THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-002095

Donna Jensen, ... Appellant,

v.

Matthew B. Wiseman and
Peoples Underwriters, Inc., ... Respondents.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF THE CASE

On April 22, 2014, Plaintiff / Appellant Donna Jensen ("Jensen") commenced the action against Defendants / Respondents Matthew B. Wiseman and Peoples Underwriters, Inc. (together, "Peoples"). (Complaint ¶¶ 1-25.)

This is a professional negligence action based on Jensen's contention that Peoples was negligent in procuring a commercial automobile insurance policy for the busses operated by Jensen's daycare business. (*Id.*) Jensen claims that she was injured when a parent accidentally drove her car (*i.e.,* the parent's car, not one of the insured commercial busses) into the side of the daycare building where Jensen was working. (*Id.* ¶ 15) The commercial automobile policy did not cover Jensen's claimed personal injuries arising out of this workplace accident, yet Jensen contends that it should have. (*Id.* ¶ 21.)

On February 18, 2015, after the completion of substantial discovery, Peoples moved for summary judgment on the grounds that Plaintiff lacked evidence of any of the four elements of a negligence claim. (Peoples' Motion for Summary Judgment.) On April 29, 2015, Peoples filed a memorandum of law amplifying its arguments that Peoples had no duty to Jensen individually, had no duty to advise Jensen, and breached no duty to Jensen. (Peoples' Memorandum in Support of Motion for Summary Judgment with Exhibits.) On May 4, 2015, Judge Larry Hyman heard argument on the motion for summary judgment and took the matter under advisement. (Form 4 Order of May 4, 2015.)

On June 22, 2015, the case was called for trial before Judge Diane Goodstein, and the Court seated the jury. (Transcript of Seating of the Jury of June 22, 2015 pp. 1-39.) Judge Goodstein then heard several pre-trial motions and advised counsel that she would re-hear Peoples' motion for summary judgment before trial the following morning.

(Transcript of Pre-Trial Motions of June 22, 2015 pp. 43-47.) On June 23, 2015, Judge Goodstein heard Peoples' motion for summary judgment and granted the motion by Form 4 Order with a formal written order to follow. (Transcript of June 23, 2015 pp. 1-49; Form 4 Order of June 23, 2015.) On June 29, 2015, despite the absence of a formal written order as contemplated in the Form 4 Order, Jensen filed a motion to reconsider. (Jensen's Motion to Reconsider.) Attached to the motion to reconsider was an inadmissible and immaterial document purporting to be a copy of a certificate of title showing that one of the business vehicles covered by the Company's commercial automobile policy was owned by the Company or Jensen in 2006, five years before the accident. (Certificate of Title.) On August 20, 2015, Judge Goodstein filed a formal written Order granting Peoples' motion for summary judgment on the grounds presented in Peoples' memorandum of law in support of summary judgment. (Order Granting Motion for Summary Judgment.)

On August 26, 2015, Jensen filed an amended motion to reconsider, to which Peoples responded on September 2, 2015. (Jensen's Am. Motion to Reconsider; Peoples' Resp. in Opp. to Am. Motion to Reconsider.) On September 10, 2015, the Court denied Jensen's motion to reconsider. (Order Denying Motion to Reconsider.)

On September 22, 2015, Jensen filed a motion for a new hearing on Peoples' Motion for Summary Judgment, to which Peoples responded on October 2, 2015. (Jensen's Motion for New Hearing on Summary Judgment; Peoples' Response.) On October 14, 2015, the Court denied Jensen's motion for a new hearing. (Order Denying Motion for New Hearing.) Meanwhile, on October 7, 2015, Jensen filed a notice of appeal, appealing the Circuit Court's order granting summary judgment to Peoples and the order denying Jensen's motion to reconsider. (Notice of Appeal.) On October 30, 2015, Jensen filed a

second notice of appeal, appealing the Circuit Court's denial of her motion for a new hearing on summary judgment. (Second Notice of Appeal.)

STATEMENT OF FACTS

Appellant Donna Jensen has owned a daycare called The Learning Station since approximately 2005. (Dep. of Donna Jensen p. 11 ln. 13-25.) The daycare is organized as a separate limited liability company, FOUR J'S & A D, LLC (the "Company"). (*Id.* at p. 12 ln. 17-20, p. 128 ln. 20 to p. 130 ln. 4.) Jensen has always obtained insurance for the Company through multiple insurance agencies; thus, no one agent or agency is responsible for the entirety of the Company's insurance. (*Id.* at p. 104 ln. 9-23; E-mail from Donna Jensen to Matt Wiseman of April 14, 2010.) In addition, Jensen's husband has always been responsible for obtaining the couple's personal insurance, including personal automobile insurance. (*Id.* at p. 141 ln. 1 to p. 142 ln. 2.) Jensen was not involved in her husband's decisions concerning their personal insurance and did not know what coverage he purchased on their behalf. (*Id.*)

In or around 2010, Respondent Matthew Wiseman of Respondent People's Underwriters, Inc. contacted Jensen to ask if he could assist her in procuring commercial insurance for the Company. (E-mail Matt Wiseman to Donna Jensen of April 6, 2010.) Jensen ultimately purchased commercial general liability, commercial property, commercial automobile (business auto), and commercial accident insurance for the Company through Peoples. (Selective Declaration Pages for Policy Period April 17, 2010 through April 17, 2011.) As noted, Peoples was not the Company's only insurance agency. For example, Peoples offered to procure workers' compensation insurance for the Company (*i.e.*, the kind of insurance that would have covered the incident at issue), but

Jensen declined, instead purchasing workers' compensation insurance through some other agency. (Jensen Dep. p. 119 ln. 16 to p. 120 ln. 3, p. 127 ln. 18 to p. 128 ln. 10.)

