THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0067

101 Ocean Boulevard, LLC

v.

Foy Insurance Group, Inc.

Reply Brief of the Appellant, Foy Insurance Group, Inc.

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ARGUMENT

I. Ocean's Alleged Facts.

Ocean's brief misstates and misconstrues many facts. Some of the material ones are highlighted below:

Brief at 7:

- *Bellemore was never told about coverage limitations.*
  This is inaccurate. As SanSouci told Bellemore, he had a surplus lines policy, and needed to "take the time to review [his] policy . . . [it] is . . . subject to many limitations, exclusions, and conditions." T. 216, Ex. D, App., Vol. V. at 32, Ex. K., App., Vol. V. at 42.
- *SanSouci suggested the best available coverage.*
  This is misleading. SanSouci suggested coverage based on information provided by Bellemore. T. 215. Bellemore represented that building systems had been updated in the 1990s, Ex. M, App., Vol. V. at 47. SanSouci's focus was making sure the property was insured to value, and discussed replacement cost limitations. T. 172, 188-89, 213.

Brief at 8:

- *Bellemore moved business to Foy.*
  This is misleading. Bellemore asked Foy to compete against, and selected other agencies, never exclusively using Foy. T. 97-98, 101-04.
- *Bellemore followed Foy's recommendations.*
  This is inaccurate. On numerous occasions, Bellemore did not

follow SanSouci's recommendations. T. 63-64, 85, 222. He conducted his own investigations regarding coverage needs, not relying on SanSouci. T. 85, 131.

Brief at 9:

- *Bellemore had 50 policies through Foy.*

  This is a misstatement. Bellemore never testified he had 50 policies through Foy. T. 83. Many of Bellemore's business interests, including his largest, were insured through other agencies. T. 120-21.

- *Bellemore's other coverages were small, and SanSouci recommended other agencies.*

  This is inaccurate. Bellemore testified he obtained coverages through other agencies for many of his large business entities. T. 96-100, 103-05, 120-21, Ex. S, App., Vol. V at 58. SanSouci explained she "could only take the [other] policy on face value, as [she] was not privy to his conversations with [other agencies] or any of the information that he had provided to them." T. 197, Ex. S, App., Vol. V at 58.

- *Bellemore paid Foy hundreds of thousands of dollars.*

  This is misleading. Bellemore paid approximately $350,000 in premiums over ten (10) years; Foy received only the standard commissions (averaging 10%, or $3,500 per year), and no other compensation. T. 200-01.

Brief at 10:

- *Boland testified that any coverage may be available in the market at the right price.*

  This is misleading. Boland testified, in general, if an individual wanted to pay $900,000 for $1,000,000 in coverage he would likely be willing to write the policy, and in theory an insurance company can cover unique situations depending on risk and price. App., Vol. I at 161, 163. Boland unequivocally testified no additional L&O coverage was available for Ocean. App., Vol. I at 144-45; T. 484, 561-62.

- *Foy never gave Bellemore L&O options.*

  This is misleading. No additional L&O coverage was available. App., Vol. I at 144-45; T. 484, 561-62.

Brief at 12:

- *Foy could not locate coverage after the fire.*

  This is inaccurate. After the fire, SanSouci located both liability and property coverage using the $1,000,000 valuation provided by Bellemore's contractor. T. 229-30, Exs. BB, CC, DD, App., Vol. V at 103-04, 108.

Brief at 13:

- *Any restoration of the existing Ocean building after the fire needed to comply with current Hampton codes.*

  This is inaccurate. The code enforcement officer has discretion, along with the fire chief, to work with the applicant to modify provisions of the code. T. 264-65.

- *The replacement cost of the Ocean building after the fire was $1,058,304.*

  This is inaccurate. This represents the *damaged* portion of the building. T. 160. The remaining, *undamaged* portion of the building was valued at approximately $1,000,000 by Bellemore's contractor. T. 134-35, Ex. BB, App., Vol. V at 103.

Brief at 14:

- *Ocean could have obtained $900,000.00 in L&O coverage.*

  This is misleading. No witness testified additional L&O coverage was available. Siegel clarified his example "doesn't bear any relevance" to Ocean's specific case. T. 356-60.

Brief at 15:

- *Milnes stated agents, like SanSouci, should have superior knowledge of commercial policy limitations.*

  This is misleading. Milnes testified *all* agents who sell commercial policies should have "superior knowledge of endorsements and limitations in commercial policies *than the general public*." T. 520 (emphasis added). But in New Hampshire, agents only have a duty to advise if a special relationship exists. *Sintros v. Hamon*, 148 N.H. 478, 480 (2002).

