.E.2d 669, 674 (Ct. App. 1998) ("South Carolina law does not recognize a cause of action by a third party for the tort of bad faith refusal to pay benefits."). Ms. Thompson testified under oath that she is *not* in a "mutually binding contractual relationship" with Lyndon. Under *Nichols*, therefore, she is a third

party who cannot assert a claim for bad faith.

Ms. Thompson's sworn testimony that she does not have a contract with Lyndon is likewise fatal to her breach of contract claim. Except for circumstances not applicable here, "one not in privity of contract with another cannot maintain an action against him in breach of contract." *Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014) (quoting *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)).

The circuit court committed an error of law denying Lyndon's Rule 59(e) motion as to Ms. Thompson's bad faith and breach of contract claims. The judgment in her favor should be vacated and her claims dismissed with prejudice.

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

Respondents contend that this case is factually similar to *Cock-N-Bull Steak House, Inc. v. Generali Insurance Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). (Resp. Br. at 33-34.) In *Cock-N-Bull*, the insurer denied coverage for certain items based on "short-hand terms" on the Declarations page, even though the items were clearly covered by the actual policy definitions. *Id.* at 4-5, 466 S.E.2d at 729. The Supreme Court held that the insurer breached the insurance contract and committed bad faith by "attempt[ing] . . . to avoid payment by limiting the policy to the short-hand descriptions . . . used in the Declarations, while ignoring the detailed language of the contract which set forth the scope of the coverage." *Id.* at 6, 466 S.E.2d at 729-30.

Cock-N-Bull is nothing like this case. There is no allegation here that Lyndon

denied coverage based on a blatant misreading of the policy (the conduct that supported the finding of bad faith in *Cock-N-Bull*). Indeed, Lyndon has never disputed that coverage exists, and it has paid out benefits under the policy to both Ms. Jones and Ms. Thompson, as well as to the other passenger.

Respondents' claim that Lyndon failed to pay "any" benefits to Respondents is simply false. (Resp. Br. at 32.) Lyndon paid benefits under the policy, and it paid them promptly. Ms. Jones herself testified that on the same day she submitted her claim, Lyndon arranged a rental car and scheduled an appraisal and estimate of her insured vehicle. (R. p. 259 (Trial Tr. 94:4-9).) A mere 38 days later, Lyndon had determined the vehicle was a total loss and issued checks for its value to Ms. Jones and the lienholder. (R. p. 261 (Trial Tr. 96:5-24).) Likewise, Lyndon promptly and fully paid $1,000.00 each for Ms. Jones's and Ms. Thompson's MedPay claims. (R. pp. 276, 287 (Trial Tr. 111:13-23, 122:17-18).) Additionally, Lyndon promptly reached a settlement with the third occupant of the vehicle and paid those benefits, as well.

Finally, Lyndon neither denied nor refused to pay bodily injury coverage under the policy. Within two weeks of receiving the October 18, 2017 demand letter and damages package from Respondents' counsel, 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).) Lyndon is entitled to make a reasonable offer to settle an insurance claim based upon its assessment of the value of the claim. *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992) ("If there is a reasonable ground for contesting a claim, there is no

bad faith." (citing *Nichols*)). Even if this assessment was wrong, that does not mean it was in bad faith. *Cf. Bishop of Charleston v. Century Indem. Co.*, 225 F. Supp. 3d 554 (D.S.C. 2016) (holding that it is not bad faith "for the insurer to make any decision (regarding its own money) contrary to the insured's preferences").

It is undisputed that following its evaluation of the medical records, Lyndon offered to settle Ms. Jones's and Ms. Thompson's claims for an amount slightly less than their total medical bills. Beyond speculation, there is no support for a conclusion that these offers reflected anything other than Lyndon's reasonable assessment of the claims' value. *See, e.g.*, *Henry v. Gov't 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).

It is also undisputed that Respondents rejected Lyndon's offer and that they would have rejected *any* offer within policy limits. (*See* Appellant's Br. at 33 (detailing history of Respondents' repeated above-limits demands and Ms. Jones's testimony that she would not have settled for policy limits).) According to the testimony of Respondents' own expert, the opportunity to settle within policy limits is a critical component of a bad faith claim. (*E.g.*, R. p. 441 (Trial Tr. 276:12-14) (testifying that insurers 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)).)

