THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-CP-29-00794

Appellate Case No. 2019-001685

NGM Insurance Company,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

NGM Insurance Company ("NGM") brought this action against Miles Insurance Agency, Inc. ("Miles") on June 29, 2018, asserting causes of action for breach of contract, contractual indemnity and equitable indemnity. (R. 23-28). This action followed the judgment in a prior case, *Webster v. Miles Insurance Agency, Inc. and National Grange Mutual Insurance Company, n/k/a/ NGM Insurance Company*, Civil Action No. 2015-CP-29-00810 (the "Webster Case"). In the Webster Case, the trial court found that the defendants—NGM, an insurer, and Miles, an insurance agent—failed to make a meaningful offer of underinsured motorists (UIM) coverage to the

plaintiffs, the Websters. The trial court ordered the reformation of the Websters' automobile insurance policy to add UIM coverage. (R. 21-22).

In the Webster Case, NGM originally filed a cross-claim against Miles for indemnification. However, before trial, NGM and Miles agreed to strike that claim pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. After the trial court reformed the policy, NGM filed this action against Miles. (R. 23-28).

The reformation of the insurance policy by the trial court provided the Websters with $50,000.00 in UIM coverage and left NGM exposed to $350,000.00 in potential liability under the policy because at the time of the accident, the Websters had seven cars insured under the policy. Thus, South Carolina's stacking rules applied. Although the judgment in the Webster Case stated that the insurance agent was the party who offered the insurance to the Websters, the judgment did not find that NGM was without fault. (R. 15; 20; 21-22). Also, no judgment was entered against Miles. The judgment strictly ordered reformation of the policy. (R. 21-22). Accordingly, Miles had no direct liability to the Websters.

Following the trial court's order in the Webster Case, NGM demanded that Miles pay the Websters' settlement demand of $350,000.00. (R. 379-380). NGM asserted that Miles was liable for the Websters' damages pursuant to the Agency Agreement between NGM and Miles. (*Id.*). Miles disagreed and did not make the payment. Consistent with its February 22, 2016 letter, Miles believed it was not liable for the amounts claimed by NGM because NGM reviewed the application submitted by Miles and accepted it when the Websters first purchased insurance, and NGM would have been liable under the policy even if Miles had made a meaningful offer of UIM coverage. (R. 378).

Rather than appeal the Webster Case, which there were grounds to do under the factors set forth in *State Farm Mut. Auto Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), NGM made the business decision to settle with the Websters for $300,000.00. Miles was not involved in NGM's decision not to appeal. After NGM made the business decision to settle, it then, brought the instant action against Miles on June 29, 2018, seeking the recovery of the $300,000.00 it paid to the Websters, plus its attorney fees and costs in the Webster Case. (R. 23-28).

Miles answered on July 27, 2018 denying NGM's claim. (R. 35-38). On November 20, 2018, Miles moved for summary judgment, arguing, in part, that even if Miles had made a meaningful offer of UIM coverage, NGM would still have been liable under the Websters' policy because Mrs. Webster, who actually purchased the policy, testified at trial that had a meaningful offer been made, she would have purchased that coverage. (R. 43-45; 109-111). Therefore, NGM could not prove that Miles proximately caused NGM's liability to the Websters. (R. 43-45; 109-111). On February 15, 2019, NGM filed a cross-motion for summary judgment, arguing that the reformation of the insurance policy was entirely Miles's fault. (R. 47-70).

Judge Curtis initially denied both motions for summary judgment by order entered May 30, 2019. Her principal ground for denying Miles's motion for summary judgment was that Miles had not presented evidence that the Websters would have purchased UIM coverage had a meaningful offer been made. (R. 7-13).

On June 6, 2019, Miles filed its motion to alter or amend pointing out that the court had overlooked the excerpt of the trial transcript from the Webster Case that had been submitted to the court. (R. 71-73). That excerpt contained Mrs. Webster's testimony that she would have purchased

UIM coverage, even though it would have significantly increased the premiums, had she received a meaningful offer. *(Id.)*

Based upon that motion, Judge Curtis amended her prior order and granted Miles's motion for summary judgment. (R. 3-6). NGM timely appealed.

