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**Feb 24 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Hon. Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2018-000735  
Unpublished Opinion No. 2021-UP-045  
(SC Court Of Appeals February 10, 2021)

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Kenneth A. Davis As Personal Representative  
Of The Estate of Kenneth Miles Davis ..... Respondent

v.

Cole Austin Dunn and John Richard Smith ..... Petitioner

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**PETITION FOR REHEARING ON BEHALF OF  
THE PETITIONERS. COLE AUSTIN DUNN AND  
JOHN RICHARD SMITH**

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The Petitioners, Cole Austin Dunn and John Richard Smith, (hereinafter known as “Petitioners”) hereby petition this Court for rehearing pursuant to Rule 221, SCACR, upon the following grounds:

The Court of Appeals erred in its Opinion Number 2021-UP-045 in affirming the circuit

court's grant of summary judgment to the Estate on Smith and Dunn's counterclaims, in refusing to consider the denial of Petitioner's Motion for Summary Judgment, and in failing to examine the Tyger River doctrine's proper role and impact on this case and its current mis-use and abuse.

## I.

The counterclaims as to which summary judgment was granted were (a) breach of contract; (b) breach of contract accompanied by fraudulent acts; (c) breach of the covenants of good faith and fair dealing; and (d) a violation of Rule 11, SCRPC.

As to the contract and good faith– fair dealing covenant counterclaims (hereinafter “contract” claims), the Opinion ruled that there could not have been a breach because as to Smith, he was not included in the Covenant Not To Execute (hereinafter “CNE”), so there was no contract. The Opinion therefore upheld the dismissal of these claims. This holding erred by failing to consider how the language of the policy affected the inclusion of parties in the CNE. Mr. Smith was protected by the policy, was a named insured and was intended to be protected by the Court Order and the Covenant, per policy language inclusive of the following definition:

In this policy, “**you**” and “**your**” refer to the “**named insured**” shown in the Declarations and the spouse if a resident of the same household. **(R.P.948)**

There is no dispute that Mr. Smith was Charlotte Smith's spouse and a household resident before this incident, at the time of this incident and since this incident. Therefore, this provision means that the policy provisions made Mr. Smith a named insured. The construction of this definition is consistent with South Carolina law which links the terms insured and named insured and, in the automobile insurance context, defines insured as including the named insured and household residents. §38-77-30, *SC Code Ann.* In fact, SC law provides that certain agreements, like one to exclude a designated person from liability coverage, when signed by the named insured,

are binding upon all insureds. §38-77-340.

Policy terms and definitions can make a spouse a named insured. *Allstate Insurance Company v. Estate of Hancock*, 345 SC 81, 545 SE2d 845 (Ct. App. 2001). In *Hancock*, this Court considered a UIM rejection case where the trial court had held that an Allstate policy defining “you” and “your”, like the Farm Bureau Policy, made a named insured’s spouse a named insured. The trial court held that since the wife was a named insured, her rejection of UIM coverage in a policy listing the husband as named insured was binding. This court disagreed because the issue was an initial UIM rejection at the time of application when no policy existed and because there was no policy contract, the court looked only to the language of the UIM rejection statute. *Id.*

A policy definition can have the effect of making the “named insured” under a policy two people instead of one. *Baxley v. State Farm Mut. Auto. Liability Ins. Co.*, 241 S.C. 332, 128 S.E.2d 165, 1962 S.C. LEXIS 44 (S.C. 1962) The purpose of a policy provision, like the one in the Farm Bureau policy, is to extend the protection of a policy to a resident spouse. See:

The first ground of appeal is that the exclusionary clause applies only to an automobile furnished for the regular use of the “named insured,” and “the ‘named insured’ were two persons under the terms of the policy and the vehicle was furnished only to one person.” We do not understand that Mavis W. Fulbright was actually named as an insured in the policy issued to her husband. Instead, this ground of appeal rests upon the policy definition of “named insured” as including the spouse of the contracting party designated in the policy, if living in the same household. We think it obvious that the sole purpose of this policy provision was to extend its protection to the spouse of the person named as the insured, and not for the purpose of enlarging, limiting or modifying the contractual rights of such person in the event of a covered loss.

