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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

B. Alex Hyman, Circuit Court Judge

Lower Court Case No. 2020-CP-26-00808

A. Tebele & Sons, a South Carolina General Partnership, Appellant-Respondent,

v.

Certain Underwriters at Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona, and Crescent Coast Insurance, LLC, Respondents,

Of which Crescent Coast Insurance, LLC is the Respondent-Appellant.

Appellate Case No. 2024-000705

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in denying Tebele's motions for directed verdict and JNOV on its breach of contract claim against the Insurers where the insurance policy was ambiguous as to whether a sprinkler system was required at Tebele's 1901 North Kings property and Tebele was therefore entitled to coverage as a matter of law?

2.

Whether Tebele was entitled to coverage as a matter of law where, even if the policy was unambiguous, the limitations on coverage were not delivered to Tebele until after the loss occurred?

3.

Whether the trial judge erred in denying Tebele's motion for a new trial absolute or a new trial nisi additur against Crescent Coast where the $15,000 award was grossly inadequate considering the insurance policy provided for $2.85 million in coverage and Tebele presented undisputed expert testimony that the cost to rebuild the property was more than $8 million?

STATEMENT OF THE CASE

A. Tebele & Sons (Tebele) filed a summons and complaint against Certain Underwriters at Lloyd's, HDI Global Specialty SE, General Security Indemnity Company of Arizona (Insurers), and Crescent Coast Insurance on February 3, 2020. Tebele brought causes of action for breach of contract and bad faith against the Insurers. In the alternative, Tebele pled causes of action against Crescent Coast for negligence and breach of fiduciary duty.

Both Tebele's motion for partial summary judgment and the Insurers motion for summary judgment were denied. The case proceeded to a jury trial before the Honorable Alex Hyman on December 4 – 13, 2023. Tebele was represented by Trey DesChamps and Gene Connell. The Insurers were represented by Roman Harper, Andrew Watson, and Dominic Starr. Crescent Coast was represented by Caleb Riser and Hunter Adams. Tr. 1.

The jury returned a verdict in favor of the Insurers on both the breach of contract and bad faith causes of action. The jury found Tebele 60% negligent in its negligence action against Cresent Coast and therefore found for Cresent Coast on that claim. However, the jury found in Tebele's favor on the breach of fiduciary duty claim and awarded $15,000 in damages.

Tebele filed a post-trial motion seeking a new trial and a judgment notwithstanding the verdict as to its claims against the Insurers. Tebele also filed a post-trial motion for a new trial absolute or a new trial nisi additur against Crescent Coast. The trial judge denied both motions.

Tebele and Cresent Coast filed cross appeals.

STANDARD OF REVIEW

Issues 1 and 2

"When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. DOT*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). "The trial court can only be reversed by this Court when there is no evidence to support the ruling below." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994).

Issue 3

"The trial judge alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (citing *Easler v. Hejaz Temple*, 285 S.C. 348, 329 S.E.2d 753 (1985)). When the verdict is grossly inadequate "so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556.

"Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge." *Toole v. Toole*, 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973). The trial judge's "exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law." *Id*. "[O]n appeal of the denial of a motion for a new trial nisi, this Court will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute." *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556.

STATEMENT OF FACTS

Introduction

This case involves a dispute over insurance coverage. A. Tebele & Sons (Tebele) owns several commercial properties throughout Myrtle Beach. Abraham Tebele (Mr. Tebele) is the managing partner of this family business. All the properties are covered by a single insurance policy which is renewed or changed every year. One of the properties, 1901 North Kings, was destroyed by fire on February 24, 2019. The policy at issue in this case went into effect on January 15, 2019. At that time, part of this property was being leased by a tenant who ran a Mexican restaurant called La Casona. Investigation of the fire revealed that the fire started in La Casona and that the fire was accidental.

Tebele made a claim with his insurance to pay for the building which was a total loss. The total insured value of the property as agreed to by the parties in the policy was $2.85 million. The Insurers denied the claim on the basis that 1901 North Kings did not have an operational sprinkler system at the time of the fire. Although Tebele had spent more than $220,000 to have a sprinkler system designed and installed at the property, the City of Myrtle Beach and the subcontractors had not finalized connecting the sprinkler system to the City's water supply.

The dispute in this case primarily turns on the interpretation of two documents: the "protective safeguards endorsement," and the "schedule of values." Neither of these documents were given to Tebele until after the fire occurred. The protective safeguards endorsement provides in part that "[a]s a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above." Pl.'s Ex. 2, 92. The "schedule" is not the same thing as the "schedule of values."

The "schedule" which appears immediately above that sentence reads:

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.

Describe any "OTHER": (a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required
(b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times
(c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.

The symbol "AS" refers to an automatic sprinkler system. The schedule of values does not contain the symbol AS anywhere on it. Although difficult to read due to the small type, line number 10 on the schedule of values indicates that 1901 North Kings has a sprinkler system which covers 100% of the property.

The schedule of values is shown here:

AmRisc Application / Schedule of Values

Any person who knowingly and with intent to defraud any insurance company files an application for insurance or statement of claim containing any materially false or misleading information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and subjects the person to criminal and (NY; substantial) civil penalties. In some states insurance benfits may also be denied. **By submission of this application the insured and the agent represent that all information is true and correct to the best of their knowledge and that they have not deleted or altered the questions herein.**

s (EIFS)
nted)

Yellow = Required
Orange = Required for ACIC
Blue = Required if habitational
Green = Required for General Liability
Gray = Required for High Hazard Quake

roperties. (Warranted)

Total # Units	Total Sq. Ft.	Avg % Occup	Avg % Sprinklered
0	271,000		24%

Bl/Rents per Unit per Month
Sq. Ft. per Unit

* Bldg No	*Property Ty	Location Name	AddressNu	*Street Address	*City	*State Co	Is Prop Mgd or Owne	Date Added to Sche	*# of Unit	*Square Foota	% Occupi	Percent Sprinkler	Sprinklered (Y/N)	ISO Prot Cla	Flood Zone
1	Building		2909	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
2	Building		2911	Hwy 17 S	Atlantic Beach	SC				10,000		0%	n	2	
3	Building		502	30th Ave S	Myrtle Beach	SC				900				1	
4	Building		3001	N Kings Hwy	Myrtle Beach	SC				17,000				1	
5	Building		3205	N Kings Hwy	Myrtle Beach	SC				8,400		0%	n	2	
6	Building		1600	E/S N Kings Hwy	Myrtle Beach	SC				10,000		0%	n	1	
7	Building	310-312	310	9th Ave N	Myrtle Beach	SC				1,000		0%	n	1	
8	Building	316-320	316	9th Ave N	Myrtle Beach	SC				3,800		0%	n	1	
9	Building	609-611	609	S Kings Hwy	Myrtle Beach	SC				3,500		0%	n	1	
10	Building		1901	N Kings Hwy	Myrtle Beach	SC				36,000		100%	y	1	
11	Building		610	W/S S Kings Hwy	Myrtle Beach	SC				25,000		100%	y	1	
12	Building		1012	S Kings Hwy	Myrtle Beach	SC				20,000		0%	n	1	
13	Building		900	Chester St	Myrtle Beach	SC				3,000		0%	n	1	
14	Building		201	Main St	North Myrtle Beach	SC				5,000		0%	n	2	
15	Building	94-96	94	S Kings Hwy	North Myrtle Beach	SC				10,000		0%	n	2	

The Insurers used the protective safeguards endorsement and the schedule of values to deny coverage. Their interpretation was that the schedule of values which listed the 1901 North Kings property as *having* a sprinkler system meant that the 1901 North Kings property was *required* to have a sprinkler system. That distinction is the central issue in this case.

Obtaining Insurance

Mr. Tebele's father and uncle moved to Myrtle Beach in the 1950s and started a small retail store. Tr. 747, l. 19 – 748, l. 22. Most of the Tebele family lived in New York but they would come to Myrtle Beach during the summers and holidays to work. Tr. 749, ll. 2 – 10. Mr. Tebele moved to Myrtle Beach full-time in 1995 to help his father run the family business. Mr. Tebele's father passed away in 2009 and Mr. Tebele has run the business himself ever since. Tr. 749, ll. 14 – 23. Tebele began purchasing properties throughout Myrtle Beach in the 1960s and has now accumulated several properties. One of the properties is located at 1901 North Kings Highway which they purchased in 1990. Tr. 753, l. 19 – 754, l. 3.

Mr. Tebele met Joey Sutherland in 2011 when Sutherland was working in the restaurant business. Tr. 507, ll. 4 – 15. In 2017, Sutherland approached Mr. Tebele about insuring his properties, including 1901 North Kings. Tr. 758, ll. 1 – 23. At that time, Sutherland was working for Global Risk Partners. Tr. 759, l. 24 – 760, l. 3. However, Sutherland didn't sell Mr. Tebele any insurance at that time. Tr. 511, ll. 21 – 25.

Sutherland left Global Risk Partners in 2018 and went to work for Crescent Coast as a "producer," i.e., a person who sells insurance. Tr. 503, ll. 6 – 13; tr. 508, ll. 1 – 4. While working for Crescent Coast in 2018, Sutherland again approached Mr. Tebele about selling him insurance on his properties. Tr. 512, ll. 1 – 6. Mr. Tebele recalled: "He would come around the office or

anytime I was at the building he would, like, warm up to me and say: You know, Mr. Tebele, I could save you a lot of money, let's sit down." Tr. 760, ll. 16 – 25.

Mr. Tebele agreed to Crescent Coast assisting him with obtaining a new insurance policy. In August 2018, Mr. Tebele met with Sutherland and David Egan (the managing member of Crescent Coast), to begin the process of filling out insurance applications. Tr. 531, l. 24 – 532, l. 4. Mr. Tebele was seeking a policy to cover all his properties for a total amount of $22 million. Crescent Coast sought out a company called Amwins[1] to help obtain a policy. Tr. 648, ll. 3 – 25.

