

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS

Hellen Lewis, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Auto-Owners Insurance Company, and )  
CWS Insurance Agency, Inc., )  
 )  
Defendants. )

Civil Action No. 11-CP-42-929

ORDER GRANTING CWS  
INSURANCE AGENCY, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT

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SC Court of Appeals

This matter appeared before me on April 18, 2013, upon motion of the Defendant, CWS Insurance Agency ("CWS") seeking Summary Judgment. The Defendant, Auto-Owners Insurance Company ("Auto-Owners"), also filed a Motion for Summary Judgment, which is addressed in a separate order, and the Plaintiff, Hellen Lewis, filed a cross-motion for summary judgment as well. After due deliberation, review of the memoranda and exhibits submitted, case law, and arguments of counsel, CWS' Motion is granted and the Plaintiff's Motion is denied.

FACTS

Taken in the light most favorable to the plaintiff, the facts are as follows. In 2007, Ms. Lewis was the owner of several dwellings in Spartanburg County located on Washington Road. Her primary home had a physical address of 2024 Washington Road, and she owned a duplex with a physical address of 2018 Washington Road and another duplex with a physical address of 2016 Washington Road. Ms. Lewis had owned the two duplexes (which were right next to each other) since the early 1960's, and until 2007, Ms. Lewis had insured them through Johnson Insurance. These two duplexes were used from time to time by the Lewis family as homes for family members or as rental properties.

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For at least thirty years, CWS Insurance served as Ms. Lewis' insurance broker with respect to her primary residence, 2024 Washington Road, and their automobiles. As part of the homeowners insurance coverage on 2024 Washington Road procured through CWS, liability coverage was extended for the 2016 Washington Road duplex and the 2018 Washington Road duplex. Thus, up until 2007, CWS was the broker for liability coverage for 2016 Washington Road and 2018 Washington Road (which was provided through the homeowners policy for 2024 Washington Road), and George Johnson Insurance was the broker for dwelling/fire coverage for 2016 Washington Road and 2018 Washington Road.

In early 2007 and for some time before then, State Auto Insurance Company provided fire/dwelling insurance for both 2016 and 2018 Washington Road. It is important to note that the Declarations page for the State Auto policy in effect from 2/28/06 to 2/28/07 referred to the duplexes separately, describing them on separate pages as 2016 A & B Washington Road and 2018 A & B Washington Road. Likewise, the George Johnson activity notes both refer to the duplexes separately as 2016 A & B Washington Road and 2018 A & B Washington Road. After numerous attempts to verify that repairs had been completed to a damaged deck on the 2018 duplex, State Auto sent a notice of non-renewal to Ms. Lewis for both 2016 and 2018 Washington Road, effective February 28, 2007.

On or around March 7, 2007, George Johnson Insurance was finally able to provide photographs to confirm completed repairs at 2018 Washington Road and emailed them to State Auto to attempt to reinstate coverage. On March 8, 2007, State Auto refused to renew the fire/dwelling policy that covered and described separately the 2016 duplex and the 2018 duplex. George Johnson Insurance then sought a quote from Auto-Owners Insurance Company for fire/dwelling coverage for both 2016 Washington Road and 2018 Washington Road. On April 2,

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2007, George Johnson Insurance called Ms. Lewis and gave her the Auto-Owners quote of \$1305.99, which would cover both duplexes. Ms. Lewis did not accept this quote according to the George Johnson Insurance records. Several weeks later, Ms. Lewis was preparing for a tenant to begin occupying the 2018 Washington Road duplex, and she then contacted CWS about insuring 2018 Washington Road.

Steve Williams is the Vice-President of CWS who has primarily handled Ms. Lewis' account since the early 2000's. In late May of 2007, Ms. Lewis spoke with Mr. Williams about fire/dwelling coverage for 2018 Washington Road. While speaking with Ms. Lewis on the phone, Mr. Williams completed a questionnaire regarding her request for a quote. The questionnaire clearly denotes that Ms. Lewis only provided information for one dwelling, namely the duplex located at 2018 Washington Road. CWS then took the questionnaire and created an application for dwelling/fire coverage with Auto-Owners Insurance that was signed by Ms. Lewis, in person, on June 27, 2007. The application also clearly and unambiguously describes a single dwelling to be used as a duplex with a policy limit of \$100,000. The address denoted is 2018 Washington Road.

Shortly after first being contacted by Ms. Lewis in late May of 2007, Mr. Williams personally went by the 2018 duplex and took pictures to submit to Auto-Owners with the application. He only took photographs of 2018, as CWS was aware due to the longstanding relationship that there were two duplexes side-by-side that were owned by Ms. Lewis and denoted as 2016 Washington Road and 2018 Washington Road. Mr. Williams testified in his deposition that he had a conversation with Ms. Lewis regarding her desire to insure the duplex at 2018 Washington Road but NOT the duplex at 2016 Washington Road. While Ms. Lewis testified she did not remember whether or not she had a conversation with CWS about not

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insuring 2016 Washington Road, Mr. Williams recalled that Ms. Lewis did not want dwelling insurance for 2016 Washington Road because she did not have renters going into that duplex and did not want to pay vacant dwelling premiums.