Jensen admits that she did not read the commercial policies procured on her behalf by Peoples, nor did she ask Peoples any questions about the coverage provided under the commercial policies. (*Id.* pp. 161 ln. 23 to 162 ln. 25.) The policies that Jensen purchased through Peoples were commercial policies that insured the Company. (Selective Policies for Policy Year April 17, 2011 to April 17, 2012.) At no time did Jensen ask to purchase personal insurance through Peoples. (Jensen Dep. p. 137 ln. 10-24.) To the contrary, Jensen's personal insurance coverage, including her personal automobile coverage, was handled exclusively by her husband, and Jensen had no involvement in procuring personal insurance. (*Id.* at p. 141 ln. 1 to p. 142 ln. 2.)

On May 11, 2011, a car ran into the side of the daycare building, purportedly injuring Jensen, who was in her daycare office at the time. (Jensen Dep. Ex. 2 and Ex. 6.) Both the at-fault driver's liability insurance and Jensen's personal automobile UIM insurance covered the accident, and both policies paid their policy limits of $25,000 each. (Jensen Dep. p. 84 ln. 12-22, p. 91 ln. 15-24.) Jensen did not have workers' compensation coverage for herself because she claims she was told by an insurance agent not affiliated with Peoples that, as an owner, workers' compensation coverage was not available to her. (*Id.* p. 127 ln. 18 to p. 128 ln. 10.)

At some point after the accident, Jensen tendered to the Company's commercial automobile carrier, Selective Insurance Company, which carrier denied coverage. Jensen then filed a declaratory judgment action against the carrier in federal court, and the federal court confirmed that there was no coverage for Jensen's claimed workplace injuries under

the commercial automobile policy. (Federal Court Order, at pp. 5-7.) This lawsuit followed. (Complaint ¶¶ 1-25.)

SUMMARY OF ARGUMENT

As an initial matter, the Circuit Court's Order should be affirmed under the "two issue rule" because Jensen has failed in her initial brief to address each of the three grounds supporting summary judgment as set forth in the Circuit Court's order. Instead, Jensen's brief argues that (1) Judge Goodstein should not have inquired at the summary judgment hearing into how the vehicles covered by the commercial automobile policy were titled and (2) the commercial automobile policy procured by Peoples was "materially deficient" because Peoples did not inquire how the subject vehicles were titled. The first argument cannot be a basis for appeal because Judge Goodstein did not base her grant of summary judgment on this issue, and the second argument is waived because Jensen did not raise the issue to the Circuit Court at summary judgment and provided no evidence in support. Jensen's brief does not address the actual stated grounds for Judge Goodstein's ruling as set forth in the written Order—no duty to Jensen individually, no duty to advise Jensen individually, and no breach of duty to Jensen—and therefore the Circuit Court's ruling must be affirmed under the two issue rule.

As to each basis for the Circuit Court's ruling, any one is sufficient to affirm summary judgment. First, there is no record evidence that Peoples had any duty to Jensen individually. Jensen has admitted that she only purchased certain *commercial insurance* through Peoples and that she did not purchase or seek to purchase any *personal insurance* through Peoples. Therefore, Peoples had no duty to Jensen individually at all; Peoples' only duty was to the Company, which is not a plaintiff in this action. Because Peoples had

no duty to Jensen, and Jensen did not appeal that holding, the Circuit Court's grant of summary judgment on this ground in favor of Peoples should be affirmed.

As to the second ground, Peoples had no duty to advise Jensen individually. Under South Carolina law, an insurance agency does not have duty to advise its customers absent a special relationship. Here, not only was Jensen not the customer, there is no record evidence of a special relationship. Peoples first placed commercial insurance for the Company only one year before the accident; thus, there was no business relationship of long standing. Jensen claims that her alleged statement to Wiseman that she wanted coverage for "everyone and everything" in the daycare created a special relationship, but this Court has held that broad, generic requests for "full coverage," the "best coverage," or the like are insufficient to create a special relationship *as a matter of law*. Absent evidence of a special relationship, Peoples had no duty to advise as a matter law, and this one ground is sufficient to affirm the grant of summary judgment.

As to the third ground, there is no record evidence that Peoples breached any duty to Jensen. Peoples' expert testified that it is customary and appropriate in placing commercial automobile insurance to list the business, not its individual owners, as the named insured. This testimony comports with Jensen's long history of purchasing commercial automobile insurance only in the Company's name. Furthermore, Jensen submitted no expert testimony concerning the standard of care in placing commercial automobile insurance. Thus, there is no record evidence that Peoples breached the standard of care, and this one ground is sufficient to affirm the grant of summary judgment.

Jensen's new argument on appeal that it was negligent for Peoples not to determine that one of the Company vehicles was allegedly titled in the name of the Company and

Jensen is waived because Jensen did not raise the issue to the Circuit Court. Furthermore, the argument is wholly without merit. As an initial matter, it is undisputed that no evidence of the vehicles' title was introduced at summary judgment, so there is no record evidence supporting the argument. Moreover, the alleged evidence of a 2006 certificate of title submitted after the Circuit Court granted summary judgment and dismissed the jury is not admissible under the Rules of Evidence. In addition, Jensen introduced no evidence, expert or otherwise, that Peoples had any duty to place the commercial automobile insurance any differently even if Jensen allegedly jointly held title to one of the Company busses. Instead, the record evidence shows that Peoples properly placed commercial automobile insurance as requested on behalf of the Company, and the Circuit Court's grant of summary judgment should be affirmed.

