THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Civil Action No. 2020-CP-04-02533

Appellate Case No. 2023-000549

Donegal Insurance,

Appellant,

v.

Charles H. Wade,

Respondent.

APPELLANT'S INITIAL BRIEF

BROWN & BREHMER
Karl S. Brehmer
Andrew C. Brehmer
Brown & Brehmer
P.O. Box 7966
Columbia, SC 29202
803-771-6600

ATTORNEYS FOR APPELLANT

June 28, 2023
Columbia, South Carolina

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in finding Respondent Charles Wade's policy should be reformed and UIM coverage be applied to the level of liability limits on the policy where the Respondent explicitly declined Underinsured Motorist coverage?

2. Did the circuit court err in finding Appellants were required to and did not produce a meaningful offer of Underinsured Motorist Coverage when no such offer was required?

STATEMENT OF THE CASE

On December 30, 2020, Plaintiff-Appellant Donegal Insurance ("Appellant") brought this declaratory judgment action against Defendant-Respondent Charles H. Wade ("Respondent") seeking a determination by the court of the following: that Appellant was under no obligation to make an offer of Underinsured Motorist ("UIM") coverage to Respondent; that the effective policy ("Policy") does not provide UIM coverage for the injuries complained of in Respondent's complaint; and, that Respondent cannot seek a reformation of the Policy to include UIM coverage by challenging the sufficiency of the offer of UIM coverage (Pl.'s Compl.). Respondent filed an Answer and Counterclaims against Appellant for the following: Breach of Contract; Reformation of Contract Based on Mutual Mistake; Reformation Based on Insured's Reasonable Expectations and Failure to Make a Meaningful Offer; Bad Faith; and Bad Faith – Attorneys' Fees. (Def.'s Ans. and Countercl.) Appellant filed a Reply to Respondent's Counterclaim denying the allegations. (Pl.'s Reply).

Prior to trial, Appellant filed a Motion for Summary Judgment which was heard on April 20, 2022. (Mot. for Summ. J.). Appellant's Motion was subsequently denied in an Order entered on June 7, 2022. (June Order). The parties later convened via teleconference to determine whether this matter could be heard by the Court in a non-jury hearing, whereupon the parties consented to such. This case proceeded to a non-jury trial before the Hon. J. Cordell Maddox, Jr. on September

20, 2022. At trial, both parties presented testimony and exhibits for their respective arguments. Judge Maddox subsequently ruled in favor of the Respondent, finding that Appellant did not produce a meaningful offer of UIM Coverage that complies with S.C. Code Ann. §§ 38-77-160 and 38-77-350. An Order was entered encompassing the Court's holding on March 17, 2023. (Mar. Order). On April 5, 2023, Appellant filed and served its Notice of Appeal on Respondent. (Notice of Appeal).

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland Cty.,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "The determination of whether coverage exists under an insurance policy is an action at law." *Nationwide Mut. Fire Ins. Co. v. Walls,* 433 S.C. 206, 212, 858 S.E.2d 150, 153 (2021). "'In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact *unless there is no evidence to reasonably support them.*'" *Bell v. Progressive Direct Ins. Co.,* 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (quoting *Crossmann Cmtys. Of N.C., Inc. v. Harleysville Mut. Ins. Co.,* 395 S.C. 40, 46-47, 717 S.E.2d 589, 592 (2011)). "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy,* 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012) (citing *Crossmann,* 392 S.C. at 47, 717 S.E.2d at 592).

STATEMENT OF THE FACTS

On November 1, 2017, Respondent was involved in a motor vehicle accident with Deanna M. McEntire in Anderson County, South Carolina. On January 23, 2019, the Respondent filed a Summons and Complaint against Ms. McEntire for damages resulting from this collision, Civil Action Number 2019-CP-04-00871. Respondent settled his claims against Ms. McEntire on a

Covenant Not to Execute within the liability limits of her automobile's liability insurance policy. Respondent deemed Ms. McEntire underinsured and thereafter served his insurance carrier through the South Carolina Department of Insurance with the Summons and Complaint in that action. At the time that this accident occurred, Respondent did not have UIM coverage as part of his automobile's insurance policy.

