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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

William C. McMaster, III, Circuit Court Judge

Circuit Court Case No. 2023CP2306646

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Appellate Case No. 2025-001316

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Robark Properties LLC .....Appellant,

v.

Northwestern Mutual Life Insurance Company ..... Respondent.

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**INITIAL BRIEF OF APPELLANT**

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## ISSUES ON APPEAL

1. Did the circuit err in granting summary judgment without allowing Appellant Robark Properties, LLC (“Robark”) to complete discovery?
2. Did the circuit court err in determining that Respondent Northwestern Mutual Life Insurance Company (“Northwestern Mutual”) produced all documents related to Robark’s three Northwestern Mutual life insurance policies (collectively, the “Policies”)?
3. Did the circuit court err in determining that Northwestern Mutual produced copies of the Policies?
4. Did the circuit court err in determining that the Policies’ language does not give rise to a duty or obligation to produce the documents requested by Robark?
5. Did the circuit court err in determining that there is no fiduciary relationship between Robark and Northwestern Mutual?
6. Did the circuit court err in determining that Robark offered no facts rebutting any assertions in Christine Cowles’ affidavit?
7. Did the circuit court erroneously conflate Rule 56 with Rule 12?
8. Did the circuit court err in overlooking or misapprehending material misrepresentations made by Northwestern Mutual?

## STATEMENT OF THE CASE

This is a case where summary judgment was granted against Robark without allowing it to complete discovery, which is improper and should not have happened. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”). For the many reasons stated herein, Robark respectfully requests this Court reverse the grant of summary judgment and remand the matter to the circuit court for further discovery and proceedings.

For background, Robark owns three Northwestern Mutual Life Insurance Policies. (*See* Robark’s verified memorandum filed January 24, 2025 (“Robark’s Verified Initial Memorandum”), p. 1). The estimated cash value of the Policies is approximately \$800,000. (*Id.*).

Robark has owned the Policies for more than thirteen years. (*Id.* at 2). In 2023, Robark underwent a significant change in management. (*Id.*) In an effort to gain a better understanding of the Policies and their histories, including, but not limited to, the decision(s) made to reduce premium amounts for the Policies (which has ultimately resulted in a significant reduction of the cash value of the Policies), Robark's new management requested documents, communications, and information from Northwestern Mutual. (*Id.*) In other words, Robark requested a copy of its file from Northwestern Mutual. A summary of those requests can be found on page 2 of the letter to Northwestern Mutual dated May 23, 2023, which is attached to the Amended Complaint as Exhibit 1 ("Robark's First Letter"). (*Id.* at 2-3).

On June 22, 2023, Northwestern Mutual responded to Robark's First Letter. (*Id.* at 3). Northwestern Mutual's response is attached to the Amended Complaint as Exhibit 2. (*Id.*) Northwestern Mutual refused and/or failed to produce many of the documents, communications, and information requested by Robark. (*Id.*) Northwestern Mutual's explanation for its refusal and/or failure to fully respond to Robark's requests was: "[w]e must decline to respond to the balance of your requests. Those that remain are not only overbroad and unduly burdensome; they are also vague and ambiguous of what you are requesting." (*Id.*) These arbitrary, boilerplate objections did not identify the documents, information, and communications Northwestern Mutual refused to provide, which is improper. *See, e.g., Loveless v. Stiles*, No. 2022-CP-40-01364, 2022 WL 22307894, at \*3 (S.C.Com.Pl. Dec. 21, 2022).

In its response, Northwestern Mutual did provide some information regarding the decision(s) made to reduce premium amounts for the Policies (ultimately resulting in a significant reduction of the cash value of the Policies):

- Who initiated the QPP?

John Bode expressed to John Mitchell concern about Robark Properties being able to continue to pay the required out-of-pocket premiums for the policies and asked whether going paid up on the policies might be possible/worthwhile. John Bode and John Mitchell discussed a number of options, including QPP; John Bode chose that option.

(*Id.*). No supporting documentation for the purported communications referenced in this portion of Northwestern Mutual's response to Robark's First Letter was provided, however. (*Id.* at 3-4).

Robark also requested a copy of the Policies. (*Id.*). Northwestern Mutual did not comply with this request and instead confessed Northwestern Mutual does not even have a copy of the Policies: "[w]e do not maintain copies of insurance policies for our customers, but we would be happy to order policy replicas if you wish." (*See* Ex. 2 to Amended Complaint).

Robark responded with a letter on November 7, 2023, which, in part, identified the many deficiencies in Northwestern Mutual's prior production and requested that such deficiencies be cured by November 21, 2023 ("Robark's Second Letter"). (Robark's Verified Initial Memorandum, p. 4). Robark's Second Letter is attached to the Amended Complaint as Exhibit 3.

(*Id.*).

Among other things, Robark's Second Letter requested Northwestern Mutual:

- a. Provide "[a] copy of each of the Policies. To the extent copies of the Policies are not maintained by Northwestern Mutual, please explain why and provide a replica of each of the Policies."
- b. Provide "any and all documents and communications you referred to in responding to the [QPP questions concerning the Policies]. If any of those documents have already been produced, please separately identify each such document."
- c. "[S]et forth with specificity Northwestern Mutual's basis for its refusal to answer [any request], including any claims of privilege, in sufficient detail to permit a court to adjudicate the validity of such refusal to answer and/or produce" and explain why the boilerplate objections previously offered by Northwestern Mutual are neither helpful nor proper."