*Fulbright v. Fidelity & Casualty Co.*, 247 S.C. 226, 146 S.E.2d 618, 1966 S.C. LEXIS 245 (S.C. 1966)

The Homeowner Policy Declarations state that “The Declarations of the policy indicated herein are subject to all other terms and conditions of the policy and replace all previously issued

declarations. This Declarations Page becomes a permanent part of your policy.” (R p 648). The CNE specifically references the subject policy as being the contract providing the coverage and funding the settlement. (R p 643). The CNE defines the claim as being the shooting, mortal injury, and death of the decedent on October 9, 2016. (R p 643). It then says that the Respondent subsequently made a claim for “wrongful death, survival, bodily injuries, medical expenses, pain and suffering, grief, loss of companionship, funeral expenses, and any and all other damages allegedly” suffered by Respondent as a result of the incident.” (R p 643). The CNE then, again, references the policy.

The Opinion held that Smith was not a party to the CNE, so he had no claims for breach of the CNE. In so holding, the Opinion failed to consider or construe the policy language that made Smith a named insured and it contradicted the referenced decisions that construed similar to identical policy language to make a spouse a named insured under the Farm Bureau policy. When the CNE listed and included named insured Charlotte Smith as a Payor and protected party, it, and its included reference to and reliance upon the policy, made Charlotte Smith’s spouse a Payor and protected party, with full rights to both protection under the CNE and to bring the asserted counterclaims for breach, inclusive of the breach with fraudulent intent, as that is fully supported by the facts.

For an action for breach of contract accompanied by a fraudulent act, three elements must be established: (1) breach of a contract; (2) fraudulent intent as to the breach; and (3) an accompanying fraudulent act. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). “Fraudulent act” is broadly defined as “any act characterized by dishonesty in fact or unfair dealing.” *Id.* At 466, 560 S.E.2d at 612. This Court has previously held that breach of the covenant of good faith and fair dealing is part of an action for breach of contract. *RoTec Services v. Encompass Services*, 359 SC 467, 597 SE2d 881 (Ct. App. 2004). “There exists in every contract an implied

covenant of good faith and fair dealing.” *Parker v. Byrd*, 309 SC 189, 420 SE2d 850 (1992). The facts of this case and the Respondent’s specific admissions qualify as such fraudulent acts and breach of the covenant of good faith and fair dealing.

The Opinion also held that Petitioner counterclaim for Rule 11 sanctions was not preserved for appeal because it was not ruled on by the trial court nor raised in a Rule 59 Motion as to the Respondent’s scheme to deceive Farm Bureau about their intent to enter a *Tyger River* settlement whereby the policy coverage would be paid to protect the insureds (plural). In this, the Opinion misapprehends or overlooks the full language of the Order. The Order specifically rejects Petitioner’s claims that the Respondent acted deceitfully in crafting his *Tyger River* demand letter. (R pp 15,22).

The Rule 11 claim was, therefore, raised before and ruled upon by the trial court and is preserved for appeal. This is a case where the *Tyger River* demand letter named Charlotte Smith and Cole Dunn as insureds, and it offered to protect both, and the **specific policy** in exchange for payment of the policy proceeds. (R p 861). As noted above, the provisions of this policy also protect Mr. Smith. The demand letter states that it was sent to give Farm Bureau “an opportunity to protect their insureds and themselves by settling this case.” (R p 862). In its letter accepting the demand, Farm Bureau stated its understanding of the terms as follows: that in exchange for payment of the coverage, the Respondent would enter a CNE that would allow the Respondent to pursue any other liability insurance policies, should such be located. (R p 864). Respondent then sent a letter stating that the first *Tyger River* demand, completion of the settlement, and then filing a second lawsuit was part of an intentional plan. (R p 875). Petitioner believe that their claim for Rule 11 sanctions is well-founded and that the dismissal of the same should be reversed.

