No. 20-5258

IN THE
Supreme Court of the United States

NIKOLE MARIE HUNTER, PETITIONER

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NIKOLE M HUNTER
Pro-Se Appellant

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QUESTIONS PRESENTED

This Fourth Circuit decision affirming the District Courts order "reflected a clear misapprehension of summary judgment standards in light of [Supreme Court] precedents" --- such as what happened in *Tolan v. Cotton*, 572 U.S. 650, 659, 134 S.Ct. 1861, 1868 (2014) (*per curiam*). Ignoring Hunters' detailed facts violated procedural rules and Supreme Court "axiom[s]", "general rule[s]", and "fundamental principle[s]" governing summary judgment. *Id.*, 134 S.Ct. at 651, 656, 660.

- Supreme Court precedents require that, "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). That did **NOT** happen here.

- Local Rule 56.1(c) following those precedents was **NOT** followed:

Thus, the QUESTIONS PRESENTED are as follows:

1. Whether the District Court, failing to review such evidence and ignoring the Plaintiffs expert witness testimony, conflict with Supreme Court precedent regarding **the general rule** that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Anderson*, 477 U.S., at 249 .... Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.' [FRCP] 56(a). ... a court must view the evidence 'in the light most favorable to the opposing party.' *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598 ... (1970); see also Anderson, supra, at 255.... " Tolan v. Cotton, supra, 134 S.Ct. at 1866.*

2. Whether an Insurer purposefully delaying the tendering of policy limits to their policyholder constitutes Breach of Contract, when the misuse of claims handling software was proven to undervalue the claim and the policyholder was offered the proceeds only in exchange for releasing any future bad faith action against their carrier. *Wisinski v. American Commerce Group Inc 2011 U.S. Dist. Lexis 320, *37-38 (W.D.Pa January 4, 2011). An insurance carrier that attempts to coerce an insurer to release her bad faith claim when the policy limit was offered as settlement constitutes bad faith. Tadlock Painting Co v. Maryland Cas. Co 473 S.E.2d 2 (S.C. 1996) We recognize the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of the claims. Polcyn v. Liberty Mut'l Ins. Co., 2013 U.S. Dist. LEXIS 76193 (S.D. Cal. May 30, 2013). The Court considered whether the carrier's late payment of the insureds' economic damages eliminated a claim for bad faith and held that it does not.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nikole Hunter respectfully petitions for a writ of certiorari to review the judgment of the United States Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reproduced at App. B and is unpublished. The summary judgment opinion of the District Court for the District of South Carolina is reproduced at App. C and is unpublished.

JURISDICTION

A petition for rehearing was timely filed in my case with the Fourth Circuit, yet was denied on October 29, 2019 and is listed as Appendix 'A' The time for filing a petition for a writ of certiorari runs through the date of Saturday, January 27, 2020 pursuant to Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

6.

RELEVANT PROVISIONS INVOLVED

This case involves a statutory provision --- the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

"...the district courts ... shall have exclusive jurisdiction of civil actions on claims against the Tort-Feasor, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT

1 Factual Background

Plaintiff filed a Bad Faith suit against GEICO 9/7/2016 alleging breach of contract including;

a) purposeful withholding and delay of policy limits by 18 months which harmed the injured policyholder and then only releasing policy proceeds conditional of Plaintiff dropping any further bad faith action.
b) Bad Faith Claims handling: using a computer program that formulated an artificial range for adjusters to negotiate the claim based on the omission of physicians assessed Whole Person Impairment rating and future treatment.

2 The District Court granted GEICO's motion for Summary Judgment on February 1, 2019 despite the Plaintiffs filing 155 pages of exhibits evidencing bad faith conduct, and Expert Witness' report of GEICO's claims handling deficiencies; Plaintiff was not even offered a hearing despite the fact that the case was docketed for a trial on or after October 23, 2017, yet delayed due to the transfer of the assigned judge to the fourth circuit.