As part of the application process, Mr. Tebele was asked a variety of questions about his properties, including whether they had fire sprinkler systems installed. Tr. 536, l. 22 – 537, l. 7. According to Sutherland, Mr. Tebele informed Crescent Coast that a sprinkler system was currently being installed at the 1901 North Kings property and that it would be completed prior to January 15, 2019, the date on which the new policy would need to go into effect. Tr. 538, ll. 11 – 22.

Egan testified that the schedule of values was a document that Amwins required as part of the underwriting process. Tr. 660, ll. 18 – 23. Egan was the person who input data into the schedule of values, including that the 1901 North Kings property had a sprinkler system that covered 100% of the property. Tr. 662, ll. 5 – 14. The final insurance application was sent by Egan to Mr. Tebele on January 11, 2019. Tr. 668, ll. 3 – 5. Mr. Tebele signed that application on January 14 and returned it to Egan who in turn sent the application to Amwins so that the insurance policy could officially begin on January 15, 2019. Tr. 666, l. 11 – 668, l. 21.

[1] There are several different corporate entities with "Amwins" as part of their name all of which are involved in various aspects of the insurance business. Melvin Depo. Tr. 14, l. 17 – 18, l. 7. None of these entities are parties to this case and counsel will refer to them collectively as Amwins for simplicity.

Mark Melvin, an underwriter for Amwins, received Tebele's insurance application on January 14, 2019. The application identified the 1901 North Kings property as having a sprinkler system which covered 100% of the property. Melvin Depo. Tr. 28, ll. 14 – 24. Amwins issued a "binder" on January 15, 2019 which confirmed insurance coverage for Tebele's properties. Melvin Depo. Tr. 35, ll. 2 – 13.

The binder is only six pages long and does not include the language of the protective safeguards endorsement. Melvin Depo. Tr. 87, l. 12 – 88, l. 13; Def.'s Ex. 25. The binder does have a page that lists "common forms" which includes the following code: "SRU-024 710 Protective Safeguards – Fire." Def.'s Ex. 25, 5. The schedule of values is not listed as a "common form," nor is it even referenced anywhere on the binder. *Id*.

The binder would only last for ninety days because the full insurance policy would be issued during that time frame. Melvin Depo. Tr. 37, l. 21 – 38, l. 5. The full policy for Tebele's properties was issued on February 6, 2019, and was sent to Crescent Coast, but not to Tebele, the following day. Melvin Depo. Tr. 44, l. 14 – 45, l. 6; 56, l. 9 – 57, l. 7.

The full policy is more than one hundred pages long. On the property declarations page of the policy, several codes are listed under the heading "Forms Applicable to Common Forms" which includes the following: "SRU-024 0710 – Protective Safeguards – Fire Endorsement." Pl.'s Ex. 2, 15. Page 92 of the policy includes the full language of the protective safeguards endorsement. Pl.'s Ex. 2, 92. However, the policy does not include the schedule of values and there is no reference to the schedule of values on the "Forms Applicable to Common Forms" section of the property declarations page. Pl.'s Ex. 2, 92.

Egan first received the full insurance policy on February 7, 2019, but he did not immediately forward it to Mr. Tebele. Tr. 673, ll. 11 – 18. In fact, Egan didn't give the policy to

Mr. Tebele until after the fire had occurred. Egan handed Mr. Tebele a copy of the insurance policy for the very first time while they were both standing in front of the bunt down 1901 North Kings property. Tr. 674, ll. 1 – 21.

The building at 1901 North Kings was insured for $2.5 million. In addition to the building itself, the contents were insured for $250,000 and the loss of rent was insured for $100,000 for a total insured value of $2.85 million. Tr. 296, l. 22 – 297, l. 2. Furthermore, the policy was an "all-risk" policy meaning that the property was "insured for all risks, unless it's specifically excluded or limited within the policy." Tr. 298, ll. 16 – 21.

Sprinkler System Installation

In 2016, Ms. Garcia sought to lease part of the 1901 North Kings property for her La Casona restaurant. After applying for a license with the City of Myrtle Beach, the City informed Tebele that a sprinkler system needed to be installed in the building due to a change in the fire code. Tr. 768, ll. 2 – 25.

Mr. Tebele contacted Crawford Sprinkler Company which is in the business of installing fire sprinklers. Tr. 769, l. 10 – 70, l. 2. Mike Dover, an employee at Crawford, testified that they were hired by Mr. Tebele to install a sprinkler system at 1901 North Kings around March of 2017. Tr. 231, ll. 5 – 25. Mr. Tebele recalled that the contract between him and Crawford for the sprinkler system installation indicated that no one other than Crawford was allowed to touch the system until it was completed by them. Tr. 802, ll. 3 – 25. The relevant portion of Tebele's contract with Crawford reads: "[U]ntil Crawford . . . has completely installed the system and has conducted the hydrostatic test, performance has not been completed, and only upon that being done by Crawford . . . does it assume any responsibility or obligation to the functioning of the system as installed by

it. *Under no circumstances is anyone else permitted or authorized to place the system in service or perform a test upon it*." Tr. 896, ll. 5 – 23; Pl.'s Ex. 4 (emphasis added).

Dover explained that designing a sprinkler system could take between two weeks and two months. Tr. 233, ll. 7 – 13. Then, the plans for the design must be submitted for approval to the governmental authority where the building is located. Tr. 233, ll. 14 – 17. After the government approves the plan, the sprinkler system will be fabricated by the company by ordering all the parts and putting them together. Tr. 233, l. 18 – 234, l. 2. After the system is fabricated, it will be taken to the building to be installed. Tr. 234, ll. 3 – 12. And finally, after the system is completely installed, it will need to be connected to water, which is normally done by connecting the system to the local government's water supply. Tr. 234, ll. 13 – 25.

The estimate given to Mr. Tebele just to design the system was $21,789. Tr. 237, ll. 8 – 25. Crawford sought approval from the City of Myrtle Beach for their design and received approval on June 13, 2017. Tr. 241, l. 2 – 242, l. 6. The price for the materials and installation of the sprinkler system was agreed at $214,727. Pl.'s Ex. 4. Mr. Tebele signed this agreement with Crawford on June 26, 2017. Tr. 243, ll. 3 – 23.

Crawford contracted with a company called Carolina Tap & Bore to connect the sprinkler system to the City of Myrtle Beach's water supply. Tr. 245, l. 2 – 246, l. 1. Carolina Tap & Bore also drew up a design plan to connect the sprinkler system to the City's water supply and that plan was submitted to Mr. Tebele on June 4, 2018. Tr. 246, l. 14 – 251, l. 9.

Dover testified that by August 31, 2018, the sprinkler system "was pretty much completed in the building." Tr. 252, l. 24 – 253, l. 7. Crawford and Carolina Tap & Bore both met at 1901 North Kings on February 13, 2019 to confirm how they would connect the sprinkler system to the

water supply. Once they determined how they were going to do it, they decided that they would get the necessary materials and return the following week to connect the water. Tr. 255, ll. 9 – 25.

Mr. Tebele testified that he was continually asking Crawford and Carolina Tap & Bore to complete the sprinkler system and asking them when it would be finished. Tr. 803, ll. 1 – 5. In fact, Mr. Tebele emailed an employee of Carolina Tap & Bore on August 31, 2018, and cc'd the City of Myrtle Beach, asking Carolina Tap & Bore to expedite the completion of the sprinkler system. Tr. 803, l. 10 – 804, l. 25; Pl.'s Ex.s 44 and 45. Dover recalled that he was notified of the fire on February 25 which was the Monday or Tuesday of the week that they planned to finish the connection. Because the building had been destroyed by fire, there was no point in connecting the water then. Tr. 256, ll. 14 – 24.

At the time of the fire, Mr. Tebele had paid Crawford $226,468.82 for their work on installing the sprinkler system which they still had not completed. Tr. 257, ll. 13 – 22; Pl.'s Ex. 40. Dover testified that he was not aware of anything that Mr. Tebele could have done to have sped up the process to ensure that the sprinkler system was functional prior to the fire. Tr. 257, l. 23 – 258, l. 8. When asked why the completion of the sprinkler system took so long, Dover testified that "it wasn't a very simple project. It was kind of complicated with different ceilings, different sizes, different floors, it just took time to physically put it all together and get everything in motion and get it all completed." Tr. 263, l. 22 – 264, l. 4.

Fire Loss and Claim Denial

Captain Steve Marinaro with the Myrtle Beach Fire Department testified that he was called at around 8:00 a.m. on the morning of February 24, 2019 and informed that the 1901 North Kings property was on fire. Tr. 194, l. 21 – 195, l. 2. The Fire Department's investigation determined that the fire started underneath the flooring area of a "DJ stand" inside La Casona and that the fire was

accidental. Tr. 212, ll. 15 – 23. Marinaro identified several pictures of the damage which were introduced as evidence by Tebele. Pl.'s Ex.s 61 – 73.

Sal Martinez, a structural engineer with thirty years of experience, testified that the property would need "extensive, if not complete reconstruction," prior to being occupied again because of the fire damage. Tr. 219, ll. 8 – 13. Martinez's recommendation was that the building be demolished and rebuilt. Tr. 221, ll. 19 – 21. Mr. Tebele testified that they did not have the money to rebuild, and the building has remained unoccupied since the fire. Tr. 757, ll. 2 – 24.

Mr. Tebele hired James Twaddell, a licensed public insurance adjuster, just two weeks after the fire occurred to assess the damage. Tr. 295, l. 11 – 296, l. 3. Twaddell assessed the property to be a "total loss." Tr. 296, ll. 4 – 7. Twaddell helped Mr. Tebele prepare his claim with the Insurers. On March 19, 2019, Twaddell received a letter from Duncan Speak, who was investigating the claim on behalf of the Insurers, which stated that the claim was being investigated but the Insurers were reserving their right to deny the claim. Tr. 306, ll. 4 – 14; Pl.'s Ex. 33. The letter specifically referenced the protective safeguards endorsement which they alleged required a sprinkler system in the building. Tr. 307, ll. 14 – 18; Pl.'s Ex. 33.

