REL: 09/30/2010

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2010

1090684

Harriet Maloof and John A. Maloof, Jr.

v.

John Hancock Life Insurance Company and Parker A. Glasgow

Appeal from Jefferson Circuit Court
(CV-08-900797)

STUART, Justice.

Harriet Maloof and John A. Maloof, Jr., sued John Hancock Life Insurance Company ("John Hancock") and Parker A. Glasgow, an independent insurance agent, in the Jefferson Circuit Court, alleging fraudulent misrepresentation, suppression, breach of contract, negligent and/or wanton failure to procure insurance, and breach of fiduciary duties arising out of Glasgow's sale of two universal life-insurance policies to the Maloofs in 1989 and 1992. The trial court entered a summary judgment in favor of John Hancock and Glasgow on all the claims, and the Maloofs appeal as to all the claims except the breach-of-contract claim. We affirm.

I.

John Maloof first became acquainted with Glasgow in approximately 1969 when they met at the University of Alabama at Birmingham Hospital where John worked as a cardiologist; Glasgow sold insurance to other physicians at the hospital. Over the next two decades, John purchased at least two life-insurance policies from Glasgow, as well as disability insurance. In 1989, after consulting with Glasgow, John elected to replace five existing life-insurance policies providing approximately $275,000 of coverage with two new policies issued by Manulife Financial.[1] When questioned by Glasgow's attorney during his deposition, John explained that

[1]Manulife Financial acquired John Hancock in approximately 2004 and now conducts most of its business in the United States as John Hancock.

the object of these transactions was to provide funds to pay the estate taxes that would be due upon John's death:

> "The reason that these policies were even being discussed was because we were talking about estate planning and we got into a discussion of -- of estate taxes and things like that. The entire reason for even considering these policies was to fund estate tax planning. Parker was kind enough to make me an appointment with [Birmingham attorney] Kirby Sevier, who's an estate planner, and arranged it, and we went over there together. The whole purpose of the policies was to take care of estate planning. That was the reason for the policies."

John also testified that Glasgow assured him that taking out these policies was in his and Harriet's best financial interests. One of the policies purchased by John in 1989 was a $500,000 universal-life policy; the other policy was a renewable and convertible $500,000 term-life policy with an initial term of three years. In 1992, John purchased another $500,000 of life insurance from Manulife through Glasgow; this coverage was another universal-life policy with a face value of $250,000 and a $250,000 term rider. John stated in his deposition that this policy was also purchased as an estate-planning move to provide liquidity for any estate taxes due upon his death and that Glasgow again represented that it was in John's best financial interests to purchase the policy. All the policies named Harriet as the beneficiary.

During the next several years, the Maloofs received quarterly bills for each of the three insurance polices and paid them as they came due. The quarterly payment for the 1989 universal-life policy was $1,275.25, the quarterly payment for the 1992 universal-life policy was $1,418.14, and the quarterly payment for the 1989 term-life policy was initially $493, but increased to $1,028 in 1992 and to $1,633 in 1995. In 1998, the Maloofs elected not to renew the term-life policy and it was canceled. Thereafter, the Maloofs continued to pay the quarterly bills for the two universal-life policies without incident until 2007.

On January 4, 2007, the Maloofs made what would ultimately be their last quarterly payment of $1,418.14 on the 1992 universal-life policy, and on February 12, 2007, the Maloofs made what would ultimately be their last quarterly payment of $1,275.25 on the 1989 universal-life policy. The Maloofs subsequently received a notice from John Hancock dated February 13, 2007, notifying them that an additional premium payment of $5,265.12 was required by April 15, 2007, in order to continue the 1992 universal-life policy until July 13, 2007; otherwise, the notice informed them, the 1992 universal-life policy would terminate on April 15. They later received another notice from John Hancock, dated May 29, 2007, informing them that an additional premium payment of $7,573.15 was required by July 29, 2007, in order to continue the 1989 universal-life policy until November 29, 2007; otherwise, this notice informed them, that policy would terminate on July 29. After receiving these notices, John contacted Glasgow, who had retired in 2000, to inquire why his policies would be terminating, even though he had timely paid the premiums on the policies for approximately 18 years. John states that Glasgow told him that he would investigate the matter, and it appears that Glasgow did subsequently contact John Hancock; however, John states that Glasgow ultimately told him that there was nothing Glasgow could do. At his deposition, John testified that he decided not to pay the additional premiums requested by John Hancock to keep his policies in effect because doing so would essentially be "just throwing money away." The Maloofs subsequently received notice from John Hancock that the 1992 universal-life policy was terminated on

April 15, 2007, and that the 1989 universal-life policy was terminated on July 29, 2007.

