THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2018-CP-29-00794

Appellate Case No. 2019-001685

NGM Insurance Company, ... Appellant,

v.

Miles Insurance Agency, Inc..... Respondent.

INITIAL REPLY BRIEF OF THE APPELLANT

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ARGUMENT

NGM suffered a $300,000 loss that was proximately caused by Miles Agency's breach of its obligation to hold NGM harmless against liability incurred solely due to Miles Agency's errors in handling the Websters' policy application.

An award of damages in an action arising out of contract "serves to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990). "The measure of damages is the loss actually suffered by the contractee as the result of the breach." *Collins Holding Co. v. Landrum*, 360 S.C. 346, 350, 601 S.E.2d 332, 333–34 (2004).

Here, NGM demanded Miles Agency to discharge the liability that attached to NGM following Judge Hayes's order reforming the Websters' policy. Miles Agency refused to do that, breaching its contractual promise to hold NGM harmless against that liability. As a direct result of that breach NGM had to expend $300,000. Under the terms of the Agency Agreement, NGM should be entitled to recover that loss[1] from Miles Agency.

A. Miles Agency's errors and omissions in making the offer of UIM coverage led to the reformation of the Webster's policy; no other factor was at play.

In its brief's statement of facts, Miles Agency makes a point of citing Judge Hayes's order to show that NGM was also held not to have made a meaningful offer of

[1] NGM concedes that under the language of the Agency Agreement it is not entitled to the attorneys' fees.

underinsured-motorist coverage (UIM) to Mrs. Webster. It also cites the UIM statute as imposing that burden on the insurer and not the agent. (Respondent's Brief at 4.) True, the UIM statute requires the insurer to make the offer. *See* S.C. Code Ann. § 38-77-160 (2012). But the insurer may do so through an agent. From the statute's perspective the agent is the insurer. There is no mystery here. Under the principles of agency, the agent's acts vis-à-vis third parties are imputed to the principal—the insurer.

While Miles Agency acknowledges that it was the "primary contact with the Websters" it goes on to say that NGM "had a role as well," further citing § 38-77-350(E) of the South Carolina Code, which provides for UIM if "the insured fails or refuses to return an executed offer form . . . to the insurer." (Respondent's Brief at 4.) Miles Agency attaches undue significance to that language, however. Unlike subsection (B) of § 38-77-350,[2] its subsection (E) governs the situations where no intermediary, such as an agent or broker, is involved. *See Gov't Emps. Ins. Co. v. Draine*, 389 S.C. 586, 698 S.E.2d 866 (Ct. App. 2010). Moreover, Mrs. Webster signed the form while at Miles Agency and she neither failed nor refused to return it; Miles Agency retained its possession.

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[2] If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits.

S.C. Code Ann. § 38-77-350(B) (2012).

Throughout the entire application process Mrs. Webster interacted with no one but Miles Agency's employees. In fact, the record lacks any evidence that she spoke directly to anyone at NGM. It follows then that while both NGM and Miles Agency were sued for reformation of the policy only the latter's actions were scrutinized by the court.

Indeed, the court found that neither Richard Miles nor his employee, Candice Short, made a meaningful offer of UIM to Mrs. Webster. (*See* 2015-CP-29-810 Order.) This determination, and not determination of Janet Webster's intent, underlay the court's decision to reform the policy. Judge Hayes did not see it fit to make a finding as to Mrs. Webster's intent to obtain the coverage because it was irrelevant to the adjudication of the matter. Thus, NGM's liability to the Websters arose solely out of Miles Agency's errors and omissions.

Miles Agency cites the Supreme Court's opinion in *Ray v. Austin*, 388 S.C. 605, 698 S.E.2d 208, 698 S.E.2d 208 (2010), for the proposition that "whether Mrs. Webster would have purchased UIM coverage was relevant to the application of the *Wannamaker* factors." (Respondent's Brief at 11.) But that is not the case. Consider that in applying the *Wannamaker* test[3] Judge Hayes did not reference Mrs. Webster's

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[3] (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium.

