THE 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
Appellate Case No. 2013-001225

Cynthia D. Bales, individually and as Personal Representative
Of the Estate of Frank R. Bales, on behalf of the Estate and
Statutory Beneficiaries..... Appellant,

v.

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

Of Whom Northbrook Indemnity Co. is the ..... Respondent.

FINAL BRIEF OF RESPONDENT

John T. Lay, Jr.
Laura W. Jordan
Janice Holmes
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

ATTORNEYS FOR RESPONDENT
NORTHBROOK INDEMNITY COMPANY

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INTRODUCTION

The circuit court's grant of summary judgment in favor of Respondent Northbrook Indemnity Co. ("Northbrook") should be affirmed because South Carolina has never recognized the theory of liability advanced by Appellant Cynthia Bales, who has brought claims against Northbrook individually and as Personal Representative of the Estate of Frank R. Bales (collectively, the "Estate"). This case arises from a fatal accident that occurred when an automobile driven by Abel Martinez-Martinez ("Martinez") allegedly ran a red light and collided with a motorcycle driven by Frank Bales. After Mr. Bales died from injuries sustained during the accident, his Estate brought a wrongful death suit in Charleston County against Martinez, the allegedly at-fault driver (the "Wrongful Death Suit").

Thereafter, the Estate filed this case - a second wrongful death/negligence-based action - seeking also to hold Northbrook liable for Mr. Bales' death for the sole reason that Northbrook insured Martinez.[1] This is not a declaratory judgment action. The Estate's claims in this case do not concern the validity of coverage under Northbrook's policy for the actions of Martinez (who incidentally never personally appeared in the Wrongful Death Suit). Instead, this case is an attempt to impose an entirely new form of liability on insurance carriers – *direct liability* for injuries caused by an insured simply because the carrier issued a policy in the first place.

South Carolina law does not recognize this theory, and it fails as a matter of law

[1] The Estate also brought claims against Buy Right Autos, Inc. ("Buy Right"), the purported seller of the vehicle Martinez was driving at the time of the accident. The claims against Buy Right are not part of this appeal and have been dismissed in the circuit court.

for two independently sufficient reasons. First, the Estate's theory imposes a duty upon insurers created out of whole cloth – a duty to protect the public at large from the actions of their policyholders. There is no legal basis for imposing upon automobile insurers a universal responsibility for any injuries caused by an insured while driving. And there is no factual or legal reason why, in this particular case, Northbrook owed a duty to Mr. Bales, or to any other driver on the road for that matter, simply because it issued a policy to Martinez.

Second, the causation analysis necessitated by the Estate's claim is not legally sound. The circuit court found that Northbrook's issuance of an automobile policy was not the proximate cause of Mr. Bales' death. To reverse, this Court must conclude that an insurance company's decision to insure a driver is both the cause in fact and the legal cause of any injuries resulting from that driver's operation of a vehicle. That is not the law, nor should it be.

The Estate's claims against Northbrook – couched as breach of fiduciary duty, nuisance, failure to warn (ordinary/gross negligence), negligence per se, wrongful death, loss of consortium, and survival – were fatally flawed from their inception. The circuit court properly granted summary judgment in favor of Northbrook, and that decision should be affirmed.

STATEMENT OF THE CASE

On September 30, 2011, the Estate filed a Summons and Complaint against Northbrook and Buy Right alleging causes of action for breach of fiduciary duty, nuisance, failure to warn (ordinary/gross negligence), and negligence per se. Cynthia Bales also sought damages, individually and as Personal Representative for the Estate, for wrongful death, loss of consortium under South Carolina Code § 15-75-20, and survival under South Carolina Code § 15-5-90. Northbrook filed an Answer on November 11, 2011 denying liability and asserting other defenses.

On September 23, 2012, Northbrook moved for summary judgment on all of the Estate's claims against it. After considering written argument and evidence, and after hearing oral argument on January 10, 2013, the circuit court granted summary judgment to Northbrook on April 29, 2013 (the "Summary Judgment Order"). The Estate did not seek reconsideration of that decision pursuant to Rule 59(e), SCRCP, and instead filed a Notice of Appeal on May 20, 2013.

