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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Anderson County
Anderson County Court of Common Pleas
Hon. J. Cordell Maddox, Jr., Presiding

Civil Action No. 2020-CP-04-02533
Appellate Case No. 2023-000549

Donegal Insurance……..…….……Appellant,

Versus

Charles H. Wade……...……..…….Respondent

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in finding Respondent Charles Wade's policy should be reformed and underinsured motorist coverage be applied to the level of liability limits on the policy?

II. Did the Circuit Court err in finding Appellants were required to and did not produce a meaningful offer of underinsured motorist coverage?

STATEMENT OF THE CASE

The Respondent adopts the statement of the case submitted by the Appellant in brief, but does not adopt the Statement of the Facts submitted by the Appellant in brief.

STANDARD OF REVIEW

The Respondent adopts the Standard of Review submitted by the Appellant in brief.

ARGUMENT

III. The Circuit Court did not err in finding Respondent Charles Wade's policy should be reformed and underinsured motorist coverage be applied to the level of liability limits on the policy.

Honorable Judge J. Cordell Maddox, Jr. did not err in finding that the Respondent's automobile insurance policy should be reformed and underinsured motorist coverage (UIM) be applied to the level of liability limits on the policy. The Appellant (Donegal) relies on this Court's opinion in *United States Automobile Association v. Litchfield*, 356 S.C. 582 (Ct. App. 2003), asserting in brief that the facts of this case are identical to the facts in *Litchfield*. The facts of this case are distinguishable on one very crucial point: Ms. Litchfield did not challenge on appeal the fact that she voluntarily elected to drop underinsured motorist coverage, while Mr. Wade in this case *did* specifically challenge at trial and continues to challenge on appeal the voluntariness of the alleged waiver of UIM coverage, as discussed *infra*. Further, contrary to the assertions of Donegal in brief, this Court specifically states in *Litchfield* that, *"We do not view this as an 'offer of UIM coverage' case……. Moreover we agree with the trial court that 'it would make no sense…..for an insurer to be required to 'offer' a given coverage to an insured who had contacted the insurance company for the specific purpose of dropping that coverage.'"* (Emphasis added) This Court was clearly concerned about ruling in favor of Litchfield given that she did not challenge her intent to waive UIM coverage on appeal. Further, *Litchfield* is a narrowly-tailored opinion that does not address the issue of whether Ms. Litchfield received a "meaningful offer" to reject UIM, which will be discussed in Argument II, *infra.* In the case at bar, however, Mr. Wade *did*

not contact his insurer for the specific purpose of dropping UIM coverage and did not waive this issue at trial, nor on appeal. Therefore, *Litchfield* is not applicable to this case and Judge Maddox did not err in ruling in favor of Mr. Wade.

As stated, Mr. Wade did not contact Donegal for the specific purpose of dropping UIM coverage. The testimony at trial established that Mr. Wade's wife, Shonda, had "a lot" of phone conversations with Michelle Rogers, who was employed by Countybanc Insurance -- the prior issuer of the Wades' car insurance policies prior to the assignment of the policies to Donegal. Of note is that Michelle Rogers was not produced as a witness at trial. Shonda Wade testified that in July, 2017, she contacted Michelle Rogers for the purpose of receiving information regarding the renewal of their insurance coverage and "what was going on with the UMI and the underinsured and uninsured motorist" coverage so that Ms. Rogers could explain the policies to her. (Tr. Trans. p. 55, lines 14-23.) Shonda Wade testified that her conversation with Ms. Rogers caused her to understand "nothing," and she was as confused as before she called Ms. Rogers. (Tr. Trans. p. 55, lines 24-25; p. 56, lines 1-8.) Subsequently, Shonda Wade testified that she gave the emails she received from Ms. Rogers to Mr. Wade so that he could speak to Ms. Rogers to receive clarification on what the different policies entailed. (Tr. Trans. p. 56, lines 15-20.) Shonda Wade testified that she never understood the difference between UIM and UM, despite Ms. Rogers' explanation to her. (Tr. Trans. p. 56, lines 21-25.) Shonda Wade testified that she and her husband Charles Wade had always carried UIM coverage, and had she known what UIM coverage was she would have continued to carry it on her insurance policy. (Tr. Trans. p. 58, lines 16-25.) Shonda Wade testified that at the time of trial she and Mr. Wade had UIM coverage on their policies, and that she

believed what Ms. Rogers told her about the coverage was a mistake. (Tr. Trans. p. 58, lines 23-25.) Shonda Wade specifically testified that she never called Countybanc to directly cancel UIM coverage. (Tr. Trans. p. 59, lines 10-12.) Charles Wade also testified at trial. Mr. Wade testified that he and his Wife contacted Countybanc because their policy was coming up for renewal and they wanted to bundle the house and car – that's what started the conversation. (Tr. Trans. p. 63, lines 22-25; p. 64, lines 1-7; p. 70, lines 21-25.) Mr. Wade also testified that he did not contact Ms. Rogers nor Countybanc to cancel UIM coverage. (Tr. Trans. p. 64, lines 8-10.) Mr. Wade testified that after Shonda Wade spoke to Ms. Rogers that Mrs. Wade was confused in thinking they were paying for the same coverage for underinsured and uninsured motorist coverage. (Tr. Trans. p. 64, lines 20-25.)

