THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

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Appellate Case No. 2019-001943
Case No. 2018-CP-10-00666

Therese Hood,..... Appellant,

v.

United Services Automobile Association,..... Respondent.

FINAL BRIEF OF RESPONDENT

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2. Did the trial court properly grant directed verdict to the extent Appellant premised her claims on an alleged duty on an insurer to *sua sponte* offer the full amount of its reserves and/or settlement authority, and premised her claim for damages on litigation induced stress allegedly caused by USAA's counsel questioning her credibility and her story that her headlights were on?

3. Did the trial court properly grant USAA's motion for judgment notwithstanding the verdict where there was no independent duty supporting Appellant's negligence claim?

INTRODUCTION

This action arises from an automobile accident involving Appellant Therese Hood ("Appellant") and two other vehicles. United Services Automobile Association ("USAA") provided Appellant with both liability coverage (under which it was bound to defend Appellant from the claims brought by other parties to the wreck) and underinsured motorist ("UIM") coverage (under which it had the right to defend another party to the wreck from Appellant's claims). The underlying facts are complex and involve a three-vehicle wreck which resulted in multiple lawsuits. The overarching factual dispute in those lawsuits was whether Appellant's headlights were on or off at the time she collided with Antoine Johnson ("Johnson"). The responding police officer and four witnesses provided evidence that Appellant's headlights were off. In contrast, Appellant initially maintained that that her lowbeam headlights were on.

Appellant first brought suit against Johnson contending he was at fault for the accident. However, Johnson counterclaimed and asserted that Appellant was really at fault because her headlights were off. Appellant disputed this through defense counsel retained by USAA. Her counsel retained an accident reconstructionist who opined, after examining Appellant's totaled car, that her highbeam headlights were on.

Subsequently, after Johnson's liability carrier paid its $25,000 policy limits, USAA took over his defense pursuant to S.C. Code § 38-77-160. Appellant's personal counsel then served Johnson/UIM counsel with a request to admit that Appellant's headlights were on. When UIM counsel denied this request, Appellant filed the subject bad faith lawsuit attaching two exhibits: the denial of the request to admit and the expert report.

Appellant's basic contentions below were that: (1) USAA should not have contested liability when defending Appellant's UIM suit because Appellant and her liability defense

counsel (who was being paid by USAA under Appellant's liability coverage) had separately denied liability and retained an expert who opined that her highbeams were on; and (2) USAA had a duty to offer its full $250,000 reserves to Appellant at mediation, where Appellant's last official demand was $650,000 and USAA's last official offer was $200,000, and where Appellant indicated at the end of mediation that the least amount she may possibly take was between $300,000 and $400,000. USAA argued that its conduct in defending the UIM suit was proper under South Carolina's legislative system for defending UIM cases codified in § 38-77-160, and that South Carolina does not require an insurer to *sua sponte* offer its full settlement authority to a plaintiff.

Six months after filing this bad faith suit, Appellant tried the underlying suit against Johnson (who was being defended by UIM counsel) to a Jasper County jury. At trial, Appellant admitted to the jury that her lights may have been off, her personal attorney offered to stipulate in open court that her lights were off, and her personal attorney chose not to call any expert to contest liability. In other words, Appellant and her personal counsel took the exact same position at trial (that her lights were off) that Appellant accuses USAA of bad faith for taking in this suit. The jury found Appellant 49% at fault, but awarded her $2.5 million in damages. This meant that she was able to recover the full amount of her $1,000,000 UIM insurance limits from USAA.

USAA paid Appellant a total of $1,023,993 under her UIM coverage. Despite recovering hundreds of thousands of dollars more than she was prepared to settle for in the underlying case, Appellant maintained this bad faith suit. She sought to recover even more at the trial of this case, putting South Carolina's UIM system itself on trial by implying that USAA acted wrongfully by being on "both sides" of the case. Given the counterintuitive and confusing nature of UIM insurance—in which a party's own insurer defends her adversary and litigates against her—

Appellant claimed to have been damaged by USAA defending, contesting liability, and examining her credibility in the UIM suit. In particular, Appellant faulted USAA for supposedly taking disparate positions despite the existence of evidentiary support for each. However, this is inherent in a UIM case where comparative fault is at issue. The case should never have reached a jury. Section 38-77-160 gives a UIM insurer the ***statutory right*** to contest liability "for its own benefit." And if an insurer cannot contest liability where four witnesses suggest the plaintiff is at fault, the plaintiff's own testimony suggests she may be at fault, and where a jury's determination of fault is two percentage points away from a defense verdict, it is difficult to imagine when an insurer could contest liability under Appellant's theory.

Appellant's second main argument—that, despite offering four-fifths of its settlement authority and still being $400,000 away from plaintiff's last demand, USAA had a duty to offer the full extent of its $250,000 reserves/settlement authority at mediation—was appropriately dismissed. Appellant essentially seeks a rule that would require insurers to *sua sponte* offer their highest evaluation of a claim and/or offer their reserves. Such a rule would have far reaching consequences, fundamentally changing the negotiation process and eliminating the incentive for one side to negotiate at all (a plaintiff need only wait for an insurer's top dollar), putting the statutory mandated practice of setting reserves into question (presumably, a requirement that an insurer offer the amount of its highest reserve would have a chilling effect upon full reserving of claims), and place confidential mediation conduct and settlement offers on trial (as was the case here). As detailed below, the trial court properly granted judgment as a matter of law on all of the claims and theories that were not viable causes of action under these facts. This Court should affirm.

COUNTER-STATEMENT OF THE CASE AND FACTS

I. Background of the underlying accident and UIM case.

The underlying accident occurred on November 7, 2014. (Am. Compl. ¶ 12; R. p. 21.) On March 17, 2015, Appellant filed suit against Johnson, through her personal counsel, Kevin Smith. (*See generally* Am. Compl.; R. pp. 16-33) Appellant also served USAA with the complaint as her UIM carrier pursuant to S.C. Code § 38-77-160. Johnson answered through counsel retained by his liability insurer, denied liability, and asserted a counterclaim for negligence against Appellant. (Ans. & Countercl., *Hood v. Johnson*, No. 2015-CP-27-00119 (S.C. Ct. Comm. Pl. Apr. 27, 2015).) Appellant requested that USAA defend her under her liability coverage. USAA retained Chris Nickles at Clawson and Staubes ("Attorney Nickels") to defend Appellant against Johnson's counterclaim. (Tr. 391:20-22, 700:1-11; R. pp. 1243, 1552.)

Separately, USAA hired counsel—Jack Daniel at Carlock, Copeland, and Stair ("Attorney Daniel")—to defend the UIM suit in Johnson's name, in accordance with the UIM statute, in the event Johnson's liability insurer settled with Appellant. (Tr. 699:4-700:21; R. pp. 1551-52.) USAA filed a notice of appearance and conditional answer on July 7, 2015. (Conditional Answer, Pl. Ex. 13; R. pp. 1801-02.)

On March 23, 2016, the occupants of the third vehicle, Mary and William Kuck, each filed suits against both Appellant and Johnson. (*See* Kuck Compl., Pl. Ex. 11; R. pp. 1789-95.) Appellant requested that USAA defend her under her liability coverage. USAA retained Attorney Nickles to defend Appellant against these suits as well. (Tr. 700:1-11; R. p. 1552.) Appellant denied liability in those cases and maintained that her lowbeam headlights would have been on in the automatic setting. (Tr. 23:22-24:5, 134:22-135:2; R. pp. 875-76, 985-86.) However, when Attorney Nickels retained an expert to draw conclusions from Appellant's

totaled vehicle, he issued an opinion that Appellant's highbeam headlights were on at the time of the collision. (*See* Poplin Report, Pl. Ex. 8; R. pp. 1779-82.) In addition to conflicting with Appellant's testimony that her lowbeam headlights were on, this evidence conflicted with multiple witnesses (detailed below) who provided evidence that Appellant's headlights were off.

II. Appearance of UIM counsel and filing of the present action.

In late 2016, Johnson's liability carrier tendered its minimum policy limits and settled with Appellant in exchange for a covenant not to execute. (Tr. 511:1-5, 581:8-10; R. pp. 1363, 1433.) Attorney Daniel then assumed the defense of the UIM claim in Johnson's name on behalf of USAA. On December 22, 2016, Appellant's personal counsel served Daniel with a request to admit that Appellant's headlights were on at the time of the collision. (Request to Admit, Def. Ex. 13; R. pp. 3179-80.) Daniel responded on January 11: "denied." (Response to Request to Admit, Pl. Ex. 14; R. p. 1796.)

On February 21, 2017, Appellant filed the subject action, accusing USAA of taking disparate positions and attaching two exhibits to the complaint: (1) the expert report obtained by Appellant's defense counsel opining that her highbeams were on and (2) the denial of Appellant's request to admit that her headlights were on. (*See* Am. Compl. & Exs. A and B; R. pp. 16-100.)

III. Trial in the UIM case.

Six months later, in September of 2017, the underlying case of *Hood v. Johnson* was tried. With respect to liability, four eyewitnesses—Antoine Johnson, Dustin Lee, Mary Kuck, and Cary Tanrath—testified that Appellant's lights were off. (*Hood v. Johnson* Trial Tr., Court's Ex. 9 at 216:22-217:8, 279:2-4, 304:16-305:8, 555:8-25; R. pp. 2797-98, 2813, 2819-20, 2882.) Additionally, the responding police officer, Sergeant Welch, testified that on her arrival shortly

after the accident, Hood's car was still running and her headlights were off. (*Id.* at 246:14-247:6; R. p. 2805.) On cross-examination, Appellant acknowledged that although she originally maintained that her headlights were on, she thought she may have been mistaken. (*Id.* at 513:19-514:21; R. p. 2872.) Lastly, when Mr. Tanrath took the stand to testify that Appellant's lights were off, Appellant's personal counsel stated in open court: "If this witness is going to testify that Appellant did not have her headlights on, we stipulate to that." (*Id.* at 553:11-13; R. p. 2882.)