These are examples demonstrating that Ocean's statement of facts is not fully accurate, and should be viewed with caution.

II. Ocean's Interpretation of *Sintros* is Inaccurate.

Ocean acknowledges many other jurisdictions require similarly situated plaintiffs to prove one of a set of factors from an "exclusive list of circumstances under which a special relationship may be established," but nonetheless argues that *Sintros* permits a finding of special relationship even if a plaintiff fails to prove any of the factors expressly articulated by this Court in its decision. Ocean's Brief, at 19.

Sintros, at 482, identified the factors other states have articulated in determining whether a "special relationship" existed, and then applied each and every factor to the facts of the case, establishing a factor-based precedent. *Id*. at 483. The Court then discussed each factor in the test before concluding that the relationship was not special, and was nothing more than a standard insurer-insured relationship. *Id*. at 484. Moreover, in articulating the special relationship test, this Court, for support, cited to the same jurisdictions Ocean argues incorrectly determined a factor-based approach is needed. *Id.* at 480-82 (citing *Harts v. Farmers Ins. Exch.*, 597 N.W.2d 47, 48 (Mich. 1999), *Nelson v. Davidson*, 456 N.W.2d 343, 344 (Wis. 1990), and *Murphy v. Kuhn*, 682 N.E.2d 972, 974 (N.Y. 1997)).

Allowing plaintiffs to establish a special relationship without proving at least one of the *Sintros* factors is contrary to the backbone of the insurance industry, bad policy, and would "turn the entire theory of insurance on its ear." *Franklin Cty. Comm'n v. Madden*, 2019 Dist. LEXIS 108535, *14, *18 (N.D. Ala. June 28, 2019) (clarifying Alabama requires proof of enumerated special relationship factors). Insurance agents would not know whether a special relationship exists, requiring an agent to

independently review a client's subjective financial situation as well as other factors (such as reviewing code requirements in municipalities where a client owns old buildings). As succinctly stated by one court:

> the amount of insurance coverage is a tradeoff between cost and risk, and risk is part subjective and dependent on other available resources . . . thus, the question of adequacy of coverage is necessarily a matter of personal opinion . . . [and] an agent or broker cannot readily verify the accuracy of financial information that an insured provides, and must instead rely on the information supplied by the insured. Absent full disclosure by an insured, which an agent or broker cannot compel, an agent or broker would have no way to ascertain an insured's exposure.

Sadler v. Loomis Co., 776 A.2d 25, 40 (Md. App. 2001) (quotations and citations omitted). In *Sintros*, this Court has already gone further than jurisdictions that refuse to acknowledge a heightened duty based on a special relationship. *See Aldridge v. Highlands Ins. Co*., 2016 W. Va. LEXIS 538, *14 (W. Va. June 17, 2016) ("this court has never recognized an insurance agent's 'duty to advise' an insured about coverage nor the 'special relationship' exception that would trigger such a duty."). The scope of *Sintros* should not be expanded as advocated by Ocean.

Further, contrary to Ocean's argument, there is no evidence in the record regarding the contours of a standard relationship, or that Ocean satisfied any *Sintros* factor.

Ocean relies on the testimony of Milnes and Siegel to support its argument that there is evidence of a standard relationship. Ocean's Brief, at

19.[1] Siegel did not discuss the contours of a standard relationship; in the passage cited by Ocean, Siegel explained "the standard of care [] based on a special relationship between the parties." T. 331. Milnes unequivocally testified the relationship was not a special relationship, and his testimony cannot support a finding that the relationship was anything other than a standard relationship. T. 473; *see also Nobbe v. Wolfgram/Tritt & Assocs.*, 2007 Minn. App. Unpub. LEXIS 770, *10 (Minn. App. July 31, 2007) (stating plaintiff "attempts to use the testimony of the agency's expert witness to support her argument that a special relationship existed. But the agency's expert specifically testified that the facts in this case did not come close to establishing such a relationship.").

Similarly, the record lacks any evidence the *Sintros* factors have been satisfied. Ocean argues there is evidence establishing three *Sintros* factors: (1) a long established relationship of entrustment in which the agent clearly appreciates the duty of giving advice; (2) an agent holding herself out as a highly-skilled expert coupled with reliance by the insured; and (3) a course of dealing over time where an agency was on notice that its advice was being sought and relied upon. For support, Ocean includes a list of facts it alleges satisfies these three factors. Ocean's Brief, at 21-22.

