IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0768

James D. Fowler.....Respondent,

v.

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

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err by denying the post verdict request for an offset which was not requested in the pleadings or argued to the jury?

II. Did the Trial Court err in allowing the testimony of the local Fire Chief as a fact witness?

III. Was a new trial absolute required simply because the verdict for actual damages for breach of contract greatly exceeded the Appellant's post verdict calculation of policy limits applicable to benefits paid promptly after the fire?

IV. Was the Trial Court required to reduce the jury verdict for actual damages resulting from Appellant's breach of contract to the Appellant's post verdict calculation of policy limits applicable to benefits paid promptly after the fire?

V. Is the Appellant insurer entitled to a JNOV on the bad faith claim because the jury and the trial judge considered the entirety of the appellant's pre-litigation handling of the claim, not just the insurer's limited and incomplete initial investigation results?

STATEMENT OF THE CASE

The Respondent homeowner suffered a total loss by fire on January 17, 2009. The home was insured by Appellant. Appellant's adjuster decided to investigate for arson in spite of significant exculpatory information, including but not limited to the fact that the homeowner was preparing the house for sale and the fact that the local Fire Chief present during the fire fighting found no reason for suspicion and made his required report to the State Fire Marshall accordingly. A cause and origin fire investigator working for only insurance companies initially opined that the fire had been intentionally set, but his report failed to note that the test results for the 6 debris samples he took were all returned negative. The insurance adjuster did pay the sum of $154,125 directly to the holders of the first and second mortgages on the premises, on the grounds that this was required by the policy and South Carolina law. He also paid the homeowner an early advance of $2,000, but he refused to make further payment after refusing to give an extension of time for the homeowner to submit his Sworn Proof of Loss, and then on March 18, 2009 returning the timely submitted proof of loss on the grounds that the claim was denied on the policy's intentional acts exclusion. The adjuster also refused to give the homeowner a copy of the cause and origin report, because the Appellant decided internally that the insured would only receive a copy "in discovery" if he filed suit.

The homeowner filed suit on June 29, 2009 asserting claims for breach of contract, bad faith, and slander. The case was tried before a jury in the Oconee

County Court of Common Pleas from November 28 through December 2, 2011. The jury returned a verdict in favor of the Respondent homeowner against Nationwide both on the breach of contract claim and on the bad faith claim, awarding $501,444 in actual damages for breach of contract and $3,000 in additional actual damages for bad faith. The verdict on the slander claim was for the defense, which removed the individual adjuster as a defendant in the case.

Nationwide timely filed a motion for a new trial, new trial *nisi* remittitur, and judgment *non obstante veredicto* on December 9, 2011. Respondent timely filed a motion for attorney's fees on December 9, 2011. The Honorable Alexander S. Macaulay held a hearing on the motions on January 17, 2012, and entered an order denying Appellant's motions on February 22, 2012. Appellant's counsel asked at the January 17, 2012 hearing for additional time to respond to respondent's motion for attorney's fees, which the Court allowed.

Appellant filed a motion to alter or amend on March 12, 2010. On September 13, 2013, Judge Macauley granted Respondent's motion for Attorneys' fees in the amount of $168,148. On October 3, 2012, Judge Macauley denied the motion to alter or amend.

Appellant filed its Notice of Appeal on October 17, 2012.

ARGUMENT

Introduction:

After the fire at the home of Respondent on January 19, 2009, caused what all parties recognized was a total loss of the house and its contents, the Appellant insurance company put all of its eggs in one basket. It accused the Respondent homeowner of burning his own home intentionally. Only after the jury's verdict fully exonerated the homeowner and awarded him substantial actual damages arising from the insurer's breach of the insurance contract, the insurer has made a flood of arguments about why the insurance company only owed a smaller amount than the verdict. The insurer has asked for the placement of limits on the award based on provisions in the policy, although the insurer itself clearly did not comply with the policy and did not pay the insured promptly the amount which it now claims was the most it was required to pay. The insurer has also asked for an offset, which it did not request in its pleadings or ask for or explain or argue to the jury at any time. These arguments by Appellant not only come too late; they are both inappropriate and they are based on authorities which are inapplicable to the facts and history of this case.

The Appellant insurer mistakenly complains that the local volunteer fire chief should not have been allowed to testify as an expert witness, citing Rule 803(8), SCRE. Chief Wright, a firefighter for more than 30 years and now a captain not only of the Seneca Fire Department but also for the volunteer department, was allowed to testify as a fact witness, not an expert witness. The

chief testified as to his personal observations on the day of the fire. Rule 701, SCRE, applies. The Chief explained the report that he was required by state regulations to make to the State Fire Marshall. The so-called Truck Report contains basic information, and the Chief explained what he personally observed on the day of the fire and why he completed the form as he did. The Trial Judge carefully limited the Chief's testimony and the use of the Truck Report, and he properly instructed the jury.

Other witnesses testified as experts as to the cause and origin of the fire, one for the plaintiff and one for the defendant. Mr. Ross for the plaintiff, a man of thirty years' experience as an arson investigator and an instructor of other fire investigators, explained his findings which were soundly based on Publication 921 of the National Fire Prevention Association. Publication 921 is recognized by fire investigators as the Bible for, and set industry standards for, fire investigations. R. p. 574, line 9–p. 575, line 13. Mr. Byers, on behalf of Nationwide for which he did investigations some 59 times in 48 months and working only for insurance companies, admitted that he does not follow Publication 921. R. p. 979, line 4-p. 980, line 2. He also testified that he essentially disregarded the negative test results of the 6 debris samples he took during his so-called independent investigation undertaken for the insurance company. Mr. Byers wrote his report after taking the debris samples but before receiving the test results. R. p. 990, line 10-p. 991, line 20. He did not go back to his initial report and did not make any mention of the 6 negative test results or why they would not be important. R. p. 799, lines 18-20.

Another expert witness called by the defendant for another purpose, Mr. Holecek, said he was a member of the National Fire Prevention Association, confirmed that Publication 921 sets industry standards, and said that Publication 921 is the guidebook he used. R. p. 1085, line 10-p. 1087, line 17. Thus, if there had been any error in the admission of the personal observation testimony of Chief Wright, it would have been a harmless error. This is true, not only because Mr. Byers was the defendant's only cause and origin expert witness, and he was thoroughly discredited, especially by the testimony of Mr. Holecek, but also because of the other evidence in the case.

The Appellant also mistakenly complains that the jury and the Court below should not have considered all the facts and circumstances relating to the insurer's actions and omissions in the processing and ultimate rejection of the plaintiff's sworn Proof of Loss, duly submitted within the 60 days for submission which the defendant refused to extend, and its denial of the homeowner's claim. All the evidence offered as to the insurer's bad faith related to matters which occurred prior to the filing of the lawsuit. See facts and holding of *Howard v. State Farm Mut. Automobile Ins. Co.,* 316 S.C. 445, 450 S.E.2d 582 (1994). The rationale and policy of the cases on insurance bad faith in South Carolina do not bind the insured or the jury to the findings and conclusions of the insurer's own investigation, and the jury can properly consider all the evidence as to the insurer's bad faith in the processing of the claim. See *Varnadore v. Nationwide Mutual Ins. Co.*, 289 S.C. 155, 345 S.C. 2d 711 (1996). Otherwise, an insurer

could safely deny all claims out of hand and put policyholders to the burden of filing suit in every case.