STATEMENT OF FACTS

In the Webster Case, the trial court found that the Defendants in this case have failed to give a meaningful offer of Underinsurance motorist coverage to Plaintiffs." (R. 21-22) (emphasis added). Undoubtedly, Miles was the primary contact with the Websters because Miles is the insurance agency that sold the Websters their policy. However, under the South Carolina Insurance Statute, NGM, as the insurer, had a role to play as well. The requirement to offer underinsured coverage set forth in S.C. Code Ann. § 38-77-160 is directed to the "insurer," not the agent. Further, if the insured fails or refuses to return an executed offer form for UIM coverage within thirty days to the insurer, the insurer is required to add uninsured and underinsured motorist coverages to the policy with the same limits as the insured's liability limits. S.C. Code Ann. § 38-77-350(E) (emphasis added).

The application form that Miles's employee, Candace Short, filled out contained an instruction regarding UIM coverage stating: "These increased premium charges must be filled-in by your insurance agent prior to your decision and signature." (R. 368). However, in the Webster Case, NGM, through Brian Brennan, testified that NGM received this form application from Miles by facsimile, reviewed the form (in which the increased premiums were not set forth), and accepted it. (R. 45-46; 342, lines 1-20). NGM testified that the form as filled out was acceptable to NGM because UIM coverage had been rejected, and, thus, the premium did not need to be filled in. (R. 338, lines 8-25; 340, lines 5-21; 342, lines 12-20). The trial court in the Webster Case obviously

did not have that opinion of the situation, finding as a matter of law that a meaningful offer was not made. NGM did not appeal that decision.

Mr. Webster was badly injured in an accident in 2012. He sued the allegedly at-fault driver in 2014. In 2015, he and Mrs. Webster filed the Webster Case seeking reformation of the policy to include UIM coverage. (R. 29-32). Following a bench trial, the Honorable John C. Hayes, III, found that a meaningful offer of UIM coverage had not been made to the Websters. (R. 21-22). NGM demanded that Miles indemnify NGM for the $300,000.00 it paid to settle with the Websters following the judgment in the Webster Case plus NGM's attorney fees. Following Miles's rejection of NGM's demand, NGM sued Miles, and Miles ultimately prevailed on summary judgment. (R. 3-6).

It is the law of the case that neither NGM nor Miles made a meaningful offer of UIM coverage to the Websters. However, Miles prevailed on summary judgment because NGM cannot prove that NGM would not have been liable for that coverage had Miles made a meaningful offer of UIM coverage on NGM's behalf. As a provider of automobile insurance, NGM is required to sell UIM coverage to an insured who wishes to purchase it up to the amount of the limits of liability that the insured purchases, S.C. Code Ann. § 38-77-160, and Mrs. Webster testified that she would have bought the coverage. (R. 111).

NGM's case rests on the language in the Agency Agreement with Miles stating:

> [T]he Agent will hold the Company harmless against liability it may incur to or on behalf of its policyholder, actual or alleged, based on error or omission of the Agent if the Company has not contributed to or compounded such error or omission.

(R. 390, ¶ XI).

When the Webster case was filed, NGM tendered the case to Miles demanding that Miles defend it. (R. 376-377). Miles declined based upon the fact that if the application was not

completed correctly, NGM was statutorily required to provide UIM coverage to the Websters under S.C. Code Ann. § 38-77-350(E). (R. 378). Miles also declined on the ground that under the facts of the case, NGM would not be able to show that it would not have accepted UIM coverage for the Websters. (*Id.*) There is an additional reason as well: the Agency Agreement does not require the agent, Miles, to defend an action brought against NGM. The Agent's contractual obligation is to pay a liability incurred because of an act or omission of the Agent, if NGM has not contributed to or compounded such error or omission. (R. 390, ¶ XI). (Emphasis added). That liability would not include an obligation to defend the case on behalf of NGM or the obligation to pay attorney fees.

Following the trial of the Webster Case, NGM settled with the Websters for $300,000.00 and brought this action. The trial court granted Miles's motion for summary judgment on the ground that NGM could not prove that the Websters would not have purchased UIM coverage had a meaningful offer been made. (R. 5).

STANDARD OF REVIEW

"'Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 578, 629 S.E.2d 375, 376 (Ct. App. 2006) (quoting *Café Assocs. Ltd. V. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "'In determining whether any triable issues of fact exist, the evidence and all the inferences that can be drawn therefrom must be viewed in the light most favorable to the nonmoving party.'" *Legette*, 368 S.C. at 578, 629 S.E.2d at 376 (quoting *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 468, 581 S.E.2d 496, 501 (Ct. App. 2003)). "'When reviewing the grant of summary judgment, the appellate court applies the

same standard applied by the trial court....'" *Id.* (quoting *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 861 (2002)).

