STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-18-1892

Cynthia D. Bales, Individually and as Personal Representative of the Estate of Frank R. Bales, on behalf of the Estate and Statutory Beneficiaries . . . . . .Appellants,

v.

Buy Right Autos, Inc. and Northbrook Indemnity Co. ——— Defendants

Of whom Northbrook Indemnity Co. is . . . . . .Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Cynthia Bales commenced the instant action, personally and on behalf of the Estate and Statutory Beneficiaries of Frank R. Bales, her late husband, in 2011. Frank Bales was killed in a two-vehicle accident when the car he was driving was struck by an automobile driven by Abel Martinez-Martinez. Named as Defendants were Buy Right Autos, Inc., from which Martinez-Martinez had purchased the car he was driving, and Northbrook Indemnity Company, which had issued Martinez-Martinez statutorily mandated automobile insurance. Appellant's claims against Respondent Northbrook sounded in Breach of Fiduciary Duty, Negligence and Gross Negligence – Failure to Warn, Wrongful Death, Loss of Consortium, and Negligence *Per Se*.

Northbrook filed a Motion seeking to sever the claims against it from those against Buy Right Autos. On September 23, 2012, it filed a second Motion praying for Summary Judgment on Appellant's claims against it. A hearing was held on January 10, 2013, and the Order granting Summary Judgment in favor of Northbrook was filed on April 29, 2013. The instant appeal arises from the entry of this Order; the claims against Buy Right Autos remain pending and are not a part of this matter.

STATEMENT OF FACTS

There is no dispute as to the facts of the underlying situation which physically gave rise to this case.

On October 15, 2008, an automobile being driven by Abel Martinez-Martinez, a Mexican national, ran a red light at the intersection of Fain Street and Aviation Avenue in North Charleston. R. p. 17. Because he was traveling at an unsafe and reckless rate of speed, and because cross traffic had the right-of-way, Frank Bales, who was riding a motorcycle through the

intersection, struck Martinez. *Id.* This action is predicated upon Martinez' ability to purchase insurance from Respondent, despite his facial lack of an operator's license and his history of illegal use of a motor vehicle. *See* R. pp. 12-32.

Outside of the insurance application, and his driving record, little is known about Martinez. He appears to have been an illegal alien, although he indicated on the insurance application that he had resided in South Carolina for at least three years as of the time of the application in 2007. He does not appear to have ever held a valid South Carolina driver's license, and now seems to have returned to Mexico. The only document introduced at the hearing, and the only document produced by Respondent herein, is Martinez' application for insurance, consisting of two pages of a form signed by both the applicant and the agent, a computerized summary of the coverage, and a Xerox copy of the driver's licenses of Martinez-Martinez and one Rosalilian Felix-Lemus, who is either Martinez' wife or paramour. R. p. 92, lines 11-19.

Interestingly, an examination of the licenses themselves, even in the difficult-to-read copies provided, shows that their mere appearance should have triggered further investigation. *See* R. p. 105. On their face, it is clear that these two documents, purportedly issued by the same governmental agency, are vastly different in appearance. *Id.* Furthermore, neither bears even the most basic indicia of actual governmental issuance or the signature of the driver, and both seem to have the relevant information, including dates of issuance and expiration, typed onto them. *Id.* If the information on them is to be believed, the license presented by Martinez was issued approximately two years prior to the time he completed the insurance application at issue in this case, during a time when – according to the information he provided on that same application – he was already living and working in South Carolina.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE DUTY OF INSURANCE COMPANIES, GENERALLY, TO PROTECT THE PUBLIC.

A. Respondent Insurance Company Owes a Fiduciary Duty to the Public.

At the heart of this action is the contention by Appellant that Respondent, as an Insurance Company licensed by the State of South Carolina and operating in a heavily regulated industry, owes a duty to the public at large and not merely to its own insured. This is, admittedly, an issue of first impression in this State. Nevertheless, the imposition of such a duty flows directly and obviously from existing statutory and case law. The Trial Court erroneously focused its examination of duty and negligence on whether Respondent owed a specific duty to Decedent. R. pp. 7 - 11. As Appellant noted during the hearing on Respondent's Motion, the duty is one that is owed to the general public. *See, e.g.,* R. pp. 76 – 77; pp. 89 – 90.

