

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

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 Respondent Respondent.

RECORD ON APPEAL

ANASTOPOULO LAW FIRM, LLC

Eric M. Poulin,
2557 Ashley Phosphate Road
North Charleston, SC 29418
(843) 614-8888
Attorney for Appellant

Daniel John Cooks, III

Ryan C. Andrews

GALLIVAN, WHITE & BOYD, P.A.

John T. Lay
P.O. Box 7368
Columbia, SC 29202
Attorney for Respondent

Laura Watkins Jordan
Janice Holmes

RECEIVED

JUN 12 2014

SC Court of Appeals

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Attorney for Respondent

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

CERTIFIED COPY

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP1801892

2013 APR 29 AM 9:12

Cynthia Bales

Frank R Bales

Buy Right Autos, Inc

Northbrook Idemnity Co

CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)

☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Edgar Dickson

2153

4/29/2013

Circuit Court Judge

Judge Code

Date

Clerk of Court Office Use Only

This judgment was entered on 4/29/2013, and a copy mailed first class or placed in the appropriate attorney's box on 4/29/2013, to attorneys of record or to parties (when appearing pro se) as follows:

Akim Angelo Anastopoulos 2557 Ashley Phosphate Road
North Charleston, SC 29418

Eric Marc Poulin 2557 Ashley Phosphate Rd. North
Charleston, SC 29418

Henry Asby Fulmer III PO Box 1330 Summerville, SC
29484

John Thomas Lay 1201 Main St., Ste. 1200 Columbia, SC
29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

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

Plaintiffs,

vs.

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

Defendants.

CERTIFIED COPY

2013 APR 29 AM 9:12

CLERK OF COURT
DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL CIRCUIT

C.A. No. 2011-CP-18-1892

ORDER

This matter is before the Court on a motion of summary judgment regarding the claims of Plaintiff Cynthia D. Bales, individually and as Personal Representative of the Estate of Frank R. Bales, on behalf of the Estate and Statutory Beneficiaries (collectively "Plaintiff") filed by Defendant Northbrook Indemnity Company ("Northbrook"), pursuant to South Carolina Rule of Civil Procedure 56. The Court conducted a hearing on January 10, 2013, in the Dorchester County Court of Common Pleas. Appearing for Plaintiff was Eric Poulin of the firm Anastopoulo Law Firm, and appearing for Northbrook was John T. Lay of the law firm Gallivan, White and Boyd, P.A. After due deliberation, review of the memoranda, case law, exhibits, and arguments of counsel, the Court finds that the motion is properly supported and should be granted. Accordingly, for the reasons set forth below, Northbrook's motion for summary judgment is hereby granted, and judgment shall be entered as a matter of law in favor of Northbrook with respect to all of Plaintiff's claims raised in the Complaint.

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SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. SCRCP 56. The purpose of summary judgment is to expedite disposition of cases that do not require the services of a finder of fact. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005) (citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)). Summary judgment depends upon the existence of plain, undisputable facts on which reasonable minds cannot differ. *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998) (citing *Priest v. Brown*, 302 S.C. 305, 396 S.E.2d 638 (Ct. App. 1990)). "To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (S.C. 2010) (citing *McKnight v. S.C. Dep't of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009)). In cases applying the preponderance of the evidence burden of proof, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. See *Hancock v. Mid-South Mgmt. Co. Inc.*, 381 S.C. 326 (2009). The Court finds that Plaintiff has failed to meet her burden and summary judgment is appropriate in this case as to all of Plaintiff's claims.

FINDINGS OF FACT

The allegations in Plaintiff's Complaint arise out of an automobile accident that occurred on October 15, 2008, in which Abel Martinez struck the motorcycle on which Plaintiff's decedent, Frank Bales, was riding. Bales died as a result of the injuries sustained during the accident.

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Martinez was insured by an automobile policy issued by Northbrook under which he and his wife, Rosa Felix, were insureds. On November 30, 2007, Martinez and Felix completed an application for automobile insurance through Jerry Bacon Insurance. In support of the application, Martinez and Felix provided their Mexican-issued drivers' licenses.

In her Complaint, Plaintiff alleges Northbrook is liable for Bales' death and resulting damages because it issued the automobile policy to Martinez. Plaintiff also alleges that Northbrook owed a fiduciary duty to the public at large, including Plaintiff and Bales, in issuing insurance policies. During her deposition, Plaintiff testified as follows regarding the nature of the claims raised in the Complaint:

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.

When asked whether she had any evidence to support her claims against Northbrook, Plaintiff testified she did not:

Q: What information do you have that he would have driven—that he only drove because of the insurance and he would have driven but for the fact that he had insurance? Do you have any evidence to that effect?

A: I don't have any evidence, but I'm saying they kind of let him go off. He had no—he was a risk to everyone. He had no proper training, he had no proper—by not having a driver's license, he didn't know the signals, the traffic lights. So he was a nuisance to the public by getting out there on the road. He killed my husband by doing that.

Q: Does your insurance company give you any sort of training on how to drive?

A: No, but I have a driver's license.

Q: And if he had a driver's license of some sort, that would be an indication

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to you he had a right to drive?

A: He had knowledge of the roads and signs and stuff, yes.

She also testified that insurance companies do not have an obligation to teach its insureds to

drive: "Q: Does your insurance company train you to drive? A: No...." She also

acknowledged that Martinez had previously driven without a license and without insurance:

Q: So in the past, despite not having insurance, in the past, despite not having a U.S. driver's license, he had driven; is that correct?

A: Yes.

Q: So the fact that he didn't have insurance had not kept him off the road in the past; is that correct?

A: No.

Q: How is that not correct if he's been busted before without a driver's license, without insurance?

A: That didn't keep him off the road.

Q: Correct. He made a decision to go ahead and drive anyway; is that right?

A: Yes.

In addition, Plaintiff testified her entire Complaint was based on mere conjecture:

Q: Well, if a person is going to drive without a driver's license, is there any reason to believe that having insurance or not having insurance is going to affect whether they drive? Is there any reason to think—

A: Well, if he gets caught again, at least he's not going to get charged without having insurance, will he?

Q: He'll get charged for not having a driver's license.

A: But he's got insurance, that's something else he won't be charged for.

Q: So you really don't know whether or not it would have had an impact, is that right, you really don't? I mean, we're under oath, we're trying to be straight here.

A: I still feel personally that it had an impact on it.

Q: Not based on any conversations you had with him, not based on any

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conversations he had with police officers?

A: No.

Q: *Not based on anything other than your own conjecture; is that correct?*

A: *That's correct.*

Plaintiff also testified that people who have driver's licenses also have automobile accidents:

Q: ...I mean, I know he had an accident. People who have driver's licenses, insurance, been driving for a long time have accidents; you understand that?

A: Yes.

Q: People who have had a driver's license, been driving for a long time that are typically very good drivers sometimes run red lights, it happens; is that correct?

A: That's correct.

CONCLUSIONS OF LAW

Based on the record presented, the Court finds that there is no genuine issue of material fact as to whether Northbrook had any fiduciary duty to the Plaintiff or that any action taken by Northbrook was the proximate cause of the Plaintiff's injuries. Plaintiff's cause of action seems to arise from the presumption that an insurer owes a duty to drivers in general with which it has no relationship. Under South Carolina law, "[t]o establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co., L.L.C. v. Tinsely & Adams L.L.P.*, 399 S.C. 322, 335-336, 732 S.E.2d 166, 173 (S.C. 2012) (citing *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004)). Where no fiduciary duty exists, there can be no breach. Also, South Carolina courts have determined that "[a] confidential or fiduciary relationship exists when one imposes a

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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.*, 2012 WL 3524812, at * 6. Further, “[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)). To determine whether a fiduciary relationship exists, South Carolina courts will “look at the particulars of their relationship.” *Pitts*, 352 S.C. at 330, 574 S.E.2d at 507. Generally, “a claim of a fiduciary relationship [can] not ‘rest upon the mere relationship of insurer and insured.’” *Id.*, 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 *Pitts*, the court determined whether a fiduciary relationship existed between an applicant for insurance and the insurance company. After examining the relationship between the parties, the court determined a fiduciary relationship did not exist. Specifically, the court explained:

Although the relationship between the insurer and an insured has at times been characterized as ‘special,’ this has occurred only after the parties have entered into a mutually binding contract for insurance, specifically in the posture of an insured’s claim for bad faith refusal to pay benefits dues under an insurance contract. The conduct at issue in these cases arose based on the insurer’s established contractual obligations.

Id. at 330, 574 S.E.2d at 507. However, the court explained it was to determine whether a fiduciary relationship existed in “the context of an insurer/insured relationship from its inception, specifically at the point of the application for insurance.” *Id.* at 331, 574 S.E.2d at 507. The court noted the Supreme Court of South Carolina had expressly “found an applicant for an insurance policy does not stand in a fiduciary relationship with the insurer.” *Id.*, 574 S.E.2d at 508 (citing *Gordon v. Fidelity & Cas. Co. of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961)).

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Here the relationship is even more attenuated than the relationship at issue in *Pitts*, Plaintiff has not alleged that she applied for insurance with Northbrook; much less that she was an insured of Northbrook subject to the policy covering Martinez's vehicle. Rather, Plaintiff is arguing that Northbrook owes a fiduciary duty to everyone in the public, including her, even if it is not the insurer of everyone in the public, including her. No South Carolina court has made the determination that an insurer owes a fiduciary duty to the public at large.

Further, 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 cited 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."); and *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."). Plaintiff has failed to offer any law from any jurisdiction tending to impose this duty.

Also, 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

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issuance of the policy was in keeping with common practice at the time of issuance of the policy in the automobile insurance industry. Plaintiff has failed to offer any evidence or law refuting Northbrook's contentions.

In addition, Plaintiff also failed to offer any evidence to show that, but for Northbrook's issuance of a policy to Mr. Martinez, Northbrook's insured, the accident would not have occurred. Under South Carolina law, to prove "[p]roximate cause requires proof of both causation in fact and legal cause." *Madison ex rel. Bryant*, 275 S.C. at 48, 267 S.E.2d at 533 (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 'but for' the defendant's negligence[, and l]egal cause is proved by establishing foreseeability." *Id.* at 48, 267 S.E.2d at 533 (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 genuine issue of material fact that the issuance of the insurance policy was not the proximate cause of Bales' death. At the hearing, Northbrook presented evidence that Martinez had been cited for driving without insurance or a license before the subject incident involved in this case. Plaintiff acknowledged this fact during her deposition. Plaintiff has failed to present any evidence demonstrating that the issuance of the policy was a proximate cause of Bales' death.

The Court hereby finds that Northbrook owed no duty to the Plaintiff. The Court further finds that neither any alleged breach of duty by Northbrook nor the issuance of the automobile policy was the proximate cause of Plaintiff's injuries. Because the Court has determined that Plaintiff has failed to meet her burden to withstand Northbrook's motion, it need not reach the

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issue regarding whether the South Carolina Code of Laws §§ 38-77-112 and 56-1-20 provide Plaintiff with a private right of action.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Northbrook Indemnity Company's Motion for Summary Judgment is hereby GRANTED. The claims of Plaintiff Cynthia D. Bales, individually and as Personal Representative of the Estate of Frank R. Bales, on behalf of the Estate and Statutory Beneficiaries, are DISMISSED WITH PREJUDICE as to Northbrook Indemnity Company.

AND IT IS SO ORDERED.



Judge Edgar W. Dickson
Circuit Court Judge



, South Carolina



, 2013

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STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

CYNTHIA BALES, individually and as Personal
Representative of the Estate of FRANK R. BALES
on behalf of the Estate and Statutory
Beneficiaries

Plaintiff(s)

vs.

BUY RIGHT AUTOS, INC., and NORTHBROOK
INDEMNITY CO.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 18- 1892

(Please Print)

Submitted By: Akim A. Anastopoulos

Address: 2850 Ashley Phosphate Rd.
North Charleston, SC 29418

SC Bar #:

Telephone #: 843-614-8888

Fax #: 800-313-2546

Other:

E-mail: akim@akimlawfirm.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

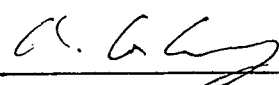
DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
- ☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20 -CP- - | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | ☐ Notice/ File Med Mal (230) | ☐ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☒ Other (399) | ☐ Other (499) |
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| | ☐ Transcript Judgment (740) | ☐ Forfeiture-Petition (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Forfeiture-Consent Order (850) | ☐ SCDOT (950) |
| | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Other (899) | ☐ Worker's Comp (960) |
| | ☐ Other (799) | | ☐ Zoning Board (970) |
| Special/Complex /Other | | | ☐ Administrative Law Judge (980) |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) | | ☐ Public Service Commission (990) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) | | ☐ Employment Security Comm (991) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) | | ☐ Other (999) |
| ☐ Other (699) | ☐ Sexual Predator (510) | | |

Submitting Party Signature: 

Date: 9/22/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction, relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

CYNTHIA D. BALES, individually)
and as Personal Representative of)
the Estate of FRANK R. BALES,)
on behalf of the Estate and Statutory)
Beneficiaries,)

Plaintiffs,)

v.)

BUY RIGHT AUTOS, INC., and)
NORTHBROOK INDEMNITY,)
CO.,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE 1ST JUDICIAL CIRCUIT
CASE NO.: 2011-CP-18-1872

SUMMONS
(Jury Trial Demanded)

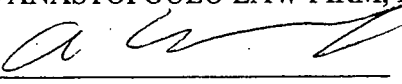
CERTIFIED COPY
2011 SEP 30 PM 4:47
CLERK OF COURT
DORCHESTER COUNTY

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Akim A. Anastopoulos, at his office, 2850 Ashley Phosphate Rd., Suite B, North Charleston, South Carolina, 29418, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at North Charleston, South Carolina on the 21 day of September, 2011.

THE ANASTOPOULO LAW FIRM, LLC


Akim A. Anastopoulos
The Anastopoulos Law Firm, LLC
2850 Ashley Phosphate Rd., Suite B
North Charleston, SC 29418
(843) 614- 8888
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE 1ST JUDICIAL CIRCUIT
CASE NO.: 2011-CP-18- 1872

CYNTHIA D. BALES, individually)
and as Personal Representative of)
the Estate of FRANK R. BALES,)
on behalf of the Estate and Statutory)
Beneficiaries,)

Plaintiffs,)

v.)

BUY RIGHT AUTOS, INC., and)
NORTHBROOK INDEMNITY,)
CO.,)

Defendants.)

COMPLAINT
(Jury Trial Demanded)

2011 SEP 30 PM 4:47
CLERK OF COURT
DORCHESTER COUNTY

TO THE DEFENDANTS, ABOVE-NAMED:

Plaintiffs, by and through undersigned counsel, complaining of the Defendants, would respectfully show to this Court and allege on information and belief as follows:

PARTIES AND JURISDICTION

1. Plaintiff's decedent, Frank R. Bales, was a resident of the County of Dorchester, State of South Carolina at his time of death.
2. The Plaintiff, Cynthia D. Bales, is the duly appointed personal representative of the Estate of Frank R. Bales, her husband.
3. Plaintiff brings this action on behalf of the Estate and on behalf of herself individually and as the decedent's wife, and Curtis Bales, the decedent's son, they being the statutory beneficiaries under the South Carolina Wrongful Death Act, South Carolina Code of Law § 15-51-10 et. Seq., (1976 as amended), and the heirs of the Estate pursuant to Decedent's survival action.
4. Upon information and belief, Defendant, Buy Right Autos Inc. (hereinafter Defendant "Buy Right") is a business incorporated under the laws of South Carolina, with its principal place of

business in the County of Dorchester, and their agent to accept service is Stanley Thigpen, who can be served at 2106-A N. Main Street, Summerville, SC 29483.

5. That upon information and belief, Defendant Northbrook Indemnity Company (hereinafter Defendant "Northbrook") is a corporation organized and existing under the laws of a foreign jurisdiction, with its principal place of business in the State of Illinois and is authorized to transact business in the State of South Carolina.
6. That upon information and belief, Defendant Northbrook carries on, contracts for, and does substantial business deriving in a large revenue there from in the State of South Carolina, County of Dorchester.
7. That Northbrook Indemnity Company is in the business of offering for sale contracts of insurance, including automobile insurance, property damage, medical coverage, and underinsured motorist's coverage.
8. The acts and omissions giving rise to this cause of action occurred in the Counties of Charleston and Dorchester, State of South Carolina.
9. This Honorable Court has jurisdiction of the parties and the subject matter hereinafter set forth.
10. On October 15, 2008, Abel Martinez-Martinez was exceeding the speed limit, traveling at an unsafe rate of speed at the intersection of Fain Street, and Aviation Avenue, in the County of Charleston, when he entered into the intersection through a red light causing the Plaintiff's decedent to collide with Martinez's vehicle.
11. Frank R. Bales died as a result of the collision.
12. That Abel Martinez-Martinez was not licensed to operate a motor vehicle, and upon information and belief, did not have knowledge requisite to understand and therefore, abide by the traffic laws and signals in place at the time and place.

13. That Abel Martinez-Martinez has been convicted on multiple occasions for operating a vehicle without a South Carolina Driver's license, including multiple offenses before the collision which is the subject of this complaint.
14. That Abel Martinez-Martinez was charged as result of this collision with operating a motor vehicle without a South Carolina Drivers' License, and Disregarding a Traffic Signal.
15. That, at the time of the collision, Abel Martinez-Martinez was operating a vehicle that he purchased from Defendant Buy Right, a Toyota pickup truck, VIN # 5TEWM72N0YZ697987 (hereafter the "vehicle"), and was insured by Defendant Northbrook.
16. That, upon information and belief, Defendant Buy Right had actual or constructive knowledge or otherwise should have been aware that Abel Martinez-Martinez was unlicensed and unauthorized to operate a motor vehicle within the state on that date when he purchased said vehicle from Defendant Buy Right and that, notwithstanding this knowledge, Defendant Buy Right did allow Martinez to purchase the vehicle and drive it from Buy Right's premises.
17. That, upon information and belief, Defendant Northbrook had actual or constructive knowledge or otherwise should have been aware that Abel Martinez-Martinez was unlicensed and unauthorized to operate a motor vehicle within the state and that, notwithstanding this knowledge, Defendant Northbrook did issue a policy of insurance, covering Abel Martinez-Martinez as the named insured, and did otherwise encourage, facilitate, and condone his operation of said vehicle on the public highways of this state.

FOR A FIRST CAUSE OF ACTION AS TO DEFENDANT BUY RIGHT AUTOS
(NEGLIGENT ENTRUSTMENT)

18. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.
19. That Defendant Buy Right Autos Inc. did, upon information and belief, sell the vehicle to

Abel Martinez-Martinez.

20. That Abel Martinez-Martinez was incompetent, unfit, and inexperienced in the safe operation and use of a motor vehicle for any one or more of the following reasons:

- a. That he was not licensed or otherwise authorized to operate a motor vehicle within this state;
- b. That he failed to complete any state mandated training program as to the safe operation and use of a motor vehicle;
- c. That he failed to pass any state mandated test evidencing his ability to safely operate and use a motor vehicle;
- d. That he lacked knowledge and understanding of the rules, regulations, signage, and other customs generally required of those who safely operate motor vehicles within the state; and
- e. That he lacked appreciation for the dangers inherent in operating a motor vehicle in an unsafe and/or unlawful and/or unauthorized manner.

21. That Defendant Buy Right Autos Inc. knew, or had reason to know, of Abel Martinez-Martinez's condition and unsafe proclivities.

22. That, knowing Abel Martinez-Martinez to be an unsafe and unfit operator of any motor vehicle within the state, Defendant Buy Right Autos Inc. nonetheless sold to Martinez-Martinez the vehicle that is the subject of this Complaint and did allow Martinez-Martinez to drive said vehicle from Buy Right's premises.

23. That a motor vehicle is and can be, in all respects, a dangerous instrumentality.

24. That Buy Right's entrustment of the same to Martinez-Martinez created an appreciable risk of harm to others, including specifically the death of Plaintiff's decedent, and a relational

duty on the part of Defendant Buy Right Autos Inc.

25. That the injuries to the Plaintiff and Plaintiff's decedent were caused directly and proximately by the Negligence of Abel Martinez-Martinez in operating the vehicle and, by extension, the negligence of Defendant Buy Right Autos Inc. in entrusting the same.

26. That the injuries and damages of the Plaintiff and Plaintiff's decedent were directly and proximately caused by the careless, negligent, grossly negligent, negligent per se, willful, wanton and reckless breach of that duty by Buy Right Autos Inc. in one or more of the following particulars, to wit:

- a. In failing to ensure that those who purchased vehicles from defendant were licensed and authorized to operate the same;
- b. In failing to ensure that those who purchased the vehicles possessed a valid driver's license;
- c. In failing to train employees who sold vehicles to ensure customers possessed a valid driver's license;
- d. In knowingly entrusting a vehicle to an unlicensed driver;
- e. In entrusting a vehicle to an incompetent driver;
- f. In allowing an unauthorized, unlicensed, and incompetent driver to leave Buy Right's premises while operating an automobile under Buy Right's possession and control;
- g. In Violating S.C. Code Ann. § 56-1-480;
- h. In any other acts or omissions which constitute a violation of the laws of this state or the United States;
- i. In any other manner Plaintiff may discover during the course of this action.

27. That as a direct and proximate result of the careless, negligent, grossly negligent, negligent per se, willful, wanton and reckless breach of duty by Defendant, Buy Right Autos Inc. described above, Plaintiff's decedent did suffer and was killed, which has and will in the future cause the beneficiaries to undergo much physical pain and suffering, has and will in the future cause beneficiaries to incur costs for medical treatment and services, and has and will in the future cause them to suffer trauma, anxiety, annoyance, hardship, loss of enjoyment of life, inconvenience, emotional distress, property damage, and loss of use of property, all to beneficiaries damage and detriment.
28. By reason of the acts and omissions of Defendant Buy Right Autos Inc. as set forth above, the Plaintiffs are informed and believe that the Plaintiffs are entitled to awards of actual and incidental damages, punitive or exemplary damages, both pre and post judgment interest, and for the costs and disbursements of this action, attorney fees and costs, and such other relief as the court may deem just or proper.

FOR A SECOND CAUSE OF ACTION AS TO DEFENDANT NORTHBROOK
INDEMNITY COMPANY
(Breach of Fiduciary Duty)

29. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.
30. That Defendant Northbrook does issue for sale within this state policies of automobile liability insurance.
31. That the citizens of South Carolina repose special confidences in the insurance industry and trust in and rely upon the industry's assurances that it will lawfully and responsibly underwrite policies of insurance within this state in such a manner as to protect those members of the general public who travel our public roadways.

32. That those companies licensed to underwrite insurance within this state enjoy special protections and privileges under our laws in recognition of and in furtherance of their fiduciary position including, without limitation, immunity from the Unfair Trade Practices Act.
33. That in exchange for such protections, those companies authorized and licensed to underwrite policies of automobile insurance within this state do covenant and warrant to the citizens of this state that they will at all times in good faith and good conscience enact reasonable policies to protect those members of the general public who travel our public roadways and to ensure that such policies neither facilitate nor encourage the operation of motor vehicles by unauthorized drivers.
34. That Defendant Northbrook is a company, upon information and belief, that is licensed to underwrite policies of insurance within this state and, therefore, stands in a fiduciary relationship with Plaintiff and her decedent and beneficiaries, the same being citizens and residents of this state.
35. That Defendant Northbrook did willfully, recklessly, and wrongfully breach that duty owed by a fiduciary as to this Plaintiff in any one or more of the following respects, among others:
- a. In issuing a policy of insurance to Abel Martinez-Martinez, a driver Defendant Northbrook knew or should have known lacked authorization to operate a motor vehicle within the state;
 - b. In encouraging Abel Martinez-Martinez to operate a motor vehicle within this state although he was not licensed to do so;
 - c. In assisting Abel Martinez-Martinez in operating a motor vehicle within this state although he was not authorized to do so;

- d. In failing to report Abel Martinez-Martinez's continued unauthorized operation of a motor vehicle the proper authorities;
- e. In failing to warn the Plaintiff and other citizens of this state of the dangerous propensities of Abel Martinez-Martinez and his likelihood operating a motor vehicle within this state although he was not authorized to do so;
- f. In any other acts or omissions which constitute a violation of the laws of this state or the United States;
- g. In any other manner Plaintiff may discover during the course of this action.

36. That as a direct and proximate result of said breach, Plaintiff's decedent was killed by an unlicensed driver, causing great harm to Plaintiff and decedent's beneficiaries and entitling the same to damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

**FOR A THIRD CAUSE OF ACTION AS TO DEFENDANT NORTHBROOK
INDEMNITY COMPANY
(Nuisance)**

37. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.
38. That the residents and citizens of the State of South Carolina share a general right to travel and move about safely upon the public highways of this state without the added risk of sharing the same with inexperienced, unlicensed, and unfit drivers; and to be secure in their personal property while so traveling.
39. That the legislature has recognized this right and enacted legislation to protect and preserve it. See, e.g. S.C. Code Ann. § 56-1-20.

40. That Defendant Northbrook was complicit with and did assist in facilitating Abel Martinez-Martinez's unauthorized use of an automobile, in violation of S.C. Code Ann. § 56-1-20, by knowingly and negligently, recklessly, willfully and wantonly providing Mr. Martinez with a policy of automobile insurance.

41. That, upon information and belief, Defendant Northbrook has in the past and will continue to be complicit with and assist in facilitating countless other unlicensed drivers' unauthorized use of an automobile, in violation of S.C. Code Ann. § 56-1-20, by knowingly and negligently, recklessly, willfully and wantonly providing them with policies of automobile insurance.

42. That the South Carolina legislature has recognized the dangers that inherently stem from the knowing issuance of automobile insurance to unauthorized drivers and did prohibit the same in enacting S.C. Code Ann. § 38-77-112.

43. That Defendant Northbrook did violate S.C. Code Ann. § 38-77-112 in one or more of the following respects, among others:

- a. In providing a policy of insurance to Abel Martinez-Martinez, an unlicensed individual, as the named insured;
- b. In failing to ensure that Abel Martinez-Martinez possessed a valid driver's license before issuing the policy;
- c. In failing to revoke the policy when put on notice of Abel Martinez-Martinez's lack of licensure;
- d. In failing to require that Abel Martinez-Martinez designate a "principal operator" who did possess a valid license and/or in failing to ensure that such designee actually did possess the same;

e. In failing to realize, regardless of any designated principal operator, that Abel Martinez-Martinez was in fact operating the vehicle when put on notice of his citations for the same;

f. In any other manner Plaintiff may discover during the course of this action.

44. That, upon information and belief, Defendant Northbrook continues to violate S.C. Code Ann. § 38-77-112.

45. That Defendant Northbrook's conduct does otherwise create an unreasonable interference with the public's right to move about safely and be free from the dangers and risks to personal property associated with an unauthorized driver's use of a motor vehicle.

46. That Defendant Northbrook's conduct does involve a significant interference with public health, public safety, public peace, public comfort and/or public convenience.

47. That Defendant Northbrook's conduct is of a continuing nature and has a significant effect upon the public right, and that Defendant Northbrook knows or should know of the same.

48. That in addition to this interference with the public's general right, this Plaintiff and her Decedent suffered specialized injury that was different in kind, in that Plaintiff's personal property was destroyed in the collision with Defendant Northbrook's unlicensed insured.

49. That this specialized injury to Plaintiff's personal property was caused directly and proximately by the nuisance created by Defendant Northbrook's conduct, Northbrook's violation of S.C. Code Ann. § 38-77-112, and Northbrook's otherwise willful, wanton, reckless and knowing acts and omissions, therefore entitling Plaintiff's beneficiaries and/or estate to damages, punitive and actual, the cost and disbursements of this action, and both prejudgment and post judgment interest, and such other and further relief, in law or in equity, as this court may deem just and proper.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Ordinary/Gross Negligence – Failure to Warn)

50. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.

51. That Defendants owe a general duty to the public at large to take reasonable precautions to avoid creating or encouraging any condition which would put the public in unreasonable danger where the same could reasonably be avoided.

52. That Defendants further owe a duty to warn the public of any dangerous conditions they do create or encourage.

53. That Defendants did breach this duty and that the harms and injuries suffered by Plaintiff as alleged in this Complaint were caused directly and proximately by one or more of the following negligent, grossly negligent, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendant in any one or more of the following respects:

As To Defendant Buy Right:

- a. In each and every instance, act, and/or omission heretofore alleged in this Complaint;
- b. In knowingly entrusting a dangerous instrumentality to Abel Martinez-Martinez;
- c. In knowingly entrusting a vehicle to an unlicensed driver;
- d. In knowingly entrusting a vehicle to an incompetent driver;
- e. In allowing an unauthorized, unlicensed, and incompetent driver to leave Buy Right's premises while operating an automobile under Buy Right's possession and control;
- f. In failing to warn Plaintiff or her decedent of the dangerous conditions

created by the heretofore alleged acts and omissions;

- g. In Violating S.C. Code Ann. § 56-1-480;
- h. In any other acts or omissions which constitute a violation of the laws of this state or the United States;
- i. In any other manner Plaintiff may discover during the course of this action.