This brief would not have space to mention and specifically refute every subsidiary point in Appellant's fifty (50) page brief. Respondent nevertheless opposes the appeal and asserts that there are answers to all Appellant's contentions sufficient to support the affirmance of the verdict and judgment below, because of the fundamental and fatal weaknesses in the underlying contentions of the Appellant. Appellant is not entitled to expect a perfect trial, but the trial in this case was carefully and correctly handled by an experienced trial judge, and substantial justice was done.

I. The Trial Court did not err by denying the post verdict request for an offset which was not requested in the pleadings or argued to the jury.

Shortly after the Appellant began its investigation of the January 19, 2009 fire at Respondent's home, the adjuster gave him a $2,000 advance towards his loss of contents. R. p. 530, lines 17-23. The adjuster also contacted representatives of the bank and of the finance company which respectively held the first mortgage and the second mortgage on the premises. When the adjuster confirmed the balances due on the mortgages, Appellant paid a total of $154,125 to these two entities directly, making the checks payable only to the respective mortgagees. Although the first mortgage was paid off in full, the second mortgagee received a payment which left a large balance due. R. p. 1024, lines 14-22. There was an additional $30,825 which would have been payable just under coverage A and under Option K of the policy, and a maximum of an additional $46,113 under coverage B, if either the policyholder or the second

mortgagee had chosen to rebuild. R. p. 522, lines 1-p. 523, line 2; p. 816, line 20-p. 817, line 18. However, the adjuster did not inform the second mortgagee's representative as to the existence of these coverages. R. p. 1037, line 25-p. 1040, line 8. Nor did the adjuster advise the second mortgagee about any of the other coverages. *Id.* This failure to explain occurred even though the adjuster admitted, as did his supervisor, that Nationwide was obligated to pay the mortgage holders the full amount of the coverage, even in the circumstance when Nationwide denied the claim of the policyholder. R. p. 1036, line 23-p. 1037, line 3. The adjuster explained that, in view of his denial of the claim of the homeowner, the mortgagees became the policyholders and that was why they had to submit their own proofs of loss. R. p. 1023, line 21-p. 1024, line 13; p. 1036, line 23-p. 1037, line 3.

Although Nationwide did not mention an offset or credit for the payments in its pleadings, nor make any request for an offset or credit in the testimony, nor any such argument to the jury at trial, Nationwide now wants credit or an offset for its limited early payments.

Generally, claims or the defenses not presented in the pleadings will not be considered on appeal. See *McNeely v. South Carolina Farm Bureau Mut. Ins. Co.,* 259 S.C. 39, 190 S.E.2d 499 (1972). This rule is consistent with the general restriction that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997); *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct.App. 1995). A party should be "prevent(ed)

from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept ace cards and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 256 S.E.2d 716, 724-725 (2000), citing with approval *Brown v. Singletary*, 226 S.C. 482, 85 S.E.2d 738 (1955). See, Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* (2d.Ed. 2002), page 56.

With specific regard to the issue of offset or payment, it is clear that payment is an affirmative defense that must be pled. Rule 8, SCRCP, states in pertinent part that

> In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . payment . . . and any other matter constituting an avoidance or affirmative defense.

According to one legal treatise:

> "Payment" is defined as a discharge of a pecuniary obligation by money or what is accepted as the equivalent of a specific sum of money. It is a discharge of a debt by a compliance with the terms of the obligation. State more fully, payment is the discharge of an obligation by the actual or constructive delivery of money or its equivalent by an obligor or by someone for the obligor for the purpose of extinguishing an obligation, wholly or partially, and the acceptance of it by the oblige. Payment requires delivery by the debtor and acceptance by the creditor, both with common purpose.

60 Am. Jur. 2d *Payment § 1*

A second article in that treatise states that:

> A setoff does not occur automatically but must be exercised affirmatively. The failure to allege a setoff as an affirmative defense can bar the setoff in the same manner as any other waiver of an affirmative defense by the failure to plead it. The failure to plead recoupment affirmatively can also waive the right to assert it,

although recoupment is adequately pled by notice of the asserted defense, regardless of the words used.

20 Am. Jur. 2d *Counterclaim, Recoupment, Etc.* § 106 (2013)

The venerable treatise *Couch on Insurance* states the following:

> Any recovery by insured under a fire policy would be limited to the amount of loss over and above amount paid by insurer to the mortgagee under the mortgage clause of the policy. To the same effect, where a fire insurer paid a mortgagee under a loss-payable clause, such payment was properly deducted from the insured's judgment against the insurer for the face amount of the policy. And, a fire insurer was entitled to setoff against the proceeds payable to a mortgagor the amount paid to the mortgagee in satisfaction of the unpaid balance of a mortgage debt jointly and severally owed by the insured mortgagors; the fire insurer could not, however, set off the amount it paid to a lienholder of a vehicle under a separate automobile policy covering a vehicle which was also damaged in the fire.
>
> **Observation:**
> **Such an offset should be raised as an affirmative defense in any action by an insured against an insurer.**

12 *Couch on Ins.* § 178:60 (2012)(emphasis added)

Although there is some authority for offsets being applied by a trial court, those cases are distinguishable in that the court was bound by statutes that mandated such an offset. See *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (setoff required by terms of statute, therefore it did not need to be pled), *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct.App. 1997) (gambling losses set off by winnings pursuant to statue and therefore not required to be pled or tried by consent.)

Further distinguishing this case is the fact that the payment in this case arguably gave rise to a counterclaim. If a jury agreed with the Nationwide's allegation that Mr. Fowler set the fire, then Nationwide would have had a right to

seek payment from Mr. Fowler for the payments it made on his behalf. Nationwide chose not to plead the mandatory counterclaim. It did not present evidence as to what the terms of its payments to the mortgage holders were. Nationwide should have asserted this mandatory counterclaim in this suit. Rule 13(a), SCRCP. It did not do so. Thus, it lost the right to assert the counterclaim. Even if Nationwide had asserted the claim, however, it failed to explain, argue, or prove its right to counterclaim or offset for the payments made.

In this case, as a matter of trial strategy Nationwide did not assert payment as a defense or otherwise. Nationwide relied solely on its failed plan to persuade the jury that the plaintiff set the fire. If Nationwide's plan had succeeded, it would owe nothing. Nationwide cannot and should not profit from its gamble by being allowed to reverse field, nor to take a second bite of the apple. *McNeely, supra; Butler, supra, Gurganious, supra; I'on, LLC, supra; Toal, et al., supra.*

A perhaps more important point now is that, as noted in the Order Denying Defendant's Post Trial Motions, the verdict was within the evidence presented. *Lemoine v. Hollingsworth*, 273 S.C. 477, 257 S.E.2d 713 (1979). Indeed, plaintiff's evidence of damages would support a higher award than the actual verdict, if the jury so found, whether or not the jury gave Nationwide credit for payments made to the mortgagees. (Please see discussion below, pages 22 to 31, about the charge as to and the evidence of the actual damages for breach of contract.) During its deliberations the jury sent out two questions; one was about giving credit for amounts paid. At that point, the evidence had been presented,

and all the arguments had been made. Neither side requested a further charge, and by agreement the questions were not answered. The jury was instructed to decide the case based on the record. R. p. 1227, lines 3-24.