Jensen's focus in her initial brief on the manner in which Judge Goodstein conducted the summary judgment hearing is erroneous and inappropriate. The issue of how the subject vehicles were titled was raised by the Circuit Court in discussion, but was not material to the Circuit Court's decision, as evidenced by the written Order. The written Order—which supersedes the Court's oral discussion—clearly based the summary judgment decision on the three issues set forth above, not on whether or not Jensen held title individually to one of the commercial vehicles. No attempt by Jensen to impugn Judge Goodstein's handling of the motion for summary judgment can change the plain fact that the Circuit Court granted Peoples' motion for summary judgment on the grounds submitted by Peoples, on the evidence of record before the Court, and in accordance with the applicable law. Therefore, Jensen's argument concerning the process should not be considered on appeal.

Finally, the Circuit Court correctly denied Jensen's motions to reconsider and motion for a new hearing on summary judgment. It is well-settled that, on summary judgment, the non-moving party is required to come forward with any admissible evidence it has that may defeat summary judgment. It is equally well-settled that the non-moving party may not enter new evidence that was available to it at the time of the motion hearing by way of a Rule 59(e) or similar motion. That is precisely what Jensen attempted here, and it was well within the Circuit Court's discretion under the law to deny Jensen's post-judgment motions.

ARGUMENT

A. The Circuit Court's Order Should Be Affirmed Under the Two Issue Rule.

The Circuit Court granted summary judgment on three grounds, set forth in separately enumerated sections of its Order. ***First***, in Section III.A of the Order, the Court held that Peoples had no duty to Jensen individually. (Order Granting Defendants' Motion for Summary Judgment pp. 4-6.) ***Second***, in Section III.B of the Order, the Court held that Peoples breached no duty to Jensen individually. (*Id.* pp. 6-8.) ***Third***, in Sections III.C and III.D of the Order, the Court held that Peoples had no duty to advise Jensen under *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988).[1] (*Id.* pp. 8-13.) Each of the grounds was independently sufficient to grant summary judgment in Peoples' favor; indeed, the Circuit Court began Section III.B by noting that it "need not address the breach of duty issue where no duty exists" before going on to hold that there was no breach. (*Id.* p. 6.)

[1] Section III.C establishes that *Trotter* controls, and Section III.D applies *Trotter* to the facts of this case.

Under South Carolina law, when two or more independent grounds support a lower court's decision, the appellate court will affirm the decision if *any one* of those grounds supports affirmance. *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 421, 472 S.E.2d 253, 255 (1996). As a result, it is incumbent on an appellant to appeal **all** of the grounds supporting the lower court's decision; otherwise, the unappealed ground stands as the law of the case, and the appeal is meaningless. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("[W]here a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). Here, because the trial court clearly based its decision on three independent grounds, it was incumbent on Jensen to address all of the three grounds in her initial brief, and she cannot use her reply brief to remedy her failure. *Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997) ("[A]n appellant may not use the reply brief to argue issues not argued in the appellant's initial brief.").

Rather than address the three independent grounds for granting summary judgment, Jensen's opening brief makes only two unrelated arguments. The first half of the brief argues that it was improper for Judge Goodstein to raise the issue of whether Jensen had an insurable interest in the insured commercial vehicles (i.e., whether she held title to the vehicles individually). (Appellant's Br. pp. 7-13.) The crux of this argument is that Judge Goodstein should not have "raise[d] a ground for summary judgment not mentioned in the motion [for summary judgment]." (*Id.* p. 11.) The argument fundamentally misapprehends what Judge Goodstein did, as her written Order granting summary judgment is not based on whether Jensen had an insurable interest in the commercial vehicles; indeed, the term

"insurable interest" is mentioned only in passing in Section III.A with respect to whether Peoples had a duty to Jensen individually, and not at all in the two sections holding that there was no duty to advise Jensen and no breach of duty. (Order Granting Defendants' Motion for Summary Judgment p. 5.) Therefore, Jensen's first argument in her initial brief does not address the grounds on which the Circuit Court granted summary judgment and should not be considered on appeal.

The second half of Jensen's initial brief argues—for the first time—that Peoples was negligent for not inquiring as to whether the Company busses were titled in Jensen's name, as opposed to or in addition to the Company's name. (Appellant's Br. pp. 14-18.) As an initial matter, this argument is waived because it was not made to the Circuit Court until Jensen's Rule 59(e) motion, and it is well-settled that issues raised for the first time on a Rule 59(e) motion are waived. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* *409* S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not."); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (same). Even construing this argument generously, it does not address the Circuit Court's actual rulings in its Order, and instead merely makes a new argument against summary judgment after the fact. This second argument, therefore, should also not be considered on appeal. *Id.*

In sum, because Jensen has failed to address the actual stated grounds for the Circuit Court's ruling, as set forth in the Order, any appeal of the Court's ruling is abandoned, and the Circuit Court's decision must be affirmed as a matter of law. *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) ("[A]ppellant has failed to specifically argue

this contention in her brief and is deemed to have abandoned this exception."); *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct. App. 1996) (same) (holding that failure to raise issue in brief constitutes abandonment of the issue on appeal).

B. The Circuit Court's Order Should be Affirmed Because Peoples Had No Duty to Jensen Individually.

If the Court were to consider the merits of the Circuit Court's ruling (even though Jensen has failed to perfect an appeal of the ruling), it is clear that the decision should be affirmed.