As To Defendant Northbrook:

- a. In each and every instance, act, and/or omission heretofore alleged in this Complaint;
- b. In issuing a policy of insurance to Abel Martinez-Martinez, a driver Defendant Northbrook knew or should have known lacked authorization to operate a motor vehicle within the state;
- c. In encouraging Abel Martinez-Martinez to operate a motor vehicle within this state although he was not licensed to do so;
- d. In assisting Abel Martinez-Martinez in operating a motor vehicle within this state although he was not authorized to do so;
- e. In failing to report Abel Martinez-Martinez's continued unauthorized operation of a motor vehicle the proper authorities;
- f. In failing to warn the Plaintiff and other citizens of this state of the dangerous propensities of Abel Martinez-Martinez and his likelihood operating a motor vehicle within this state although he was not authorized to do so;
- g. In violating S.C. Code Ann. § 38-77-112;

h. In any other acts or omissions which constitute a violation of the laws of this state or the United States;

i. In any other manner Plaintiff may discover during the course of this action.

54. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendants, as is set forth more fully above, Plaintiff, her decedent and his beneficiaries were injured, have endured pain and suffering, have suffered mentally and emotionally, and have incurred, and will incur, various medical expenses, and have otherwise been damaged and injured as alleged within this Complaint.

55. That Defendants' acts and omissions, as is set forth more fully above, show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendants' conscious indifference to the consequences of such acts and omissions.

56. That because of the Defendants' acts and omissions and the proximate harm resulting to Plaintiff her decedent and his beneficiaries, Plaintiffs should be awarded punitive damages in an amount to be determined by the trier of fact, in order to punish and penalize these Defendants and to deter these Defendants and others from similar behavior.

57. That upon information and belief, Plaintiff her decedent and his beneficiaries are entitled to judgment against these Defendants for actual, compensatory and exemplary or punitive damages for their personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence *per se*)

58. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein

verbatim.

59. That Defendant Buy Right Autos, Inc., did violate S.C. Code Ann. § 56-1-480 as set forth more fully in the preceding paragraphs.
60. That Defendant Northbrook Indemnity Company did violate S.C. Code Ann. § 38-77-112 as set forth more fully in the preceding paragraphs.
61. That S.C. Code Ann. § 56-1-480 and S.C. Code Ann. § 38-77-112 were enacted solely in the interest of public safety and, in particular, were enacted to ensure that that unlicensed, unauthorized, and incompetent drivers were not operating motor vehicles within this State.
62. That Defendants' statutory violations as set forth more fully above did cause exactly the type of injury the laws were enacted to prevent in that such violations encouraged and allowed an unlicensed, unauthorized, and incompetent driver to operate a motor vehicle within this State.
63. That said statutes seeking to prevent the unauthorized operation of motor vehicles within this state were enacted to protect the public from the dangers associated with unlicensed drivers and, in particular, to protect those on our public roads who are authorized to operate such vehicles.
64. That Plaintiff's decedent was a member of the class to be protected.
65. That Defendants' statutory violations therefore constitute negligence per se and entitle Plaintiff, her decedent and his beneficiaries to judgment against these Defendants for actual, compensatory and exemplary or punitive damages for their personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Wrongful Death)

66. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.

67. Defendants knew or should have known that Frank Bales would suffer foreseeable injury, including death, as a result of Defendants' negligence, gross negligence, carelessness, recklessness, willfulness and/or wantonness as set forth in this Complaint.

68. As a direct and proximate cause of the Defendants' conduct, as aforesaid, Frank Bales lost his life and his beneficiaries under the Wrongful Death Act, for whom this action is brought, have experienced mental anguish, grief, suffering bereavement, loss of society, guidance and comfort. Funeral expenses were incurred and they have been otherwise seriously damaged in such amount as the jury may determine.

FOR A SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Loss of Consortium)

69. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.

70. Defendants knew or should have known that Frank Bales would suffer foreseeable injury, including death, as a result of Defendants' negligence, gross negligence, carelessness, recklessness, willfulness and/or wantonness as set forth in this Complaint.

71. As a direct and proximate cause of the Defendants' conduct, as aforesaid, Frank Bales lost his life, injuring the Plaintiff, in her individual capacity as Decedent's wife, and depriving her of the companionship, aid, society and services of her spouse, all which injuries are compensable under the common laws of this state and under S.C. Code Ann. § 15-75-20.

FOR AN EIGHTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Survival Action)

72. Plaintiff restates and re-alleges each of the preceding allegations as if set forth herein verbatim.

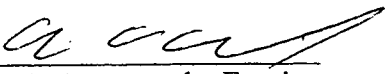
73. As a consequence of the events set forth in this Complaint, and as a direct and proximate result of the negligence of the Defendants as aforesaid, Frank R. Bales was caused to sustain great conscious pain and suffering prior to his death, which injuries are compensable under South Carolina Code of Laws, Section 15-5-90.

WHEREFORE, the Plaintiff prays for judgment against these Defendants in an individual capacity for her loss of consortium and as Personal Representative for the estate in Decedent's survival actions and for Decedent's beneficiaries pursuant to the wrongful death act; for actual damages, and punitive damages where permitted in an amount to be determined by the finder of fact; for pre and post judgment interest where appropriate, treble damages, whatever costs, interest and attorney fees that they may be entitled, to be determined by a jury, and such other relief as the court deems just and proper.

[Signature on the Following Page]

ANASTOPOULO LAW FIRM

BY


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North Charleston, SC 29418
(843) 614-8888

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
Sept. 21, 2011

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

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

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO. 2011-CP-18-1892

**DEFENDANT NORTHBROOK
INDEMNITY, CO.'S ANSWER AND
AFFIRMATIVE DEFENSES**

(Jury Trial Demanded)

Defendant, Northbrook Indemnity Co. ("Defendant Northbrook"), answers the Complaint of Plaintiffs, Cynthia D. Bales, individually and as Personal Representative of the Estate of Frank R. Bales, on behalf of the Estate of Statutory Beneficiaries ("Plaintiffs"), herein as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every paragraph of Plaintiffs' Complaint not specifically admitted, qualified or explained is denied.
2. Defendant Northbrook is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 1 and 2 and, therefore, denies same and demands strict proof thereof.
3. Paragraphs 3 states a legal conclusion that requires no response from Defendant Northbrook.

4. Defendant Northbrook is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4 and, therefore, denies same and demands strict proof thereof.

5. Paragraph 5 is admitted.

6. Paragraph 6 is denied as stated. Defendant Northbrook admits only that it contracts for and does business in the State of South Carolina, County of Dorchester.

7. Paragraph 7 is admitted.

8. Defendant Northbrook is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 8 and, therefore, denies same and demands strict proof thereof.

9. Paragraphs 9 states a legal conclusion that requires no response from Defendant Northbrook.

10. Defendant Northbrook is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 10 through 16 and, therefore, denies same and demands strict proof thereof.

11. Defendant Northbrook denies the allegations contained in Paragraph 17 and demands strict proof thereof.

12. Paragraph 18 is a paragraph of incorporation that requires no response from Defendant Northbrook.

13. The allegations contained in Paragraphs 19 through 28 (and all subparts) are not directed at Defendant Northbrook and, therefore, do not require a response.

14. Paragraph 29 is a paragraph of incorporation that requires no response from Defendant Northbrook.

15. Paragraph 30 is admitted.

16. Paragraphs 31 through 33 state legal conclusions that require no response from Defendant Northbrook; to the extent a response is required, Defendant Northbrook denies same and demands strict proof thereof.

17. Paragraph 34 is denied as stated. Defendant Northbrook admits only that it is licensed to underwrite policies of insurance within this state. Defendant Northbrook denies the remaining allegations of Paragraph 34.

18. Defendant Northbrook denies the allegations contained in Paragraphs 35 and 36 (and all subparts), and demands strict proof thereof.

19. Paragraph 37 is a paragraph of incorporation that requires no response from Defendant Northbrook.

20. Paragraphs 38 and 39 state legal conclusions that require no response from Defendant Northbrook.

21. Defendant Northbrook denies the allegations contained in Paragraphs 40 and 41 and demands strict proof thereof.

22. Paragraphs 42 states a legal conclusion that requires no response from Defendant Northbrook.

23. Defendant Northbrook denies the allegations contained in Paragraphs 43 through 49 (and all subparts), and demands strict proof thereof.

24. Paragraph 50 is a paragraph of incorporation that requires no response from Defendant Northbrook.

25. Defendant Northbrook denies the allegations contained in Paragraphs 51 and 52 and demands strict proof thereof.

26. The allegations contained in subparts “a through i” of Paragraph 53 as to Defendant Buy Right are not directed at Defendant Northbrook and, therefore, do not require a response; the allegations contained in subparts “a through i” of Paragraph 53 as to Defendant Northbrook are denied, and strict proof demanded thereof.

27. Defendant Northbrook denies the allegations contained in Paragraphs 54 through 57 and demands strict proof thereof.

28. Paragraph 58 is a paragraph of incorporation that requires no response from Defendant Northbrook.

29. The allegations contained in Paragraph 59 are not directed at Defendant Northbrook and, therefore, do not require a response.

30. Defendant Northbrook denies the allegations contained in Paragraph 60 and demands strict proof thereof.

31. Paragraphs 61 states a legal conclusion that requires no response from Defendant Northbrook.

32. Defendant Northbrook denies the allegations contained in Paragraph 62 and demands strict proof thereof.

33. Paragraphs 63 and 64 state legal conclusions that require no response from Defendant Northbrook; to the extent a response is required, Defendant Northbrook denies same and demands strict proof thereof.

34. Defendant Northbrook denies the allegations contained in Paragraph 65 and demands strict proof thereof.

35. Paragraph 66 is a paragraph of incorporation that requires no response from Defendant Northbrook.

36. Defendant Northbrook denies the allegations contained in Paragraphs 67 and 68 and demands strict proof thereof.

37. Paragraph 69 is a paragraph of incorporation that requires no response from Defendant Northbrook.

38. Defendant Northbrook denies the allegations contained in Paragraphs 70 and 71 and demands strict proof thereof.

39. Paragraph 72 is a paragraph of incorporation that requires no response from Defendant Northbrook.

40. Defendant Northbrook denies the allegations contained in Paragraph 73 and demands strict proof thereof.

41. The Wherefore paragraph of Plaintiffs' Complaint is denied.

FOR A SECOND DEFENSE
(12(b)(6))

42. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

43. Defendant Northbrook would show that Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendant Northbrook; therefore, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Comparative Negligence)

44. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

45. Defendant Northbrook alleges, upon information and belief, that any injuries or damages sustained by Plaintiffs were due to Plaintiffs' decedent's own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of Defendant Northbrook, which are specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. Such negligent, careless, reckless and/or grossly negligent acts or omissions on the part of Plaintiff were the direct and proximate cause of any injuries or damages sustained by Plaintiffs, and Defendant Northbrook pleads such negligence, carelessness, recklessness and gross negligence on the part of Plaintiffs' decedent and would ask that this court compare the negligence or other conduct of Plaintiff's decedent and Defendant Northbrook and if it is determined that Plaintiffs' decedent's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of Defendant Northbrook, which is specifically denied, then Plaintiffs should be totally barred from recovery and if it is determined that Plaintiffs' decedent's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of Defendant Northbrook, then the amount of recovery available to Plaintiffs should be reduced by the percentage of Plaintiffs' decedent's own negligence, carelessness, recklessness and gross negligence.

FOR A FOURTH DEFENSE
(Intervening and Superseding Cause)

46. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

47. Defendant Northbrook alleges that any damages alleged in Plaintiffs' Complaint were caused by the intervening and superseding acts or omissions on the part of someone other than Defendant Northbrook, over whom Defendant Northbrook had no control or right of control, thereby barring or diminishing Plaintiff's alleged right of recovery.

FOR A FIFTH DEFENSE
(Negligence/Gross/Negligence/Recklessness of Others)

48. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

49. Defendant Northbrook would show that any injuries or damages sustained by Plaintiffs were due to and caused by the sole negligence and acts or omissions of some persons or entities over whom Defendant Northbrook exercised no authority or control, for which reason Defendant Northbrook is not liable to Plaintiffs in any sum whatsoever.

FOR A SIXTH DEFENSE
(Criminal Acts of Others)

50. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

51. Defendant Northbrook would show that any injuries or damages sustained by Plaintiffs, if any, were due to and caused by the criminal acts of others, for which Defendant Northbrook is not liable.

FOR A NINTH DEFENSE
(Unconstitutionality of Punitive Damages)

52. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

53. Defendant Northbrook alleges that Plaintiffs' claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina constitution in one or more of the following particulars:

- a. That the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.
- b. That, even if a standard governing the award of punitive damages does exist, this standard is void for vagueness.
- c. That the amount of punitive damages awarded is based upon the wealth of the Defendant Northbrook in violation of its right to equal protection of the laws.

FOR A TENTH DEFENSE
(No Private Right of Action)

54. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

55. Plaintiffs' have failed to reference a statute that creates a private cause of action against Defendant Northbrook; therefore, Plaintiffs claims should be dismissed.

FOR AN ELEVENTH DEFENSE
(Rule 19(b) Failure to Join)

56. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

57. Plaintiffs have failed to join necessary parties to this action without whom proper relief may not be granted. Accordingly, in equity and good conscience, this action should be dismissed absent these necessary parties.

FOR A TWELFTH DEFENSE

(Laches)

58. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

59. Plaintiffs neglected to bring these claims in a timely manner. As a result of the Plaintiffs' unreasonable delay, Defendant Northbrook would experience undue and material prejudice should Plaintiffs' claims against it proceed. Therefore, Plaintiffs' claims should be dismissed.

FOR A THIRTEENTH DEFENSE

(Justiciability – Standing)

60. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

61. Plaintiffs' claims are barred, in part or in whole, because the Plaintiffs lack standing and they have not suffered any actual or cognizable or ascertainable injury or damages.

FOR A FOURTEENTH DEFENSE

(Statute of Limitations/Repose)

62. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

63. Plaintiffs have failed to bring these claims within the applicable statute of limitations and/or statute of repose, and therefore the Complaint should be dismissed.

FOR A FIFTEENTH DEFENSE

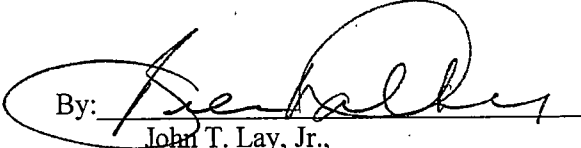
(No Duty to Act)

64. Further answering Plaintiffs' Complaint herein, Defendant Northbrook reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

65. Defendant Northbrook owed no duty to take steps to protect Plaintiffs from the harms allegedly created by other's wrongful conduct.