The jury found in Appellant's favor, but also found her to be 49% at fault. (Tr. 617:17-24; R. p. 1469.) The jury awarded her $2.5 million in actual damages, which the court reduced to $1.275 million in light of Appellant's comparative fault. (*Id.*) After the verdict, and the denial of its post-trial motions on December 12, 2017, USAA paid Appellant $1,023,993. (Tr. 269:5-8, 645:4-10; Check, Def. Ex. 1; R. pp. 2811, 2905, 3120.) This amount represented the $1 million UIM policy limits plus interest that accrued during the post-trial motions practice.

IV. Factual background of Appellant's claims and procedural history of this case.

A. Pretrial events and relevant rulings of the trial court.

Although the underlying trial resulted in Appellant recovering $750,000 ***more*** than the amount Appellant claimed she would have taken had USAA acted in "good faith" by resolving her claim for $250,000, Appellant continued with this suit after the underlying trial. Accordingly, on March 12, 2018, USAA moved for summary judgment as to each of Appellant's claims: (1) bad faith, (2) breach of contract, (3) negligence, (4) barratry, (5) outrage, and (6) negligence per se. (Mot. for Summ. J.; R. pp. 111-14.) Via Form 4 order dated June 21, 2018, the trial court denied the motion without prejudice and "with leave to renew at a later time." (Form 4 Order Denying Summ. J.; R. p. 5.)

After the case appeared on a jury trial roster in June 2019, USAA renewed its motion in a one page filing reasserting the arguments from its initial motion. (Renewed Mot. for Summ. J.; R. pp. 114-16.) The trial court heard USAA's renewed motion immediately prior to trial. The court granted summary judgment as to Appellant's claims for barratry, outrage, breach of contract, and negligence per se. As to barratry, the trial court found that there was no evidence that USAA stirred up or instigated any of the litigation. (Tr. 156:6-9; R. p. 1008.) Regarding outrage, the court found that there was no conduct by USAA that was so extreme as to shock the conscience such that no reasonable person could be expected to endure it. (Tr. 156:10-16; R. p. 1008.) For breach of contract, the court found that USAA complied with its duties under the policy by paying the policy limits following the verdict in the UIM case. (Tr. 156:17-19; R. p. 1008.) Finally, the court found that there was no genuine issue of material fact as to Appellant's negligence per se claim, which was premised on an unsupported allegation that USAA had unlicensed insurance adjusters. (Tr. 146:6-9; 156:20-22; R. pp. 998, 1008.)

B. Relevant evidence and testimony presented at trial and the court's related rulings.

The parties tried the remaining claims for negligence and bad faith between June 25, 2019 and June 28, 2019. Appellant premised her presentation on two issues which she contended supported that USAA acted wrongly.[1] First, Appellant asserted that USAA improperly took inconsistent positions about whether her headlights were on in the UIM case. (Tr. 196:17-22, 202:4-207:1; R. pp. 1048, 1054-59.) Appellant argued that USAA was prevented from contesting her liability because she had taken the position that her lights were on, and that position was

[1] Due to the trial court's narrowing of the issues throughout the course of the litigation, the specific evidence and testimony relevant to the issues Appellant raises on appeal is discussed in greater detail in the appropriate section below.

advanced by her counsel (retained by USAA) defending her from the Johnson and Kuck claims. (Tr. 206:2-15; R. p. 1058.) She contended that because USAA was paying for the lawyers advancing her position that her lights were on, it was inconsistent for USAA, when defending the UIM suit, to rely on the evidence supporting that her lights were off. (*See id.*) Appellant especially criticized USAA's refusal to admit that her lights were on following the expert report opining that her highbeams were on. (Tr. 214:8-217:2; R. pp. 1066-69.)

USAA countered that the General Assembly established the procedure for an insurer's defense of a UIM suit as a matter of South Carolina law and policy. (Tr. 219:16-221:17; R. pp. 1071-73.) As USAA noted, Appellant was using the legislatively constructed structure of the UIM case to argue that USAA was on both sides of the same case.[2] (*See id.*) USAA also explained that it had a good faith and reasonable basis for its position on the headlights since there were multiple eyewitnesses who testified that Appellant's lights were off. (Tr. 224:15-226:13; R. pp. 1076-78.) Moreover, although the expert report opined that her highbeams were on, Appellant's own testimony was that she only kept her lights on the automatic lowbeam setting. (*See id.*)

Next, Appellant contended that USAA improperly failed to offer the full amount of its reserves and/or settlement authority at mediation. During the UIM case, USAA set its reserves at $250,000 prior to mediation. USAA also authorized Attorney Daniel to settle for up to this amount. (Tr. 415:6-9; 418:24-419:2; 436:9-12; R. pp. 1267, 1270-71, 1288.) The parties

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[2] Although USAA paid Attorney Nickels to defend Appellant under the liability coverage's duty to defend, he owed professional duties ***solely*** to Appellant as she alone was his client, not USAA. *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019). In contrast, a UIM carrier's statutory right to step into the shoes of the tortfeasor is, at the express direction of the Legislature, "***for its own benefit***." S.C. Code § 38-77-160 (emphasis added). Therefore, USAA was only on one "side" in the litigation.

negotiated at mediation and USAA increased its offers, up to $200,000, which was four-fifths of its reserve. (Tr. 426:24-25; R. p. 1278.) However, in response, Appellant's lowest settlement offer was $650,000. (Tr. 217:11-20, 227:5-17; R. pp. 1069, 1079.) As mediation concluded, Appellant's counsel informally represented the lowest she would accept was between $300,000 and $400,000 and negotiations ceased. (*See id.*) However, at the trial of this case, Appellant revealed that the lowest she would have taken was actually $250,000. This was never communicated to USAA and, ironically, Appellant simultaneously criticized USAA's counsel for stating in mediation that $200,000 was the most USAA would pay. Regardless, as USAA explained, if Appellant would have settled for less than $650,000 and ended up recovering over $1 million by not settling, she was not damaged in any event. (Tr. 227:22-228:2; R. pp. 1079-80.)

At the conclusion of Appellant's case, USAA moved for directed verdict. (Tr. 665:17-695:18; R. pp. 1517-47.) The court granted this motion in part and narrowed the scope of Appellant's claims and recoverable damages. The court determined that there was sufficient evidence to submit the claims of negligence and bad faith to the jury, along with punitive damages. (Tr. 693:18-694:13; R. pp. 1545-56.) As to bad faith, the court found there was a jury question as to whether USAA acted in bad faith by taking "disparate positions" with respect to Appellant's headlights in the underlying actions. (Tr. 693:18-21; R. p. 1545.) For the negligence claim, the court found that there was also a jury question as to breach of a tort duty. (*See* Tr. 694:3-5; R. p. 1546.) The court, however, granted directed verdict to the extent either claim was premised on conduct relating to the mediation of the UIM claim or related negotiations. (Tr. 693:22-694:2; R. pp. 1545-46.) The court reasoned that USAA did not have a duty to offer the full amount of its reserves or evaluation where the parties were that far apart in negotiations. (*Id.*)

Finally, the court held that actual damages would be limited to litigation costs in the Johnson suit. (Tr. 694:6-695:2; R. pp. 1546-47.) The court noted there was insufficient evidence supporting Appellant's alleged emotional distress, as there was nothing tying the alleged distress to the purported bad faith of USAA, as opposed to the other stresses present in the various underlying lawsuits. (*Id.*)

USAA renewed its directed verdict motion at the close of its case, but the trial court denied the motion. (Tr. 753:24-754:11; R. pp. 1605-06.) The court submitted four issues to the jury: (1) whether USAA breached its duty of good faith and fair dealing, (2) whether USAA acted negligently, (3) if so, the amount of actual damages, and (4) whether USAA acted intentionally or willfully and, if so, the amount of punitive damages. (Jury Verdict; R. p. 15.) The jury found in Appellant's favor on her claim for negligence, in USAA's favor as to whether it breached its duty of good faith and fair dealing, and found that USAA had acted intentionally or willfully. (*See id.*) The jury awarded $49,052.20 in actual damages and $250,000 in punitive damages, and the court entered judgment against USAA in this amount on July 1, 2019. (*See id.*)

On July 8, 2019, USAA timely filed four post-trial motions: (1) a motion for judgment notwithstanding the verdict ("JNOV"), (2) a motion for a new trial absolute, (3) a motion for a new trial nisi remittitur; and (4) a motion for new trial – thirteenth juror. (*See* Mot. for JNOV; R. pp. 136-45.) Appellant filed a motion for a new trial nisi additur and for attorney's fees and a motion on her offer of judgment.

On November 1, 2019, following a hearing on all the post-trial motions, the trial court entered an order granting USAA's motion for JNOV and denying all of the other post-trial motions as moot. (Order Granting JNOV; R. pp. 6-10.) The court agreed with USAA that the duty in tort owed by USAA to Appellant arising from the contract of insurance was the duty of

good faith and fair dealing, and thus no separate cause of action for negligence existed under the facts of this case. (*Id.* at 1-2; R. pp. 6-7.) The court explained that although breach of this duty can be proven by showing either bad faith or unreasonable action, there is no separate, additional duty in tort. (*Id.* at 3-4; R. pp. 8-9.) The grant of JNOV disposed of Appellant's remaining claim and, therefore, the court directed that judgment be entered in USAA's favor. (*Id.* at 4; R. p. 9.) This appeal followed.