Although the questions were not answered, it must be deemed, from the jury's asking the question and from the precise nature and specific amount of the verdict, that the jury duly considered the undisputed but limited evidence in the record about the payments direct to the mortgagees, and that it then made the appropriate adjustments and precise calculations in determining the amount of Mr. Fowler's actual damages caused by Nationwide's breach of contract. Appellant's brief speculates that the jury did not correctly consider the prior payments to the mortgage holders and did not make a proper adjustment of the award. The basis for the speculation must be that the Appellant had neither pled offset nor mentioned the payments as a basis for offset in its argument to the jury. Such speculation, however, is obviously flawed and inappropriate.

Very respectfully the cases cited by Nationwide in the Appellant's Brief are simply inapplicable. No one says that any plaintiff is entitled to a double recovery. In the *Fowler* case at bar, however, Nationwide has <u>not</u> shown that there has been any double recovery. Nationwide chose to do nothing in the trial to ask or argue for a credit, but it is clear that the jury in its wisdom did consider the matter and in its wisdom apparently made an appropriate adjustment in its award of actual damages.

Just as the trial court may not charge on the facts, it is not the role of the Court to make findings of fact on post trial motions or appeals, and the evidence

is to be viewed in the light most favorable to the nonmoving party. There is no cause or reason to invade the province of the jury or to disturb the verdict.

Accordingly, since the defendant not plead, either as an affirmative defense or as a counterclaim, as required, and did not argue to the jury, that it was entitled to an offset, defendant cannot raise this matter now. It must be deemed, however, that the jury made the appropriate resolution of the matter.

II. The Trial Court did not err in allowing the testimony of the local fire chief as a fact witness.

One of the witnesses for the plaintiff was David Wright, Chief of the Friendship Fire Department, where he had volunteered for thirty-one years. Mr. Wright was also a Captain in the Seneca Fire Department, where he had served for twenty-two years. Chief Wright was present at the premises during the fighting of the fire and made personal observations as he arrived, during the fire fight, and after it was over. As the fire chief, he was required to make a report to the State Fire Marshall called the "NFIR" or the "Truck Report". He was also required to make a report to SLED if he observed anything suspicious at the fire. The report to the office of the State Fire Marshall is required by S.C.A.D.C. 71-8300 (B) (1) (now at S.C. Code of Regulations R. 71-833.4(B)(1)(2013)).

Chief Wright was challenged by the defendant as an expert witness, but after consideration of a motion in limine and extensive voir dire, the Chief was offered as a fact witness (R. p. 403, lines 1-25). Plaintiff also sought to have the Chief explain his Truck Report (R. p. 404, lines 4-23). The trial court ruled that the witness would be limited to the responses or answers on the Truck Report by his schedule or the manual used to fill out the required form. Tr. p. 405, lines 2-

16. This is because those answers were basically "factual matters" that the Chief was required to determine, "(without) any sort of expertise required." R. p. 405, line 17-p. 407, line 20. As a fact witness, the Chief's testimony was limited to opinions which are rationally based on the perception of the witness. R. p. 407, lines 10-20.

The factual testimony of Chief Wright was an important part of the case. This is because of what he observed and what he said, not because he gave opinion testimony as an expert. He did not hold himself out as an expert. He just explained what he personally observed on the day of the fire and what he did according to State regulation. He was in the second fire truck that arrived and saw flames coming out of the roof. He described the portion of the roof where the flames were coming out. R. p. 416, lines 17-22. He described the fighting of the fire. R. p. 417, line 9-p. 419, line 6. He observed that the most heavily damaged part of the house was to the left of the front door. R. p. 419, line 17-p. 420, line 8. He explained the "V pattern", which points down to where the fire originated. R. p. 420, lines 9-18. He said that the V pattern was located to the right of the door or the opening as you go into the kitchen. R. p. 420, line 19-p. 421, line 3. The place where he had seen the fire in the roof was right above this location. R. p. 421, lines 4-6. The most heavily damaged area was right there in the same location. R. p. 421, lines 7-11. The Chief said that he was supposed to investigate every fire, not like an investigator, but to look to determine if he needed to call SLED because he saw something suspicious suggesting arson. R. p. 421, line 23-p. 422, line 10. He said he did not smell any accelerants, such

as gas, diesel fuel, lighter fluid, or anything flammable, which he knew from experience. R. p. 422, line 11-p. 423, line 1. Mr. Ross, who was plaintiff's expert witness as the cause and origin of the fire, gave the expert opinion as to the significance of the Chief's factual observations. R. p. 560, line 17-p. 607, line 24.

Chief Wright also explained his entries on the Truck Report, marked Plaintiff's Exhibit Number 6 (R. p. 1237), based upon his observations on the day of the fire. R. p. 423, line 6-p. 429, line 14. Some of his answers were "undetermined". R. p. 427, lines 5-6. He had marked the form indicating that the cause of ignition was unintentional because he did not see anything or smell anything. R. p. 427, lines 8-9. He marked that the heater was the equipment involved in ignition because it was at the bottom of the V pattern. R. p. 427, lines 20-25. It is also in the area which was below where the fire was coming out of the roof and it was where he had observed the greatest damage. R. p. 428, lines 13-18. Although he had on prior occasions smelled accelerants, this time neither he nor the other fire fighters had found anything that made them want to call SLED. R. p. 430, line 13-432, line 3.

The Chief was cross examined extensively by defense counsel about various details of the fighting of the fire, explaining the need to call in SLED "if it's over our head" (R. p. 438, lines 16-18), the V pattern (R. p. 439, line 13-p. 442, line 9), and having had "an instructive class training session on arson suspicion". R. p. 442, lines 10-20.

It is interesting to note that even Mr. Gilden, one of Nationwide's claims investigators who said he was not an expert, testified that he was familiar with the V factor (sic) as a way to trace the origin of a fire. R. p. 891, lines 1-3.

As the Appellant must and does concede, the admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000); see also *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (Ct.App.2000), cert. granted (holding the court's ruling to admit or exclude evidence will only be reversed if it constituted an abuse of discretion amounting to an error of law). In order for an appellate Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).

In this *Fowler* case at bar, it is clear that the experienced Trial Judge did not abuse his discretion. It is also clear that there was no prejudice.

Very respectfully, Nationwide is mistaken in its complaints that Chief Wright testified as an expert and that his report is inadmissible hearsay not falling under the exception provided by Rule 803(8), SCRE.

The question of the status of Chief Wright as a witness was carefully considered by the Court at the trial. As stated above, the defendants had filed a motion in limine to exclude testimony by Chief Wright as an expert witness. The plaintiff, however, offered him as a fact witness. The Court allowed Chief Wright to testify as a fact witness.

The defendant had further challenged the admission of evidence of the Truck Report signed by Chief Wright. As established by the testimony of all the fire witnesses, however, the Truck Report is a report prepared by Chief Wright pursuant to regulations of the State Fire Marshall. The Chief, who was not only present at the fighting of the fire but also present in Court to testify, completed the report making the observations required by the regulation.

The Trial Court, in careful deference of the limitations in Rule 803(8), excluded the second version of the Truck Report which had a narrative, which arguably stated opinions, judgments, or conclusions.