WHEREFORE, Defendant Northbrook, having fully answered the Complaint of Plaintiffs, prays that same be dismissed with prejudice and for such other and further relief as the Court deems just and proper.

GALLIVAN, WHITE & BOYD, PA

By: 

John T. Lay, Jr.,
Breon C.M. Walker,
1201 Main Street, Suite 1200
Post Office Box 7368 (29202)
Columbia, SC 29201
Telephone: 803-779-1833

ATTORNEYS FOR DEFENDANT
NORTHBROOK INDEMNITY CO.

November 11, 2011

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE ☐ COURT OF COMMON PLEAS
☐ FAMILY COURT

Cynthia D. Bales, et al.

☐ Plaintiff

v.

Buy Right Auto, Inc., et al.

☒ Defendant

CASE NO.

2011-CP-18-1892

**MOTION INFORMATION FORM
AND COVER SHEET**

Check box above indicating submitting party

Name, S.C. Bar No. and address of Plaintiff's Attorney
Akim A. Anastopoulos
Anastopoulos Law Firm, LLC
2850 Ashley Phosphate Rd, Ste B, N. Charleston, SC 29418
Telephone: 843-614-8888 Fax: 800-853-2291
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Name, S.C. Bar No. and address of Defendant's Attorney
John T. Lay, SC Bar #64526
Gallivan White & Boyd, PA
1201 Main St., Ste 1200, Columbia, SC 29201
Telephone: 803-779-1833 Fax: 803-779-1767
e-mail: jlay@gwblawfirm.com Other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 15 Minutes

Court Reporter Needed: YES / NO

SECTION II: Motion Type

☒ Written Motion attached

☐ Form Motion—

I hereby move for relief or action by the court as set forth in the attached proposed order

Signature of Attorney for Plaintiff/Defendant

Date Submitted

SECTION III: Motion Fee

☒ PAID—AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced in writing
from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED—AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

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

Plaintiffs,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL CIRCUIT

C.A. No. 2011-CP-18-1892

MOTION FOR SUMMARY JUDGMENT

TO: AKIM A. ANASTOPOULO, ESQUIRE AND ERIC M. POULIN, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Northbrook Indemnity Co. ("Northbrook") will move before the Presiding Judge of the First Judicial Circuit at the Dorchester County Courthouse at such time and place as may be set by the Court, for an Order pursuant to South Carolina Rule of Civil Procedure 56 granting summary judgment in its favor. In support of its Motion, Northbrook states as follows:

1. Plaintiffs have failed to provide any evidence demonstrating that Northbrook owed a fiduciary duty to Plaintiff or Plaintiff's decedent, Frank R. Bales, such that a breach of that fiduciary duty could occur.
2. Plaintiffs have failed to provide any evidence demonstrating that South Carolina Code of Laws §§ 38-77-112 and 56-1-20 provide a private right of action upon which they are able to bring suit and seek damages.
3. Plaintiffs have failed to provide any evidence demonstrating that Northbrook owed a duty to Plaintiffs or Plaintiffs' decedent to warn of any alleged danger.

4. Plaintiffs have failed to provide any evidence demonstrating that Northbrook's actions or inaction was a proximate cause of Plaintiffs' decedent's death.

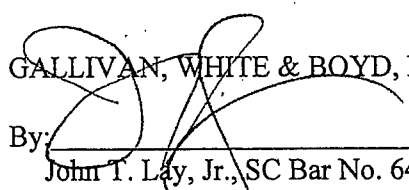
5. Plaintiffs have failed to provide any evidence demonstrating that Northbrook's actions or inaction was a proximate cause of Plaintiffs' alleged damages.

6. Plaintiffs have failed to provide any evidence demonstrating that Northbrook's actions or inaction was reckless, willful, or wanton.

This Motion is based on the pleadings in this action, all discovery undertaken prior to the hearing of this Motion, the South Carolina Rules of Civil Procedure, supporting case law, any supporting affidavits, and a memorandum of law to be filed in the future.

WHEREFORE, Defendant Northbrook Indemnity Co. respectfully requests this Court enter an Order granting summary judgment in its favor, dismissing Plaintiffs' Complaint with prejudice, and awarding it costs and fees as this Court deems just and proper.

GALLIVAN, WHITE & BOYD, P.A.

By: 

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Janice Holmes, SC Bar No. 75038
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Attorneys for Defendant Northbrook Indemnity Co.

September 24, 2012

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

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

Plaintiffs,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL CIRCUIT

C.A. No. 2011-CP-18-1892

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

TO: AKIM A. ANASTOPOULO, ESQUIRE AND ERIC M. POULIN, ESQUIRE,
ATTORNEYS FOR PLAINTIFFS:

Defendant, Northbrook Indemnity Co. ("Northbrook"), by and through its undersigned attorneys, has moved pursuant to South Carolina Rules of Civil Procedure Rule 56 for entry of an Order regarding its Motion for Summary Judgment because there is no genuine issue to be tried on Plaintiff's Complaint and Northbrook is entitled to judgment in its favor as a matter of law.

I. INTRODUCTION

Plaintiff brought suit against Northbrook alleging a variety of causes of action arising out of an automobile accident during which Plaintiff's decedent, Frank Bales, was injured and died. The basis of Plaintiff's Complaint against Northbrook is that the driver of the vehicle, Abel Martinez-Martinez ("Martinez"), obtained a policy of automobile insurance issued by Northbrook. Plaintiff claims Northbrook is liable for the death of the decedent and damages sustained by her and the estate merely because Northbrook issued the automobile policy to Martinez. Plaintiff has failed to provide any evidence supporting any of the causes of action

alleged in her Complaint.

There is no genuine issue of material fact and Northbrook is entitled to judgment as a matter of law with regard to each of Plaintiff's causes of action. Northbrook respectfully requests the Court grant its motion for summary judgment.

II. STATEMENT OF MATERIAL UNDISPUTED FACTS¹

A. Issuance of Automobile Insurance

On November 30, 2007, Martinez and his wife, Rosa Felix, completed an application for automobile insurance with Jerry Bacon Insurance. As a part of his application for insurance, Martinez selected the following limits: \$25,000/\$50,000/\$25,000. (Northbrook 0001-0003) At the time he completed the application Martinez owned a vehicle, a 1998 Ford Countour. (Northbrook 0004) Both Martinez and his wife were identified as operators in the household. (Northbrook 0005) Also, at the time of making the application, both Martinez and his wife presented their drivers' licenses issued by Mexico. (Northbrook 0005; 0008)

B. Automobile Accident and Lawsuit

On October 15, 2008, Frank Bales was on his way to work when he and Martinez were involved in an automobile accident. (Bales Depo. 10:16-24) As a result of the injuries he sustained in the accident, Frank Bales died instantly. (Bales Depo. 10:21-24)

On September 30, 2011, Plaintiff filed this lawsuit in the Court of Common Pleas for the First Judicial Circuit, Dorchester County, South Carolina on behalf of the Estate of Frank R. Bales and herself individually against Defendant Buy Right Autos, Inc. ("Buy Right") and Northbrook. In her Complaint, Plaintiff includes the following causes of action: breach of fiduciary duty, nuisance, failure to warn (ordinary/gross negligence), and negligence per se. In

¹ For purposes of this Motion only, Northbrook has stated any disputed facts in the light most favorable to Plaintiff.

addition, the Complaint includes damages pursuant to South Carolina's Wrongful Death Act, South Carolina Code of Laws § 15-75-20 for loss of consortium, and South Carolina Code of Laws § 15-5-90 as a survival action for Plaintiff's decedent's alleged conscious pain and suffering. In the Complaint, she also stated she was seeking punitive damages.

On November 19, 2012, Plaintiff was deposed in connection with her claims against Northbrook and Buy Right.² During her deposition, Plaintiff explained the basis of her lawsuit against Northbrook 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.

(Bales Depo:12:12-21) However, when asked whether she had any evidence to support her claims against Northbrook, Plaintiff admitted she did not:

Q: What information do you have that he would have driven—that he only drove because of the insurance and he would have driven but for the fact that he had insurance? Do you have any evidence to that effect?

A: I don't have any evidence, but I'm saying they kind of let him go off. He had no—he was a risk to everyone. He had no proper training, he had no proper—by not having a driver's license, he didn't know the signals, the traffic lights. So he was a nuisance to the public by getting out there on the road. He killed my husband by doing that.

Q: Does your insurance company give you any sort of training on how to drive?

A: No, but I have a driver's license.

² Plaintiff has also indicated she intends to assert claims against Northbrook and its parent company, Allstate Insurance Company, with regard to a judgment she received against Martinez in her lawsuit against him arising out the same accident. During the deposition, Plaintiff was asked questions in connection with that related lawsuit and this issue will be addressed in Northbrook's Response to Plaintiff's Motion for Protective Order.

Q: And if he had a driver's license of some sort, that would be an indication to you he had a right to drive?

A: He had knowledge of the roads and signs and stuff, yes.

(Bales Depo. 13:20-14:14) She admitted that insurance companies do not have an obligation to teach its insureds to drive: "Q: Does your insurance company train you to drive? A: No...."

(Bales Depo. 15:3-5) She also acknowledged that Martinez had previously driven without a license and without insurance:

Q: So in the past, despite not having insurance, in the past, despite not having a U.S. driver's license, he had driven; is that correct?

A: Yes.

Q: So the fact that he didn't have insurance had not kept him off the road in the past; is that correct?

A: No.

Q: How is that not correct if he's been busted before without a driver's license, without insurance?

A: That didn't keep him off the road.

Q: Correct. He made a decision to go ahead and drive anyway; is that right?

A: Yes.

(Bales Depo. 27:18-28:6) In addition, Plaintiff admitted her entire Complaint was based on mere conjecture:

Q: Well, if a person is going to drive without a driver's license, is there any reason to believe that having insurance or not having insurance is going to affect whether they drive? Is there any reason to think—

A: Well, if he gets caught again, at least he's not going to get charged without having insurance, will he?

Q: He'll get charged for not having a driver's license.

A: But he's got insurance, that's something else he won't be charged for.

Q: So you really don't know whether or not it would have had an impact, is

that right, you really don't? I mean, we're under oath, we're trying to be straight here.

A: I still feel personally that it had an impact on it.

Q: Not based on any conversations you had with him, not based on any conversations he had with police officers?

A: No.

Q: *Not based on anything other than your own conjecture; is that correct?*

A: *That's correct.*

(Bales Depo. 22:25-23:24)

Plaintiff also admitted that people who have driver's licenses also have automobile accidents:

Q: ...I mean, I know he had an accident. People who have driver's licenses, insurance, been driving for a long time have accidents; you understand that?

A: Yes.

Q: People who have had a driver's license, been driving for a long time that are typically very good drivers sometimes run red lights, it happens; is that correct?

A: That's correct.

(Bales Depo. 25:20-4)

III. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where 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 judgment as a matter of law." *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005) (citing *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004) and SCRCP 56. The purpose of summary judgment is to expedite disposition of cases that do not

require the services of a fact finder. *Rife*, 363 S.C. at 215, 609 S.E.2d at 568 (citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)).

Summary judgment depends upon the existence of plain, undisputable facts on which reasonable minds cannot differ. *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998) (citing *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct.App.1990)). Moreover, if the plaintiff fails to establish a genuine issue of fact as to one essential element necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore subject to summary judgment. *Baughman v. Am. Tel. & Tele. Co.*, 306 S.C. 101, 410 S.E.2d 537, 545-46 (1991) (“plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case”) “To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.” *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (S.C. 2010) (citing *McKnight v. S.C. Dep’t of Corrs.*, 385 S.C. 380; 390, 684 S.E.2d 566, 571 (Ct.App. 2009)).

IV. ARGUMENT

A. Plaintiff has failed to demonstrate the existence of a fiduciary relationship with Northbrook, and therefore, its claim for breach of fiduciary duty fails as a matter of law.

In her Complaint, Plaintiff alleges Northbrook has breached “that duty owed by a fiduciary as to this Plaintiff” in a variety of ways. (Complaint ¶ 35). Further Plaintiff alleges this breach resulted in the death of the Plaintiff’s decedent. (Complaint ¶ 36). However, Plaintiff fails to provide any evidence demonstrating that a fiduciary relationship exists between Northbrook and Plaintiff or that any of Northbrook’s actions constitute would constitute a breach of that relationship, if one in fact exists. Because Plaintiff has failed to meet her burden on

demonstrating that fiduciary relationship exists between her and Northbrook such that no breach could have occurred, summary judgment should be entered in Northbrook's favor on this claim as a matter of law.

The Supreme Court of South Carolina has determined "[t]o establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, No. 27157, 2012 WL 3524812, at * 6 (S.C. Aug. 15, 2012) (citing *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004)). Where no fiduciary duty exists, there can be no breach. Also, 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.*, 2012 WL 3524812, at * 6. Further, "[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)). To determine whether a fiduciary relationship exists, South Carolina courts will "look at the particulars of their relationship." *Pitts*, 352 S.C. at 330, 574 S.E.2d at 507. Generally, "a claim of a fiduciary relationship [can] not 'rest upon the mere relationship of insurer and insured.'" *Id.*, 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 *Pitts*, the court determined whether a fiduciary relationship existed between an applicant for insurance and the insurance company. After examining the relationship between the parties, the court determined a fiduciary relationship did not exist. Specifically, the court

explained:

Although the relationship between the insurer and an insured has at times been characterized as 'special,' this has occurred only after the parties have entered into a mutually binding contract for insurance, specifically in the posture of an insured's claim for bad faith refusal to pay benefits due under an insurance contract. The conduct at issue in these cases arose based on the insurer's established contractual obligations.

Id. at 330, 574 S.E.2d at 507. However, the court explained it was to determine whether a fiduciary relationship existed in "the context of an insurer/insured relationship from its inception, specifically at the point of the application for insurance." *Id.* at 331, 574 S.E.2d at 507. The court noted the Supreme Court of South Carolina had expressly "found an applicant for an insurance policy does not stand in a fiduciary relationship with the insurer." *Id.*, 574 S.E.2d at 508 (citing *Gordon v. Fidelity & Cas. Co. of N.Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961)).

Here the relationship is even more attenuated than the relationship at issue in *Pitts*, Plaintiff has not alleged that she applied for insurance with Northbrook, much less that she was an insured of Northbrook subject to the policy covering Martinez's vehicle. Rather, Plaintiff seems to be arguing that Northbrook owes a fiduciary duty to everyone in the public, including her, even if it is not the insurer of everyone in the public, including her. No South Carolina court has made this determination. In addition, 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 cited 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.”); and *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.”).