Hunter argues that GEICO falsely responded to the concise statement of material facts that she tabled in the Interrogatories, of which GEICO's original statement of answers included:

1. That no software was used to evaluate the policyholders UIM claim, which is in stark contrast to an internal notation from a claims Supervisor stating '$20k Granted Authority No Adj to Reserves based on High End of Cl Iq'; Referring to the in-house computer program 'Claim IQ'.
2. When questioned about whether incentives or bonuses were offered to claims adjusters, defense counsel answered 'No. Employees are paid a straight salary'; however, under deposition all three (3) adjusters acknowledge that they participate in an annual profit sharing program.

Thus, the panel opinion basically excused the District Court for their failures to comply with Local Rules which comport with Supreme Court precedent on how to decide summary judgment issues.

Additionally, the panel opinion went further to hold that they 'find no reversible error'; therefore, none of Hunter's proposed facts contradict a material fact that the district court relied on in conducting its summary judgment analysis..." with the claimed result that, "...none of [Hunter's] facts demonstrate that GEICO breached the contract and the implied covenant of good faith and fair dealing.

The reality is that GEICO's submitted answers to interrogatories were not consistent with Adjusters individual responses during deposition thus further highlighting genuine issues of material fact.

REASONS FOR GRANTING THE PETITION

a) Fourth Circuit decision conflicts with the Supreme Court decision

b) The case presents an issue of national importance.

1. "...a United States court of appeals has decided...an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c)

As outlined above, *Tolan v. Cotton, supra,* strongly and dramatically set forth its holding as to how Supreme Court precedent firmly establishes that the "axioms," "general rules," and "fundamental principles" direct how summary judgment decisions are to be made. When those are not followed, vacating the circuit decision and remand are required. That was true in *Tolan v. Cotton,* and it is likewise true here. The rationale for such a ruling is set forth in detail herein.

The same *Tolan*-like result was reached in *Thomas v. Nugent, 572 U.S. 1111, 134 S.Ct. 2289 (Mem), 189 L.Ed.2d 169 (2014)* two weeks after the *Tolan* decision, to wit:

> "On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eighth Circuit for further review of Appeals and which has long been mandatorily required by the United States Supreme Court's precedents, axioms, general rules, and fundamental principles."

Also, the *Tolan* opinion, *supra,* 134 S.Ct. at 1868, referred to other cases where Supreme court action has been deemed necessary to correct "a clear misapprehension of summary judgment standards in light of [Supreme court] precedents":

The District Court and the Fourth Circuit in this case basically claim to be exempt from the axioms, general rules, and fundamental principles which have historically governed the processing of summary judgment motions.

What happened in this case --- denying Ms. Hunter that to which she was entitled by rule and by case law --- can only be seen as departing from what the Supreme Court has held to be the principles according to which summary judgment decisions are to be made:

"... the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the ... motion.'

"This court still has the 'obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence.'" *U.S. v. City of Columbia, Mo.*, 709 F. Supp. 174, 175 (W.D. Mo. 1989), citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, ... (1970);

These principles are wholly violated when a party refuses to follow local rules on evidence presentation and the District Court and the Appellate Court thereafter refuses to apply the mandated evidentiary consequence. These material facts establish the claims of Bad Faith Claims handling and purposeful delay of tender policy limits further harming the injured Plaintiff.

The panel opinion's finding of 'no reversible action' cannot be squared with the reality of the record, particularly when viewed "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1596, 26 L.Ed.2d 142 (1970) and *see also Anderson, supra,* at 255, 106 S.Ct.

2505, all as quoted and cited in *Tolan v. Cotton, supra, at 1866.*

- The current panel opinion nullifies Local Rule 56.1(c).

- The current panel opinion provides precedent for courts to
  (a) ignore altogether the non-movant's position,

  (b) view no facts in the light most favorable to the non-movant, and

  (c) deny the non-movant the benefit of reasonable inferences.

2. EXCEPTIONAL IMPORTANCE

A 2012 Consumer Federation of America (CFA) report headed by a former Allstate executive revealed that Insurers nationwide were using Claim Evaluation Software designed to purposefully undervalue Bodily Injury Claims. This was enabled by the software being 'tuned' to downgrade the severity or omit injuries sustained in the accident as a form of cost containment; Adjusters were being pressured to use the artificial range calculated by the program over independent judgment.