ARGUMENT

Because the Appellant's case was premised upon duties not recognized by South Carolina law, the case should not have reached a jury and the rulings of the lower court were correct. To forbid a UIM insurer from contesting liability under these facts or to require a UIM insurer to offer the full amount of its evaluation, settlement authority, or reserves, even when the plaintiff's demand is somewhere between $100,000 and $400,000 above that number, would turn South Carolina law and practice on its head.

The trial court properly granted judgment as a matter of law as to all of Appellant's claims. Appellant's claims for barratry and negligence per se were abandoned on appeal and are not before the Court. As to breach of contract, the trial court correctly found that USAA complied with its policy obligations by tendering the UIM benefits following the denial of its post-trial motions in the UIM case. Moreover, the trial court properly found that Appellant's outrage claim failed as a matter of law because there was no evidence supporting extreme or outrageous conduct by USAA and since it was premised solely on litigation conduct.

Next, the trial court correctly granted directed verdict as to the parties' negotiations and mediation conduct by finding USAA owed no duty to offer its full reserve and settlement authority amount. The trial court also properly determined that USAA was entitled to directed

verdict on Appellant's claims for emotional distress damages as they were not supported by the evidence presented. Finally, the trial court properly granted USAA's motion for JNOV, finding there was no independent duty supporting a standalone negligence claim. In light of the jury's verdict in USAA's favor on the bad faith claim, this resulted in judgment in USAA's favor.

Each of these rulings was correct and in accordance with applicable South Carolina law. This Court should affirm.

I. The trial court properly granted summary judgment on Appellant's claims for barratry, negligence per se, breach of contract, and outrage.

A. Standard of review.

The appellate courts apply the same standard as the trial court when reviewing a grant of summary judgment. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 92, 687 S.E.2d 321, 326 (2009) (quoting *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, summary judgment is inappropriate where further inquiry into the facts is necessary to "clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

B. The trial court properly considered USAA's renewed motion.

Appellant first contends that the trial court should not have considered USAA's motion because it was not served at least ten days before the hearing date. This is without merit as USAA's motion was simply a one-sentence renewal of its prior motion for summary judgment and restated the exact same arguments.

USAA filed its original motion on March 12, 2018. Appellant responded with a 17 page memorandum in opposition with roughly 300 pages of exhibits attached. At the June 20, 2018 hearing, Appellant's counsel argued that Appellant needed to conduct discovery to respond to the motion. (6/20/18 Hearing Tr. 15:10-17:9; R. pp. 1754-56.) Accordingly, the court entered an order denying USAA's motion "without prejudice, with leave to renew at a later time." (Order; R. p. 5.)

On June 17, 2019, the case appeared on a jury roster for the week beginning June 24, 2019. The parties were already scheduled for a hearing on USAA's motion to amend its answer before Judge Culbertson on June 18, 2019. At that hearing, USAA expected Appellant's counsel to agree that the case was not ready for trial because Appellant had requested more discovery. (Tr. 8:14-21; R. p. 860.) However, Appellant's counsel told the court that they were ready for trial. (*See id.* at 11:2-13; R. p. 863.) Therefore, USAA filed a one sentence motion for summary judgment the following day stating that "USAA ***renews*** its motion for summary judgment filed on March 12, 2018" and that it "refers to and incorporates by reference the arguments made in that motion." (Mot. for Summ. J. filed 6/19/2019; R. p. 114 (emphasis added).) No new arguments were contained in the motion.

The trial court's consideration of USAA's renewed motion was appropriate. Rule 6(d) provides that a motion must be served at least 10 days prior to the hearing unless a different

period is fixed by court order. Rule 6(d), SCRCP. Furthermore, as this Court has explained, "[t]he decision whether to reconsider a motion for summary judgment is within the trial judge's discretion." *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997). In *Brown*, the appellants contended that the respondent's motion did not give them any notice that a certain issue would be re-argued. *Id.* The court gave them four days to submit any cases in support of their argument, and this Court found that the appellant failed to show they were prejudiced by this ruling. *See id.*

The ten day requirement contemplated by Rule 56(c) ensures that a party has adequate notice of the arguments that the moving party intends to raise and to submit any opposing evidence if it so chooses. Here, the motion for summary judgment ***was*** served more than 10 days before the hearing. In fact, it was served over a year before the hearing, giving Appellant time to file a 17 page response. USAA's one-sentence filing simply renewed its prior motion and arguments and did not rely on any new evidence or arguments.

Moreover, the day after Appellant indicated she was ready for trial (meaning that she was no longer pursuing outstanding discovery), USAA filed a notice to renew its motion. Gathering and submitting any additional rebuttal evidence was not a burden on Appellant, as her evidence was already marshaled for trial on the merits. Additionally, the court did not hear USAA's motion until the morning of trial, which gave Appellant six days to prepare.

For all of these reasons, the trial court properly considered USAA's renewed motion prior to the commencement of trial.

C. Appellant abandoned her claims for barratry and negligence per se.

After the trial court granted USAA's motion on these two claims, Appellant did not move to reconsider or file any post-trial motion that addressed these claims. Moreover, Appellant did

not address these claims in her opening brief. Therefore, Appellant's claims for barratry and negligence per se have been abandoned and this Court should affirm the trial court's grant of summary judgment on these claims. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (holding an issue not argued in the appellant's brief is deemed abandoned on appeal).

D. The trial court properly granted summary judgment on Appellant's breach of contract claim.

1. Appellant's breach of contract argument is not preserved.

As an initial matter, the arguments raised in Appellant's opening brief are not preserved. At the summary judgment hearing, USAA's counsel noted that Appellant initially brought a breach of contract claim asserting that USAA breached the terms of the policy. However, the UIM case concluded with the verdict in Appellant's favor and USAA paid the $1 million policy limits after the denial of its post-trial motions. Thus, as USAA's counsel noted, "I don't think there's a breach of contract claim anymore." (Tr. 149:12-14; R. p. 1001.) Appellant did not respond to this contention and made no argument in support of this claim at the hearing. The court agreed with USAA and found that because there had been an award and USAA tendered its limits, summary judgment was appropriate as to the breach of contract claim. (Tr. 156:17-19; R. p. 1008.) Appellant did not move to reconsider or otherwise attempt to provide any supporting arguments or evidence for this cause of action.

Therefore, Appellant failed to preserve her appellate arguments as to the merits of this claim and this Court need not consider them. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); *see also*

Pryor v. Nw. Apartments, Ltd., 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (finding argument that circuit court erred by granting summary judgment because discovery requests were outstanding was not preserved because the issue was not raised to the lower court).

2. South Carolina law supports that there was no breach of contract.

Moreover, even if Appellant had preserved the arguments she raises for the first time on appeal, her position is without merit. In her opening brief, Appellant asserts that USAA's alleged refusal to "promptly pay the reasonable amount owed" supported a breach of contract—even though USAA tendered the $1 million policy limits following the judgment in the UIM case. (Br. of Appellant at 12.) The Supreme Court expressly rejected the same argument in *Lawson v. Porter*, 256 S.C. 65, 180 S.E.2d 643 (1971).[3] *Lawson* involved the uninsured motorist statute, but as courts have acknowledged, "the statutory procedures for UIM and UM are identical." *Crowe v. Vaughn*, No. 8:08-3665-HMH, 2008 WL 5114956, at *1 (D.S.C. Dec. 2, 2008). As *Lawson* explained, recovery of uninsured coverage "is subject to the condition that the insured ***establish legal liability on the part of the uninsured motorist***." *Lawson*, 256 S.C. at 68-69, 180 S.E.2d at 644 (emphasis added). "Such an action is one *Ex delicto* and the only issues to be determined therein are the liability and the amount of damage." *Id.* ***After judgment*** against the uninsured motorist, "a direct action *Ex contractu* can be brought to recover from the insurance company on

[3] This Court's recent decision in *Connelly v. Main Street America Group*, Op No. 2017-00234 (S.C. Ct. App. filed Aug. 12, 2020) (Shearouse Adv. Sh. No. 31 at 32), is not to the contrary. *Connelly,* which did not cite *Lawson* or its progeny, held that where an insured and insurer agreed on the tortfeasor's fault and the amount of UIM damages, a suit against the tortfeasor was not a prerequisite to the recovery of UIM benefits. The case did not address the normal UIM situation in which fault and/or damages are disputed and, as a result, a suit against the tortfeasor under § 38-77-160 is required. *See id.* (noting the Court agreed that an insured must establish "fault on the part of the tortfeasor and the amount of the insured's damages" (quoting *Jenkins v. City of Elkins*, 738 S.E.2d 1, 11 (W. Va. 2012))). In South Carolina, the statutory method of establishing fault and the amount of damages is a suit against the tortfeasor.

its endorsement and in such action policy defenses may be properly raised by the insurance company." *Id.*

Applying *Lawson*, a number of cases have dismissed claims for breach of contract alleging failure to pay UIM benefits where judgment had yet to be entered in the underlying UIM case. *See, e.g.*, *Williams v. Selective Ins. Co. of the Se.*, 315 S.C. 532, 446 S.E.2d 402 (1994) (affirming summary judgment for insurer where no suit was brought and no judgment obtained against tortfeasor prior to expiration of statute of limitations); *Crowe*, 2008 WL 5114956, at *1 (dismissing claim for breach of contract alleging that insurer failed to pay UIM benefits where judgment had not been entered in the UIM action); *Halmon v. Am. Int'l Grp. Ins. Co.*, 586 F. Supp. 2d 401, 404-05 (D.S.C. 2007) ("[W]hich party is at-fault must be established in a court of law before insurers are contractually required to disburse UIM benefits.").