STATEMENT OF FACTS

Because the issues on appeal are questions of law not of fact,[2] the underlying facts are few and undisputed. Viewing the facts presented to the circuit court in the light most favorable to the Estate as the non-moving party, the record reveals the following: On November 30, 2007, Martinez and his wife, Rosa Felix, completed an application for automobile insurance with Jerry Bacon Insurance. (R. pp. 98-100). On that date, Martinez owned a vehicle, a 1998 Ford Contour. (R. p. 101). The application identified both Martinez and his wife as operators in the household, (R. p. 102), and both Martinez and his wife presented their drivers' licenses issued by Mexico, (R. pp. 102, 105). Thereafter on October 15, 2008, Frank Bales was on his way to work when he and Martinez were involved in an automobile accident, and as a result of injuries sustained in the accident, Frank Bales died instantly. (R. p. 47 (citing Bales Depo. 10:16-24)).[3]

Those were the only facts before the circuit court, and they were undisputed. (*See* Appellant Brief, p. 1 ("There is no dispute as to the facts of the underlying situation."); R. p. 74, l. 20 – p. 75, l. 2 ("Mr. Martinez was in the United States. He applied for a policy of insurance from Northbrook and he was driving around when he struck . . . my client's husband . . . . Those are the facts.)). The Estate concedes that "the only document" presented to the circuit court for consideration on summary judgment is "Martinez'[s]

[2] The Estate admits that "[at] the heart of this action" is the legal question of whether Northbrook, "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 its own insured." (Appellant Brief, p. 3). The Estate concedes "[t]his is, admittedly, an issue of first impression in this State." (*Id.*)

[3] Although neither party submitted the actual pages from Cynthia Bales' deposition to the circuit court, Northbrook's memorandum in support of summary judgment quoted deposition excerpts that were reproduced in the court's Summary Judgment Order and considered by the circuit court in its analysis. (R. pp. 5-7).

application for insurance, consisting of two pages of a form . . ., a computerized summary of the coverage, and a Xerox copy of the driver's license of Martinez . . . [and an individual] who is either Martinez'[s] wife or paramour." (Appellant Brief, p. 2).

Nevertheless, the Estate's brief on appeal is replete with bald assertions disguised as "facts." These purported "facts" find no support in the record, were not presented to the circuit court, and were not considered by the circuit court in any context – much less in the context suggested by the Estate. Two of these unsubstantiated claims predominate the Estate's "Statement of Facts" on appeal: (1) that Martinez "appears to have been an illegal alien, . . . does not appear to have ever held a valid South Carolina driver's license, and now seems to have returned to Mexico;" and (2) that the Mexican licenses attached to the insurance application "are vastly different in appearance" and lack "indicia of actual governmental issuance." (Appellant Brief, p. 2).

It is telling that the Estate cites no record support for these two claims; it does not exist. The Estate concedes as much with regard to the first claim that Martinez was an "illegal alien" by declaring that it has now "verified information" that Martinez was deported – information that admittedly was "not part of the record in this action." (Appellant Brief, p. 8 n.1).[4] Nor is there a record citation to support the Estate's second

[4] After admitting that this "fact" and other "information obtained during the course of the [Wrongful Death Suit] . . . is not a part of the record in this action," the Estate suggests this information was not obtained earlier because "discovery had barely commenced at the time of the [summary judgment] hearing." (Appellant Brief, p. 8 n.1). This offhand comment about discovery - in a footnote - has no impact on this appeal. The Estate has not appealed the circuit court's decision to hear and decide the summary judgment motion when it did. The only issues raised by the Estate on appeal concern the merits of the circuit court's summary judgment ruling, not the timing of it. (*See* Appellant Brief, Statement of Issues on Appeal). A passing reference in a footnote that contains no citation to authority is not sufficient to present an issue for appellate

claim concerning the "mere appearance" of the licenses, because this is not a "fact" at all. It is an argument by counsel – an *ad hoc* "examination of the licenses" – that is not supported by evidence. (Appellant Brief, p. 2). It is not even a valid argument on appeal because it was never raised to the circuit court in the first place. *Oxner*, 391 S.C. at 134, 705 S.E.2d at 52 (finding that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed). This Court should reject the Estate's invitation to accept as "fact" these unsupported allegations.

ARGUMENT

For the reasons outlined below, the circuit court properly determined that the Estate failed, as a matter of law, to establish that Northbrook owed a duty, breached a duty, or proximately caused the injuries and death of Mr. Bales. (R. pp. 7-10).