Here, every demand made by Respondents was *above* policy limits. Even if Lyndon were obligated to offer policy limits (it was not), it cannot be held liable for failing to make an offer that Respondents would have rejected. *See Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, 2016 WL 3219538, at *7 (D.S.C. June 8, 2016) (no bad faith where insured's demands were always above policy limits); *Snyder*, 586 F. Supp. 2d at 459-60 (no bad faith where insured would not have accepted a within-policy-limits offer of settlement).

IV. ALTERNATIVELY, LYNDON IS ENTITLED TO A NEW TRIAL

A. Alternatively, Lyndon Is Entitled to a New Trial *Nisi Remittitur* to Avoid Double Recovery and an Excessive Verdict

As Lyndon explained in its opening brief, in the event this Court finds that Lyndon breached its contract with Ms. Jones (it did not), Lyndon is entitled to a new trial *nisi remittitur* (1) to avoid double recovery on both the breach of contract and the bad faith claim; and (2) because the jury's damages award of $50,000 on the breach of contract claim plainly exceeds the remaining coverage of $42,000. (Appellant's Br. at 35-36.) Respondents do not challenge either the applicable law or Lyndon's argument on these points; they merely argue that Lyndon failed to preserve this issue by not filing an improper successive Rule 59(e) motion. However, Lyndon's post-trial motions under Rules 50(e), 59(b), and 59(e) squarely presented this issue to the circuit court, which denied relief. (R. p. 118 (Lyndon's Post-Trial Motions at 10).) Accordingly, the issue is

preserved.

The law of South Carolina is clear that while a bad faith claim is distinct from a claim for breach of an insurance contract, the insured "may only recover once for [his] actual damages." *Nichols*, 279 S.C. at 341, 306 S.E.2d at 619. Thus, the jury's award of damages on both Ms. Jones's bad faith claim and her breach of contract claim is plainly contrary to law.[2] The proper remedy, in the event the Court does not vacate the judgment against Lyndon and direct dismissal of all claims against it and judgment in its favor, is a new trial *nisi remittitur*.

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

Respondents likewise offer no substantive response to Lyndon's argument that, in the event the Court finds that Lyndon breached its contract with Ms. Jones (it did not), Lyndon is entitled to a new trial due to the prejudicial effect of the relentless attacks on Lyndon's counsel throughout the trial. (*See* Appellant's Br. at 36-39.) As with Lyndon's arguments for a new trial *nisi remittitur*, Respondents erroneously contend that Lyndon was required to make a successive Rule 59(e) motion to preserve this argument this argument.

Tellingly, Respondents do not attempt to refute or justify the attacks on counsel or the repeated misrepresentations that the verdict in the John Doe action was against Lyndon. (Appellant's Br. at 37-38.) They also make no attempt to show that the jury's

[2] Because Ms. Thompson was never in privity of contract with Lyndon, she is not entitled to any recovery, either on a breach of contract theory or a bad faith theory.

astronomical verdict was not the result of the prejudice created by these tactics. In effect, therefore, Respondents have conceded that, in the event the Court does not vacate the judgment against Lyndon and direct dismissal of all claims against it and judgment in its favor, Lyndon is entitled to a new trial absolute on these grounds.

V. THE PUNITIVE DAMAGES AWARD MUST REVERSED, OR ALTERNATIVELY, REDUCED TO COMPLY WITH THE STATUTORY CAP

Respondents' argument in support of the punitive damages award is little more than a repetition of the circuit court's order. (Resp. Br. at 40-45.) Lyndon did not, as Respondents claim, force Respondents to sue Lyndon for breach of contract and bad faith.[3] It was Respondents' choice to file suit after making repeated, unreasonable above-limits demands and depriving Lyndon of any opportunity to settle within policy limits. For the reasons explained above, Respondents' steadfast refusal to consider a policy-limits settlement precludes a finding of liability against Lyndon for either bad faith or breach of contract. Obviously, conduct that does not support a finding of liability likewise cannot support an award of punitive damages, much less an uncapped award.

In support of their contention that Lyndon's conduct was "reprehensible," Respondents point first to their outstanding medical bills. (Resp. Br. at 40.) The mere fact that Lyndon did not offer the entire amount of Respondents' medical expenses is not

[3] Lyndon certainly did not force Ms. Thompson to assert claims despite her clear lack of standing as a third party to the contract between Lyndon and Ms. Jones.