If “a fiduciary relationship [can] not ‘rest upon the mere relationship of insurer and insured,’” certainly where there is no relationship at all, no fiduciary relationship can exist. Therefore, Plaintiff’s claim for breach of fiduciary duty fails. See *Brown v. Green Tree Fin. Servicing Corp.*, C.A. No. 2:06-2777-PMD, 2008 WL 2157120, at * 11 (D.S.C. May 19, 2008)(“Because the court concludes there was no fiduciary relationship in this case, the court grants [defendant insurance company’s] Motion for Partial Summary Judgment on this claim.”).

B. Plaintiff has failed to demonstrate that Northbrook is liable to her under a nuisance cause of action based on an alleged violation of South Carolina Code of Laws § § 38-77-112 and 56-1-20 or for negligence per se based on an alleged violation of South Carolina Code of Laws §38-77-112.

In her Complaint, Plaintiff also alleges Northbrook is liable to her for her “specialized injury” because her “personal property was destroyed in the collision with Defendant Northbrook’s unlicensed insured.” (Complaint ¶ 48) Plaintiff appears to be alleging a cause of action for public nuisance because she argues that Northbrook’s alleged “conduct does otherwise create an unreasonable interference with the public’s right to move about safely and be free from the dangers and risks to personal property associated with an unauthorized driver’s use of a motor vehicle.” (Complaint ¶ 45) Plaintiff contends Northbrook has violated sections 38-77-112 and 56-1-20 of the South Carolina Code of Laws and that these alleged violations form the basis for her claim of nuisance. Plaintiff’s argument fails as a matter of law because the statutory

sections under which she alleges her claims arise do not provide for a private right of action and any action taken by Northbrook with regard to issuing a policy of insurance to Martinez was not a proximate cause of Frank Bales' death.

I. The statutes do not create a private right of action.

"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 creates a private right of action. See *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 245, 711 S.E.2d 908, 911 (2011) ("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.")

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.

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).

Section 56-1-20 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 conveyances.

Likewise, no private right of action is provided for in this statute. Because these statutes do not provide a mechanism whereby Plaintiff may bring a private cause of action, Northbrook is entitled to summary judgment.

2. *The issuance of the insurance policy was not a proximate cause of Frank Bales' death.*

"Negligence per se 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)). "Negligence is not actionable unless it is a proximate cause of the injury." *Madison ex res. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 146-147, 638 S.E.2d 650, 662 (2006) (citing *Hanselmann v. McCardle*, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980)). Even if the Court determines that Northbrook did violate any of the statutes identified in Plaintiff's Complaint, she still must show "whether [Northbrook]'s conduct proximately caused damage to the plaintiff." *Rayfield*, 297 S.C. at 104, 374 S.E.2d at 915. To prove "[p]roximate cause requires proof of both causation in fact and legal cause." *Madison ex rel. Bryant*, 275 S.C. at 48, 267 S.E.2d at 533 (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 'but for' the defendant's negligence[, and l]legal cause is proved by establishing foreseeability." *Id.* at 48; 267 S.E.2d at 533 (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 genuine issue of material fact that the issuance of the insurance policy was not the proximate cause of Frank Bales' death. Plaintiff testified that the lack of an insurance policy did not keep Martinez from driving before. Further, Plaintiff admitted the allegations in

her Complaint have neither a valid factual or legal basis because she admitted her Complaint is based on pure conjecture. The evidence in this case does not show that the issuance of the insurance policy was a "but for" cause. Therefore, Northbrook is entitled to a grant of summary judgment in its favor.

C. Plaintiff has failed to demonstrate that Northbrook had a duty to warn Plaintiff's decedent or the public at large about Martinez status as a licensed driver.

Plaintiff contends Northbrook "owe[s] a general duty to the public at large to take reasonable precautions to avoid creating or encouraging any condition which would put the public in unreasonable danger where the same could reasonably be avoided." (Complaint ¶ 51). Further, Plaintiff contends Northbrook "further owe[s] a duty to warn the public of any dangerous conditions they do create or encourage" and that Northbrook breached this duty. (Complaint ¶¶ 52, 53) Plaintiff is mistaken, and her position is not supported by decisions of South Carolina courts. Northbrook did not have a duty to warn the public at large or Plaintiff, particularly, about Martinez's status as a driver, licensed or unlicensed. Therefore, Northbrook is entitled to an entry of summary judgment in its favor on this claim.

"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." *Doe*, 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)). South Carolina courts "recognize five exceptions to this rule: 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

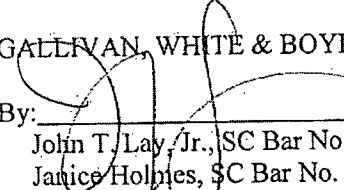
regard to the "special relationship exception, the duty to warn may exist "when the defendant 'has the ability to monitor, supervise, and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'" *Id.* at 247, 711 S.E.2d at 912 (quoting *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007)). None of these exceptions is applicable here.

No special relationship exists such that Northbrook had a duty to warn Plaintiff's decedent, or the public at large, regarding whether Martinez had a license or not. Further, the existence of a duty does not matter in this case because Plaintiff cannot demonstrate that any action taken by Northbrook was a proximate cause of Frank Bales' death. Summary judgment in favor of Northbrook is proper.

V. CONCLUSION

Based upon the foregoing authorities and arguments, Northbrook respectfully requests that this Court enter summary judgment in its favor as to all of Plaintiff's causes of action and dismiss Plaintiff's Complaint with prejudice.

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January 8, 2013
Columbia, South Carolina

1 (The within matter came before the Court for hearing
2 on January 10, 2013)

3 THE COURT: Mr. Lay, you've got . .

4 MR. LAY: I've got just Northbrook.

5 THE COURT: And you've got a Motion for Summary Judg-
6 ment and a Motion to sever.

7 Is that correct?

8 MR. LAY: Yes, sir.

9 THE COURT: And . .

10 MR. POULIN: I'm Eric Poulin, Your Honor, P O U L I N.

11 THE COURT: For Plaintiff?

12 MR. POULIN: That's correct.

13 THE COURT: You have a Motion for a Protective Order,
14 Mr. Poulin?

15 MR. POULIN: That's correct.

16 THE COURT: Okay, and is that something you all can
17 agree on?

18 MR. POULIN: It actually is, Your Honor.

19 MR. LAY: I was getting ready to say we don't oppose
20 the Motion for Protective Order. I mean, I've got the
21 information I needed on the question.

22 There was a question where he asked his client not
23 to respond or he instructed his client not to respond.

24 THE COURT: Okay.

25 MR. POULIN: Yes, sir. I believe the Rule requires

1 me to file one if I instruct the client, you know, not to
2 answer.

3 THE COURT: Okay.

4 MR. POULIN: So it's a formality, if Mr. Lay doesn't
5 intend to re-open the deposition.

6 THE COURT: So we don't need to go further with that
7 one?

8 MR. POULIN: No, sir.

9 THE COURT: So the Motion for Protective Order is
10 withdrawn and do we need to put anything on the record
11 about it?

12 Everything is okay?

13 MR. POULIN: Yes, sir. I think the better way to say
14 it is the Plaintiff has withdrawn it.

15 THE COURT: Okay, unopposed and granted, I guess.

16 MR. LAY: I think the way to proceed is -- if I
17 may, sir?

18 THE COURT: Yes, sir.

19 MR. LAY: I think we should probably just hear the
20 Summary Judgment Motion.

21 THE COURT: Okay.

22 MR. LAY: There may not be any need for any discus-
23 sion on the Motion to sever, or that may obviate . .

24 THE COURT: All right.

25 MR. LAY: . . the need for discussion.

1 THE COURT: All right.

2 MR. LAY: Your Honor, this is a Rule B Six Motion
3 for Summary Judgment.

4 To set the stage of this law suit, the Plaintiff's
5 decedent was killed in an automobile accident on Septem-
6 ber 30th -- excuse me -- on October 15 of 2008.

7 He was involved in an automobile accident with a Mr.
8 Martinez, who apparently or may have run a red light.

9 In any event, Your Honor, there was an automobile
10 accident, and Mr. Bales, Frank Bales, was killed in the
11 accident.

12 The Plaintiff brought suit in this case in September
13 of 2011, and here's what the basic allegations are, and
14 I'll have to fill in a little bit of background.

15 The basic allegations are that my client, an insur-
16 ance company, wrote a policy for Mr. Martinez, and the
17 claim is because he did not have a valid South Carolina
18 driver's license that that would be -- that they breached
19 an obligation to Mr. Bales and that that somehow was the
20 proximate cause of his death.

21 I mean, that's it in a nutshell, and I'll give you
22 the different facts that play a part in what they pled.

23 THE COURT: All right.

24 MR. LAY: What we have in the record is that on No-
25 vember 30th of 2007 Mr. Martiniz and his wife went into

1 an insurance agency that write on Northbrook -- writes
2 some Northbrook paper, and they filled out an applica-
3 tion of insurance and provided two -- in the Defendant's
4 view there were two valid driver's licenses from Mexico.
5 A policy of insurance was given to them, and off they go.

6 Then Mr. Martinez was involved in the automobile ac-
7 cident later.

8 The Plaintiff in this case has made a claim for a
9 breach of fiduciary duty; has made a claim for what looks
10 like a Newton-type claim; got a claim for failure to warn
11 as well.

12 Now, that's what is going on in this case.

13 There is another law suit that is going on in
14 Charleston which is what I call the underlying suit, and that
15 is the claim of the Bales against Mr. Martinez.

16 There is a judgment that is in effect now in that
17 case now, and that is on appeal. So there are actually
18 two pieces of litigation that are going on right now.

19 I am not involved in that. Mr. Poulin is involved
20 in that litigation in Charleston.

21 I am just representing Northbrook in this, what is
22 a wrongful death survival action couched in this breach
23 of fiduciary obligation . .

24 THE COURT: Is Northbrook denying that they had in-
25 surance coverage for Mr. Martinez?

1 MR. LAY: No.

2 THE COURT: So they had a valid policy?

3 MR. LAY: They had a valid policy in place.

4 THE COURT: And Mr. Martinez was involved in an ac-
5 cident and if there is liability they would pay?

6 MR. LAY: Yes, and the policy limits have been of-
7 fered up.

8 THE COURT: Okay.

9 MR. LAY: And have been rejected.

10 THE COURT: Okay.

11 MR. LAY: And what the suit is saying is that, North-
12 brook, you actually caused Mr. Bales' death because you
13 sold a policy of insurance to Mr. Martinez.

14 THE COURT: Okay.

15 MR. LAY: And we are moving for summary judgment be-
16 cause there is not a case on this planet where this kind
17 of allegation has been successful, or not in any law suit
18 that I am aware of.

19 THE COURT: Okay, I understand.

20 MR. LAY: You know, I actually went to . .

21 THE COURT: I think I understand.

22 MR. LAY: There is no case that supports these al-
23 legations or this kind of allegation and I actually went
24 through . .

25 THE COURT: I'm sure Mr. Poulin is going to have

1 something to tell me about that.

2 MR. LAY: I look forward to hearing it.

3 THE COURT: Me too.

4 MR. LAY: And I . . .

5 THE COURT: I am looking forward to hearing it my-
6 self. Okay.

7 MR. LAY: The first cause of action I want to deal
8 with is this breach of fiduciary obligation.

9 A fiduciary obligation is established if there is
10 some sort of a special relationship, and there is not in
11 this case. Mr. Bales has no special relationship with
12 Northbrook.

13 He is not an insured of Northbrook. He has no re-
14 lation to them at all. He has never been an insured of
15 Northbrook.

16 To have a fiduciary relationship, there has to be
17 some sort of special confidence, and there actually is a
18 case on point, which is the Pitt case, that says that
19 even if Mr. Bales was somehow an insured of Northbrook,
20 that is a contract relationship, not a fiduciary rela-
21 tionship.

22 So if Mr. Bales is just someone of the general public
23 and was involved in an accident with an insured of North-
24 brook, there cannot be in that case a fiduciary obligation
25 here.

1 As a result, that first cause of action should and
2 must fail.

3 The second claim is this nuisance claim, and what
4 they've couched it in are two causes of action, 38 77
5 112 and 56 120, which are in our brief.

6 The 38 77 112 says that a carrier is not required
7 to write coverage, and then the 56 120 statute says you
8 have to drive with a valid driver's license.

9 Now, I'll do a reversal. Under 56 120, there is no
10 allegation that Northbrook or its agent was driving at
11 the time of the accident and caused the accident, but it
12 was simply an insured of Northbrook.

13 So 56 120 is inapplicable.

14 Then under 38 77 112, they are not required to write
15 coverage. However, a person came in to the agency -- the
16 person who came in to the agency filled out an applica-
17 tion for insurance.

18 The person who came in had a valid driver's license
19 in Mexico -- two valid driver's licenses were provided,
20 husband and wife.

21 In South Carolina you can drive legally with a Mexi-
22 can driver's license. You can be insured with a Mexican
23 driver's license under South Carolina law. There is ab-
24 solutely no violation of any statute as a result of writ-
25 ing insurance on a Mexican driver's license.

1 The insured or the South Carolina driver would have
2 an obligation in eighteen months to two years -- at some
3 point to change their driver's license if they are going
4 to be a permanent resident.

5 They have an obligation to change their driver's li-
6 cense to a South Carolina driver's license, but that is
7 not Northbrook's responsibility at all.

8 We have no evidence here about how long Mr. Martinez
9 had lived here. We've got no evidence whether he had
10 been back and forth. We know that he is in Mexico now.
11 The word on the street is that he has been back and forth
12 and we don't know how long he had been in the United
13 States.

14 There is no representation to us that he had been
15 here more than two years, and he has a valid Mexican
16 driver's license.

17 Everything that was done -- and this is undisputed
18 -- there is no evidence that we did anything that vio-
19 lated the statutes of South Carolina.

20 We accepted an application for insurance. We ac-
21 cepted a premium. We wrote a policy, and they had valid
22 driver's licenses which they presented.

23 Another thing that is important is that 38 77 112 and
24 56 120 -- there is no private cause of action anyway.

25 Even if we did violate it, there is no private cause

1 of action in South Carolina law on any of the statutes.
2 Even if we say we did violate it, there is no cause of
3 action.

4 Did we have a fiduciary obligation? There cannot
5 be because there is no special relationship.

6 Then we have the two statutes where they have pled
7 this sort of strange nuisance claim by citing those two
8 statutes, where there is no action under South Carolina
9 law for those violations.

10 There was really no violation of either one of those
11 statutes, and in addition there is no evidence to the
12 contrary.

13 Then getting to this failure to warn, I have cited
14 cases. There are a bunch of cases which are cited where
15 there is no general duty to warn by an insurer or anyone
16 else. You don't have an obligation to warn the general
17 public at large, if that is what they are talking
18 about here.