On March 13, 2008, the Maloofs sued John Hancock and Glasgow in the Jefferson Circuit Court, alleging fraudulent misrepresentation, suppression, breach of contract, negligent and/or wanton failure to procure insurance, and breach of fiduciary duties arising out of their purchase of the universal-life policies in 1989 and 1992. The gravamen of their complaint was that Glasgow had misrepresented to them that purchasing those insurance policies was in their best financial interests and that the policies would provide benefits that would be available to pay any estate taxes due upon John's death when, in fact, based upon the projected insurance and interest rates at the time of sale, those policies would likely lapse when John was approximately 78 years old unless the Maloofs at some point substantially increased the amount of the premiums they paid. On April 16, 2008, John Hancock moved the trial court to stay all proceedings pending a ruling from the United States District Court for the Southern District of California on whether the Maloofs' action was barred by the settlement of a class action overseen by that court in 1998 in which allegedly deceptive sales practices used by Manulife between 1982 and 1993 were challenged; Glasgow subsequently joined in that motion. On June 19, 2008, the trial court entered a limited stay during which some preliminary discovery could still be conducted; however, that stay was lifted in its entirety effective November 19, 2008, after the United States District Court for the Southern District of California held that the Maloofs' claims were not covered by the settlement of the previous class action except to the extent that the Maloofs alleged that the contract charges on their life-insurance policies had been misrepresented.

On December 29, 2008, the trial court set an initial trial date of September 21, 2009; that trial date was later continued until February 1, 2010. On October 22, 2009, Glasgow and John Hancock filed their first formal answers to the Maloofs' complaint. On November 2, 2009, the Maloofs moved to strike those answers, arguing that they were untimely under Rule 12(a), Ala. R. Civ. P., which requires defendants to "serve an answer within 30 days after the service of the summons and complaint." Accordingly, the Maloofs argued, John

Hancock and Glasgow's answers were filed over 550 days late. On December 7, 2009, the trial court denied the Maloofs' motion. The Maloofs then petitioned this Court for a writ of mandamus directing the trial court to strike John Hancock's and Glasgow's answers as untimely; however, on January 22, 2010, this Court denied that petition, without an opinion (No. 1090375).

On November 24, 2009, Glasgow moved the trial court to enter a summary judgment in his favor on all counts, and, on November 25, 2009, John Hancock did the same. The Maloofs filed responses opposing the motions, but, on January 5, 2010, the trial court entered an order granting the motions of John Hancock and Glasgow and entering a summary judgment in their favor. On February 10, 2010, the Maloofs filed their notice of appeal to this Court.

II.

The Maloofs first make the general argument that the summary judgment entered by the trial court was erroneous because, they say, it was based at least partly upon affirmative defenses asserted by John Hancock and Glasgow; however, the Maloofs argue, those defenses had been effectively waived because John Hancock and Glasgow did not assert them until they filed their untimely answers more than 550 days after the answers were due. See Baldwin County Elec. Membership Corp. v. City of Fairhope, 999 So. 2d 448, 461 (Ala. 2008) (stating that the appellant had waived affirmative defenses first asserted in an untimely pleading). However, in both their motion to strike John Hancock's and Glasgow's answers and their brief filed with this Court, the Maloofs fail to address the significance of the stay entered by the trial court on June 19, 2008; rather, they argue only that the answers were late because they were not filed within 30 days after the summonses and complaints were served. In fact, the order entered by the trial court on June 19, 2008, granting a limited stay states that "either party shall file an appropriate d[i]sposit[i]ve pleading to the court" when the United States District Court for the Southern District of California ruled on John Hancock's motion asserting that the Maloofs' claims were part of a 1998 class action presided over by that court, thus indicating that the defendants' obligations to file merits-related pleadings or motions were in abeyance during the duration of the stay. Accordingly, John Hancock's and Glasgow's answers were not late merely because, as the Maloofs argue, they were not filed by the 31st day after the summonses and complaints were served. Instead, the relevant issue would instead be whether the answers were late because they were not filed for almost a year after the stay was lifted on November 19, 2008. However, this is not an issue that was raised by the Maloofs in either the trial court or in their brief filed with this Court. They instead have argued exclusively that the answers were late because they were not filed within 30 days after the summonses and complaints were served. This Court will not consider an argument not raised in the trial court or in the appellate briefs; accordingly, there is no basis on which to hold that the trial court erred in failing to grant the Maloofs' motion to strike John Hancock's and Glasgow's answers. See Yellow Dog Dev., LLC v. Bibb County, 871 So. 2d 39, 41 (Ala. 2003) ("[T]his Court will not 'reverse a trial court's judgment based on arguments not presented to the trial court or based on arguments not made to this [C]ourt.'" (quoting Brown v. Wal-Mart Stores, Inc., 864 So. 2d 1100, 1104 (Ala. Civ. App. 2002))).

III.

We next consider the Maloofs' arguments that the trial court erred by entering a summary judgment in favor of John Hancock and Glasgow on the Maloofs' fraudulent-misrepresentation and suppression claims, their negligent- and/or wanton-failure-to-procure-insurance claim, and their breach-of-fiduciary-duties claim; the Maloofs do not challenge the judgment entered on their breach-of-contract claim. We review these arguments pursuant to the following standard of review.