It is important to note, however, that Chief Wright was present to testify. Nationwide had the chance to cross examine Chief Wright. Chief Wright never said he was an expert. He modestly explained why he completed the required form in the way he did. The jury gave his testimony appropriate weight, as properly instructed by the Court.

The judge's handling of the testimony of Chief Wright was entirely consistent with the provisions of Rule 701 regarding opinion testimony by lay witnesses. As stated in the rule, if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding with the witnesses' testimony or the determination of the fact at issue, and (c) do not require special knowledge, skill, experience, or training. The Chief's testimony met these tests. As stated above, the Chief's testimony was based on his observations at the scene on the

day of the fire – clearly a rational basis, and it certainly did not constitute hearsay testimony.

The most important observation of Chief Wright about the fire was not as to how it started, but rather where it started. The Chief testified that the location was near the heater (not that the heater was the cause of the fire). R. p. 426, line 21-p.428, line 18. The Chief identified this location using three factors: (1) the V pattern, (2) the location of the greatest damage, and (3) the area right below the place where the fire first broke out from the roof. *Id.* Thus, the Chief's testimony as to the location of the fire was not a direct challenge to defense witness Byers' opinion that an accelerant was the cause of the fire, although it did intend to show that Mr. Byers' opinion as to where the fire was started (allegedly with accelerants) was wrong, in that Mr. Byer's opinion was inconsistent with the Chief's factual observations on the day of the fire as to the location.

The Chief's testimony in its entirety was relevant to other aspects of the case: (1) there was a fire which resulted in a total loss, (2) the Chief did not smell any accelerants, and (3) the local fire department made a report but Nationwide's hired fire expert essentially disregarded the Chief's observations – relevant to bad faith.

The Judge's instructions to the jury correctly instructed the jury as to the weight to give to the testimony of all the witnesses, including expert witnesses, and the defendant did not object.

Very respectfully, the cases cited by Nationwide to the effect that a particular fire chief could not testify as an expert as to the cause and origin of fire, *Wright v. Hiester Constr. Co., Inc.*, 389 S.C. 504, 698 S.E.2d 822 (Ct.App. 2010), or to the effect that a police officer cannot testify as an expert as to the cause of a traffic accident, *State v. Kelley*, 285 S.C. 373, 339 S.E.2d 442 (1985), are distinguishable and quite different from the Fowler case at bar. This is because Chief Wright testified as a fact witness. He did not offer opinion testimony. He just explained the factual reasons why he completed the state required Truck Report in the way he did.

The Fowler case at bar is distinguishable from *State v. Morris,* 376 S.C. 189, 656 S.E.2d 359 (2008), cited by the Appellant, because Chief Wright testified in person, whereas the bankruptcy examiner in *Morris* was not in Court to testify and only the bankruptcy examiner's report was offered, under an exception to the hearsay rule .

The Fowler case at bar is also distinguishable from *SCDMV v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011), cited by the Appellant, because Chief Wright was present to testify, whereas in *McCarson* an incident report was offered without the testimony of the officer who prepared it based on his personal observations.

In *Cardinal v. Farmer's Mut. Ins. Co.,* 2011 WL 202 2948 (Mich.App., May 24, 2011) cited by the Appellant, the Court determined that even if there were errors in the admission of a report, they were harmless because the fire chief in *Cardinal* was present to testify. As noted, Chief Wright was present and did

testify, explaining what he personally observed on the day of the fire and why he had filled out the Truck Report as he did. He readily admitted that he was not an expert, and he candidly pointed out that he had said on the report that various things were "undetermined".

Very respectfully, Appellant's Brief seems to suggest mistakenly that Chief Wright was the only witness to differ with the defense cause and origin expert witness, Mr. Byers. Not so. Plaintiff's cause and origin expert witness, Mr. Ross, is a professional of equal if not better credentials than Mr. Byers. Unlike Mr. Byers, he was not subject to impeachment for bias, or for failure to observe industry standards in investigating and reporting fires (set by Publication 921), or for failure to mention or explain in his report the negative test results of the six debris samples he took. Even Mr. Holecek, testifying for the defense, corroborated the status and importance of Publication 921.

Indeed, the self proclaimed expertise of Mr. Byers was so completely destroyed by his numerous deviations from industry standards (e.g., using the phrase "pour patterns" without the support of positive debris sample test results (R. p. 987, line 10-p. 997, line 4) that the defendant could never have carried its burden of proof that Mr. Fowler set the fire.

Further, the fact that Mr. Fowler was preparing his house for sale completely negates the claim that he had a motive to burn the house. The preparation of the house for sale is a fact to which Mr. Fowler testified. R. p. 694, line 1-20. Ms. Yarbrough corroborated this important fact. R. p. 475, line 5-p. 477, line 7. It was also a fact which the adjusters had recorded in

Nationwide's own claim log. R. p. 894, line 19-p. 895, line 5 (Gilden) and p. 1030, line 4-p. 1031, line 3 (Flanagan). It negates the idea that Mr. Fowler would burn the house, because no one would buy a burned house. R. p. 897, line 17-p. 900, line 11.

Respondent respectfully notes that, the Trial Judge correctly instructed the jury how to evaluate the testimony of witnesses, expert and nonexpert, and how to decide the credibility, force, and effect of testimony. R p. 1188, line 10-p. 1191, line 2. Very respectfully, there was no reversible error with reference to Chief Wright's limited testimony.

III. A new trial absolute is not required simply because the verdict for actual damages for breach of contract exceeded the Appellant's post verdict calculation of policy limits applicable if benefits were paid promptly after the fire.

Now, so long since the fire, far more than the pretrial 34 months, the insurer self righteously asks the Court to limit the amount it owes to the amount it says it would have owed if it were not in breach of the contract. The insurer further says in its third Issue on Appeal that a verdict in a higher amount "could only have resulted from passion, caprice, or prejudice." On this flawed premise, Nationwide seeks a new trial.

Nationwide's motions below and its appeal are to be judged taking the facts and inferences therefrom in the light most favorable to the non moving party, to wit, the Respondent. On the facts and the law, all Nationwide's post trial motions should have been denied; and its appeal should be denied and the judgments below should be affirmed.

A new trial absolute may be granted only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, the jury's determination of damages is entitled to substantial deference. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention.

A breach of contract cause of action does not fail where the precise amount of damages are difficult to ascertain because of the wrongful act of the defendant. *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 356, 342 S.E.2d 611, 615 (Ct.App.1986). In *Powers v. Calvert Fire Ins. Co.,* 216 S.C. 309, 321-22, 57 S.E.2d 638, 644 (1950), the Supreme Court held: "Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must realize that in such cases 'juries are allowed to act upon probable and inferential as well as direct and positive proof.' " See also *Minter v. GOCT, Inc.*, 322 S.C. 525, 529, 473 S.E.2d 67, 70 (Ct. App. 1996).

Nationwide's claim on appeal is that the verdict was so large that it was not supported by the evidence and was rather the result of passion, caprice and prejudice. Not so.

First, admitted into evidence was the defendant's own Property Loss Report Form, Plaintiff's Exhibit Number 30, (R. p. 1279) which stated Nationwide's calculation that the maximum coverage of the policy was $523,333. This calculation sheet in this amount was discussed in the testimony and in the

argument. It was discussed, however, in the context that this is the maximum the defendant should have paid if the policy benefits had been paid promptly, to wit, if the defendant had not breached the insurance contract.