19 The only way that you would have a general obliga-
20 tion to warn is if there is something to warn about. If
21 we knew he had not had a driver's license, but there is
22 no evidence of that.

23 And we had no obligation to control, to monitor and
24 supervise. Insurance companies don't have the ability or
25 the obligation to control, to monitor or to supervise

1 an insured, any of its insureds.

2 So there is absolutely no duty here, so there is no
3 breach of it.

4 If you look at the four actions, negligence, duty,
5 proximate cause of damages -- the first three cannot be
6 met. Those three all fail.

7 Now, I took the deposition of Ms. Bales and asked
8 a lot of questions about what she knew about this. I
9 mean, the guy had apparently driven in the past without
10 a driver's license.

11 So his buying insurance, having insurance or not
12 having insurance had never been a problem. Yes, he had
13 driven without a driver's license before -- been stopped
14 and didn't have it on him. .

15 THE COURT: Pardon me. You took the deposition of
16 who?

17 MR. LAY: Ms. Bales, who was Frank Bales' wife, the
18 decedent's wife.

19 THE COURT: Okay.

20 MR. LAY: And he had been stopped for not having
21 insurance before.

22 THE COURT: This is Mr. Bales?

23 MR. LAY: This is Mr. Martinez.

24 THE COURT: How did she know anything about Mr.
25 Martinez?

1 I'm curious about that.

2 MR. LAY: Well, I think she was involved when they
3 tried to prosecute him -- he got arrested at the scene
4 and there was a prosecution of Mr. Martinez, and while
5 those charges were pending he headed back to Mexico.

6 I think there was some information about what had
7 happened with him in the past that was available.

8 THE COURT: Okay.

9 MR. LAY: But they've got to prove proximate cause.
10 They've got to prove that but for selling the insurance
11 policy to Mr. Martinez and insuring Mr. Martinez, this
12 accident wouldn't have happened.

13 The only thing they've got in the record is that
14 this guy had driven without insurance before, and we've
15 got Ms. Bales' just stark accusations that this would have
16 changed things.

17 I asked her, and she was very honest about it, but
18 that is conjecture. I don't know if it would have changed
19 things. I don't know if he would have driven anyway.

20 But they have got to come forward with some kind of
21 evidence somewhere that there is a causal relationship
22 between this policy and the driving of that vehicle when
23 this accident occurred, and it just fails.

24 So those are the grounds on which we are moving
25 for summary judgment.

1 Again, it is all of the legs or three of the four
2 legs of negligence.

3 I mean, they have damages. . The poor man was killed
4 in the automobile accident which is tragic, but all my
5 client did was sell a policy of insurance.

6 To this day, there has been no evidence that we've
7 violated any South Carolina statute at the time Mr.
8 Martinez walked into our office and presented that appli-
9 cation, paid the premium and presented his driver's
10 license.

11 THE COURT: All right. Thank you.
12 Mr. Poulin?

13 MR. POULIN: Thank you, Your Honor, and first I would
14 like to thank the Court for re-scheduling this hearing
15 today. It was originally scheduled for yesterday. I ap-
16 preciate that. It was very helpful for me with my sche-
17 dule yesterday.

18 But on that note, and this is a procedural matter,
19 as we get started -- I would just like to note my objec-
20 tion for the record in going forward with the summary
21 judgment motion today.

22 The summary judgment motion was originally filed a
23 while back. I think maybe back in October at some point.

24 But on October 18th of 2012 we reached an agreement
25 with defense counsel that the -- defense counsel agreed

1 to postpone the motion for summary judgment as the Court
2 mentioned until the close of the discovery period and
3 until all discovery motions had been ruled upon that were
4 pending.

5 You know, part of our argument was that we'd like
6 to complete discovery before we go into the summary judgment motion and defend that motion.

8 Your Honor, the discovery period did close pursuant
9 to the Discovery Order that was signed by Judge Goodstein,
10 scheduled to be -- the discovery period closed on December 7th, I believe, of 2012.

12 We still had not received responses to discovery
13 from the defense, and I had granted them an extension --
14 didn't have any problem with giving them more time.

15 So we just got the defense discovery responses. I
16 believe they probably got to my office around December
17 20th, and, of course, with Christmas and everything else
18 -- there were some deficiencies in the discovery responses.

19 I think they only responded to one of my requests
20 for production, and there will probably be a motion to
21 compel or something on that, some communication on that.

22 So there is the issue of some outstanding discovery
23 issues, and when all these motions were originally set
24 on the docket back in October of 2012, the docket was
25 published showing only the motion to sever and my motion

1 for protective order.

2 I didn't find out until Monday in an E-mail from
3 the Clerk that there was a Motion for Summary Judgment
4 that was also scheduled to be argued yesterday before it
5 was moved to today.

6 Now, that being said, I understand the Court intends
7 to hear the Motion for Summary Judgment today, and I be-
8 lieve just based upon the discovery that has been conducted
9 and what I have that there is some evidence why summary
10 judgment should not be granted..

11 I'm going to present that to Your Honor right now,
12 but I would note that as we're going through there is some
13 discovery we ^{requested but} have not received, such that if Your Honor
14 feels that maybe summary judgment maybe should be granted
15 at this time, based upon what I'm about to present today
16 but feels some of this evidentiary evidence might change
17 Your Honor's mind, perhaps we could postpone this follow-
18 ing argument.

19 THE COURT: All right.

20 MR. POULIN: Your Honor, Mr. Lay has summarizeed the
21 facts pretty well of what happened. Mr. Martinez was in
22 the United States. He applied for a policy of insurance
23 from Northbrook and he was driving around when he struck
24 my client, or my client's husband, Mr. Bales,
25 and unfortunately killed him.

1 Those are the facts and most of those facts are not
2 in dispute.

3 What I think Mr. Lay has mis-characterized a little
4 bit is our allegations in our cause of action and what we
5 are trying to do with this case.

6 The first cause of action we brought was -- and the
7 causes of action tied together are breach of a fiduciary
8 duty and public nuisance -- it is essentially a public
9 nuisance claim. These sort of tie in to the proximate
10 cause argument as well.

11 But what we've alleged, and I think the law of this
12 State and the actions of our Legislature and of other
13 states throughout the country support this -- we've al-
14 leged that the insurance industry is a regulated industry
15 in South Carolina as it is in most states.

16 You know, insurance plays a very great role in our
17 society obviously, and because of the unique position
18 that the insurance companies hold with the public, they
19 have a special fiduciary duty to the public.

20 It isn't just me saying this. If you look as far
21 back as 1921, you know, in some of the Horn books -- Couch
22 on Insurance or Common Law -- you know, it was recognized
23 even back then that we have taken the law of insurance
24 practically out of the category of contracts, and we have
25 established the duties of public service companies are

1 not contractual.

2 So it has been noted that throughout the nineteenth
3 century because insurance contracts are relational that
4 they do not flow from agreements but they flow from the
5 calling in which it is engaged in its constant relation-
6 ship to the public.

7 In South Carolina this has been constant in some
8 cases, Hinds versus United Auto case which is 248 SC 285.
9 There the Courts have said that the business of insurance
10 is affected by the public interest.

11 So, it . .

12 THE COURT: Can I ask you a question?

13 MR. POULIN: Yes, sir.

14 THE COURT: Excuse me for interrupting your chain
15 of thought.

16 MR. POULIN: Absolutely.

17 THE COURT: Okay. Fiduciary duty -- do you have
18 any cases that -- where someone has collected on fidu-
19 ciary duty of a third party against an insurance company
20 like this?

21 MR. POULIN: No, Your Honor.

22 THE COURT: Okay.

23 MR. POULIN: And, you know, under case law insurance
24 companies are granted some privileges under South Carolina
25 law.

1 They can't be sued for trade practices and things
2 like that, and I may move on to . .

3 THE COURT: That would be good.

4 MR. POULIN: I will move on -- yes, sir -- I will
5 move on to what I think is the heart of this argument
6 here, and that is that we have also alleged behind the
7 duty to warn -- our last allegation is negligence per
8 se.

9 Negligence per se is a little bit different than su-
10 ing under the statutes, whether or not the statute creates
11 a private cause of action.

12 Negligence per se is the theory that where a statute
13 exists that the statute could create a duty, and if that
14 duty is breached and through a violation of a statute,
15 and a plaintiff can prove that, that that can be proof
16 of negligence.

17 THE COURT: Like speed?

18 MR. POULIN: Exactly, Your Honor, and the statute --
19 another thing I have to show if I'm going to allege neg-
20 ligence per se, of course, is that the statute was in-
21 tended to protect a certain class of persons, and that
22 the Plaintiff is the type of person that the statute was
23 enacted to protect.

24 This is set forth in Whitlock versus Kroger, 306 SC
25 51, and it has been around in the common law.

1 We are not alleging that Northbrook's violation was
2 -- we're not alleging that 38 77 112 itself creates a
3 private cause of action. We're alleging that 38 77 112
4 creates a duty and that Northbrook breached that duty;
5 that that breach was a proximate cause of Ms. Bales' in-
6 juries.

7 THE COURT: Okay.

8 MR. POULIN: Your Honor, I've got a copy of 38 77 112
9 where it has been amended. I think it was amended in
10 2011. If you look it up now, it's a little bit different
11 but it was valid at the time the law suit was brought and
12 at the time of the accident.

13 If I could hand this up?

14 Specifically it says if the automobile is (inaudible)
15 and operated in this State, the owner of the vehicle can
16 be (inaudible) regardless of whether he possesses a valid
17 South Carolina driver's license if -- and only if, I would
18 suggest -- he designates to the insurer who the princi-
19 pal operator of the vehicle will be and this person has
20 a valid South Carolina driver's license or otherwise meets
21 the requirements of this section.

22 And the reason for that is that we understand there
23 may be circumstances where someone owns a vehicle, does
24 not have a driver's license and still would want to have
25 it insured.

1 I think a lot of the Horn books talk about perhaps
2 an elderly person who can't drive any more but who owns
3 a vehicle and wants to make sure it's insured for his
4 family.

5 What we know is that having insurance on a vehicle
6 -- you've got to have insurance on a vehicle to register
7 a vehicle and get tags for it, and to allow an unlicensed
8 driver to purchase insurance with intent of driving a ve-
9 hicle and allowing him to use that to register the vehicle
10 and operate the vehicle on our roadways creates a problem
11 for society.

12 What I would like to look at with Your Honor -- I
13 have copies of what Northbrook produced to us in our re-
14 quests for production . . .

15 THE COURT: Okay. Is this the application?

16 MR. POULIN: Yes, Your Honor. This is one document
17 they did produce in response to requests for production,
18 the policy application that Mr. Martinez filled out for
19 Northbrook.

20 It is important to note that it was applied for and
21 executed in November of 2007, and I think the dates are
22 important.

23 In 2007 is when this policy was applied for. It
24 was date stamped on the bottom. GWB 6905-64.

25 It asks his name and address which is shown as a

1 Charleston, South Carolina, address on the policy which
2 I have handed up, on the fourth page of the policy.

3 THE COURT: Okay.

4 MR. POULIN: Are you with me, Your Honor?

5 THE COURT: You said on page four?

6 MR. POULIN: Page four.

7 THE COURT: Four -- yeah, I'm with you.

8 MR. POULIN: At the top it says applicant's name
9 and address.

10 THE COURT: Yes, sir.

11 MR. POULIN: And it shows the address as being 769 C
12 McKnight Drive which is in Charleston, South Carolina.

13 It also asks -- it also talks about the vehicle he
14 is seeking to insure there by the policy.

15 Then if we turn to the following page, . . .

16 THE COURT: All right.

17 MR. POULIN: . . . and we look down. There is one
18 line across, two lines, and we look down to the third
19 section which says, household section.

20 Are you with me on that?

21 THE COURT: I'm with you.

22 MR. POULIN: So here it says number of months or
23 years at present residence, and presumably this is how
24 long Mr. Martinez has lived at that residence in
25 Charleston.

1 The policy application says he's lived there since
2 2004.

3 THE COURT: Right.

4 MR. POULIN: That is three years -- he has been
5 there at least three years when he comes in for this
6 policy application.

7 Their allegation was that Northbrook had no idea
8 how long he had been in South Carolina, and I think that
9 is refuted by their own policy application.

10 They knew or should have known if they read their
11 own policy application that Mr. Martinez has been in
12 South Carolina since at least 2004.

13 It also shows he had been employed in South Carolina
14 for at least three years.

15 I think that any reasonable argument he was going
16 back and forth between Charleston and Mexico are some-
17 thing that would be refuted by the fact that he had held
18 employment in South Carolina for three years.

19 And, more important, the very next question is is
20 this the address where the vehicle is principally lodged,
21 and the answer to that is yes. It says yes on the policy
22 application.

23 So if we go back to the statute, the 38 77 112, it
24 is required that if an insurance company in South Carolina
25 is going to write a policy to an unlicensed driver on a

1 vehicle that is -- I think it says that is principally
2 lodged and operated within this State -- they are re-
3 quired to either verify that the applicant has a valid
4 driver's license or they are required to have the
5 driver fill out a form designating who the principal
6 operator of the vehicle will be.

7 THE COURT: Okay.

8 MR. POULIN: So that . . .

9 THE COURT: If you otherwise meet the requirements
10 of the section and you get a valid -- if you have a
11 Mexican driver's license, can you get insurance in
12 South Carolina?

13 MR. POULIN: I don't think so, Your Honor.

14 THE COURT: All right.

15 MR. POULIN: I think the law requires for a
16 Mexican driver's license that -- I think the driver has
17 to obtain an international driving permit for a Mexican
18 before he comes into the United States.

19 It is different in every state, but what we do know,
20 and what Mr. Lay, I think, talked about earlier is even
21 if the Mexican driver's license was valid for some point
22 in time within nine or -- I think Mr. Lay admitted to as
23 much as eighteen months -- but then Mr. Martinez would
24 have been required to switch over to a South Carolina
25 driver's license.

1 And we know from the policy that he had been here
2 for at least three years and still had a Mexican driver's
3 license.

4 We also know that he was arrested at the scene of
5 the accident for not having a proper driver's license,
6 and I think whatever the law is, the Mexican driver's
7 license he did possess was not valid and probably -- it
8 definitely was not valid at the time the policy was taken
9 out as he had been here for three years.

10 Furthermore, if you are still on page five of the
11 policy application, down near the bottom, it has the
12 driving information on all driving members of the house--
13 hold.

14 It's got Mr. Martinez there and, of course, it's got
15 a section for driver's license number and that's blank be-
16 cause he didn't have a South Carolina driver's license.

17 Looking further down, under Mr. Martinez's name, it
18 has estimate of percentage of use of auto, and item
19 one was the vehicle they sought to insure, and it is
20 listed as a hundred percent usage.

