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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Perry H. Gravely, Circuit Court Judge
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2023-001833
Trial Case No.: 2019-CP-23-01438

Benigna Vargas

Appellant,

v.

MGA Insurance Company, Inc. and
Calidad Latina, Inc.,

Respondents.

FINAL BRIEF OF RESPONDENT

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s/Jeanmarie Tankersley
Jeanmarie Tankersley
Clawson and Staubes, LLC
Bar No.: 101068
200 E Broad Street, Suite 450
Greenville, South Carolina 29601
Phone: (864) 331-8940
Fax: (864) 232-2921
Email: jtankersley@cslaw.com
Attorney for Respondent

December 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION FOR BAD FAITH AND UNFAIR TRADE PRACTICES ACT?

2. WHETHER THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION FOR J.N.O.V, MOTION FOR A NEW TRIAL ABSOLUTE, AND MOTION TO ALTER OR AMEND JUDGMENT?

STATEMENT OF THE CASE

This appeal stems from a simple declaratory judgment action, which Appellant Benigna Vargas ("Appellant") has attempted to convolute into an action for fraud and bad faith over the course of five years. Appellant, Plaintiff below, filed a Complaint for Declaratory Judgment on March 20, 2019 naming MGA Insurance Company, Inc. ("MGA') as the Defendant. (R. pp. 28-32). Nearly two years later, Appellant filed a Motion to Amend the Complaint in an attempt to turn the Declaratory Judgment Action into a case regarding the Unfair Trade Practices Act, Bad Faith, and Fraud. (R. pp. 686-691). MGA filed a memorandum in opposition to Appellant's motion, arguing the amendment would be futile. Specifically, Respondent argued Appellant failed to properly allege a cause of action for fraud, that a cause of action for fraud was not ripe, Respondent was exempt under the South Carolina Unfair Trade Practices Act ("SCUPTA"), the cause of action for bad faith was not ripe, and Appellant lacked standing to bring an action for bad faith. (R. pp. 1032-1037). The Circuit Court granted Appellant's Motion to Amend as to the fraud cause of action, with limitations, and denied the Motion to Amend as to the bad faith and SCUPTA causes of action. (R. pp. 1-3). Appellant's Amended Complaint was filed on September 8, 2021 adding Calidad Latina, Inc. ("Calidad") as a Defendant and adding a cause of action for fraud. (R. pp. 45-77).

Following discovery[1], MGA filed a Motion to Dismiss the fraud cause of action in

[1] Appellant states in her Initial Brief that this case involved extensive discovery which required Appellant to file multiple motions. Respondent disagrees with Appellant's assertion that the motions were caused by a failure to comply with discovery and that the motions were all resolved in Appellant's favor. However, the discovery stage of this case is not an issue on appeal so Respondents will simply note that most discovery issues were resolved between the parties and remaining issues needed to be decided by the Court, given the dispute as to the relevancy of the information sought.

November 2022. (R. pp. 1044-1051). Respondents MGA and Calidad also filed a Motion for Summary Judgment in November 2022. (R. pp. 1042-1043; 1052-1220). Appellant also filed a Motion for Summary Judgment as to the Declaratory Judgment Action (R. pp. 749-750). The Court denied the Motion to Dismiss in finding that the fraud cause of action was sufficiently pled, and denied both Motions for Summary Judgment on the grounds that neither party carried their burden of proof. (R. pp. 15-17).

Respondents then filed a Motion for Summary Judgment as to the fraud cause of action (R. pp. 1221-1333) which was granted by the Court. (R. pp. 18-20). Calidad was dismissed from the suit and trial began on October 24, 2023 on the issue of whether or not a meaningful offer of underinsured motorist coverage ("UIM") was made. (R. pp. 29-23). The jury unanimously found Defendant made a meaningful offer of UIM coverage to Alfredo Mendez. (Verdict Form[2]).

After the jury was discharged, Appellant made her post-trial motions. The Court ruled from the bench, denying the motions. Appellant did not move for additional time to make post-trial motions. (R. pp. 683-684). Regardless, Appellant then filed a Motion for J.N.O.V, Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant to Rules 50, 52, 59, and 60. (R. pp. 895-896). Respondent opposed the motion on the grounds that the motion had already been made and ruled upon, no evidence or support for relief under Rule 59 or 60, SCRCP was provided by Respondent, and the evidence presented at trial supported the jury verdict. (R. pp. 1334-1341). The Court denied Appellant's Motion on the grounds that Appellant failed to establish any basis to alter or amend its previous Order, J.N.O.V. would be inappropriate because

[2] The Verdict Form is listed as page 24 in the Index on the Record on Appeal, but is not actually located on page 24 of the Record on Appeal

more than one inference could be drawn from the evidence, and the evidence presented at trial supported the jury's verdict. (R. pp. 24-26). Appellant's appeal to this Court followed.