[1] Ocean's assertion that Foy waived its argument regarding "something more" than a standard relationship is unfounded. In its directed verdict motion, and renewed motion, Foy argued there was "insufficient evidence to submit to the jury" regarding "whether a special relationship exists or not." T. 394; T. 600 ("there's insufficient evidence of a special relationship here as that has been defined by the Supreme Court in the *Sintros* case for a jury to so find."). As defined by this Court, *Sintros* requires "something more than the standard insurer-insured relationship." 148 N.H. at 481.

Many of the "facts" alleged by Ocean are a recitation of the assertions in its statement of facts, and are addressed above.

None of them establishes that Foy "*clearly appreciated* the duty of giving advice," "was on *notice* that its advice was being *sought and relied upon*," or that Foy held itself out as a highly-skilled expert with reliance.

The facts that Ocean and Foy had a relationship since 2006, had prior dealings, communicated regarding other policies, and SanSouci previously provided recommendations to Bellemore, do not satisfy the requirements of the *Sintros* factors. Ocean's attempt to frame this issue as a matter of "conflicting evidence" misconstrues its burden under *Sintros,* requiring Ocean to prove that Foy clearly appreciated its duty, or that Foy was on notice its advice was sought and relied upon. Bellemore's testimony cannot, either directly or by inference, satisfy Ocean's burden to prove Foy's understanding of the relationship.

The evidence established Foy treated Ocean similarly to any other commercial client, knew it was one of several agencies Bellemore utilized, relied on Ocean to signal when it wanted to make coverage changes, knew Bellemore conducted his own research regarding coverage needs, and knew Ocean did not rely on Foy's recommendations as, on multiple occasions, he rejected them. T. 85, 230-31. Foy could not have clearly appreciated its duty or understood it was on notice its advice was sought and relied upon when it is undisputed Bellemore did not appreciate or rely on Foy's advice.

Similarly, SanSouci and Foy did not hold themselves out as experts, Bellemore was told he was responsible for reviewing his own policies, and SanSouci's AAI designation is not evidence of highly skilled expertise. T.

216, 563-64, Ex. D, App., Vol. V at 32, and Ex. K, App., Vol. V at 42; *see also Buelow v. Madlock*, 206 S.W.3d 890, 894 (Ark. App. 2005).

III. Ocean Misconstrues the Causation Issue.

Ocean argues it is immaterial whether additional L&O coverage is available because Foy breached its duty, and Ocean suffered its damages, *before* the fire. Ocean's Brief, at 24. This argument contradicts the complaint and evidence at trial. App., Vol. I at 18 (Complaint, ¶¶ 65, 66) (Foy "breached its duty by failing to inform the Plaintiff it did not have full coverage . . .[and] Foy should have recommended that the Plaintiff increase the limits of L&O coverage to an amount that would provide full coverage.").

At trial, Ocean did not prove damage as a result of its inability to "mitigate its risk arising from inadequate coverage," Ocean's Brief, at 24, but instead sought damages associated with expensive code upgrades it allegedly needed to pay for as a result of its lack of sufficient L&O coverage. T. 701. Ocean's attempt to recast its injury as Bellemore's failure to mitigate risk is a red herring. Throughout this case, Bellemore has alleged Ocean was damaged because it lacked sufficient L&O coverage. Whether Bellemore would have told tenants not to smoke or allegedly would have installed sprinklers has no bearing on whether, as alleged in its complaint, Ocean suffered damage *after* the fire because it lacked adequate L&O coverage.

Finally, Ocean's factual assertions on causation are inaccurate. There was no conflicting evidence regarding the availability of additional

L&O coverage for Ocean – it was not available. App., Vol. I at 144-45; T. 484, 561-62.

IV. Improper Jury Instructions and Verdict Form Warrant a New Trial.

Ocean does not dispute the verdict form presented an incorrect causation standard to the jury, instead arguing it does not matter because the instructions accurately reflected the law. Ocean's Brief, at 25. This argument ignores precedent: a new trial is warranted when the "verdict form may have misled the jury by suggesting that it could hold the defendant liable . . . without finding" all elements of a cause of action. *Demetracopoulos v. Wilson*, 138 N.H. 371, 374 (1994).