Twaddell responded to this letter by indicating that the building did have a sprinkler system but that it just had not been activated at the time of the fire. Tr. 308, ll. 1 – 5; Pl.'s Ex. 50. Furthermore, the policy indicated that if there was an AS symbol on the schedule of values next to one of Tebele's properties, that meant that the property was required to have a sprinkler system. But there was no AS symbol next to the 1901 North Kings property on the schedule of values. Tr. 308, ll. 6 – 17. Twaddell testified that this meant the policy did not require a sprinkler system at 1901 North Kings. Tr. 308, ll. 18 – 21.

Twaddell also received a different letter from Duncan Speak that demanded Mr. Tebele submit a sworn proof of loss statement. Tr. 311, ll. 15 – 23. Mr. Tebele and Twaddell provided the Insurers with a sworn statement regarding proof of loss. Tr. 313, ll. 11 – 19. Twaddell also emailed Duncan Speak on March 29, 2019 emphasizing that Tebele had never received a copy of the policy or the schedule of values until after the fire occurred and therefore Tebele had no way of knowing that the schedule of values indicated that 1901 North Kings was 100% sprinklered. Tr. 320, l. 12 – 321, l. 21; Pl.'s Ex. 34.

Twaddell explained on cross examination that although the schedule of values indicates that 1901 North Kings *was* 100% sprinklered, it did not *require* the property to be 100% sprinklered. Tr. 370, l. 21 – 371, l. 1; tr. 377, ll. 8 – 14. Twaddell was unable to convince the Insurers to pay the claim and he was informed by the Insurers that they were denying the claim. Tr. 326, l. 19 – 327, l. 10; Def.'s Ex. 46.

ARGUMENT

1.

The trial judge erred in denying Tebele's motions for directed verdict and JNOV on its breach of contract claim against the Insurers because the insurance policy was ambiguous as to whether a sprinkler system was required at Tebele's 1901 North Kings property and Tebele was therefore entitled to coverage as a matter of law.

Relevant Facts

Summary Judgment

Tebele filed a partial motion for summary judgment and a memorandum in support of its motion on May 10, 2022. Tebele argued in part that he was entitled to coverage as a matter of law because the language in the policy was ambiguous as to whether a sprinkler system was required

for the 1901 North Kings property to be covered in the event of a fire loss. Tebele further argued that because the protective safeguards endorsement was not given to Tebele until after the fire occurred that it could not be applied to bar coverage. Pl.'s MISO MPSJ, 3.

The Insurers filed a motion for summary judgment as well in which they argued that Tebele was not entitled to coverage as a matter of law. Def.'s MSJ. The Insurers pointed out that at the time of the fire, the sprinkler system at 1901 North Kings was not connected to a water supply and was thus not operational. The Insurers argued that this fact required a denial of coverage because the insurance policy required a fully functional sprinkler system for the property to be covered in the event of a fire loss. *Id*.

Both motions for summary judgment were denied and the case proceeded to a jury trial.

Motions in Limine

Prior to the start of trial, the Insurers moved to exclude evidence regarding ambiguity in the policy from being presented to the jury. The Insurers maintained that "even if the policy were to be deemed ambiguous . . . the Court has to make that decision, the Court then has to adopt that reasonable interpretation because that is insurance law in the State of South Carolina. There is no jury question about one interpretation." Tr. 65, ll. 3 – 20.

Counsel for Tebele cited to *Harbin v. Williams*, 429 S.C. 1, 837 S.E.2d 491 (Ct. App. 2019) and argued that if the trial judge determined that the policy was ambiguous, "the extrinsic evidence on the intent of the parties goes to the jury." Tr. 71, ll. 5 – 13. Counsel pointed to several specific ambiguities in the policy. First, counsel pointed out that the policy purports to cover "additions under construction," which would presumably apply to the sprinkler system since it was actively being installed. Tr. 71, ll. 10 – 25. Counsel also pointed out that the protective safeguards endorsement did not identify which specific properties were required to have a sprinkler system.

Tr. 72, ll. 3 – 12. Counsel also argued that a limitation on insurance coverage cannot be applied to deny coverage if the insured had never been made aware of that limitation. Tr. 82, ll. 21 – 24.

The Insurers responded that Tebele did have notice of the limitation through Crescent Coast because Cresent Coast was Tebele's insurance agent, and they had received the policy containing the protective safeguards endorsement prior to the fire. Tr. 83, l. 7 – 84, l. 2. The Insurers also argued that the sprinkler system itself may constitute covered property under the policy because it was an addition under construction but that did not mean that damage from fire would be a covered cause of loss. The Insurers maintained that covered property and covered cause of loss are two distinct requirements. Tr. 76, l. 20 – 78, l. 7. Tebele responded that the protective safeguards endorsement and the language indicating that covered property includes additions under construction created an internal inconsistency in the policy. Tr. 81, l. 20 – 82, l. 7.

The trial judge questioned whether Tebele had ever seen the language in the protective safeguards endorsement prior to the fire. Tr. 85, ll. 18 – 19. The Insurers responded that if Tebele's position was that he had never seen the policy, the policy would not be enforceable at all. Tr. 85, l. 23 – 86, l. 5. The Insurers argued that "[d]elivery of the policy was accomplished by giving copies of the policy to Crescent Coast," to which the trial judge replied: "We're going to agree to disagree on that." Tr. 86, ll. 13 – 19.

The trial judge initially found that the insurance policy was ambiguous. Tr. 86, l. 19 – 87, l. 11. The Insurers argued that if the judge found the policy was ambiguous then it must find coverage as a matter of law and that the issue was not to be submitted to the jury. Tr. 87, l. 19 – 88, l. 13. Counsel for Tebele argued that the jury should hear extrinsic evidence regarding ambiguity under *Harbin v. Williams*. Tr. 94, ll. 17 – 23. The trial judge later reversed course, finding

that the policy was not ambiguous on its face. However, the judge ruled that testimony regarding ambiguity could be presented to the jury. Tr. 153, l. 2 – 155, l. 3.

Evidence regarding ambiguity

The policy issued to Tebele stated that the insured locations were those locations that were listed in the schedule of values. Tr. 578, l. 21 – 580, l. 7; Pl.'s Ex. 2, 26. The policy also indicated that only certain causes of loss at those properties are covered. Tr. 581, l. 22 – 582, l. 23; Pl.'s Ex. 2, 30. Part of the insurance policy was the protective safeguards endorsement. Tr. 578, ll. 15 – 20; Pl.'s Ex. 2, 92. This endorsement conditioned coverage on "maintaining" the protective devices listed in the "schedule above." That schedule, which is not the same thing as the schedule of values, included the symbol AS, which was defined as an automatic sprinkler system. Tr. 583, l. 14 – 584, l. 23; Pl.'s Ex. 2, 92. In addition to this condition of coverage, the endorsement also had an exclusion of coverage. That exclusion provided that the Insurers "will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order." *Id*.

As previously indicated in the Statement of Facts, Twaddell, the licensed public insurance adjuster that Mr. Tebele hired to assist him with his insurance claim, testified that the protective safeguards endorsement indicated that if there was an AS symbol on the schedule of values next to one of the properties, that meant that the property was required to have a sprinkler system. Twaddell explained that because there was no AS symbol next to the 1901 North Kings property on the schedule of values, the policy did not require a sprinkler system at 1901 North Kings. Tr. 308, ll. 6 – 21. Twaddell explained that there was no column on the schedule of values indicating which protective safeguards endorsements applied to which properties. Tr. 310, ll. 10 – 17. Twaddell also pointed out that although the schedule of values indicates that 1901 North Kings

was 100% sprinkled, it does not *require* the property to be 100% sprinkled. Tr. 370, l. 21 – 371, l. 1; tr. 377, ll. 8 – 14.

Gerald Finkel testified on behalf of Tebele and was qualified as an expert in the field of bad faith insurance. Tr. 385, ll. 12 – 19. Finkel explained to the jury that insurance contracts are "contracts of adhesion," meaning that the insured is unable to negotiate the terms of the policy. The only thing an insured can typically negotiate is how much coverage to buy. Tr. 386, l. 10 – 388, l. 17. Finkel further explained that coverage provisions in insurance policies are to be read broadly in favor of the insured and exclusions on coverage are to be read narrowly in favor of the insured. Tr. 400, ll. 2 – 22.

Finkel testified about the policy's definition of covered property which indicated that covered property included "additions under construction, alterations and repairs to the building or structure," if those additions were "not covered by other insurance." Tr. 401, ll. 8 – 11; Pl.'s Ex. 2, 30. Finkel explained that the covered property definition, broadly construed in favor of coverage, would include the sprinkler system which was actively being installed. Tr. 401, l. 18 – 402, l. 4. He testified: "I'm kind of blown away by the fact that there are at least nine lawyers in here all fighting over what this means, so imagine what Mr. Tebele had to know who's not a lawyer?" Tr. 401, ll. 12 – 15.

Finkel was asked on cross examination about the policy's definition of covered property as including "additions under construction," and specifically whether that provision simply meant that parts of the building that are under construction could potentially be covered. Tr. 416, ll. 9 – 18. Finkel answered with a qualified "yes," indicating that the language "if not covered by other insurance" made the policy ambiguous because if the protective safeguards endorsement exclusion

applied to the fire loss, then that definition of covered property would become an exception to that exclusion. Tr. 416, ll. 19 – 24.

Finkel maintained that the protective safeguards endorsement did not apply because the symbol AS does not appear on the schedule of values. Tr. 402, ll. 6 – 403, l. 21. Finkel also testified that the protective safeguards endorsement could not be enforced against Tebele because it was not delivered to Mr. Tebele until after the fire destroyed the property. Tr. 402, l. 6 – 403, l. 6. Finkel further testified that Mr. Tebele did not have control over the connection between the sprinkler system and the City's water supply. Tr. 405, ll. 13 – 24.