State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 534 S.E.2d 555, 556 (1987).

testimony—that she would have bought UIM had it been explained to her. (2015-CP-29-810 Order at 6–8.) Furthermore, in *Ray v. Austin* the Court's finding that the insured intended to reject the coverage was not dispositive. The opinion merely indicates that the strict compliance with the *Wannamaker* criteria is not necessary if the evidence shows that the overarching purpose of the meaningful-offer requirement is nonetheless achieved: that is "to give [insureds] the opportunity 'to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Ray*, 388 S.C. at 614, 698 S.E.2d at 213 (citing *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 262–63, 626 S.E.2d 6, 12 (2005)).

Ray v. Austin involved a sophisticated purchaser of insurance coverage, Cintas Corporation. *Id.* at 608–10, 698 S.E.2d at 210–11. The company adopted a risk management strategy of declining UIM in those states where such coverage was not required. *Id.* at 210, 698 S.E.2d at 210. Cintas's employee, who suffered an injury in a traffic accident while on the job, sought reformation of the policy to include UIM on the grounds that the insurer's agent did not make a meaningful offer to Cintas. The Court examined the evidence and found that the insurer failed to meet one criterion of the *Wannamaker* test. The Court nonetheless concluded that the reformation of the policy would not be appropriate because the evidence showed that Cintas had been fully aware of the nature of coverage it was rejecting. *Id.* at 614, 698 S.E.2d at 213.

The evidence of the insured's intent to reject UIM coverage, however, did not prevent reformation in other South Carolina cases. *See, e.g., Ackerman v. Traveler*

Indem. Co., 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995); *American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993).

B. NGM did not contribute to, or compound, Miles Agency's errors or omission in making the offer of UIM coverage.

Under the indemnification clause of the Agency Agreement, NGM can recover from Miles Agency only "if [it] has not contributed to or compounded [Miles Agency's] error or omission" that was the basis of NGM's liability to its policy holder. (Agency Agreement at 3.) Thus, the relevant issue to be considered is whether NGM *contributed to* or *compounded* Miles Agency's omission of the increased premiums from the UIM offer form, its error in placing the check marks on the form instead of having Mrs. Webster do that, and the ultimate failure to intelligibly advise Mrs. Webster in a commercially reasonable manner of the increased premiums if UIM were to be selected.

The indemnification clause—and its phrase "contributed to or compounded such errors or omissions"—must be interpreted in accordance with the rules and canons of construction applicable to contracts generally. *Lauren Emer. Med. Spec. v. M.S. Bailey*, 348 S.C. 191, 195, 558 S.E.2d 531, 533 (Ct. App. 2002). "If that language is clear and unambiguous, it must be given its plain and usual meaning." *Id.* That meaning can be established through resort to dictionary definitions of the relevant words.

According to Merriam–Webster, "to contribute" is "to play a significant part in bringing about an end or result." *Merriam–Webster Dictionary* (online edition).[4] The New Oxford Dictionary of English defines "contribute to" as "help to cause or bring about." *The New Oxford Dictionary of English* 399 (1998). To compound, on the other hand, is to "put together (parts) so as to form a whole," "add to," or "make (something bad) worse; intensify the negative aspects of." *Merriam–Webster Dictionary* (online edition);[5] *The New Oxford Dictionary of English* 377 (1998). Thus, the following questions arise: Did NGM play a part in Candice Short's not filling in the blanks or not having Mrs. Webster herself place the check marks on the UIM offer form? Did NGM cause Miles Agency, in any way, not to advise Mrs. Webster of the availability of UIM in accordance with the *Wannamaker* criteria? Finally, were any of those failures made worse by any act or omission of NGM? The answer to all is no.

To be sure, NGM eventually received the forms, including the UIM offer form. (Brian Brannan Dep. 14:13–14:16, November 15, 2016.) And, as Miles Agency points out in its brief, "NGM reviewed the application for approval." (Respondent's Brief at 15.) But the purported failure to discover the form's deficiencies does not amount to contributing to or compounding the errors and omissions that had already been made. By the time the form was submitted to NGM, the proverbial genie was out of the bottle: the meeting with Mrs. Webster had already taken place and no meaningful offer of UIM was

[4] https://www.merriam-webster.com/dictionary/contribute (last visited May 22, 2020).
[5] https://www.merriam-webster.com/dictionary/compound (last visited May 22, 2020).

made during that meeting. The coverage was bound on the same day, without UIM, as reported to NGM by Miles Agency. (*See* Brennan Dep. 8:7–9:8.)