ARGUMENT

I. EVEN IF MILES HAD FILLED OUT THE FORMS AS NGM CONTENDS ON APPEAL IT SHOULD HAVE, THE RESULT WOULD BE THE SAME.

Miles and NGM largely agree on the concept expressed in NGM's brief: "Thus, the agent's error or omission must be the basis of the company's liability." (Appellant's Brief, p. 10). In this case, the agent's error or omission was not the basis of the company's liability. The basis of the company's (NGM's) liability was that Mrs. Webster wanted to buy UIM coverage, and the law required NGM to provide it. Did Miles make an error? Yes, but did that error affect the outcome? No.

NGM argues that if Miles had filled out the forms correctly, a meaningful offer would have been made, and NGM would not have had to pay the $300,000.00 to the Websters in settlement. This analysis, while overlooking the errors of NGM in failing to make a meaningful offer (they reviewed and accepted the application), is just plain wrong. Based on the law of the case, NGM had to pay under any scenario. To demonstrate this, let us assume that Miles made no error and filled out the forms in a manner that NGM says they should have on appeal. Had a meaningful offer been made, the only evidence is, by way of Mrs. Webster's testimony, that Mrs. Webster would have purchased UIM coverage. Had Mrs. Webster elected UIM coverage, NGM was obligated to sell it to her. *See* S.C. Code §§ 38-77-160, -350(E) (requiring NGM to sell UIM coverage to the Websters). Thus, under NGM's theory of the case, if Miles had filled out the forms the way NGM says it should have, the result would be that the Websters would have had UIM coverage when Mr. Webster was involved in the automobile accident, and NGM would have been required to pay pursuant to that coverage—up to $350,000.00.

Let us juxtapose that with the facts that actually occurred, and let us ask one question: what difference does it make? The facts are that neither NGM, nor Miles made a meaningful offer of UIM to Mrs. Webster. As a result, after Mr. Webster's accident, the trial court reformed the policy to reflect that the Websters had UIM coverage. Because of the trial court's decision to reform the policy, NGM decided to settle and paid out less than it would have been required to had a meaningful offer been made in the first place—$300,000.00. Under either scenario, NGM has to pay UIM coverage for Mr. Webster's accident. NGM's argument, therefore, just simply does not make a difference in any type of legal analysis and should be ignored. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). This is why the trial court granted summary judgment to Miles, and this is why this Court should affirm.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF MILES IN FINDING THAT MILES IS NOT LIABLE TO NGM UNDER A THEORY OF CONTRACTUAL INDEMNIFICATION.

Miles's position with respect to indemnification was explained by this Court in *Fowler v. Hunter,* 380 S.C. 121, 668 S.E.2d 803 (Ct. App. 2008), *aff'd,* 388 S.C. 355, 697 S.E.2d 531 (2010). In *Fowler,* an insurance agency made a computer error causing the insured's automobile not to be covered under a four-million dollar umbrella policy when it was supposed to have been. *Id.* at 124, 668 S.E.2d at 805. As part of the settlement, the insurer paid the plaintiffs 1.5 million dollars under the umbrella policy and assigned its claim for equitable indemnification against the agent to the plaintiffs with any recovery to be split equally between the plaintiffs and the insurer. *Id.*

The insurance agency moved for summary judgment, which was granted. *Id.* at 124-25, 668 S.E.2d at 805. This Court reversed stating:

> We find [the insurer] Selective's position raises a question regarding the indemnification claim, but only if we can conclude Selective would not have issued

> the policy had the application been correctly submitted. In other words, if Selective would have issued the policy anyway, it was not damaged by Insurance Associates' negligence as it would have been exposed for the full four million dollars.

Id. at 129, 668 S.E.2d at 807.

Presumably, this case explains why NGM did not raise its claim for equitable indemnification on appeal. NGM cannot prove that it would not have issued UIM coverage. South Carolina requires NGM to issue UIM coverage if the insured selects it. S.C. Code § 38-77-160. In this case, the insured—Mrs. Webster—testified that had a meaningful offer been made, she would have selected the coverage. (R. 4-5). The issue here is whether the same principle applies under the indemnification provision of the Agency Agreement as it would to a claim for equitable indemnification.