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

The Maloofs' fraudulent-misrepresentation and suppression claims were premised on the allegation that Glasgow misrepresented to the Maloofs that the universal-life policies were in their best financial interests and that they would provide funds that would be available to pay the estate taxes due upon John's death, while at the same time suppressing from them the facts that the policies were actually not in their best interests and that benefits from those policies would not be available to pay estate taxes due upon John's death if he lived beyond approximately age 78. To merit consideration by a jury, both of these claims require some evidence of reasonable reliance, that is, that the Maloofs reasonably relied upon the alleged false representations, Boswell v. Liberty Nat'l Life Ins. Co., 643 So. 2d 580, 581 (Ala. 1994), or that they reasonably relied "on the state of affairs as it appeared in the absence of the suppressed information." Houston County Health Care Auth. v. Williams, 961 So. 2d 795, 814 (Ala. 2006). In its order granting John Hancock's and Glasgow's motions for a summary judgment, the trial court explained its conclusion that evidence of reasonable reliance was lacking:

> "Counts one and two of [the Maloofs'] complaint allege fraud and suppression, and the undisputed facts of this case place it squarely within the facts and holding of the Alabama Supreme Court's recent decision in AmerUS Life Insurance Co. v. Smith, 5 So. 3d 1200 (Ala. 2008). As in this case, AmerUS involved a plaintiff insured filing suit for substantially similar claims of fraudulent misrepresentation and suppression against his insurer and independent insurance agent. The similarities between the cases are striking insofar as: (1) both AmerUS and this case arise from the sale of universal life policies; (2) both AmerUS and this case involve misrepresentations as to the advisability of plaintiffs' purchase of the universal life policies; the replacement of life insurance policies owned by the plaintiffs, the amount of premiums to be paid, and the length of time in which those premiums would carry the policies; (3) in both AmerUS and this case, the universal life policies were sold by independent insurance agents who were appointed to sell the products of the insurance company and who sold a substantial amount of business through the insurance company; (4) in both AmerUS and this case, the universal life policies issued by the insurance company called for the payment of 'planned premiums'; (5) in both AmerUS and this case, the universal life policies advised the plaintiffs to read their policy carefully; (6) in both AmerUS and this case, the universal life policies provided the plaintiffs with a 'free-look' provision; (7) in both AmerUS and this case, the universal life policies were self-described as 'Flexible Premium Adjustable Life Policies'; (8) in both AmerUS and this case, the universal life policies contained statements disclosing that the policies would lapse if sufficient premiums were not paid to keep the

policies in force; (9) in both AmerUS and this case, plaintiffs were provided documents both at the time of issuance of the policies and afterwards, including annual statements, showing the performance of the policies based upon assumed interest rates and indicating policy lapses, all of which contradicted the alleged misrepresentations made by the insurance agent; and (10) in both AmerUS and this case, it was communicated to the plaintiffs that additional premiums beyond the planned premium would be required to sustain the policies. In AmerUS, the communication was verbal; here, the communication occurred in two separate letters in 1992 and 1997 written by the insurance agent and received and kept by the [Maloofs]. Based upon the holding in AmerUS and its overwhelming application to the present case, this court finds, as a matter of law, that [the Maloofs] cannot establish the necessary element of reasonable reliance in order to sustain their fraud and suppression claims. For these same reasons, [the Maloofs] were likewise put on notice of the alleged fraud more than two years prior to the commencement to this action, and, therefore, these claims are barred by the applicable statute of limitations.

"Additional grounds bar some of the misrepresentations claimed by [the Maloofs]. The statement allegedly made to plaintiff John Maloof as to what was in his best financial interests is a statement of opinion and not a statement of a material fact. Moreover, the statement that the policies would be available to pay estate taxes was not false because the universal life policies would have been available for such purposes if sufficient premiums had been paid.

"Other grounds likewise mandate dismissal of [the Maloofs'] suppression claims as [the Maloofs] have failed to offer substantial evidence to establish a duty to disclose by the defendants, and the court finds that there was no special

> relationship between the insurance agent and the [Maloofs]. As to [the Maloofs'] claims regarding suppression of the policies' contractual charges, [the Maloofs] agree that such claims are barred by the order entered earlier by the United States District Court for the Southern District of California and filed in this case."

In their briefs to this Court, John Hancock and Glasgow reiterate the rationale of the trial court, while the Maloofs attempt to distinguish AmerUS Life Insurance Co. v. Smith, 5 So. 3d 1200 (Ala. 2008), arguing that the facts in this case are substantially different from the facts there and that reasonable reliance is a question for the jury. For the reasons that follow, we disagree.