BACKGROUND FACTS

This case arises out of the Appellant's significant other's[3] decision to reject underinsured motorist ("UIM") insurance coverage. Appellant's significant other, Alfredo Palafox Mendez, purchased a minimum limits policy ("the Policy") of automobile insurance from Respondent Calidad Latina on March 13, 2017. (R. pp. 1222-1228). The Policy was with MGA. The Policy insured a 2012 Honda owned by Mr. Mendez. Mr. Mendez declined to purchase UIM coverage with the Policy. The Policy never provided UIM coverage from its inception until the Policy was cancelled for non-payment in August 2018.

According to Mr. Mendez, he and Appellant purchased a 2012 Honda Civic for her use and were then sent to Calidad to obtain proof of insurance. (R. pp. 1222-1228; 559-560). The dealership required he obtain "full coverage" for the vehicle, meaning "that it was going to repair everything even if I was at fault, but it would cover other people if they were in the vehicle with me." (R. pp. 1222-1223). Angela Beltran, the owner of Calidad, testified that full coverage was generally a requirement for dealerships. Full coverage consists of liability, comprehensive, and collision coverage. Otherwise, customers would often request "basic coverage." Basic coverage consists of liability and uninsured coverage. (R. p. 1223). Mr. Mendez went to Calidad and asked for full coverage, per the dealership's requirement. (R. pp. 1223; 1267; 567, lines 7-12; p. 570, lines 15-17). Mr. Mendez testified that he did not have a valid South Carolina's driver's license

[3] Alfredo Mendez is referred to as Appellant's "significant other" because it was unclear from deposition and trial testimony whether the parties were ever married.

at the time he requested insurance, resulting in less policy options being available. However, he confirmed he was presented with multiple options for policies with different carriers, but opted for the Gainsco policy because "it was the most economical one that they were offering." (R. 1223; 566, lines 10-24, p. 569, lines 22-24).

Mr. Mendez testified he had no memory of meeting with an agent at Calidad Latina. (R. p. 1223; 571, lines 7-9). He again testified he could not remember the meeting with an agent, but confirmed he signed the application including the selection/rejection form and received the coverage he requested:

> Q: Whose signature is that?
> A: Mine.
> Q: Okay. Do you have any memory of signing these documents at all?
> A: Not exactly.
> Q: Okay. What can you remember?
> A: I just remember because I see this here, but – that, yes, that's my signature but that's about it.
> Q: Okay. Do you remember anything about the conversations that you were having with the agent while you were filing out these forms?
> A: I just remember that they said this is the part of – this is your coverage on your auto and that this is what it covers, but I don't really – they didn't really go into specifics on anything, and I don't remember anything else really."
> Q: Okay. Do you remember asking any questions?
> A: No.
> Q: Okay. How come?
> A: I just went under the impression that I was going and getting the insurance that the dealer required of me, so I didn't feel the need to necessarily ask more questions of it.
> Q: Okay. And did you get the insurance that the dealer required?
> A: Yes. (R. pp. 1223-1224).

Mr. Mendez has no memory of receiving any of the pages in the application, but confirmed that each signature was his signature. (R. p.1224; 561, lines 5-18; p. 572, line 14 - p. 574, line 18). He could not remember if he received the entire form, but testified he was later mailed all of his policy information. He does not know if he reviewed it, and testified that he might have thrown it

away. (R. pp. 1225-1226; p. 579, line 8 – p. 580, line 9). Finally, Mr. Mendez also confirmed that he signed page 6 of the form under which it states, in bold typeface, in English and in Spanish:

> "**If you cannot read, comprehend, or understand this document, all or in part, it is very important that you ask for help from some person that can interpret and explain to you the content of this document**.
>
> **My signature represents that this document has been explained to me and I understand all the contents of this document**." (R. p. 1224)

Mr. Mendez confirmed that his signature meant he understood what he was signing, that it confirmed that the document was explained to him, and he understood the contents of the document. (R. p. 1224; p. 574, line 19 – p. 575, line 21). Mr. Mendez further confirmed that he signed multiple other forms in the meeting with the agent, but he has no memory of the forms. (R. p. 1224).[4] Amongst the additional forms, was a document created by Calidad written in Spanish which confirms the two types of coverage Mr. Mendez had on his policy: one basic coverage (liability + uninsured motorist) and one full coverage (liability + uninsured + collision + comprehensive). Mr. Mendez confirmed he signed that document as well, acknowledging his coverage. (R. pp. 1224-1225; p. 578, lines 7-24).

Per his testimony, Mr. Mendez reviewed and signed the application form and other documents provided by Calidad ("Executed Application"). (R. pp. 1224-1225; p. 570, line 21-578, line 24). The documents presented to Mr. Mendez included the first six pages of the application, which contained an offer of optional UIM coverage. The application complied with the South Carolina Department of Insurance's requirements for an offer of optional UIM coverage.