The Trial Court correctly set out the standard for fiduciary duty and the requirements necessary in order to demonstrate a breach of that duty. R. pp. 7 – 8. In order to find that such a duty exists, the court must determine that there is a "confidential or fiduciary relationship [which] 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." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). A relationship must be more than casual to equal a fiduciary relationship. *Steele v. Victory Sav. Bank,* 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). "Courts of equity have carefully refrained from defining the particular instances of fiduciary relationship in such a manner that other and perhaps new cases might be excluded and have refused to set any bounds to the circumstances out of which a fiduciary relationship may spring." *Island Car Wash, Inc.*,

292 S.C. at 599, 358 S.E.2d at 152; *see Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986).

Appellant herein has found no reported case which explicitly extends the general scope of the fiduciary duty of an insurance company to protect the public at large. Insurance is, however, a highly regulated industry, and the regulations themselves are clearly intended by the legislature to protect the entirety of the public interest. As the South Carolina Supreme Court has noted, "[t]he fact that the business of insurance serves a vital public interest cannot be questioned." *Rowell v. Harleysville Mut. Ins. Co.*, 272 S.C. 108, 112, 250 S.E.2d 111, 113 (1978). The South Carolina Code of Laws devotes an entire title to the regulation of and mandatory standards to be imposed upon insurance carriers. *See* S.C. Rev. Code Title 38.

The Trial Court relied upon *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002) to conclude that no fiduciary relationship existed between an applicant for insurance and the insurance company to which he was making application. *See* R. pp. 7-8. There is no doubt but that the *Pitts* court concluded that the fiduciary relationship between the insured and his insurer arose only after the contract for insurance had been executed, and that it applied primarily in the context of a direct claim for bad faith. *Id.* at 330, 574 S.E.2d at 507. The Court erred, however, in concluding that this general precept, which is applicable as between an individual and a potential insurer, means that the arguments upon which Appellant relies are "even more attenuated." R. p. 9. In fact, in the context of automobile liability insurance, it is specifically the protection of the public at large that is the predominant interest, and the particular relationship between insured and insurer is secondary.

Appellant has found no South Carolina case law for the proposition it is advancing herein. However, other jurisdictions have found that an insurance company may not avoid the

imposition of some duty to protect third parties, with whom it has no contract or prior contact, when it fails to exercise ordinary care in the issuance of a policy. In *Barrera v. State Farm Mut. Automobile Ins. Co.*, 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674 (1969), State Farm attempted to rescind an insurance contract, post-accident, when it discovered that its insured had allegedly failed to disclose an earlier DUI and license suspension. The California Supreme Court found that the insurer had a duty to investigate when it, or its agent, was in possession of knowledge that might give rise to a suspicion that the information with which it had been provided was incomplete or inaccurate. The Court further found that was a duty to the public, not to the actual insured or prospective insured, and that where the insurer failed to do so, it could not escape liability to the third party who had been injured. *Accord GEICO v. Govan*, 451 A.2d 884 (D.C. App. 1982); *State Farm Fire & Cas. Co.*, 272 Ore. 278, 537 P.2d 88 (1975).