Clark Hanness testified on behalf of the Insurers. Hanness worked for one of the approximately eighty syndicates that operate within Lloyd's insurance market. Tr. 571, l. 9 – 572, l. 3. Hanness admitted that the schedule of values associated with Tebele's property did not contain the symbol AS anywhere on it. Tr. 584, l. 24 – 585, l. 5. He claimed, however, that the AS symbol did not need to appear on the schedule of values for the automatic sprinkler system requirement to apply. Instead, Hanness insisted that if the schedule of values indicated that the property had a sprinkler system, this meant that the property was required to have a sprinkler system. Tr. 585, ll. 6 – 17. Hanness testified that Tebele's claim was denied because the 1901 North Kings property did not have a sprinkler system in place. Tr. 599, ll. 14 – 23. Part of their reasoning was that the sprinkler system, though fully installed in the building, was not connected to the water supply. Tr. 602, ll. 17 – 20.

On cross examination, Hanness admitted that the AS symbol appears immediately to the left of the language "as indicated on the schedule of values on file with the company" and that he does read English from "left to right." Tr. 620, ll. 9 – 19. However, Hanness strangely attempted to explain that even though English is read from left to right, and that the AS symbol appears

immediately to the left of the language "as indicated on the schedule of values on file with the company," that the AS symbol was not required to actually appear on the schedule of values to indicate which properties were required to have a sprinkler system. Tr. 620, l. 20 – 622, l. 2. Hanness also admitted that he had not been asked his opinion about whether the "additions under construction" part of the policy was ambiguous and therefore never gave any opinion as to that. Tr. 623, ll. 3 – 24.

Bernard Hennes also testified on behalf of the Insurers. Hennes was qualified as an expert in insurance claim handling and standards and practices. Tr. 916, ll. 16 – 22. Hennes conceded that the binder did not list the specific locations which were required to have an automatic sprinkler system. Tr. 925, ll. 12 – 14. When asked how a policy holder is supposed to know then, which properties are required to have a sprinkler system, Hennes claimed that they would know based on what was put into the insurance application. Tr. 925, l. 25 – 926, l. 6.

Hennes attempted to explain how the protective safeguards endorsement's use of the symbol AS indicated that the locations to which it was applicable were to be indicated on the schedule of values did not actually mean that AS had to appear on the schedule of values. Hennes, like Hanness, claimed that the protective safeguards endorsement should be read to mean that any property listed on the schedule of values as having a sprinkler system was required to have a sprinkler system. Tr. 928, l. 23 – 932, l. 7.

Directed Verdict

After the Insurers and Crescent Coast rested their cases, Tebele moved for a directed verdict. Counsel for Tebele asked the trial judge to "find, as a matter of law, that there's an ambiguity in the insurance contract in this case." Tr. 1183, ll. 4 – 11. Counsel argued that there were several ambiguities in the contract. First, the inclusion of property under construction as

being covered property under the contract, and second, that the schedule of values did not include an AS symbol on it next to the 1901 North Kings property making it ambiguous as to whether a sprinkler system was required to be in full working order at that location for fire loss to be covered. Tr. 1183, ll. 11 – 1184, l. 5. Finally, Counsel argued that the word "maintain" in the protective safeguards endorsement was ambiguous as to what it required given that the sprinkler system had not been finished. Counsel asked the trial judge to instruct the jury that the ambiguities in the contract must be construed in favor of coverage and that the only issue for the jury to consider was the amount of damages. Tr. 1184, ll. 5 – 14.

Counsel for the Insurers responded that there was no reasonable interpretation of the covered property provision of the contract, which included the language about additions under construction being covered, that could be construed as providing insurance coverage "merely because something qualifies as property." Tr. 1184, ll. 15 – 23. Counsel argued that for a loss to be covered by the insurance policy, it had to be both covered property and a covered cause of loss. Tr. 1184, l. 24 – 1185, l. 4. Counsel also argued that the AS symbol was not required to be on the schedule of values next to the property where a sprinkler system was required. Counsel argued that requiring the AS symbol on the schedule of values would make the whole endorsement surplus and that the court should not construe an insurance contract in that manner. Tr. 1185, ll. 4 – 13.

The trial judge asked counsel for the Insurers why, if on the protective safeguards endorsement the symbol AS appears next to the words stating that symbol was applicable to the locations "as indicated on the Schedule of Values on file with the Company," that the AS symbol would not actually appear anywhere on the schedule of values to indicate which locations a sprinkler system was required. Tr. 1185, l. 14 – 1186, l. 3. Counsel acknowledged that the AS symbol does not appear anywhere on the schedule of values but argued that the protective

safeguards endorsement would have no meaning if the AS symbol was required to appear on the schedule of values. Tr. 1186, l. 4 – 1187, l. 4.

Counsel for Tebele cited to *State Farm Mut. Auto. Ins. Co. v. Windham* 438 S.C. 156, 882 S.E.2d 754 (2022) and *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014) in arguing that when there are two reasonable interpretations of an insurance policy, the interpretation that provides for coverage should be adopted as a matter of law because insurance contracts are contracts of adhesion. Tr. 1189, l. 8 – 1190, l. 10.

The trial judge took the matter under advisement and proceeded immediately into the charge conference with the attorneys. Tr. 1190, ll. 15 – 16. During the charge conference, reference was made to requested jury instructions regarding ambiguity in the insurance policy. The Insurers objected to those charges on the grounds that ambiguity was a question solely for the trial judge and that the judge should instruct the jury that the policy was not ambiguous. Tr. 1192, l. 15 – 1193, l. 5.

After a discussion regarding damages and agency charges, the trial judge circled back to the ambiguity charges and said "[a]s to ambiguity, I'm going to stick with my earlier ruling in that regard," apparently referring to his ruling during the motions in limine phase of trial in which he ruled that the policy was not ambiguous. Tr. 1206, ll. 6 – 7. Just moments later, Tebele objected to a proposed jury instruction by the Insurers that included the following language: "this Court has reviewed the insurance policy at issue, and it's determined the provisions are not ambiguous."

Counsel for Tebele asked the judge to make a specific ruling about whether the provisions of the policy which contain language about property under construction being covered and about the AS symbol not being on the schedule of values even though it appears to be required by the protective safeguards endorsement made the policy ambiguous. Tr. 1213, ll. 13 – 22. The trial

judge again said: "I'm going to stay with my prior ruling that it's not ambiguous." Tr. 1213, ll. 23 – 25. Counsel renewed his motion one more time asking that the judge find the insurance policy to be ambiguous understanding that the judge had already ruled on that issue. The trial judge simply responded "Yes, sir." Tr. 1247, ll. 1 – 6.

In his instruction to the jury, the trial judge told the jurors that "[t]his Court has reviewed the insurance policy at issue and has determined that the provisions are not ambiguous. Therefore, you are required to apply the plain language of the policy's terms." Tr. 1315, ll. 4 – 7. At the conclusion of the jury charge, Counsel for Tebele renewed his requests to charge the jury that the policy was ambiguous and that those ambiguities should be read in favor of coverage. Tr. 1329, ll. 18 – 24. The trial judge said "I'm going to follow my previous rulings on those." Tr. 1329, l. 25 – 1330, l. 2.

The jury found in favor of the Insurers.

Post-trial Motions

Tebele filed a post-trial motion pursuant to Rules 59(a) and 50(b) of the Rules of Civil Procedure requesting a new trial and a judgment notwithstanding the verdict. Tebele argued that the trial judge erred in failing to find the policy was ambiguous as a matter of law. Pl.'s mot. for JNOV, 1-2. Specifically, Tebele argued that the internal inconsistencies in the policy and the protective safeguards endorsement made the policy ambiguous and that the trial judge was required as a matter of law to award coverage to Tebele. Tebele argued that the issue regarding whether the loss was covered should have never been submitted to the jury but instead they should have only been allowed to consider whether the Insurers acted in bad faith. *Id*., 6-7. Tebele also argued that the limitation on coverage could not be applied because it was not delivered to Tebele until after the fire. *Id*., 18.

The Insurers filed a response in opposition to Tebele's motion for a new trial and JNOV arguing that the trial judge correctly found the policy to be unambiguous and that Tebele had failed to move for a directed verdict and was thus precluded from moving for a JNOV. Def.'s res. to Pl.'s mot. for JNOV, 2-3. The trial judge denied Tebele's post-trial motions as to the Insurers.

Argument Summary and Legal Framework

The policy in this case is ambiguous in three ways. First, the protective safeguards endorsement is inconsistent with the schedule of values because the endorsement provides that properties listed on the schedule of values with an AS symbol next to them are required to have a sprinkler system, but the AS symbol does not appear anywhere on the schedule of vales. Second, the policy does not define the words "maintain" or "control." It is therefore ambiguous as to whether Tebele's sustained effort to install a sprinkler system, the completion of which was outside of his control, was sufficient to comply with the protective safeguards endorsement. Finally, the policy is internally inconsistent by indicating that covered property includes "additions under construction if not covered by other insurance" but excludes the sprinkler system that was actively being installed in the building at the time of the fire. Because the policy contains both patent and latent ambiguities, the ambiguities are required to be read in a manner that provides coverage to Tebele as a matter of law.

A directed verdict is proper when the case presents only an issue of law for the court. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012); Rule 50(a), SCRCP. If the trial court denies a motion for a directed verdict, the moving party may move for a JNOV after the verdict in accordance with its directed verdict motion. *Id.*; Rule 50(b), SCRCP.

"An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Williams v. GEICO*, 409 S.C.

586, 594, 762 S.E.2d 705, 709 (2014) (citing *Auto Owners Ins. Co. v. Rollinson*, 378 S.C. 600, 663 S.E.2d 484 (2008)). "Whether language is ambiguous is a question of law for the Court." *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). *See also S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) ("It is a question of law for the court whether the language of a contract is ambiguous").

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Id*. The cardinal rule of contract interpretation is to "ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language in the contract." *First South Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)).

"A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation." *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "Where language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted." *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) (citing *Edens v. S.C. Farm Bureau Mut. Ins. Co.*, 279 S.C. 377, 379, 308 S.E.2d 670, 671 (1983)).

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. Co. v. Homestead Indus.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (citing *Spinx Oil Co. v. Federated Mut. Ins.*, 310 S.C.