[4] Mr. Mendez signed additional forms for Reimbursement Motor Club, the vehicle inspection report, the bill of sale, and a form from Calidad Latina in Spanish stating that family members would need to be included on the policy if they were going to drive the vehicle.

Additionally, Calidad agents, pursuant to company policy, explain the insurance options to potential customers. (R. p. 1225). Calidad agents also explain the option of purchasing UIM coverage. (R. p. 1225).

As memorialized by his signatures on the Executed Application, Mr. Mendez declined to purchase UIM coverage. A Calidad agent signed the Executed Application to certify that the application, including the option of UIM coverage, was explained to Mr. Mendez and that Mr. Mendez understood the application. (R. p. 1225). Following Mr. Mendez's completion of the application, an employee of Calidad Latina scanned and uploaded Mr. Mendez's signature pages from the application packet and additional signature pages to the Calidad server. (R. p. 1225).

Mr. Mendez testified that after the Policy was issued, he received information from Gainsco by mail regarding the details and renewals of the policy. None of the notifications or any policy information Mr. Mendez received from Gainsco ever indicated that he had UIM coverage. He never amended the Policy or requested UIM coverage be added. (R. pp. 1225-1226; p. 579, line 8 – p. 583, line. 17).

> Q: Did you ever amend or change the policy in any way?
> A: No.
> …
> Q: Okay. Did any of the notifications or mail that you had received from GAINSCO ever indicate that you had underinsured motorist coverage?
> A: No.
> Q: Okay. Did you ever call or go to Calidad and ask for UIM coverage to be added?
> A: No.
> Q: In all the times that you've taken out insurance with any agent or any carrier, have you ever opted to have underinsured motorist coverage?
> A: No.
> Q: In all of the times that you've gotten insurance coverage, including this time with GAINSCO, has your goal been to get what the dealership has asked for and nothing else?
> A: Yes. (R. p. 1226).

On July 18, 2018, Appellant was involved in a motor vehicle collision while operating the 2012 Honda owned by Mr. Mendez. (R. p. 46). Appellant filed a claim against the driver of the other vehicle involved in the collision, alleging that she suffered personal injuries as a result of the collision. (R. p. 46). Appellant and the other driver's insurer subsequently agreed to settle the claim for $25,000.00 in exchange for a covenant not to execute. (R. p. 47). Appellant then demanded UIM coverage from MGA. MGA denied coverage on the grounds that Mr. Mendez rejected UIM coverage and had never paid premiums for UIM on his policy.

Appellant's attorney requested documentation of Mr. Mendez's rejection of UIM coverage from Calidad. On November 28, 2018, Calidad produced Mr. Mendez's signed rejection of UIM coverage to MGA. (R. pp. 53-57). MGA sent the attorney the signed portions of pages 1-6 of the application three times on November 28, 2018. (R. pp. 53-70). Upon a subsequent request from Appellant's attorney, pages 1-6 of the application were provided on March 17, 2019. (R. p. 1227).

Appellant then filed suit against MGA. In her lawsuit, Appellant sought a declaratory judgment reforming the Policy to include UIM coverage on the grounds that a meaningful offer of UIM coverage was not made to Mr. Mendez. (R. p. 49). Appellant alleges that because page four of the application was not included in the documents MGA sent on November 28, 2018 to her counsel, page four was not presented to Mr. Mendez at the time Mr. Mendez bought the Policy, over a year prior. (R. p. 49). Appellant further alleges that the absence of page four meant that Mr. Mendez did not receive a meaningful offer of UIM coverage. Id.

Approximately two years after filing the Declaratory Judgment Action, Appellant moved to amend the Complaint to add in causes of action for fraud, violation of the South Carolina Unfair Trade Practices Act ("SCUPTA") and bad faith, and to name Calidad Latina as a defendant. The

Court denied Plaintiff's Motion as to the causes of action for bad faith and violation of SCUTPA, but permitted Plaintiff to amend to allow for fraud but must follow the procedure outlined in Gaskins v. Southern Farm Bureau Casualty Ins., 354 S.C. 416 (2003).

After filing the Amended Complaint, the Court ultimately dismissed Appellant's fraud cause of action by granting Respondents' Motion for Summary Judgment on the grounds that Appellant failed to establish most if not all of the elements of fraud and Appellant lacked standing. (R. pp. 18-20). The trial proceeded against Respondent MGA on the declaratory judgment action. After hearing testimony from Appellant, Alfredo Mendez, and Respondents, and reviewing the evidence presented, the jury found a meaningful offer was made to Alfredo Mendez. (Verdict Form).