Second, a leading treatise on insurance makes it clear that the insurer's post verdict calculation of policy benefits, if paid promptly, does not limit an award for actual damages if the insurer breaches the contract. 2 Insurance Claims and Disputes § 6:39 (6th ed.) states as follows:

> "The general measure of damages available for breach of a contract to pay money is the amount due, plus interest. There is language in a few cases, therefore, indicating that an insurer, following its breach of contract, is liable only for the amount of policy benefits owed, plus interest. The dicta in those cases, however, do not accurately represent the law. Absent a statute to the contrary, consequential damages are, in fact, always available in contract actions if they arise naturally from the breach and are such that they may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. The courts that have expressly considered the issue, therefore, have consistently recognized that, under certain circumstances, the foregoing test might be met in an action against an insurance company arising out of a breach of its duty to indemnify.
>
> The leading case in the area is *Lawton v. Great Southwest Fire Insurance Co*.
> (emphasis added) (footnotes omitted)

In *Lawton v. Great South West Fire Ins. Co.,* 118 N.H. 607, 392 A.2d 576 (1978), the insured, alleging that the carrier had breached its duty to indemnify him for his fire loss, sought to recover consequential damages consisting of damage to his business and credit reputation, loss of use of his property, loss of business opportunity, additional damage to the property occasioned by the delay in payment, and mental anguish. The carrier moved to dismiss the claim for

consequential damages. The court denied the motion, holding that whether the carrier had reason to foresee a particular injury will normally be a question of fact for the jury. The court correctly recognized that the policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach. The court held:

> "The subject insurance contract limits the insurer's liability to $250,000 for damages that result from the casualties insured against, not its liability for damages resulting from its own breach of contract." 118 N.H. at 611, 392 A.2d at 579 (emphasis added).

See also *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 856 N.Y.S.2d 505, 886 N.E.2d 127 (2008) ("limiting an insured's damages to the amount of the policy, i.e., money which should have been paid in the first place, plus interest, does not place the insured in the position it would have been in had the contract been performed (citations omitted)'. . .The purpose of the (insurance) contract was not just to receive money, but to receive it promptly." 10 N.Y. 3d at 195, 286 N.E.2d at 131-132, 856 N.Y.S. 2d at 509-510. *Accord, e.g., Reichert v. General Ins. Co. of America*, 59 Cal. Rptr. 724, 428 P.2d 860, (Cal. 1967); and *Sabbeth Industries Ltd. v. Pennsylvania Lumbermens Mut. Ins. Co.,* 238 A.D.2d 767, 656 N.Y.S.2d 475 (3d Dept 1997).

The law in South Carolina is the same. Generally, liability for breach of an insurance contract is dependent upon the terms specified in the contract. *Jacobs Press, Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 107 F.3d 866 (4th Cir. 1997) (interpreting South Carolina law). Plaintiff may certainly claim damages in the amount of the contractually stated amount of coverage indicated on the face of the Policy together with accrued interest. *Hutson v. Continental Assur. Co.*,

269 S.C. 322, 237 S.E.2d 375 (1977), *overruled on other grounds*, *O'Neal v. Bowles*, 431 S.E.2d 555 (1993). Additionally, however, the South Carolina Supreme Court has held that where the money was to be paid for a special purpose which was known to the party agreeing to make the payment, damages directly and naturally resulting from the breach and therefore supposed to have been in contemplation of the parties may be given in addition to interest. Those damages in the contemplation of the parties, known as special damages, can be particularly alleged and proved. Id. (citing *Kline Iron & Steel Co. v. Superior Trucking Co., Inc.*, 261 S.C. 542, 201 S.E.2d 388 (1973). The Court in *Hobbs v. Carolina Coca-Cola Bottling Co.*, 194 S.C. 543, 10 S.E.2d 25 (1940) stated this principle as follows: "But where damages do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage sustained in order to introduce testimony in regard to it. The rule is to avoid surprise." 194. S.C. at 548, 10 S.E.2d at 27 (emphasis added).

There is no real surprise about the damages alleged in the *Fowler* case at bar. The Complaint (R. p. 25) contains the following allegations:

> "(Paragraph) 24, "The insurance company has refused to pay for the damage cleanup at the fire, causing plaintiff to incur this trouble and expense himself.
>
> (Paragraph) 25, "The insurance company has also failed to provide for the plaintiff's loss of use of the damaged house, in that it did not provide alternate living arrangements for him, and the plaintiff has been forced to live in an outbuilding on the property without proper heat or running water, and has suffered inconvenience and discomfort thereby." R. p. 25, lines 23-31.

The plaintiff in the Fowler case at bar also set forth his claim for consequential/special damages in his Answers to Interrogatories (R. p. 43), served in September 2009, stating in relevant part as follows:

> "Plaintiff has not received full or proper payment under Nationwide Policy Number 61 39 HO 787845, including but not necessarily limited to the personal property or contents of the home in the basic amount of $109,910, with extended replacement coverage costs up to $114,692; loss of use or additional expense in the amount of $147,407 with additions up to $154,125; biological deterioration/damage cleanup in the basic amount of $5,000 with additions up to $7,706; landscaping in a basic amount with additions up to $7,706.
>
> Plaintiff has been unable to repair or return to his residence; has been forced to live in an out building on the property without proper heat, running water, toilet or laundry facilities; and has suffered inconvenience and discomfort thereby.
>
> Plaintiff has lost the use of his personal property and the enjoyment of his real and personal property, including the landscaping." (R. p. 43, line 16-32).

Nationwide can make no legitimate claim of surprise, as shown by the history of this case. What could be more obvious, however, than the fact that the insured homeowner is going to suffer consequential damage if the insurer does not pay the claim when a fire causes a total loss of his home and all its contents? The whole reason for people to buy fire insurance is to get the money to rebuild and replenish their homes. A total loss of one's home and all its contents causes great physical hardship when the insurer does not pay. The insurer indisputably knows this very well.

The Fowler case at bar is far different from the case from *Holmes v. Nationwide Life Ins. Co.*, 273 S.C. 711, 258 S.E.2d 924 (1979) relied upon by

Appellant. In *Holmes*, the insured had a policy of health insurance, not fire insurance. More importantly, as stated by the court, "it was the position of the Insurance Company throughout that recovery, if permitted, should be limited to the terms of the insurance policy." 273 S.C. at 713, 258 S.E.2d at 925 (emphasis added). No special damages had been alleged anywhere in the Complaint. The insurance company had objected when the plaintiff was allowed to testify that he borrowed $3,800, paying 9% interest, to pay his hospital bills. Very significantly, the Nationwide in *Holmes* had also objected to an erroneous jury charge that the insurer would be liable "for all injury and damage that is naturally and proximately caused by the breach" and "liable for any special damage, which at the time of the contract may reasonably be supposed to have been within the contemplation of the parties as a probable consequence of any breach." 273 S.C. at 713, 258 S.E.2d at 926. In *Holmes*, therefore, the court remanded the case to the trial court for entry of a judgment of that amount which the counsel could agree upon or which the court would calculate.