477, 427 S.E.2d 649 (1993)). "It is well settled that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of a conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery." *Cogdill v. Equity Life & Annuity Co.*, 262 S.C. 248, 253, 203 S.E.2d 674, 677 (1974).

South Carolina law clearly requires courts to resolve any insurance policy ambiguities in favor of the insured. *See Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 639, 594 S.E.2d 455, 459 (2004) ("Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted."); *see also Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 525, 167 S.E.2d 420, 423 (1969) ("It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured"). Furthermore, "exclusionary terms in a policy are narrowly construed to the benefit of the insured." *Hutchinson*, 404 S.C. at 23, 743 S.E.2d at 829.

In addition, an ambiguity arises if the insurance contract is silent as to a particular matter. *Columbia E. Assoc. v. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). "Where an internal inconsistency in an insurance policy renders it ambiguous, and the policy is susceptible of more than one reasonable interpretation, one of which provides coverage, coverage must be found as a matter of law." *Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992).

A. The inconsistency between the protective safeguards endorsement's reference to the AS symbol as indicating on the schedule of values which properties were required to have a sprinkler system and the absence of the AS symbol on the schedule of values rendered the policy ambiguous as to what properties were required to have a sprinkler system.

The protective safeguards endorsement is both ambiguous on its face and ambiguous when applied to the schedule of values. Had the trial judge properly resolved the ambiguities in favor of coverage as is required when there is a reasonable interpretation of an insurance policy which provides for coverage, Tebele would have been entitled to a directed verdict and a JNOV on its breach of contract claim against the Insurers. Whether coverage was due under the policy should never have been submitted to the jury. The only issues that should have been submitted to the jury as to the Insurers was whether they acted in bad faith in denying Tebele's claim.

The protective safeguards endorsement provides that "[a]s a condition of this insurance, [Tebele is] required to maintain the protective devices or services listed in the Schedule above." The endorsement also contains an exclusion: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order." Pl.'s Ex. 2, 92.

The "Schedule above," is shown here:

SCHEDULE

Symbol(s)	Location(s) Applicable
AS	as indicated on the Schedule of Values on file with the Company.
AA	as indicated on the Schedule of Values on file with the Company.
OTHER	as indicated on the Schedule of Values on file with the Company.
Describe any "OTHER":	(a) Ansul Systems – ansul system over all cooking surfaces and semi-annual professional cleaning for hoods and ducts required (b) Heating, Ventilation, and Air Conditioning – maintained and in operation at all times (c) any aluminum wiring in buildings are properly pigtailed or retrofitted with CO/AL receptacles on all switches, outlets and circuit breaker panels and in accordance with local electrical codes.

The AS symbol depicted on the schedule is identified in the endorsement as an automatic sprinkler system. Specifically, the endorsement defines AS:

Automatic Sprinkler System means:

a. Any automatic fire protective or extinguishing system, including connected:

(1) Sprinklers and discharge nozzles;

(2) Ducts, pipes, valves and fittings;

(3) Tanks, their component parts and supports; and

(4) Pumps and private fire protection mains.

Pl.'s Ex. 2, 92. The schedule states that the locations where a sprinkler system is required are those "as indicated on the Schedule of Values on file with the Company." The schedule of values relied upon by the Insurers to deny coverage to Tebele does not include the AS symbol anywhere on it. Instead, it merely indicates that 1901 North Kings has a sprinkler system. Pl.'s Ex. 18.

The Insurers, following the submission of Tebele's claim, formulated an interpretation of the protective safeguards endorsement schedule's reference to the applicable insured locations "as indicated on the Schedule of Values on file with the Company" to mean that the endorsement's exclusionary provisions applied to the insured locations reported as 100% sprinklered in the schedule of values. In other words, the Insurers took the position that if a property *had* a sprinkler system, it was *required to have* a sprinkler system.

Interestingly—and tellingly—the Insurers appear to have changed the language of the protective safeguards endorsement after Tebele filed its claim. Specifically, the language in the protective safeguards endorsement was changed from "as indicated on the Schedule of Values on file with the Company" to "All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company."

SCHEDULE	
Symbol(s)	**Location(s) Applicable**
AS	All Covered Locations reported as sprinklered in the Schedule of Values on file with the Company
Describe any "OTHER":	

The Insurers therefore appeared to recognize the ambiguity in the policy themselves. This modified language in the protective safeguards endorsement appears on page 114 of Plaintiff's Exhibit 2. Hanness, an employee with one of the Lloyd's syndicates, was asked about this modified protective safeguards endorsement and he testified that the modified endorsement was not part of Tebele's policy. Tr. 617, l. 14 – 619, l. 6.

Certainly, if the policy issued to Tebele had said that an automatic sprinkler system was required at "all locations reported as sprinklered in the schedule of values," this case would be very different. However, that is not what the protective safeguards endorsement in Tebele's policy said. The endorsement in Tebele's policy said that the AS symbol would indicate on the schedule of values what properties were required to have a sprinkler system but then the AS symbol appears nowhere on the schedule of values.

In *Westfield Ins. Co. v. Enter. 522, LLC*, the protective safeguards endorsement relied upon by the insurer to deny coverage mirrors the one at issue here. 34 F. Supp. 3d 737 (E.D. Mich. July 29, 2014).[2] The protective safeguards endorsement at issue in *Westfield Ins. Co.* purportedly had a condition which required the insured to "maintain the protective devices or services listed in the schedule above." *Id*. at 742. The endorsement's provision requiring an automatic sprinkler system was defined by a "P-1" symbol. *Id*. at 744. However, the symbol P-1 was not listed in the schedule referenced in the protective safeguards endorsement that made the exclusion applicable to the

[2] "When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions." *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 224, 837 S.E.2d 910, 917 (Ct. App. 2019); *see also Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) ("Our supreme court will look to other states for persuasive authority where there are no South Carolina opinions on point") (citing *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995)).

insured. *Id*. at 742. The P-1 symbol was listed in the policy declarations but not listed as a limitation on coverage. *Id*.

The insurer in *Westfield Ins. Co.* argued that the protective safeguards endorsement was not ambiguous because the policy declarations detailed that the insured was required to maintain an automatic sprinkler. *Id*. at 744. Specifically, the insurer asserted that an adequate connection could be made between the endorsement and the policy declarations because the form code or encrypted series of codes listed on the endorsement were also listed in the declarations under "forms and endorsements." *Id*.

The *Westfield Ins. Co.* Court held that the "applicability of the exclusion is patently ambiguous on its face; even a reading of the policy, i.e., the endorsement and … [the] declarations fail to adequately show that the exclusion is a condition of fire coverage." *Id*. The Court in *Westfield Ins. Co.* thus found that because the exclusion and P-1 symbol were only defined in the endorsement, and that the P-1 symbol which made the endorsement's exclusion applicable was not listed in the schedule referenced in the endorsement, the exclusion could not be used as a bar to coverage. *Id*.

Just like the protective safeguards endorsement at issue in *Westfield Ins. Co.*, the protective safeguards endorsement here is defined by a symbol: AS. The policy's declarations page neither defines the AS symbol nor directs Tebele, as the insured, to a policy provision which defines the AS symbol. Instead, it lists several codes under the heading "Forms Applicable to Common Forms" which includes the following: "SRU-024 0710 – Protective Safeguards – Fire Endorsement." Pl.'s Ex. 2, 15. Like in *Westfield Ins. Co.*, the AS symbol, which applies the protective safeguards endorsement's exclusionary provisions to the insured properties "as indicated on the Schedule of Values on file with the Company," is not listed, depicted, or referenced

in the schedule of values. Therefore, the endorsement is both ambiguous on its face and ambiguous when applied to the schedule of values. These ambiguities must be construed in favor of coverage as a matter of law. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 420 S.E.2d 511 (Ct. App. 1992).

Indicating that a property has a sprinkler system in place is not the same thing as indicating that a property is required to have a sprinkler system. The Insurers have maintained throughout this case that the policy unambiguously indicates that any property that has a sprinkler system is required to have a sprinkler system. The policy is far from unambiguous on that. A reasonable interpretation of the policy is that 1901 North Kings had a sprinkler system but was not required to have a sprinkler system. That is because the schedule of values did not have the AS symbol listed on it even though the protective safeguards endorsement indicated that the AS symbol was used to identify which properties were required to have a sprinkler system.

The trial judge erred in finding that the policy was unambiguous and erred in denying Tebele's motions for directed verdict and JNOV. Tebele was entitled to coverage and therefore entitled to a directed verdict and JNOV on its breach of contract claim against the Insurers.

B. The policy's failure to define the words "maintain" or "control" created an ambiguity as to what Tebele was required to do to comply with the protective safeguards endorsement where Mr. Tebele continuously pursued completion of the sprinkler system in the building but had no ability to ensure the completion of the system prior to the fire loss.

The protective safeguards endorsement requires Tebele to "maintain" the sprinkler system "over which [Tebele] ha[s] control." Pl.'s Ex. 2, 92. As a matter of law, the endorsement is ambiguous because the words "maintain" and "control" are not defined in the policy. "Maintain" and "control" have more than one reasonable meaning rendering the exclusionary language in the endorsement ambiguous.

South Carolina courts must scrutinize the meaning of every word in an insurance policy–especially where an insurer relies on undefined terms to bar coverage through an exclusion. *See Beaufort County Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 517-19, 709 S.E.2d 85, 91 (2011) (extensively interpreting the terms "series" and "related" in an exclusion and holding in the insured's favor at summary judgment because both terms were "not defined in the endorsements, so [they] must be defined according to the usual understanding of the ordinary person").

In *Breton, LLC v. Graphic Arts Mut. Ins. Co.*, 446 Fed. App'x. 598 (4th Cir. 2011)[3] the Fourth Circuit interpreted a protective safeguards endorsement identical to the one at issue in this case. The *Breton* Court concluded that the terms "maintain" and "control" were ambiguous and, as such, had to be interpreted in favor of coverage. The Fourth Circuit partially affirmed the trial court's entry of summary judgment in the insured's favor when the insurer denied coverage for a fire loss based on a protective safeguards endorsement. *Id*. at 600.