I. The Estate Cannot Rely Upon Facts And Arguments That Were Never Presented To, Nor Considered By, The Circuit Court.

Before delving into the merits of the circuit court's decision, it is important to define the contours of the Estate's theory of liability because as previously noted, it has raised new arguments on appeal that are not properly before this Court. The Estate's Complaint may have alleged separately-denominated claims against Northbrook for breach of fiduciary duty, nuisance, failure to warn, negligence per se, wrongful death, survival, and loss of consortium, but the Estate's argument in opposition to summary

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consideration. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 488-489, 732 S.E.2d 205, 213 (Ct. App. 2012). The record before the circuit court on summary judgment cannot be enlarged now, and the Estate cannot raise new evidence for the first time on appeal that was never presented to the circuit court. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)(outlining the requirements for preservation). There is no exception to the preservation rule that would permit the Estate to raise a new theory on appeal simply because it has now "verified information" that supports such a theory.

judgment presented one, streamlined theory of negligence-based liability: Northbrook owed a duty, breached that duty, and caused the injuries and death of Mr. Bales. (*See generally* Appellant Brief, p. 3; *see also* R. p. 75, ll. 6-10; R. p. 77, ll. 5-8, 12-16). On appeal, the Estate continues this approach by proclaiming that "[at] the heart of this action" is a legal question of first impression that would require this Court to fashion a general duty upon insurers to protect the public from the actions of their insureds. (Appellant Brief, p. 3; *see also* R. p. 75, ll. 6-10; R. p. 77, ll. 5-8, 12-16). The existence of a duty owed by Northbrook is the common denominator and, without it, all of the Estate's claims against Northbrook fail.

Nevertheless, the origin of this duty - and the claimed breaches thereof - have been a moving target and continue to evolve even on appeal. Initially, the Estate's Complaint tried on a variety of sources for the duty, including: (1) a general guarantee by all insurance companies to South Carolina citizens that it will "enact reasonable policies to protect those members of the general public" in exchange for the privilege to underwrite insurance in this State, (R. p. 22, ¶ 33); (2) a fiduciary relationship between Northbrook and all "citizen[s] and resident[s] of this state" including "Plaintiff and her decedent and beneficiaries." (R. p. 22, ¶ 34); (3) a statutory duty derived from S.C. Code Ann. § 56-1-20, which merely outlines the requirements for a driver to be legally entitled to drive in this State, (4) a statutory duty derived from S.C. Code Ann. § 38-77-112, which proclaims that "no automobile insurer is required to write coverage for automobile insurance . . . for any applicant or existing policyholder," (R. pp. 24-25, ¶ 43); and (5) an inherent obligation to avoid "encouraging any condition which would put the public in unreasonable danger," (R. p. 26, ¶ 51), and to warn of any dangerous conditions, (R. p. 26

¶ 52).[5] The Estate claimed that Northbrook "encouraged," "enabled," and "assisted" Martinez's "unauthorized use of an automobile" by issuing a policy to him. (R. pp. 22-23, ¶ 35).

At the hearing on Northbrook's summary judgment motion, the Estate made clear that the duty it advocates is a *new* duty that would obligate all insurers to protect "the general public" – a duty that would impose a burden upon insurers to prevent unauthorized persons from driving. (R. p. 76, l. 17 – p. 77, 2). The Estate disavowed any claim that Northbrook owed a "specific duty to Decedent."[6] (*See* Appellant Brief, p. 3 (citing to the hearing transcript)). Cobbling together language from two statutes – one addressed to insurers that gives them the right (not duty) to refuse coverage and one addressed to drivers that makes unauthorized operation of a vehicle unlawful, the Estate shifted its focus to whether possession of a Mexican license is sufficient to operate a vehicle in the first place. (R. p. 78, l. 1 – p. 79 l. 11). According to the Estate, Northbrook should have known that a Mexican license-holder was not authorized to drive

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[5] Plaintiff's deposition testimony explained the basis of her lawsuit as follows:

> Q: What is your understanding about this lawsuit?
>
> A: Well, I understand that this person was given a license—he had no driver's license and was given insurance to drive. And, this—we're supposed to be protected with insurance, and they gave him the—basically the man had no training, no formal training, no license, and no—he was given a right to drive and he used his vehicle as a deadly weapon, I mean, basically.

(R. p. 48 (citing Bales Depo:12:12-21)).

[6] And for good reason – neither Mr. Bales nor his wife applied for insurance with Northbrook, and they were not insureds of Northbrook subject to the policy covering Martinez's vehicle.

in South Carolina and therefore should have denied coverage to Martinez simply because he presented a Mexican license. (Tr. p. 79, l. 5 – p. 82, l. 25). These were the only theories presented to the circuit court before its decision, and the Estate did not file a Rule 59(e) motion challenging the circuit court's ruling.

