THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2007-CP-23-6453

Douglas Earl Stiltner and
Christine Rene Stiltner, ... Appellants,

v.

USAA Casualty Insurance Company, ... Respondent.

REPLY BRIEF

Blake A. Hewitt, SC Bar # 73674
John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

(South Carolina)

(Other Jurisdictions)

Statutes and Other Authorities

ARGUMENT

If this were a normal case, the outcome of this appeal would be a foregone conclusion. The "any evidence" standard applies to factual findings in an action at law, and it is difficult to imagine a lower court making findings that are literally unsupported by a single piece of evidence.

But this is not a normal case. What makes this case unusual is that it is marked by a demonstrable *lack* of evidence. After over 5 years of litigation, only two things are clear. The first is that Doug Stiltner used to have UM and UIM in the same amount as his liability coverage. The second is that although Doug has been a USAA customer since 1990, the only evidence of any meaningful offer of UIM — ever — are the forms Doug's wife apparently faxed to USAA in the year 2000. No one knows whose actions prompted USAA to drop UIM from Doug's policy sometime between October of 1998 and March of 2001,[1] and the best anyone can say about the forms Rene faxed is that she cannot imagine she would have handled them if she had not talked with her husband first.

If this is enough to satisfy the meaningful offer requirement, there is not much incentive for an insurance company to follow the rules. South Carolina law puts the burden on the insurer — the insurer must affirmatively show that it followed through with the requirement to make a meaningful offer. This burden is significantly diminished if an insurer can satisfy it by creating hypothetical after-the-fact justifications for the senseless failure to deal with the person that actually owns the policy. Conduct that is rewarded will be repeated.

---

[1]The declaration sheet showing UIM on Doug's policy is dated October 6, 1998. See (R.p.138). The first declaration sheet without UIM on Doug's policy is dated March 9, 2001. See (R.p.142). There are no declaration sheets for the period in between.

Contemporaneous documentation is critically important because most oral testimony about a meaningful offer is going to be practically useless. No one who works for an insurance company is going to remember the details of one specific transaction. The best they will be able to do is offer generic testimony about the company's policies and practices. The most an individual insured will be able to do is deny that the company followed those policies in his or her case. In many cases, there may be no principled way to choose who is right. The only way to pick is to guess, and both parties may be telling the truth.

Fact-finding involves more than simply making a guess, and the problem in this case is that where this order gives specific reasons for its decisions, those reasons are either incorrect or based on pure speculation. Something also has to be said of USAA's admission that it has no problem letting someone transact business on someone else's insurance policy as long as the two people are married. This would be fine but for the fact that nothing in USAA's policy is written this way, and neither the law on meaningful offers nor the law of agency gives USAA this license. Here again, conduct that is rewarded will be repeated.

Nobody can identify when Doug Stiltner's policy dropped UIM or lowered his UM below the liability limits, and the reason nobody can do this is that USAA *chose* to conduct its business this way. USAA can't use a guessing game to win — USAA has the burden of proof — and because guesswork is exactly what happened here, this Court should reverse.

A. The Reasons Given to Support the Finding That Rene Did Not Change the Policy's Coverage Are Inaccurate.

The trial court's order lists five reasons for finding that Rene did not change Doug's coverage. The first is that the Stiltners previously admitted Rene's actions did not change

anything. The remaining reasons are that Doug might have dropped UIM based on the Stiltners' marriage, their move to Easley, their decision to purchase two new vehicles, or the decision to raise the liability limits to $100,000/$300,000. (R.pp.13-14). The trial court reasoned that all of these changes could have affected the policy's premiums and triggered a decision to drop UIM. *Id.*

i. The Stiltners' "Admission."

The Stiltners do not know whether Rene's actions were the actions that caused USAA to remove UIM from Doug's policy. This is evident from a review of the trial transcript. When USAA's lawyer asked Doug if he knew whether UIM had already been dropped by the time Rene faxed USAA the forms, Doug responded "no," he did not know. (R.p.90, lines 18-21). USAA's lawyer then asked Doug "[y]ou can't say for sure, can you?" (R.p.90, line 22). The same answer, "no." (R.p.90, line 23). USAA's lawyer later admitted "we don't know. . . what act effectively dropped [UIM]." (R.p.118, lines 9-10). That ought to be enough to establish that neither party knows the answer.

All Rene said was that she did not *think* she would have been trying to change Doug's coverage, see (R.p.104, lines 9-15), but that is a different question than whether Rene's actions *in fact* changed the coverage. The Stiltners do not know, and neither does USAA.

ii. The Stiltners' Marriage.