The Fowler case at bar, however, is different indeed. Nationwide in this case did not object to the charge. In fact, the charge was different from the *Holmes* charge, and it was correct. The charge as to actual damages for breach of contract in *Fowler* was:

> "A party breaches a contract when a party does not perform as agreed under the contract by failing to carry out a term, promise, or conditions of a contract. The damages recoverable for a breach of an insurance contract are those which follow as the natural consequence of the breach. All of these damages which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into. Generally, the damage to which one is entitled for breach are those which arise naturally from the breach or those which reasonably are supposed to

have been within the contemplation of the parties at the time the contract was entered into." R. p. 1002, lines 8-17 (emphasis added).

This charge has the necessary reference to what was within the contemplation of the parties at the time of the contract.

Most important, however, is the fact that in the *Fowler* case the insurance company never said anything to the jury or to the Judge before the verdict to the effect that the recovery should be limited to the terms of the policy. Indeed, the insurance company had put all of its eggs in one basket. It simply accused the policy holder of setting the fire. Perhaps Nationwide realized how weak its proof of the accusation would be, so it did not want to discuss damages or anything about the terms of the policy. It may have feared that such a discussion would have been seen by the jury as a tacit admission that it should have paid the policy benefits at the very beginning.

The case of *Cook v. Mack's Transfer & Storage*, 291 S.C. 84, 352 S.E.2d 296 (Ct.App. 1986) is a strange case for Appellant to rely upon, since it involved workers' compensation. There was absolutely no contract between the injured employee and the carrier, and there could be no breach of contract. So, at the very least, *Cook* is basically irrelevant to the *Fowler* case at bar.

In addition to the oddity of Appellant's citation of a case like *Cook* involving workers' compensation is the unfortunate fact that the Appellant's citation of the *Cook* case and its placement in quotes of part of a sentence is very misleading. To wit, the last sentence in the initial paragraph on page 31 of Appellant's Brief (the paragraph carried over from page 30) starts with a four word phrase "If, and only if", which is not found in *Cook* anywhere. This added phrase is then

followed by wording from *Cook,* the last twelve of which are placed in quotations, and the citation to *Cook* is added. Thus, Appellant's Brief mistakenly cites *Cook* for the false proposition that, if and only if, an insured proves insurer bad faith can he "recover damages not limited to the face amount of the policy".

There is no case in South Carolina which holds that an insured can recover actual consequential damage for breach of contract "only if" the insured proves insurer bad faith.

Accordingly, there is no South Carolina authority to the contrary, and the weight of authority, as reflected in the treatise and in the *Lawton v. Great Southwest Fire* case, is that the carrier, if in breach of its contract to pay benefits promptly to its insured, is liable for consequential damages which are reasonably supposed to have been within the contemplation of the parties at the time the contract was entered into. This is the better rule as well. It is the long established measure of actual damages for breach of contract.

It is important to note that if the insurer is found to have acted in bad faith, then the actual damages are not limited to the damages which were within the contemplation of the parties at the time of the contract. *Nichols v. State Farm Mutual Automobile Ins. Co.,* 279 S.C. 336, 306 S.E.2d 616 (1983). In cases of insurer bad faith, the actual damages can include all damages which proximately result from the bad faith. This does mean that long standing rules for the recovery of actual damages for breach of contract disappear. No. In the *Fowler* case at bar breach of contract damage was correct. It was not objected to by Nationwide. And it was followed by the jury.

Third, when this case was sent to the jury, the jury had abundant evidence, including the policy, and the law to apply. The court properly instructed the jury to interpret the policy liberally in favor of the policy holder and against the insurance company. The jury could find, based on the policy and all the other evidence, that Nationwide was required to make certain payments, and that it was required to make those payments promptly. Nationwide did not challenge plaintiff's proof of damages, nor assert potential coverage limitations, nor assert any possible setoffs for payments to other parties.

Thus, the jury could have appropriately found (and apparently did find) that the plaintiff suffered hardship because of the fact that Nationwide did not pay promptly. The plaintiff had been out of his house for 34 months from the date of the loss to the time of trial. Nationwide had paid only $2,000 to plaintiff since the day of the fire. The plaintiff testified that it would take twelve months or more to rebuild the house once he had the money, because he would need to obtain the necessary permits and hire a crew or building company to help. The jury, using its common sense, as the court's jury charges correctly allowed, could have reasonably concluded, based on Nationwide's continued unchanging attitude so far, that it will be quite a while before plaintiff gets the money to rebuild his house and replace its contents. The jury could have further placed (and apparently did place) a large value on the hardship plaintiff has had to endure and will likely continue to endure: living only in an outbuilding on the property called a "gazebo" even up to the time of trial, bathing in the lake and using the neighbors' toilet facilities until he built his own temporary replacement bathroom facility, and

the other damages caused by Nationwide's breach of contract. These are damages that the jury clearly found were in the contemplation of the parties. These damages are not at all the result of passion, caprice, or prejudice.

Now that Nationwide has lost, it wants to make arguments that it could have and should have made to the jury - probably without success – that is, the insurer wants limits or reductions to be applied to plaintiff's claim. It is too late. *McNeely, supra*; *Butler, supra; Gurganious, supra, I'On, LLC, supra, Toal, supra.*

Fourth, on the breach of contract claim, the jury awarded $501,444, which is less than the $523,333 maximum amount of the policy coverage according to Nationwide's own Property Loss Report Form, and therefore well within the province of the jury, even without reference to the amount of hardship damages resulting from Nationwide's failure to make timely payments required by the policy.

It is not clear exactly how the jury calculated the amount of $501,444, but it is easy to justify such a number – or an amount much higher. In fact, the $501,444 probably was the net figure the jury found after applying an offset to what would otherwise be available. This is the most logical interpretation of the fact that the jury in the middle of the deliberations sent out a question whether it should make deductions for prior payments. The precise nature of the verdict makes it clear the jury very carefully considered all the facts in evidence in the record and all the arguments made. The jury did not round off the number, which would suggest imprecision, such as to $500,000 or $600,000 or $700,000. Again, the damages are not at all the result of passion, caprice, or prejudice.

The Trial Judge properly instructed the jury on the issue of actual damages for breach of contract, and the jury reached a proper result.

Fifth, inasmuch as Nationwide failed to object to the jury instruction regarding damages, it cannot in effect do so now. Rule 51, SCRCP, which pertains to jury instructions, states, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." A party's failure to object or otherwise challenge a jury charge precludes the issue from being raised in a new trial motion to trial court or on appeal. *Winters v. Fiddie*, 394 S.C. 629, 640, 716 S.E.2d 316, 322 (Ct. App. 2011), *Munn v. Asseff*, 226 S.C. 54, 58, 83 S.E.2d 642, 643–44 (1954). Accordingly, because Nationwide failed to object at trial, it cannot now complain about the court's instructions to the jury.

Sixth, as outlined above, the jury determined that the total value of plaintiff's actual damages resulting from Nationwide's failure and refusal to pay timely plaintiff's claim was substantial. The calculation of all plaintiff's actual damages was precisely $501,444. There is no reason to impeach the verdict on the grounds of passion, caprice, prejudice. If the jurors were so motivated, the jury would have answered yes, not no, to the interrogatory whether Nationwide acted in a willful, wanton, or reckless manner.