For a year prior to the accident described above, Respondent possessed UIM coverage on his automobile's insurance policy through Southern Mutual Insurance Company, a subsidiary of Appellant. The prior UIM coverage was for $100,000 per person, $300,000 per occurrence and $100,000 for property damage ("100/300/100"). However, on or about August 8, 2017, Respondent's wife, Shonda Wade, spoke with Michelle Rogers of CountyBanc Insurance Services, Inc. via telephone, informing her that Respondent wished to reject UIM coverage from the Policy. (Court Tr. 61:6-10; Plaintiff's Ex. 5). Following this phone call, Michelle Rogers emailed Respondent detailing the nature of the conversation and advising Respondent that, if Respondent wished to completely reject UIM coverage for bodily injury and property damage, Respondent would need to advise Ms. Rogers as such. *See* August 8, 2017, at 8:44 a.m., email between Respondent and Michelle Rogers, located in the record as Plaintiff's Ex. 5. Otherwise, Respondent would retain UIM coverage of $25,000 per person and $50,000 per occurrence for bodily injury claims and $25,000 for property damage claims ("25/50/25"). *Id.* Between this email and Respondent's reply, Appellant generated a personal auto declarations page amending UIM coverage thereby decreasing UIM coverage from 100/300/100 to 25/50/25. (Plaintiff's Ex. 3) Respondent replied to this correspondence with Ms. Rogers, where he stated, "I want to completely reject the UIM BI/PD." (Plaintiff's Ex. 7). As such, Appellant generated a policy amendment to

the Policy's declaration page, where the amendment was to remove UIM coverage from the Policy for the effective term of August 5, 2017, to August 5, 2018. (Plaintiff's Ex. 2).

Through email correspondence by Respondent, Appellant followed procedural safeguards to ensure the intent of the Respondent by sending Respondent a South Carolina Owner Supplement – Offer of Additional Uninsured Motorists Coverage and Optional Underinsured Motorist Coverage. (Plaintiff's Ex. 11). Respondents reviewed and completed this document by checking "no" for the offer of optional UIM coverage and signing the written acknowledgement included in this Supplement. *Id.* As a result, Appellant issued a revised Personal Auto Declarations Page to Respondent on August 8, 2017, to be the effective Policy at the time of Respondent's accident with Ms. McEntire. (Plaintiff's Ex. 2).

ARGUMENT

I. Because the instant case is identical to *UNITED SERVICES AUTO.*, the trial court erred in ordering the policy to be reformed and underinsured motorist coverage to be applied retroactively.

Under *UNITED SERVICES AUTO. v. Litchfield*, this Court held that "[b]ecause [Insured] once had UIM coverage and later changed the policy by dropping the UIM coverage from [the Policy], [Insurer] was under no obligation to make another offer of UIM coverage." *UNITED SERVICES AUTO. v. Litchfield,* 356 S.C. 582, 590 S.E.2d 47 (S.C. App. 2003). In that case, the insured, Lesli Litchfield, received an automobile insurance policy from UNITED STATES AUTOMOBILE ASSOCIATION ("USAA") that included an offer of optional UIM coverage which she failed to sign and return to USAA. *UNITED SERVICES AUTO.,* 356 S.C. at 583, 590 S.E.2d at 47. USAA then issued her a policy which included UIM coverage in the amount of her liability insurance coverage due to her failure to reject UIM coverage. *Id.* After six months, she called USAA to drop her UIM coverage, and USAA sent her a form with a handwritten note,

stating "Rejection of UIM per phone conversation". *Id.* Mrs. Litchfield returned the signed form to USAA, and an amended declaration was issued to her, reflecting the deletion of UIM coverage and the prorated, decreased premium for the remainder of the policy's effective period. *Id.*