(*Id.*).

On November 16, 2023, Northwestern Mutual responded to Robark's Second Letter. (*Id.*). Northwestern Mutual's response is attached to the Amended Complaint as Exhibit 4. (*Id.*). Northwestern Mutual produced none of the documents, communications or information requested by Robark in Robark's Second Letter and affirmatively stated, "[w]e will not be providing anything more with respect to [Robark's Policies]." (*Id.* at 4-5). As part of the blanket refusal, Northwestern Mutual refused to provide a copy of the Policies or the alleged "policy replicas." (*Id.* at 5).

On December 15, 2023, Robark filed its summons and complaint for a declaratory judgment requiring Northwestern Mutual to produce a complete copy of Robark's file. Northwestern Mutual did not move to dismiss the complaint pursuant to a 12(b) motion. Instead, on February 1, 2024, Northwestern Mutual filed its Answer wherein it "incorporate[d] by reference the terms, provisions, conditions, exclusions, exceptions, and limitations set forth in *the Policies* and would show that Northwestern Mutual has complied with its applicable duties and obligations under *the Policies*." (Answer, ¶ 31 (emphasis added)). Such statement contradicted Northwestern Mutual's prior representation to Robark, which is that Northwestern Mutual did not have a copy of the Policies. In addition, despite making such statement, Northwestern Mutual still did not provide Robark with a copy of the Policies, or even a copy of the alleged "policy replicas" for the Policies. (Robark's Verified Initial Memorandum, p. 5).

On March 4, 2024, Robark served its initial discovery requests and requested the true, accurate and complete copy of each of the Policies referenced in Northwestern Mutual's Answer. (*See* Robark's Verified Initial Memorandum, Exhibit B). About a month later, Northwestern Mutual responded and submitted to discovery. In doing so, Northwestern Mutual stated, through

counsel, “that it is not *industry practice* for insurance companies to maintain photocopies or scanned copies of the insurance policies they issue and deliver to insureds or policyholders,” (emphasis added) and only produced alleged “replica policies” to Robark. (See Robark’s Verified Initial Memorandum, Exhibit C).

On July 17, 2024, Robark served Northwestern Mutual with a second set of interrogatories and a second set of requests for production, which, among other things, sought discovery on Northwestern Mutual’s purported “industry practices,” and answers to standard interrogatories (collectively, the “Second Set of Discovery Requests”). (See Exhibit A to Robark’s Motion to Compel). The deadline for Northwestern Mutual to respond to the Discovery Requests was August 21, 2024. Northwestern Mutual did not respond to the Discovery Requests. Northwestern Mutual instead moved for summary judgment and then for a protective order and refused to respond to any of the discovery requests. In response, Robark filed its Motion to Compel.

On January 24, 2025, Robark filed Robark’s Verified Initial Memorandum. An in-person hearing was held on January 27, 2025. Following the hearing, Northwestern Mutual asked the Court if supplemental briefing could be submitted. As a result, both parties submitted supplemental briefings to the Court. On March 7, 2025, the Court entered the Order Granting Summary Judgment (“Order”).

On March 17, 2025, Robark timely filed a motion to reconsider the Order. On April 1, 2025, Northwestern Mutual filed a response in opposition to Robark’s motion to reconsider. On May 30, 2025, a hearing was held on Robark’s motion to reconsider the Order. On June 11, 2025, the Court entered a Form 4 order denying Robark’s motion to reconsider. On July 1, 2025, Robark timely filed and served its notice of appeal.

## STANDARD OF REVIEW

A circuit court may only grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). “Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Id.* “In determining whether triable issues of fact exist, all inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion.” *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998).

## ARGUMENT

### **I. The circuit court erred by not allowing Robark to complete discovery.**

The Order states that “[t]here is nothing in the affidavit submitted by [Robark] which suggests a reason why any additional discovery would assist [Robark] in responding to Northwestern Mutual’s motion for summary judgment . . . .” (Order, p. 9). The referenced affidavit is that of Ralph Falls, Robark’s manager, and is attached as Exhibit E to Robark’s Verified Initial Memorandum. Mr. Falls’ affidavit provides, in part:

I have read Robark’s Amended Complaint, Robark’s Motion to Compel, and [Robark’s Verified Initial Memorandum]. The facts stated in those documents are

true of my own knowledge, except for those matters alleged upon information and belief, and as to those, I believe them to be true.

(Ex. E to Robark's Verified Initial Memorandum, ¶ 6). Section IV of Robark's Verified Initial Memorandum alone sets out many different reasons why additional discovery is necessary. (See Robark's Verified Initial Memorandum, pp. 10-15). In support of Northwestern Mutual's motion for summary judgment, a Northwestern Mutual employee named M. Christine Cowles and Northwestern Mutual's litigation counsel offered conclusory statements characterizing – without any documentary support for same – whatever Northwestern Mutual arbitrarily chooses to do as “industry practice” or “standard practice.” Below is a sampling of the conclusory statements.