ARGUMENT

I. The Circuit Court did not Abuse its Discretion in Denying Appellant's Motion to Amend to Add Causes of Action for Bad Faith and Unfair Trade Practices Act

A. Standard of Review

The standard of review for the Court of Appeals regarding a motion to amend is abuse of discretion. Appellant incorrectly states the standard as Rule 15, SCRCP which is not the appellant standard of review, but rather the Rule governing the circuit court judge's discretion. "A motion to amend under Rule 15…is within the sound discretion of the circuit court…Because [the motion is] subject to the sound discretion of the circuit court, [it] 'will rarely be disturbed on appeal.' The circuit court's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Oulla v. Velazques,427 S.C. 428, 831 S.E.2d 450 (Ct.App.2019).

B. The Bad Faith Cause of Action was Futile as the Cause of Action was not Ripe and Appellant Lacked Standing

The trial court did not abuse its discretion in denying Appellant's Motion to Amend to add a cause of action for bad faith as amending the Complaint to add in the cause of action would have been futile. South Carolina law provides that a motion to amend may be denied where there is bad faith, undue delay, or prejudice, or where the amendment would be futile. See Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988); and Jennings v. Jennings, 389 S.C. 190, 697 S.E.2d 671 (Ct. App. 2010). Appellant's claims do not meet the legal criteria for a cause of action of bad faith. There are no facts which could have been set forth in the amended Complaint which would change the legal outcome.

Appellant attempted to allege Respondent refused to pay benefits required under a binding contract of insurance and such refusal was a breach of the implied covenant of good faith and fair dealing arising out of the contract (R. pp. 687-691).

First, Appellant's cause of action for bad faith failed to state a claim upon which relief could be granted and was futile because Appellant's claim was not ripe at the time of the proposed amended Complaint. The Declaratory Judgment Action was still pending. There had been no adjudication that UIM coverage existed and, therefore, no refusal to pay benefits of said coverage. Now, the jury has confirmed that a meaningful offer was made to Alfredo Mendez and, accordingly, the UIM coverage was rejected.

Second, Appellant's cause of action for bad faith failed to state a claim upon which relief could be granted because Appellant did not have standing to bring a bad faith claim against Respondents and, therefore, the claim was futile. South Carolina courts have recognized a first party cause of action by an insured against the insurer under their mutually binding insurance

contract. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336 (1983). Appellant did not have a contract with Respondents. Rather, Alfredo Mendez had a policy with Respondents. Appellant attempts to argue that she was an insured under the policy because she was operating a vehicle covered by the policy. However, the fact that she was driving a vehicle listed in the policy clearly does not equate to her having a contract with Respondents. Appellant further attempts to argue that she was an insured under the policy because she is listed on the policy. However, Appellant was not listed as a named insured under the policy but rather as someone who resided with Alfredo Mendez. (R. pp. 897-905; 893-894).

Appellant was not the proper party to bring a cause of action for bad faith under South Carolina law. The South Carolina Supreme Court held in Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000) that actions for bad faith refusal to pay claims to third parties who are not named insureds are not permitted under South Carolina law. The Court further stated, "South Carolina has never extended the concept of an 'insured' to include parties whose rights arise from the contract between the first party insured and the insurer." Id. at 136. Appellant could not bring a third-party cause of action for bad faith against Respondents. Accordingly, her requested amendment was futile, and the trial court did not abuse its discretion in denying the motion to amend.

B. The South Carolina Unfair Trade Practice Act was Futile

Appellant attempted to allege that Respondents' purported conduct constituted unfair and deceptive trade practices in violation of the South Carolina Unfair Trade Practices Act ("SCUPTA"). (R. pp. 686-691). The trial court did not abuse its discretion in denying Appellant's motion to add in a claim for violation of SCUPTA because adding in the cause of action would be

futile. SCUPTA exempts Respondents pursuant to S.C. Code Ann. § 39-5-40, which provides "Nothing in this article shall apply to: (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law."

The conduct complained of by Appellant falls squarely under the regulation of a state agency, the Department of Insurance. As Respondents' conduct, namely the offering of UIM coverage, is regulated by the Department of Insurance, Respondents are exempt under S.C. Code Ann. § 39-5-40. Accordingly, Appellant's claim for violation of SCUPTA was futile.

Appellant argued insurance companies and agents are not generally exempt from claims under SCUPTA by incorrectly relying on Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666 (Ct. App. 2000). In Gaskins, the Court of Appeals reversed the trial court's dismissal of fraud, negligence, breach of the covenants of good faith and faith dealing, misrepresentation, and unfair trade practices. However, the Court did not address the statutory exemption, but rather reversed the dismissal as the trial court relied on Hopkins v. Fidelity Ins. Co., 240 S.C. 230 (1962) which the Court of Appeals found had been supplanted by the South Carolina Rules of Civil Procedure. In the subsequent Supreme Court ruling in Gaskins v. Southern Farm Bureau Cas. Ins. Co., 354 S.C. 416, 581 S.E.2d 169 (2003), the Court found that Hopkins was not supplanted but rather, has been modified to allow for fraud claims.