Because liability and damages were disputed, there was no way for the parties to know what amount Johnson was liable for (illustrated by the wide disparity between the verdict and even the Appellant's lowest settlement demand), and thus no way to know the amount of benefits owed, until after a judgment. The trial court correctly granted summary judgment on the breach of contract claim and this Court should affirm.

E. There was insufficient evidence to create a genuine issue of fact as to Appellant's outrage claim.

1. Appellant submitted no supporting evidence for this claim.

The trial court also properly granted summary judgment on Appellant's outrage claim because Appellant failed to provide evidence demonstrating a genuine issue of material fact. Appellant based her outrage claim on USAA's defense of her suit against Johnson. She claimed this defense was outrageous because USAA "called her a liar" through challenging her version of

events and testing her credibility on the headlight issue. To suggest that this conduct rises to the level required for outrage is entirely unsupported by any South Carolina law. And in any event, litigation conduct is expressly recognized in other jurisdictions as being immune from outrage causes of action, which comports with South Carolina's immunity from defamation claims for litigation conduct.

Outrage or intentional infliction of emotional distress requires proof that: (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from the its conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the action caused the plaintiff's emotional distress; and (4) the emotional distress suffered was severe such that no reasonable person could be expected to endure it. *Argoe v. Three Rivers Behavioral Center*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010).

To prevent claims for intentional infliction of emotional distress from becoming "a panacea for wounded feelings rather than reprehensible conduct," courts play a significant gate keeping role in analyzing a defendant's motion for summary judgment. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct. App. 1984)). "Under the heightened standard of proof for emotional distress claims, a party cannot establish a prima facia claim for damages resulting from a defendant's tortious conduct with mere bald allegations." *Id.* Instead, the Court "must look for something 'more'—in the form of third party witness testimony and other corroborating evidence—in order to make a prima facie showing of severe

emotional distress." *Id.* A plaintiff must make a prima facie showing on each element of this claim to survive summary judgment.

Here, Appellant relied upon bald allegations before the court at summary judgment, and even those did not support the high standard required for outrage. Appellant focused solely on the purported litigation conduct of USAA, asserting that it "drag[ged] her through five years of litigation" and "call[ed] her a liar" despite knowing that Appellant's defense expert said her lights were off. (Tr. 153:1-8; R. p. 1005.) Appellant, however, did not submit any evidence—affidavits, deposition testimony, exhibits, or otherwise—supporting this argument. Thus, the trial court was ***required*** to grant summary judgment. *See Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required . . . to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment."); *see also Clark v. Greenville Cnty.*, 313 S.C. 205, 208, 437 S.E.2d 117, 188 (1993) (finding that arguments of counsel were not evidence to oppose summary judgment).

On appeal, Appellant cites to her deposition and trial testimony—neither of which was before the court at the time of the hearing—to support that there were genuine issues of material fact for trial. It is axiomatic that an appellate court must review the record ***as it was presented to the lower court***. *See, e.g., Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 657 n.1 (4th Cir. 2018) ("[I]n reviewing the district court's summary judgment order, we limit our review to the portion of the record that was presented to the district court as the summary judgment record."); *Baker v. Town of Sullivan's Island*, 279 S.C. 581, 583, 310 S.E.2d 433, 435 (Ct. App. 1983) (noting that the question is whether the evidence "offered at the summary judgment

stage," when taken in a light most favorable to the nonmoving party, gives rise to any genuine issue of material fact). As the *Baker* court noted, it is "***irrelevant*** that additional evidence might be presented at trial." *Id.* (emphasis added).

In determining whether the trial court erred, this Court engages in a similarly backward-looking analysis to determine if there was a genuine issue of material fact for trial based on the record before the trial court at the time of the order. It would turn the analysis on its head to permit an Appellant to premise supposed reversible error on evidence that was not submitted to the trial court until after it had already ruled on summary judgment.[4] This Court should affirm due to the lack of any evidence supporting Appellant's outrage claim.

2. Appellant focused her outrage claim on litigation conduct, which is not actionable as a matter of law.

The trial court also correctly granted summary judgment for this reason. At the summary judgment hearing, the only conduct identified by Appellant to support the outrage claim was a bald allegation that USAA and its counsel "called her a liar" during the UIM litigation. Although Appellant now contends on appeal that the trial court failed to account for the "special relationship" between insurer and insured, which she contends would support a viable outrage claim under these facts, she never raised this issue to the trial court. Thus, that argument is waived. In any case, she does not cite to any authority which would impose a lower burden for

[4] If Appellant believed the court erroneously granted summary judgment due to its failure to consider certain arguments or evidence, she should have moved to reconsider pursuant to Rule 59(e). Because no such motion was filed, the issue is not properly before this Court. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review"); *Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (finding that because issues raised were not addressed in the grant of partial summary judgment or raised in a Rule 59(e) motion, they would not be examined on appeal).

proving outrage in the insurer-insured context. Regardless, litigation conduct does not support a claim for outrage.

South Carolina law recognizes a lawyer's conduct during litigation is generally privileged from outrage liability. *See* Restatement (Third) of the Law Governing Lawyers § 56 cmt. g (2000) ("Vigorous advocacy is important in adversary proceedings. Thus, a lawyer's partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client's case in such a proceeding is not considered extreme and outrageous and is privileged from [IIED] liability to the opposing party."); *see also Kozel v. Kozel*, 299 F. Supp. 3d 737, 754-55 (D.S.C. 2018) ("South Carolina . . . provides immunity to an attorney for a claim of IIED if the attorney acted within his professional capacity, as an attorney on behalf of and with the knowledge of a client.").

The Georgia Court of Appeals' decision in *East River Savings Bank v. Steele*, 311 S.E.2d 189 (Ga. Ct. App. 1983) is instructive. In that case, the court held as a matter of law that a lawyer who accused the plaintiff of perjury during cross-examination and threatened to bring perjury charges ***did not*** engage in extreme and outrageous conduct, despite the fact that the statements allegedly led the plaintiff to suffer a heart attack. *Id.* at 190. While referring to the lawyer's "severe cross-examination" as "discourteous and unprofessional," the court was concerned about the impact that subjecting the lawyer to tort liability would have on lawyers' willingness to engage in rigorous cross-examination. *Id.* As the court explained:

> Litigation and, more particularly, cross-examination are by design rough-and-tumble, fraught with stress and tension. . . . Cross-examination is the cornerstone of our trial system. Through probing and challenging questioning by a zealous advocate, the jury and the judge are aided in evaluating the witness, and ultimately perceiving the truth.

Id. at 191. Other courts have recognized that litigation conduct cannot support a claim for outrage for analogous reasons. For example, the Ninth Circuit has held that "[a]ny claim for intentional infliction of emotional distress based on actions occurring during the course of litigation is barred by the litigation privilege." *Lory v. Federal Ins. Co.*, 122 F. App'x 314, 318 (9th Cir. 2005). As that court explained, "[t]he absolute privilege protects parties, attorneys and witnesses to state anything at trial relating to, or connected with, the matters at issue." *Id.* at 319.

Additionally, although South Carolina courts have not addressed an absolute privilege in the context of an outrage claim, they have recognized an absolute defamation privilege for conduct arising out of court proceedings. This absolute privilege "covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002) (citing W. Prosser & W. Keaton, *The Law of Torts*, § 114, at 817 (5th ed. 1984)).

Therefore, Appellant's outrage claim fails as a matter of law.

3. Summary judgment was also appropriate because the outrage claim was contradicted by the facts.

Finally, even if outrage was a cognizable claim under these facts, it would fail on the merits. Although Appellant has repeatedly argued throughout the case that USAA and its counsel called her a liar, her trial testimony confirmed that this was her ***subjective*** view of what she ***felt*** Attorney Daniel was saying. When asked on cross-examination what lie USAA or Attorney Daniel told, Appellant testified that USAA "knew for a long period of time that I was innocent, based on their findings; and they continued the case accusing me of the same thing, of not telling the truth about my life." (Tr. 279:22-25; R. p. 1131.) The following exchange occurred next:

> Q. So I am trying to get down to the lie that you say USAA told. And what you just told us is the lie was they knew you were innocent but, what, Jack Daniel defended the suit; is that the lie?
>
> A. I cannot say it was solely Mr. Daniels. Because he was an attorney for USAA, and it was a -- he had made USAA aware of the circumstances.
>
> And I don't know if I can say this or not. But at my first deposition with Mr. Daniels, in several different ways he ridiculed me, make -- questioning my sanity, do you realize this, do you realize that, did you say this, did you say that, why did you say this, why did you say that.
>
> I had -- first of all, I had never had an attorney before. Had no idea what to expect. And then here comes this man, you know, just making me feel stupid in front of everybody.
>
> And on the other encounters with this man, he did the same thing.
>
> . . .
>
> Q. All right. And so let me get back to the what you call the lie. You said that USAA knew you were innocent so USAA -- what you are saying is USAA knew that your headlights were on; right?
>
> A. Right.

(Tr. 280:23-281:15, 283:9-13; R. pp. 1132-33, 1134.)