Regardless of any oral misrepresentations that Glasgow may have made to convince the Maloofs to apply for new life-insurance policies, it is undisputed that the Maloofs had 20 days to review both the 1989 and 1992 universal-life policies after they received the policies and that they could cancel the policies at any time within that 20-day "free-look" period and receive a full refund of any premiums paid. Page three of both the 1989 and 1992 policies clearly states that "[t]his policy provides life insurance coverage for the lifetime of the life insured if sufficient premiums are paid. Premium

<u>payments in addition to the planned premium may need to be made to keep this policy and coverage in force.</u>" (Emphasis added.) When questioned by Glasgow's attorney about this language when he was deposed, John acknowledged that he understood its plain meaning:

> "Q: What does that mean please, sir?
>
> "A: It means you may have to pay more to keep the policy in force.
>
> "Q: All right. And you have no trouble understanding that language?
>
> "A: I understand it.
>
> "Q: Okay. And so you would have understood back in [19]89, when you got this policy, that you may be required to make additional premium payments in the future, is that right?
>
> "A: Yes."

Moreover, within the 20-day free-look period the Maloofs had to review the 1989 and 1992 universal-life policies after receiving them, they also received a document produced by John Hancock labeled "Statement of Policy Cost and Benefit Information" for each policy. This document summarized the contract and surrender charges associated with the policy, as well as the expected life of the policy based on the premiums paid and interest rates and mortality rates applied. The document received in conjunction with the 1989 universal-life policy stated that the policy would lapse in approximately 4 years based on guaranteed interest rates and mortality rates, while the policy would lapse in approximately 18 years based on the current interest rates and mortality rates. The document received in conjunction with the 1992 universal-life policy stated that the policy would lapse in approximately 4 years based on guaranteed interest rates and mortality rates, while the policy would lapse in approximately 16 years based on the current interest rates and mortality rates. Both documents also contained the following disclaimer:

> "The projected results of your insurance program may change significantly with variations in interest rates; mortality rates (risk charges); and the frequency, timing and amounts of premium payments. The projected values using 'current rates' are not guaranteed and the values with guaranteed rates are the minimum that you will receive upon the surrender of the policy.
>
> "Read your policy very carefully. In addition, there are other factors which could affect the projected values."

John acknowledged in his deposition that the language of this disclaimer was "perfectly clear."[2]

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[2]John Hancock and Glasgow submitted additional evidence indicating that, over the approximately 18-year period between the time they purchased the first universal-life policy in

In AmerUS, this Court stated:

> "In light of the language of the documents surrounding the insureds' purchase of the life-insurance policies at issue in this case and the conflict between [the insurance agent's] alleged misrepresentations and the documents presented to [the plaintiff], it cannot be said that [the plaintiff] reasonably relied on [the insurance agent's] representations. As this Court stated in Torres [v. State Farm Fire & Cas. Co., 438 So. 2d 757 (Ala. 1983)]: '[T]he right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests.' 438 So. 2d at 759. The insureds here took no precautions to safeguard their interests. If nothing else, the language in the policies and the cost-benefit statement should have provoked inquiry or a simple investigation of the facts by [the plaintiff]. Instead, based upon the record before us, we must conclude that [the plaintiff] 'blindly trust[ed]' [the insurance agent] and 'close[d] [his] eyes where ordinary diligence require[d] [him] to see.' Munroe v. Pritchett, 16 Ala. 785, 789 (1849). ... We conclude that no reasonable person could read the policies and the cost-benefit statement and not be put on inquiry as to the existence of inconsistencies, thereby making reliance on [the insurance agent's] representations unreasonable as a matter of law. Because the insureds failed to present substantial evidence indicating that [the plaintiff's] reliance on [the insurance agent's] representations was reasonable, [the life insurance company] is entitled to a JML."

1989 and the time John testified that he realized his policy was in danger of lapsing in 2007, the Maloofs were sent other letters and documents indicating that the universal-life policies could lapse before John died.

5 So. 3d at 1215-16. We agree with the trial court that our holding in AmerUS controls here. The Maloofs argue that this case is different from AmerUS because the alleged misrepresentations were different; however, that fact is ultimately immaterial. The relevant inquiry is the same in both AmerUS and this case: whether it was reasonable for the insured to rely on an insurance agent's representations about an insurance policy when those representations are contradicted by language in the insurance policy itself. This Court has repeatedly stated that it is not, not only in AmerUS, but also in Baker v. Metropolitan Life Insurance Co., 907 So. 2d 419 (Ala. 2005); Liberty National Life Insurance Co. v. Ingram, 887 So. 2d 222 (Ala. 2004); and Alfa Life Insurance Co. v. Green, 881 So. 2d 987 (Ala. 2003).