Finally, Appellant attempted to circumvent the statutory exemption in S.C. Code Ann. § 39-5-40 by relying on the Claims Practice Act. (R. pp. 687-691). However, the Claims Practice Act does not create a private cause of action, which is explicitly stated in the case relied upon by Appellant. In Gaskins, the Court of Appeals upheld the dismissal of the cause of action under the

Claims Practice Act, stating,

> "We also affirm the trial court's dismissal of the Gaskin's cause of action alleging wrongful adjustment pursuant to South Carolina Code Annotated Section 39-59-20 (1989) (The South Carolina Claims Practices Act)…Section 38-59-20 declares that a third party may pursue *administrative action* before the Chief Insurance Commissioner if an insurer *inter alia* 'knowingly misrepresents to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages. The Act does not create a private cause of action…A cause of action for wrongful adjustment under section 38-59-20 only entitles the Gaskins to an administrative remedy. (Emphasis in original)." Gaskins, at 673 (Ct. App. 2000).

Appellant attempted to change a declaratory judgment action into an action for bad faith or fraud, under the South Carolina Unfair Trade Practices Act which was improper under the statute. Appellant could attempt to make a claim under the Claims Practice Act, but only administratively. South Carolina law does not permit a private cause of action under the Claims Practice Act. Masterclean, Inc. v. Star Ins. Co., 347 S.C. 405, 556 S.E.2d 371 (2001). However, even if Appellant attempted to make an administrative claim under the Claims Practice Act, it would likely fail as the conduct complained of by Appellant was conduct between her counsel and Respondents or her counsel and Respondents' counsel, and did not involve Respondent directly.

The trial court did not abuse its discretion in denying Appellant's Motion to Amend the Complaint to include a cause of action for violation of SCUPTA and a cause of action for bad faith as both claims would have been futile and failed on legal grounds. The trial court's decision should be upheld.

II. The Circuit Court Properly Denied Appellant's Motion for J.N.O.V., Motion for New Trial Absolute, and Motion to Alter or Amend the Judgement

A. Standard of Review

Appellate courts apply the same standard that governs the trial court when reviewing a

J.N.O.V. motion. That is, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The motion must be denied if the evidence yields more than one reasonable inference or its inference is in doubt. A motion for J.N.O.V. may be granted *only* if no reasonable jury could have reached the challenged verdict. The trial court's ruling will be reversed *only* if no evidence supports the ruling below. In deciding the rulings, neither the trial court or appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.LP., 399 S.C. 322, 732 S.E.2d 166 (2012) (emphasis added); Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797 (2022); Gadson v. ECO Servs. Of S.C., Inc., 374 S.C. 171 (2007).

The standard of review for a motion for a new trial absolute is abuse of discretion. "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Watts v. Chastain, 438 S.C. 597, 885 S.E.2d 398 (Ct.App.2022) (quoting Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996).

Appellant's brief includes as an issue on appeal whether or not the trial court erred in denying her Motion for J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant to Rules 50, 52, 59, and 60. However, the brief itself is limited in argument to whether or not the J.N.O.V should have been granted. Appellant has waived any argument relating to Rules 59 and 60, SCRCP. However, to the extent they need to be addressed the standard of review for Rules 59(e) and 60, SCRCP is abuse of discretion. Rouvet v. Rouvet, 388 S.C. 301, 696

S.E.2d 204 (Ct.App.2010).

B. Motion for J.N.O.V.

Rules 50 and 59, SCRCP require motions for J.N.O.V. and motions for new trials be made "promptly after the jury is discharged, or in the direction of the court not later than 10 days thereafter." Appellant made her Motion for J.N.O.V after the jury was discharged. (R. p. 683, lines 13-24). Argument was presented after the jury was discharged, and the court ruled from the bench, denying the motion. (R. p. 683, lines 18-22). Appellant could have requested 10 days from the court, pursuant to the Rules, to make post-trial motions rather than make the motion after the jury was discharged. However, Appellant did not move for additional time, but rather moved forward with the motions once the jury was discharged.

Appellant improperly then attempted a second bite at the apple by filing a Motion for J.N.O.V., Motion for New Trial Absolute, and Motion to Alter or Amend the Judgment Pursuant to Rules 50, 52, 59, and 60, SCRCP. (R. pp. 895-896). "[A] party must make a motion for a new trial promptly after the jury is discharged **or** request ten days within with to make the motion." Boone v. Goodwin, 314 S.C. 374, 376 (1994) (holding the respondent did not timely move for a new trial where the party did not make motions after the jury was discharged and did not move for ten days to make post-trial motions) (emphasis added). Appellant cannot both make the motion at the conclusion of trial and again after the motion was denied. Appellant's written motion was not properly before the trial court and should not be considered as part of the appeal. Appellant's first motion to set aside the verdict was simply "we don't think the verdict was supported by the evidence." (R. p. 683, lines 15-17). Appellant failed to argue how no reasonable jury could have reached the verdict. Accordingly, denial of the motion by the trial court was proper.

If Appellant's subsequent written motion is to be considered, the trial court's ruling should still be upheld because viewed in the light most favorable to Respondents, the evidence at trial supports the jury's verdict, or yields more than one reasonable inference. Appellant's motion and argument at trial centered on emails and faxes sent in 2018 and 2019 between Respondents and counsel for the parties. They have no bearing on whether a meaningful offer was made to Alfredo Mendez in 2017 at the time the policy was purchased.

Appellant focuses primarily on the argument that Angela Beltran's deposition testimony and trial testimony were inconsistent. Even if that were true, which is denied, it is not a proper argument for the Court of Appeals to decide when considering a motion for J.N.O.V., as "***neither*** the trial court or appellate ***court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.***" See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.LP., 399 S.C. 322, 732 S.E.2d 166 (2012) (emphasis added); Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797 (2022); Gadson v. ECO Servs. Of S.C., Inc., 374 S.C. 171 (2007).

However, as demonstrated in Ms. Beltran's direct examination and cross examination, she could easily explain her answers in her deposition and any confusion either she or Appellant's counsel had during questioning. (R. pp. 462-486). In actuality, Ms. Beltran's deposition testimony, trial testimony, and subpoena response[5] (which was provided in evidence at trial) all support her assertion that the entirety of insurance applications are provided to customers and only the pages of the forms which include identifying information (descriptions of the limits, policy information,

[5] Appellant argues Ms. Beltran's subpoena response demonstrates that page 4 of MGA's application was not provided to Mr. Mendez because Ms. Beltran signed a verification page noting that the documents produced were a complete copy of the documents **requested** and maintained by Calidad. However, Appellant never produced at trial a copy of the subpoena itself showing what was "requested."

signature pages, etc. are saved in the agency's system). (R. pp. 525-532)

> Q: And then once the clients would sign the documents, what would you do with them?
> A: So the customer will sign the documents, we'll scan them in our system and save it there."
> …
> Q: And what documents would you upload?
> A: The application. The application, everything that it requires to be signed
> …
> Q: And would you keep copies of the documents the client signed as well?
> A. Yeah, for sure. (R. p. 1281).

> A: So we scan all the – we'll scan all the documents that has signature pages. The rest of the document that don't have the signature pages is still in the computer system in the MGA or Gainsco system where we can just download them. And we scan that separately from the package…
> A: …There is this package that comes with the application from Gainsco that it has everything in there. So we download all that. We show it to the customer for him to sign. We explain to him everything. We keep the pages that have the signatures. And the rest of the pages either we have to send to the company or we give to the customer. Page 4 – in there is a page that we, as agents, need to give to the customer. Because that Page 4 indicates all the coverage as an explanation and a phone number for you to call the state if you have any questions about it. So if we wanted to get that form, we would – we just went to their system where they have everything there and just print it again. (R. p. 463, line 10 – p. 465, line 9)
> …
> A: Our policy is to keep the signature pages and any back up that we have from the customer, right? So Page 4 doesn't have any signatures. But if it's required from the company or from – if the customer wants it again, we have a way to just print it out and give it to the customer, send it to the company, or do anything we want with that. So in our policy, in our world, we have all the documents. They may not be in the same order or in the same place, but we have them. (R. p. 476, lines 5-14).

Appellant also argues that Ms. Beltran's testimony at trial regarding who the agents were at Calidad in Greenville in 2017 was opposite of her deposition testimony, which is incorrect. Both Ms. Beltran's deposition testimony and her testimony at trial confirmed the three agents who worked in the office in 2017. (R. p. 490, lines 10-20; R. p. 1280, lines 2-13). Appellant argues there were a few other inconsistencies in Ms. Beltran's testimony. Those arguments are incorrect

based on the evidence presented at trial. Regardless, the jury heard all of Appellant's arguments attacking Ms. Beltran's credibility as well as Respondents' arguments in support of her testimony. The jury was able to evaluate and weigh Ms. Beltran's credibility when deciding the verdict. It is not the responsibility of the court to decide credibility issues or resolve conflicts in the testimony and evidence. Reiland v. Southland Equip. Serv., 330 S.C. 617, 500 S.E.2d. 145 (Ct.App. 1998).

S.C. Code Ann. Sec. 38-77-350 mandates the director of the South Carolina Department of Insurance to "approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies." S.C. Code Ann. § 38-77-350(A). The form must contain:

> (1) a brief and concise explanation of the coverage;
>
> (2) a list of available limits and the range of premiums for the limits;
>
> (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
>
> (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
>
> (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

Id.