Equitable indemnification requires the party seeking indemnification to prove: (1) "the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp,* 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). Applying those elements, this Court in *Fowler* held that unless an insurer can prove that it would not have provided coverage if the agent had not been negligent, the insurer has no claim for indemnification against the agent. Thus, the analysis in Roman numeral one would apply because NGM was required to provide UIM coverage to Mrs. Webster, who again, testified she would have bought it, had a meaningful offer been made. *See* S.C. Code §§ 38-77-160, -350(E) (requiring NGM to sell UIM coverage to the Websters).

The requirements of the contractual indemnification provision at issue in this case are quite similar to the elements of equitable indemnification. The contractual language in the Agency Agreement with Miles on which NGM relies states:

> [T]he Agent will hold the Company harmless against liability it may incur to or on behalf of its policyholder, actual or alleged, based on error or omission of the Agent if the Company has not contributed to or compounded such error or omission.

(R. 390, ¶ XI).

Under these contractual terms, as with equitable indemnification, NGM must show that Miles' error or omission caused NGM's liability to the Websters, *and* that NGM did not contribute to or compound the error or omission. This burden of proof is the same as the second and third elements of the requirements for equitable indemnification.[1] Thus, the reasoning in *Fowler* applies – the agent cannot have caused the insurer's liability if the insurer would have been liable to the insured regardless of the agent's error. The contractual language at issue here cannot be construed to mean that Miles can be held legally responsible for a liability NGM would have incurred had Miles done its job as NGM says on appeal Miles should have.

NGM's argument is that Mrs. Webster's "ex-post-facto" testimony should be ignored. But, this is an argument to the Court to ignore the evidence in the Record on Appeal, and this Court cannot ignore evidence in the Record on Appeal in resolving the issue before it. *See Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (The Court cannot ignore facts unfavorable to a party in deciding an appeal). Additionally, Mrs. Webster's testimony is not ex-

[1] The liability element of equitable indemnification would be covered by the fact that there is an indemnification agreement between the agent and the company.

post-facto, which would mean that it had retroactive force. She testified to what she would have done had she been properly told about UIM coverage. In the Webster Case, that testimony was directly relevant to the application of the *Wannamaker* factors.

In *Wannamker,* the South Carolina Supreme Court identified a four-part test to determine whether a meaningful offer had been made:

> (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.

Id. at 521, 354 S.E.2d at 556.

Contrary to NGM's position, whether Mrs. Webster would have purchased UIM coverage was relevant to the application of the *Wannamaker* factors. *Ray v. Austin,* 388 S.C. 605, 614, 698 S.E.2d 208, 213 (2010) ("On the other hand, if we were to find Lumbermans failed to make a meaningful offer of UIM coverage because it failed to offer coverage in more specific terms, we would reach the absurd result of reforming the insurance policy to give Cintas coverage it understood, did not want, and clearly rejected."). Had Mrs. Webster testified that she knew what UIM coverage was, knew it cost an additional premium and knowingly rejected it, the policy would not have been reformed. (R. 19) ("Evidence of the insured's knowledge or level of sophistication is relevant and admissible when analyzing, under *Wannamaker*, whether an insurer intelligibly advised the insured of the nature of the optional UIM coverage")).

Instead, she testified that she would have purchased the coverage. In fact, she testified in

the Webster Case in her deposition that she only found out in 2012, after her husband's accident, that she did not have UIM coverage. (R. 283, lines 5-15). Regardless of how that fact affected the outcome of the Webster Case, it closes the door on NGM's ability to show that Miles should pay NGM's liability to the Websters. The only evidence in this case is that if Miles had made no error, NGM would still have owed the money.

Miles would also respectfully show that even if Mrs. Webster had not so testified, a rejection of the insurer's defense under *Wannamaker*, implies a finding that the insured would have purchased the UIM coverage had a meaningful offer been made. *See Ray*, 388 S.C. at 614, 609 S.E.2d at 211 ("The facts of this case reveal that Cintas made a business decision to refuse UIM coverage."). Had *Wannamaker* been overruled by statute, it is conceivable, though it would be terrible policy, that an insured could knowingly reject UIM coverage but take advantage of an improperly filled-out form to get UIM after the fact. However, applying *Wannamaker*, Miles submits that a court's finding that a policy must be reformed to include UIM includes an implied finding that had an offer been properly made, the insured would have purchased it.