The Maloofs claim that Glasgow misrepresented to them that the universal-life policies they purchased were in their best interests and that they would provide funds that would be available to pay the estate taxes due upon John's death, while at the same time suppressing from them the facts that the policies were actually not in their best interests and that benefits from those policies would not be available to pay estate taxes due upon John's death if he lived beyond approximately age 78. However, the Maloofs could not have reasonably relied on the alleged misrepresentations concerning the availability of benefits from those policies to pay estate taxes due upon John's death in light of the clear language of the insurance policies. Moreover, with regard to Glasgow's alleged misrepresentation that the purchase of the 1989 and 1992 universal-life policies was in the Maloofs' best financial interests, we agree with the trial court that this was merely a statement of an opinion, not of a material fact. See State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 322-23 (Ala. 1999) (holding that insurance agent's statements that the purchased insurance policy was "the Cadillac of all insurance" and "the very best" amounted to mere puffery that could not reasonably be relied upon in light of the insured's level of education and degree of sophistication). Accordingly, the trial court did not err by entering a summary judgment in favor of John Hancock and Glasgow on the Maloofs' fraud claims.

The Maloofs have also argued that the trial court erred by entering a summary judgment in favor of John Hancock and

Glasgow on their claim alleging that John Hancock and Glasgow negligently and/or wantonly failed to procure insurance for them. We have stated that "'when an insurance agent or broker, with a view to compensation, undertakes to procure insurance for a client, and unjustifiably or negligently fails to do so, he becomes liable for any damages resulting therefrom.'" Crump v. Geer Bros., 336 So. 2d 1091, 1093 (Ala. 1976) (quoting Timmerman Ins. Agency, Inc. v. Miller, 285 Ala. 82, 85, 229 So. 2d 475, 477 (1969)). The Maloofs allege that Glasgow agreed to procure life-insurance policies for them that would provide benefits available to pay estate taxes due upon John's death; however, they argue, they now have no such life-insurance policies.

The undisputed facts indicate that Glasgow did in fact procure two universal life-insurance policies for the Maloofs and that, had the Maloofs continued to pay sufficient premiums on those policies, they would have remained in effect and the benefits of those policies would have been available for any purpose after John died. John Hancock did not spontaneously act to cancel the policies in 2007, nor did Glasgow take any action leading to their cancellation; rather, the Maloofs elected not to pay the increased premiums required to keep the policies in effect. There is no doubt that they made that decision with full knowledge of the fact that the failure to pay the increased premiums would lead to the cancellation of the policies. Thus, the undisputed facts indicate that Glasgow in fact fulfilled the Maloofs' request to procure life-insurance policies that would provide funds that could be used to pay estate taxes upon John's death, and those policies were canceled only after the Maloofs failed to pay the required premiums. John Hancock and Glasgow cannot be held liable for the negligent or wanton failure to procure insurance based on the Maloofs' failure to pay the required premiums; accordingly, the summary judgment was properly entered on this count.

The Maloofs' final argument is that the trial court erred by entering a summary judgment in favor of John Hancock and Glasgow on the Maloofs' claim that John Hancock and Glasgow breached certain duties owed to them because of their alleged fiduciary relationship with Glasgow, namely, the duty to disclose material facts related to the insurance policies and the duty to act in the Maloofs' best interests. This Court discussed this claim in a similar context in Guinn v. American Integrity Insurance Co., 568 So. 2d 760, 764 (Ala. 1990), where we stated:

> "[The plaintiff's] breach of fiduciary duty claim was premised on her allegation that her reposal of trust in [the defendant insurance agents] to advise her on what policies she should purchase, coupled with their acceptance of that trust, created a fiduciary relationship. She argues that her reliance, along with her advanced age, lack of mental strength, lack of knowledge of insurance matters, and the agents' superior knowledge concerning insurance, constituted special circumstances that warranted the imposition of a fiduciary duty on [the agents].
>
> "This Court has held that an insurance agent may be the agent of the insured, the insurer, or both. Washington National Ins. Co. v. Strickland, 491 So. 2d 872, 874-75 (Ala. 1985). However, an insurance agent is generally not considered to be an agent of the insured until a contract of insurance has been entered into. Strickland, supra; Highlands Underwriters Ins. Co. v. Eleganté Inns, Inc., 361 So. 2d 1060 (Ala. 1978). Until such a contractual relationship has been established, the parties remain in the relationship of salesperson and prospective customer. The salesperson and his principal may be liable for damages if he misrepresents material facts in an attempt to induce the prospective customer to enter into the contract, Harrell v. Dodson, 398 So. 2d 272 (Ala. 1981); Ala. Code 1975, § 6-5-101 through 6-5-104. However, that potential liability does not indicate the existence of a fiduciary relationship.
>
> "In addition, the existence of a duty is a question of law for the trial court. Berkel & Co. Contractors v. Providence Hospital, 454 So. 2d 496

> (Ala. 1984); Hand v. Butts, 289 Ala. 653, 270 So. 2d 789 (1972). Because [the plaintiff] failed to present evidence of a relationship between herself and [the defendant agents] that gave rise to a fiduciary duty, the court did not err in dismissing the claim based on an alleged fiduciary duty."

For the reasons that follow, we similarly conclude in this case that there was insufficient evidence of a relationship between the parties that would give rise to fiduciary duties.