The CNE made the policy part of the agreement. The Declarations page made the policy terms part of the Declarations. Therefore, the Opinion overlooked or misapprehended the necessity

of construing the policy provisions as part of the CNE, and when so construed this matter should be reheard, reconsidered, or reversed.

## II.

Petitioner also respectfully suggest that this Court misapprehended the import of considering the denial of their Motion for Summary Judgment at this stage. The Opinion stated that the Court, in its discretion, could choose to review an ordinarily unappealable Order if doing so would avoid unnecessary litigation and cites to *Morris v. Anderson Cnty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002), where the Court declined to consider the denial of a constitutional issue which might not arise and because the Court prefers not to reach constitutional issues not directly before it. *Id.* Review of a denial of a Summary Judgment motion is also allowed where the denial affects the merits of a case or affects a substantial right. *S.C. Code Ann. § 14-3-330 (Supp. 2003)*; *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995); *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). An Order involves the merits if it "finally determine(s) some substantial matter forming the whole or a part of some cause of action or defense." *Woodard*, 319 S.C. at 243, 460 S.E.2d at 394. An Order affects a substantial right if it "determine(s) the action and prevent(s) a judgment from which an appeal might be taken or discontinue(s) the action." *Id.* *Brown v. County of Berkeley*, 366 S.C. 354 (S.C. 2005)

The Order and Opinion before the Court involve the merits and affect a substantial right. The Opinion upholds the trial court's determination that Mr. Smith was not a named insured. That is a crucial and incorrect finding. Without it, all of the Petitioner's claims are decided the other way, this case is out of Court, and – hopefully – the integrity of the *Tyger River* doctrine stands. Further, the

Opinion decides that Mr. Smith was not a named insured without analyzing the policy. An analysis of the policy, which is required here, entwines all of the issues such that deciding, and reversing, the denial of Summary Judgment to the Petitioner avoids unnecessary litigation. An Order involving the merits finally determines a substantial matter comprising the whole, or part, of a cause of action or defense. *Mid-State Distributors v. Century Importers*, 310 S.C. 330 (S.C. 1993)

The trial court Order and this Court's Opinion determine a substantial matter relative to Petitioner's claims and defenses as follows: (1) The defenses of accord and satisfaction, release, settlement, waiver, payment, joint tortfeasors, and reformation of agreement; (2) Tyger River; (3) Collateral Estoppel and (4) Public Policy. At a minimum, the Order and Opinion, inclusive of the finding that Mr. Smith was not a named insured, act to finally determine the Petitioner's defenses of accord and satisfaction, release, settlement, waiver and payment and these issues are clearly bound and entwined with the Petitioner's claims for breach of contract.

In this case, many of the issues relate to the overall one of whether Mr. Smith was an insured under the Farm Bureau policy. These issues and the import of the Court overlooking or misapprehending the need to analyze the policy in order to determine whether Mr. Smith was a named insured mean that this Court should rehear, reconsider and reverse this decision.

### III.

The Opinion overlooks or misapprehends the impact and import of the *Tyger River* doctrine on this case, under these facts and in failing to address the plaintiff's bar's current mis-use and abuse of the doctrine.

Damages sought in this case were paid and approved in a prior Wrongful Death approval of a settlement made after Respondent's TYGER RIVER demand under Policy Number HO 0412831, issued by Palmetto Casualty Insurance Company, a/k/a South Carolina Farm Bureau (SCFB). In

compliance with well-established precedent, SCFB considered the Tyger River demand, put its insureds' interests ahead of its own, and determined that settling was the reasonable thing to do. SCFB replied to the Tyger River Demand letter agreeing to pay the homeowner's coverage to protect its insureds' interests. The Wrongful Death settlement was court approved and the coverage under the subject policy was paid. **(R.P.945-1004; 860-863; 864-865; 930-1004).**