Now, for the first time on appeal, the Estate claims that Northbrook was duty-bound to investigate Martinez and deny coverage because: (1) the Estate surmises that the Mexican licenses presented at the time of application were "very clearly forged," (Appellant Brief, p. 9), and/or (2) the Estate hypothesizes that "Martinez clearly could not obtain a valid South Carolina driver's license, as he seems to have been an illegal alien," (Appellant Brief, p. 8). Perhaps having realized that South Carolina *does* permit a Mexican license-holder to operate a vehicle under certain circumstances, the Estate has sought support outside of the record for new allegations concerning the authenticity of the Mexican-issued license and the immigration status of Martinez. The Estate even fashions a new duty argument to accompany these new allegations: that Northbrook should have conducted an "investigation . . . prior to the issuance of an insurance policy." (Appellant Brief, p. 9). These arguments were not only never presented to, nor considered by, the circuit court, but they assume facts that were not even part of the summary judgment record as outlined above.[7]

The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *Oxner*, 391 S.C. at 134, 705 S.E.2d at 52

[7] Even if this Court considered the merits of the Estate's new theories (which it should not), they are untethered to a legal duty owed by Northbrook. Even assuming *arguendo* that the licenses were forged and/or that Martinez was an illegal alien, there is no legal basis for holding Northbrook liable for issuing insurance to him, as outlined in more detail in Section II, *infra*.

(internal quotations omitted); *see also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), the circuit court must have had the opportunity *for each theory advanced by the Estate* "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The Estate cannot keep "ace card[s] up [its] sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [it] another opportunity to prove [its] case." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724. But that is exactly what the Estate attempts to do in this appeal by arguing that Northbrook had a duty to deny Martinez coverage because his license appeared forged and/or because he was not lawfully residing in the United States. These theories are outside the scope of arguments presented to and considered by the circuit court, and they are not on appeal. Against that backdrop, Northbrook turns to the merits of the Estate's liability theory.

II. The Circuit Court Correctly Granted Summary Judgment In Favor Of Northbrook Because South Carolina Law Does Not Obligate Insurers To Protect The Public From The Actions Of Its Insureds.

The circuit court properly determined that the Estate failed, as a matter of law, to establish that Northbrook owed a duty to either the public generally or Mr. Bales specifically, (R. pp. 7-10), and that decision should be affirmed. Without a duty, there can be no breach in the first instance.

A. The Summary Judgment Standard

Summary judgment is appropriate where, as here, "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(e), SCRCP; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the circuit court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)). Where a defendant establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); *Dyer,* 284 S.C. at 211, 325 S.E.2d at 70. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

B. There Is No South Carolina Authority Imposing Upon Insurers A Generalized Duty To Protect The Public At Large.

The Estate's argument is that each insurer, including Northbrook, owes a duty to protect every resident of South Carolina, including the Decedent, from the actions of its policyholders – either by refusing coverage to an applicant or by warning the public about an insured's driving status. The Estate admits there is no existing South Carolina

law that obligates insurance companies to protect the public at large from the actions of their policyholders. (Appellant Brief, p. 4 ("Appellant has found no South Carolina case law for the proposition it is advancing herein.")).

In the absence of a legal justification for imposing such a broad duty upon insurance companies, the Estate's claims were flawed from their inception. To succeed on a negligence-based theory like the one advanced by the Estate, "the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011).

South Carolina has not recognized the existence of a general duty on the part of an insurer to keep the public safe, and other jurisdictions considering similar arguments have determined no such public duty exists. *See, e.g., Hiller v. Allstate Prop. & Cas. Ins. Co.*, No. 11-CV-0291-TOR, 2012 WL 2325603, at * 11 (E.D. Wash. June 19, 2012) ("As an initial matter, the Hillers have not citied any authority for the broad proposition that insurance companies operating in Washington owe a duty of good faith to the general public. Accordingly, the court finds that this cause of action fails to state a claim for relief."); *White v. State, Dep't of Pub. Safety & Corrections Office of Motor Vehicles*, 569 So.2d 1001, 1003, 1004 (La. App. 1990) (declining to extend policy that liability insurance is purchased for the "protection of the general public as well as the insured" "to say that an insurance agency owes a duty to the public to insure only persons who are physically able to drive safely."); *Sterling v. Hartenstein*, 341 P.2d 90, 98-99 (Kan. 1959) ("Knowledge on the part of an insurance company that a motor carrier for which it issues an indemnity policy should comply with the Public Motor Carrier Act is not in and of

itself sufficient to force direct liability upon the insurance carrier by reading the statute (66-1, 128, supra) into the policy.").

The Estate, having recognized that it has asked this Court to do what no South Carolina court has done before, argues that "the imposition of such a duty flows directly and obviously from existing statutory and case law." (Appellant Brief, p. 3). That is not the case.