The protective safeguards endorsement at issue in *Breton* read: "as a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above." *Id*. (internal alterations omitted). The only protective device listed in the schedule was an automatic sprinkler system. The endorsement went on to state that the insurers "will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you . . . failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order." *Id*. Thus, the protective safeguards endorsement at issue in *Breton* is the same as the one at issue in this case.

[3] *Breton* is an unpublished opinion. While Rule 268(d)(2) of the South Carolina Appellate Court Rules prohibits citation to unpublished opinions by South Carolina Courts, the Federal Rules of Appellate Procedure provide that a court may not prohibit or restrict the citation of unpublished federal judicial opinions that were issued after January 1, 2007. Fed. R. App. P. 32.1.

Like Tebele, the insured in *Breton* had a completely installed sprinkler system at the property, but the "valve controlling the water to the sprinkler heads was in the closed position, rendering the . . . Sprinkler System inoperable." *Id*. at 601. Also like Tebele, the insured in *Breton* was leasing the property to a tenant. And like Tebele, the insured property in *Breton* was destroyed by fire and the insurer denied coverage based on the protective safeguards endorsement. *Id*. at 601.

The trial judge in *Breton* found that the word "maintain" could reasonably mean "to keep in existence," and that the word "control" could mean "physical control." *Id*. The Fourth Circuit affirmed, siding with the insured. The Court explained that "the word 'maintain' may be understood in more than one way, which supports a finding of ambiguity." *Id*. at 603 (internal quotations omitted). The Fourth Circuit specifically pointed to Black's Law Dictionary which gave several different definitions of "maintain," including: "1. To continue (something). 2. To continue in possession of (property, etc.) . . . 4. To care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." *Id*. (quoting Black's Law Dictionary (9th ed. 2009)).

While the insurer in *Breton* argued that the word "maintain" was not open to interpretation nor ambiguous because it has a "plain meaning," the Fourth Circuit disagreed. Specifically, "[a]s used in the insurance contract, the word 'maintain' could be reasonably interpreted . . . to refer to an obligation to continue to have an Automatic Sprinkler System," instead of the insurer's interpretation, which implied "regular repair obligations with respect to the Automatic Sprinkler System." *Id*. And while both interpretations are reasonable, the ambiguity must be construed in favor of coverage. And as in Tebele's case, the exclusionary language in the *Breton* policy did not define "maintain," but qualified it with contiguous language: "in complete working order." *Id*.

Thus, the *Breton* Court found that "interpreting 'maintain' to require ensuing operability would render the 'in complete working order' language in the exclusion superfluous." *Id*.

In this case, the protective safeguards endorsement is identical to the one interpreted and held ambiguous by the Fourth Circuit in *Breton*. The endorsement relied on by the Insurers to deny coverage to Tebele provides that "[a]s a condition of this insurance, [Tebele is] required to 'maintain' the protective devices or services listed in the Schedule above." It also contains an exclusion, which states: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to maintain any protective safeguard listed in the Schedule above, and over which you had control in complete working order." Pl.'s Ex. 2, 92.

The Insurers chose not to define the words "maintain" or "control," nor did they specify what Tebele was required to do to "maintain" the protective devices described in the endorsement. A common and reasonable understanding of the term "maintain" certainly includes those definitions from Black's Law Dictionary that were relied on by the Fourth Circuit in *Breton*, including: "To continue (something) [or t]o continue in possession of (property, etc.) [or t]o care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." *Maintain*, Black's Law Dictionary (9th ed. 2009).

The term "control" also has multiple meanings depending upon the context in which the term is used. With regard to real property which a landlord owns and leases to a tenant, the landlord surrenders possession and control of the property to the tenant. "When land is occupied by a lessee . . . the law of property regards the lease as equivalent to a sale of the premises for the term of the lease." *Byerly v. Connor*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992). Thus, the policy was ambiguous as to what was meant by the words "maintain" and "control" and that ambiguity was required to be read in favor of coverage.

Furthermore, Tebele's contract with Crawford specifically provided that no one other than Crawford was permitted to touch the sprinkler system. The contract provided that "[u]nder no circumstances is anyone [other than Crawford] permitted or authorized to place the system in service or perform a test upon it." Pl.'s Ex. 4. Tebele did not have control over the sprinkler system as that concept is commonly understood.

Tebele, like the insured in *Breton*, purchased fire coverage and the Insurers intended to issue fire coverage. The undisputed facts presented at trial established that Tebele paid Crawford more than $220,000 to install a sprinkler system at 1901 North Kings, that the sprinkler system was under construction at the time of the fire, and that Ms. Garcia and her La Casona restaurant were occupying the building at the time of the fire. Thus, Tebele did not have control over the sprinkler system. In addition, applying the ordinary meaning of the term "maintain" renders the endorsement ambiguous on its face because it is impossible for one to rebuild, repair, replace or perform other acts of repairs to prevent a decline, lapse, or cessation in a new sprinkler system which had never been completed at the time of the fire.

Much like the insured in *Breton*, Tebele took great steps to ensure the installation of the sprinkler system at 1901 North Kings. Tebele paid Crawford to obtain the pertinent permit application and install the sprinkler system. To confirm the sprinkler system was properly installed, Tebele repeatedly contacted Crawford and their subcontractors in August of 2018, telling them "that the [sprinkler] system had to be connected." Tr. 803, l. 10 – 804, l. 25; Pl.'s Ex.s 44 and 45.

Tebele undertook these actions even though he was not in control of the property, but merely owned it. *See Byerly v. Connor*, 307 S.C. 441, 443 (S.C. 1992) (finding that a lessor was not responsible for hazardous conditions on the land created by the lessee because "[i]n the absence of an agreement to the contrary, the lessor surrenders possession and control of the land to the

lessee."); *see also Monari v. Surfside Boat Club, Inc.*, 469 F.2d 9, 11 (2d Cir. 1972) (defining control as "sufficient possessory dominion over the property").

The trial judge erred in finding that the policy was not ambiguous. The judge thus erred in denying Tebele's motion for a directed verdict and JNOV motion on its breach of contract claim against the Insurers. Because the policy was ambiguous, Tebele was entitled to coverage as a matter of law. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 420 S.E.2d 511 (Ct. App. 1992). This Court should reverse the trial judge's decision and direct a verdict in favor of Tebele on it breach of contract claim against the Insurers.

C. The policy's definition of covered property included "additions under construction" which created an internal inconsistency rendering the policy ambiguous as to whether loss from a fire would be covered where the sprinkler system was actively being constructed in the building at the time of the fire.

The protective safeguards endorsement's exclusionary provisions directly conflict with the policy's provisions that insure additions under construction such as the sprinkler system that was being installed at the time of the fire. This conflict creates an internal inconsistency that renders the policy ambiguous and as such, Tebele is entitled to coverage as a matter of law. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 (Ct. App. 1992).

The policy that the Insurers sold to Tebele promised to pay for "direct physical loss of or damage to Covered Property at [1901 North Kings] caused by or resulting from [fire]." Pl.'s Ex. 2, 30. Pursuant to the policy, covered property included not only the building, but also "additions under construction, alterations and repairs to the building or structure." At the time of the fire, construction of the sprinkler system was not completed it was therefore not operational. This was through no fault of Tebele who had continuously requested Crawford and Carolina Tap & Bore to expedite the installation.

Dover admitted that the delay in completion of the project was not Tebele's fault and that there was nothing Mr. Tebele could have done to ensure completion of the sprinkler system any sooner. Tr. 257, l. 23 – 258, l. 8. Under the definition of covered property contained in the policy, the fire loss would undoubtedly be covered regardless of the sprinkler's operational status because the policy specifically covers additions under construction.

In exchange for Tebele's premium payment, the Insurers agreed to provide coverage for both the buildings and additions under construction that may be damaged or destroyed by fire. This of course included the sprinkler system that was under construction at the time of the fire. To give effect to the endorsement's exclusionary provision would render the policy virtually meaningless because the endorsement, as interpreted by the Insurers to deny coverage, would exclude coverage for all claims arising from the very risk contemplated by both the Insurers and Tebele.

Furthermore, the only expert testimony presented in this case regarding the ambiguity of the "additions under construction" provision of the policy came from Finkel. Specifically, Finkel testified that the covered property definition, broadly construed in favor of coverage, would include the sprinkler system which was actively being installed. Tr. 401, l. 18 – 402, l. 4. Finkel explained that the language "if not covered by other insurance" made the policy ambiguous because if the protective safeguards endorsement exclusion applied to the fire loss, then the policy's definition of covered property would become an exception to that exclusion. Tr. 416, ll. 19 – 24. The Insurers expert, Clark Hanness, gave no opinion as to whether this provision was ambiguous or not. Tr. 623, ll. 3 – 24.

The internal inconsistency created by the protective safeguards endorsement and policy's definition of covered property renders the policy ambiguous. That ambiguity must be construed in favor of coverage. *See Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 19, 459

S.E.2d 318, 321 (Ct. App. 1994) (The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very risks sought to be insured renders the policy ambiguous).

Issue 1 Conclusion

The trial judge erred in finding that the policy was not ambiguous. As argued above, the policy was ambiguous in three distinct ways. Several reasonable interpretations of the policy would provide coverage for the fire loss at 1901 North Kings and as such the judge was required to find that the loss was covered as a matter of law. These reasonable interpretations are: (1) the absence of the AS symbol on the schedule of values meant that 1901 North Kings was not required to have a sprinkler system as a condition of coverage; (2) Tebele's sustained effort and significant expenditures in installing the sprinkler system which was never completed through no fault of his own and was wholly outside his control made "maintaining" the system an impossibility; and (3) the additions under construction clause provides that the fire loss would be covered where the sprinkler system was under construction at the time the fire occurred. Thus, Tebele was entitled to a directed verdict and a JNOV on its breach of contract claim against the Insurers.

2.

Tebele was entitled to coverage as a matter of law because, even if the policy was unambiguous, the limitations on coverage were not delivered to Tebele until after the loss occurred.