Subsequently, Mrs. Litchfield's husband made a claim for UIM coverage benefits under her USAA policy after sustaining injuries in a motor vehicle accident. *UNITED SERVICES AUTO.,* 356 S.C. at 583, 590 S.E.2d at 47. USAA filed a declaratory judgment action on the basis that Mrs. Litchfield cancelled her UIM coverage, and the Litchfields counterclaimed, seeking to reform the policy. *Id.* The trial court granted USAA's Motion for Summary Judgment, finding Mrs. Litchfield's voluntary election to drop UIM coverage was the sole reason the policy did not contain UIM coverage at the time of her husband's accident. *Id* at 584. This Court affirmed the trial court's decision in a succinct and pointed ruling, indicating that USAA was under no obligation to make another offer of UIM coverage due to Mrs. Litchfield's voluntary decision to drop the respective coverage. *Id.*

Here, Respondent and his wife, Shonda Wade, enjoyed UIM coverage in an amount equal to their policy's liability limits in the year prior to renewal on August 5, 2017. (Plaintiff's Ex. 9). Respondent's UIM coverage renewed that day; however, Shonda Wade contacted the Respondent's insurance agent, Michelle Rogers, three days later to inquire about UIM insurance. (Court Tr. 60:25). In response to this conversation, Ms. Rogers emailed Respondent as follows:

> Per my conversation with Shonda this morning—she advised you guys wish to reject the UIM completely for bodily injury and property damage. If so you will need to let me know that you wish to completely reject the UIM BI/PD…otherwise there will be UIM BI/PD coverage of 25/50/25 on your autos.

(Email August 8, 2017, Defendant's Ex. 1). Like Mrs. Litchfield, Respondent replied to this correspondence, stating "I want to completely reject the UIM BI/PD." *Id.* Appellant then provided

Respondent with the South Carolina Auto Supplement to the Policy ("Supplement"), which included the offer of additional UIM coverage. (Plaintiff's Ex. 11). The Supplement provides a lengthy description of both Uninsured Motorists Coverage and Underinsured Motorist Coverage on the first two pages.[1] *Id.* Following these descriptions, an insured must fill out separate sections of the form to disclose whether the insured wishes to add additional Uninsured Motorist coverage and whether the insured wished to add optional Underinsured Motorist coverage. *Id.* The Respondent checked "Yes" for additional Uninsured Motorist coverage; however, Respondent checked "No" for optional Underinsured Motorist coverage. *Id.* Furthermore, Respondent signed the form to verify the Respondent's selection, and added an additional note stating, "please apply to all vehicles." *Id.* Therefore, Respondent, like Mrs. Litchfield, signed his respective form, deleting UIM coverage from the Policy and submitted such decision to Appellant, who, in turn, amended the Respondent's Policy and supplied an amended Declarations page to Respondent. (Plaintiff's Ex. 2).

During this policy restructuring period, Respondent did not provide any documented notice to Appellant that Respondent did not understand what UIM coverage is. Instead, Respondent made unambiguous, pointed statements on two separate occasions that Respondent no longer wished to include UIM coverage on the Policy and for it to be removed. (Plaintiff's Ex. 7, 11). It was not until after Respondent resolved his dispute with Ms. McEntire and declared her underinsured that Respondent disputed Appellant's responsibilities as an insurer.

Respondent repeatedly asserts and testified that he and his wife did not contact Appellant with the specific purpose of cancelling UIM coverage and that he and his wife did not understand

[1] As noted in *Kelly v. S.C. Farm Bureau Mut. Ins. Co.,* a party "entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning." *Kelly v. S.C. Farm Bureau Mut. Ins. Co.,* 316 S.C. 319, 325, 450 S.E.2d 59, 62 (S.C. App. 1994).