C. The Imposition Of Such A Duty Does Not Flow From South Carolina Statutes.

The Estate's argument that Northbrook was duty-bound by statute to deny coverage to a Mexican national who did not present a South Carolina license is premised on a tortured reading of two statutes: (1) one addressed to insurers that gives them the right (not duty) to refuse coverage, S.C. Code Ann. § 38-77-112; and (2) one addressed to drivers that makes unauthorized operation of a vehicle unlawful, S.C. Code Ann. § 56-1-20. Neither of these statutes prevented Northbrook from issuing a policy to Martinez.

Indeed, *no* South Carolina statute prohibited Northbrook from issuing a policy to a Mexican national with a Mexican driver's license. Although counsel for the Estate initially suggested at the summary judgment hearing that a driver with a Mexican license "has to obtain an international driving permit for a Mexican before he comes into the United States," (R. p. 82, l. 15-18), the Estate no longer advocates that position. Even at the hearing, counsel admitted that the law "is different in every state" and that a Mexican license-holder may be able to operate a vehicle legally under certain circumstances without a South Carolina license. (Tr. p. 82, l. 19; R. p. 83, ll. 4-9). On appeal, the Estate appears to confirm that insurance companies were not prohibited during the relevant time

period from writing insurance for individuals who lacked a South Carolina license, and the Estate speculates that this "may be the reason [Martinez's] wife or paramour was also asked for her license." (Appellant Brief, pp. 7-8).

At the time Northbrook issued Martinez's policy, there were multiple, nuanced exemptions in the South Carolina Code permitting individuals without South Carolina licenses to operate a vehicle legally in this State. As the Estate concedes in its brief on appeal, "[t]he statutory scheme . . . provides that, under certain situations, foreign nationals may continue to drive with their foreign licenses for a period of up to five years." (Appellant Brief, p. 8 (citing S.C. Code Ann. § 56-1-30(6)). Regardless, the statutory scheme imposed a duty upon *Martinez* to ensure he complied with those nuanced exemptions and other South Carolina driving requirements – that duty was not imposed on his insurance company.[8]

There is no statute that required Northbrook to evaluate whether Martinez qualified under any of these nuanced exemptions or mandated that Northbrook deny coverage to Martinez because he held a Mexican license instead of a South Carolina license. If anything, Northbrook had a duty *not* to deny coverage to Martinez because he was a Mexican national; Section 38-77-122 prohibits insurers and agents "from refusing

[8] As discussed previously, the Estate has raised new arguments on appeal concerning Martinez's ability to obtain a valid South Carolina license due to his immigration status and has suggested that Northbrook had a duty to investigate Martinez. (Appellant Brief, p. 8). This argument is not before this Court on its merits because it has not been preserved. Nevertheless, even if these allegations were true, that does not impose upon Northbrook a duty to deny insurance to Martinez. Northbrook was not charged with the determination of whether Martinez could obtain a South Carolina driver's license, and it was not obligated to verify his driving status. Northbrook sold an insurance policy to a foreign national who possessed a foreign driver's license when the statutory scheme authorized foreign nationals to drive with a foreign driver's license under certain circumstances. Verification of those circumstances did not fall upon Northbrook.

to issue automobile insurance policies due to certain factors" including "national origin." S.C. Code § 38-77-122. As the circuit court observed, "evidence presented at the hearing showed that Northbrook issued a policy to Martinez, who presented his Mexican-issued license at the time of the application, and the issuance of the policy was in keeping with common practice at the time of issuance of the policy in the automobile insurance industry." (R. pp. 9-10). The Estate admits on appeal that it "has found no case law discussing the superimposition of such a duty on top of the statutory privileges and obligations in the insurance context." (Appellant Brief, p. 9).

No laws were violated by Northbrook, and no insurer is obligated by statute or otherwise to ensure that its policyholders are not driving unlawfully.

D. The Imposition Of Such A Duty Does Not Flow From Existing Case Law.

The Estate also requests that this Court extend South Carolina case law to impose a duty upon insurers to protect the public. This duty does not flow legally or logically from existing law. At its core, imposing a duty on insurers to protect the public from the actions of their policyholders obligates insurers to supervise, monitor, and control their policyholders. There is no South Carolina law that warrants the imposition of a duty of this kind. "'Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger.'" *Wal-Mart Stores, Inc.*, 393 S.C. at 246, 711 S.E.2d at 911 (quoting *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)). Only five exceptions to this rule exist: "1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty;

4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant." *Id.*, 393 S.C. at 246-247, 711 S.E.2d at 911-912 (citing *Faile*, 350 S.C. at 334, 566 S.E.2d at 546). With regard to the "special relationship exception, the duty to warn may exist "when the defendant 'has the ability to monitor, supervise, and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'" *Id.* at 247, 711 S.E.2d at 912 (quoting *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007)). None of these exceptions is applicable here. Northbrook was not obligated to supervise or control Martinez or to warn the public about Martinez's status as a driver, licensed or unlicensed. The Estate's theory is that because insurance *serves* a public interest, insurance companies therefore are *obligated to protect* the public from its policyholders. This premise does not comport with South Carolina law, which requires more before an obligation to control or warn arises.