NGM's argues that if Miles had just filled out the form "correctly," Mrs. Webster would have signed it, and all would have been well. However, NGM has no means of proving that position. Presumably, the reason why the form has to be filled out with premiums included for the safe harbor to apply is that such thoroughness helps to explains the available UIM coverage to the insured. In fact, this was, in part, the reasoning behind the decision in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005), discussed below. Thus, to prove its case, NGM is left to speculation as to what Mrs. Webster would have done. The only evidence in this case, is that she would have purchased the coverage. Further, for reasons set forth below, because of the *Floyd* decision, issued after Mrs. Webster purchased this insurance, NGM is foreclosed from arguing that

Miles made an error or was guilty of an omission that would have altered the outcome of the Webster Case.

III. UNDER THE RULE ANNOUNCED IN *FLOYD V. NATIONWIDE MUTUAL INSURANCE CO.*, NGM WOULD HAVE BEEN LIABLE UNDER THE POLICY IN THE ABSENCE OF ANY ERROR OR OMISSION.

There was an additional problem highlighted by the trial court in the Webster Case that, while not made a basis for summary judgment in this case, could still serve as a basis for affirming the grant of summary judgment in this case. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling ... upon any ground(s) appearing in the Record on Appeal."). The Order in the Webster Case is part of the Record on Appeal.

The trial court in the Webster Case held the application was defective because Mrs. Webster did not actually fill out the form rejecting UIM coverage. (R. 18; 21-22). The determination that the insured's not filling out the form renders the application invalid for purposes of providing protection to the insurer regarding UIM coverage was not made until 2005 in *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005). In that case, the South Carolina Supreme Court acknowledged that it was answering a novel question of law submitted to it from the United States District Court as to whether an otherwise valid rejection of UIM coverage is invalid if the agent, rather than the insured, checks the boxes. *Id.* at 259, 626 S.E.2d at 10. The South Carolina Supreme Court ruled that the agent's checking the boxes invalidated the protection of the otherwise correctly-filled-out form. *Id.* at 263, 626 S.E.2d at 12. The South Carolina General Assembly quickly moved to change the outcome in *Floyd*, such that going forward, the agent could fill out the form. S.C. Code Ann. 38-77-350(B) (Act No. 395, 2006 S.C. Acts 3186).

Four years before *Floyd* was decided, Miles's employee, rather than Mrs. Webster, filled out the form, and the trial court in Webster held that that fact alone was sufficient to invalidate the

protective presumption for NGM. (R. 18; 21-22). Appellant cannot make the argument that Miles should have known how *Floyd* would be decided four years in advance. The United States District Court did not even know. Under the Agency Agreement, Miles was not obligated to update NGM as to changes in the law. (R. 388-392). Thus, once again, if Miles had filled out the entire form, with premiums filled-in, the policy would still have been reformed under the facts of this case.

IV. NGM CONTRIBUTED TO OR COMPOUNDED THE ERROR OR OMISSION BY APPROVING THE FORM AS SUBMITTED BY MILES.

As with equitable indemnification, NGM, under the terms of its own agreement, cannot claim indemnification if it has contributed to or compounded the error or omission. There is no question that NGM was not exonerated under the Order in the Webster Case. The Order in the Webster Case made the following findings:

- "On January 5, 2001, Defendants never made a meaningful offer of underinsurance coverage to the Plaintiffs Jerry and Janet Webster." (R. 15).
- "The Defendants have not shown that they orally or in writing told Plaintiffs her premium ranges.... The same goes for any material issued by Defendants after 2001 including declaration pages." (R. 20).
- "The Defendants in this case have failed to give a meaningful offer of Underinsurance motorist coverage to the Plaintiffs." (R. 21).
- "Defendants failed to present a meaningful offer per *Wannamaker* by offering no evidence of informing the Plaintiff of any additional premium to be considered to purchase under insurance [sic]." (R. 22).

In applying the language of equitable indemnification, NGM was not "exonerated from any liability for those damages." *Vermeer Carolina's, Inc.*, 336 S.C. at 63, 518 S.E.2d at 307 (Ct. App. 1999).

NGM should not have been exonerated.[2] Miles would respectfully show that NGM was not merely in a position to have noticed that the premiums for UIM coverage were not filled out. NGM actually reviewed the application for approval. (R. 176, line 7; R. 177, line 19); (R. 374-375). Brian Brennan of NGM testified that the form was received by NGM for approval and was accepted. (R. 338, lines 8-25; 340, lines 5-21; 342, lines 1-20). Thus, NGM was not free of fault in the problems with the form. Therefore, it cannot seek indemnification under the language of its own agreement.