Relevant Facts

During the initial application process between Tebele and Crescent Coast, Mr. Tebele informed Sutherland and Egan that the sprinkler system was being installed and would be completed soon. Based on that, Sutherland listed 1901 North Kings as being 100% sprinklered in the insurance application. Tr. 538, ll. 11 – 22. Crescent Coast submitted Tebele's final insurance

application on January 14, 2019. Tr. 517, ll. 6 – 8. In exchange for obtaining coverage for Tebele, Crescent Coast received a commission of ten percent of the premium for the policy. Tr. 519, ll. 10 – 24. The premium on Tebele's policy was more than $100,000.

The Insurers had a written agreement with Amwins called a "binding authority" in which the Insurers authorized Amwins to bind insurance coverage within certain parameters. Tr. 574, ll. 5 – 22. Crescent Coast also had a written agreement with Amwins to obtain access to Lloyd's insurance syndicates. Tr. 648, ll. 20 – 25.

Amwins issued a binder on January 15, 2019, which confirmed insurance coverage for Tebele's properties. Melvin Depo. Tr. 35, ll. 2 – 13. The binder was delivered to Tebele. However, although the binder included the code "SRU-024 710 Protective Safeguards – Fire" as a "common form," it did not include the language of the protective safeguards endorsement. Melvin Depo. Tr. 87, l. 12 – 88, l. 13; Def.'s Ex. 25. The schedule of values was not listed as a "common form," nor was it referenced anywhere on the binder. *Id*. Melvin, an underwriter for Amwins, admitted that the binder did not indicate which of Tebele's properties were required to have a sprinkler system. Melvin Depo. Tr. 87, l. 12 – 88, l. 13.

Egan, the managing member of Crescent Coast, testified that he "believed" he advised Mr. Tebele in December 2018 that a sprinkler system was required at 1901 North Kings but did not recall. Tr. 663, ll. 11 – 19. Egan later testified: "I believe I said, please review the conditions. I don't recall if I specifically said 1901 or any of the other properties that had a sprinkler system." Tr. 743, ll. 5 – 9. Egan, like Melvin, admitted that the binder did not specify what specific properties were required to have a sprinkler system as a condition of coverage for fire loss. Tr. 728, l. 15 – 729, l. 17. Egan also admitted that Mr. Tebele was never given a copy of the schedule of values

which lists the 1901 North Kings property as being 100% sprinklered. Egan testified that he "assumed" Mr. Tebele would know that a sprinkler system was required. Tr. 731, ll. 1 – 17.

The full policy for Tebele's properties was issued on February 6, 2019, and was sent to Crescent Coast the following day. Melvin Depo. Tr. 44, l. 14 – 45, l. 6; 56, l. 9 – 57, l. 7. Egan first received the full policy on February 7, 2019, but he did not forward the policy to Mr. Tebele. Tr. 673, ll. 11 – 18. In fact, Egan handed Mr. Tebele a copy of the insurance policy for the first time while they were standing in front of the bunt down 1901 North Kings property. Tr. 674, ll. 1 – 21.

Mr. Tebele testified that throughout his application process with Cresent Coast, Egan never discussed or mentioned anything about the protective safeguards endorsement. Tr. 786, ll. 12 – 16. Mr. Tebele recalled that even after the fire occurred, Egan indicated that he was not concerned about the Insurers not covering the claim because there was a sprinkler system fully installed in the building. T. 786, l. 17 – 787, l. 6.

Mr. Tebele also testified, as did Egan, that Egan did not give him a copy of the policy until after the fire had destroyed the building at 1901 North Kings. Tr. 789, ll. 5 – 9. And Mr. Tebele also confirmed what Egan had previously testified to in that Mr. Tebele was never given a copy of the schedule of values. Tr. 789, ll. 10 – 15. Mr. Tebele confirmed what both Melvin and Egan said regarding the binder, which was that the binder did not state which specific properties were required to have sprinkler systems. Tr. 790, ll. 3 – 24. Finally, Mr. Tebele pointed out that the insurance application he signed did not state that an operating sprinkler system was required at 1901 North Kings. Tr. 843, l. 7 – 844, l. 1.

Twaddell, Mr. Tebele's public adjuster who helped him submit his claim to the Insurers, notified the Insurers during the claims process that Mr. Tebele had never received a copy of the schedule of values. Tr. 320, l. 23 – 321, l. 21. Gerald Finkel, Tebele's expert in bad faith, also

testified that the policy was never delivered to Tebele prior to the fire and therefore Tebele could not be bound by the limitations on coverage. Tr. 412, l. 25 – 413, l. 8. Finkel explained that while the binder referenced the protective safeguards endorsement, it did not include the protective safeguards endorsement itself, nor did it identify what properties the endorsement applied to. Thus, the binder was effective at granting coverage, but the limitations in the endorsement could not be applied to Tebele until the policy was delivered. Tr. 435, l. 3 – 436, l. 18.

Argument

Endorsements to insurance policies are designed to enlarge, restrict, particularize or otherwise modify some provision of the policy. *Charles v. Canal Ins. Co.*, 238 S.C. 600, 121 S.E.2d 200, 210 (S.C. 1961). An endorsement or rider to a policy definitively becomes effective to bind the insured when it is "physically attached to a policy of insurance contemporaneous with execution, and delivered to the insured as attached, and sufficient reference is made in either the policy or the attached matter to identify the papers as related." *Id.* at 607, 121 S.E.2d at 204 (citing *Brown v. State Farm Mut. Ins. Co.*, 233 S.C. 376, 388, 104 S.E.2d 673, 679 (1958)). Because endorsements modify the terms of insurance contracts, "to be considered a part" of a policy in question, an endorsement "must be so clearly imported into it as to leave no doubt of the intention of the parties" to rely on its terms and inclusion. *Id.*

When an insurance company seeks to limit its coverage, "it must use clear and unequivocal language to evidence its intent to limit temporary coverage, and also must call limiting conditions to the attention of the applicant." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 358, 415 S.E.2d 393, 395 (1992). This rule applies with special force to exclusionary policy language, whether in the policy itself or any attached endorsements to the policy, which is "construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's

applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 614 S.E.2d 611 (2005); *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 143, 781 S.E.2d 137, 141 (S.C. 2015).

The protective safeguards endorsement cannot bar coverage for the fire because Tebele did not receive it when the Insurers bound coverage, nor was he made aware of its existence until after the fire. Our Supreme Court has recognized that "restrictions or limitations of which an insured has no notice are not binding" on the insured. *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 186, 399 S.E.2d 770, 772 (1990) (citing *Hyder v. Metropolitan Life Ins. Co.*, 183 S.C. 98, 190 S.E. 239 (1936)). "An insurer who wishes to avoid liability must not only use clear and unequivocal language evidencing its intent to limit temporary coverage, but it must also call such limiting conditions to the attention of the applicant." *Poston*, 303 S.C. at 186, 399 S.E.2d at 772 (quoting *Sanchez v. Connecticut General Life Ins. Co.*, 681 P.2d 974 (Co. App. 1984)).

In *Poston*, the Supreme Court dealt with the question as to whether a limitation on life insurance coverage was applicable to the insured where he received a conditional receipt binding coverage that had a list of conditions written on the back. Poston's insurance agent had not specifically called Poston's attention to the conditions written on the receipt and did not recall whether he had given the receipt to Poston or Poston's wife. *Poston*, 303 S.C. at 183-84, 399 S.E.2d at 771. The Court emphasized that Poston had not sought out an agent to procure a life insurance policy for him but rather it was the agent that solicited Poston. The Supreme Court held that Poston was not bound by the limitations on coverage that were listed on the receipt. *Id.* at 186, 399 S.E.2d at 772. Likewise, in *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 298, 468 S.E.2d 292, 297 (1996) the Supreme Court found that an insured was not bound by limitations on coverage that appeared on a conditional receipt of a life insurance policy where the insurance agent had failed to inform the insured of those limitations.

Tebele's situation is similar to *Poston* and *Rickborn*. Sutherland sought out and solicited Mr. Tebele's business. Crescent Coast then sought out Amwins to assist in obtaining insurance for Tebele. Crescent Coast had a written agreement with Amwins and Amwins had a written agreement with the Insurers to bind coverage on their behalf. After Crescent Coast procured a policy for Tebele, Egan emailed the binder to confirm total coverage amounts. As previously noted, the binder did not state what properties were required to have a sprinkler as a condition of coverage.

Crescent Coast, not Tebele, received the full policy on February 7, 2019. However, Crescent Coast did not give the policy to Mr. Tebele until after the fire occurred. As such, Tebele cannot be bound by the limitations on coverage contained in the policy. The trial court erred in denying Tebele's motion for a judgment notwithstanding the verdict because the limitations on coverage were never delivered to Tebele and could not be enforced as a matter of law.

3.

The trial judge erred in denying Tebele's motion for a new trial absolute or a new trial nisi additur because the $15,000 award was grossly inadequate considering the undisputed testimony presented by Tebele that the cost to rebuild the property was more than $8 million.

Relevant Facts

Evidence of damages

The building at 1901 North Kings was insured for $2.5 million. In addition to the building itself, the contents were insured for $250,000 and the loss of rent was insured for $100,000 for a total insured value of $2.85 million. Tr. 296, l. 22 – 297, l. 2.

The building at 1901 North Kings was a total loss. Sal Martinez, the structural engineer hired by Tebele to assess the property, testified that the building would need "complete reconstruction," prior to being occupied and recommended that Tebele demolish the building and

rebuild it. Tr. 219, ll. 8 – 13; tr. 221, ll. 19 – 21. At the time of trial, the building at 1901 North Kings continued to sit empty because Tebele did not have the funds to rebuild. Tr. 757, ll. 2 – 24.

As part of Twaddell's work in assisting Mr. Tebele with the preparation of his claim, he hired a consultant to estimate the damage to the building. Tr. 346, ll. 13 – 16. That consultant estimated that the cost to replace the building would be approximately $4.5 million. Tr. 346, l. 17 – 347, l. 9. That estimate was prepared in April of 2019. Tr. 347, ll. 10 – 15.