Nor can the Estate justify imposing upon insurers a general duty to "protect the public" by cloaking it with the "fiduciary duty" moniker. South Carolina courts have determined that "[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." *RFT Mgmt. Co., L.L.C. v. Tinsely & Adams L.L.P.*, 399 S.C. 322, 335-336, 732 S.E.2d 166, 173 (2012). It is well-established that "[a] relationship must be more than casual to equal a fiduciary relationship." *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002) (citing *Steele v. Victory Sav. Bank*, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988)). Generally, "a claim of a fiduciary relationship [can] not

'rest upon the mere relationship of insurer and insured.'" *Pitts*, 352 S.C. at 332, 574 S.E.2d at 508 (quoting *Moses v. Mfrs. Life Ins. Co.*, 298 F. Supp. 321 (D.S.C. 1968)).

In this case, the Estate admits there was no special or confidential relationship between insurer and insured or insurer and Decedent; rather, the Estate claims that the public at large places "special confidence" in insurance companies as a whole and this gives rise to a fiduciary duty. (Appellant Brief, pp. 3-4). Again, the Estate concedes that it "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." (Appellant Brief, p. 4).

The circuit court correctly rejected the Estate's unwarranted extension of the law because South Carolina courts have refused to impose a fiduciary duty on an insurance company *simply because it is an insurance company.* In *Pitts,* this Court refused to recognize a fiduciary relationship between an insurer and a third-party when no contractual relationship existed at the time. *Id.,* 352 S.C. at 330, 574 S.E.2d at 507 (distinguishing cases finding that an insurer owed a fiduciary duty because "conduct at issue in th[o]se cases arose based on the insurer's established contractual obligations"). Significantly, this Court observed:

> [South Carolina] cases clearly establish the sale of insurance is an arm's length commercial transaction, which does not give rise to a fiduciary relationship. Because an applicant is ***still operating in the marketplace*** at the point of purchase, the insurer is in a decidedly different position than after the contract has been entered into; thus, no heightened duty has attached.

Id. at 331, 574 S.E.2d at 508 (emphasis added).

South Carolina courts have already determined that an insurance company's *status* as an insurer is not enough to establish a fiduciary relationship with a third party to

whom it owes no contractual obligation; the third party "is still operating in the marketplace" and no duty is owed to that party. It simply does not follow that South Carolina law would impose upon an insurer a fiduciary duty to *an entire marketplace of third-parties* for no reason other than they are South Carolina citizens.[9]

There is no authority in South Carolina that warrants imposing upon insurance companies a general duty to protect the public from the actions of policyholders.

III. The Circuit Court Properly Granted Summary Judgment In Favor Of Northbrook Because Northbrook's Issuance Of An Insurance Policy Did Not Proximately Cause The Decedent's Injuries.

Even if the Estate could establish that Northbrook owed a duty to protect the public that it breached (which it did not), the Estate's tenuous causation argument warranted summary judgment in favor of Northbrook. There is no evidence that the presence or absence of an insurance policy influenced Martinez's decision to drive a vehicle or was the "but for" or legal cause of the accident that resulted in the death of Mr. Bales. The Estate relies on conjecture alone to demonstrate causation, and the law is clear that speculating about non-existent facts is not the same as drawing a reasonable inference from existing facts.

To prove "[p]roximate cause requires proof of both causation in fact and legal cause." *Madison ex rel. Bryant*, 371 S.C. 123, 146, 638 S.E.2d 650, 662 (2006) (citing *Oliver v. S.C. Dep't. of Highway & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)). "Causation in fact is proved by establishing the injury would not have occurred

[9] In light of the holding in *Pitts* and its progeny, the Estate's citation to a California case because it "impos[ed] some duty to protect third parties, with whom [the insurer] has no contract or prior contract" is inapposite. (Appellant Brief, p. 5). The case is not binding nor consistent with South Carolina's approach to third parties in the insurance context.