Respondent's demand letter stated as follows: "I am contacting you pursuant to Tyger River v. Maryland Casualty Company, 170 SC 286, 170 SE 346 (1933), and its progeny to inform you that my client, Kenneth A. Davis, as Personal Representative of the Estate of Kenneth Miles Davis, will agree to accept three hundred and five thousand and no/100 (\$305,000) Dollars." ***The letter concluded with the following statement: "We are submitting this demand letter with the hope that we can resolve this matter within your insured' limits of liability coverage by affording Farm Bureau Insurance Company the opportunity to protect their insureds (emphasis added) and themselves by settling this case."*** **(R.P.862).** SCFB responded by stating that it accepted the (Tyger River) demand and would pay the policy limits for a Covenant Not to Execute and would have local counsel Dwight Hudson's draft a Covenant to protect its insureds. **(R.P.864-865)**

The approval Order stated as follows:

"...such Covenant Not to Execute, when so executed and delivered, shall be valid and effectual forever as to South Carolina Farm Bureau Mutual Insurance Company, its stated policy and its named insured and the Defendants - subject to the terms of this Order preserving the Plaintiff's rights to pursue any other available coverage or source of payment." **(R.P.932)**

At no prior time had Powell indicated an intention to file this action or any action involving Dunn's stepfather, Mr. Smith, who was not Dunn's natural or legal guardian, and did not own the shotgun on the date of the fatal accidental discharge. Mr. Smith was not mentioned in the settlement demand by name, though the demand was made pursuant to Tyger River and the demand letter stated

it was made to resolve the claim within policy limits so that the carrier could protect "their insureds and themselves by settling this case." **(R.P.862)** After the settlement, Attorney Powell sent a letter admitting that his actions throughout this process were part of a scheme to attempt to extort or coerce the carrier to pay the policy limits a second time. **(R.P.872-875)**

After an exchange between counsel, the Respondent exposed the ultimate goal of his scheme by discussing alleged bad faith by the carrier and his intention to seek an assignment of that bad faith claim. Respondent's letter noted Farm Bureau's obligation to protect all of its insureds - which is exactly what the carrier did, intended to do, and agreed to do by accepting Powell's original Tyger River Demand which the demand letter says was made to afford Farm Bureau Insurance Company the opportunity to protect their **insureds** (emphasis added) and themselves by settling this case. **(R.P.862)**

The foundation of the Tyger River doctrine is the insurance contract. Every contract carries an implied covenant of good faith and fair dealing. Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970) Under Tyger River, the insurance company owes a duty of good faith to defend and indemnify within policy limits. **Tyger River Pine Co. v. Maryland Casualty Co.**, 170 S.C. 286, 170 S.E. 346, 348 (1933) (cause of action recognized for bad faith failure to pay benefits to the insured). In Nichols, the SC Supreme Court found that public policy reasons for recognizing a first party bad faith action for breach of the Implied Covenant of Good Faith and Fair Dealing were abundant. The Court noted the relative difference in bargaining power between an insured and an insurance company and found that without recognizing a tort claim carriers could deny claims and profit from the use of the insured's money during litigation without facing more risk than the delayed payment of a claim and limited attorney's fees. Nichols, at 340, 619 Tyger River was created in 1933 to give insureds similar protection.

The Order and Opinion ignore the troubling course of conduct in this matter. It is now clear r

that from the initial Tyger River Demand throughout, the Respondent and his attorney intended to file and collect twice from the same carrier and the same insureds for the same Wrongful Death claim, it is equally clear that this intention was never disclosed to the carrier or counsel. In fact, these intentions were deliberately hidden.

Abuse of bad faith claims has been dealt with by other courts. In a Kansas case, an insurer accepted a bad faith demand by one claimant, but refused to proceed after counsel advised of the intent to pursue a separate negligent entrustment claim under the same policy. The Kansas court ultimately held that the insurer was not liable for bad faith, finding that the underlying motive was to create a bad faith situation. It held that even if the insurer had accepted the prior settlement offer to pay the coverage to protect Hudgens that Plaintiff Kemp would have pursued a bad faith claim against the insurer as to the excess verdict against Kelly. *Kemp v. Hudgens*, 133 F. Supp 3d 1271 (2015).

