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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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1.

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2.

Whether the trial judge properly denied Crescent Coast's motion for a directed verdict on Tebele's breach of fiduciary duty claim where Crescent Coast did owe a fiduciary duty to Tebele, and the jury was presented with ample evidence on which to conclude it breached that duty?

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.

The case proceeded to a jury trial before the Honorable Alex Hyman on December 4 – 13, 2023. Crescent Coast moved for a directed verdict on both causes of action against it which the trial judge denied. The jury found in favor of Crescent Coast on Tebele's negligence claim, but found in Tebele's favor on the breach of fiduciary duty claim. The jury awarded $15,000 in damages against Crescent Coast.

Tebele filed a post-trial motion for a new trial absolute or a new trial nisi additur against Crescent Coast which Cresent Coast opposed. Crescent Coast did not file a post-verdict motion for a JNOV. The trial judge denied Tebele's post-trial motions.

Tebele and Cresent Coast filed cross appeals.

STANDARD OF REVIEW

"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).

STATEMENT OF FACTS

Relevant Trial Testimony

Mr. Tebele met Joey Sutherland in 2011 when Sutherland was working in the restaurant business. Tr. 507, ll. 4 – 15. Sutherland has owned and managed several different restaurants in the Myrtle Beach area. Tr. 502, ll. 13 – 19; tr. 503, ll. 2 – 17. Sutherland managed a restaurant called Kansas City Steakhouse in 2011 and again in 2014. Tr. 504, l. 1 – 505, l. 9. That restaurant operated out of Tebele's 1901 North Kings Property. Tr. 505, ll. 10 – 16.

In 2017, while working for Global Risk Partners, Sutherland approached Mr. Tebele about insuring his properties, including 1901 North Kings. Tr. 758, ll. 1 – 23; 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 sold an insurance policy to Tebele's tenant, Melissa Garcia, who was operating a Mexican restaurant called La Casona at 1901 North Kings. Tr. 513, ll. 10 – 19. Crescent Coast used a company called Amwins[1] to assist in obtaining insurance for Ms. Garcia. As part of the process of insuring La Casona, Amwins received an inspection report that had been done on 1901 North Kings on October 3, 2018. That report indicated that the property had a sprinkler system. Tr. 474, l. 2 – 475, l. 16; Pl.'s Ex. 13.

[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.

Sutherland continued to approach 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. As it did for Ms. Garcia, Crescent Coast used Amwins to help obtain a policy for Tebele. Tr. 648, ll. 3 – 25. On August 20, 2018 after meeting with Tebele, Egan prepared an ACORD form application and submitted it to Whitney Northcut, an employee of Amwins, for the purpose of obtaining insurance coverage quotes for Mr. Tebele. Tr. 658, ll. 5 – 18; Pl.'s Ex. 9.

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. Sutherland testified that he did not recall whether Mr. Tebele gave a specific time-period for which construction of the new sprinkler system at 1901 North Kings was to be completed but understood from his discussions with Mr. Tebele during the August 2018 meeting that the sprinkler system was to be completed shortly. Tr. 538, ll. 11 – 22. Even though Mr. Tebele told Sutherland the sprinkler system was not completed in the building, Crescent Coast still listed the property as having been 100% sprinklered in both Ms. Garcia's insurance application, and the coverage quote ACORD form that was submitted to obtain coverage quotes for Mr. Tebele. Pl.'s Ex.s 9, 11, and

25. The coverage quote ACORD form was not signed by either Mr. Tebele or Egan, nor was it ever provided to Mr. Tebele for review. Tr. 658, ll. 3 – 11.

Sutherland testified that he obtained his producer's license and surplus lines broker license in 2010 but that he did not always maintain those licenses and there were periods of time that his licenses lapsed. Tr. 513, l. 20 – 514, l. 15. He later acknowledged that his producer's license was first issued on March 5, 2023, long after he solicited Mr. Tebele to purchase insurance through him and Crescent Coast. Tr. 515, l. 7 – 516, l. 2; Pl.'s Ex. 74. And even though Sutherland was apparently not licensed to sell insurance in 2019, and even though he maintained that he did not fill out Tebele's insurance application, he acknowledged that it was his name at the top of Tebele's application. Tr. 516, ll. 14 – 22; Pl.'s Ex. 25.