The trial court's order reasons that because the Stiltners got married between April 1999 and October 2001, this could have affected the policy premium and caused Doug to decline UIM coverage. This sentence contains an obvious error; no one has yet assigned significance to any date in October of 2001. Rene returned these forms to USAA in October

of 2000, and the first evidence of UIM being absent from Doug's policy is a declaration page dated March 9, 2001. See (R.p.142).

The Stiltners got married in 1998; accordingly, they were already married in April 1999. Doug explained that he added Rene to his policy when they got married, see (R.p.55, lines 15-20), and to that end, a declaration page dated October 6, 1998, shows Rene's name listed on the policy. (R.p.138). This same declaration page shows Doug's policy containing UIM. *Id.* There does not appear to be any basis for reasoning that the marriage might have caused Doug to drop coverage. This policy *had* UIM after they were married.

iii. The Stiltners' Move to Easley.

Doug's October 1998 declaration page lists his mailing address as located in Liberty, South Carolina. See (R.p.138). The March 2001 declaration page shows his mailing address as located in Easley, South Carolina. (R.p.142). No one presented any evidence at trial about whether a move from one place to the other would affect Doug's policy premiums.

iv. The Stiltner's Decision to Purchase Two New Vehicles.

In October of 1998, there were three vehicles on Doug's policy. See (R.p.138). The policy contained UIM, and the UIM limits were the same as the UM and liability coverages. In March of 2001, Doug's policy still covered only three vehicles, but there is no UIM coverage listed. See (R.p.142). There was no evidence presented at trial establishing that the three vehicles in 2001 were more expensive to insure than the three vehicles in 1998.

v. Doug's Decision to Raise His Liability Limits.

The first evidence of Doug's policy premiums being raised to $100,000/$300,000 is the March 2001 declaration page. See (R.p.142). The total liability premium, for all of three

vehicles combined, is about $340. This is a six-month premium, and it is roughly $60 more than Doug's total liability premium in 1998, when his liability limits were $25,000/$50,000. See (R.p.138). The cost of UM coverage is only marginally different; the roughly $11 charge per vehicle has risen to about $12.50.

The idea that Doug would drop UIM coverage because he raised his liability limits is — frankly — a little hard to swallow. In 2001, Doug could have purchased UIM in the same amount as his liability limits ($100,000/$300,000) for $11.65 per vehicle; a total six-month premium of $35. See (R.p.130) (listing the prices of available UIM). Doug explained that he always wanted more coverage than the law required "to be safer," (R.p.71, lines 17-25), and that he never canceled or lowered his coverage. (R.p.74, line 23 - p.75, line 3). To accept USAA's argument, the court had to reason that Doug would significantly (and voluntarily) raise his liability limits to well over the minimum limits required by law, but at the same time, make a conscious decision to drop the two coverages that directly protected himself and his loved ones. People do unusual things, but that would be a most unusual decision.

No one knows when Doug raised his liability limits, and no one knows when UIM was first dropped from Doug's policy. The fact that Doug raised his liability limits in no way tends to prove that Rene's actions were not the actions that dropped UIM.

B. The Reasons Given to Support the Finding That Rene and Doug Discussed the UIM Form Are Indistinguishable from the Reasons That Were Rejected on Summary Judgment.

The judgment below reasons that the Stiltners must have discussed the UIM form because the form was faxed from Rene's place business twice, because the Stiltners agreed

they would have discussed it, because the different versions of the form were faxed 2 days apart, and because subsequent declaration pages showed no UIM coverage. (R.pp.14-15).

This is nothing more than guessing, and this is the same reasoning that was used to grant summary judgment to USAA. It is inaccurate to say "[t]here was no evidence [Rene] failed to discuss UIM with [Doug]." (R.p.14). Doug specifically denied she did. (R.pp.60-61). It is also inaccurate to say that the "only reasonable inference" is that Rene and Doug discussed the form. (R.pp.14-15). If the evidence led to only one reasonable inference, one of the parties was entitled to summary judgment. This reasoning is manifestly incorrect.

C. Rene Explained That Any Authorization for Her to Act Relied on Doug's Permission. This Is Express Agency.

Implied agency arises when people conduct their affairs in such a way that the law implies an agency relationship. In *Fernander v. Thigpen*, the physical appearance of a restaurant and the fact that the restaurant's employees believed they worked for the restaurant's parent corporation gave rise to a jury question whether there was an agency relationship between the restaurant's owner and the parent corporation. 278 S.C. 140, 143-44, 293 S.E.2d 424, 426-27 (1982). In *Nationwide v. Prioleau*, the law *had* to imply an agency relationship between the husband and the wife because if the husband did not have authority to enter into the parties' insurance contract, the wife did not have any insurance policy to reform. 359 S.C. 238, 243, 597 S.E.2d 165, 168 (Ct. App. 2004). An agent's authority has to come from the principal, and implied agency is the term of art used to describe a situation where there is no express investing of agency authority, but the circumstances suggest an agency.