The Maloofs summarize their argument that they had a special relationship with Glasgow that gave rise to fiduciary duties as follows in their brief to this Court:

> "For many years, [the Maloofs] entrusted their financial affairs and estate planning needs to Glasgow. His relationship with [the Maloofs] was far more confidential and complex than that of a mere insurance salesman. Glasgow indicated to the [Maloofs] that he was their 'financial planner.' Glasgow not only sold insurance products to the [Maloofs], but guided and advised [them] regarding important financial and estate planning affairs and decisions. He made insurance, financial and estate planning recommendations to the Maloofs. He referred them to a lawyer and made the appointment with the lawyer. He even went with the Maloofs to meet with the lawyer. He witnessed their wills. Their relationship far surpasses that of merely a 'salesperson and prospective customer' and does indeed give rise to a fiduciary duty. [Guin, 568 So. 2d] at 764. Glasgow's relationship with [the Maloofs] is precisely the type that gives rise to a fiduciary duty."

Maloofs' brief, pp. 59-60. However, the Maloofs' general contention that they had a trusting and confidential relationship with Glasgow is belied by the testimony John gave in his deposition regarding that relationship, where he made the following statements:

> "Every insurance agent I've ever known has had a lot of recommendations and a lot of promises and wants to sell me something and wants to get money and Parker [Glasgow] is no exception. So, I'm certain that when I talked to him he told me whatever was favorable that he wanted me to hear, and that's the way it is. That's -- that's the way it was. And Parker called. I would see him. I wouldn't see him every time, but -- because I knew that he wanted to sell me something. So, even though I liked him I'm not stupid and I knew he wanted to sell me something and I didn't want to just buy something for no reason. So, I'm sure he explained to me whatever it was he thought that I should know or that I ought to know to make me buy the policy."
>
> ___________
>
> "[T]here was a consistent record of trying to sell me policies, and for that reason there was a lot less credibility between me and Mr. Glasgow than there might have been otherwise."
>
> ___________
>
> "My perception was that he wanted to sell me policies for whatever reason rather than the correct reason."
>
> ___________

> "He was forever trying to sell me policies. Every time I saw him he had one idea after another selling -- do this, do that, trade this in, do that. All he wanted to do was sell me policies and make a commission."

> "I always considered whatever [Glasgow] said. I took everything with a grain of salt."

This testimony indicates that the Maloofs certainly did not view their relationship with Glasgow, though cordial and long-standing, as anything special or outside the typical salesperson-customer relationship. Combined with the facts in the record indicating that John is a well-educated professional and an experienced investor, we agree with the conclusion of the trial court that there was "no evidence that would justify the imposition of a fiduciary duty owed to [the Maloofs] by [John Hancock and Glasgow]" and that the summary judgment was accordingly proper.

IV.

The Maloofs sued John Hancock and Glasgow, alleging fraudulent misrepresentation, suppression, breach of contract, negligent and/or wanton failure to procure insurance, and breach of fiduciary duties arising out of Glasgow's sale of certain life-insurance policies to the Maloofs in 1989 and

1992. After the trial court entered a summary judgment in favor of John Hancock and Glasgow on all the claims asserted by the Maloofs, the Maloofs appealed. Because no genuine issue of material fact exists, we affirm the judgment of the trial court.

AFFIRMED.

Lyons, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

Woodall, J., concurs in the result.

Cobb, C.J., dissents.

COBB, Chief Justice (dissenting).

I respectfully dissent. I believe that, in affirming the summary judgement of this case, the majority improperly substitutes itself for the trier of fact. Since Foremost Insurance Co. v. Parham, 693 So. 2d 409 (Ala. 1997), the test for when an aggrieved person is charged with discovering fraud has been "reasonable reliance."

> "[T]he trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms."

693 So. 2d at 421 (emphasis added).

The standard of appellate review of a summary judgment requires that we view the evidence most favorably in favor of the nonmovants, John A. Maloof, Jr., and Harriet Maloof, Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993); Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990). I emphasize that neither the trial court nor this Court is in the business of weighing the facts at the summary-judgment stage. That is, we should consider only whether the evidence offered in support of the summary-judgment motion is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. Of Florida, 547 So. 2d 870, 871 (Ala. 1989). Moreover, the nature of the misrepresentations constituting the fraud and suppression asserted by the Maloofs in this case is of particular note. Specifically, Parker Glasgow, an agent for John Hancock Insurance Company, represented that the policies would be in the Maloofs' best financial interests and that the policies would supply benefits at John's death of approximately $1,000,000. Although the policies and documents delivered to the Maloofs indicated that they might be subject to additional premium payments, representations by Glasgow indicated that the policies would become self-sustaining, and his October 30, 1992, letter to the Maloofs indicated that

> "[the policy] is building up cash value and this cash value will help to keep the premiums level at a later date. It may be necessary to pay more into this policy in order for it to be maintained at the full death benefit level of $500,000 past age 74 according to current interest rates. I went over this with you in a letter February 7, 1990. However, the insurance amount could be reduced at some later date and that would have the effect of

> extending the policy for a longer period of time. For example, you could stop paying the premium at age 65, reduce the death benefit and, thereby, extend the coverage into your 80's."