Sutherland recalled receiving an email from another employee of Crescent Coast named Sandra Neena on December 19, 2018. In the email, Sandra wrote to Melissa Garcia that an inspector had been trying to reach her so that he could do an inspection on 1901 North Kings as mandated by Amwins. Tr. 520, l. 11 – 521, l. 8; Pl.'s Ex. 103. Sutherland explained that the reason this email was sent to him was so that he could help facilitate communication between the inspectors who were trying to inspect 1901 North Kings and Ms. Garcia who would be able to provide the inspectors with access to the building. Tr. 530, l. 10 – 531, l. 7.

Just a few days before coverage was bound on Mr. Tebele's properties, and before Tebele's insurance application was submitted to Amwins, Sutherland received another email from Sandra. This email from Sandra was also sent to Whitney, an employee of Amwins, and it indicated that the sprinkler system at 1901 North Kings was not yet operational. Tr. 518, l. 14 – 519, l. 12; Pl.'s Ex. 23. Sutherland also received a phone call from Ms. Garcia who was in a panic because the

inspector who looked at the building told her that the sprinkler system was not operational. Tr. 523, l. 12 – 524, l. 10.

Although the email from Sandra referenced the insurance policy for La Casona, and the phone call Sutherland received was from Ms. Garcia, both La Casona and Tebele were purchasing insurance through Crescent Coast for 1901 North Kings. It was well known to both Sutherland and Egan that La Casona operated out of Tebele's 1901 North Kings property. In fact, Sutherland testified that, as of January 11, 2019, he was aware that Ms. Garcia was concerned about the sprinkler not being operational. Tr. 547, l. 13 – 548, l. 5; Pl.'s Ex. 23. As previously indicated, Crescent Coast sold Melissa Garcia insurance for La Casona in 2018. Tr. 506, ll. 17 – 20; tr. 649, ll. 1 – 18; Pl.'s Ex. 11 and 105. Whitney responded to the email on January 11, 2019, indicating that she would note the fact that the sprinkler was not operational in Amwins' file. Pl.'s Ex. 23.

Egan acknowledged that the insurance policy for Ms. Garcia indicated that the 1901 North Kings property was 100% sprinklered but that the policy did not require the property to have an automatic sprinkler system for coverage. Tr. 654, l. 7 – 655, l. 19. Crescent Coast knew that the email sent by Sandra to Whitney on January 11, 2019 stated that the sprinkler system at 1901 North Kings had not been turned on but never mentioned nor disclosed to Tebele the email or Crescent Coast's knowledge of the sprinkler system's operational status. Tr. 743, ll. 14 – 20; tr. 746, ll. 10-14. In fact, Egan testified that Crescent Coast did not have an obligation to notify Mr. Tebele of its knowledge as to the operational status of the sprinkler system at 1901 North Kings, and that he finally provided a copy of Sandra's January 11 email to Mr. Tebele after Egan submitted Tebele's loss claim. Tr. 675, ll. 8 – 17; tr. 743, ll. 14 – 20.

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 schedule of values contained the 100% notation that Egan entered for the 1901 North Kings property in December of 2018, and Egan testified that he believed he entered the notation into the schedule of values on or before December 17, 2018. Tr. 662, ll. 12-18; tr. 727, l. 22 – 728, l. 11. Egan further testified that he knew the information that was put into the schedule of values would affect Tebele's terms of coverage "to a degree." Tr. 663, ll. 6 – 10.

Egan said 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 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 due to the 100% notation that Egan input onto the schedule of values. Tr. 662, ll. 12-18; tr. 731, ll. 1 – 17.