The specific cases cited by the Trial Court for the proposition that an insurance company does not owe any fiduciary duty to the general public are inapposite and in each of them the relied-upon language is dictum. *See* R. pp. 7 – 10. *Hiller v. Allstate Prop. & Cas. Ins. Co.*, No. 11-CV-0291-TOR, 2012 WL 2325603 (E.D. Wash. June 19, 2012), upon which the Trial Court relied, involved a claim arising as a result of the defective construction of a residence, and the resultant bad faith claim by the insured against his own carrier. In *White v. State, Dep't of Pub. Safety & Corrections Office of Motor Vehicles*, 569 So.2d 1001 (La. App. 1990), the reviewing court did, in fact, state that it declined to hold that an insurance agency owed a duty to the public. However, it is equally noteworthy that in the sentence immediately preceding this statement, the court stated that "[i]t has long been the recognized public policy of this state that a policy of liability insurance is issued for the protection of the general public as well as for the security of the insured." *Id.* at 1003. As a general matter, the *White* court, and the other courts that have

looked generally at the question whether a particular relationship does or does not create a fiduciary relationship, have relied on the very specific facts of the matter before them, not on general theories. *See Island Car Wash, supra.*

The Trial Court correctly found that Appellant had offered, and could not offer, any direct evidence that but for Respondent's having issued insurance to Martinez-Martinez the accident would not have occurred. R. p. 10. However, as is discussed in detail *infra*, the fact is that the issuance of this policy made it considerably more difficult for law enforcement to identify an unlicensed driver operating an illegally registered vehicle. Had Respondent fulfilled its clear duty to the public by refusing to issue this policy, Martinez-Martinez would have been less likely to have been on the road and behind the wheel of a deadly instrumentality in the first instance. As a company owing a duty to the general public, Respondent had a duty to ensure that it verified the right of an applicant for automobile insurance to operate an automobile in the first instance. The Trial Court erred when it found that Respondent had no fiduciary duty to the public.

B. Respondent Breached the Ordinary Duty of Due Care by Failing to Verify the Validity of Facially Improper Mexican Driver's Licenses, Licenses Which Were Invalid to Confer Driving Privileges in South Carolina.

As a part of the application submitted into evidence, the Trial Court had the opportunity to examine the driver's licenses claimed to belong to Martinez and his girlfriend. *See* R. pp. 98-105. It relied upon these licenses in making the decision to insure Martinez, even though – as noted – Martinez should not have been driving in this State given that he also told the insurance agent that he had lived here more for several years. *See id.*

The licenses shown to Respondent's agent should have put the agent on notice that it should not issue an insurance policy to Martinez. *See* R. p. 105. First, of course, is the fact that

Martinez' own supposed license was issued to him, in Mexico, at a time when he had already told Respondent he was residing in South Carolina. *Id.* More significantly, the licenses are clearly and facially forged. *Id.* Respondent's failure not only to verify that Martinez had a valid license, but to even notice that the documents he presented were grossly inadequate and obviously not legitimate constitutes a breach of ordinary care. The Trial Court erroneously failed to recognize that such a breach creates liability to members of the public injured by the failure to act in a reasonable manner.

The business of insurance is heavily regulated; it, like several other professions, has been deemed by the Legislature to be sufficiently intertwined with the public good, and sufficiently susceptible to abuses of a kind likely to injure that public, that specific chapters of the South Carolina Code of Laws are dedicated to the oversight of the manner of doing business. These laws exist for dual purposes: to ensure that those entering the profession are held to a certain standard, and simultaneously to protect those who have to do business with members of the profession. In fact, many of the most highly regulated professions are those with which the public must have some dealings – institutions such as insurance agencies and banks rank highly, as there are no reasonable alternatives to doing business with these concerns.

Because of this highly regulated structure, the duties of insurance companies are, for the most part, clearly set out in the Code of Laws. For example, an insurance company is free to reject any applicant. S.C. Code § 38-77-112 ("...no automobile insurer is required to write coverage for automobile insurance as defined in Section 38-77-30 for any applicant or policyholder. An insurer or agent shall retain, for a period of three years, the driver's license numbers for all persons who have submitted an application for insurance but who were refused coverage... "). Under the version of this statute in effect until 2011, the insurer was permitted to

write insurance to a vehicle owner who was not licensed provided the owner designated a primary operator who did possess a valid license; that provision is no longer part of the Code. It was, however, still in existence at the time Martinez obtained insurance from Respondent. It may be the reason his wife or paramour was also asked for her license.