Furthermore, *Madeja v. MPB Corp.*, 149 N.H. 371 (2003), cited by Ocean, is distinguishable. *Madeja* did not involve a situation where the verdict form articulated an incorrect legal standard to the jury. Rather, there, the defendant claimed the verdict form should have recited the affirmative defenses as articulated in the instructions. *Id.* at 389-90. Unlike *Madeja*, the verdict form here expressly told the jury to find in favor of Ocean on causation regardless of whether the jury found Ocean satisfied both required elements of causation.

Ocean also ignores law pertaining to the L&O instruction. The State Building Code incorporates the International Existing Building Code, allowing municipal officials to exercise discretion in waiving certain provisions. RSA 155-A:1, IV. All municipalities in New Hampshire must maintain codes "which do not prohibit minimum implementation and enforcement of the state building code." RSA 155-A:3, I. Ocean argues

the Town of Hampton has adopted provisions of its code different from the State Building Code, but Town officials expressly testified to the adoption of the State Building Code, and the applicable code allows for discretion in waiving provisions of the code consistent with the International Existing Building Code. T. 260, 264-65.

Ocean also argues the record lacks evidence regarding whether waivers of certain provisions of the code were "likely or even feasible with respect to Ocean." Ocean's Brief, at 30. This is precisely the point. No one knows what provisions of the code Ocean actually would have been required to satisfy, because it tore down the building without discussing any possible code modifications or waivers with Town officials or his contractors. Instructing the jury that Ocean was required to meet all provisions of the code was legally inaccurate, not supported by the record, and prejudicial.

Ocean misinterprets the law regarding Foy's proposed damages instruction. In *Elwood v. Bolte,* 119 N.H. 508 (1979), this Court remanded for a new trial in order to apply the proper computation of damages. *Id.* at 511. Courts have held, in this context, the proper measure of damages is the cost incurred as a result of a lack of coverage. *See Maldineo v. Schmidt*, 52 So.3d 1154, 1164 (Miss. 2010) (appellants "clearly have damages, as they have incurred uninsured losses caused by Hurricane Katrina. The central inquiry is causation – if [appellee] breached his duty as an insurance agent ... ."). Accordingly, Foy's instruction properly captured the measure of damages based on Ocean's policy, and should have been given. App., Vol. I at 42, App., Vol. III at 40.

V. Ocean's Closing Argument Was Plain Error.

Ocean's closing argument warrants a new trial. Imploring the jury to use its voice and send a message is, as a matter of law, improper and constitutes error. *Laramie v. Stone*, 160 N.H. 419, 434 (2010); *Murray v. Developmental Servs. of Sullivan County*, 149 N.H. 264, 270 (2003). The error was plain as it was a "clear" and "obvious" violation of this Court's holding in *Laramie* and *Murray*. *See also United States v. Olano*, 507 U.S. 725, 734 (1993) ("'plain' is synonymous with 'clear' or, equivalently, 'obvious.'"). No contemporaneous objection is required when an error is plain. In the context of this case, the cumulative erroneous statements affected Foy's substantial rights and seriously affected the fairness of the case, as Ocean's closing argument impermissibly told the jury to use its power to send a message to the insurance industry by issuing a record-setting verdict and change the way it (including Foy) sells insurance. *Id.* ("the third and final limitation . . . is that the plain error affect substantial rights . . . [which] means that the error must have been prejudicial.").

VI. Admission of the Checklist Was Error.

Exhibit 27, App., Vol. IV at 101, was not admitted as a "demonstrative" exhibit. It was advocated as, and admitted for, direct evidence of the applicable standard of care, *i.e.*, Foy should have used a checklist. T. 544-45. Its admission over Foy's objection was improper.[2]

[2] This checklist is also the subject of an appeal of the post-trial discovery order issued on May 1, 2019 (Case No. 2019-0444), and a petition for new trial filed on July 23, 2019 (Docket No. 216-2019-CV-00640).

CONCLUSION

For these reasons, and those in Foy's original Brief, the trial court should have directed a verdict for Foy, or alternatively, granted a new trial.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within reply brief complies with Sup. Ct. R. 26 (7) and contains 2,958 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

Foy Insurance Group, Inc.,

By its Counsel,

UPTON & HATFIELD, LLP

Date: August 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded through the Court's Electronic Filing System to John G. Cronin, Esq., opposing counsel of record.

/s/ Russell F. Hilliard
Russell F. Hilliard