Pursuant to cross examination, counsel for Donegal questioned Shonda Wade about why the emails introduced as Defendant's Exhibit 1 do not indicate whether she understood the distinction between uninsured or underinsured motorist coverage. (Tr. Trans. p. 59, lines 18-25; p. 60, lines 1-8; Defendant's Exhibit 1.) Appellant's trial counsel seemingly chastises Shonda Wade for not saying, "I'm not going to buy this because I don't know what it is." (Tr. Trans. p. 60, lines 12-13.) Appellant's trial counsel also questions Mr. Wade about not sending an email stating that he did not understand the distinction of uninsured coverage or underinsured coverage. (Tr. Trans. p. 69, lines 17-25.) As the statutes and case law squarely put the burden upon the insurance company to make a meaningful offer of UIM coverage, as discussed *infra*, it is concerning that counsel is seemingly shifting the burden to the insured to understand insurance coverages without the insurance company presenting a meaningful offer under

the statutes and case law. Certainly Judge Maddox received sufficient evidence in this case to distinguish the *Litchfield* case and rightly so. Judge Maddox did not err and his order should not be disturbed on appeal.

IV. The Circuit Court did not err in finding Appellant was required to and did not produce a meaningful offer of underinsured motorist coverage.

Contrary to the assertions of Donegal in brief, the Wades have never been given a "meaningful offer" to reject UIM coverage based on the record of this case. In brief, Donegal seems to abandon the assertion that the Wades were given a meaningful offer to reject UIM coverage when they initially bought their policies by arguing in brief on page 8 that the "supplement" sent to Respondent Wade satisfied a meaningful offer from which Respondent is to be bound. (Appellant's Brief, p. 8.) Donegal makes no mention of the initial form provided to the Wades as the initial form that was presented to them purportedly to waive UIM coverage did not meet the requirements of S.C. Code Ann. § 38-77-160 nor 38-77-350 et seq, nor the elements of *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987). (Plaintiff's Exhibit 1.) The S.C. Supreme Court in *Wannamaker* adopted a four-part test to determine whether an insurer has made a "meaningful offer" of UIM coverage (if the insurer does not enjoy the statutory presumption by compliance with 38-77-350 et seq. which the Appellant in this case does not): (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. The supplement in this case is as defective as the original form as there are no premiums listed on the form. (Defendant's Exhibit 2.) Donegal has utterly failed to comply with the requirements of ***Wannamaker*** in this case, but significantly has failed as to prongs (3) and (4). It was clear from the testimony of the Wades at trial, discussed *supra*, that Donegal did not intelligibly advise the insured of the nature of the optional coverage as the Wades were confused about the coverage. Further, the Wades were not informed that optional coverages were available for additional premiums as there were no premiums listed on the supplemental form. (Defendant's Exhibit 2.) Mr. Wade specifically testified that he did not understand at the time of his email on August 8 at 1:10 p.m. saying he wanted to completely reject UIMBIPD what he was rejecting, and believed that UIM and UM coverage was the same thing. (Tr. Trans. p. 69, lines 2-8; Defendant's Exhibit 1.) Mr. Wade testified that had the premiums been designated on the UIM form emailed to him and had Ms. Rogers explained what UIM coverage was to him properly, he would have purchased it and "kept what we had. We had already been paying for it. There wasn't no reason for us really to cancel it." (Tr. Trans. p. 68, lines 1-6.) This Honorable Court in ***Jackson v. State Farm Mut. Auto. Ins. Co.,*** 301 S.C. 440, 392 S.E.2d 472 (Ct.App.1990), aff'd as modified, 303 S.C. 321, 400 S.E.2d 492 (1991), specifically held that the insurance company had failed to demonstrate a meaningful offer of UIM coverage, where, among other reasons, the form did not specify the limits of the coverage in dollar amounts, and ***it failed to state the amount of the additional premium the insured must pay for UIM coverage at the specified limits***. (Emphasis Added)

As stated previously, the requirement of a meaningful offer of additional UM and UIM coverage is intended to protect an insured. A meaningful offer of additional UM and UIM makes as certain as possible that an insured has actual knowledge of his options with respect to such coverages and is therefore able to make an informed decision with respect to his desired coverage. *Floyd v. Nationwide Mutual Insurance Company*, 367 S.C. at 262-63, 626 S.E.2d at 12 (2005). Honorable Judge Thomas E. Huff dissented in the *Litchfield* case, finding that USAA did not make a valid offer of UIM coverage and concluded he would have reversed the trial court's grant of summary judgment to USAA. Judge Huff was rightly concerned about whether an insured can truly make an informed decision to reject UIM coverage if there has never been a meaningful offer of coverage through a valid form executed pursuant to statutory and/or case law requirements.

As Judge Huff also points out, an insurer (such as Donegal) cannot rely on the argument that S.C. Code Ann. § 38-77-350(C) provides that an automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supercedes or replaces an existing policy, as the subsection envisions that an effective past offer has already been made. *See Antley v. Nobel Ins. Co.*, 350 S.C. 621, 635 567 S.E.2d 872, 879-80 (Ct. App. 2002); *McDonald v. S.C. Farm Bureau Ins. Co.*, 336 S.C. 120 125, 518 S.E.2d 624, 626 (Ct. App. 1999); *Ackerman v. Travelers Indem Co.*, 318 S.C. 137, 142, 456 S.E.2d 408, 411 (Ct. App. 1995). The record of this case establishes that no meaningful offer of UIM coverage was ever made to the Wades – either initially or as of the date of trial – and Judge Maddox did not err in ordering reformation of the Wades' insurance policy to provide UIM coverage. This Honorable Court should not disturb Judge Maddox's sound order on appeal.

CONCLUSION

The Respondent, Charles Wade, respectfully prays that this Honorable Appellate Court will affirm the Order of the Honorable Judge J. Cordell Maddox, Jr., Circuit Court Judge presiding, dismiss this appeal with prejudice, and for any further relief as deemed appropriate by this Court.

Respectfully Submitted,

s/Scarlet B. Moore

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