The Order first holds that Peoples had no duty to Jensen individually. Under South Carolina law, professionals generally have duties only to their clients. *See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 38*8 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (affirming summary judgment in professional malpractice case because professional had no duties to the non-client plaintiff). Insurance agents, in particular, have limited duties **to the insured customer**, not to anyone else. *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347 (outlining insurance agent's limited duties to customers).

Here, Peoples' only insured customer was the Company, which is not a plaintiff in this case.[2] It is undisputed that Peoples only offered, and Jensen only sought, commercial insurance for the Company and that Jensen's husband handled her personal insurance needs through other insurance agents. (Jensen Dep. p. 137 ln. 10-24, 141 ln. 1 to p. 142 ln. 2; E-mail of Matt Wiseman to Donna Jensen of April 6, 2010; E-mail of Donna Jensen to Matt

[2] The Company was initially named as a plaintiff. However, the Circuit Court granted Peoples' motion to dismiss by order filed on September 9, 2014, because the Company did not claim any damage, which is an essential element of a negligence claim. (Order September 9, 2014.) This order was not appealed and is the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling is the law of the case).

Wiseman dated April 14, 2010.) In addition, the insurance identification cards for the busses, which Jensen received, were only in the name of the Company. (Insurance ID Cards; Jensen Dep. Ex. 15.) Jensen admits that she did not ask Peoples to place any personal insurance, only commercial insurance for the Company. (Jensen Dep. p. 137 ln. 10-24, p. 141 ln. 1 to p. 142 ln. 2.) It is equally undisputed that Jensen signed an application for commercial insurance clearly stating that the "insured" under the commercial policies sought was the Company and that there were no other or additional insureds. (Application; Jensen Dep. Ex. 12.) It is also undisputed that Jensen received a copy of the commercial automobile policy, which she had a duty to read. *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 327, 233 S.E.2d 111, 114 (1977) (holding that insured has duty to read insurance policy). The policy clearly stated on the declarations page that the Company was the only insured. (Selective Policy for Policy Year April 17, 2011 to April 17, 2012.)

In short, there is no record evidence—not even a scintilla—that Peoples had any insured customer other than the Company, and no record evidence—not even a scintilla—that Jensen sought personal insurance from Peoples. Therefore, the Circuit Court correctly ruled that Peoples had no duty to Jensen individually, and the Circuit Court's grant of summary judgment should be affirmed for this reason alone.

C. The Circuit Court's Order Should be Affirmed Because Peoples Had No Duty to Advise Jensen Individually.

As a second and additional ground for granting summary judgment, the Circuit Court ruled that Peoples had no duty to advise Jensen with respect to the insurance coverage provided under the commercial automobile policy. Under South Carolina law, an insurance agent generally has no duty to advise an insured. *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347. Such a duty may only be created if the agent expressly or impliedly

undertakes to advise the insured. *Id.*; *see also Houck v. State Farm Fire & Cas. Ins. Co.*, *366* S.C. 7, 12, 620 S.E.2d 326, 329 (2005) (same); *Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993) (same); *Pitts v. Jackson Nat'l Life Ins.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002) (same).

Here, of course, Jensen was not the insured customer and there is no record evidence that Peoples expressly undertook to advise Jensen. Indeed, Jensen admitted under oath that she had no discussion and asked no specific questions regarding the coverage provided by the commercial automobile policy; rather, she simply "assumed that [she] would be covered for any incident." (Jensen Dep. pp. 127:14-17; 161:23-25 to 162:1-3.) Her claim against Peoples is based solely on her assumptions, and as such, she cannot maintain a claim against Peoples. *Houck*, 366 S.C. at 16, 620 S.E.2d at 331 (holding that consumer's assumption that agent would provide best policy at best rate insufficient to create duty to advise as a matter of law).

A duty to advise may only be implied if: "(1) the agent received consideration beyond a mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on." *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347 (internal citations omitted).

Jensen has never argued that Peoples received additional consideration or that she and Peoples had an extended course of dealing because there are no record facts to support such contentions. Rather, Jensen's argument below focused on whether she made a clear request for advice. She did not. At most, Jensen testified that she wanted "coverage for every person who went in and out of [her] building, including [herself]." (Jensen Dep. p.

137:10-18.) Notably, Jensen did not testify that she told Peoples that she wanted this kind of coverage. However, even if it were to be assumed that she did convey this information to Peoples (though no such assumption is warranted on the record), Jensen's testimony is not a clear request for advice under the law. As the Court stated in *Trotter*, "[a] request for 'full coverage,' 'the best policy,' or similar expressions does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." 297 S.C. at 472, 377 S.E.2d at 347. Rather, to trigger a duty to advise, the insured must seek specific advice about a specific situation. *See Riddle-Duckworth*, 253 S.C. at 418, 171 S.E.2d at 489 (holding that insurance agent had duty to advise when he responded to customer's specific question as to whether an elevator was covered).[3]

Jensen admits that she did not seek advice on the situation of a workplace injury not involving the insured commercial vehicles because "no one could have predicted this specific incident". (Jensen Dep. pp. 127:14-17; 162:1-3.) Jensen merely assumed she would be covered for any incident. (*Id.* pp. 161:23-25 to 162:1-3.) Under the law, assumptions are not sufficient to create a duty to advise. *Houck*, 366 S.C. at 16, 620 S.E.2d at 331 (holding that insured's assumption that agent would find her the best coverage at the best price was insufficient to create a duty to advise as a matter of law).