(Emphasis supplied.)

Whether the policy language suggesting that additional premiums <u>might</u> be required negates a claim of fraud in light of this letter and the evidence concerning Glasgow's representations is a genuine issue of material fact that precludes a summary judgment. The trier of fact could reasonably infer that Glasgow's representations and letter do suggest that the policies will generate income sufficient to pay extra premium requirements so that the policies will remain in force in spite of any increased premium.

There is no evidence in this case suggesting that at the time John Maloof executed these policies he was informed, or should have reasonably been able to discover, that greatly increased premiums, premiums approaching the actual value of the policies, would be <u>absolutely necessary</u> in order to sustain the policies. Rather, the policies and the accompanying documentation note that "[t]he projected results of your insurance program may change significantly with variations in interest rates; mortality rates (risk charges);

and the frequency, timing and amounts of premium payments." Whether policy results may be "significantly" better or worse than expected was left to the speculation of the policyholder. In this case, of course, Glasgow's speculation for John Maloof was that the policy would generate such income that premium payments might be reduced or eliminated. However, the evidence presented by the Maloofs' expert, Dr. David Lange, makes clear that these policies were so significantly underfunded that John Hancock knew at the time it issued the policies that significant additional payments would almost certainly be necessary. When asked about the language in Glasgow's letter that premium payments "may be" required, Dr. Lange stated:

> "But [Glasgow is] an insurance sales person who sold this policy and ran the illustration and would certainly be aware of the Statement of Policy Cost and Benefit Information and be aware the interest rates had declined.
>
> "In fact, the –- that this policy by '92, and since he had run a large number of illustrations in these various documents, he had to know from the beginning it wasn't going to make it. It was going to make it to seventy-four or thereabouts. And since interest rates were coming down, was unlikely to do so. I'm amazed, absolutely amazed that he would use the phrase: 'it may be necessary.'"

Further, when questioned about Glasgow's representation that the policy period could be extended by a reduction in the death benefit, Dr. Lange stated, "It's actually a complete falsity."

A reasonable person could understand from this evidence that it was readily apparent to John Hancock and to Glasgow that the policies were so underfunded at the time they were issued that they would fail in the purpose intended for the Maloofs. Moreover, an insurance expert like Dr. Lange, trained in the mathematics of insurance policies, could also uncover this fact. However, when questioned about a layman's ability to understand the policies, Dr. Lange stated:

> "The difficulty I have with that is because of the calculations involved in there, that I'm not sure someone, even if they read it, would appreciate the mathematics involved."

Thus, there is a genuine issue of material fact in this case as to whether the various documents supplied by John Hancock, including the policies and the annual statements and updates, disclosed facts from which a layman like John Maloof could discern that the policies were so underfunded that they could <u>never</u> serve his estate-planning purposes. Further, none of those documents directly contradict Glasgow's representations that the policies would generate income that would significantly defray additional premium costs or that the policies could be extended at the same premium costs by reducing death benefits. None of the documents supplied to the Maloofs before the policies were canceled makes clear that huge increases in premium payments will absolutely be required in order to maintain the policies. In fact, the Maloofs became aware of the fraud and suppression asserted in their claims only when they received notice that the policies were being canceled unless the Maloofs paid substantial additional premiums. Further, this cancellation was to take place in spite of the fact that the Maloofs had timely paid all premiums required on the policies during the 18 years since the first policy was purchased.

In addition to my concern that the summary judgment incorrectly holds that there is no genuine issue of fact as to whether the Maloofs could have relied on the misrepresentations by Glasgow in this case, the above recitation of facts highlights the ambiguities in the instant policies, particularly from a layman's perspective. Although the analysis of this issue does not involve a breach-of-contract claim, the majority's conclusion that the policies and the documentation from John Hancock are clear about the effect, or lack of effect, of these policies certainly flies in the face of the rule that ambiguities in an insurance contract are to be construed against the drafter of the contract. Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co., 817 So. 2d 687, 695 (Ala. 2001). See also Life Ins. Co. of Georgia v. Miller, 292 Ala. 525, 296 So.2d 900 (1974).

Although the trial court relied on AmerUS Life Insurance Co. v. Smith, 5 So. 3d 1200 (Ala. 2008), I believe that there are significant differences between the facts in this case and those in that case. In AmerUS, the plaintiff admitted that he did not read his policies, and the information supplied in the policy information directly contradicted the representations of the insurance agent. Thus, the Court concluded that the plaintiff's reliance on the agent's representations could not, as a matter of law, be reasonable. This is not the case here. In this case, without the knowledge of an insurance expert, it is not clear that the representations that the policies would generate income that would significantly defray premium costs are inconsistent with the language in the policies that "[t]he projected results of your insurance program may change significantly ...." Nor is it clear from the policies and subsequent documentation that the policies were so underfunded as to be, in the words of Dr. Lange, "DOA."[3] In fact, Dr. Lange indicated that a layman could not easily comprehend the financial-outcome implications of the policies. Further, the increased premiums required to sustain the policy in AmerUS were approximately $25,000; in this case the amount of premiums necessary to extend John Maloof's million-dollar coverage until age 90 exceeded $1,036,000.