Auto-Owners issued a fire/dwelling policy covering the dwelling at 2018 Washington Road with an effective date of May 30, 2007 through May 30, 2008. The declarations page unambiguously describes one duplex. This policy was renewed in 2008 and 2009 with Auto-Owners through CWS.

On October 19, 2009, a fire occurred at the duplex located at 2016 Washington Road, rendering the home virtually a total loss. After an investigation by Auto-Owners, the claim was denied due to the lack of a dwelling/fire policy that covered the duplex at 2016 Washington Road. This lawsuit was ultimately filed by Ms. Lewis against CWS and Auto-Owners Insurance. The causes of action asserted against CWS include breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, and gross negligence. For the reasons set forth below, CWS' Motion for Summary Judgment is granted.

### ANALYSIS

Summary judgment should be granted where the pleadings, depositions, interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SCR 56(c).

#### **I. Breach of Contract**

Under South Carolina law, in order to prevail on a breach of contract claim, the plaintiff bears the burden of establishing the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach. Fuller v. Eastern

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Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Moreover, “[i]t is elemental ... that before a party can recover for the breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on.” Rabon v. State Financial Corp., 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943). In the present case, there is no contract between CWS and Ms. Lewis, and as a result, Plaintiff’s breach of contract cause of action fails.

Moreover, CWS was not a party to the contract between Ms. Lewis and Auto-Owners. Under South Carolina law, one who is not a party to a contract of insurance cannot be held liable for its breach or of the breach of the duty of good faith and fair dealing. In Carolina Bank & Trust v. St. Paul Fire & Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983), the Court of Appeals held that Peoples’ demurrer to the complaint was appropriate on a breach of the duty of good faith and fair dealing because “the duty of good faith in the performance of obligations based on or arising under the contract does not extend to a person who is not a party to the insurance contract.” Id. at 581, 310 S.E.2d at 166. This conclusion was reiterated by our Supreme Court in Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co., 355 S.C. 614, 586 S.E.2d 586 (2003) wherein the Court held that although the insurer owes the insured a duty of good faith and fair dealing, this duty of good faith arising under the contract *does not extend to a person who is not a party to the insurance contract.* Id. at 618, 586 S.E. 2d at 588 (citing Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co., *supra*).

In addition to the fact that there was no contract in place between CWS and Ms. Lewis, there is no evidence that Auto-Owners did not insure exactly what Ms. Lewis applied for and exactly what was described on the declarations page, namely one duplex structure with a

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physical address of 2018 Washington Road. Accordingly, under Charleston Dry Cleaners and Carolina Bank & Trust, a cause of action for breach of contract must fail.

Plaintiff argued that the Auto-Owners policy as written covers the 2016 Washington Road duplex based on plaintiff's belief that both structures were covered or based on some insurance industry standard. However, summary judgment is still appropriate. CWS' insurance expert, Maurice Kraut, testified that the application is not vague or ambiguous with respect to the number of structures being provided dwelling/fire coverage. Plaintiff has presented no expert testimony to counter the opinions of Mr. Kraut. Therefore, the parol evidence rule prevents any extrinsic evidence regarding what Ms. Lewis believed was covered under the policy. Additionally, Plaintiff has not presented any expert testimony regarding insurance industry standards, and namely, that the designation of 2018 Washington Road should include both separate duplexes simply because the plot of land is denoted as 2018 Washington Road. Therefore, summary judgment is appropriate on Plaintiff's breach of contract claim.

## II. Breach of Contract Accompanied by a Fraudulent Act

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." 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.

Plaintiff has failed to present any evidence of a fraudulent intent or fraudulent act with respect to the procurement of fire/dwelling coverage for Ms. Lewis, and this cause of action was withdrawn by Plaintiff's counsel at the hearing on this Motion.

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### III. Breach of Fiduciary Duty

A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). A relationship must be more than casual to equal a fiduciary relationship. Steele v. Victory Sav. Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." Island Car Wash, Inc., 292 S.C. at 599, 358 S.E.2d at 152; see Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986) ("As a general rule, mere respect for another's judgment or trust in his character is usually not sufficient to establish such a [fiduciary] relationship. The facts and circumstances must indicate that one imposing the trust has foundation for his belief that the one giving advice or presenting arguments acting not in his own behalf, but in the interests of the other party.").