In other words, Appellant's position was premised entirely on the fact that USAA presented eyewitness testimony that her headlights were off and tested the veracity of her allegations in a deposition.[5] Probing the truthfulness of a party's allegations is both customary and expected in litigation, which Appellant chose to institute. After Johnson's carrier tendered its limits, USAA had the statutory right to assume the defense in Johnson's name, and defend

[5] Note that USAA's representative, Kathy Moats, denied that USAA ever called appellant a liar and stated that she would lose her job if she ever called an insured a liar. (Tr. 504:3-6; R. p. 1356.) Likewise, Attorney Daniel expressly denied that he ever called Appellant a liar. (Tr. 717:16-18; R. p. 1569.) In her deposition in this case, Appellant acknowledged that Attorney Daniel never said anything to her that was off the record. (Dep. of Therese Hood at 120:25-122:3, Court's Ex. 7, R. pp. 2583-85.) If Attorney Daniel called Appellant a liar, it would have been easy for her to point to some trial or deposition questioning that she contends was outrageous.

against Appellant's allegations, "for its own benefit." Litigation, and our adversarial system of justice, is a search for the truth and necessarily involves examination and questioning of each side of the story. *See Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (quoting *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973)).

Attorney Daniel's challenges to Appellant's testimony were an appropriate exploration of her factual assertions and attempt assess her credibility. Although Appellant repeatedly highlights an expert opinion as "proving" that USAA knew her lights were on and rendering this questioning inappropriate, this opinion was far from sacrosanct. *See* Ralph King Anderson, *South Carolina Requests to Charge*, § 1-6 General Instructions - Expert Witness Testimony (2016) (explaining that the jury should consider an expert's opinion just as it would all other evidence in the case and "must weigh such evidence and accept or reject it in the same manner that you treat all other evidence in the case"). There may have been any number of reasons why the jury could find the expert's report unreliable, and it represented only one piece of the total evidentiary puzzle. Furthermore, the report itself in fact ***conflicted with Appellant's own testimony***. The report concluded that Appellant only had her highbeam lights on—a result Appellant acknowledged was surprising to her. (Tr. 285:19-290:7; R. pp. 1137-42.) She testified at the trial of this case that she kept her headlights on the automatic setting and never messed with them. (*Id.*) USAA's investigation determined that when that vehicle's headlights are on the automatic setting the highbeams do not come on, only the lowbeams do. (Tr. 390:23-391:6; R. pp. 1242-43.) And perhaps most importantly, Appellant chose not to present any evidence from this expert at the underlying trial (where her personal attorney stipulated that her headlights were off). Finally, as detailed above, several other witnesses had given statements supporting that Appellant's lights were off. (Tr. 483:16-485:11, 486:3-488:14, 489:2-24, 491:20-13, 705:1-22;

Police Report, Def. Ex. 3; Tanrath Stmt., Def. Ex. 4; Johnson Stmt., Def. Ex. 5; R. pp. 1335-37, 1338-41, 1343, 1557, 3121-36.)

Therefore, the record evidence supported a legitimate disagreement in the UIM case on the headlight issue. It was reasonable and appropriate for USAA to test the veracity and credibility of Appellant's allegations. Although a deposition may be uncomfortable for some litigants due to the probing nature of the questioning, it is a necessary part of the search for the truth. At a minimum, any conduct by USAA or its counsel was subject to the litigation privilege. However, even if it was not, there is no evidence that USAA acted intentionally or recklessly in such an "extreme and outrageous" manner that "exceed[ed] ***all possible bounds of decency***" merely by questioning Appellant's version of events. *Argoe*, 388 S.C. at 402, 697 S.E.2d at 555 (emphasis added). Moreover, there is no evidence that the distress Appellant suffered was so severe that no reasonable person could be expected to endure it. *Id.* The trial court correctly granted summary judgment on Appellant's outrage claim, and this Court should affirm.

II. The trial court properly granted directed verdict on the issues of mediation conduct and noneconomic damages.

A. Standard of review.

In reviewing the trial court's decision on a motion for directed verdict, this Court applies the same standard "by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) (quoting *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010)). This court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Turner v. Med. Univ. of S.C.*, 430 S.C.

569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020), *reh'g denied* (Aug. 13, 2020). "On review, an appellate court will affirm the granting of a directed verdict in favor of the defendant when there is no evidence on any one element of the alleged cause of action." *Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 462, 702 S.E.2d 372, 374 (Ct. App. 2010). "Essentially, this [c]ourt must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

B. The trial court correctly found that there was no duty to offer the full extent of USAA's reserves at mediation when the parties were between $150,000 and $400,000 apart.

Through imposing a duty upon insurers to offer their full reserves, evaluation, or authority, either *sua sponte*, or in response to certain settlement demands, Appellant seeks to have courts and juries review and second guess mediation decisions and negotiation strategy of parties and their counsel. Such a duty is not recognized by South Carolina law. The deleterious effects of doing so would be significant and include, at a minimum: altering the way that negotiations and mediations are conducted; eliminating the incentive for at least one party to negotiate; and discouraging the full evaluation of claims, the setting of reserves, and the provision of settlement authority.

1. The trial court correctly found there was no duty to offer USAA's full evaluation and/or reserves to Appellant.

The existence and scope of a duty are questions of law for the court. *Cummins Atl., Inc. v. Sonny's Camp-N-Travel Mart, Inc.*, 481 F. Supp. 2d 531, 535 (D.S.C. 2007). South Carolina courts have repeatedly held that the concept of a legal duty of care should not be extended beyond reasonable limits, and that it is the function of the court to set those limits. *McCullough*

v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 48, 644 S.E.2d 43, 46 (2007); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003); *Andrade v. Johnson*, 356 S.C. 238, 246, 588 S.E.2d 588, 592 (2003).

Appellant seeks to expand the scope of the duty of good faith to require insurers to *sua sponte* offer their highest evaluation of a claim and/or offer their reserves, even where liability is unclear and the damages are uncertain. Such a duty would fundamentally change how negotiations and mediations are conducted, affect the evaluation of claims and setting of reserves, and likely result in other unforeseen consequences.

First, this duty would require courts and juries to delve into confidential mediation settlement offers, demands, and negotiations. The Court need look no further than the testimony of Appellant's personal counsel, Kevin Smith, quoted in Appellant's brief, where he discusses the conduct and discussions within mediation and the meaning and interpretation of communications therein. (Br. of App. at 20-21.) Mediation is a process that is having great success in this state. *See* Supreme Court Admin. Order No. 2015-11-12-04 (noting the success of pilot mediation program and extending mandatory mediation to all counties). This is, in part, due to the ability of parties to speak freely and confidentially to one another. *See* Rule 8, SCADR. Imposing a duty on an insurer to offer its full settlement authority and/or to offer the full extent of its reserves will affect mediation in at least two ways. First, by requiring one side to offer the full amount of its evaluation, it would operate as a disincentive to the other side to negotiate. A plaintiff would never drop her demand if she knew that her opponent was duty bound to pay the highest amount it thought it would ever have to pay.[6] Second, the knowledge that a court or jury

[6] Additionally, the duty of good faith and fair dealing runs to both parties of a contract. *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (there is an implied

could one day examine and weigh in upon the offers, demands, and negotiations within the mediation would make its confidential protections largely meaningless.

Additionally, requiring an insurer to offer the full extent of its evaluation, reserves, or settlement authority would likely result in the ***lowering*** of these amounts. In personal injury litigation, most cases involve an issue of liability, the amount of damages, or both, and case values can increase or decrease during the course of a case depending on testimony, witness presentation, treatment, results of motions, discovery of evidence, and the evidence admitted at trial. Under the Appellant's proposed duty, an insurer would be subjecting itself to overpayment were it to set reserves, evaluations, or settlement authority prior to the full development of evidence, resolution of all motions, and/or presentation of evidence at trial. In other words, by providing insurers a disincentive to assign value to a case, the Appellant's proposed duty would make cases ***less likely*** to settle prior to trial.

To recognize a duty that would hinder free negotiations between the parties, remove incentives for one side to negotiate, and impede the free and frank evaluation of disputed claims and setting of reserves would reduce judicial economy, stymie the prompt settlement of claims, and run counter to the public policy of South Carolina. *See Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). Indeed, public policy underlies the concept of duty, and this state would not recognize an extension of a duty averse to its public policy. *See Araujo v. S. Bell Tel.*

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covenant of good faith and fair dealing in every insurance contract "that neither party will do anything to impair the other's rights to receive benefits under the contract" (quoting *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983))). Therefore, if an insurer has an obligation to offer its highest number *sua sponte*, presumably the insured likewise has an obligation to *sua sponte* offer her lowest number. How that would work in practice is anyone's guess. Ironically, had Appellant followed what she now proposes as a duty of good faith by offering her lowest number (which she now claims was $250,000) instead of $600,000, she would have been within USAA's authority.

& Tel. Co., 291 S.C. 54, 57-58, 351 S.E.2d 908, 910 (Ct. App. 1986) ("[A] duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.").

Finally, the duty Appellant seeks to impose is a solution in search of a problem. This case illustrates why. Although assessment of jury verdicts is necessarily guesswork, it is to the parties' benefits to guess as accurately as possible. If an offeror miscalculates a jury verdict and fails to settle, it is the offeror who faces the consequences. Here, the verdict showed that both sides' guesswork was off. As a result, USAA had to pay over a million dollars to Appellant, and Appellant recovered many hundreds of thousands of dollars more than she was willing to accept. This precise situation was discussed by the court in *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 459 (D.S.C. 2008). As that court explained, if State Farm had known the jury would find significantly in excess of its offer to settle, the "last course of action it would have wanted" would have been to insist on taking the case to trial. *Id.* at 461. The evidence revealed that "State Farm simply made an erroneous (and costly) miscalculation as to how much money a jury was likely to award Snyder for his injuries," but this was not a basis for determining that its conduct was unreasonable or in bad faith. *Id.* It also noted that "[e]stimating likely jury verdicts is by its very nature an unpredictable pursuit, and from time to time juries are bound to return verdicts that are either substantially more or substantially less than the insurer's estimates." *Id.* at 462. The same findings are equally applicable to USAA in this case.