This section of the Code, particularly in the version which existed at the time Respondent accepted Martinez' application and issued Martinez a policy of insurance, ties in directly with S.C. § 56-1-20, which unequivocally states that all persons driving motor vehicles in the State of South Carolina are required to possess a valid operator's permit. The statutory scheme further provides that, under certain situations, foreign nationals may continue to drive with their foreign licenses for a period of up to five years, S.C. Code § 56-130(6), but also states that an applicant must provide proof of the existence of a valid Social Security number, S.C. Code § 56-1-90. The Code expressly states that no operator's license may be issued to a person who is not a resident of South Carolina, and further equally expressly states that illegal aliens may not be considered to be "residents." S.C. Code § 56-1-40(7).

The importance of these Code sections, their interaction, and the instant matter is apparent. Martinez clearly could not obtain a valid South Carolina driver's license, as he seems to have been an illegal alien.[1] Although Respondent had the statutory ability to refuse to issue insurance, and the concurrent ability and duty to verify that at least the primary driver of the vehicle it was insuring had a valid license, it failed to take any steps to do so. Whether it requested license information from Martinez' paramour because she was being presented as the primary driver of a vehicle owned by an individual known to Respondent not to have a valid

[1] Although the information obtained during the course of the initial litigation against Martinez, directly, is not a part of the record in this action – primarily because discovery had barely commenced at the time of the hearing on the motion for summary judgment – Appellant has verified information showing that Martinez was arrested at the time of the accident, and was subsequently deported.

license, or whether it simply accepted at face value a document that clearly failed to meet any of the statutory requirements of a valid operator's license is immaterial. Respondent had both the opportunity and the ability to protect itself, and the public, and failed to do so, deciding instead to ignore the clear deficiencies in the documentation it was provided.

Notwithstanding the strict control imposed over the business and practice of insurance by the Legislature, the duty of ordinary care does not disappear. Although Appellant has found no case law discussing the superimposition of such a duty on top of the statutory privileges and obligations in the insurance context, it has been found to exist in other, similarly regulated, industries. For example, in *Dennis v. South Carolina Nat'l Bank*, 299 S.C. 34, 382 S.E.2d 237 (Ct. App. 1988), this Court found that a bank could be held liable for cashing forged checks even though the customer had failed to timely notify it of the forgeries. The Court held that the customer's negligence in failing to review his statements and cancelled checks did not negate the bank's negligence and demonstrable lack of ordinary care. It concluded that the duty of ordinary care existed in part because of the extent of statutorily imposed control over the industry.

The evidence presented in this case should, at an absolute minimum, have resulted in some investigation by Respondent prior to the issuance of an insurance policy. The two driver's licenses presented to the agent, introduced as a part of the small application package completed at the time the policy was written, are very clearly forged. *See* R. p. 105. Although they were purportedly issued by the same jurisdiction, and near the same time, they appear radically different on their faces. *Id.* The text on each has been written on a standard typewriter or printer; neither bears any signature or seal of any Mexican official. *Id.* Even without the problem that the law requires that anyone resident in this State for the period of time Martinez

stated he had lived here obtain and possess a valid South Carolina license, what was shown to the agent is quite obviously not a valid Mexican license.

Any investigation, even the most cursory, would have revealed that Martinez should never have been issued an insurance policy. Had Respondent exercised even ordinary care, it would not have issued that policy, and its failure to do so requires that this Court reverse the decision of the Trial Court in granting summary judgment on the issue of negligence.

C. The Trial Court Erred in Concluding that Appellant Had Failed to Show that the Issuance of Insurance to Martinez Was Casually Connected to Martinez Causing the Death of Appellant's Decedent.

Because Appellant herself could not testify as to whether or not Martinez would have driven an automobile without insurance, the Trial Court concluded that Appellant had failed to show that the accident was proximately caused by the negligent acts of Respondent. R. p. 10. This is incorrect, and fails to focus on the correct analysis.