CFA recommended that state insurance regulators and the National Association of Insurance Commissioners (NAIC) implement both policy changes and ongoing operational measures to better protect consumers from insurers that manipulate 'Colossus' and similar systems to unjustifiably lower claims' payouts. – THIS HAS NOT HAPPENED, it was further reported that 'few consumers have knowledge of these practices, <u>while even less understand the significant impact that the practices can have on their financial lives.'</u>

The United States Congress, House Committee on Financial Services reported in October 2007 on the

need for Insurance Regulatory Reform adding 'The use of these programs severs the promise of good faith that insurers owe to their policyholders.'

In this action, Plaintiff highlights the critical importance of making insurers accountable for their misuse of Claims evaluation software. In this current instance GEICO had been caught red-handed purposefully undervaluing the Plaintiffs' claims using their in-house program 'Claims IQ' and when caught out, then extorting the policyholder into removing any future bad faith legal action in exchange for rightful policy proceeds.

This action by an Insurer is not an isolated incident: *Hayes v. Harlevsville. 841A.2d 121 (Pa. Super. 2003) Alloc. Denied 870 A.2d 322 (Pa. 2005).*

(Exhibits filed against GEICO in this case show a notation made by a claim supervisor doing just that; rejecting a claims adjusters' manual evaluation over that of a computer calculated range which is designed to undervalue claims) and yet the district court and fourth circuit dismissed this critical information and instead incorrectly sided with the moving party.

As result of such claims handling misconduct, a majority of insureds nationwide are losing up to 80% of their rightful claim value despite being first party policyholders and having paid their premiums in full.

Claim centers have wrongfully become Profit Centers with Expert Witnesses in other recent Bad Faith action against GEICO reporting that claim staff have been incentivized to reduce claim payout to meet their Average Loss Payment (ALP) Goals.
As such their participation in Annual Profit Sharing Programs, of which (GEICO) defense counsel deny, helps them attain their Profit share bonus, which in

many cases exceed 17% of their annual gross salary, by keeping their claim negotiation's within the programs artificial calculated range, thus underpaying their policyholders. In *Harper v GEICO (Ed. NY 2013.* No. SC17-85, 2018 WL 4496566), under deposition a claims adjuster stated that *'if a claim is settled outside the range, that is a mark down on your report card – a reprimand.'*

This tactic unknown to many Plaintiff Attorneys pertains to the undervalued range produced by the in-house program 'Claim IQ' which negates any future pain and suffering value based on a physician's assessed Whole Person Impairment rating; This is the single largest value driver in a Bodily Injury claim which is simply ignored by their proprietary in-house system. This as well as ignoring any assessment for future treatment which are all compensable damages due under an auto accident bodily injury claim are deleted from the claim evaluation.

In this claim, Ms. Hunters' significant Whole Person Impairment rating of 34% was Input into 'Claim IQ' program, however, the value applied was $0 (zero). All of these purposeful and deceitful methods of cost containment have been available for review by both District Court and Fourth Circuit – amazingly not one comment was made, a clear lack of favor viewed towards the non-moving party and certainly not protecting the interests of the American consumers who 'will be in the fight of their life'. to receive fair compensation under their insurance policy.

GEICO like many other insurers specifically do not mention any contractual provision as a result of delaying payment of insurance proceeds in their contract, which is their 'get out of jail card' when they purposeful delay payment of policy proceeds.

Under deposition questioning, the Plaintiff and Expert witness were unable to contest the delay in tendering the limits due to the yes/no line of questioning. As a result, the District Court failed to review the critical 155 pages of exhibits which favored the Plaintiffs, which again highlights the deficiencies

deny injuries that would otherwise increase the reserves set on a claim. This case has clearly demonstrated that this practice is still in use behind closed doors and is potentially robbing hundreds of millions of dollars annually from policyholders for the sole purpose of putting the Insurers interest over that of their insured, increasing shareholder's financial interests at the expense of policyholders.

CONCLUSION

The decision to grant GEICO motion for Summary Judgment CANNOT BE SQUARED WITH "viewing the facts in the light most favorable"

OR

granting "the benefit of all reasonable inferences."

The Supreme Court is urged to grant this Petition for Certiorari and remand the case for trial in the District Court.

Respectfully submitted,

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Signed: Nikole M Hunter Dated. 01/07/2020

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