1. “[It] is not **industry practice** for insurance companies to maintain photocopies or scanned copies of the insurance policies they issue and deliver to insureds or policyholders.” (Ex. C to Robark's Verified Initial Memorandum, p. 1 (emphasis added)).
2. “Many of the categories of requested documents were outside of the scope of documents that Northwestern Mutual would provide as part of its **standard practices** when responding to the requests of owners of life insurance policies.” (Affidavit of M. Christine Cowles attached to Northwestern Mutual's Motion for Summary Judgment, ¶ 7 (emphasis added)).
3. “I advised her in my letter that Northwestern Mutual would produce additional documents, but would not produce documents that were outside the scope of documents produced to customers as part of the company's **standard practice**.” (*Id.* at ¶ 9 (emphasis added)).
4. “It is not within the **standard practice** of Northwestern Mutual to provide to owners of life insurance policies any information or documents other than what has already been provided . . . .” (emphasis added). (*Id.* at ¶ 15 (emphasis added)).
5. “It is the **standard practice** of Northwestern Mutual to provide the following types of documents to owners of life insurance policies.” (*Id.* at ¶ 16 (emphasis added)).
6. “Northwestern Mutual has already provided to the Plaintiff copies of the policies, illustrations, annual statements, beneficiary change forms, and the other types of documents commonly sent to policyholders under the company's **standard practices**.” (Northwestern Mutual's Motion for Summary Judgment, p. 2 (emphasis added)).

7. “Many of the categories of requested documents were outside of the scope of documents that Northwestern Mutual would provide as part of its standard practices when responding to the requests of owners of life insurance policies.” (*Id.* at p. 4 (emphasis added)).
8. “Northwestern Mutual would produce additional documents, but would not produce documents that were outside the scope of documents produced to customers as part of the company’s standard practice.” (*Id.* at p. 5 (emphasis added)).
9. “This is not a standard request from a policyholder, nor is there any legal obligation on the part of Northwestern Mutual to provide such information in response to a policyholder request.” (*Id.* at p. 7 (emphasis added)).
10. “As explained by Ms. Cowles, it is the standard practice of Northwestern Mutual to provide the following types of documents to owners of life insurance policies.” (*Id.* at p. 12 (emphasis added)).
11. “But, as confirmed by Ms. Cowles, it is not within the standard practice of Northwestern Mutual to provide to owners of life insurance policies any information or documents other than what has already been provided . . . .” (*Id.* (emphasis added)).

Northwestern Mutual produced no documentation that supports Ms. Cowles’ and its litigation counsel’s conclusory assertions regarding “industry practice,” “standard practice” or a “standard request.” Despite this and Robark having served discovery requests for the same, the Order accepted Northwestern Mutual’s conclusory statements. Worse, in granting *summary judgment against Robark*, the circuit court stated, “Northwestern Mutual produced to [Robark] . . . documents that it would provide to policyholders as part of its standard practices.” (Order, p. 3). The circuit court made this finding without allowing *any* discovery (written discovery or depositions) regarding what actually is an “industry practice,” a “standard practice” and a “standard request.”

South Carolina law is clear that summary judgment is inappropriate when, as here, further inquiry into the facts is merely “desirable” to clarify the application of the law. *See Tupper*, 326 S.C. at 325 (finding that summary judgment is not appropriate “where further inquiry into the facts of the case is desirable to clarify the application of the law”). Moreover, in South Carolina,

“[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Id.* In the years following the *Tupper* case, South Carolina appellate courts have reversed circuit courts granting summary judgment while discovery is ongoing. *See, e.g., Pallares v. Seinar*, 407 S.C. 359, 373, 756 S.E.2d 128, 135 (2014) (reversing the circuit court’s grant of summary judgment because summary judgment was premature); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (reversing the circuit court’s decision granting summary judgment, holding that the opposing party should have been permitted to complete discovery, which was ongoing at the time of the summary judgment hearing, prior to summary judgment); *Baughman*, 306 S.C. at 112-14, 410 S.E.2d at 544 (holding that, although three years had elapsed between the filing of the action and summary judgment, the circuit court erred in granting summary judgment prematurely).

For many reasons, Robark was not given anything close to a full and fair opportunity to complete discovery by the circuit court. To start, by issuing the Order, the circuit court denied Robark *any inquiry whatsoever* as to Northwestern Mutual’s conclusory assertions that everything it does is “industry practice” or “standard practice” and instead affirmed Northwestern Mutual’s conclusory assertions that everything it has chosen to do is “standard practice.” (Order, p. 3).

