IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

2025-UP-074 (S.C. Ct. App. filed Feb. 24, 2025)

Appellate Case No. 2023-000654
Trial Court Case No. 2020-CP-12-00207

Alexis Jones,.....Respondent-Appellant,

v.

Progressive Northern Insurance Company.....Appellant-Respondent.

RESPONDENT-APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Respondent-Appellant Alexis Jones petitions this Court to rehear and reconsider the opinion in *Jones v. Progressive Northern Ins. Co.*, 2025-UP-074 (S.C. Ct. App. filed Feb. 24, 2025). Ms. Jones asserts the Court overlooked or misapprehended the following points in affirming Ms. Jones' cross-appeal:

1. Plaintiff's Bad Faith Claim

The Court held the circuit court properly dismissed Ms. Jones' bad faith claim, stating "we believe there is no evidence Progressive acted in bad faith." The Court added "Progressive denied Jones the full policy limits based upon its *misapplication* of *Gordon* and *Barker*. Although we disagree with Progressive's *interpretation of those cases*, we do not find Progressive acted in bad faith." (emphasis added). This ruling is tantamount to holding that where an insurer "misapplies" or "misinterprets" a case despite the clarity of the case's holdings to the contrary and the lack of ambiguity in the contract, the insurer can defeat a bad faith claim in South Carolina. The Court's holding is inconsistent with South Carolina law and presents an unacceptable opportunity for mischief on the part of unscrupulous insurance carriers.

South Carolina law provides: "An insurer is not insulated from liability for bad faith *merely because there is no clear precedent* resolving a coverage issue raised under the particular facts of the case." *Portrait Homes-South Carolina, LLC v. Pennsylvania National Mut. Cas. Ins. Co.*, 442 S.C. 515, 900 S.E.2d 245 (Ct. App. 2023), *reh'g denied* April 24, 2024 (emphasis added), citing *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002). *See, also, Hood v. United Services Auto Association*, 445 S.C. 1, 910 S.E.2d 767 (2025) (citing favorably to *Mixon*'s holding that expanded "a bad faith claim to include not just

nonpayment of a legitimate claim but how that claim was processed").

If an insurer can be liable in bad faith where there is *no* clear precedent, then an insurer most certainly can be liable in bad faith where the insurer "misapplies," "misinterprets," or even misstates the holding of clear precedent that does not support or is contrary to its position. Otherwise, all an insurer who denies coverage due under the policy will need to do to defeat a bad faith claim is to misstate a case's holding based upon a "misinterpretation," that is, "misapplication" of a case. This cannot be the law.

In this matter, as this Court observed, neither of the two cases Progressive relied upon, *Gordon v. Fid. & Cas. Co. of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961) and the unpublished federal court order from *Barker v. Washington National Insurance Company*, No. 9:12-CV-1901-PMD, 2013 WL 1767620, at *5 (D.S.C. Apr. 24, 2013), supported the position Progressive took in denying payment to Ms. Jones of benefits she was due under her policy. The Court stated that in order to justify its position, Progressive "misapplied" or "misinterpreted" the holdings of each case. This "misapplication" or "misinterpretation" was not reasonable given the plain language and facts of each case. *Gordon*'s holding was straightforward, involving a veteran who *never* incurred any costs for his medical treatment at the VA Hospital. *Barker*, relying on the same misapplication of *Gordon* Progressive advocated in this case, as well as a specific clause in the subject policy that was absent in this case[1], is wrongly decided and, being an unpublished

[1] The *Barker* case involved a health insurance policy, not an automobile policy. This is a meaningful distinction. Insurers have more flexibility when including terms like the "Medicare Provision" found in the *Barker* policy as opposed to automobile insurance coverage. In an automobile policy, a term must comply with the governing statutory provisions or the term is void. *See, e.g., Cothran v. State Farm. Mut. Auto. Ins. Co.*, 427 S.C. 545, 831 S.E.2d 919 (2019) (holding invalid a "coordination clause" which permitted insurer to reduce PIP payments for workers' compensation recovery). The "Medicare Provision" in *Barker* would likely suffer the

order by a Federal District Court, is not binding on this Court; it is not good precedent for Progressive's position.

As Ms. Jones argued in her brief, as a means of protecting insureds who ordinarily possess no bargaining power when entering into an insurance contract, the Supreme Court recognized the tort action for an insurer's bad faith refusal to pay first party benefits in *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983). Just two months ago, the Supreme Court described and reaffirmed this holding from *Nichols*.[2] *Hood v. United Services Auto Association, supra* (filed Jan. 8, 2025). Permitting Progressive to escape bad faith exposure based upon an unreasonable application of a case that is nearly 65 years old, and as interpreted unreasonably by Progressive, is contrary to the Supreme Court's jurisprudence under *Nichols* and its progeny.

Ms. Jones respectfully requests that this Court reconsider its holding and grant this Petition for Rehearing, withdraw its opinion, and reverse the circuit court's dismissal of Ms. Jones' bad faith claim.