It should be noted that the jury awarded Mr. Fowler an additional $3,000 in actual damages from Nationwide's bad faith. This amount shows that the jury determined, under proper jury instructions, that the actual damages for the

breach of the insurance contract were substantial ($501.444) and that the bad faith added to Mr. Fowler's total damage, but not an extraordinary amount. In other words, the damages resulted from the breach, as was reasonably within the contemplation of the parties when the contract was entered. In still other words, Mr. Fowler had been damaged, very substantially, by the nonpayment of the benefits promised by the policy – not by the bad faith.

The jury was clearly not motivated by passion, caprice, or prejudice, because it did not add an excessive amount of actual damages from the bad faith. The jury determined that it was the nonpayment which damaged Mr. Fowler.

In this case, the jury has acted very reasonably in evaluating the evidence, the arguments, and the instructions from the Judge. The verdict is entitled to deference, and it should be affirmed. *Vinson v. Harley, supra.*

IV. The trial court was not required to reduce the jury verdict for actual damages resulting from Appellant's breach of contract to the Appellant's post-verdict calculation of policy limits applicable to benefits paid promptly after the fire.

Very respectfully, the Appellant's fourth stated Issue on Appeal is very similar to and hard to distinguish and separate from the third stated Issue on Appeal. This is because the Appellant uses in both the phrase "contractual damages", apparently meaning by the term the Appellant's post-verdict calculation of policy limits if benefits had been paid promptly after the fire.

As stated in the preceding section III, the Appellant did not pay the policyholder properly and promptly. More than 34 months had passed before the

trial even began. Appellant persists with this appeal, having paid nothing to the insured except $2,000.

As stated in the insurance treatise and the cases, consequential damages are in fact always available in contract actions if they arise naturally from the breach and are such that they may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. See *Lawton v. Great Southwest Fire Ins. Co.*, *supra*, which is described as the leading case in this area. South Carolina law is to the same effect. Please see discussion *supra* pages 23-31.

In the case at bar, the jury received proper instructions as to actual damages recoverable for breach of contract. The defendant did not object at trial; indeed the instructions correctly stated the law.

The Appellant's brief claims on its page 29 as to the third Issue on Appeal that at trial the Respondent "conceded" that the evidence of damages totaled only a certain amount lower than the amount Nationwide now claims is the policy limits, and it says again on its page 36 that it was "Respondent's own position that he was <u>not</u> entitled to the full policy limits", but "the jury entered a verdict for nearly every policy limit, whether applicable or not". These arguments are fatally flawed.

First, the jury was instructed on the law as to actual damages resulting from breach of contract. Nationwide never requested a charge that the jury was to consider each provision in the policy which had been breached. Nationwide never requested a charge that the jury should at any point in its deliberations

specifically go coverage by coverage, A, B, C and so forth, and then add up its calculations. Nationwide never requested a charge that the jury was limited in its award of damages to any method of calculation of precise numbers according to any particular formula.

No. To the contrary, Nationwide was content with the Trial Judge's stated plan to let the parties argue the provisions of the policy. R. p. 1103, lines 5-16.

Nationwide, however, failed to make any argument to the jury as to the damages. Nationwide chose to ignore its opportunity to explain to the jury how Nationwide would calculate the benefits due under the policy if the policy benefits had been paid promptly.

Indeed, the adjuster conceded that he did not even explain to the mortgage companies anything about the other coverages besides Coverage A. He said nothing about the existence or the nature of the other coverages, because he decided the second mortgagee did not need to know. If he had told the second mortgagee, maybe a higher claim would have come in from the second mortgagee. In the same method of doing business, Nationwide chose not to explain its present position on damages to the jury. Nationwide apparently felt that this would or could lead to a verdict higher than the defense verdict it wanted.

Nationwide may have made a bad choice, but it is too late to change now.

The jury listened to the evidence, the arguments, and the charges, and it rendered its verdict. The jury did its job correctly. The verdict need not and should not be reduced.

Appellant's brief also contends erroneously on its pages 31-32 that Respondent "conceded" that consequential damages were only sought as part of the bad faith cause of action. The discussion of the jury charges was very confusing. When the charges about breach of contract were being discussed, the Judge and counsel first discussed the language of the policy and whether the defense offered any evidence that the insured could recover less than the policy limits. R. p. 1098, line 3-p. 1099, line 25. The Judge said he had a charge on damages on contract and that for an insurance contract "you are not limited to the terms of the policy, nor to the policy limits." R. p. 1100, lines 15-18. Defense counsel seemed to agree. R. p. 1100, lines 19-20. The discussion turned to the recoverability of consequential damages. Plaintiff's counsel said that was "the most we could probably get" (emphasis added). R. p. 1100, lines 23-25. On the bad faith plaintiff "can get consequential damages" according to plaintiff's counsel, to which defense counsel replied "consequential but not additional". R. p. 1100, line 25-p. 1101, line 3. Defense counsel shortly said "It is almost asking the Judge to explain what the policy requires. I think you just say, I think you have to charge you are entitled to any damages flowing from the breach. I think it's up to Counsel to read the policy to the jury and tell them that." R. p. 1101, lines 19-24 (emphasis added).

The Judge resolved the matter by saying "Why don't we do this. What I will do is not cover it and let you argue it. . . . I am gonna (sic) leave it up to the attorneys to argue it." R. p. 1103, lines 5-15. Defense counsel, who had suggested this, readily agreed. R. p. 1103, line 16.

There was no objection to the charge as given.

Counsel for the Respondent was pushing for consequential damages to be charged. These are specifically recoverable under the bad faith cause of action, which is a tort cause of action and therefore allows a plaintiff to recover all damages which proximately result from the breach, even if they were not within the reasonable contemplation of the parties at the time of the contract.

Both sides, however, were comfortable with the judge's instruction as to the recovery of actual damages for breach of contract. Actual damages for breach of contract include those which are within the reasonable contemplation of the parties at the time they entered the contract.

As the case progressed, it is clear that the jury received evidence that the defendant knew that Mr. Fowler would not be able to repair the house or replace the contents, unless and until he was paid the policy benefits. Mr. Fowler was clear and obviously correct on the point. R. p. 704, line 1-p.705, line 12. Mr. Madden, Nationwide's claims supervisor, was evasive on this point. R. p. 823, lines 16-19. The jury, however, could easily and appropriately find that Nationwide would obviously know that its policyholders cannot rebuild or replace their property without the insurance proceeds. The jury also heard testimony from Mr. Fowler about the hardship Mr. Fowler endured in the many months and years since the fire caused a total loss. R. p. 707, line 2-p. 713, line 16; p. 734, line 2-13; p. 739, line 15-p. 740, line 6; p. 743, line 2-p. 744, line 20. This was corroborated by Ms. Yarbrough. R. p. 471, line 6-p. 477, line 10. It is apparent from the size of the verdict on the breach of contract action, that the jury found,

based upon the evidence from Mr. Fowler, Ms. Yarbrough, and the other witnesses, and from common experience, that Mr. Fowler suffered substantial actual damages as a result of the insurer's breach of contract in failing to pay the policy benefits promptly, and that this hardship was within the reasonable contemplation of the parties at the time the contract was entered.

Juries are, of course, not limited by the arguments of counsel. They are guided by the judge's instructions and they are instructed to render their verdict based on the evidence. The jury's verdict awarding substantial damages for breach of contract, since they were found to be reasonably within the contemplation of the parties at the time of the contract, should be sustained.