Next, as part of its argument for summary judgment, Northwestern Mutual disputed that a fiduciary relationship exists between it and Robark. That analysis turns on the facts and circumstances. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004). Despite this being in dispute, the circuit court disallowed discovery on the facts and circumstances concerning Robark and Northwestern Mutual’s relationship before issuing the Order. In addition, in its reply brief submitted *after* the hearing on Northwestern Mutual’s motion for summary judgment, Northwestern Mutual – *for the first time* – claimed Northwestern Mutual did not accept

or induce the confidence Robark placed in it. (*See* Northwestern Mutual’s reply brief, p. 9). Robark did not agree. (*See, e.g.*, Exhibit E to Robark’s Verified Initial Memorandum, ¶ 5). Whether Robark or Northwestern Mutual prevail on this dispute turns on the facts and circumstances, *Moore*, 360 S.C. at 251, and Robark sought discovery concerning the facts and circumstances. The circuit court, however, improperly disallowed this discovery before granting summary judgment and determining that no fiduciary relationship exists between Robark and Northwestern Mutual.

Third, Northwestern Mutual asserted that a “policy replica” is a substitute for the *actual* Policy. The Order adopts Northwestern Mutual’s conclusory assertion without allowing any of the discovery sought by Robark on how Northwestern Mutual arrived to that conclusion and instead ruled as if the Policies and the purported “policy replicas” are the copies of the Policies. (*See* Order, p. 5 (“the clear and unambiguous language of **the policies** does not give rise to a duty or obligation which requires Northwestern Mutual to provide the requested materials”) (emphasis added)).

Fourth, Northwestern Mutual provided the following information regarding QPP (the program that reduced the premiums for the Policies and, in turn, reduced the cash values of the Policies):

- **Who initiated the QPP?**

**John Bode expressed to John Mitchell concern about Robark Properties being able to continue to pay the required out-of-pocket premiums for the policies and asked whether going paid up on the policies might be possible/worthwhile. John Bode and John Mitchell discussed a number of options, including QPP; John Bode chose that option.**

Northwestern Mutual refused, however, to provide the supporting documentation for the purported communications. Robark requested such documents and information in discovery as they are relevant to the parties’ relationship and the associated obligations concerning same. The Court did not allow such discovery and instead granted summary judgment incorrectly determining

“all documents” related to any changes to the Policies had been provided by Northwestern Mutual. (See Order, p. 3 “[d]uring this action, Northwestern Mutual produced . . . all documents relating to any changes to [the Policies] and regarding the payment of premiums.”). Worse, even Northwestern Mutual concedes it refused to produce all the documents relating to changes to the Policies. (See, e.g., the Affidavit of M. Christine Cowles, ¶ 9 (“[Northwestern Mutual] would not produce documents that were outside of documents produced to customers as part of the company’s standard practice”)).

Fifth, while difficult to follow (as no discovery was permitted on this either), in its reply brief, it appears that Northwestern Mutual – *for the first time* – attempted to push fiduciary obligations owed to Robark away to an unidentified subsidiary corporation. (See Northwestern Mutual’s Reply Brief, p. 9, n.4). This too calls for further discovery as it goes to the heart of the central issue in this case: whether Northwestern Mutual is obligated to produce a copy of its file to Robark.<sup>1</sup>

Sixth, Northwestern Mutual did not even respond to Rule 33(a) standard interrogatories, which any party may serve in any civil case:

1. Give the name and address of each person known to you or your counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform Robark of the facts known to or observed by the witness, and indicate whether or not any written or recorded statement(s) have been taken from the witness and, if so, indicate who has possession of such statement(s).
2. List the names and addresses of any expert witness(es) whom you propose to use as a witness at the trial of this case.

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<sup>1</sup> To the extent Northwestern Mutual’s eleventh-hour attempt to rid itself of any fiduciary obligations to Robark somehow warrants amendment of Robark’s pleading or the circuit court found any other deficiencies with Robark’s cause of action as pled, Robark requested that leave to amend be granted under SCRCP 15(a) to, among other things, add in any necessary subsidiaries identified and, if necessary, address any other deficiencies in its cause of action identified by the circuit court. (See, e.g., Robark’s Reply Memorandum dated February 10, 2025, p. 8, n.2). This request was not granted.

3. Set forth a list of photographs, plats, sketches or other prepared documents in Your possession that relate to a claim or defense in this case.

“Discovery . . . is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Rule 26(b)(1) of the South Carolina Rules of Civil Procedure provides for broad discovery concerning “any matter . . . which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” *Id.*; see also *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 166, 829 S.E.2d 707, 712 (2019) (“The scope of discovery in South Carolina is generally broad.”). To meet this broad standard, South Carolina courts have held that requests must only “show a reasonable expectation of obtaining information that will aid in the dispute’s resolution.” *Oncology & Hematology Assocs. of S.C., L.L.C. v. S.C. Dep’t of Health & Environ. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924-925 (2010). Such standard is consistent with purpose of discovery, which is “to prevent a trial from becoming a guessing game or one of ambush for either party.” *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App. 2003).

The Order is not consistent with the purpose of discovery. It instead permits and even adopts Northwestern Mutual’s conclusory assertion ambush and denies Robark the opportunity to conduct any discovery concerning Northwestern Mutual’s assertions. It cannot be the law in South Carolina that a plaintiff sues a corporation and that a corporation can then arbitrarily refuse to provide discovery, move for summary judgment and prevail. And it is not the law. See, e.g., *Tupper*, 326 S.C. at 325; *Pallares*, 407 S.C. at 373; *Batson*, 345 S.C. at 322; *Baughman*, 306 S.C. at 112-14).