Arguably, NGM would have contributed to Miles Agency's failure to make a meaningful offer if NGM's underwriting and rate manuals commanded use of quote sheets or instructed the agents that entering the premiums onto the UIM offer form was not required. Quite the opposite was true, however; the instructions embedded in the form—the use of which was commanded by NGM—stated that the "increased premium charges *must be* filled-in by your insurance agent." (Short Dep. Ex. 1 at 5.)

Similarly, one cannot compound the errors resulting in Miles Agency's not making a meaningful offer. Those errors could not have been made worse or intensified by NGM as to bring about the effect noted by Judge Hayes. Again, no NGM's action or failure to act would have made the UIM offer, presented by Miles Agency, any less meaningful than it already was. Because NGM did not contribute to, or compound, Miles Agency's errors or omissions in making the offer of UIM coverage to Mrs. Webster, NGM's recovery cannot be barred.

C. *Fowler v. Hunter* is inapplicable.

Miles Agency's reliance on this Court's opinion in *Fowler v. Hunter*, 380 S.C. 121, 668 S.E.2d 803 (Ct. App. 2008), is misplaced and the discussion of the principles of equitable indemnification a red herring. (*See* Respondent's Brief at 8–10.) Although in its complaint NGM pleaded equitable indemnity (Compl. ¶¶ 30–36) that cause of

action was abandoned at the summary judgment stage of the litigation. (*See* NGM's Cross-Motion for Summary Judgment at 1; Hearing Tr. at 17:10–17:11.)

Furthermore, unlike in *Fowler*, where in the action underlying the insurer's equitable indemnity claim the insured sued for damages caused by professional negligence of the agent in failing to procure the requested coverage, *Fowler*, 380 S.C. at 124–25, 668 S.E.2d at 805, the Websters never claimed to have been damaged by anyone's failure to exercise due care in processing their insurance application. They sought reformation on the grounds that Miles Agency, and by extension NGM, failed to meaningfully offer them UIM coverage as mandated by the South Carolina law. If the Websters sued NGM for recovery in negligence, and NGM was held vicariously liable for Miles Agency's negligence that proximately damaged the Websters, then *Fowler* would be analogous and applicable, provided equitable indemnification was at issue. But that is not the case here.

CONCLUSION

Under plain language of the Agency Agreement, NGM had to show, and has shown, that (1) Miles Agency's errors and omissions in making the offer of UIM caused NGM's liability to the Websters; (2) NGM did not contribute to or compound those errors and omissions; (3) Miles Agency had a contractual obligation to hold NGM harmless against that liability; (4) Miles Agency failed to hold NGM harmless by discharging the liability upon NGM's demand, thus breaching the terms of the Agency

Agreement; (4) as a direct result of the breach NGM suffered $300,000 loss, which it would not have suffered had Miles Agency performed its contractual promise.

Accordingly, the appellant, NGM Insurance Company, reiterates its request for the reversal of the trial court's Order Granting Defendant's Motion to Alter or Amend, Denying Plaintiff's Motion for Reconsideration and Granting Summary Judgment to Defendant.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of the Appellant on counsel for the Respondent, Miles Insurance Agency, Inc., by depositing its copy in the United States Mail, postage prepaid, on May 22, 2020, addressed to Bernie W. Ellis, Esq., BURR & FORMAN, LLP, Post Office Box 447, Greenville, SC 29602.

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May 22, 2020

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Re: *NGM Insurance Company v. Miles Insurance Agency, Inc.*
Appellate Case No. 2019-001685
Our File No. 15248-382

Dear Madam Clerk:

Enclosed for filing please find the original and a copy of the Initial Reply Brief of the Appellant in the above-referenced matter. Please note that while the original due date was April 2, 2020, I have taken advantage of the 20-day extension granted by the South Carolina Supreme Court's Order Regarding Operation of the Appellate Courts During the Coronavirus Emergency (Appellate Case No. 2020-000447).