The Kansas Court in Kemp cited to a decision by the 10th Circuit in another bad faith situation. In that case, the Court rejected a bad faith claim against a carrier after a motor vehicle accident, a stop light case, in which witnesses disagreed over which of the seriously injured parties had the green light. Counsel sent and withdrew a couple of policy limit demands sent with very short triggers, and then he associated co-counsel whose primary expertise was bad faith litigation. At his deposition, trial counsel admitted that the litigation plan was to reject the settlement offer and then to negotiate directly with the opposing party/insured to get an assignment of a bad faith claim. Wade v. Emasco Ins. Co., 483 F.3d 657 (10th Cir. 2007)

In discussing such strategies to craft bad faith situations, the Wade Court said as follows:

The doctrinal impetus for insurance bad faith claims derives from the idea that the insured must be treated fairly and his legitimate interests protected. . . . In other words, the justification for bad faith jurisprudence is as a shield for insureds--not as a

sword for claimants. Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator.

*Wade v. Emcasco Ins. Co.*, 483 F.3d 657, 669-670, 2007 U.S. App. LEXIS 8227, 31-32

The reverse side of the issue was considered by a Texas Court after an insurer paid all of its coverage to settle on behalf of one of its insureds, leaving, Pride, another insured, exposed. In that case, the settlement demand expressly noted that Pride was intentionally omitted from the demand. After exhausting the coverage, the carrier advised Pride that it was withdrawing its defense. The Court noted that an insurer cannot be liable for failing to settle remaining claims "unless there is evidence that either (1) [the insurer] negligently rejected a demand from the [claimant] within policy limits; or (2) the [initial settlement demand] was itself unreasonable." The Court held that the carrier acted properly. Pride Transp. v. Cont'l Cas. Co., 511 Fed. Appx. 347 (5th Cir. 2013)

It is of note that in the above decisions, the Kansas and Texas cases involved attorneys who advised carriers of their intention to pursue action against another insured. Only in the Wade case out of the 10th Circuit, was a carrier not advised of such intended litigation against an insured following a settlement. And Wade was the case where the Court held that bad faith claims were created to be a shield for insureds and not a sword for claimants. This case is similar to Wade and the Court should so hold.

In the years since Tyger River, the doctrine has strayed far from its original impetus of protecting insureds by requiring them to be treated fairly and that their interests be protected. Eager attorneys have seized the shield of Tyger River and turned it into a sword, much as the 10th Circuit observed. Wade v. Emcasco Ins. Co., 483 F.3d 657, 669-670 (10th Cir. 2007) Plaintiff's attorneys

now use the doctrine to cause damages that they seek to recover, and in the process, the insured has become a mildly interested spectator. *Id.*

Recognition of a tort claim to the carrier in the Tyger River context would give carriers the ability to defend against overzealous advocates who cloak themselves with the doctrine in bad faith, with the intention of not dealing fairly. It would give this Court a venue to regulate practices such as attorneys who use the doctrine dishonestly, unfairly or without full disclosure or those who set unreasonably short deadlines that don't account for an adjuster possibly being ill, on vacation, or involved in a deposition or trial, and those that set deadlines that appear deceptively reasonable in a case with large damages but questionable liability, and those who set deadlines but don't get the carriers information needed to analyze the claim and meet the deadline.

If ever an area required recognition of a duty of good faith and fair dealing, it is the Tyger River Doctrine in today's circumstances. Petitioner believe that if such a tort claim for breach exists, then the Trial Court erred in granting Summary Judgment and in denying Summary Judgment to the Petitioner. If such a duty and claim do not yet exist, then time for recognition has come, and Petitioner ask that this Court do so and give guidance as to the standards for dealing fairly and in good faith, and as to acts which might breach such a duty.