2. The authority cited by plaintiff to support the duty is unavailing.

Appellant first cites *Myers v. State Farm Mutual Auto Insurance Co.*, 950 F. Supp. 148 (D.S.C. 1997), for the proposition that "in cases of liability where it is clear that damages have been suffered by the insured that are greatly in excess of the tortfeasors' policy limits, the

underinsured carrier may have a duty to make a settlement offer prior to its insured obtaining a judgment against, or exhausting the policy limits of the tortfeasor." *Id.* at 151 (Br. of App. at 17-18.) But *Myers* is distinguishable. First, this statement applies only "in cases of liability"; in other words, when ***fault is not contested***. Here, as the underlying jury's finding of 49% comparative negligence illustrates, fault was at issue. Thus, *Myers* would be inapplicable even if it was controlling. Second, *Myers* did not hold that an insurer had a duty to offer its highest evaluation or the full amount of its reserves. It simply held that in a case of liability an insurer may have a duty to "make a settlement offer." This is a far cry from inviting judges and juries to assess the sagacity of specific numbers exchanged during mediation. Other federal courts have examined *Myers* and disposed of suits seeking to hold insurers liable for not making sufficiently high settlement offers in UM or UIM cases. *See Snyder*, 586 F. Supp. 2d at 459-61; *Stewart v. State Farm Fire & Cas. Co.*, No. 2:11-CV-03020-DCN, 2013 WL 3206553, at *4 (D.S.C. June 24, 2013); *Collins v. Auto Owners Ins. Co.*, 759 F. Supp. 2d 728 (D.S.C. 2010) (stating there is no bad faith where the value of the plaintiff's UIM claim "could reasonably be debated").

Appellant's citation to *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) similarly misses the mark. That case concerned first party property damage (frozen foods damaged by a power outage) and concerned the insurer's delay in paying the "undisputed amount" of the property damage. *Id.* at 337, 450 S.E.2d at 70. This is inherently different from an adversarial personal injury suit where the amount of "damage" is to be determined by a jury and can only be guessed at in advance. The same is true of other cases cited by Appellant. *Richardson v. Ky. Nat. Ins. Co.*, 607 S.E.2d 793 (W. Va. 2004) (concerning personal property damaged by fire); *PHC, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 501 S.E.2d 701 (N.C. Ct. App. 1998) (involving undisputed amount of damage to insured's vehicle).

3. Authority from other jurisdictions supports the lower court's decision not to impose a duty to offer the full amount of reserves.

In addition to being supported by *Stewart*, *Snyder*, and *Collins,* the lower court's ruling is also supported by the law of other jurisdictions. Other courts have found that an insurer does not act in bad faith by not offering the amount of its reserves or full settlement authority where the amount of damages are uncertain. *See, e.g.*, *Stewart v. GEICO Ins.*, No. 2:18-CV-00791-MJH, 2020 WL 822053, at *4 (W.D. Pa. Feb. 19, 2020) ("Pennsylvania law requires an insurance company to set reserves aside when they are placed on notice of a possible loss arising under its policy. However, the failure of a carrier to offer its full settlement authority does not constitute bad faith."); *Greil v. Geico*, 184 F. Supp. 2d 541, 545-46 (N.D. Tex. 2002) (explaining that settlement authority does not equate to a valuation of the claim since "numerous factors other than the actual value of the claim, including the desire to avoid a trial, go into calculating a settlement amount," and finding that the insurer did not act in bad faith by offering $40,000 where a maximum of $60,000 was authorized). In *Kosierowski v. Allstate Ins. Co.*, the court refused to impose a duty to settle where the amount of damages was uncertain, noting that "a refusal to settle may constitute bad faith [] only when the amount in question is clearly known by the insurer." 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999), *aff'd*, 234 F.3d 1265 (3d Cir. 2000). The court stated that it "also rejects the idea that negotiation—*i.e.*, offering the bottom of an estimated settlement range—qualifies as bad faith in this case for similar reasons. Such an argument fails to consider the nature of the UIM policy purchased by plaintiff." *Id.*

4. USAA's reserves were not a "concession" that it owed Appellant anything.

Finally, contrary to Appellant's characterization, USAA did not "concede" that it owed Appellant $250,000 solely by setting its reserves and authorizing settlement authority at this

amount. An insurer's reserves are "merely estimates of the insurer's total exposure." *Messer v. Universal Underwriters Ins. Co.*, No. 2017-CA-000293-MR, 2019 WL 2557330, at *8 (Ky. Ct. App. June 21, 2019). Consequently, "reserve amounts may be calculated based on the maximum possible exposure without regard for the strength of liability defenses or coverage defenses . . . [and] may not be based on a thorough factual or legal analysis of a case or claim." Douglas R. Richmond, *Recurring Discovery Issues in Insurance Bad Faith Litigation*, 52 TORT TRIAL & INS. PRAC. L.J. 749, 766-67 (2017) (emphasis added). As a result, "the majority rule holds that reserves do not evidence an admission of coverage, fault, or liability by the insurer." *Id.* at 768; *see also, e.g.*, *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235-SHL-dkv, 2016 WL 5869580, at *15 (W.D. Tenn. Oct. 5, 2016) (explaining that reserves are a "business judgment and do not reflect a legal determination of the validity of the Plaintiffs' claim against [the insurer]").

Therefore, USAA was under no obligation to offer the full amount of its reserves or authorized authority, and neither of these actions operated as a "concession" that USAA owed Appellant that amount of money for the UIM claim.

5. Even if USAA owed a duty, no reasonable jury could find in Appellant's favor.

As an additional sustaining ground, even if the Court were to recognize a duty allowing jurors to second guess mediation conduct, no reasonable jury could find it was unreasonable for USAA to not offer its entire authority when the parties where hundreds of thousands of dollars apart. It is undisputed that Appellant's lowest official demand was $650,000. (Tr. 427:1-6, 538:19-25, 626:23-24; R. pp. 1279, 1390, 1478.) After the exchange of formal offers, Appellant's personal counsel approached Attorney Daniel and informally suggested that the case

could possibly settle for between $300,000 and $400,000. (Tr. 437:20-438:22; 626:25-627:6; R. pp. 1289-90, 1478-79.) As he testified, this was "lawyer language" meaning that he would "settle the case for $350,000."[7] (Tr. 627:20-24; R. p. 1479.) USAA's representative, Ms. Moats, acknowledged that in "mediation world" she understood this to mean $350,000. (Tr. 438:5-22; R. p. 1290.)

During the UIM case, Appellant ***never*** indicated to USAA that she would settle for $250,000. (Tr. 539:1-5; R. p. 1391.) In fact, Ms. Moats testified she was surprised to hear Appellant later contend that she would have settled for this amount. (*Id.*) Appellant first indicated she would have accepted $250,000 during the present litigation after she learned in discovery that USAA had set its reserves at $250,000 prior to the mediation. (*Id.*) Yet Appellant never demanded this amount, and never represented that she would have settled for it until the trial of the present case. (Tr. 264:5-10; R. p. 1116.) In her deposition, Appellant stated that she "expected" the $1 million policy limits and confirmed she never told anyone she would settle for less than that amount. (Dep. of Therese Hood at 207:15-209:5, Court's Ex. 7, R. pp. 2670-72.)

Thus, the fact that USAA set its reserves at $250,000 and gave Attorney Daniel that amount of authority is irrelevant. Likewise, Attorney Daniel's supposed representation during mediation that the extent of his authority was $200,000 instead of $250,000 was equally irrelevant. The lowest amount USAA ever heard that Appellant might accept was "between $300,000 and $400,000," which both USAA and Appellant's counsel understood to mean $350,000. USAA cannot be said to have acted unreasonably by offering $200,000 instead of

[7] At the trial of this case, Appellant's personal counsel testified that she authorized him to settle for $250,000, but he admitted this was never conveyed to USAA. (Tr. 625:23-626:23, 644:22-645:3; R. pp. 1477-78, 1496-97.) Appellant's recollection, however, was that she ***did not*** discuss a specific amount of authority with counsel. (Dep. of Therese Hood at 207:15-208:2, Court's Ex. 7, R. pp. 2670-71.)

$250,000 where there is no evidence it would have impacted the outcome in any way. This situation is a classic example where the overarching appellate maxim applies: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The trial court correctly found that there was no question for the jury "regarding the conduct at mediation," as USAA did not have a duty to offer the full amount of its evaluation or reserves where the official offers were $450,000 apart. (Tr. 682:18-22; R. p. 1534.) This Court should affirm.

C. The trial court properly granted directed verdict on Appellant's alleged consequential damages.

1. Appellant's brief erroneously attempts to shoe-horn *Tyger River*'s standard into the UIM context.

In support of her argument regarding consequential damages, Appellant cites to *Tyger River* to support that she should have been permitted to recover the "excess verdict" amount as consequential damages. This is not supported by South Carolina law.

The *Tyger River* doctrine recognizes that an insured may recover damages in a bad faith suit where an excess verdict was entered ***against the insured as a result of the insurer's failure to settle a case***. *See Miles v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 374, 380-81, 120 S.E.2d 217, 220 (1961) (citing *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933)). *Tyger River* and its progeny give an insured recourse against her insurer where the insured suffers exposure to an excess judgment because of the insurer's bad faith conduct. *See id.* In that situation, the insured has suffered harm and a direct loss due to her insurer refusing to settle when it had the chance since she is personally liable for the resulting verdict. This is a fundamentally different scenario than in a UIM case. Tellingly, Appellant has not cited any

South Carolina authority applying these concepts in the UIM context and, in fact, the District of South Carolina has expressly found that *Tyger River* ***does not*** apply. *See Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 459 (D.S.C. 2008).