Please return a clocked-in copy of the brief in the return envelope enclosed for your convenience.

By copy of this letter, the brief is being served on the counsel for the Respondent, Miles Insurance Agency, Inc.

With kind regards I remain,

Sincerely,

Michal Kalwajtys

cc w/enc.: Bernie W. Ellis, Esq.

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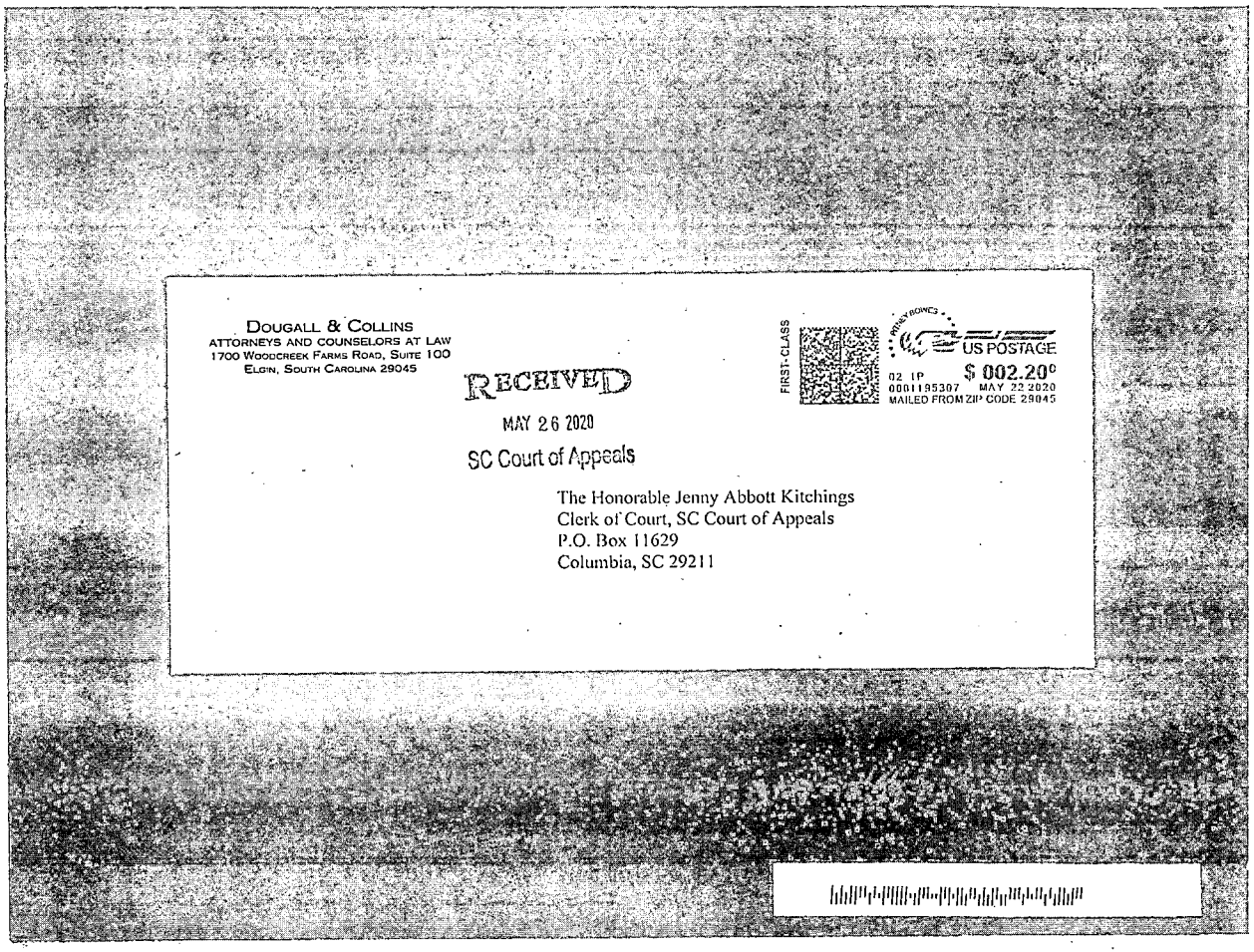

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