V. EVEN IF THE RULES OF EQUITABLE INDEMNIFICATION SHOULD NOT BE ADAPTED AND APPLIED TO THE AGENCY AGREEMENT, NGM STILL CANNOT PROVE DAMAGES AGAINST MILES.

This case, as it exists on appeal, is essentially a breach of contract action. NGM demanded that Miles indemnify NGM under the terms of a contract, the Agency Agreement. Miles declined to do so, and now NGM is seeking damages based upon Miles's refusal.

To prove its claim, NGM has to prove, *inter alia,* that Miles proximately caused NGM's damages, *i.e.*, that if Miles had committed no error or omission, NGM would not have been liable under the policy. *Branche Builders, Inc. v. Coggins,* 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). The trial judge correctly ruled that NGM cannot make such a showing because the only evidence in the case regarding NGM's liability is that Mrs. Webster would have bought UIM coverage had a meaningful offer been made. (R. 5). NGM is thus, seeking to be better off than it would have been had Miles performed its duties perfectly.

Presumably, because NGM did not mention *Fowler* in its brief, NGM will take the position that they are not appealing the grant of summary judgment as to equitable indemnification.

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[2] This was an area in which the trial court did not agree with Miles in its original order denying summary judgment. (R. 7-13).

However, assuming that the principles in *Fowler* are not directly applicable, NGM still has the problem that, in contract law, the plaintiff must show that the defendant proximately caused plaintiff's damages. *Coggins,* 386 S.C. at 48, 686 S.E.2d at 202. *See also*, *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.,* 303 S.C. 74,77, 399 S.E.2d 8, 10-11 (Ct. App. 1990) ("In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed."). Therefore, even if this case did not involve an insurer and an agent, the plaintiff in a breach of contract must show that if the defendant had complied with the contract, the plaintiff would have had no damages. If plaintiff can show damages, it must prove to a reasonable degree of certainty what those damages are. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). This is the primary reason why even if NGM's were correct that the intent of the insured has no impact on the reformation of the policy, the insured's intent is relevant to whether the agent has to indemnify the insurer in a subsequent action. In a contract action, when it comes to damages, proximate cause matters.

For all the reasons set forth above, NGM failed to raise a genuine issue of material fact that Miles proximately caused damages that NGM would not have otherwise had. If Mrs. Webster had testified that she would not have purchased UIM coverage regardless of what she was told and the trial court still ruled in her favor, Miles would have a problem here. However, the only evidence here is that Mrs. Webster would have asked to buy the coverage and NGM would have sold it to her. Therefore, under a purely contractual analysis, Miles was properly granted summary judgment.

VI. UNDER THE TERMS OF THE AGENCY AGREEMENT, IF MILES WERE LIABLE TO INDEMNIFY NGM, MILES WOULD NOT BE LIABLE FOR NGM'S ATTORNEY FEES AND COSTS IN THIS CASE.

Even if NGM could claim indemnity for liability to its policyholder, it cannot claim attorney fees as a part of its recovery. The provision under which it is appealing allows NGM only to recover for liabilities it incurs. (R, 390, ¶ XI a.). Contrast that provision with subparagraph (b) of that section which provides that the "Company agrees to hold the Agent harmless against civil liability for damages and expenses, including the costs of defense, which he may be obligated to pay as a direct result of the failure of the Company to comply with the requirements of the Fair Credit Reporting Act...." (R. 390, ¶ XI b.). *See BP Oil Co. v. Federated Mut. Ins. Co., Inc.*, 329 S.C. 631, 640-41, 496 S.E.2d 35, 40 (1998).

Even NGM's brief argues that the "contractual promise entailed Miles Agency's duty to step in and pay the Websters upon the court's reformation order that established Miles Agency's errors." (Appellant's Brief, p. 12). The contract language relied upon by NGM did not require the Agent to defend the underlying case. Therefore, even were this Court to disagree otherwise with Miles's position, NGM has no right to recover its fees under the Agency Agreement for defending the Webster case.

CONCLUSION

For the foregoing reasons, Miles prays that the trial court's order granting summary judgment be affirmed.

July 7, 2020

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Miles Insurance Agency, Inc.

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.

CERTIFICATE OF COUNSEL

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

July 7, 2020

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