Appellant argues Respondents did not produce evidence showing that a complete UIM selection rejection form was presented to Mr. Mendez. To the contrary, there was evidence that the MGA application was printed and provided to Mr. Mendez, which included page 4 of the selection rejection form, as well as a number of other pages which were later taken out prior to scanning and saving some of the application (along with other documents the agency kept in

addition to the application). (R. p. 479, line 12 – p. 481, line 24; p. 608, line 1- p. 609, line 24). Appellant argues that Respondent did not offer testimony as to who met with Mr. Mendez, which is incorrect. (R. p. 499, lines 10-16). At trial, Mr. Mendez himself testified he believed he met with Ms. Beltran. (R. p. 569, lines 7-8). However, even if he did not meet with Ms. Beltran, Ms. Beltran provided testimony of the general practice of all the agents when they provide insurance options to their customers. (R. p. 470, line 19 – p. 471, line 1; p. 491, line 1 – p. 497, line 24; p. 532, line 1 – p. 535, line 6; p. 540, lines 1-22). In Cohen v. Progressive N. Ins. Co., 402 S.C. 66, 737 S.E.2d 869 (Ct.App. 2013), a meaningful offer was found where the agent had no memory of the communication with the insured, but testified that their general practice is to explain the coverage. In that case, the insured testified he spent less than five minutes signing the documents and he did not review them. Regardless, the offer was found to be meaningful. Importantly, Mr. Mendez testified he had no reason to believe he was not presented with the entire selection rejection form, including page 4. (R. p. 573, lines 9-20). He confirmed all the signatures on the application and additional documents from the agency were his signature. (R. p. 570, line 21- p. 575, line 21). He confirmed the pages of the form were numbered and that he did not notice a page missing. (R. p. 573, lines 3-20). He additionally confirmed that he signed the form underneath language in both English and in Spanish (in bold) which read "**If you cannot read, comprehend, or understand this document, all or in part it is very important that you ask for help from some person that can interpret and explain to you the content of this document. My signature represents that this document has been explained to me and I understand all the contents of this document.)**" (R. p. 574, line 14 – p. 575, line 21). There was ample evidence from Mr. Mendez's testimony, Ms. Beltran's testimony, and in the exhibits provided to the jury

which would allow the jury to find a meaningful offer was made because the form complied with the statutory requirements. In Bagnal vs. Foremost Ins. Group, 2011 U.S. Dist. LEXIS 3396 (D.S.C. 2011), the Court found a meaningful offer where an insured claimed he only received one page of an offer form, but did not dispute he signed it. The Court noted the signed acknowledgement of that form showed that the form had been explained to him and he understood it. Similarly, in Slice vs. Liberty Mut. Fire Ins. Co., 2009 U.S. Dist. LEXIS 113864 (D.S.C. 2009), the Court found a meaningful offer where the insured claimed she only received 2 of the 4 pages of the form, but could not really remember which pages she received. She acknowledged that the signature was her signature. The agent also testified that it was normal procedure to give all of the pages, but only save the signature pages. The Court again recognized the pages were numbered and that was sufficient to alert somebody if a page was missing.

Further, even if the jury believed the form did not comply with the statutory requirements, there was ample evidence showing that a meaningful offer was made under the Wannamaker standard. In South Carolina, "automobile insurance carriers shall offer . . . underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute." S.C. Code Ann. § 38-77-160. The South Carolina Supreme Court interpreted this statute to require that "the insured . . . be provided with adequate information . . . to allow the insured to make an intelligent decision of whether to accept or reject the coverage." State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). "To comply with this statutory obligation, the insurer's offer of UIM coverage must be 'meaningful.'" Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 630,

658 S.E.2d 106, 109 (Ct. App. 2008).

The South Carolina Supreme Court set forth a four-factor test in Wannamaker to determine whether an offer of UIM coverage is meaningful. 291 S.C. at 521, 354 S.E.2d at 556. The Wannamaker test requires:

> (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium.

Id. at 521.

Both Mr. Mendez and Ms. Beltran testified that the agent went over the insurance options with him, explained his coverage and choices, and specified the limits of coverage and costs of coverages both verbally and in writing. (R. p. 489, lines 15-21; p. 493, lines 2-24; p. 499, line 4 – p. 506, line 23; p. 569, lines 16-24; p. 574). Appellant attempted to argue that Ms. Beltran was incorrectly explaining insurance and, therefore, could not provide Mr. Mendez with a meaningful offer. The jury heard evidence, however, of Ms. Beltran's impressive educational background, her knowledge of the insurance industry, and her growing business which she founded for the purpose of serving the Hispanic community to ensure that insurance is explained in Spanish, if requested, and that their customers understand what they are choosing. (R. p. 487, line 13 – p. 490, line 9.; p. 190, lines 1-14). Ms. Beltran correctly testified regarding the types of insurance coverage available in South Carolina, the nature of the coverage, and the policy that Mr. Mendez ultimately purchased. (R. p. 494, lines13-21; p. 502, lines 3-24; p. 516, line 1- p. 522, line 13). The jury, in weighing Mr. Mendez's sophistication, also heard testimony regarding his level of understanding of the English language (including that he has lived in the United States for 20 years), the fact that

he has purchased a number of insurance policies over the years, that he has repeatedly used Calidad Latina as his agency (demonstrating a level of trust), and he is 44 years old and testified he understands what his signature represented on the forms. (R. p. 565, line 4 – p. 567, line 15).

In reviewing whether a J.N.O.V. motion was properly granted or denied, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The motion must be denied if the evidence yields more than one reasonable inference or its inference is in doubt. A motion for J.N.O.V. may be granted *only* if no reasonable jury could have reached the challenged verdict. The trial court's ruling will be reversed *only* if no evidence supports the ruling below. For the reasons set forth above, it is clear that in viewing the evidence in light most favorable to Respondents, that the evidence supported the verdict, or at least yielded more than one reasonable inference. The evidence at trial showed that at the time he took out the policy in 2017, Mr. Mendez wanted and received simply the insurance the dealership required of him, that UIM coverage was explained to him orally, presented to him in the application, and explained to him again orally. Mr. Mendez rejected the additional coverage and signed the forms confirming his rejection. He never attempted to add UIM coverage to the policy after that date. Mr. Mendez testified repeatedly that he had no independent memory of the forms provided by the agents, and therefore, could not testify that he was not presented with page 4 of the application. Additionally, Mr. Mendez confirmed his signature on multiple pages of the application, and acknowledged that his signature represented that the document was explained to him and that he understood the contents of the document. The pages of the application were numbered. Mr. Mendez did not testify that page 4 of the application was missing, nor did he testify that he informed the agent the page was missing. Mr. Mendez could not argue that he failed to read or

comprehend the document, as South Carolina law states that "a person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003).

B. Motion for New Trial Absolute

Appellant's initial brief includes as an issue on appeal whether or not the trial court erred in denying her Motion for J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant to Rules 50, 52, 59, and 60. As previously mentioned, the brief itself is limited in argument to whether or not the J.N.O.V should have been granted. Accordingly, Appellant has not presented or preserved an argument that she should have been granted a New Trial Absolute. To the extent an argument is required in opposition, Respondents maintain there was no abuse of discretion in denying Appellant's Motion for New Trial Absolute for the reasons set forth herein.

C. Motion to Alter or Amend the Judgment

Similarly, to the extent Appellant is arguing her Motion to Alter or Amend pursuant to Rules 59 and 60, SCRCP was improperly decided, Respondent disagrees. First, Appellant failed to provide any argument supporting or discussing the grounds for the Motion to Alter or Amend in her Motion or Supporting Memorandum to the trial Court. Accordingly, Appellant did not preserve any argument on the Motion to Alter or Amend the Judgment for appeal. Further, Appellant does not now provide any argument in support of the Motion in her appeal. Assuming, *arguendo*, that the argument was properly preserved, Appellant has failed to show an abuse of discretion on the part of the trial court in denying the Motion, for the reasons set forth herein.

Further, Rule 59, SCRCP does not provide any procedure for a party to amend a motion for new trial or add new grounds for the motion. See Gary v. Bryant, 298 S.C. 285 (1989).

CONCLUSION

For the reasons stated herein, Respondents request this Court affirm the Circuit Court's denial of Appellant's Motion to Amend the Complaint and Motion for J.N.O.V., Motion for New Trial Absolute, and Motion to Alter or Amend Judgment, and to dismiss this appeal with prejudice.

Respectfully submitted,

s/Jeanmarie Tankersley_____
Jeanmarie Tankersley
Clawson and Staubes, LLC
Bar No.: 101068
200 East Broad Street, Suite 450
Greenville, South Carolina 29601
Phone: (864) 331-8940
Fax: (864) 232-2921
Email: jtankersley@cslaw.com
Attorney for Respondent

December 2, 2024

CS | LAW

CLAWSON & STAUBES

JEANMARIE TANKERSLEY
LICENSED IN SC AND GA
JTANKERSLEY@CSLAW.COM

December 2, 2024

File No.: 20190364.000

Via E-Mail to ctappfilings@sccourts.org
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Benigna Vargas vs. MGA Insurance Company, Inc., & Calidad Latina, Inc.
Appellate Case No.: 2023-001833

Dear Ms. Kitchings:

Enclosed please find Respondents' Final Brief for filing in the above-referenced case.

Should you have any questions, please do not hesitate to contact me.

Thank you for your assistance in this regard.

Very truly yours,

CLAWSON and STAUBES, LLC

Jeanmarie Tankersley

JT/vlm
Enclosure
cc: Raymond Wooten, Esq. (w/enclosure)