The carrier, on behalf of its insured(s), has acted fairly and in good faith throughout this matter, and it expected that Respondent/Plaintiff's counsel, on behalf of his client, would do the same. Both parties owed that duty. This matter presents a case study in bad faith, deceit and the open breach of the duty of good faith and fair dealing.

The South Carolina Supreme Court recognized the Tyger River Doctrine to compel insurance carriers to act reasonably to settle claims within policy limits and protect their insured(s) financial interest over the carriers' interests. The Doctrine does not compel a carrier to settle once as to part of

its insureds and then to pay policy limits a second time to protect the rest of its insured(s) and nothing requires a carrier to pay a second policy limit for the same loss. Inherent in the *Tyger River* doctrine is a duty of good faith. Respondent availed himself of the doctrine to induce this settlement without any intention of accepting the coverage in exchange for an agreement protecting the insureds.

The failure of this Court to reverse the lower Court's denial of Summary Judgment to Petitioner and grant of it to Respondents will erode and eventually destroy the *Tyger River* doctrine, crowding the Court's calendars with lawsuits proceeding to trial - because defense attorneys and carriers will be unable to risk paying their coverage in exchange for a worthless Covenant or to risk paying it multiple times.

The time has come to recognize a tort claim for breach of the implied covenant of good faith and fair dealing in the Tyger River arena. This Court gave insured's a shield. Plaintiff's attorneys stole it and turned it into a sword, a weapon they wield recklessly and unreasonably. The Court has not yet held that carriers deserve a way to defend themselves, and this case presents an opportunity for the Court to intervene and steer the Tyger River Doctrine towards fairness and justice.

The Petitioner believe that there are several *Tyger River* issues here and that this case presents an urgent need for the Court to address the proper use of the doctrine, the existence and ramifications of a "partial" *Tyger River* demand and the need for a cause of action for insurance carriers to combat misuse and abuse of the doctrine. Petitioner believe that the *Tyger River* issues permeate this case and that the Opinion overlooked or misapprehended the same, such that the Opinion should be reversed and/or the matter reheard.

IV.

Lastly, Petitioners respectfully reassert in support of their Petition for Rehearing herein all the grounds and bases they previously presented in this appeal in support of reversing the grant of Summary Judgement to Respondent and addressing and reversing the lower court's decision, and reference to the same is craved as forming a part hereof.

CONCLUSION

Based upon the foregoing, the Petitioners respectfully submit that the matters addressed were overlooked or misapprehended by the Opinion and that this Court should rehear, and reconsider its Opinion, fully reverse the grant of Summary Judgment to the Respondent, and grant Summary Judgment to the Petitioner.

Respectfully submitted,

*s/ J. Dwight Hudson, Esquire*  
J. Dwight Hudson, Esquire  
SC Bar # 2753  
**Hudson Law Offices**  
PO Box 70218  
Myrtle Beach, SC 29572  
T: (843) 692-9889  
F: (843) 692-9190  
E: hudsonlaw@hudsonlawoffice.com

*Attorney For: Petitioner*

**Dated:**

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**Feb 24 2021**

**SC Court of Appeals**

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**PROOF OF SERVICE**

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I certify that on February 25, 2021 I have served a copy of the **PETITION FOR REHEARING** on each party who has served a brief, being the Respondent by counsel, by forwarding the same to counsel at the e-mail address designated with AIS, and directed as noted below:

J. Taylor Powell Esq.  
SC Bar # 100211  
Lesemann & Associates LLC  
418 King Street, Suite 301  
Charleston, SC 29403  
**Email: [jtp@lalawsc.com](mailto:jtp@lalawsc.com)**

*s/ J. Dwight Hudson, Esquire*

---

J. Dwight Hudson, Esquire  
SC Bar # 2753  
**Hudson Law Offices**  
PO Box 70218  
Myrtle Beach, SC 29572  
T: (843) 692-9889  
E: [HUDSONLAW@HUDSONLAWOFFICE.COM](mailto:HUDSONLAW@HUDSONLAWOFFICE.COM)

***Attorney For: Petitioner***