[3] Jensen contends that this case is controlled by *Riddle-Duckworth* rather than *Trotter*. This is incorrect because, unlike this case, *Riddle-Duckworth* involved the customer reading his policy and thereafter asking the agent specific questions about coverage, to which the agent responded. 253 S.C. at 418, 171 S.E.2d at 489. In this case, as in *Trotter*, Jensen neither read the policy nor asked the agent specific questions; rather, she simply assumed that she would have coverage for a situation that was never discussed with the agent. (Jensen Dep. pp. 161:23 to 162:25.) Therefore, Jensen's argument that *Riddle-Duckworth* controls is unavailing.

Because there is no record evidence—not even a scintilla—that Jensen made a specific request for advice concerning a specific situation, Peoples had no duty to advise Jensen as a matter of law, and the Circuit's Court's grant of summary judgment should be affirmed for this reason alone.

D. The Circuit Court's Order should be Affirmed Because Peoples Breached No Duty to Jensen.

In addition to its ruling that Peoples had no duty to Jensen individually and had no duty to advise Jensen individually, either of which is independently sufficient to warrant summary judgment in Peoples' favor, the Circuit Court also ruled that Peoples breached no duty to Jensen as a matter of law. This third ruling was based on the record evidence, including the testimony of Peoples' expert, Edwin Stuart Powell, a licensed insurance broker and agent with 42 years of experience in the industry and numerous industry certifications. Mr. Powell attested that Peoples' conduct in placing the commercial automobile policy at issue comported with the standard of care in all respects. (Powell Aff. ¶ 21.) Specifically, Mr. Powell attested that it is accepted practice to name the business, not individual owners of the business, as the named insured on a commercial automobile policy because the purpose of commercial coverage is to protect the business from a loss. (*Id.*) Naming individual owners as additional insureds would not be normal practice because personal coverage for owners is not priced into the premium (*i.e.*, the premium would go up if they were named), and the coverage would unnecessarily duplicate the owners' personal automobile coverage. (*Id.*) Further, the kind of insurance that is designed to cover a workplace accident like the one at issue here is workers' compensation coverage, which Jensen specifically instructed Peoples not to procure. (*Id.*) Therefore, Peoples'

placement of commercial automobile coverage on behalf of the Company did not breach the standard of care. (*Id.*)

Jensen did not present any contrary evidence. Indeed, Jensen presented no expert testimony at all in the case. This alone precludes Jensen from proving a breach of the standard of care, as it is well-settled that "a plaintiff in a professional malpractice action is required to introduce expert testimony to establish the defendant's standard of care." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C.* 459, 472, 570 S.E.2d 197, 203 (Ct. App. 2002); *accord City of York v. Turner-Murphy Co.*, 317 S.C. 194, 196, 452 S.E.2d 615, 617 (Ct. App. 1994) (requiring expert testimony in professional malpractice case). Although Jensen now contends that she does not need expert testimony because the subject matter is such that a lay person can recognize the alleged negligence, this exception to the general rule does not apply to this case. Indeed, the exception has not been applied to allegations of insurance agency malpractice concerning commercial insurance because such insurance is sold by licensed persons, and how to properly place commercial insurance within the factual context is not within the ken of an ordinary layperson.[4] Only a qualified person in the insurance industry can testify

[4] The cases cited by Jensen are readily distinguishable. *Perderson v. Gould*, 288 S.C. 141, 341 S.E.2d 622 (1986) stated that there is an exception to the rule that expert testimony is required when the subject matter of a professional's alleged negligence is a matter of common understanding; however, the *Perderson* Court declined to apply the exception in a medical malpractice case involving the proper performance of a hysterectomy. In *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981), another medical malpractice case, the plaintiff introduced expert testimony regarding the standard of care, and the Court affirmed the admission of that testimony. In *dicta*, the *King* Court opined that expert testimony was not necessary because of the defendant doctor's own admission than he anticipated plaintiff would recover in no more than 30 days, yet the doctor did not consult a specialist for more than a year when the patient failed to recover, and this undisputed fact made it obvious to a layperson that there was negligence. Likewise, in *Green v. Lilliewood*, 272 S.C. 192, 249 S.E.2d 910, 913 (1978), the court permitted a medical malpractice plaintiff to use a

to the custom and practice of placing commercial automobile insurance under the factual circumstances presented. Here, it is undisputed that the Company had for many prior years obtained commercial automobile insurance only in the name of the Company and Jensen did not request any change in this practice when she met with Peoples. To now claim, as Jensen does for the first time on appeal, that Peoples had a duty to second guess prior coverage and Jensen's own signed application is without logic, legal precedent or evidentiary support. In short, Jensen cannot assert what constitutes the applicable standard of care for independent insurance agents under these facts without support in the law and the testimony of a qualified expert. Because she failed to prove a breach in the applicable standard of care, Peoples was entitled to summary judgment, and the ruling should be affirmed. *See Tommy L. Griffin Plumbing & Heating Co.*, 351 S.C. at 472, 570 S.E.2d at 203; *City of York*, 317 S.C. at 196, 452 S.E.2d at 617.