The circuit court deprived Robark of its right to conduct discovery and instead entered summary judgment against it. Summary judgment was premature and should not be permitted by this Court.

**II. The circuit court erred in determining that Northwestern Mutual produced all documents related to any changes to the Policies.**

The Order states, “[d]uring this action, Northwestern Mutual produced . . . all documents relating to any changes to [the Policies] and regarding the payment of premiums.” (*Id.*, p. 3). This is incorrect. The record is clear that Northwestern Mutual refused to produce all the documents relating to changes to the Policies. (*See e.g.* the Affidavit of M. Christine Cowles, ¶ 9 (“[Northwestern Mutual] would not produce documents that were outside of documents produced to customers as part of the company’s standard practice”); *see also* Northwestern Mutual’s response to Robark’s First Letter asking for all documents relating any changes to the Policies) (“[w]e must decline to respond to the balance of your requests. Those that remain are not only overbroad and unduly burdensome; they are also vague and ambiguous of what you are requesting”).

**III. The circuit court erred in finding that Northwestern Mutual produced copies of the Policies.**

The Order also states, “[d]uring this action, Northwestern Mutual produced to [Robark] copies of the life insurance policies.” (*Id.*, p. 3). This did not happen. Even Ms. Cowles concedes that:

In response to the request for “copies of the policies,” I informed [counsel] that Northwestern Mutual ***does not*** maintain copies of the policies.

(Cowles Aff., ¶ 11). Northwestern Mutual instead only produced what it purports to be “policy replicas,” which are not copies of the Policies.

**IV. The circuit court erred in finding the Policies' language does not give rise to a duty or obligation to produce the documents.**

The Order states, “the clear and unambiguous language of **the policies** does not give rise to a duty or obligation which requires Northwestern Mutual to provide the requested materials.” (*Id.*, p. 3) (emphasis added). This statement cannot be. As noted above, Northwestern Mutual does not have copies of the Policies.

**V. The circuit court erred in finding that there is no fiduciary relationship that gives rise to an obligation to produce the materials requested by Northwestern Mutual.**

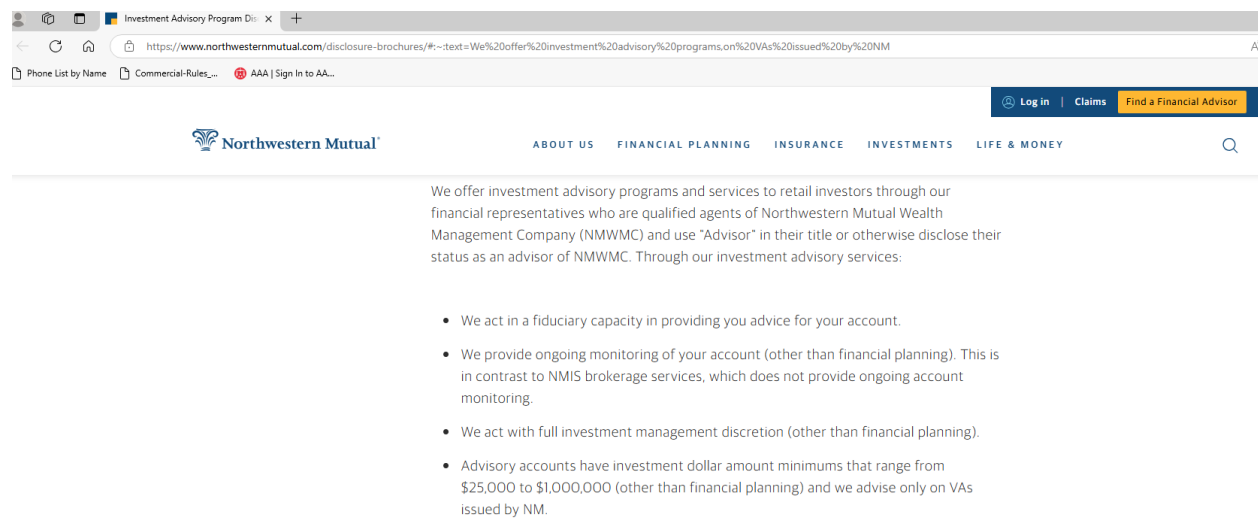
In its arguments to the circuit court prior to the entry of summary judgment, Northwestern Mutual did not even attempt to address the Supreme Court’s opinion in *Burwell v. S.C. Nat’l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986). In *Burwell*, “[t]he Supreme Court of South Carolina has found that a financial institution [here Northwestern Mutual] owes a fiduciary duty to its customer where the institution goes beyond the mere provision of transactional services and actually engages in an advisory role with respect to the customer [here Robark]. *Id.*, 288 S.C. at 40.”

Rather than addressing the Supreme Court’s *Burwell* opinion, Northwestern Mutual cited to an opinion issued by this Court, *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, S.E.2d 502 (Ct.App. 2002). In doing so, Northwestern Mutual failed to understand that the *Pitts* case is actually in line with *Burwell* and supportive of Robark’s position.