V. The Appellant insurer is not entitled to a JNOV on the bad faith claim simply because the jury and the trial judge looked at the entirety of the Appellant's pre litigation handling of the claim, not just the insurer's limited and incomplete initial investigation results.

In this case like another *Nationwide* case, this Nationwide has boldly asked the court to limit the jury's examination of the defendant's conduct in a bad faith case to an evaluation of the contents of the insurer's own investigation, and further, to adopt the insurer's own self-serving evaluation of that investigation. This is the same position that Nationwide, or one of the Nationwide companies, took in the case of *Varnadore v. Nationwide Mutual Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1996). The Supreme Court of South Carolina, however, specifically rejected the idea that the insurer can so limit the jury's examination. The court's holding in the 1996 Nationwide case specifically allows the jury to examine the whole process of a claims' handling. *Varnadore, supra.* An insurer is required to

exercise an honest and informed judgment in processing a claim. *American Fire & Casualty Co. v. Johnson*, 332 S.C. 307, 504 S.E.2d 356 (Ct.App. 1998). The covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659 (Ct.App. 2002).

Nationwide's position at trial, which is now its position on appeal, is that Nationwide's actions are immune from examination once Nationwide has issued an initial claim denial letter. The trial court correctly determined that there is no such bright line as to when the defendant insurer's actions are immune from the scrutiny of the jury. The respondent respectfully submits that the language cited by the insurance company in *Howard v. State Farm Mut. Automobile Ins. Co.*, 316 S.C. 445, 45 S.E.2d 582 (1994) is *obiter dictum*. The actual holding of the case, based upon the facts of the case, was that the insurance company could not be held liable for a bad faith claims handling if the plaintiff's proof consisted of actions taken by the insurance company during the litigation itself. (The South Carolina Rules of Civil Procedure provide remedies and sanctions for discovery abuses by an insurance company after litigation begins. Indeed, the plaintiff in this case successfully filed motions to compel pretrial discovery in this case. R. p. 866, lines 6-13.)

It is quite relevant that after the initial claim denial letter on February 11, 2009, the plaintiff was refused an extension of time and was required to submit his sworn Proof of Loss within sixty days. R. p. 495, line 2-p. 499, line 19. When he received the Proof of Loss, the adjuster denied the claim again on March 17,

2009. R. p. 499, line 16-p. 501, line 10. Thus, the claims process was a continuum of actions on both sides. There is no reason to have a bright line drawn at the initial claims denial letter.

The evidence in this case includes abundant evidence of bad faith and lack of fair dealing by Nationwide in processing the claim. The most egregious act of bad faith was the defendant's refusal to give the policyholder a copy of the Cause and Origin Investigation Report, knowing that the report made no mention of the six negative test results of the debris samples and stating internally that the insured would only get a copy of the report if he filed suit and got it "at discovery". (Words "at discovery" appearing in Nationwide's claims log produced pursuant to order compelling discovery.) R. p. 492, line 20-p. 494, line 9; p. 829, line 18-p. 832, line 15. The insurer did not follow up in any way on the six negative test samples. R. p. 868, line 10-p. 869, line 24. The insurance investigator mentioned the fire and the testing of the debris samples to the Oconee County Sheriff, but never returned as requested when the test results were received. R. p. 548, line 13-p. 549, line 8; p. 887, line 12-p.888, line 8. The insurer also informed the mortgage companies unnecessarily that it was accusing the policyholder of setting the fire. R. p. 509, line 15-p. 511, line 3.

With regard to a motion for JNOV, the court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur,* 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.,* 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996). In making this determination, the trial court must view the

evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the plaintiff. *Gilliland v. Doe,* 357 S.C. 197, 592 S.E.2d 626 (2004); *Small v. Pioneer Mach., Inc.,* 329 S.C. 448, 494 S.E.2d 835 (Ct.App.1997). The trial court must deny the motion when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County,* 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein,* 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000).

In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.,* 355 S.C. 316, 585 S.E.2d 272 (2003). When considering a JNOV motion, the trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 320, 585 S.E.2d at 274; *Reiland v. Southland Equip. Serv., Inc.,* 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998).

The court should uphold a jury's verdict if there is any evidence to sustain it. *Shupe v. Settle,* 315 S.C. 510, 445 S.E.2d 651 (Ct.App.1994), *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004).

It is respectfully submitted that, as set forth above, there is ample evidence in the record and the verdict as to the insurer's bad faith should be upheld according to the many cases cited.

In addition to seeking a judgment notwithstanding the jury verdict that the insurer was liable for additional actual damages because of its bad faith, the Appellant also seeks to set aside the determination of the trial judge that the

insurer owed attorney fees pursuant to statute, S.C. Code § 38-59-40, because its refusal to pay policy benefits was unreasonable or in bad faith. The grounds for the Appellant's position are essentially the same, to wit: the insurer wants to limit the trial judge to an evaluation of the insurer's limited and incomplete Initial Investigation, not allowing the trial judge to look at all the acts and omissions of the insurer before the lawsuit was filed.

The statute commits to the trial judge the determination of whether the insurer is guilty of bad faith or unreasonable delay. The judge is not limited to the findings of the jury on these points. Indeed, the matter is not to be submitted to a jury at all. *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 504 S.E.2d 127 (Ct.App. 1998). *Coker v. Pilot Life Ins. Co.*, 265 S.C. 260, 217 S.E.2d (1976).

Nonetheless, the trial judge heard all the evidence received by the jury. All the factors properly considered by the jury could also be properly considered by the judge. *Varnadore v. Nationwide Mutual Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1996), supra.* The trial judge did consider these factors, listing them, and reaching the proper conclusion that statutory attorneys' fees were appropriate. Very respectfully, the evidence of the Appellant's bad faith was abundant and it was strong. The correct determination was made.

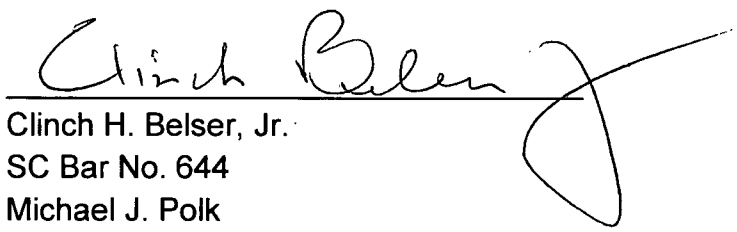
Accordingly, this portion of the Appellant's appeal should also be denied.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully asks the Court to deny the Appellant's appeal in its entirety and to affirm the judgments below. No new trial is required or appropriate because of any of the evidence

admitted or because of the size of the jury's very precise award of actual damages for breach of contract. No offset or reduction of the award is needed or appropriate based on the facts and history of this case. Both the jury award for insurance bad faith and the Trial Court's award of attorney's fees pursuant to S.C. Code § 38-59-40 are based on appropriate evidence and should be affirmed.

Respectfully submitted,



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October 22, 2013.

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Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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James D. Fowler.....Respondent,

v.

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

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

PROOF OF SERVICE

I certify that I have served the FINAL BRIEF OF RESPONDENT on the Appellant by hand delivering one copy of it on October 22, 2013, to its attorney of record, J.R. Murphy, Murphy and Grantland, 4406-B Forest Drive in Columbia, South Carolina.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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