'but for' the defendant's negligence[, and l]egal cause is proved by establishing foreseeability." *Madison, 371 S.C.* at 147, 638 S.E.2d at 662 (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130 *and Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

There is no evidence of proximate cause in this case, a fact that the Estate has all but conceded. As the Estate recognizes on appeal, Cynthia Bales "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." (Appellant Brief, p. 12 (referencing R. p. 10)). Even counsel for the Estate conceded at oral argument that "if Mr. Martinez were to come in here and testify that he would have driven the vehicle anyway [regardless of his insurance status], then my case would be dead." (R. p. 85, ll.7-10). The Estate's causation analysis was not supported by a single fact in the record.

Instead, the Estate hypothesized that insurance gave Martinez a "green light to drive around without a license." (R. p. 91, ll. 8-11). Aside from the fact that this theory relies on a fact that is not in the record, it also does not logically comport with the Estate's other claims of lawless behavior by Martinez (again, unsupported by the record). If, as the Estate claims, Martinez drove without a license, presented a forged Mexican license, lived illegally in the United States, and fled the country (*see* Appellant Brief, pp. 2, 6, 9-10), why would he suddenly become law-abiding and refrain from driving until he procured automobile insurance? The Estate's only response is to pile on more speculation that "issuance of this policy made it considerably more difficult for law enforcement to identify an unlicensed driver operating an illegally registered vehicle" because "[t]he South Carolina Department of Motor Vehicles verifies the existence of

insurance before it will issue a license plate." (Appellant Brief p. 6, 10). The layers of conjecture are too many to count – that Martinez would not have obtained insurance absent Northbrook's policy, that Martinez would not have been able to obtain license plates by any other means, that police officers would have stopped Martinez from driving if he lacked license plates, that Martinez would have never been driving if stopped for lack of registered plates. This is not proximate cause; it is a multi-layered decision tree with numerous moving parts.

For this alternative, legally sufficient reason, the circuit court correctly granted summary judgment in favor of Northbrook.

IV. As An Alternative Sustaining Ground, The Circuit Court's Grant Of Summary Judgment Was Proper Because The Statutes Upon Which The Estate Relies Do Not Give Rise To A Private Right Of Action.

The circuit court's decision should also be affirmed because neither § 38-77-112 nor § 56-1-20 creates a private right of action, which is an alternative sustaining ground for the circuit court's decision under Rule 220(c), SCACR. Although Northbrook presented this argument to the circuit court on summary judgment, the court found that it "need not reach the issue regarding whether the South Carolina Code of Laws §§ 38-77-112 and 56-1-20 provide Plaintiff with a private right of action" because it had already "determined that [the Estate] has failed to meet her burden to withstand Northbrook's motion." (R. pp. 10-11).

The Estate does not overtly contend that above-referenced statutes authorize a private right of action, yet it relies on these statutes as the basis for "[n]egligence per se [which] is a negligence cause of action that arises from a defendant's violation of a statute." *Spires v. Acceleration Nat'l Ins. Co.*, 417 F. Supp.2d 750 (D.S.C. 2006) (citing

Rayfield v. S.C. Dep't of Corrs., 297 S.C. 95, 374 S.E.2d 910, 915 (1988). The practical effect of the Estate's argument is an accusation that Northbrook violated §§ 38-77-112 and 56-1-20 by issuing an insurance policy to Martinez, yet neither statute authorizes a private right of action in the event of a violation.

"The main factor in determining whether a statute creates a private cause of action is legislative intent." *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 576, 614 S.E.2d 619, 622 (2005) (citing *Dorman v. Aiken Commc'ns., Inc.*, 303 S.C. 63, 398 S.E.2d 687 (1990)). Further,

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute....In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Overcash, 364 S.C. at 576, 614 S.E.2d at 622 (quoting *Dorman*, 303 S.C. at 67, 398 S.E.2d at 689). In addition, courts must look to the purpose of the statute when determining whether a statute crates a private right of action. *See Wal-Mart Stores, Inc.*, 393 S.C. at 245, 711 S.E.2d at 911 ("Further, the Court looked to the purpose of the Children's Code and determined § 63-7-310 is concerned with the protection of the public and not with the protection of an individual's private right.")

Neither the purpose nor the legislative intent of §§ 38-77-112 and 56-1-20 is consistent with an actionable violation. Section 38-77-112 provides:

> An automobile insurer is not required to write coverage for automobile insurance as defined in Section 38-77-30 for an applicant or existing policyholder. An insurer or producer shall retain, for at least three years, a record of its refusals of coverage including the reason for the refusal and shall furnish this information upon the request of the Director of the

Department of Insurance or his designee.