The *Pitts* case provides: “[a] confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Id.* 352 S.C. at 330. *Pitts* then provides, in line with *Burwell*, that there has been a “special” confidence between an insurer and insured such that a fiduciary relationship exists “after the parties have entered into a mutually binding contract for insurance.” *Id.* Aside from affirming basic principles set forth in

*Burwell*, the *Pitts* case is inapposite to the issues here. In *Pitts*, the Court of Appeals discussed whether the mere sale of insurance gives rise to a fiduciary relationship. The Court of Appeals said no, which also tracks with *Burwell*.

The Order states that “[Robark] has not cited to any South Carolina law establishing the existence of a fiduciary relationship between a life insurer and policyholder based solely upon that relationship.” (*Id.*, p. 7). Robark, however, has never argued that the mere sale of life insurance by Northwestern Mutual established a fiduciary relationship. Robark’s position is that Northwestern Mutual’s advisory role with respect to Robark did. As noted in Robark’s Verified Initial Memorandum, the documents produced by Northwestern Mutual to date identify John F. Mitchell as Robark’s “Financial Representative.” (*Id.* at 7). John F. Mitchell is identified by Northwestern Mutual as its “Wealth Management Advisor” and “Private Wealth Advisor.” (*Id.*). Northwestern Mutual’s website further provides:



(Robark’s Reply Memorandum, p. 8). To be clear, Northwestern Mutual’s own website states: “[Northwestern Mutual] act[s] in a fiduciary capacity in providing you advice for your account.” (*Id.*) (emphasis added). As noted in Robark’s Verified Initial Memorandum, Northwestern Mutual,

through Mitchell (and possibly others who may be discovered during discovery), has provided advice to Robark concerning the Policies. (*Id.* at 7-8).

Such a relationship requires Northwestern Mutual “to act in good faith and due regard of the interest of the party entrusting said confidence [Robark].” *See SSI Medical Services v. Cox*, 310 S.C. 493, 500, 392 S.E.2d 789, 794 (1990). It cannot be seriously argued that the extensive litigation Northwestern Mutual is forcing Robark to engage in just to obtain a copy of its own file is with due regard for Robark, especially when Robark is agreeable to a mutually agreed-upon confidentiality order. Tellingly, Northwestern Mutual offers no such argument.

Despite all this, the circuit court ruled – without permitting discovery as to the facts and circumstances in accordance with *Moore* – that there is not a fiduciary relationship between Northwestern Mutual and Robark. The circuit court’s basis for such determination is flawed. In support of its ruling, the Court erroneously found:

1. Robark “has not come forward with any facts by way of affidavit or otherwise that would support a finding of a fiduciary relationship with Northwestern Mutual.” (Order, p. 8). This is a misstatement. (*See, e.g.*, Ex. E to Robark’s Initial Verified Memorandum, ¶¶ 5-6).
2. “There is certainly no evidence that Northwestern Mutual accepted the role of a fiduciary with respect to [Robark].” (Order, p. 8). But the documents produced by Northwestern Mutual to date identify John F. Mitchell as Robark’s “Financial Representative.” (Robark’s Verified Initial Memorandum, p. 7). John F. Mitchell is identified by Northwestern Mutual as its “Wealth Management Advisor” and “Private Wealth Advisor.” (*Id.*). Northwestern Mutual concedes Mitchell discussed “a number options” with Robark concerning thie Policies:

- Who initiated the QPP?

John Bode expressed to John Mitchell concern about Robark Properties being able to continue to pay the required out-of-pocket premiums for the policies and asked whether going paid up on the policies might be possible/worthwhile. John Bode and John Mitchell discussed a number of options, including QPP; John Bode chose that option.

- And Robark’s manager provided a sworn affidavit stating that Mitchell provided to Robark. (Robark’s Initial Verified Memorandum, Ex. E, ¶ 5).
3. “Robark has not directed the Court to any legal authorities showing that, even if there were a fiduciary relationship, there would be a duty to provide the requested materials.” (Order, p. 8). This too is not correct. Such a relationship requires Northwestern Mutual “to act in good faith and due regard of the interest of the party entrusting said confidence [Robark].” *See SSI Medical Services v. Cox*, 310 S.C. 493, 500, 392 S.E.2d 789, 794 (1990). As noted above, Northwestern Mutual did not even attempt to argue that forcing Robark to engage in this litigation just to obtain a copy of its own file is with due regard for Robark, especially when Robark is agreeable to a mutually agreed-upon confidentiality order. Worse, as noted above, *Moore* provides that a fiduciary relationship is determined by evaluating facts and circumstances and, at the summary judgment stage, “all inferences from the facts in the record must be viewed in the light most favorable to the party [here, Robark] opposing the summary judgment motion.” *Manning*, 294 S.C. at 385.
  4. “*Burwell* addressed a bank as a financial institution, not a life insurance company.” (Order, p. 8). Here, the circuit court appears to imply that Northwestern Mutual is not a financial institution. To the extent that is what the circuit court is attempting to do, there is no basis. (*See e.g.* Black’s Law Dictionary (which defines a systematically important financial institution as a bank, insurance company, or other financial firm)).