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Additionally, South Carolina appellate courts have previously determined that an insurance applicant does not stand in a fiduciary relationship with the insurer or the insurance agent. See Pitts v. Jackson National Life, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002) The Supreme Court has found an applicant for an insurance policy does not stand in a fiduciary relationship with the insurer. Gordon v. Fidelity & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961) (finding no relationship of trust and confidence existed between the insurance applicant and the insurance agent); O'Connor v. Bhd. of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d

884 (1950) (holding no relation of trust and confidence existed between the insurance applicant and the soliciting agent).

In this case, Ms. Lewis provided no testimony that would give rise to a fiduciary relationship with CWS. Although Ms. Lewis had been insured with CWS for a number of years, this was the first instance that Ms. Lewis had sought fire/dwelling coverage through CWS for the 2018 duplex. Additionally, as Ms. Lewis has testified that she never mentioned to CWS that she specifically wanted coverage for the 2016 duplex, there is no evidence of a breach of any fiduciary duty. Accordingly, summary judgment is granted.

#### IV. Negligence

In South Carolina, a plaintiff in a professional liability action is required to introduce expert testimony to establish the defendant's standard of care. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002). However, where the subject matter is of common knowledge or experience so that no special training is required to evaluate the defendant's conduct, expert testimony is not required. v. Haynsworth, Marion, McKay, & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996) (stating that expert witness testimony is generally required to establish the standard of care in legal malpractice cases); see Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997) (stating that unless the subject is a matter of common knowledge, expert witness testimony is required to establish both the standard of care and defendant's failure to conform to the standard in medical malpractice cases).

In this case, there has been no expert offered on behalf of the plaintiff to establish that CWS acted negligently in some regard. Moreover, the allegations of negligence in this matter involve the way a structure is referenced or included on an application for fire/dwelling

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insurance. This subject matter does not involve common knowledge, and CWS has presented an expert, Maurice Kraut, who has testified that CWS followed industry standards in the way that the 2018 Washington Road duplex was identified on Ms. Lewis' application of insurance with Auto-Owners.

Additionally, an essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Washington v. Lexington County Jail, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999). A legal duty arises from the relationship between the alleged tortfeasor and the injured party, South Carolina Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986), and has been defined by our courts as "the *obligation* to conform to a particular standard of conduct toward another." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (2000); see also Prosser and Keeton, On the Law of Torts § 53 (5th ed. 1984) ("... 'duty' is a question of whether the defendant is under any *obligation* for the benefit of the particular plaintiff"). In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care. Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993).

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"The determination of the existence of a duty is solely the responsibility of the court." Hendricks v. Clemson University, 353 S.C. 449, 454, 578 S.E.2d 711, 713 (2003); see also Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003) (same); Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002) (same). Without a duty, there is no actionable negligence. See Huggins, 353 S.C. at 332, 585 S.E.2d at 277 (holding that "[i]f there is no duty, Defendant is entitled to a judgment as a matter of law).

Generally, under South Carolina law, an insurance agent does not have any duty to advise an insured. See Pitts v. Jackson Nat'l Life Insur. Co., 352 S.C. 319, 574 S.E.2d 502, 510 (Ct.

App. 2002) (citing Trotter v. State Farm Mutual Automobile Insurance Company, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988). A duty may be imposed, however, “if the agent, nevertheless, undertakes to advise the insured.” Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co., 310 S.C. 32, 425 S.E.2d 39, 43 (1992) (citing Trotter, 377 S.E.2d at 347). No allegations in the Complaint, and no facts in the record, support a claim that CWS undertook a duty under South Carolina law to advise Ms. Lewis about whether or not she should insure the duplex at 2016 Washington Road. Again, Ms. Lewis admits that she never mentioned that she wanted coverage for 2016 Washington Road. Under the law established by Trotter and Jackson, an agent is not required to advise an applicant about his or her insurance needs; the agent is merely required to procure the requested insurance in a non-negligent manner. The fact that Ms. Lewis viewed 2016 and 2018 collectively as “2018 Washington Road” was never communicated to CWS, thus, there is no evidence of negligence in the procurement of dwelling/fire coverage for 2016 Washington Road. Moreover, even if the court accepts Ms. Lewis’ explanation as true, she still had the opportunity to review an application for one structure and a declaration page for the structure to correct any confusion as to whether one or two structures were covered under the Auto-Owners policy. There has simply been no evidence that CWS owed her a duty to do more than procure dwelling/fire insurance for the 2018 Washington Road duplex in 2007, nor any evidence that they failed to meet any industry standards in the manner in which they procured the dwelling fire insurance for 2018 Washington Road. Accordingly, summary judgment is granted

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CONCLUSION

For the reasons set forth above, CWS' Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied.

IT IS SO ORDERED.



Honorable J. Derham Cole  
Seventh Judicial Circuit

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