S.C. Code Ann. § 38-77-112. The declared purpose of the "Automobile Reparation Reform Act," located at Chapter 77 of Title 38, Insurance is "to effect a complete reform of automobile insurance and insurance practices in South Carolina" in order to provide:

> (1) that every automobile insurance risk which is insurable on the basis of the criteria established in this chapter is entitled to automobile insurance;
>
> (2) for a residual market mechanism, known as the Associated Auto Insurers Plan, for every person who is legally entitled to automobile insurance but has not been able to obtain a motor vehicle liability policy to apply to the director of the Department of Insurance to have his risk assigned to an insurance carrier licensed to write and writing motor vehicle liability insurance in the State who shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility in this chapter;
>
> (3) prohibitions and penalties in respect to unfairly discriminatory or unfairly competitive practices having as their purpose or effect evasion of the coverages as provided in this chapter; and
>
> (4) medical, surgical, funeral, and disability insurance benefits without regard to fault to be offered under automobile insurance policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this State.

The stated purpose does not include the intention to create private rights of action for individuals. In its previous iterations, South Carolina courts have determined this act did not provide for a private right of action. *See Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984). No private right of action is authorized by Section 56-1-20 either, which provides:

> No person, except those expressly exempted in this article shall drive any motor vehicle upon a highway in this State unless such person has a valid motor vehicle driver's license issued to him under the provisions of his article. No person shall receive a motor vehicle driver's license unless and until he surrenders to the Department of Motor Vehicles all valid operator's licenses in his possession issued to him by any other state. All

> surrendered licenses shall be returned by the Department to the issuing department, agency or political subdivision. No person shall be permitted to have more than one valid motor vehicle driver's license or operator's license at any time.
>
> Any person holding a currently valid motor vehicle driver's license under this article may exercise the privilege thereby granted upon all streets and highways in the State and shall not be required to obtain any other license to exercise such privilege by any country, municipal or local board or body having authority to adopt local police regulations; *provided, however*, that this provision shall not serve to prevent a county, municipal or local board from requiring persons to obtain additional licenses to operate taxis, buses, or other public convey-ances.

S.C. Code Ann. § 56-1-20.

To the extent that the Estate relies on either of these statutes for its claims against Northbrook, the lack of a statutory mechanism authorizing these claims is an alternative sustaining ground for the circuit court's grant of summary judgment in favor of Northbrook.

CONCLUSION

South Carolina law simply does not recognize the theory of liability advanced by the Estate, and the Estate cannot salvage its claims by presenting new facts and arguments for the first time on appeal. For all of these reasons, Northbrook respectfully requests this Court to affirm the circuit court's grant of summary judgment in favor of Northbrook.

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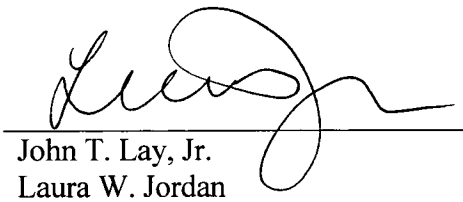
By: 

John T. Lay, Jr.
Laura W. Jordan
Janice Holmes
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767
ATTORNEYS FOR RESPONDENT
NORTHBROOK INDEMNITY COMPANY

THE 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
Appellate Case No. 2013-001225

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Of the Estate of Frank R. Bales, on behalf of the Estate and
Statutory Beneficiaries.....Appellant,

v.

Buy Right Autos, Inc. and Northbrook Indemnity Co., Defendants,
Of Whom Northbrook Indemnity Co. is the .....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules and the August 13, 2007, Order from the South Carolina Supreme Court titled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings."

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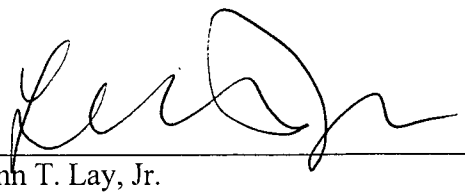
April 29, 2014

By: 

John T. Lay, Jr.
Laura W. Jordan
Janice Holmes
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
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PROOF OF SERVICE

I certify that I served copies of Respondent Northbrook Indemnity Co.'s Final Brief of Respondent by United States mail, postage prepaid, addressed to:

Akim A. Anastopoulo, Esq.
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
N. Charleston, SC 29418

Signature on next page

GALLIVAN WHITE & BOYD, P.A.

John T. Lay, Jr.
Laura W. Jordan
Janice Holmes
Post Office Box 7368
Columbia, South Carolina 29202
Tel: 803.779.1833
Fax: 803.779.1767

ATTORNEYS FOR RESPONDENT NORTHBROOK INDEMNITY COMPANY

Columbia, South Carolina

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