This is a logical conclusion since the insured is the plaintiff in a UIM case, not the defendant. The insured necessarily cannot suffer any "loss" or "harm" by pursing the UIM claim and obtaining a verdict in excess of what she would have settled for and/or the policy limits. Other jurisdictions are in accord. In *Bartlett v. State Farm Mut. Auto. Ins.,* No. IP01-0510CHK, 2002 WL 31741473 (S.D. Ind. Nov. 27, 2002) the Southern District of Indiana rejected a similar claim, distinguishing the *Tyger River* context from a suit against a UIM insurer for failure to settle. The court explained that "to the extent that [the insured] suffered injuries beyond the relevant policy limits, they were caused by [the tortfeasor], not by his insurer's disagreement with him about the value of his claim. That disagreement cannot be used to remove the policy limits on coverage." *Id.* at *5. Likewise, the Florida Supreme Court rejected an attempt to recover the amount of an excess judgment in the UIM context because "[t]o allow recovery of the excess judgment in first-party cases would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause." *McLeod v. Cont'l Ins. Co.*, 591 So. 2d 621, 624 (Fla. 1992) (superseded by statute).[8]

Appellant ignores the plain fact that, at common law, consequential damages still require showing causation of an actual loss. *See* Black's Law Dictionary 174 (3rd pocket ed. 2006) (explaining that consequential damages are "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act"). Here, Appellant asserted that she

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[8] The Florida Legislature subsequently altered the common law by altering its UIM statute to allow for recovery of an excess judgment in the UIM context. Fla. Stat. Ann. § 627.727.

would have settled for $250,000. By proceeding to trial, she received a windfall in excess of $750,000. Appellant suffered no harm as a result of the "excess verdict" since she actually obtained far more money than she alleges she would have settled for in this case.

Thus, the trial court correctly determined that the litigation costs Appellant incurred in pursuing the UIM claim were the only real "harm" suffered by Appellant as a result of proceeding to trial. (Tr. 694:6-11; R. p. 1546.) The trial court accurately noted that the "excess" verdict was not a proper element of damages due to the posture and mechanics of a UIM case. This Court should affirm the grant of directed verdict on this issue.

2. The trial court correctly granted directed verdict on Appellant's claim for emotional distress damages because it was premised solely on alleged litigation stress.

In her brief, as at trial, Appellant connected her emotional distress to questions concerning whether her headlights were on or off and whether her initial testimony that her lights were on was accurate. (*See* Br. of Appellant at 27-30 (stating that Attorney Daniel "insinuated that I lied in my depositions," "questioned her sanity," and asked her "do you realize this, did you say this, did you say that, why did you say this, why did you say that").) Appellant's husband testified:

> I know this has been tearing her up since day one, since they first started this whole thing about were her lights on, were her lights off, and where they're going back and forth with, you know, is she telling the truth, is she not telling the truth. And her credibility is more important to her than anything else.

(Tr. 312:15-21; R. p. 1164.)

However, from "day one" (the day of the accident) it was the police officer who put in her accident report that Appellant was at fault and that Appellant's lights were off upon her arrival. (Police Report, Def. Ex. 3; R. pp. 3121-22.) As detailed above, four other witnesses gave

statements that her lights were off. Johnson and the Kucks all sued Appellant contending her lights were off and she was at fault. In fact, her own lawyer offered to stipulate in open court that her lights were off, and a jury found that she was 49% at fault. (Tr. 617:17-24; R. p. 1469.)

Appellant did not present evidence from which a jury could determine that Attorney Daniel's assertion that her lights were off caused her any different distress than any of the witness testimony, arguments of counsel, other lawsuits, or findings of the underlying jury. As the lower court astutely observed: "[W]hat I am struggling with is when you say they called her a liar, I mean there were several other people that were saying that the headlights were not on. . . . But to the extent that USAA's counsel could be faulted for suggesting that her lights were off, he was one of many."). (Tr. 690:22-691:5; R. pp. 1542-43.)

The lower court's ruling was correct. For example the Fourth Circuit, applying South Carolina law, reversed a jury's verdict for consequential damages in a bad faith action where the plaintiff could not separate bad faith damages from those inherent in litigation as "[n]either the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729, 733 (4th Cir. 1990) (quoting *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 444 (1971)).

Moreover, as a general rule, "litigation-induced emotional distress is ***never*** a compensable element of damages." *Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001) (collecting cases) (emphasis added). "[A]ny anxiety, stress or other unpleasantness" that the plaintiff experiences as a by-product of litigation is not caused by the supposed bad act itself. *Id.* at 641. "Such mental distress is 'inherent in most litigation'" and though one could argue the plaintiff should not have had to assert her rights, "the same can be said of the successful plaintiff in any case." *Id.* (quoting *School Dist. No. 1, Multnomah Cnty. v. Nilsen*, 534 P.2d 1135, 1146

(Or. 1975)); *see also Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983) ("An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages.").

Various courts have found that litigation stress is not recoverable in the insurance bad faith context. *See, e.g.*, *Seehafer v. Depositors Ins. Co.*, No. 19-CV-01461-REB-KMT, 2020 WL 1627092, at *2 (D. Colo. Feb. 28, 2020) ("Plaintiffs generally cannot recover for the stress occasioned by the filing and prosecution of a lawsuit to vindicate their rights."); *Allen v. State Farm Mut. Auto. Ins. Co.*, No. 3:15-CV-0019-HRH, 2018 WL 1474526, at *7 (D. Alaska Mar. 26, 2018) (predicting "that the Alaska Supreme Court would hold that litigation-induced stress is not recoverable, primarily because 'the heavy weight of authority holds that litigation-induced stress is not ordinarily recoverable as an element of damages'" (quoting *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 79 (1st Cir. 2001))); *Leporace v. N.Y. Life & Annunity Corp.*, No. 11-2000, 2014 WL 1806788, at *3 (E.D. Pa. May 7, 2014) (precluding expert's opinions on litigation stress "because there is no question that filing a lawsuit . . . is the plaintiff's decision, and imposing additional damages on the defendant for defending against the plaintiff's claims would impair the defendant's right to defend himself").

Thus, even if Appellant had been able to distinguish between emotional distress caused by Attorney Daniel suggesting that her lights were off and the various other people suggesting the same, credibility concerns are inherent in most litigation. As these authorities establish, mere litigation stress is not actionable "emotional distress" for purposes of a bad faith claim.

Therefore, the trial court properly granted directed verdict on Appellant's claim for emotional distress damages.[9]

III. The trial court correctly granted USAA's motion for JNOV where there was no independent duty that could support a negligence claim.

A. Standard of review.

A motion for a JNOV is merely a renewal of the directed verdict motion. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 331-32, 732 S.E.2d at 170. An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

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[9] An additional sustaining ground for this ruling is that there was no evidence of any physical manifestation. *See Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014). As USAA argued multiple times to the trial court, South Carolina law requires a physical manifestation of injury for emotional distress damages to be recoverable, even for a bad faith claim. *See Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) ("Damages for emotional or mental suffering are typically not recoverable, unless there is some physical manifestation of the emotional distress."); *see also McLawhorn v. Ocwen Loan Servicing, LLC*, No. 4:14-CV-02745-RBH, 2017 WL 624530, at *6 (D.S.C. Feb. 15, 2017) (granting summary judgment where plaintiff "failed to offer evidence of any physical manifestation of the emotional distress"). Appellant did not introduce any evidence or testimony of any physical manifestation and, as a result, there was no genuine issue of fact for the jury.

B. Appellant mischaracterizes USAA's consistent arguments on this issue and the trial court's ruling.

Appellant attempts to obfuscate and avoid the trial court's well-reasoned ruling by creating a strawman, incorrectly contending that USAA premised its JNOV argument on a purported inconsistency in the verdict. This is patently inaccurate. Throughout the proceedings, USAA consistently maintained there was no independent tort duty that could support a negligence claim separate and apart from the duty of good faith and fair dealing. As USAA argued on summary judgment, South Carolina law recognizes two theories of recovery where improper action is alleged by an insured against its insurer: (1) breach of the insurance contract, and (2) breach of the implied duty of good faith and fair dealing giving rise to the tort of bad faith. (Tr. 149:1-9; R. p. 1001.) There is no separate duty that could give rise to a standalone negligence claim. (*Id.*) USAA echoed these arguments on directed verdict, and reasserted them when it renewed its directed verdict motion. (Tr. 670:8-15, 754:3-11; R. pp. 1522, 1606.) Following the trial, USAA again raised the same arguments in its motion for JNOV. (*See* Mot. for JNOV; R. pp. 136-45.) USAA did not contend that the verdict was inconsistent or that JNOV was appropriate for that reason. Instead, its consistent position was that negligence was an element that the jury could consider in evaluating whether USAA acted in bad faith and was incorporated into that cause of action. The trial court's ruling agreed with this argument and was in no way premised on a supposed inconsistency in the verdict. (*See generally* Order Granting JNOV; R. pp. 6-10.)

C. The trial court's ruling was correct under controlling South Carolina law.

In granting JNOV, the trial court found that there was no independent tort duty owed by USAA to Appellant under these facts that could support a negligence claim. (JNOV Order at 2;

R. p. 7.) The duty arising from an insurance contract that could give rise to a tort claim is the implied duty of good faith and fair dealing. South Carolina courts have never recognized that a ***separate***, additional tort duty is owed by an insurer to its insured sufficient to support a negligence claim where bad faith is also alleged.