Moreover, even if Jensen could somehow avoid the legal requirement that she present expert testimony to prove a breach in the standard of care under the facts at issue, there is nothing in the record rebutting Mr. Powell's testimony that Peoples complied with the standard of care in procuring the commercial automobile policy for this Company. To the contrary, Mr. Powell's conclusion comports with the evidence and with common sense. The evidence proves that the Company was the only named insured on all of its prior commercial automobile policies placed by other agents and continued to be placed only in

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combination of the defendant doctor's admission of malpractice and the testimony of the defendant's expert that the defendant failed to comport with the standard of care, rather than a plaintiff's expert, to establish the defendant's professional negligence. Jensen's case is entirely different from *King* and *Green* in that there are no admissions from Peoples or its expert that establish a violation of the standard of care under the facts presented. Therefore, Jensen's reliance on these cases is misplaced.

the name of the Company by other agents after the accident. (Jensen Dep. Ex. 7 and Ex. 25.) Before Jensen began working with Peoples, she procured commercial automobile insurance for the Company through other agents for more than five (5) years, each time procuring a policy in which the Company was the only named insured, and there is no evidence that Jensen asked Peoples to procure anything differently. (*Id.*; Jensen Dep. p. 104 ln. 9-23.) From this well-established pattern, it is clear that Jensen could not legitimately expect to be covered personally by the Company's commercial automobile policy for an accident that did not involve the covered busses. Indeed, in the application, Jensen requested that the Company be insured under a commercial automobile policy on two busses, which is what Peoples placed, and Jensen signed that no other insureds were requested. (Application; Jensen Dep. Ex. 12.) Moreover, on a practical level, it would not be reasonable for Jensen to assume that a commercial automobile policy on the daycare's school busses would cover her personal injuries **resulting from a workplace accident that had nothing whatsoever to do with the covered school busses**. For this accident, Jensen was covered by the at-fault driver's personal auto policy and her own personal auto policy. (Jensen Dep. p. 84 ln. 12-22, p. 91 ln. 15-24.) Workers' compensation insurance would also have covered this workplace accident, but Jensen failed to procure such insurance from her other agent and specifically declined such insurance from Peoples. (*Id.* p. 127 ln. 18 to p. 128 ln. 5; Powell Aff. ¶¶ 18-20.)

Peoples procured what Jensen requested for the Company and what Jensen had requested for the Company for many prior years from other agents: standard commercial automobile coverage for the Company on two specific busses. Because Peoples properly fulfilled the request, and because there is no record evidence—not even a scintilla—to the

contrary, there was no breach in the standard of care, and the Circuit Court's grant of summary judgment on this additional ground should be affirmed.

E. Jensen's New Argument has No Merit: Peoples Neither Had, Nor Breached, a Duty to Determine Whether the Commercial Vehicles Were Also Titled in Jensen's Name.

In the second half of her initial brief, Jensen advances the new argument that Peoples somehow had and breached a duty to determine that one of the busses was allegedly jointly titled in the Company's name and her own name. As noted above, this argument is waived and thus cannot be considered on appeal because it was not raised until Jensen's 59(e) motion. *Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 567, 762 S.E.2d at 695; *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482. Even if the argument were to be considered, it fails as a matter of law for several reasons.

First, as the Circuit Court correctly ruled, there is no record evidence that either commercial vehicle was titled in Jensen's name. Jensen repeatedly admits she did not present evidence of title before or at summary judgment because she had never considered this to be an issue. (Appellant's Br. 8-9.) This alone precludes Jensen's new argument on appeal. Belatedly, Jensen submitted a poor copy of what purports to be a certificate of title bearing an issue date of April 2006, five years before the accident, showing that one of the vehicles was titled in the name of the Company or Jensen on that date. (Certificate of Title.) Even if Jensen had submitted this document at summary judgment (which she did not), the document could not have been considered by the court for numerous reasons: it

was not turned over in discovery;[5] it was not authenticated;[6] it was not a certified or otherwise admissible copy;[7] and, it did not address the vehicle's title in May 2011, the date of the accident.[8] *Hansen v. DHL Lab., Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994) ("A genuine issue of fact . . . can be created only by evidence which would be admissible at trial."). Without any admissible evidence that the commercial vehicle was titled in Jensen's name at the time of the accident, Jensen's new argument fails as a matter of law.

Second, there is no evidence that Peoples had a duty to inquire into how the commercial vehicles were titled. To the contrary, the undisputed evidence shows that Peoples was presented with a long history of Jensen procuring commercial automobile insurance for the Company with the Company as the only named insured. There is no evidence that Jensen advised Peoples that she wanted a change in title for the commercial

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[5] Because the summary judgment motion was heard and decided on the morning of trial, discovery was completed at the time of the summary judgment hearing. Indeed, the parties had already exchanged proposed trial exhibits. No certificate of title was provided in discovery or listed by Jensen as proposed trial exhibits. Jensen's attorney has stated that he had not even considered the issue. (Appellant's Br. 8-9.)

[6] While public records can be self-authenticating, they must bear the seal of the issuing entity and the signature of an officer thereof. Rule 902(a), SCRE. Here, the copy submitted by Jensen is so poor that there is no way to tell if the document bears a seal or signature, and it therefore stands unauthenticated under the rules of evidence.

[7] To admit a public record into evidence, the presenting party must either submit a certified copy or the testimony of a witness who has compared the copy to be admitted into evidence with the original. Rule 1005, SCRE. Other evidence of the contents of a public record (such as a non-certified copy) may only be admitted upon a showing that a certified copy could not be obtained through reasonable diligence. (*Id.*) Here, it is inconceivable that Jensen, through reasonable diligence, could not have obtained a properly certified copy of the vehicle's certificate of title, and she has submitted no evidence that complies with the rule.

[8] The document is dated April 2006, five years before the May 2011 accident at issue. There is no evidence whatsoever of the state of the title as of May 2011.

vehicle policy. Indeed, Jensen applied for commercial insurance on behalf of the Company only. (Application; Jensen Dep. Ex. 12.) Further, Mr. Powell's uncontroverted expert opinion is that it is appropriate for commercial automobile policies to list only the company as the named insured because any other listing would result in an increased premium and unnecessarily duplicate the business owner's personal coverage. (Powell Aff. ¶ 15.) Jensen presented no contrary evidence, and, as discussed in more detail above, no contrary expert testimony. Therefore, there is no record evidence that Peoples had a duty to inquire into ownership of the commercial vehicles.