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 coverage could begin on January 15, 2019. Tr. 666, l. 11 – 668, l. 21. Egan testified that he also signed the application on January 14, 2019 and submitted it on that same day to bind coverage. Tr. 702, l. 17 – 703, l. 20; Pl.'s Ex. 25. Egan further testified that he would not have signed the application on January 14 if he were to believe that the information on the application was not true. Tr. 704, ll. 4 – 12. However, Egan admitted that Crescent Coast knew that the sprinkler system at the 1901 North Kings property was not operational on January 10 before he sent the final insurance application to Mr. Tebele on January

11, 2019. Tr. 738, l. 20 – 740, l. 6; Pl.'s Ex. 23. In fact, Egan testified that if Mr. Tebele, rather than Ms. Garcia, had notified Crescent Coast of the sprinkler system's operational status on January 10, 2019, Egan would have immediately contacted the underwriter to discuss. Tr. 720, ll. 16-22; Tr. 739, l. 20 – 740, l. 6; Pl.'s Ex. 23.

Egan emailed Mr. Tebele on January 15 and attached the premium finance agreement for the insurance policy indicating that a down payment of $34,199.42 was required and that the check was to be made out to Crescent Coast. Mr. Tebele sent Crescent Coast the down payment that same day. Tr. 668, l. 6 – 669, l. 13; tr. 671, l. 15 – 672, l. 14; Pl.'s Ex.s 26-28. Egan explained that after receiving the check, Crescent Coast deposited it, withheld its commission, and distributed the remaining money to Amwins. Tr. 672, l. 15 – 673, l. 7. Sutherland testified that he was paid his commission thirty days after coverage was bound. His commission was 40% of Crescent Coast's commission which was 10% of the policy premium. Sutherland estimated that his personal commission was $6,800. Tr. 551, l. 22 – 554, l. 21.

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 burnt down 1901 North Kings property. Tr. 674, ll. 1 – 21. Tebele's loss claim was denied due to the 100% sprinklered notation that Egan input into the schedule of values in December of 2018. Specifically, the Insurers contended that the protective safeguards endorsement applied to bar coverage because the 100% notation that Egan input into the schedule of values identified 1901 North Kings as having a sprinkler system. Tr. 585, l. 10 – 586, l. 8; Def.'s Ex. 46.

Trial Arguments and Rulings

At the close of Tebele's case, Crescent Coast moved for a directed verdict and incorporated its motion for summary judgment. Tr. 1087, l. 24 – 1087, l. 13. Crescent Coast argued that it simply obtained information from Tebele and conveyed that information to Amwins. Crescent Coast maintained that Tebele told Crescent Coast that 1901 North Kings had a sprinkler system under construction covering 100% of the building that would be completed prior to the policy renewal date and then never informed Crescent Coast that the sprinkler system was not completed. Tr. 1088, ll. 1 – 15. Counsel argued that Mr. Tebele signed the insurance application on January 14, 2019 indicating that 1901 North Kings was 100% sprinklered and Crescent Coast forwarded that application to Amwins for binding. Tr. 1088, ll. 15 – 19.

In support of its argument for a directed verdict as to Tebele's breach of fiduciary duty cause of action, Crescent Coast relied on *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (2002) and *Gordon v. Fidelity & Cas. Co. of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961). Tr. 1095, l. 10 – 1096, l. 3. Counsel argued that Tebele was a sophisticated insurance buyer and that there was no special relationship between Tebele and Crescent Coast. Tr. 1096, ll. 3 – 25.

Counsel for Tebele responded by citing to *Smith v. Universal Prop. & Cas. Ins. Co.*, 2017 U.S. Dist. LEXIS 134036 (D.S.C. Aug. 22, 2017) in support of the argument that Mr. Tebele and Mr. Sutherland had a long relationship, and that Mr. Sutherland had solicited Mr. Tebele for years to sell him insurance on his properties. Counsel for Tebele argued that there was enough evidence for the jury to consider whether Crescent Coast was liable for breach of fiduciary duty to Tebele. Tr. 1097, l. 18 – 1099, l. 1.

The trial judge denied Crescent Coast's motion for a directed verdict. Specifically, the judge said: "I'm going to send it to the Jury based on Mr. Sutherland's knowledge of the property,

the fact that he had worked there for some period of time, and had been in that business, and it does appear that he was contacting the Plaintiff for years before when they were trying to get him to obtain insurance." Tr. 1099, l. 22 – 1100, l. 4. Crescent Coast renewed its motion for a directed verdict at the close of all evidence and the trial judge again denied it. Tr. 1182, l. 13 – 1183, l. 1. As previously indicated, the jury found in Tebele's favor on its breach of fiduciary duty cause of action and awarded $15,000 in damages.

In its memorandum in opposition to Tebele's motion for a new trial, Crescent Coast argued that the $15,000 verdict was explainable as representing the commissions which Tebele paid Crescent Coast for the 1901 North Kings property. Crescent Coast's mem. in opp. to Tebele's post-trial motion, 11. Crescent Coast did not renew its directed verdict motion by filing a motion for a JNOV on its claim that it was entitled to judgment as a matter of law on the breach of fiduciary duty claim against it.

ARGUMENT

1.

Crescent Coast's directed verdict motion pursuant to Rule 50(a) is not preserved for appellate review because it failed to move for a JNOV pursuant to Rule 50(b) after the jury rendered a verdict in Tebele's favor on the breach of fiduciary duty claim.

"When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of all evidence." *Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006). "[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion." *Id*. at 20, 640 S.E.2d at 496. "When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV."

Id. "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

South Carolina has not explicitly addressed whether the failure to move for a JNOV after a jury verdict forecloses the ability to raise a directed verdict motion on appeal. This question has been addressed by the U.S. Supreme Court and the Fourth Circuit though, and because our Rule 50 is substantially the same as Rule 50 of the Federal Rules of Civil Procedure, these cases are instructive.

In *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215 (1947), the Supreme Court of the United States considered "whether a party's failure to make a motion in the District Court for judgment notwithstanding the verdict, as permitted in Rule 50(b) [of the Federal Rules of Civil Procedure], precludes an appellate court from directing entry of such a judgment." Like the South Carolina Rule, the federal rule regarding motions for JNOV allows a party who moved for directed verdict to renew that motion by way of a motion for JNOV after the jury returns its verdict. Both Rules also allow the moving party to simultaneously move to a new trial as an alternative to a JNOV. *See* Rule 50(b), SCRCP and Rule 50(b), Fed. R. Civ. P.

As the Supreme Court noted in *Cone*, this procedure allows a trial court to choose between the two alternatives: new trial, or judgment as a matter of law. *Cone*, at 215-16. In *Cone*, "[t]he respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial." *Id*. at 217-18. Because of the failure to move for JNOV after the jury's verdict, the Supreme Court held that "the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Id*. at 218.

The U.S. Supreme Court reaffirmed this view in *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006) noting that Rule 50 sets forth "two stages" for challenging the sufficiency of the evidence. First, the party must move for a directed verdict after the evidence is presented but before the case is decided by a jury. Next, if the jury decides the case against it, the party must file its Rule 50(b) motion for JNOV or new trial after the jury renders its decision. A party's failure to challenge the jury's verdict by way of a Rule 50(b) motion forecloses its ability to challenge that verdict on appeal. *Id*. at 396. *See also Ortiz v. Jordan*, 562 U.S. 180, 191-92 (2011) (finding that an appellate court has "no ability to "upset the jury's decision on . . . liability" when the appealing party failed to first challenge the jury's determination by way of a Rule 50(b) motion); *Morrash v. Strobel*, 842 F.2d 64, 70 (4th Cir. 1987) ("Where a motion for j.n.o.v. has not been presented to the trial court, this court will not direct the district court to enter judgment contrary to the one it had permitted to stand"); *Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996) (holding that an appellate court can review the alleged error but that its remedial power is limited by the failure to move for JNOV after the verdict is issued and that "[i]n the absence of a proper Rule 50(b) motion after the verdict, we cannot order an entry of judgment contrary to that made by the district court").

Crescent Coast did not renew its directed verdict motion after the jury verdict against it in conformity with Rule 50(b) of the South Carolina Rules of Civil Procedure. As such, this Court is without power to provide Crescent Coast with the relief it seeks: a judgment in its favor as a matter of law. Crescent Coast's failure to move to set aside the jury verdict against it represents an acquiescence to that verdict. This Court should affirm the jury verdict against Crescent Coast for breach of fiduciary duty because that verdict was not challenged by Cresent Coast by way of a Rule 50(b) motion.

2.

The trial judge properly denied Crescent Coast's motion for a directed verdict on Tebele's breach of fiduciary duty claim because Crescent Coast did owe a fiduciary duty to Tebele, and the jury was presented with ample evidence on which to conclude it breached that duty.

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). "A 'fiduciary relationship' is founded on trust and confidence reposed by one person in the integrity and fidelity of another." *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). Furthermore, a duty of an insurance agent to advise the insured may arise where "there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on." *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988).

"[W]hether a fiduciary relationship has been breached can be a question for the jury, [but] the question of whether one should be imposed between two classes of people is a question for the court." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 715-16 (2003). "Historically, [the Supreme Court] has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, *such as with* lawyers, *brokers*, corporate directors, and corporate promoters." *Id*. at 459, 578 S.E.2d at 716 (emphasis added).

Crescent Coast argues that there was no fiduciary duty between it and Tebele as a matter of law relying primarily on *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2020), *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (2002), *Gordon v. Fid. & Cas. Co.*, 238 S.C. 438, 120 S.E.2d 509 (1961), and *O'Connor v. Bhd.*

of R.R. Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950). AIB for R-A, 18-19. None of these cases indicate that an insurance broker can never owe a fiduciary duty to his client, and in fact suggest that, at least in some circumstances, a broker could owe such a duty.

In *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, this Court held that a hospital did not owe a fiduciary duty to its patient in the submission of insurance claims because that relationship—as distinguished from that of doctor-patient—was a creditor-debtor relationship and not fiduciary in nature. 429 S.C. at 514, 839 S.E.2d at 474. Both *Gordon* and *O'Connor* were "failure to read" cases where the insured had physical possession of the policy for months but failed to review it. Under those circumstances, the courts found the insured was precluded from recovering from their agents for statements the agents made that were inconsistent with the coverages in the policy. *Gordon*, 238 S.C. at 451, 120 S.E.2d at 515-16; *O'Connor*, 217 S.C. at 448, 60 S.E.2d at 886. Of course, Tebele was never given a copy of the insurance policy until after the fire. It was only then that Egan handed the policy to Mr. Tebele for the first time. These "failure to read" cases have little application in this case.

The case that most strongly supports Crescent Coast's position is *Pitts*, in which this Court held that no fiduciary relationship existed between the insured and the insurer *at the application stage*. 352 S.C. at 331, 574 S.E.2d at 507-08. *Pitts* did not hold that a fiduciary relationship *can never exist* between an insurance agent and an insured. In fact, *Pitts* and the other cases relied on by Crescent Coast leave open the possibility that a fiduciary relationship between an agent and an insured may arise if there are factors evidencing a relationship beyond the mere sale of insurance. "[T]o determine whether a fiduciary relationship existed between [the parties], we must look at the particulars of their relationship." *Pitts*, 352 S.C. at 330, 574 S.E.2d at 507.

In *Smith v. Universal Prop. & Cas. Ins. Co.*, then U.S. District Judge J. Michelle Childs was presented with a motion by the plaintiffs to remand an insurance lawsuit back to state court. 2017 U.S. Dist. LEXIS 134036 (D.S.C. Aug. 22, 2017). The defendants in *Smith* argued, in part, that the plaintiffs had "no hope of succeeding on their cause of action for breach of fiduciary duty against [the insurance agent]" because this Court's decision in *Pitts* established that there could never be a fiduciary relationship between an insured and his agent. *Smith* 2017 U.S. Dist. LEXIS 134036, at *10-11. Judge Childs rejected the defendants' argument:

> Neither *Pitts* nor cases following it state that, as a categorical matter, a fiduciary relationship can never arise between an insurance agent and an insured. Thus, they implicitly leave open the possibility that a fiduciary relationship might arise between an agent and an insured if, for instance, the transaction was not truly at arm's length or other factors demonstrate that the parties' relationship goes beyond the mere sale of insurance.

Smith, at *12-13. Judge Childs granted the plaintiffs' motion to remand the case back to state court finding, in part, that South Carolina law does not preclude the existence of a fiduciary relationship between an insured and his agent, and that the allegations set forth in the complaint could support a conclusion that a fiduciary relationship existed. *Id*. at *13.

Consider also our Supreme Court's decision in *Darby v. Furman Co.*, 334 S.C. 343, 513 S.E.2d 848 (1999). The question presented there was whether a real estate broker who represented the seller of real property could retain his sales commission when he ultimately became the purchaser of that property without disclosing that to the seller. *Id*. at 345-46, 513 S.E.2d at 849. The *Darby* Court noted that "[r]eal estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." *Id*. at 346-47, 513 S.E.2d at 849 (citing *Hamby v. St. Paul Mercury Indem. Co.*, 217 F.2d 78, 80 (4th Cir. 1954)). The Court also noted that the real estate broker was required to "make full

disclosure to his principal of all material facts relevant to the agency [which] is fundamental to the fiduciary relationship of principal and agent." *Darby*, 334 S.C. at 347, 513 S.E.2d at 850. The Court ultimately concluded that the real estate broker was required to return the sales commission because he breached his fiduciary duty. *Id*. at 348, 513 S.E.2d at 850. Although our appellate courts have never explicitly held that an insurance broker owes a fiduciary duty to his client, there is no reason for this Court to treat an insurance broker differently from a real estate broker.

Additionally, as the Fourth Circuit noted in *Hamby*, "[c]ertainly there can be no question as to the existence of the fiduciary capacity in a case where the agent has been entrusted with money to be used for a specific purpose." 217 F.2d at 80. In this case, Egan emailed Mr. Tebele on January 15 and attached the premium finance agreement for the insurance policy indicating that a down payment of $34,199.42 was required to purchase the insurance coverage. Mr. Tebele sent Crescent Coast the down payment that same day. Tr. 668, l. 6 – 669, l. 13; tr. 671, l. 15 – 672, l. 14; Pl.'s Ex.s 26-28. After receiving the check, Crescent Coast deposited it, withheld its commission, and distributed the remaining money to Amwins. Tr. 672, l. 15 – 673, l. 7. Crescent Coast's commission which was 10% of the policy premium. Tr. 551, l. 22 – 554, l. 21.Tebele entrusted Crescent Coast with this money to be used for the specific purpose of buying insurance coverage, including fire coverage for his properties, including 1901 North Kings. As such, Crescent Coast did owe a fiduciary duty to Tebele.

Other states have also found the existence of a fiduciary duty in an insured-insurance broker relationship. For instance, the Fifth District Appellate Court of Illinois in *Econ. Fire & Cas. Co. v. Bassett*, found that "the relationship between an insured and his broker, acting as the insured's agent, is a fiduciary one even though the broker may be compensated by some third party." 170 Ill. App. 3d 765, 772, 525 N.E.2d 539, 543 (1988). In *Bassett*, a child was injured at

his babysitter's home and the parents sued to recover damages. The homeowner's insurance company denied the claim pointing to an exclusion in the policy that prohibited coverage for injuries sustained from business pursuits of the insured. *Id*., 170 Ill. App. 3d at 767-68, 525 N.E.2d at 540-41. The *Bassett* Court agreed that the insurance broker was liable for their failure to obtain coverage because the broker was aware that the insured conducted babysitting business out of her home. Despite this knowledge, the broker failed to advise the insured that injuries sustained at the home as part of the babysitting business would not be covered. *Id*., 170 Ill. App. 3d at 772-73, 525 N.E.2d at 544.

Bassett is not unlike the situation here where Crescent Coast was aware that the sprinkler system was not yet functional, but still represented to the Insurers that 1901 North Kings was 100% sprinklered. *See also Poluk v. J.N. Manson Agency*, 258 Wis. 2d 725, 739, 653 N.W.2d 905, 912 (2002) ("While we do not expect insurance agents to be clairvoyant, when they are presented with information suggesting an exemption clause might be triggered in a policy being renewed, they have a duty to inquire further. To hold otherwise would be to absolve the agent of their duty to obtain the insurance requested by the insured").

Ample evidence was presented to the trial judge which indicated that the relationship between Mr. Tebele and Crescent Coast, and Sutherland in particular, went beyond the mere sale of insurance. Sutherland had worked for a tenant of Tebele's at 1901 North Kings and solicited Tebele for years to sell him insurance. Egan, at the insistence of Amwins, prepared the schedule of values without informing Tebele of that fact. Egan knew the schedule of values would affect Tebele's coverages, but still did not tell Tebele about this or give Tebele a copy of it. Importantly, the 100% sprinklered notation that Egan put into the schedule of values was the basis for the Insurers denying coverage. Finally, Tebele sent a check to Crescent Coast for more than $30,000

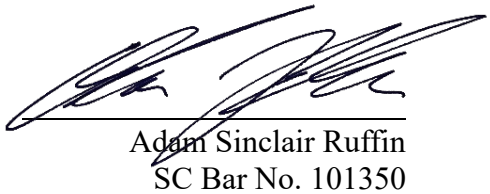
for the insurance which Crescent Coast accepted, withheld their commission, and distributed the remainder to Amwins. All these facts support the trial judge's ruling that Crescent Coast had a fiduciary duty to Tebele and properly submitted the case to the jury. This Court should affirm.

There was also ample evidence presented to the jury that established Crescent Coast's breach of its fiduciary duty. First, Sutherland was apparently not even licensed to sell insurance in 2019. Tr. 516, ll. 14 – 22; Pl.'s Ex. 25. Crescent Coast was aware that 1901 North Kings did not have an operational sprinkler system when they submitted Melissa Garcia's insurance application to Amwins in which Crescent Coast had indicated to Amwins that the property was sprinklered. Just days before the final application was sent to Mr. Tebele to sign, Crescent Coast was informed that the sprinkler system was not operational. While Crescent Coast insists that Tebele was in the better position to know whether the 1901 North Kings sprinkler system was operational or not, this misses the point. The point is not whether Tebele knew that the sprinkler system was still under construction and not yet operational. The point is that Tebele was never informed by anyone at Crescent Coast that the property was required to have a sprinkler system for coverage. Egan admitted as much when he testified that he had no recollection of ever telling Mr. Tebele that a sprinkler system was required but that he "assumed" Mr. Tebele would know that a sprinkler system was required. Tr. 731, ll. 1 – 17.

Finally, even though Tebele paid Crescent Coast a large sum of money to purchase insurance for his properties, including fire insurance, Crescent Coast never told Tebele the agreement required a sprinkler system, and they never gave him the policy until after the fire occurred. The trial judge correctly denied Crescent Coast's motion for a directed verdict and the jury correctly determined that Crescent Coast breached its fiduciary duty to Tebele. This Court should affirm.

CONCLUSION

By reason of the foregoing arguments, this Court should hold that Crescent Coast is procedurally barred from requesting a directed verdict in its favor when it failed to renew that motion through a post-verdict Rule 50(b) motion. Alternatively, this Court should affirm the trial judge's denial of Crescent Coast's motion for a directed verdict because there was ample evidence establishing that Crescent Coast owed Tebele a fiduciary duty and that it breached that duty.



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This 14th day of April 2025.