2. Plaintiff's Claim for Attorneys' Fees

The Court ruled "because we hold the circuit court properly dismissed the bad faith claim, we do not reach the issue of attorneys fees." Because the Court improperly affirmed the

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same infirmity if included in an automobile PIP/Medpay policy; the validity of such a clause would be questionable given the PIP/Medpay statute's provision that benefits "the coverage shall not be assigned or subrogated and is not subject to a setoff." S.C. Code Ann. § 38-77-144.

[2] Westlaw flags *Nichols* as overruled. This is a misstatement. The case Westlaw referenced, *Duncan v. Provident Mut. Life Ins. Co.*, 310 S.C. 465, 427 S.E.2d 657 (1993), holds merely that "the tort created by *Nichols* is expressly preempted when the bad faith claim arises under an employee benefit plan" under ERISA and federal law. *Nichols* is otherwise still good law, as reaffirmed in *Hood*.

dismissal of Ms. Jones' bad faith claim, the Court should reconsider its holding dismissing Ms. Jones' claim for attorneys' fees.

Furthermore, the Court overlooked or misapprehended that Ms. Jones sought fees under S.C. Code Ann. § 38-59-40 (Supp. 2022), which does *not* require a finding of bad faith for an award. The statute provides:

> In the event of a claim, loss, or damage which is covered by a policy of insurance or a contract of a nonprofit hospital service plan or a medical service corporation and the refusal of the insurer, plan, or corporation to pay the claim within ninety days after a demand has been made by the holder of the policy or contract and a finding on suit of the contract made by the trial judge that the *refusal was without reasonable cause or in bad faith*, the insurer, plan, or corporation *is liable to pay the holder*, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer, plan, or corporation. The amount of reasonable attorneys' fees must be determined by the trial judge and the amount added to the judgment. The amount of the attorneys' fees may not exceed one-third of the amount of the judgment.

S.C. Code Ann. § 38-59-40 (emphasis added). Thus, an insurer "is liable" to an insured for reasonable attorneys' fees as determined by the trial judge upon a finding of one of two things: (1) refusal to pay the claim without reasonable cause, *or* (2) refusal to pay the claim due to bad faith. By summarily dismissing the claim for attorney fees under the statute under a holding that there is no evidence of bad faith, both the circuit court and this Court essentially amend the statute's use of the word "or" into "and." Amending this statute, however, is for the General Assembly, not this Court. *Cf.*, *Doe v. State*, 421 S.C. 490, 508, 808 S.E.2d 807, 816 (2017) (the Court cannot construe or effectively amend statutes to change the plain language of "and" to "or"), citing *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain

language of the statute by adding words which the Legislature saw fit not to include.")

This Court overlooked Ms. Jones' argument that the trial judge erred as a matter of law by stating that his finding that Progressive did not act in bad faith precluded payment under the statute. The preponderance of the evidence demonstrates that Progressive at least acted without reasonable cause in light of the settled law of South Carolina. Progressive refused to pay Ms. Jones based upon Progressive's "misapplication," "misinterpretation," or misstatement of the holdings in *Gordon* and even *Barker* so as to support Progressive's unsupported argument that her contract of insurance permitted Progressive to limit payment to the medical expenses she "actually incurred," which Progressive arbitrarily deemed to be the reduced amount paid by a collateral source, Medicaid. This was not "reasonable cause" to deny payment to her.

The Court should grant this Petition, withdraw its opinion, rehear this matter, and reverse the circuit court's order denying Ms. Jones the right to seek attorney fees under Section 38-59-40.

3. Plaintiff's Claim for Breach of Contract Accompanied by a Fraudulent Act

The Court affirmed the circuit court's dismissal of Ms. Jones' claim for breach of contract accompanied by a fraudulent act. The Court stated, "There is no evidence of an independent fraudulent act that accompanied Progressive's breach of contract because its failure to analyze and apply the relevant or proper cases when considering Jones's claim was *part of* the breach." (emphasis by the Court).

Although the Court cited to the Supreme Court's holding in *Connor v. City of Forest Acres*, the Court failed to properly apply the case. The Supreme Court held:

> In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of

> the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The fraudulent act is any act characterized by dishonesty in fact *or unfair dealing. Id.* "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921) (citation omitted).

348 S.C. 454, 465-466, 560 S.E.2d 606, 612 (2002) (emphasis added).

The Court overlooked Ms. Jones' contention that she provided evidence that Progressive engaged in *unfair dealing* in the manner in which Progressive adjusted her claims for MedPay benefits, and this unfair dealing was separate from the breach. Progressive advocated its "misapplication" or "misinterpretation" of *Gordon*, a case that is meaningfully distinct and greatly predates settled precedent to the contrary, and *Barker*, a non-binding US District Court case that is also meaningfully distinct and is wrongly decided. *Barker* relied upon *Gordon*, the same older case, and the district court wrongfully predicted the application of South Carolina law. *Barker* also involved health insurance, which is not as heavily regulated as automobile insurance. Neither Progressive nor the district court analyzed relevant, applicable, and more recent precedent to the contrary. Ms. Jones was therefore required to bring suit to force Progressive to honor its contractual commitments because of Progressive's unreasonable assertion that *Gordon* and *Barker* permitted it to deny complete coverage. Progressive's position amounted to unfair dealing with her, which was apart from its breach of its contract of insurance by its arbitrary reduction in payments due.