21 So not only did they know that Mr. Martinez did not
22 have a driver's license, but they failed to ask him who
23 the principal operator of the vehicle is going to be, when
24 in fact Mr. Martinez had told him he was going to be the
25 principal operator of the vehicle; that he's going to use

1 it a hundred percent of the time.

2 This is in their application, and they can argue that
3 they didn't know any of this; that Mr. Martinez had
4 mis-represented things to them, but this is in their ap-
5 plication which they have to review before they write a
6 policy of insurance.

7 Based upon this and the statute, 38 77 112, which
8 would prohibit them from writing these types of policies,
9 we think that the statute creates a duty.

10 Maybe not a private cause of action. We're not
11 really alleging that, but it creates a duty, and we do
12 think clearly the evidence suggests that Northbrook has
13 breached that duty.

14 So we go then to the issue, I guess, of proximate
15 cause, and . . .

16 THE COURT: How is that possible?

17 MR. POULIN: Well, Your Honor, we have our theory --
18 proximate cause is usually a question for the jury.

19 The summary judgment standard -- and we're here on
20 summary judgment today -- is could any reasonable juror
21 viewing the evidence and the inferences -- and case law
22 says any inferences that can be drawn from the evidence.
23 -- could a reasonable juror agree with my position and
24 agree with proximate cause.

25 Mr. Martinez unfortunately is gone and we don't know

1 where he is. I can't ask Mr. Martinez, would you have
2 driven this vehicle if you didn't have insurance.

3 By the same token, Mr. Lay has not been able to
4 produce an affidavit from Mr. Martinez or some similar
5 testimony that says I would have driven the vehicle any-
6 way, regardless of whether there was insurance.

7 I acknowledge to the Court that in this if that ev-
8 idence was out there -- if Mr. Martinez were to come in
9 here and testify that he would have driven the vehicle
10 anyway, then my case would be dead.

11 But that evidence doesn't exist, and I am also not
12 sure that is any evidence to suggest that Mr. Martinez
13 might have been cited for driving without insurance be-
14 fore. He had been cited a couple of times before for
15 driving without a driver's license, but I am not aware,
16 at least from my review of the file and from the incident
17 report, that he had been cited for not having insurance
18 before.

19 Ms. Bales may have been confused about that, or she
20 may know something that is not in the record, because
21 that is not in the record.

22 Back to the problem I think that we have with this,
23 and where Northbrook comes in, when you are driving down
24 the road without a driver's license there is no -- there
25 is not a flashing light on your car, you know, or anything

26

1 on there that says, hey, I'm driving without a driver's
2 license; you need to pull me over and stop me.

3 That is not there. However, if you were driving
4 down the road with no tags or with expired tags, or any-
5 thing like that, that gives an officer reason to pull you
6 over, and when he pulls you over he will, of course, de-
7 termine that you don't have a driver's license. You
8 probably don't have a driver's license or registration
9 or anything else.

10 So we know that South Carolina law requires you to
11 have a valid insurance policy, to register the vehicle
12 and get the tag, and a reasonable juror--and I believe
13 the inference that can be drawn from this is that is
14 exactly why Mr. Martinez went out and purchased this pol-
15 icy.

16 Then having the policy enabled him to register the
17 vehicle and enabled him to continue to drive this ve-
18 hicle, hoping that it would never be detected.

19 I mean, had he not run Mr. Bales down he might not
20 have been detected for some time. I'm sure he was care-
21 ful not to speed or do other things, but an insurance
22 policy was an enabling factor, and I think a proximate
23 cause or at least question to be put to the jury as to
24 proximate cause of Mr. Martinez being on the road that
25 day and driving without a driver's license.

1 And as to negligence per se and some of the things
2 that wrap back into public nuisance and the other alle-
3 gations go to some of the evidence we requested in dis-
4 covery but have not received yet.

5 One of the things we asked for was the actuarial
6 table that Allstate has.

7 It is my understanding from handling other cases like
8 this that the insurance company for each type of insured
9 that comes in will do a floor sheet and actuarial fig-
10 ures, and what we know from other cases we've dealt with
11 is that -- and this deals with wilfulness and wantonness
12 and everything like that -- it might be more profitable
13 for an insurance company to insure citizens who may or may
14 not be in the country legally.

15 From other cases and from what we think we can dis-
16 cover through this case, if proper documents were released
17 we know that people who are not in the country legally
18 or do not have valid driver's licenses -- we know they are
19 less likely to make a claim on their collision coverage,
20 on their comprehensive.

21 We know they're going to pay their premiums every
22 month and pay that money into the insurance company. We
23 know they are statistically less likely to make claims
24 against that insurance.

25 I believe if we take a look at the actuarial numbers

1 from Allstate, we will see that Allstate knew that and
2 was intentionally selling these policies and pushing the
3 policies.

4 I guess to get back to the root of my argument and
5 to respond to Mr. Lay's argument or to the root of Mr.
6 Lay's argument, the evidence is that Allstate knew this
7 guy didn't have a driver's license.

8 They knew he had been in the country for at least
9 three years at an address in Charleston, South Carolina.
10 They knew they weren't supposed to write a policy to him,
11 and they knew he would be the principal operator of this
12 vehicle.

13 They enabled him to do that, to violate the law and
14 drive without a driver's license.

15 We think there is more than a reasonable inference
16 that can be drawn from the evidence, and we think there
17 might be more out there for the jury to look at in the
18 situation and say that Allstate enabled Mr. Martinez,
19 and therefore was the proximate cause of Mr. Bales' in-
20 jury and death.

21 We think there is a duty created by the statute and
22 the breach of duty is clear from the policy to submit
23 it to the jury to determine damages.

24 THE COURT: Mr. Lay?

25 MR. LAY: Thank you, Judge.

1 My argument would be pretty much the same or very
2 similar to the fiduciary argument, but the nuisance argu-
3 ment is -- of course, it is very difficult for a private
4 plaintiff to bring in things which are different in kind,
5 and this would be one where I guess the actuarial tables
6 come in more.

7 THE COURT: Okay.

8 MR. POULIN: Our allegation is, first of all, the stat-
9 ute does require every driver who drives on South Carolina
10 roads to have a valid driver's license.

11 It is obviously there to keep unlicensed drivers, un-
12 safe drivers, off the road.

13 So when unlicensed and unsafe drivers are on the
14 road, that creates risk for all other drivers -- for
15 every driver on the road in the public, and if Allstate
16 has been violating 38 77 112 -- if Allstate has done that
17 in training and materials they give to their agents, adver-
18 tising materials and things like that, and it comes out in
19 discovery, of course, that is compelling.

20 If Allstate is pushing these policies on this class
21 of people because they are more profitable, they are cre-
22 ating a danger, a general danger, to the public and a nui-
23 sance to other drivers.

24 But that creates a financial nuisance on the public.
25 It causes premiums to be higher, causes more accidents

1 and things like that.

2 Of course, the specific damage that Ms. Bales suf-
3 fered is that this particular unsafe driver caused the
4 property damage to the vehicle and also caused his death.

5 THE COURT: Let me ask you a question. If they are
6 selling more policies to Mexican drivers -- I mean, that
7 is a part of your argument?

8 MR. POULIN: Right.

9 THE COURT: That they are advertising and so forth,
10 and doing more to sell more policies to Mexican drivers,
11 but they need to have insurance. Right?

12 MR. POULIN: That doesn't make it any safer.

13 THE COURT: It may not make it any safer but it at
14 least causes potential for some kind of a recovery;
15 whereas, you, yourself, I'm sure, have had clients who
16 were involved in accidents with people who have no insur-
17 ance.

18 MR. POULIN: Yes, sir.

19 THE COURT: Which situation is better for the public
20 then?

21 MR. POULIN: Well, Your Honor, I think and we would
22 argue that the Legislature has addressed that already in
23 requiring that each policy of insurance that any victim
24 may have have uninsured motorist coverage.

25 THE COURT: Uh hm.

1 MR. POULIN: Which would cover them for that, and
2 so I guess it's kind of a balancing test if there is
3 going to be uninsured motorist coverage anyway. I mean,
4 the victim is going to be insured that way anyway.

5 The question is whether Allstate is helping the un-
6 licensed driver to avoid detection by the police, and
7 that is basically what we have here.

8 When they give insurance to a red shirt vehicle, un-
9 less a police officer has other reasons to pull him over
10 it gives him a green light to drive around without a li-
11 cense.

12 I mean, there is no outward appearance that you are
13 an inlicensed driver with no insurance, no registrattion,
14 and I probably shouldn't admit this to the Court, but I
15 went through a very, very brief spell a couple of months
16 ago where my -- I had paid for my tags like I was sup-
17 posed to do, but it took the DMV a couple of days to mail
18 them to me.

19 THE COURT: You got stopped?

20 MR. POULIN: I did not get stopped, but I felt like
21 I had a flashing light on my car. I didn't mean to break
22 any law and I want to make that clear, but I realized it
23 and while driving I felt I had this flashing light on me
24 for all the cops to see.

25 Honestly, I think Mr. Martinez and other unlicensed

1 drivers have that and would have that without having a
2 properly registered and tagged vehicle, uninsured.

3 THE COURT: All right. Thank you, sir.

4 All right, Mr. Lay.

5 MR. LAY: Your Honor, again, I really have never
6 heard of a case which allowed this particular kind of a
7 lawsuit. There simply isn't one.

8 To go through it quickly, no case like this has been
9 allowed to go forward because it is just simply too re-
10 mote.

11 We are talking about an application for insurance,
12 in which there were two individuals that applied, and
13 the wife is still living there. We call her his wife, or
14 former wife. I think she is the paramour, but for pur-
15 poses of this argument we'll call her his wife.

16 Back then they had a relationship of some sort, but,
17 regardless, we are looking at a situation in which we,
18 one, do not have a problem -- you can sell insurance to
19 a Mexican national with a valid driver's license.

20 I asked . . .

21 THE COURT: Excuse me. Is that by statute?

22 MR. LAY: There is no statute that prohibits it.

23 THE COURT: Okay.

24 MR. LAY: There is no statute that prohibits it, and,
25 frankly, insurance companies all across the country are

1 selling insurance policies to foreign nationals, and for-
2 eign nationals coming into the United States are allowed
3 to drive if they have a valid driver's license.

4 They are going to have to get a different driver's
5 license if they claim their intention to stay here, and
6 this is where we're going to reside; we're going to be
7 here for a certain amount of time. At some point they'll
8 have to change that.

9 THE COURT: Is that two years?

10 MR. LAY: I think it's two years.

11 THE COURT: The application says they've been here
12 three years.

13 MR. LAY: On this application, two people are buying
14 insurance, and the wife still lives there now. Mr. Martinez
15 has been back and forth and, in fact, is in Mexico.

16 THE COURT: Okay. Does that put them on any notice
17 that somebody has to have a license under South Carolina
18 law?

19 MR. LAY: I don't think it puts them under an obli-
20 gation to do anything but there is nothing that directly
21 prohibits it.

22 But let's just assume that it did and that they vio-
23 lated the law; that they did have an obligation and they
24 violated the law. Where is the proximate cause, and I
25 keep going back to that.

1 THE COURT: Okay.

2 MR. LAY: And I asked her, you know, do you have
3 any evidence that but for the sale of this insurance pol-
4 icy -- that's their obligation -- but for -- it's not
5 just foreseeability, but they've got to prove but for --
6 if you didn't sell them that insurance policy, this guy
7 would not have been on the road.

8 This guy wouldn't have been on the road at the mo-
9 ment that this accident occurred, and she says she has not
10 -- there is no evidence of that.

11 And this suggestion that I've got to bring in some
12 sort of affidavit from Martinez -- that's not the law of
13 South Carolina.

14 In this situation, it is just a case that cannot be
15 proven. He cannot prove that but for the sale -- that
16 that caused this fellow to be on the road.

17 It is the obligation of the Plaintiff to bring that
18 information in here and allow you to look at it
19 and the Court decide what it is going to do.

20 As to the discovery, we got a thirty B six notice --
21 if I can go into that very quickly?

22 THE COURT: Yes, sir.

23 MR. LAY: He filed a Motion for protective Order be-
24 cause we got a thirty B six notice with the exact same
25 thing he served on us with the Request for Production,

1 which was (inaudible) on their office, and I'm prepared to
2 deal with it but this is the first time I've heard of a
3 problem with it.

4 You know, we've dealt with that, and we filed a Motion
5 for Protective Order and got an agreement that dramati-
6 cally limited that.

7 Then we got a Request for Production that asks for
8 the same exact things asked for and which were limited in
9 the Protective Order.

10 This has all come at the eleventh hour, fifty-nine
11 minutes, fifty-nine seconds -- this case has been in suit
12 for a year and a half, and we have -- we got the 30 B Six
13 Notice; we got it limited; I'm ready to -- I was ready to
14 produce my witnesses, and I never heard anything from him.
15 Never heard a word from him.

16 You know, I'm not going to chase him down, and the
17 actuarial tables he's talking about, that's rank specula-
18 tion.

19 It is not an issue in this case. It hasn't been
20 pled, hasn't been produced. There is no motion to compel.
21 We are here on the evidence, and there is nothing on prox-
22 imate cause in the evidence.

23 THE COURT: All right, thank you.

24 MR. LAY: Thank you, Your Honor.

25 MR. POULIN: Thank you again for accommodating my

1 schedule.

2 THE COURT: There are a lot of documents here, and I
3 will contact you shortly with my decision in the matter.

4 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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CERTIFICATE

I, Harriet P. Bennett, Official Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared from the records of Harry Dot Walker to the best of my ability, having been heard in the Court of Common Pleas for Dorchester County on January 10, 2013.

Further, I certify that I am neither of kin nor of counsel to any party to this action, nor do I have any interest therein.

October 8, 2013

A handwritten signature in cursive script that reads "Harriet P. Bennett". The signature is written in dark ink and is positioned to the right of the typed name and date.



Allstate

Message Confirmation Report

NOV-30-2007 17:01 FRI

Fax Number :
Name :

Name/Number : UM/UM / 918889218362
Page : 2
Start Time : NOV-30-2007 17:01 FRI
Elapsed Time : 00' 44"
Mode : STD ECM
Results : [O.K.]



Allstate

III. OFFER OF UNDERINSURED MOTORIST COVERAGE

Available Limits and Range of Premiums (Premiums quoted are for a six month premium period)

Do you wish to purchase underinsured motorist coverage? Yes ☒ No ☐

If your answer is "yes," you must sign here

If your answer is "yes," then specify the limits which you desire. The limits you indicate here as your choice cannot exceed your automobile insurance liability limits.