A fiduciary relationship exists between Robark and Northwestern Mutual that calls for the production of Robark's file to Robark. Thus, to prevail under the law, Northwestern Mutual's position has to be that it somehow is in *Robark's* best interest for Northwestern Mutual to not provide a copy of *Robark's* files to **Robark**. This is nonsensical and should not be adopted by this Court.

**VI. The circuit court erred in determining that Robark offered no facts rebutting any assertions in Chris Cowles' affidavit.**

The Order states: Robark "offered no facts rebutting any assertions in Ms. Cowles' affidavit. (*Id.*, p. 5, n.1). This is another misstatement. By way of just one example, in her own affidavit, Cowles states she has reviewed the "Robark Policies." (Cowles Aff., ¶ 14). She did not do this, however. Her own affidavit, in fact, confirms Northwestern Mutual does not possess copies of the Policies. (*Id.*, ¶ 11). Robark raised this with the circuit court. (*See, e.g.*, Robark's Motion to Reconsider Order, p. 15).

By way of yet another example, Cowles states, "[t]here is no language in the policies that creates any right on the part of [Robark] to obtain from Northwestern Mutual any documents beyond what Northwestern Mutual has already." (Cowles Aff., ¶ 14). This too was rebutted by the undisputed fact that Northwestern Mutual has no copies of the Policies.

**VII. The circuit court erroneously conflated Rule 56 with Rule 12.**

The Order "notes that the Amended Complaint includes no allegation of a fiduciary relationship in support of Plaintiff's request for declaratory judgment." (*Id.*, p. 7). The Order further states:

'Where a complaint is devoid of allegations which are sufficient to establish the existence of a right in plaintiff arising out of the matters alleged, a cause of action for declaratory judgment is not stated,' and the complaint is subject to dismissal. *Plenge v. Russell*, 236 S.C. 473, 486, 115 S.E.2d 177, 183 (1960) (finding the

complaint contained no ‘assertion of legal rights and a positive legal duty’ to support declaratory judgment action).

The *Plenge* case, however, addresses a demurrer. “Rule 12(b)(6) of the South Carolina Rules replaces and performs the same function as the old statutory pleading rules regarding demurrers.” *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). Northwestern Mutual did not move to dismiss this action Rule 12(b)(6). Further, the Order itself states that “Rule 56(e), SCRCPP provides that an adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial” (which Robark did even without being able to pursue the discovery it is entitled to). Nevertheless, the Order improperly criticizes the allegations of Robark pleading. Even if a motion for summary judgment turned on the allegations of a defending party’s pleading (it does not), Robark’s allegations are well-pled – as affirmed by Northwestern Mutual’s decision to not move for dismissal pursuant to Rule 12(b) – and affirmatively state that Northwestern Mutual is “obligated “to produce to Robark at copy of its file. (Amended Complaint, ¶ 32).<sup>2</sup>

**VIII. The circuit court erred in overlooking or misapprehending multiple, easily disprovable misrepresentations made by Northwestern Mutual.**

The Order overlooks or misapprehends multiple misrepresentations Northwestern Mutual made to the Court. To start, at the hearing on January 27, 2025, the following exchange took place:

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<sup>2</sup> Additionally, as noted in the previous footnote herein, if the circuit court found any deficiencies with Robark’s cause of action as pled, Robark requested that leave to amend be granted under SCRCPP 15(a) to address any deficiencies in its cause of action identified by the circuit court. (*See e.g.*, Robark’s Reply Memorandum dated February 10, 2025, p. 8, n.2). This request was not granted.

2 THE COURT: And the file, just not the internal  
3 communications inside of the insurance company. Is that  
4 really what we're at issue here? Just those internal  
5 communications? Is that just -- that's what it really boils  
6 down to?

7 MS. EBBINI: Yes. Your Honor --

(January 27, 2025 Hearing Transcript, 21:2-7). Northwestern Mutual's response to the circuit court's question was false. Much more than just internal communications are at issue.<sup>3</sup> Below are some of Robark's unanswered interrogatories (the first three are *standard interrogatories*):

1. Give the name and address of each person known to you or your counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform Robark of the facts known to or observed by the witness, and indicate whether or not any written or recorded statement(s) have been taken from the witness and, if so, indicate who has possession of such statement(s).
2. List the names and addresses of any expert witness(es) whom you propose to use as a witness at the trial of this case.
3. Set forth a list of photographs, plats, sketches or other prepared documents in Your possession that relate to a claim or defense in this case.
4. State the factual basis for each affirmative defense you allege in your answer to the Amended Complaint.