"reprehensible" as a matter of law.[4] Respondents then claim that they were "financially vulnerable because of their age and/or lack of work history" and that their outstanding medical bills "resulted in bad credit and would limit both Ms. Jones' and Ms. Thompson's ability to obtain credit to get loans and/or would limit their ability to obtain other goods and/or limit their ability to obtain stable housing." (Resp. Br. at 40.) ***There is nothing whatsoever in the record to support these claims***. While both Respondents testified as to the existence of their outstanding medical bills, neither of them offered any testimony regarding any impact on her credit rating, job prospects, or ability to obtain housing. Respondents, as the plaintiffs below, bore the burden of proving their entitlement to punitive damages by clear and convincing evidence. *See Sea Island Food Grp., LLC v. Yaschik Dev. Co.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907 (Ct. App. 2021). Because the punitive damages award is based on nothing more than speculation, it must be reversed. *See Ralph v. McLaughlin*, 432 S.C. 640, 651, 856 S.E.2d 154, 160 (2021).

Even if the award of punitive damages stands (it should not), Respondents make no attempt to counter Lyndon's argument that, as a matter of statutory construction, the punitive damages award is not exempt from the statutory cap because Lyndon's alleged non-payment of benefits did not result in physical injury. *See* S.C. CODE ANN. § 15-32-530(C).

[4] Respondents admitted that Lyndon paid each of them $1,000 in MedPay coverage. (R. pp. 276-277 (Trial Tr. 111:21-112:10); R. p. 287 (Trial Tr. 122:17-21).) However, Ms. Jones admitted that she did not use the MedPay funds to pay down her medical bills. (R. p. 277 (Trial Tr. 112:11-13).)

Lyndon demonstrated in its opening brief that under settled rules of statutory construction, the "intent to harm" exception in sub-section (C)(1) requires proof of intent to cause physical, rather than merely economic, harm. (Appellant's Br. at 40-42.) Respondents simply assert, without citing evidence or supporting case law, that Lyndon "intended" to injury Respondents by "requir[ing]" them to pursue the John Doe action and then to sue Lyndon for bad faith and breach of contract. (Resp. Br. at 44.)

If the award of punitive damages stands at all, the circumstances identified by Respondents do not support removal of the statutory cap on punitive damages. Respondents were required by statute—not by Lyndon—to file suit and obtain a verdict against "John Doe," the unknown driver of the vehicle that struck Ms. Jones's car. *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); *see also The Law of Automobile Insurance in South Carolina* at 157 (Constance A. Anastopoulo *et al.*, eds. 8th ed. 2024) (explaining that an insured can recover uninsured motorist coverage in a hit-and-run only by establishing the legal liability of the unknown driver, and the amount of damages, in a John Doe action).

VI. THERE ARE NO ADDITIONAL GROUNDS FOR AFFIRMANCE

Seeking to hedge their bets, Respondents ask the Court to affirm "based upon any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." (Resp. Br. at 45.) However, Respondents provide no hint of what additional grounds might exist or how they would overcome the multiple errors of law afflicting

the verdict. Respondents also do not show that any additional grounds for affirmance were raised to the circuit court. *See I'On*, 338 S.C. at 421, 526 S.E.2d at 724 (holding that the possibility of affirmance on alternative grounds should not "dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling").

CONCLUSION

South Carolina recognizes first-party claims against insurers for bad faith and breach of contract as a means of promoting honest and fair dealing by insurers with their insureds. These purposes are not served by the verdict against Lyndon in this case, which is contrary to the law of South Carolina and the evidence. The settled law of South Carolina is that Ms. Thompson lacks standing because she is not, and has never been, in "a mutually binding contract of insurance" with Lyndon. *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 451, 450 S.E.2d 582, 586 (1994) (listing requirements for bad faith claim); *see Fabian*, 410 S.C. at 488, 765 S.E.2d at 139 (holding that "one not in privity of contract with another cannot maintain an action against him in breach of contract"). Accordingly, the judgment in favor of Ms. Thompson should be vacated and her claims dismissed.

Because Ms. Jones's claims fail as a matter of law, the judgment in her favor should also be vacated and her claims dismissed. Ms. Jones's testimony establishes that: (1) Lyndon promptly paid her claim for the total loss of her vehicle and MedPay benefits of $1,000; (2) Lyndon reasonably offered nearly the full amount of her medical bills; and (3) she never demanded the policy limits from Lyndon and would not have accepted a

policy-limits offer. The evidence is therefore insufficient, as a matter of law, to support a finding of either breach of contract or bad faith.

To the extent the judgments against Lyndon are not vacated in their entirety for lack of standing (Ms. Thompson) and legal insufficiency (Ms. Jones), Lyndon should receive a new trial absolute or *nisi remittitur*. Alternatively, the punitive damages award should be reversed entirely or, at a minimum, reduced to conform to the statutory cap.

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
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