There is no doubt about Appellant's ability to testify as to the state of mind of a third party – which is, obviously, none – and given that Martinez has apparently fled the country, he is unavailable to testify as to whether or not he would have continued to drive even without insurance. However, just as the duty to investigate and ensure that only validly licensed drivers are insured is a duty to the public and not to Appellant individually, the causal analysis too must be done in the context of public, rather than individualized, safety.

The South Carolina Department of Motor Vehicles verifies the existence of insurance before it will issue a license plate. A vehicle without a license plate is more likely to be stopped by any law enforcement officer who might come into contact with it. As a rule, the police tend to take persons without licenses off the road, and impound their vehicles. On the other hand, although the same result will ensue if the police happen to stop for some other reason an

individual – such as Martinez – who is operating a motor vehicle without having a valid license to do so, law enforcement cannot see into someone's back pocket or wallet. So long as the car itself bears valid plates, it is unlikely to be stopped; without those plates, the driver is at risk every moment the automobile is on the road.

In other words, although Appellant cannot testify to or otherwise prove Martinez' actual state of mind or intentions, it requires little other than common sense to show the integral connection between his obtaining insurance coverage and his continued presence on the roadways. Respondent's failure to investigate, its failure to exercise ordinary care to ensure that it was not selling insurance policies to unqualified, unlicensed, drivers, is clearly a proximate cause of Mr. Bales' death.

"Proximate cause" does not necessarily refer to the sole cause. The South Carolina Supreme Court has said that

> The law recognizes there may be more than one proximate cause. The acts of two or more persons may combine and concur together as an efficient or proximate cause of the death of a person. The defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased.

State v. Burton, 302 S.C. 494, 496 – 97, 397 S.E.2d 90, 91 (1990); *see also Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). The seminal issue is whether the conduct is foreseeable to the defendant. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). The precise outcome or event need not have been foreseeable; all that is required is that the event be a natural and probable consequence of the defendant's acts or omissions. *Id., Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991).

At an absolute minimum, the issue of proximate cause in this case should have gone to a jury. Rule 56 of the South Carolina Rules of Civil Procedure requires that the Trial Court view

all of the evidence in the light most favorable to the non-moving party, and grant summary judgment only when there is no genuine issue of material fact. S.C.R.C.P. 56(c); *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990). Where the evidence is susceptible of more than one reasonable inference, the case should be submitted to the jury. *Fairchild v. S.C. D.O.T.*, 398 S.C. 90, 727 S.E.2d 407 (2012); *Unlimited Servs., Inc. v. Macklen Enters. Inc.*, 303 S.C. 384, 401 S.E.2d 153 (1991).

The Trial Court looked exclusively to the testimony of Mrs. Bales, in which she understandably admitted that she could not know for a fact whether or not Martinez would have refrained from operating a vehicle if he did not have insurance.[2] *See* R. pp. 7 – 10. It failed to employ the accurate standard for proximate cause: whether it was foreseeable to Respondent that if it issued insurance to an unlicensed driver, that driver would subsequently continue to drive, and whether continuing to drive with neither a license nor the necessary training would make it likely that the driver would be involved in an accident.

[2] There is, of course, an obvious presumption that he would not have driven without it, created merely by the fact that Martinez, an unlicensed driver, sought out insurance coverage – given that he never obtained a license, it is highly unlikely that he would ever have made a claim under the policy, which was therefore clearly obtained exclusively in order to facilitate his being able to purchase plates for the car.

CONCLUSION

For the reasons set forth above, Appellant would respectfully request that the decision of the Honorable Edgar W. Dickson granting summary judgment in favor of Respondent Northbrook Indemnity Co. be reversed, and the action be remanded for trial.

April 24, 2014

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief on Northbrook Indemnity Co. by depositing a copy of it in the United States Mail, postage prepaid, on April 30, 2014, addressed to their attorney of record, John T. Lay, Post Office Box 7368, Columbia, South Carolina, 29202.

April 30, 2014

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