The Court should grant this Petition, withdraw its opinion, rehear this matter, and reverse

the circuit court's order denying Ms. Jones claims for breach of contract accompanied by a fraudulent act as described in *Connor*.

4. Right of Action Under Section 38-77-144

The Court affirmed the circuit court's ruling that S.C. Code Ann. § 38-77-144 (2015) does not provide a private right of action. The Court stated:

> We find the Legislature did not intend to provide insureds a private cause of action under section 38-77-144. The statute does not expressly create a civil liability on behalf of the insurer, and we find the Legislature intended only to protect insureds from an insurance company applying a setoff. Accordingly, we hold the Legislature did not enact this statute with the intention of providing an insured with an additional cause of action when an insurance company improperly reduces the amount it is obligated to pay pursuant to the policy. Therefore, we find the court did not err.

Jones, at p. 5 (internal citations omitted). The Court overlooked or misapprehended Ms. Jones' specific arguments in making this ruling.

Ms. Jones pointed out that the essential purpose of Section 38-77-144 is not to secure the safety or welfare of the public. Instead, the statute was enacted for the purpose of protecting an insured who elects to purchase PIP or MedPay coverages that an insurer voluntarily offers to the insured. The essential purpose of the statute is to create no-fault coverage for payment of medical bills or lost wages, and to prevent any assignment, subrogation *or set-off* of those benefits.

Progressive improperly sought a set-off for reductions done due to a collateral source, Medicaid. The only way Ms. Jones, as the insured, can enforce the express provisions of Section 38-77-144 is by bringing a private lawsuit. *Cf. Nichols v. State Farm Mut. Ins. Co.*, at 340, 306 S.E.2d at 619 ("Absent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not."). Her right to sue to force Progressive

to follow the plain language of Section 38-77-144 is implied within the statute's language and purpose.

The Court also failed to consider Supreme Court precedent holding "In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Denson v. National Casualty Co.*, 439 S.C. 142, 151-152, 886 S.E.2d 228, 233-234 (2023), citing *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). The essential purpose of the statute is to protect insureds who buy optional PIP or Medpay coverage from having the insurer reduce the payments based upon an arbitrary claim of a setoff, as Progressive did in this case. The only way that insured can enforce that protection is through a lawsuit. Ms. Jones falls squarely within the class of persons the statute is intended to protect.

By holding the statute only prevents an insurer from applying a setoff without any risk of a private cause of action, the Court construes the statute to provide the insurers a "free shot" at denying payments rightly due under the agreement. If they are wrong, they simply pay what was always due while enjoying the use of the funds during the dispute. Insurers must be held to account for violating a statute designed to protect a discrete class of persons like Ms. Jones, that is, those who purchased voluntary PIP or Medpay.

This Court should reverse the trial court's ruling and remand the matter with instructions to permit Ms. Jones to proceed with her claim under Section 38-77-144.

CONCLUSION

For the reasons stated the Court should grant this Petition for Rehearing, withdraw its opinion, rehear the matter, and reverse the trial court's order dismissing Ms. Jones's claims for bad faith, violation of Section 38-77-144, and breach of contract accompanied by a fraudulent act, and remand this matter for further proceedings. The Court should also reverse the circuit court's order denying Ms. Jones's motion for an award of fees and costs, and should remand the matter for entry of judgment in accordance with this Court's mandate.

Respectfully submitted,

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March 12, 2025

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Alexis Jones,.....Respondent-Appellant,

v.

Progressive Northern Insurance Company.....Appellant-Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, she served counsel for the Appellant-Respondent with a copy of the Respondent-Appellant's *Petition for Rehearing* by email only to the following:

J.R. Murphy, Esq.
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Kalen Reed, Paralegal

March 12, 2025
Columbia, South Carolina

Kalen Reed

From: Kalen Reed
Sent: Wednesday, March 12, 2025 4:13 PM
To: J. Murphy; mwalker@murphygrantland.com
Cc: John Nichols; Meredith Brown; cannon@shawcannon.com
Subject: Alexis Jones v. Progressive Northern Insurance Company/Appellate Case #2023-000654
Attachments: Petition for Rehearing.pdf

Good afternoon,

Attached please find Respondent-Appellant's Petition for Rehearing which is being served upon you in the above matter.

Thank you,

BLUESTEIN ATTORNEYS
Listening. Lawyering. Leading.

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VIA ELECTRONIC FILING
The Honorable Jenny A. Kitchings
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RE: Alexis Jones v. Progressive Northern Insurance Company
Appellate Case No.: 2023-000654

Dear Ms. Kitchings:

Please find enclosed for filing the Respondent-Appellant's *Petition for Rehearing* in reference to the above matter. I have also enclosed a certificate of service upon counsel for Appellant-Respondent. Please let me know if you need anything further.

With kind regards,

John S. Nichols

JSN/knr
Enclosures

cc: J. Logan Cannon, Esq.
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