Moreover, the financial and business relationship between the plaintiff and the agent in AmerUS was not nearly as significant as the relationship between John Maloof and Parker Glasgow in this case. As I noted in my dissent in AmerUS Life Insurance Co. v. Smith, 5 So. 3d at 1217, the reasonable-reliance standard adopted by the Court in Foremost Insurance Co. v. Parham, 693 So. 2d 409 (Ala. 1997), which imputes to a signatory the knowledge of the contents of a contract, is subject to certain exceptions. Potter v. First Real Estate Co., 844 So. 2d 540 (Ala. 2002).

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[3]DOA is an acronym for "dead on arrival."

> "'The instant case does not come within the rule of Southern Building & Loan Ass'n v. Dinsmore, 225 Ala. 550, 144 So. 21 (1932), that the law imputes no knowledge of a contract's contents to a party who signs the contract without having read or having knowledge of its contents, if that party is lulled into a feeling of security because of a misrepresentation of the contents of the contract and because of special circumstances, relationships, or disability of the party relating to the contract's execution. See also Arkel Land Co. v. Cagle, 445 So. 2d 858 (Ala. 1983); Rose v. Lewis, 157 Ala. 521, 48 So. 105 (1908).'"

AmerUS, 5 So. 3d at 1217 (Cobb, C.J., dissenting) (quoting Holman v. Joe Steele Realty, Inc., 485 So. 2d 1142, 1144 (Ala. 1986)). As we recognized in Potter, supra, a special relationship between the contract signatory, here John Maloof, and the sales agent, here Parker Glasgow, can constitute an exception to the imputation of knowledge required by the reasonable-reliance standard. In Potter, the relationship was between the plaintiffs, a young married couple, and their real-estate agent, who misrepresented to them that the property that they sought to purchase was not located in a flood plain. Although that relationship was entirely contractual, the Court determined that the nature of that relationship, in which the real-estate agent asserted that she represented the plaintiff buyers as much as she represented the seller, was such that there was a question for the trier of fact as to whether the buyers had notice of a survey showing that the property was located in a flood plain. Here, there is evidence in the record that could support the inference that John Maloof thought of Glasgow as just another insurance salesman. However, there is also evidence in this record indicating otherwise, and we must view all the evidence most favorably to the Maloofs, including John Maloof's testimony that he relied on Glasgow, Wilma Corp., supra. Under this standard, we consider only whether there is also evidence from which the jury could conclude that Glasgow had a special relationship with John Maloof that supported John Maloof's reliance on Glasgow's assurance because the jury, as trier of fact, would be free to disregard other statements by John Maloof supporting a different inference.

In fact, the record shows that Glasgow had been John Maloof's exclusive insurance agent for some 20 years before the transactions at issue in this case and that he also served as John Maloof's "financial planner." Further, John Maloof received reports, at least annually, from Glasgow concerning his financial interests and the effect of his insurance on his estate planning; Glasgow also participated in estate-planning meetings between John Maloof and his lawyer, and he contributed to those meetings by representing that the policies were valid additional assets of John Maloof's estate. As I noted in my dissent in AmerUS, the significance of a relationship of this type is entirely distinct from a single transaction between an insurance agent and a client; the relationship in this case is more of a special relationship than the "special relationship" based on a single transaction that this Court recognized in Potter. If the law in Potter concerning what constitutes a special relationship is no longer to be recognized, then Potter should be overruled. Accordingly, I believe that the question of Glasgow's special relationship with John Maloof presents at least a question of fact as to whether John Maloof could have reasonably relied on Glasgow's representations under the facts of this case.

Thus, I disagree that the difference in nature of the misrepresentations in this case and those in AmerUS are ultimately immaterial -- in this case, unlike in AmerUS, there is a question of fact as to whether the policies and subsequent documents supplied to the Maloofs could reasonably be understood by one who did not have specialized knowledge of the mathematics underlying the policies; it is certainly not apparent that the cost of keeping the policies would come to exceed the actual value of the policies in less than 20 years. The record also shows that Glasgow's representations as to the performance of the policies was not directly contradicted by the policies and other documentation, and there is at least a question of fact as to whether Glasgow was in such a special relationship with John Maloof that the Maloofs' reliance on the misrepresentations was reasonable under the circumstances. The question of reasonable reliance in this case is a question of fact to be decided by the trier of fact; reasonable reliance is not a standard that should be used to shield those who make false representations that they know, or should know, are untrue from the damage caused by their lies. The summary judgment in this case should be reversed. Therefore, I dissent.