Under South Carolina law, although parties to a contract generally have no duty in tort to one another, an exception to this rule exists where there is a "special relationship" between them. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). One such special relationship exists in the insurance contract, as the duty of good faith and fair dealing implied in the contract can support a tort claim for bad faith. *See, e.g.*, *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996).

Federal cases applying South Carolina law have recognized that under the circumstances of this case—where the claims revolve around an insurer's alleged refusal to pay UIM benefits—a standalone negligence claim is not viable. *See* Order, *Maranto v. State Farm Mut. Auto. Ins. Co.*, No. 2:98-3131-23-PMD, at 3-4 (D.S.C. Aug. 11, 1999), ECF No. 19; *see also Kraemer v. Mass. Mut. Life Ins. Co.*, No. CV 2:15-04571-CWH, 2017 WL 5635469, at *6 (D.S.C. Apr. 28, 2017), *aff'd*, 701 F. App'x 268 (4th Cir. 2017) (discussing *Maranto*). In *Maranto*, the plaintiff asserted claims for negligence and bad faith for the insurer's failure to pay UIM benefits and make a reasonable offer to settle the claim. *Kraemer*, 2017 WL 5635469, at *6. The *Maranto* court explained that the negligence allegations were "more appropriately considered in the context of a claim for bad faith." *Id.* (quoting *Maranto*, No. 2:98-3131-23-PMD, at 3-4) Thus, the court granted summary judgment on that claim, explaining that:

> "[a] jury is entitled to consider issues of an insurance company's negligence in determining whether the company acted unreasonably in refusing to pay benefits. However, ***no authority . .***

> ***. support[s] the existence of a separate, free-standing claim of negligence in such circumstances. . . .***"

Id. (emphasis added) (quoting *Maranto*, No. 2:98-3131-23-PMD, at 3-4).

Although *Kraemer* did not involve UIM coverage, the plaintiff in that case similarly alleged that the insurer owed duties under the subject disability policy that were separate from the contractual duty and duty of good faith and fair dealing. *See id.* at *5. Specifically, the plaintiff contended that the insurer owed him a duty to: (1) "accurately and truthfully convey to consumers the true coverage and benefits amounts for each policy marketed and/or sold," (2) "refrain from willfully and intentionally defrauding policyholders of contracted-for benefits," and (3) "do those things which a reasonable, prudent person would do under the circumstances then and there prevailing." *Id.* Relying on *Maranto*, the court granted summary judgment on the plaintiff's negligence claim, finding that the "crux" of that claim was really that the insurer "breached the policies in bad faith when it refused to pay benefits," and thus the claim was "better suited as a bad faith claim." *Id.* at *6.

Finally, *Skinner v. Horace Mann Ins. Co.*, 369 F. Supp. 3d 649 (D.S.C. 2019) also relied on *Maranto* and reached the same result. *See id.* at 653. As the *Skinner* court explained, although the complaint stated a claim for negligence, the gravamen of the cause of action was really that the insurer was "negligent in processing, handling, and adjusting Plaintiff's claim against [insured]," which related to a breach of the covenant of good faith and fair dealing. *Id.* at 654. The court found that the claim was therefore "duplicative of the bad faith claim, as other judges in this District have recognized." *Id.* Thus, the freestanding claim of negligence was not cognizable. *See id.*

Here, the trial court properly rejected Appellant's argument that even though the jury found on a special verdict form that USAA did not breach its duty of good faith and fair dealing, the jury could still have found that USAA breached a separate duty to act reasonably which would support a negligence cause of action. Appellant argued to the trial court, and has reasserted in her brief, that the fact that an insured can recover if it can demonstrate bad faith "or unreasonable action" indicates two separate and distinct duties. However, she has never been able to explain what that duty is or from where the non-bad-faith duty derives. At the JNOV hearing, the Court pinned Appellant down on this question asking: "So my first question was what duty did they breach to support the negligence cause of action, which I think you have just answered by saying it's either bad faith or unreasonable action. Is that your response?" (9/26/19 Hearing Tr. 19:20-25; R. p. 1727.) Appellant responded that it was. (*Id.*) This illustrates that Appellant's attempts to explain the source of the independent duty in tort she claims USAA owes always revert back to the bad faith standard.

Breach of the implied covenant of good faith and fair dealing can be proven by showing either bad faith or unreasonable action on the part of the insurer. *See Cock-N-Bull Steak House v. Generali Ins.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (stating the elements of a claim for "bad faith refusal to pay benefits," explaining that insured can succeed by showing a refusal "resulting from the insurer's ***bad faith or unreasonable action*** in breach of an implied covenant of good faith and fair dealing arising on the contract" (emphasis added) (quoting *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992))). Thus, while bad faith can be proven by unreasonable action, this is not a separate duty from the duty of good faith and fair dealing. As a result, the trial court correctly found that USAA was entitled to JNOV on the negligence claim.

D. Any purported issues caused by the grant of JNOV arose as a result of Appellant's invited error.

Appellant focuses her argument on the fact that the negligence and bad faith verdicts were not inconsistent. USAA agrees with Appellant that the verdict was not inconsistent when viewed in the context of how the case was presented to the jury. Rather, the verdict reflects that Appellant's attempt to put the General Assembly's method of handling UIM suits on trial was a success. The jury found that USAA complied with its policy duties and did not breach the duty of good faith, but apparently took issue with the system that allows an insurer to stand in the shoes of its insured's adversary, essentially litigating against its own insured. This is not surprising given the confusing and counterintuitive nature of UIM coverage, a subject that confounds many lawyers and was certainly a struggle for a jury.[10]

Appellant consciously chose to proceed on both claims despite being on notice of USAA's argument that this was erroneous as a matter of law. Appellant knew USAA had argued there was no independent tort duty on summary judgment and during both directed verdict motions, and that USAA would renew that argument in the event of a plaintiff's verdict. Therefore, Appellant was aware that the trial court could agree with USAA that there was no legal duty supporting the standalone negligence claim and grant JNOV. And Appellant was aware that if the jury found in her favor solely on the negligence claim, this would result in judgment in USAA's favor. Nevertheless, Appellant opted to proceed under both theories, argue

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[10] In *Yoho v. Thompson*, the Supreme Court recognized the confusion inherent in UIM insurance. While allowing impeachment of an expert witness retained by an insurance carrier and the injection of insurance into a wreck case to prove bias, it held that pains must be taken to not confuse the jury with the subject of UIM coverage, explaining that "cross-examination must be carefully tailored, however, ***so as not to confuse the jury by revealing that Nationwide, while defending in the name of Thompson, is actually Yoho's underinsured motorist carrier***." 345 S.C. 361, 367, 548 S.E.2d 584, 586 (2001) (emphasis added).

to the jury that the facts and evidence supported an award under either theory, and urge the trial court to charge and submit both issues to the jury. Additionally, Appellant knew there could be a verdict on either or both of the causes of action, and that either or both causes of action may or may not stand on JNOV or appeal. Now that USAA has succeeded on its motion for JNOV, Appellant contends that the court erred in granting JNOV because the jury heard arguments tailored to each issue individually and was instructed that the two theories were separate. Appellant, however, invited any purported error that she now asserts on appeal by urging the court allow presentation of the issues in this way. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error . . . which his own conduct has induced."); *State v. Logan*, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal.").

The result Appellant seeks from this Court would foreclose USAA from being able to raise and argue a properly preserved question of law about a discrete cause of action in a post-trial motion.[11] The Court should reject such an absurd result and affirm the grant of JNOV.

E. An additional sustaining ground for the trial court's grant of JNOV is that no reasonable jury could have found that USAA was negligent.

Finally, as USAA argued in its motion for JNOV, no reasonable jury could have found in Appellant's favor on the negligence claim as presented and argued. This represents an additional sustaining ground for the trial court's ruling. As for breach of the purported duty (which, as detailed above, does not exist), no reasonable jury could have found that an insurer's defense of a

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[11] In her brief, Appellant attempts to twist the effect of the trial court's ruling. Appellant got a "free shot" at arguing a claim that she never should have been able to argue ***as a matter of law***, not fact. As a result, the trial court's grant of JNOV had the same effect as if the court granted summary judgment or directed verdict prior to trial, and placed Appellant in the same position.

liability suit pursuant to its right under the UIM statute, and alleged taking of disparate positions—justified by supporting evidence—pursuant to those rights, breached a duty of care. Likewise, no reasonable jury could have found that the alleged taking of disparate positions breached a duty of care where fault was allocated almost equally between the two parties. And no reasonable jury could have found a legally recognized, cognizable harm proximately caused by USAA under these facts.

Additionally, damages were not supported by the evidence and testimony presented at trial, and no reasonable jury could have awarded damages in Appellant's favor. Appellant contended she would have settled the underlying case for $250,000 if USAA had offered it. Her theory was that USAA's failure to pay $250,000 led her to incur approximately $49,000 in litigation expenses. However, those litigation expenses led to an over $1,000,000 ***recovery***. Thus, USAA's purported breach of duty and negligence caused the Appellant to recover a windfall of $750,000.

Therefore, an additional sustaining round for affirming the trial court's judgment is that no reasonable jury could have found in Appellant's favor on the negligence claim. This Court should affirm.

CONCLUSION

For the forgoing reasons, Respondent respectfully requests that this Court affirm the judgment in USAA's favor.

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November 24, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2019-001943
Case No. 2018-CP-10-00666

Therese Hood, ... Appellant,

v.

United Services Automobile Association, ... Respondent.

CERTIFICATE OF COUNSEL

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

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