That is not what the trial testimony in this case describes. Rene Stiltner said that in order for it to be acceptable for her to take action on Doug's policy, she would have to have received Doug's "permission." (R.p.110, line 25 - p.111, line 3). This should not be controversial. It is express authority, not implied.

All of this is being generated after-the-fact — there is no evidence that the Stiltners ever conducted business in a way that implied an agency relationship between them. This one interaction with USAA is the only dealing of the Stilters' in the record, and there are multiple cases establishing that without something more, one spouse may not reject UIM on another's insurance policy. See *Nationwide Mut. Ins. Co. v. Powell*, 292 F.3d 201 (4th Cir. 2002) (applying South Carolina law); and *Allstate Ins. Co. v. Estate of Hancock*, 345 S.C. 81, 545 S.E.2d 845 (Ct. App. 2001). If having a meaningful offer form signed by the spouse of the named insured was enough, the holdings of these cases would be different.

D. Unless a Declaration Sheet Constitutes a Meaningful Offer, USAA Cannot Establish the "Full Knowledge of the Facts" Prong of Ratification. Similarly, Rene Cannot Be Estopped from Seeking Benefits Because USAA Cannot Show it Acted Reasonably in Relying on Rene's Rejection.

Among other things, ratification requires that the principal have full knowledge of the agent's acts. *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

The Supreme Court has explained that the purpose of the meaningful offer requirement is to structure this transaction such a way that insureds will "know their options and [] make an informed decision as to which amount of coverage will best suit their needs." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 262-263, 626 S.E.2d 6, 12 (2005) (internal

quotation marks omitted). None of the declaration pages sent to Doug advised him of the nature of UIM coverage, the available limits, or of the fact that Rene had rejected an offer of this coverage. See (R.pp.141-227). If this argument carried the day, the holdings in cases like *Hancock* and *Powell* would be different. See *Hancock*, 345 S.C. at 81, 545 S.E.2d at 845; *Powell*, 292 F.3d at 201.

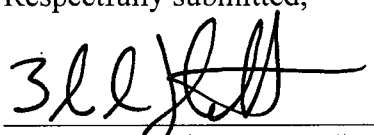
On its own motion, the *Powell* court raised and dismissed the argument that the wife who rejected UIM should be estopped from seeking coverage. See 292 F.3d at 205 n.5. The court explained that even if the rejection form constituted an implicit representation that the wife was authorized to take such action, "a party cannot be equitably estopped by virtue of her misrepresentation when the party to whom the misrepresentation was made could have acquired the true facts had it acted with reasonable diligence." *Id.* The court explained that to determine whether the wife possessed the authority to reject UIM on her husband's policy, the insurance company "needed only to ask [the husband]." *Id.*

The fact that South Carolina law controls this analysis is the reason why the federal cases USAA uses to support its arguments do not counsel a contrary result. Neither decision indicates that it is from a jurisdiction with a meaningful offer law like South Carolina's. See *State Farm Ins. Co. v. Taylor*, 293 F.Supp.2d 530 (E.D.Pa. 2003); *Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228 (4th Cir. 1996) (applying Maryland law). The *Taylor* decision partially rests on the reasoning that had the defendants reviewed their policy, they would have been aware of the policy's scope. 293 F.Supp.2d at 535. The *Benner* decision involves a presumption in Maryland law that an insured has read a policy and assented to its terms. 93 F.3d at 1237. Neither is in accord with South Carolina's law on meaningful offers.

CONCLUSION

Section 38-77-350 of the South Carolina Code required USAA to present Doug Stiltner with a meaningful offer of UIM when he purchased his automobile insurance policy in 1990. There is no proof USAA did that. Ten years later, USAA had no legal justification for assuming that Rene Stiltner had authority to modify or ratify her husband's policy, and if USAA had insisted in dealing with Doug, this dispute would have never happened. No one knows whether Rene's actions dropped UIM from the policy — there is no principled way to determine what happened. This Court should accordingly reverse the trial court's decision and order that the policy be reformed.

Respectfully submitted,



June 20, 2013

Blake A. Hewitt, SC Bar # 73674
John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2007-CP-23-6453

Douglas Earl Stiltner and
Christine Rene Stiltner, ... Appellants,

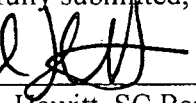
v.

USAA Casualty Insurance Company, ... Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



Blake A. Hewitt, SC Bar # 73674
John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com
Attorneys for Appellant

June 20, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2007-CP-23-6453

Douglas Earl Stiltner and
Christine Rene Stiltner, ... Appellants,

v.

USAA Casualty Insurance Company, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *final Brief of Appellants and Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

J.R. Murphy, Esquire
Ashley B. Stratton, Esquire
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

June 26, 2013

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC