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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
THE HONORABLE B. ALEX HYMAN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2024-000705
CIVIL ACTION NO. 2021-CP-26-00808

A. Tebele & Sons, a South Carolina General Partnership,

APPELLANT-RESPONDENT,

versus

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.

FINAL REPLY BRIEF OF RESPONDENT-APPELLANT CRESCENT COAST INSURANCE, LLC

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STATEMENT OF ISSUES IN REPLY

I. Crescent Coast was not required to move for a judgment notwithstanding the verdict following the jury's verdict to preserve for appeal whether it owed a fiduciary duty to A. Tebele & Sons because it had previously raised the issue to the Trial Court and the existence of a duty is a legal question to be determined by the court.

II. Crescent Coast is entitled to a directed verdict on the breach of fiduciary duty claim brought by A. Tebele & Sons because, as a matter of law, Crescent Coast as an insurance agent owed no fiduciary duty to A. Tebele & Sons during the arm's length transaction for the sale of insurance.

ARGUMENT IN REPLY

I. Crescent Coast was not required to move for a judgment notwithstanding the verdict following the jury's verdict to preserve for appeal whether it owed a fiduciary duty to A. Tebele & Sons because it had previously raised the issue to the Trial Court and the existence of a duty is a legal question to be determined by the court.

A. Tebele & Sons argues that Crescent Coast Insurance, LLC is not entitled to request this Court to enter judgment as a matter of law on A. Tebele & Sons' breach of fiduciary duty claim due to a lack of duty because Crescent Coast did not move for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b), SCRCP following the jury's verdict. To the contrary, Crescent Coast moved for a directed verdict pursuant to Rule 50(a), SCRCP on the issue of the lack of a fiduciary duty at the close of A. Tebele & Sons' case, as well as at the close of all the evidence. The issue was raised to and ruled upon by the Trial Court. There has never been a requirement under South Carolina law that a party must then move for a JNOV subsequent to the jury's verdict to preserve for appellate review an issue raised to and ruled upon by the trial court during the trial of the case.

Furthermore, the issue which Crescent Coast has appealed is one of law to be decided by the court and not a jury. As such, Crescent Coast was not required to move for

a JNOV because the issue raised on appeal is not one testing the sufficiency of the evidence for a jury, but is rather an issue of law for the court.

At the close of the evidence presented by A. Tebele & Sons, Crescent Coast moved for a directed verdict pursuant to Rule 50(a), SCRCP on the breach of fiduciary duty claim [R.pp. 1262, l. 24 – 1276, l. 4; Tr. pp. 1086, l. 24 – 1100, l. 4], including specifically that Crescent Coast did not owe a fiduciary duty as a matter of law to A. Tebele & Sons. [R.pp. 1271, l. 10 – 1276, l. 4; Id. at pp. 1095, l. 10 – 1100, l. 4.] Crescent Coast subsequently renewed its motion for a directed verdict at the close of all the evidence. [R.p. 1353, ll. 13-19; Id. at p. 1182, ll. 13-19.]

There is no case law in South Carolina requiring a party to move for a JNOV following a jury's verdict to preserve for appeal issues raised to the trial court in a Rule 50(a) directed verdict motion. Under our State's jurisprudence, "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial." Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). Rather, post-trial motions are "used to preserve those that have been raised to the trial court but not yet ruled upon by it." Id. Thus, our State's appellate courts have not required parties to renew the same request or issue after an adverse ruling to preserve the issue for appeal.

A. Tebele & Sons relies upon federal case law in arguing that Crescent Coast was required to move for a JNOV to preserve for appeal the issue of whether the breach of fiduciary duty claim failed for a lack of duty. Notwithstanding the inapplicability of this federal law on South Carolina's issue preservation jurisprudence, the reasoning for requiring a JNOV motion under the Federal Rules of Civil Procedure as set forth in the federal case law cited by A. Tebele & Sons does not apply in this case.

In each of the federal cases cited by A. Tebele & Sons, the appellate court determined that under the Federal Rules of Civil Procedure, the appellate court could not review a challenge as to the sufficiency of the evidence supporting the jury's findings where the appellant did not renew its preverdict motion under FED. R. CIV. P. Rule 50(b). In these cases, once the jury rendered its factual findings, those were conclusive unless the appellant requested the lower court to grant judgment as a matter of law pursuant to Rule 50(b) due to the insufficiency of the evidence. Otherwise, the appellate court was limited in the relief it could provide to the appellant.

But the issue Crescent Coast has appealed is not one for the jury. Instead, this State's Supreme Court has held the "determination of the existence of a duty is solely the responsibility of the court." Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (internal citation omitted). The court itself must decide "[w]hether the law recognizes a particular duty." Id. Therefore, "the question of whether [a fiduciary duty] should be imposed between two classes of people is a question for the court." Id. at 459, 578 S.E.2d at 715. The Supreme Court rejected the proposition that the existence of a fiduciary duty could be a factual question for a jury. Id. at 459, 578 S.E.2d at 715-16.; see also Spence v. Wingate, 395 S.C. 148, 160, 716 S.E.2d 920, 926-27 (2011) (emphasizing that whether a fiduciary duty is owed is not a question of fact for a jury).

Therefore, even assuming the federal case law relied upon by A. Tebele & Sons applies to the principles of issue preservation under South Carolina law, Crescent Coast was not required to file a motion for a JNOV to preserve for appellate review the legal issue of whether a fiduciary duty existed because it was not an issue for a jury. The Supreme Court of the United States has recently held that under federal law, a party is not required

to renew purely legal arguments in a post-trial motion to preserve them for appeal. Dupree v. Younger, 598 U.S. 729, 736 (2023).

As noted by the U.S. Supreme Court in Dupree, "[t]he filing of a post-trial motion under Rule 50 allows the district court to take first crack at the question that the appellate court will ultimately face: Was there sufficient evidence *in the trial record* to support the jury's verdict? Absent such a motion, "an appellate court is 'powerless' to review the sufficiency of the evidence after trial." Id. at 735 (quoting Ortiz v. Jordan, 562 U.S. 180, 189 (2011) (quoting Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006))) (emphasis in original).

A purely legal question, such as the existence of a duty, does not require the trial court or the appellate court to determine whether the evidence in the trial record was sufficient to support the jury's verdict because such a question is not one for jury determination. Therefore, a JNOV motion would serve no useful purpose in that instance.

In this case, the legal question of whether a fiduciary duty existed between A. Tebele & Sons and Crescent Coast was raised to and ruled upon by the Trial Court. Accordingly, this question of law reserved for determination by the courts is preserved for appellate review by this Court.

II. Crescent Coast is entitled to a directed verdict on the breach of fiduciary duty claim brought by A. Tebele & Sons because, as a matter of law, Crescent Coast as an insurance agent owed no fiduciary duty to A. Tebele & Sons during the arm's length transaction for the sale of insurance.

In Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002), this Court observed "the sale of insurance is an arm's length commercial transaction, which does not give rise to a fiduciary relationship." Id. at 332, 574 S.E.2d at 508. No fiduciary relationship arises "[b]ecause an applicant is still operating in the marketplace at the point

of purchase . . . ." Id. The relationship between an insurance applicant and an insurance agent is no different from other customers and sellers negotiating contracts. Id. "[A] fiduciary relationship, if one is found to exist, flows not from the mere fact of an insurance relationship between the parties; something more than the mere fact of an insurance relationship is required to establish a fiduciary relationship." Id. at 333, 574 S.E.2d at 509 (quoting 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 198:7, at 198–16 (3d ed. 1999)).

As set forth in the Appellant's Brief of Crescent Coast, A. Tebele & Sons and Crescent Coast were engaged in an arm's length transaction for the sale of insurance. Mr. Tebele was in fact still shopping the marketplace with his current insurance agency while he was shopping quotes with Crescent Coast as well.

In its Respondent's Brief, A. Tebele & Sons has not offered any facts that A. Tebele & Sons and Crescent Coast had anything more than an arms-length transactional relationship for the sale of insurance. A. Tebele & Sons attempts to distinguish the cases of Gordon v. Fidelity & Cas. Co. of N.Y., 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) by arguing they are failure to read only cases, but this Court in Pitts noted that although Gordon and O'Connor involved a failure on the part of the insured to read the policy, these cases provide clear guidance and establish a fiduciary relationship does not arise from a transactional relationship involving the sale of insurance. Pitts, 352 S.C. at 331, 574 S.E.2d at 508.

A. Tebele & Sons also relied upon an unreported decision by the United States District Court for the District of South Carolina, Smith v. Universal Prop. & Cas. Ins. Co.,

No. 5:16-CV-03905-JMC, 2017 WL 3599590 (D.S.C. Aug. 22, 2017), in arguing that South Carolina law does not preclude a party from establishing the existence of a fiduciary relationship with his insurance agent. In Smith, the District Court held a party might be able to show the existence of a fiduciary relationship with its insurance agent *if* the party could show something more than a relationship involving only the sale of insurance:

> 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.

Id. at *4 (emphasis added).

In making this observation, the Smith court relied upon the South Carolina District Court decision in Great Am. Ins. Co. v. Mills, No. 4:06-cv-01971-RBH, 2008 WL 2250256, at *10 (D.S.C. May 29, 2008). In Mills, the District Court recognized "at the time of initial purchase of the [] insurance policy, no fiduciary relationship existed between Mills and the insurance company or its agent." Id. The District Court found that a more difficult question was presented by the situation present in that case in which Mills did business with the company and its agent for *over fifteen years*. Id. The District Court in Mills, however, was reluctant to recognize a fiduciary relationship between an insurance company and an insured where South Carolina courts had not done so. Id. The District Court thus dismissed the breach of fiduciary duty claim in that case. Id.

A. Tebele & Sons has not presented any factors showing that the relationship with Crescent Coast was not arm's length or that the relationship went beyond the sale of insurance. Mr. Tebele was a highly sophisticated businessman familiar with the yearly purchase of insurance for the millions of dollars of property he managed. Even though he

had known Mr. Sutherland for several years through the restaurant business and even though Mr. Sutherland had solicited Mr. Tebele for the sale of insurance, they had not actually done business together for multiple years as the parties in Mills had done (and in which the District Court still found no fiduciary relationship). Many of the factors A. Tebele & Sons cites to involve not the existence of a duty, but of a breach of a duty to advise which the jury fully considered and rejected under A. Tebele & Sons' negligence cause of action, finding A. Tebele & Sons at greater fault. See Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 471-74, 377 S.E.2d 343, 347-48 (Ct. App. 1988) (addressing elements of an insurance agent's negligent failure to advise). A. Tebele & Sons has not appealed the jury's verdict on its negligence claim.

A. Tebele & Sons also suggests that a fiduciary relationship arose with Crescent Coast because A. Tebele "entrusted" Crescent Coast with its money. A. Tebele & Sons mischaracterizes the transaction. A. Tebele & Sons was merely transmitting funds to Crescent Coast to purchase the insurance as a part of the arm's length commercial transaction between them. If A. Tebele & Sons' argument was correct, almost every sales transaction involving a middleman would turn into a fiduciary relationship.

Finally, the cases cited by A. Tebele & Son from the jurisdictions of Illinois and Wisconsin do not aide its contention that it had a fiduciary relationship with Crescent Coast. While the courts in Illinois recognize a fiduciary relationship between an insured and its broker, acting as the insured's agent, the cause of action for the failure to procure insurance under Illinois law sounds in negligence:

> If an agent *neglects* to procure insurance or does not follow instructions when obligated to do so, or if the policy obtained is void or materially defective through the agent's fault, or if the principal suffers damage by reason of any mistake or act of omission or commission of the agent which

> constitutes a breach of duty to his principal, he is liable to his principal for any loss he may have sustained thereby.

Econ. Fire & Cas. Co. v. Bassett, 170 Ill. App. 3d 765, 772, 525 N.E.2d 539, 544 (1988) (internal citation omitted) (emphasis added).

The Illinois court further noted that "an insurance broker is bound to exercise reasonable skill and diligence in the transaction of the business entrusted to him and will be responsible to his principal for any loss resulting from his failure to do so." Id. at 772, 525 S.E.2d at 543. This is fundamentally no different that our State's negligence principles in that an insurance agent who undertakes to advise the insured "must exercise due care." Trotter, 297 S.C. at 471, 377 S.E.2d at 347. As noted above, the jury in this case considered the negligence cause of action and determined that A. Tebele & Sons was greater at fault, thus barring recovery for negligence.

The Wisconsin case relied upon by A. Tebele & Sons, Poluk v. J.N. Manson Agency, Inc., 653 N.W.2d 905 (Wis. Ct. App. 2002), does not address whether an insurance agent owes a fiduciary duty to the insured. Instead, it analyzes under negligence and misrepresentation causes of action circumstances when the agent has a duty to advise. Once again, these issues were submitted to the jury in this case under the negligence cause of action, which the jury found A. Tebele & Sons' greater negligence barred recovery.

In conclusion, in the absence of a fiduciary duty, no cause of action for its purported breach exists. Therefore, Crescent Coast is entitled to a directed verdict on the breach of fiduciary duty claim.

CONCLUSION

For the reasons set forth herein and in its Appellant's Brief, Crescent Coast requests this Court to reverse the Trial Court's denial of a directed verdict on the breach of fiduciary duty claim because Crescent Coast as a matter of law owed no fiduciary duty to A. Tebele & Sons. As such, the jury's verdict and award of damages on the breach of fiduciary duty claim against Crescent Coast must likewise be reversed.

Furthermore, should this Court conclude in the primary appeal of A. Tebele & Sons that coverage for its fire loss exists under the policy issued by the Insurers, then Crescent Coast as a matter of law cannot be liable for negligence and breach of fiduciary duty for the failure to procure insurance coverage and the jury's verdict should be reversed on this additional ground.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Reply Brief of Respondent-Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent-Appellant, Crescent Coast Insurance, LLC, do hereby certify that I have this date served the foregoing Final Reply Brief, dated July 31, 2025, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Amended Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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