Tebele also called Fred Shenay[4] who was qualified as an expert in general contracting and cost estimating. Tr. 1017, ll. 13 – 21. Shenay was hired by Tebele's Counsel to compare the cost to rebuild the building in 2019 versus the cost to rebuild in 2023. Tr. 1017, l. 24 – 1018, l. 11. Shenay concluded that the cost to rebuild in 2019 would have been approximately $6.3 million and the cost to rebuild in 2023 would have been approximately $8.4 million. Tr. 1026, l. 20 – 1027, l. 3; Pl.'s Exs. 55-A and 55-B.

Notwithstanding this evidence, the jury returned a damage award in Tebele's favor of merely $15,000.

Post-trial motion

Tebele filed a post-trial motion for a new trial absolute or, in the alternative, a new trial nisi additur. Pl.'s mot. for new trial. Tebele argued that pursuant to South Carolina's Value Policy Statute, Tebele was entitled to $2.85 million at a minimum because that was the insured amount under the policy. *Id*. at 6. Tebele also argued the jury award was grossly inadequate and that a new trial absolute was warranted. *Id*. at 8. Finally, Tebele argued for a new trial nisi additur in the alternative to a new trial absolute. *Id*. at 9. The trial judge denied the motion in a Form 4 Order.

[4] The transcript incorrectly names this witness "Gerald Genay." Because the witness' real name is Fred Shenay, the name Fred Shenay will be used in this brief.

Argument

The jury's $15,000 verdict in favor of Tebele on its breach of fiduciary duty claim against Crescent Coast was grossly inadequate. First, South Carolina's Valued Policy Statute entitles an insured to the "full amount of insurance" under a fire insurance policy when the property is a total loss, which in this case was $2.85 million. The jury's verdict was so inadequate as to provide a compelling justification for granting a new trial absolute. And even if a new trial absolute was not proper, the trial judge erred in not granting Tebele's motion for a new trial nisi additur to increase the damage award to conform to the undisputed evidence regarding the cost to rebuild the property.

A. As a fire insurance policy, Tebele's insurance policy covering 1901 North Kings was subject to South Carolina's Valued Policy Statute and Tebele was entitled, at a minimum, to the full amount of $2.85 million.

Tebele's policy covering the 1901 North Kings property is subject to South Carolina's Valued Policy Statute which provides in relevant part that: "the amount of insurance must be fixed by the insurer and insured at or before the time of issuing the policy. In case of total loss by fire the insured is entitled to recover the full amount of insurance." S.C. Code § 38-75-20. Our Supreme Court has interpreted the Valued Policy Statute "to require that in a case of total loss by fire, recovery equals the full amount of insurance under the policy." *Averill v. Preferred Mut. Ins. Co.*, 314 S.C. 49, 52, 441 S.E.2d 632, 633 (1994). The referenced statute is deemed to form a part of every policy issued in South Carolina, and any conflicting policy provision will be rendered null and void. *Tedder v. Hartford Fire Ins. Co.*, 246 S.C. 163, 166, 143 S.E.2d 122, 123 (1965).

In *Averill*, the Supreme Court was presented with the question as to whether summary judgment was properly granted in favor of homeowners whose home was destroyed by fire while it was under construction. The insurers in *Averill* had refused to pay the amount due under the policy and the homeowners sued for breach of contract. 314 S.C. at 50, 441 S.E.2d at 632. The

homeowners and insurers disputed the value of the destroyed home under the property. The Court held that in a case involving a total loss from fire, "recovery equals the full amount of insurance under the policy and not the actual value of the insured property." *Id*. at 52, 441 S.E.2d at 633.

The policy at issue in this case is a provided fire insurance coverage to Tebele, as the first-named insured, for the full value of the insured properties fixed by the Insurers at the time the policy was issued. 1901 North Kings was insured for $2.85 million. Thus, the jury's verdict of $15,000 is grossly inadequate and fell far short of what Tebele was entitled to recover.

Furthermore, in cases involving the failure of an insurance agent or broker to maintain or procure insurance, courts have recognized an insured's prerogative to rely on the expert knowledge of the agent or broker." *Republic Textile Equip. Co. v. Aetna Ins. Co.*, 293 S.C. 381, 388, 360 S.E.2d 540, 544 (Ct. App. 1987). Had Crescent Coast not breached its obligation and fiduciary duty to obtain the desired coverage which Tebele sought and purchased to provide coverage in the amount of $2.85 million, a loss payment equal to $2.85 million would have been paid to Tebele following the fire loss as required by the Valued Policy Statute. Therefore, a verdict in favor of Tebele as to the causes of action against Crescent Coast must be *at a minimum* $2.85 million.

B. The jury's damage award was grossly inadequate in comparison to the damages which far exceeded the insured value under the policy which provides a compelling justification to set aside the verdict and grant a new trial absolute.

Our courts have long held that verdicts which are grossly inadequate should be set aside and that a new trial absolute should be granted. A new trial absolute is required when the verdict is so grossly inadequate or excessive that it clearly indicates that it was the result of prejudice, passion, caprice or some other improper motive. *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

This Court has previously explained that a trial judge "must grant a new trial absolute if the amount of the verdict is grossly inadequate . . . so as to shock the conscience of the court." *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005). *See also Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (noting that a trial judge should only grant a new trial absolute when "the verdict is shockingly disproportionate to the injuries suffered") (internal quotations omitted). "When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993).

Of course, the right to a civil jury trial is a fundamental constitutional right and our courts must not take invading the province of the jury lightly. S.C. Const. art. I, § 14; *Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 524, 905 S.E.2d 380, 387 (2024). Before a court can invade the province of the jury by altering its damage award, the court must give compelling reasons for doing so. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). The fact that the $15,000 verdict is so inadequate when compared to the damages which far exceed the policy amount is a compelling reason for this Court to grant a new trial absolute.

In *Allstate Ins. Co. v. Durham*, our Supreme Court reversed a trial judge's refusal to grant a new trial absolute. In that case, Allstate presented "undisputed evidence that it sustained damages of $35,651.74 as a result of Durham's breach of implied warranty." 314 S.C. at 531, 431 S.E.2d at 557. The Court thus found that the verdict award of $160.20 was grossly inadequate and a new trial absolute was required.

The damage award found to be grossly inadequate in *Allstate v. Durham* pales in comparison to the disparity in this case. Tebele presented undisputed evidence that his damages far exceeded the value of the policy. At the very least, Tebele's damages were estimated at $4.5 million by the consultant hired by Twaddell. Tr. 346, l. 17 – 347, l. 9. But Tebele also presented undisputed expert testimony that to rebuild the property in 2023, the cost was more than $8.4 million thanks to the significant increase in construction costs. Tr. 1026, l. 20 – 1027, l. 3. To state the plainly obvious, $15,000 is a pittance in comparison to the undisputed damage estimates presented by Tebele.

The damage award in this case was shockingly disproportionate to the damages sustained by Tebele and the trial judge erred in denying Tebele's motion for a new trial absolute. This Court should reverse.

C. Even if this Court were to find that the jury verdict was not grossly inadequate, it should at least find that the verdict was merely inadequate such that a new trial nisi additur is necessary to increase the jury's damage award to conform to the evidence presented.

Our appellate courts "have long held that a trial court has the authority to grant a new trial nisi additur or remittitur when it finds the amount of the verdict to be inadequate or excessive." *Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 522, 905 S.E.2d 380, 386 (2024) (citing *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). Trial judges have the power to increase a damage award if the judge finds that the amount is merely inadequate. *Id*. "This 'merely inadequate or excessive' standard distinguishes cases in which a trial court may grant a new trial nisi from cases in which the trial court may not do so because the verdict is 'grossly inadequate or excessive,' indicating the verdict was not based on the evidence and the law." *Id*.

In *Jolly*, the Supreme Court considered a trial judge's granting of a new trial nisi additur in a mesothelioma case. The Court found that the trial judge's decision to increase the jury awards

from $200,000 to $1.58 million and from $100,000 to $290,000 was a proper exercise of its discretion. In *Jolly*, the plaintiffs presented undisputed testimony that the total cost of future medical care would be $1 million and therefore "it would clearly be within the trial court's discretion to find a $200,000 award inadequate." *Jolly*, 443 S.C. at 526, 905 S.E.2d at 388. *See also Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 418, 878 S.E.2d 696, 708 (Ct. App. 2022) (affirming a trial judge's granting of a new trial additur in a mesothelioma case where the jury's verdict was increased from $600,000 to $1 million).

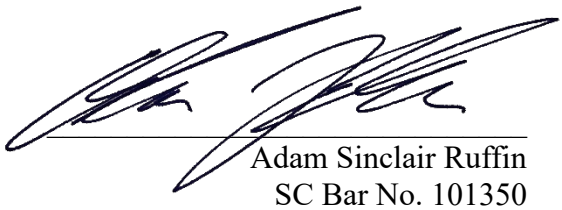
In this case, a verdict of $15,000.00 on the breach of fiduciary duty claim against Crescent Coast is *at least* merely inadequate. As pointed out above, the building at 1901 North Kings was destroyed by fire and the value of the policy was $2.85 million. The undisputed testimony presented by Tebele estimated the cost between $4 and $6 million had the reconstruction occurred in 2019. However, the only evidence presented as to the cost to rebuild in 2023 was that of Shenay who concluded it would cost *$8.4 million*. Tr. 1026, l. 20 – 1027, l. 3; Pl.'s Exs. 55-A and 55-B.

If this Court concludes that a new trial absolute is not required in this case, it should at least find the $15,000 award inadequate and hold that the trial judge erred in denying Tebele's request for a new trial nisi additur.

CONCLUSION

By reason of the arguments in Issues 1 and 2, Tebele respectfully requests this Court to hold that Tebele was entitled to coverage as a matter of law and therefore entitled to a directed verdict and motion for JNOV on its breach of contract claim against the Insurers. As such, Tebele requests this Court to remand for a new trial on Tebele's bad faith claim against the Insurers.

Alternatively, by reason of the arguments in Issue 3, Tebele respectfully requests this Court to hold that the $15,000 damage award was grossly, or at a minimum merely, inadequate and order a new trial absolute or a new trial nisi additur.



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