Third, Jensen signed an insurance application for commercial vehicle insurance naming only the Company; she received quotations for commercial insurance in the name of the Company only; she received copies of the commercial insurance policies in the name of the Company only; and she received insurance vehicle identification cards in the name of the Company only, all of which she had a duty to read, and all of which reflected that the Company was the only named insured. (Application; Quotation; Selective Policy Year April 17, 2011 to April 17, 2012; Jensen Dep. Ex. 11, Ex. 12, Ex. 17 and Ex. 18.) As Judge Goodstein noted at the summary judgment hearing, if Jensen wanted personal coverage because of her purported joint ownership of one of the busses, it was incumbent upon her to request such coverage. (Transcript of June 23, 2015 p. 37 ln. 6-15.) As a matter of law, Jensen cannot press a claim against Peoples for her own failure to read the application, policy, and other documents, and her own failure to raise any issues apparent from the face of those documents. *See Doub*, 268 S.C. at 327, 233 S.E.2d at 114.

Fourth, there is no record evidence that Peoples would or should have done anything differently even if Jensen had advised that she purportedly had an ownership

interest in one of the commercial vehicles or Peoples had the title document Jensen now advances. First, the title document is dated 2006. (Title Document.) In addition, Mr. Powell has attested that Peoples satisfied the standard of care. (Powell Aff.) According to the expert, personal coverage for the business owner is not priced into a commercial automobile policy, so, regardless of how the commercial vehicle is titled, it is customary to name only the business because there would otherwise be an additional premium and a duplication of the owner's personal coverage. (Powell Aff. ¶ 15.) The custom and practice in the industry to name only the business as the insured on a commercial automobile policy is further proven by the prior commercial policies procured only in the Company name.

Without evidence that information on Jensen's purported ownership would have any material effect on how the commercial vehicle coverage should have been procured—and there is none—Jensen cannot prove a breach of duty or damages proximately caused. For all of these reasons, even if Jensen's new argument were to be considered by this Court, the new argument cannot succeed as a matter of law, and summary judgment should be affirmed.

F. Jensen's Criticism of Judge Goodstein's Handling of the Motion for Summary Judgment Is Erroneous and Inappropriate.

Instead of arguing against the Circuit Court's three reasons for granting summary judgment, Jensen spends more than half of her initial brief attacking Judge Goodstein's conduct at the hearing on Peoples' motion for summary judgment. Specifically, Jensen takes issue with Judge Goodstein inquiring into whether the commercial vehicles were titled in the Company's name or Jensen's name—a subject which Jensen fully admits she did not raise or submit evidence upon. (Appellant's Br. 8-9.) In her brief, Jensen characterizes the issue of whether the commercial vehicles were titled in her name or the

Company's name as a new "ground to support summary judgment" that Judge Goodstein raised and adopted *sua sponte*, allegedly without giving Jensen an adequate chance to respond. (Appellant's Br. p. 11.)

Jensen grossly mischaracterizes the record and misunderstands Judge Goodstein's purpose in raising the question of how the commercial vehicles were titled. At the June 23, 2015 hearing, Judge Goodstein explained why she inquired as to how the vehicles were titled:

> [T]he only theory I could come up with in light of the *Trotter* case was that -- was . . . to ponder whether this insurance agent or this insurance agency had a duty to list this Plaintiff as an additional insured.
> ....
> That prompted that inquiry this morning, because last evening as I was going through the information before me, I could find no information that led me to believe that this Plaintiff had an insurable interest.
> ....
> And being true to his duty to the Court as an officer of the Court, counsel for the Plaintiff indicated that this record was void of any evidence of this Plaintiff having an insurable interest.
> ....
> I am unable to come up with a theory that would allow this Plaintiff to survive the motion for summary judgment by Defendant.

(Transcript of June 23, 2015 pp. 45-46.)

In other words, the Court's inquiry was not directed at a "new" ground for summary judgment; rather, the Court was pointing out the kind of evidence that, in its mind, might have allowed Jensen to defeat one of the grounds for summary judgment on which Peoples had moved, that of duty to Jensen individually.[9] To use an analogy, a trial judge might say

[9] To be clear, Peoples does not agree that such evidence would have properly defeated summary judgment. As noted in the prior section of this brief, there is no evidence that

to plaintiff's counsel at summary judgment in a slip and fall case that it appears undisputed in the record that the obstacle over which the plaintiff fell was both open and obvious and the subject of a conspicuous warning sign, but the court is curious whether plaintiff's counsel has any evidence that plaintiff's view of the obstacle or the warning sign was obstructed so as to create a triable issue of fact. In such a case, the issue of whether there is evidence of an obstruction would not be a "new" ground for summary judgment; rather, it would simply be the kind of evidence that, ***if it were in the record***, might defeat summary judgment.

Here, Judge Goodstein, in an effort to be as thorough as possible, was simply exploring what kind of evidence might defeat summary judgment as to the duty issue, and the Court asked counsel whether such evidence was in the record. It is both disingenuous and insulting that Jensen is now attempting to turn the Judge's thoroughness into grounds for an attack on her fairness. It is not the Circuit Court's obligation on the morning of trial to grant the non-moving party a continuance to attempt to develop admissible evidence necessary to defeat a properly filed summary judgment motion, evidence that the non-moving party could have obtained prior to the hearing. Rather, it is the non-moving party's obligation to place in the record admissible evidence that might defeat summary judgment at or before the motion hearing, and certainly before the day of trial.[10] *Myatt v. RHBT Fin.*

Peoples had a duty to question the Company's ownership of the vehicles as told to them by Jensen in her application and by prior policies procured through different agents, or that Jensen's purported joint ownership of one of the commercial vehicles would or should have changed the kind of commercial insurance coverage procured.