UIM coverage; however, Respondents failed to provide any evidence in the record of this trial to substantiate such claims. Respondent was placed on notice by Appellant that, if Respondent wished to remove UIM coverage from the Policy, then Respondent would need to indicate such to Appellant, which Respondent did so unequivocally. (Plaintiff's Ex. 7). Despite these unilateral decisions, the Respondent seeks refuge from his own acts in declining UIM coverage and asks the South Carolina judicial system to assist in defrauding Appellant for such coverage. Under *UNITED SERVICES AUTO.*, this Court held:

> Indeed, if [the insured] were allowed to prevail in this instance, then anyone whose policy currently includes UIM coverage in an amount less than his or her liability coverage would be able to question later the sufficiency of the offer of UIM coverage and seek to have the policy reformed in an attempt to increase the limits thereof. **The opportunity for fraud would be enormous.**

UNITED SERVICES AUTO., 356 S.C. at 584, 590 S.E.2d at 47. This action by the Respondent is exactly what this Court predicted would result from such a decision in *UNITED SERVICES AUTO.* As such, Appellant respectfully requests that this Court uphold its ruling in *UNITED SERVICES AUTO.* and reverse the trial court's ruling in favor of the Appellant to avoid a ruling inconsistent with well-settle law in the state of South Carolina.

II. Because Appellant was under no obligation to make another offer of underinsured motorist coverage to Respondent, the trial court erred in finding that Appellant was required to and did not produce a meaningful offer of underinsured motorist coverage to Respondent.

Under S.C. Code Annotated § 37-77-350(c), "[a]n automobile insurer is not required to make an offer of coverage on any automobile insurance policy which **renews**, extends, **changes**, supersedes, or replaces an existing policy. *S.C. Code Ann. § 38-77-350(c).* In Respondent's Answer, Respondent pleaded five counterclaims, all of which are predicated on Respondent's belief that the Policy should be reformed because the Supplement failed to "comply with S.C.

Code § 38-77-350 in making a meaningful offer of underinsurance coverage and to show the premiums associated with different policy coverages" and "[Respondent] relied on the assurance from the [Appellant's] agent that [Respondent's] underinsurance coverage would be on the policy and would always remain on the policy." (Respondent's Ans., at ¶¶ 12, 16). However, Respondent's statutory basis, in relying on S.C. Code § 38-77-350, is limited only to "new applicants." *S.C. Code Ann. § 38-77-350, et seq.* Therefore, Appellant was not required to make an offer of coverage for the Respondent's renewal and change to his UIM coverage. It is undisputed that Respondent enjoyed insurance coverage from Appellant for at least one year prior to renewal period in question. (Plaintiff's Ex. 9). As such, this action arose out of a disputed renewal and change to the Policy effective August 5, 2017, which thereby excludes the application of S.C. Code Ann. § 38-77-350(c).

Should this Court find this argument unpersuasive, Appellant would respectfully show that the Supplement sent to Respondent satisfied a meaningful offer from which Respondent is to be bound. Respondent argues that Appellant failed to strictly comply with S.C. Code §§ 38-77-160 and 38-77-350 by not providing the premium amounts allocated to various coverages in the Supplement. For a form to be conclusively presumed as a meaningful offer, the form must include the following:

> (1) a brief and concise explanation of the coverage, (2) a list of available limits and the range of premiums for the limits, (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires, (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages, (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

McDowell v. Travelers Property & Cas. Co., 357 S.C. 118, 122, 590 S.E.2d 514 (S.C. App. 2003). However, a failure to comply with the statute does not necessarily require a reformation of the

policy. *Id,* 357 S.C. at 123. The Supreme Court adopted a four-part test to determine the sufficiency of an offer to qualify as a meaningful offer of UIM coverage, which Respondent relies upon in substantiating its claim that premiums for optional coverage must be included. In *State Farm Mut. Auto. Ins. Co. v. Wannamaker,* the Court provides that a "meaningful" offer under S.C. Code Ann. § 38-77-160 is one where:

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

State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555, 556 (1987). Based on these standards, the Supplement sent to Respondent to confirm the deletion of UIM coverage from the Policy qualifies as a meaningful offer. The Supplement (1) was in writing; (2) specified that "you have the right to buy, and your insurance company is required to offer, optional underinsured motorist coverage in various limits *up to the limits of liability coverage you have purchased*;" (3) spells out the differentiation between, and a description of, uninsured and underinsured motorist coverages across multiple paragraphs in Section 1; and, (4) notified Respondent that "[i]f you select optional underinsured motorist coverage, an additional premium will be charged." (Plaintiff's Ex. 11.) Furthermore, Respondent has not made any suggestion in his testimony that the results of his completed Supplement would have been different had Respondent strictly complied with the statute. Simply put, the written Supplement specifies the limits of coverage available as those associated with liability coverage under the effective policy, describes the optional coverage available, and places the insured on notice of additional premiums associated with such coverage. *Id.*

Furthermore, Linda Barnes, an agent of Countybanc Insurance Services, Inc., testified that the purpose for sending the Supplement to Respondent was to have written verification that Respondent was rejecting UIM coverage. (Court Tr. 44:13-16). In the Supplement, Appellant included an acknowledgement which states:

> If you reject optional underinsured or additional uninsured coverages shown on this form and if you are involved in an automobile accident that is not your fault, this form may be used by your insurance company as evidence against you if you make a claim for additional uninsured motorist coverage or optional underinsured motorist coverage.

(Plaintiff's Ex. 11). As such, the Supplement served as documentation of placing Respondent on notice that Respondent has the right to reject optional UIM coverage and verification that Respondent did, in fact, reject such coverage. (Court Tr. 44-45:21-1). While it would qualify as an additional offer of UIM coverage, this Supplement merely served the purpose of ensuring that Appellant thoroughly documented the intent of Respondent in writing aside from that encompassed in an email. At no point did Respondent make any written assertions on the Supplement that Respondent did not understand any language in Section 1 describing the optional coverage nor anywhere else on the form. Respondent did, however, write that Respondent wished for UIM coverage to be deleted from all vehicles that Appellant insured. (Plaintiff's Ex. 11). Therefore, Appellant was under no obligation to make another meaningful offer of UIM coverage, and the Supplement provided to Respondent served only as a written verification of Respondent's intent for Appellant's records.

CONCLUSION

Based on the arguments encompassed herein, Appellant would respectfully show unto this Court that Appellant is under no obligation to provide retroactive UIM coverage to Respondent and that the trial court erred in finding in favor of Respondent. Respondent unequivocally indicated

his intent to have UIM coverage deleted from the Policy to which Appellant complied with such request. As such, Appellant respectfully requests this Court overrule the Circuit Court's verdict in the trial of this case in favor of Appellant.

RESPECTFULLY SUBMITTED,

BROWN & BREHMER

s/Karl S. Brehmer
Karl S. Brehmer (SC Bar # 12849)
Andrew C. Brehmer (SC Bar # 106113)
Brown & Brehmer
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
ksb@brownandbrehmer.com
acb@brownandbrehmer.com

Attorneys for Respondent Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier

Columbia, South Carolina
June 28, 2023.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 28 2023
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-000549

Donegal Insurance,

Appellant,

v.

Charles H. Wade,

Respondent.

PROOF OF SERVICE

I certify that a true copy of Appellant's Initial Brief in this case has been served on Thomas Erskine Hite, III, Esq., counsel for Respondent, this 28th day of June 2023, by emailing a copy of such to his primary email address (t3@hiteandstone.com), listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022, Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

[SIGNATURE PAGE TO FOLLOW]

BROWN AND BREHMER

s/Karl S. Brehmer

Karl S. Brehmer (SC Bar # 12849)
Andrew C. Brehmer (SC Bar # 106113)
Brown & Brehmer
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
ksb@brownandbrehmer.com
acb@brownandbrehmer.com

Attorneys for Respondent Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier

Columbia, South Carolina
June 28, 2023.