(See Robark's Exhibit A to Robark's Motion to Compel). Robark's first two requests for

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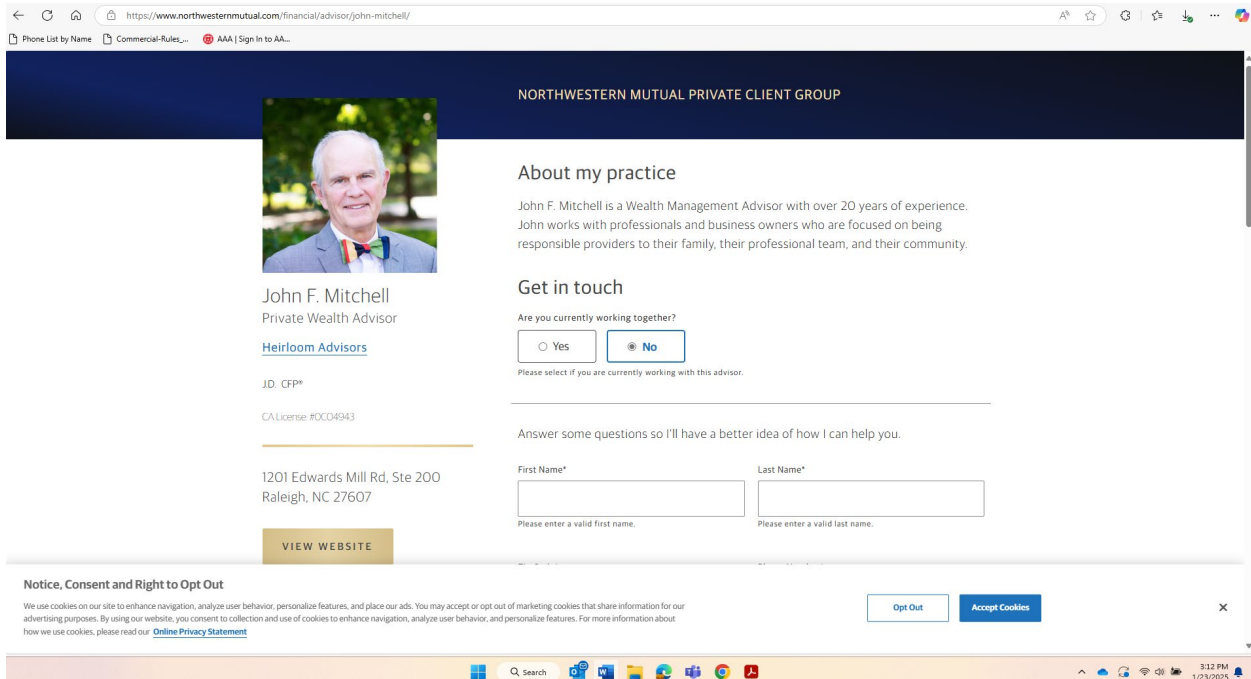
<sup>3</sup> Northwestern Mutual also misrepresented to the Court that it produced copies of the alleged "policy replicas" to Robark on November 16, 2023 before this action was filed. (Ex. A to Robark's Reply Memorandum, pp. 5:25-6:3). That is not true. On November 7, 2023, undersigned counsel sent a letter which, in part, requested copies of the alleged "policy replicas." That letter is attached to the Amended Complaint as Exhibit 3. On November 16, 2023, Northwestern Mutual sent the letter attached to the Amended Complaint as Exhibit 4 which stated, "[w]e will not be providing anything more with respect to [the Policies]." In accordance with such statement, Northwestern Mutual ***did not provide copies of the alleged "policy replicas"*** or anything else that was requested. The policy replicas were produced in discovery ***in this case*** before Northwestern Mutual arbitrarily decided to not continue to participate in the discovery process.

production are:

1. Produce all documents identified by You in response to Robark’s interrogatories or which are responsive to Robark’s interrogatories.
2. Produce all documents referred to or reviewed in the preparation of Your answers to Robark’s interrogatories, or relied upon by You or Your attorneys in responding to Robark’s interrogatories.

(*Id.*, p. 10). In addition, Robark has requested the production of: “all records, documents, communications, photographs, videos, audio recordings, and/or materials of any kind concerning the allegations of the Amended Complaint and/or related to the subject matter of this action.” (*Id.*, Request No. 5). Northwestern Mutual did not respond to these requests, which go well beyond internal communications in the many ways identified herein.

Northwestern Mutual also falsely contended that the screenshot provided in Robark’s Initial Verified Memorandum was from a separate webpage. (*See* Northwestern Mutual’s reply brief, p. 9, n.4). It was not. The screenshot was pulled from [northwesternmutual.com](https://www.northwesternmutual.com) as the screenshot itself confirms:



Northwestern Mutual also misrepresented to the circuit court that Robark's discovery requests seek the "very same" information sought by declaratory judgment. The aforementioned interrogatories and requests for production, as well as the issues identified herein, show Northwestern Mutual's allegations are not true.<sup>4</sup> Nevertheless, the circuit court incorrectly found that Robark's discovery seek "the same" information sought by declaration. (Order, p. 6).

### CONCLUSION

Northwestern Mutual's mere belief that discovery should not proceed does not render discovery afforded by the South Carolina law and procedure moot. Were such a position correct, parties throughout this State would simply file a dispositive motion as a shield to avoid the discovery contemplated by the Rules. For this reason and for the many other reasons stated herein, Robark respectfully requests this Court reverse the grant of summary judgment and remand the matter to the circuit court for further discovery and proceedings.

Date: October 30, 2025

*s/ Ioannis (Ian) G. Conits*

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<sup>4</sup> Further, even if some do, Northwestern Mutual already has produced some of the documents sought by declaration in the limited discovery that has taken place in this case.