[10] Contrary to Jensen's contention, Judge Goodstein did not misapprehend the burden of proof. As this Court has noted many times:

> Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Once the party moving

Corp., 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006) ("[T]he non-moving party must come forward with specific facts showing a genuine issue for trial."); *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003).

In this case, Jensen's counsel readily admits that he failed to develop and place in the record before or at summary judgment the evidence of title that the Court was questioning. (Appellant's Br. 8-9; Transcript of June 23, 2015 p. 46.) As a matter of law, Jensen's failure cannot be corrected by later filing a motion to reconsider and/or a motion for new hearing. *Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 567, 762 S.E.2d at 695 ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not."); *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 460 (Ct. App. 2005) (holding that motion for relief from judgment under Rule 60(b)(2) is improper if it merely presents evidence that could have been developed before judgment was entered). The Circuit Court properly granted summary judgment on the admissible evidence in the record at the time of the hearing, and Jensen's complaints about Judge Goodstein are unfair and misplaced.

> for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Regions Bank, 354 S.C. at 660, 582 S.E.2d at 438 (internal citations omitted) (collecting cases).

Here, Peoples demonstrated its entitlement to summary judgment by submitting an extensive record comprised of affidavits, documentary evidence, and deposition transcripts. (Peoples' Memorandum in Support of Summary Judgment with Exhibits.) The burden then shifted to Jensen to "come forward with specific facts showing there is a genuine issue for trial." *Regions Bank*, 354 S.C. at 660, 582 S.E.2d at 438. Because Jensen failed to come forward with such evidence, summary judgment was properly granted in Peoples' favor.

G. The Circuit Court Did Not Abuse Its Discretion in Denying Jensen's Post-Judgment Motions.

The Circuit Court did not abuse its discretion in denying Jensen's motions to reconsider under Rule 59(e) or her motion for a new hearing under Rule 60(b)(2). *Pollard v. County of Florence*, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994) (evaluating Rule 59(e) ruling under abuse of discretion standard); *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992) ("Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge."). Jensen's post-judgment motions attempted to present a certificate of title document that, if the rules for admissibility had been followed, could have been presented at or before the summary judgment hearing. Jensen's counsel has candidly admitted that this readily available document was not timely or properly submitted because counsel did not believe it important. (Appellant's Br. 8-9.)

The Circuit Court was on firm ground in holding that the submission of evidence that could have been procured before judgment is not proper on a Rule 59(e) or Rule 60(b)(2) motion, and the Court did not abuse its discretion in so holding. *Stevens & Wilkinson of S.C., Inc.*, 409 S.C. at 567, 762 S.E.2d at 695 ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not"); *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 460 (Ct. App. 2005) (holding that motion for relief from judgment under Rule 60(b)(2) is improper if it merely presents evidence that could have been developed before judgment was entered). Moreover, as an alternate sustaining ground, the certificate of title document could not have been admitted into evidence in any event for all of the reasons discussed above. Furthermore, the document would not have changed the outcome of the summary judgment ruling because the document itself could not establish the standard of care or a

breach in the standard of care, as discussed above, elements necessary to prove a professional negligence claim. Thus, Peoples would still be entitled to summary judgment in its favor.

CONCLUSION

For the foregoing reasons, and any others appearing in the record, the Circuit Court's grant of summary judgment in favor of Peoples and denial of Jensen's post-judgment motion should be affirmed.

Respectfully submitted,

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August 4, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2015-002095

Donna Jensen, ... Appellant,

v.

Matthew B. Wiseman and
Peoples Underwriters, Inc., ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on August 4, 2016, the foregoing **RESPONDENTS' INITIAL BRIEF and RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served on all counsel of record via U.S. Mail, addressed as follows:

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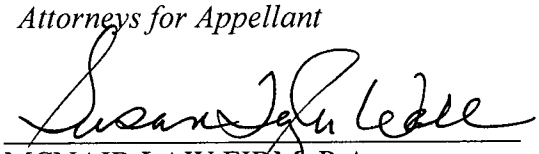

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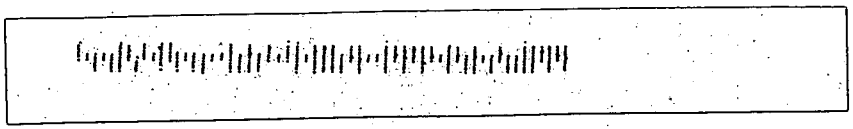

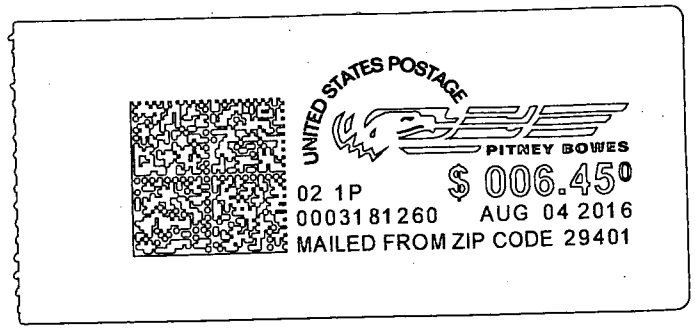

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