I SELECT 250,000/500,000/250,000

Without the Recoupment fee: LIMITS OF COVERAGE

	AMOUNT OF PREMIUM		
	Single Car Policy	Multi Car Policy	
\$25,000/\$50,000/\$25,000	\$ 48.92	\$ 63.19	each vehicle
\$50,000/\$100,000/\$50,000	\$ 75.71	\$ 98.16	each vehicle
\$100,000/\$300,000/\$50,000	\$ 121.78	\$ 158.84	each vehicle
\$250,000/\$500,000/\$50,000	\$ 149.74	\$ 185.61	each vehicle
OTHER	\$	\$	each vehicle
	\$	\$	each vehicle

With the Recoupment fee: LIMITS OF COVERAGE

	AMOUNT OF PREMIUM		
	Single Car Policy	Multi Car Policy	
\$25,000/\$50,000/\$25,000	\$ 51.94	\$ 67.10	each vehicle
\$50,000/\$100,000/\$50,000	\$ 83.73	\$ 107.36	each vehicle
\$100,000/\$300,000/\$50,000	\$ 133.78	\$ 173.84	each vehicle
\$250,000/\$500,000/\$50,000	\$ 164.74	\$ 214.61	each vehicle
OTHER	\$	\$	each vehicle
	\$	\$	each vehicle

IV. APPLICANT'S ACKNOWLEDGEMENT

I hereby acknowledge that I have read, or have had read to me, the above explanations and offers of additional insured and underinsured motorist coverage. I have indicated whether or not I wish to purchase each coverage in the spaces provided. I further understand that the above explanations of these coverages are intended only to be brief descriptions of uninsured motorist coverage and underinsured motorist coverage, and that payment of benefits under any of these coverages is subject both to the terms and conditions of my automobile insurance policy and to the State of South Carolina's laws.

My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.

Binder/Policy Number: 000078733480901

Applicant's Printed Name: Abel Martinez

Applicant's Full Address: [REDACTED]

Applicant's Signature: AVR1 MAY 1983

Agent's Signature: [REDACTED]

Today's Date: 230-NOV-07

UMK734

Page 4 of 4 / Line 19

000078733480901 6426198724SC4



Allstate
Make it your best

R2853J

R2853-2



You're in good hands.

Available Limits and Range of Premiums (Premiums quoted are for a six month premium period)

Do you wish to purchase underinsured motorist coverage? Yes X No

If your answer is "no," you must sign here.

If your answer is "yes," then specify the limits which you desire. The limits you indicate here as your choice cannot exceed your automobile insurance liability limits.

I SELECT 75000, 50000, 25000

Without the Recoupment fee: LIMITS OF COVERAGE

AMOUNT OF PREMIUM

	Single Car Policy	Multi Car Policy	
\$25,000/\$50,000/\$25,000	\$ 48.99	\$ 63.19	each vehicle
\$50,000/\$100,000/\$50,000	\$ 75.78	\$ 98.36	each vehicle
\$100,000/\$300,000/\$50,000	\$ 121.78	\$ 158.84	each vehicle
\$250,000/\$500,000/\$50,000	\$ 149.74	\$ 195.61	each vehicle
OTHER	\$	\$	each vehicle
	\$	\$	each vehicle

With the Recoupment fee: LIMITS OF COVERAGE

AMOUNT OF PREMIUM

LIMITS OF COVERAGE	Single Car Policy	Multi Car Policy	
\$25,000/\$50,000/\$25,000	\$ 53.99	\$ 69.19	each vehicle
\$50,000/\$100,000/\$50,000	\$ 82.78	\$ 107.36	each vehicle
\$100,000/\$300,000/\$50,000	\$ 133.78	\$ 173.84	each vehicle
\$250,000/\$500,000/\$50,000	\$ 164.74	\$ 214.61	each vehicle
OTHER	\$	\$	each vehicle
	\$	\$	each vehicle

IV. APPLICANT'S ACKNOWLEDGEMENT

I hereby acknowledge that I have read, or have had read to me, the above explanations and offers of additional uninsured and underinsured motorist coverage. I have indicated whether or not I wish to purchase each coverage in the spaces provided. I further understand that the above explanations of these coverages are intended only to be brief descriptions of uninsured motorist coverage and underinsured motorist coverage, and that payment of benefits under any of these coverages is subject both to the terms and conditions of my automobile insurance policy and to the State of South Carolina's laws.

My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.

Binder/Policy Number: 000078733480901

Applicant's Printed Name: Abel Martinez

Applicant's Full Address:

Applicant's Signature: Avel Martinez

Agent's Signature:

Today's Date: 30-Nov-07

U98724

Page 4 of 4 / Line 19

00007873348090146426U98724SC4



**Allstate.**

You're in good hands.

II. OFFER OF ADDITIONAL UNINSURED MOTORIST COVERAGE

Available Limits and Range of Premiums (Premiums quoted are for a six month premium period) South Carolina law requires uninsured motorist coverage limits of at least 25/50/25. The cost for these limits is as follows:

Without the Recoupment fee:
\$25,000/\$50,000/\$25,000 \$ 24.60 single car/ \$ 25.50 multi car policy

With the Recoupment fee:
\$25,000/\$50,000/\$25,000 \$ 27.60 single car/ \$ 28.50 multi car policy

Do you wish to purchase additional uninsured motorist coverage? Yes ☒ No ☐

If your answer is "no," you must sign here. _____

If your answer is "yes," then specify the limits which you desire. The limits you indicate here as your choice cannot exceed your automobile insurance liability limits.

I SELECT 25,000 / 50,000 / 25,000

Higher limits of uninsured motorist coverage are also available; these limits and their cost per vehicle are as follows:

**Without the Recoupment fee:
LIMITS OF COVERAGE**

	AMOUNT OF PREMIUM		
	Single Car Policy	Multi Car Policy	
\$50,000/\$100,000/\$50,000	\$ 28.37	\$ 29.45	each vehicle
\$100,000/\$300,000/\$50,000	\$ 33.42	\$ 34.76	each vehicle
\$250,000/\$500,000/\$50,000	\$ 36.20	\$ 37.69	each vehicle

OTHER

_____ \$ _____ each vehicle
_____ \$ _____ each vehicle

**With the Recoupment fee:
LIMITS OF COVERAGE**

	AMOUNT OF PREMIUM		
	Single Car Policy	Multi Car Policy	
\$50,000/\$100,000/\$50,000	\$ 31.37	\$ 32.45	each vehicle
\$100,000/\$300,000/\$50,000	\$ 37.42	\$ 38.76	each vehicle
\$250,000/\$500,000/\$50,000	\$ 40.20	\$ 41.69	each vehicle

OTHER

_____ \$ _____ each vehicle
_____ \$ _____ each vehicle

U98724

Page 3 of 4 / Line 19

00007873348090146426U98724SC3

R2853-2

Northbrook 0003
GWB 6905-64



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NORTHBROOK INDEMNITY COMPANY
SOUTH CAROLINA

HOME OFFICE
NORTHBROOK, ILLINOIS

Application No.: 000078733480901

Send Policy to Agent: N

Applicant's Name: ABEL MARTINEZ AND ROSA L FELIX
Address : [REDACTED]
City : [REDACTED]
Telephone Num. : County: 018 Terr.: 4700203

VEHICLES

No	Yr	Make	Model	Vehicle ID Number	Cy	Dr	CT	PGS	VSC	Cost	Own/Lease
1	1998	FORD	CONTOUR	3FALP553XWM114887	4	4	10	W	B11		Y/N

USE RATE

No	Odom	Car	Miles	Date	Est Ann	Incl	Class	Split	Alt	Table
(000) Usage	One Way	Purch	Mi (000)	Cmp	Auto	Terr	Yr			
1: 99	WORK	8	05/2006	12	N	N	0203			

No	Own/Lease	Original Owner/Lessee	FR4
1:	Y/N	N	

COVERAGES

AA	Bodily Injury Liability	Ea Per	LIMITS	1998 CONTOUR PREMIUMS
		Ea Acc	\$25,000	225.27
		Ea Acc	\$50,000	Included
BB	Prop Damage Liability	Ea Acc	\$25,000	158.71
SS	Uninsured Mot Bodily Injury	Ea Per	\$25,000	18.40
		Ea Acc	\$50,000	Included
	Prop Damage	Ea Acc	\$25,000	6.20
SU	Underinsd Mot Bodily Injury	Ea Per	\$25,000	45.10
		Ea Acc	\$50,000	Included
	Prop Damage	Ea Acc	\$25,000	3.89
CC	Medical Expense Benefits	Ea Per	\$1,000	47.25
JJ	Roadside Help		\$100	8.69

Page 1 of 4

R2853-2



Allstate.
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NORTHBROOK INDEMNITY COMPANY
SOUTH CAROLINA

Application No.: 000078733480901

HOME OFFICE
NORTHBROOK, ILLINOIS

Estimated Vehicle Premiums

513.51

DISCOUNTS APPLIED	ITEM 1
Homeownership Discount	X
Anti-Lock Brake	X
Good Payer Discount	X
Airbag Discount	30 %
Est. 6 mo. Policy Premium	: 513.51
Premiums charged must be in accordance with the Company's manual rules & rates	
Amount Paid:	\$172.00 Cash

HOUSEHOLD SECTION (APPLIES TO APPLICANT ONLY)
Mo Yr at Present Residence: 11/2004 Residence Type: AP Own or Rent: OR
Years at Present Employment: 3 Other Vehicles Owned in Household: N
Is this the address where the vehicles are principally garaged? Y
Is the Residence located within the city limits? Y

INSURANCE RECORD (PRESENT OR MOST RECENT AUTO INSURANCE CARRIED)
Prior Co: Policy Number:
Exp Date: Years/Months Insured: 00/00 PI Code: NO
Is the above policy JUA or Assigned Risk? N
BI LIMIT: \$0/\$0

OPERATOR INFORMATION ON ALL DRIVING MEMBERS OF HOUSEHOLD

Name: ABEL MARTINEZ	Sex: M	DOB: 05/07/1980
Relation to Ins: SA INSURED	Occupation: EM OTHER	Mar St: MA
Orig Date Licensed: 05/1996	Drivers Lic No:	
State Lic: OC	DD Course Completion Date:	
Est & Use of Item 1: 100	Item 2:	Item 3: Item 4:
Name: ROSA L FELIX	Sex: F	DOB: 11/14/1983
Relation to Ins: SP SPOUSE	Occupation: EM OTHER	Mar St: MA
Orig Date Licensed: 11/1999	Drivers Lic No:	
State Lic: OC	DD Course Completion Date:	
Est & Use of Item 1: 14	Item 2:	Item 3: Item 4:

REMARKS:

Page 2 of 4

R2853-2



Allstate.
You're in good hands.

NORTHBROOK INDEMNITY COMPANY
SOUTH CAROLINA

HOME OFFICE
NORTHBROOK, ILLINOIS

Application No.: 000078733480901

AGENT AND APPLICANT MUST COMPLETE "OFFER OF OPTIONAL ADDITIONAL UNINSURED AND UNDERINSURED AUTOMOBILE COVERAGES" FORM

NOTICE: As part of Northbrook Indemnity Company's underwriting/qualification procedure and subject to applicable laws and regulations, we may obtain information regarding you and other individuals who may be covered by the insurance you are applying for, including: (i) driving record, based on state motor vehicle reports and loss information reports; (ii) your prior insurance record, if any, which will be obtained from your current or prior carrier(s); (iii) credit reports, and (iv) claim history, based on loss information reports.

BINDER PROVISION

In reliance on the statements in this application and subject to the terms and conditions of the policy authorized for the company's issuance to the applicant, the Company named above binds the insurance applied for to become effective:

Become Effective 04:20 PM 11/30/2007

During the 90 day binder period, the Company reserves the right to cancel part or all of the coverage afforded under the binder for any reason by mailing notice to you at least 15 days before the date of cancellation. If the Company does not mail a notice of cancellation within the 90 day binder period, the Company will afford coverage for the remainder of the policy period, subject to the terms and conditions of the policy.

Agent's Signature _____ No: 046426 Loc: A49
Office Phone: 843 569 0680
Home Phone : 843 824 6673

Producer's Signature _____

To the best of my knowledge, the statements made on these application pages, including attachments hereto, are true. I certify that the information concerning insurance history, auto usage, and drivers used to compute my premium is correct and that I am eligible for the appropriate discounts indicated above. I request the Company, in reliance thereon, to issue the insurance applied for. I declare that the Company may recompute the premium shown if the statements made herein are not substantially true.

If your initial premium payment for your first policy period is by check, draft, or any remittance other than cash, such payment is conditional upon the check, draft, or remittance being honored upon presentation. If such check, draft, or remittance is not honored upon presentation, this policy shall be deemed void from its inception. This means that Northbrook Indemnity Company will not be liable under this policy for any claims or damages which would otherwise be covered had the check, draft, or remittance been honored upon presentation. I have read this entire application, including the binder provision before signing:

Policyholder Applicant Signature _____

Transaction/Date/Time _____

Page 3 of 4

R2853-2



Allstate.
You're in good hands.

NORTHBROOK INDEMNITY COMPANY
SOUTH CAROLINA

Application No.: 000078733480901

HOME OFFICE
NORTHBROOK, ILLINOIS

SAR2449

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R2853-2

PAGE 8/9 * RCVD AT 5/25/2012 12:49:15 PM [Central Daylight Time] * SVR:A0185-XFX0008-S/21 * DNIB:57628 * CSID:84382419303 * DURATION (mm-ss):02-03

Northbrook 0007
GWB 6905-64



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,

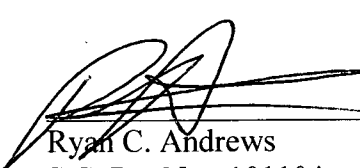
v.

Buy Right Autos, Inc. and Northbrook Indemnity Co.

Of whom Northbrook Indemnity Co. is Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other materials.



Ryan C. Andrews
S.C. Bar No.: 101104
ANASTOPOULO LAW FIRM, LLC
2557 Ashley Phosphate Road
Charleston, SC 29418
(843) 614-8888
ryan@akimlawfirm.com

Attorney for Appellant

June 2, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
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Edgar W. Dickson, Circuit Court Judge

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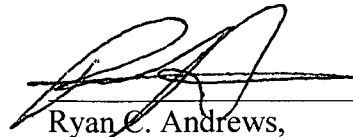
Buy Right Autos, Inc., and Northbrook Indemnity Co.,

Of whom Northbrook Indemnity Co. is Respondent Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Northbrook Indemnity Co. by
depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2014,
addressed to their attorney of record, John T. Lay, Post Office Box 7368, Columbia,
South Carolina, 29202.

June 5, 2014



Ryan C. Andrews,
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Road
North Charleston, SC 29418
(843) 614-8888

Attorney for Appellant

RECEIVED

JUN 12 2014

SC Court of Appeals