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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge
R. Lawton McIntosh, Circuit Court Judge

Case No.: 2019-CP-23-01438

Benigna Vargas . . . . . Appellant,

v.

MGA Insurance Company, Inc., and
Calidad Latin, Inc. . . . . Respondents.

FINAL BRIEF OF APPELLANT

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2. Did The Trial Court Err In Denying Appellant's Motion For J.N.O.V., Motion For A New Trial Absolute, And Motion To Alter Or Amend Judgment Pursuant To Rules 50, 52, 59, And 60, *SCRCP*?

STATEMENT OF CASE

This case is a declaratory judgment and bad faith action involving an insurance carrier and its agent. In this case, the evidence showed that Appellant was not presented with a complete underinsured motorist selection/rejection form that complied with S.C. Code Ann. § 38-77-350, and that a meaningful offer was otherwise made in compliance with State Farm Mut. Auto. Ins. Co. v. Wannamaker, 354 S.E.2d 555, 556 (S.C. 1987). Instead of admitting this, and providing coverage, Respondent and its agent attempted to insert the missing page to create a complete form, and then pass it off to Appellant as a complete form that they had all along. Respondent's agent testified to a convoluted and implausible story to cover up the fact that the missing page was inserted after the fact. At some point during the pendency of the case, Respondent and its agent apparently realized that the law is such that they could get around the fact that a complete form was not presented to Mendez by claiming that Respondent only kept the signature pages.[1] At trial, Respondent's agent completely changed her testimony to say that her agency only scanned signature pages and not all pages that were presented to its customers as she has testified to at her deposition.

Appellant challenges two issues on this case. First, Appellant appeals the Circuit Court's denial of Appellant's Motion to Amend to add causes of action for Bad Faith and violation of the South Carolina Unfair Trade Practices Act against Respondent MGA and Calidad Latina, Inc. Second, Appellant appeals the trial court's denial of her Motion for

[1] This appears to be a holdover from the days of paper files and microfilm storage that does not make sense in today's paperless offices where the marginal cost of storing additional pages on a computer is essentially zero..

Directed Verdict and her Motion for Judgment J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant To Rules 50, 52, 59, And 60, SCRCP.

I. BACKGROUND

Appellant was involved in an automobile wreck on July 18, 2018. When the wreck occurred, Appellant was driving a vehicle insured by Respondent MGA. The policy was purchased by Appellant's husband, Alfredo Palafox Martinez, and was purchased from the Calidad Latina, Inc., ("Calidad") insurance agency. Calidad is owned by Angela Beltran ("Beltran"). The liability carrier for the at-fault driver in the wreck tendered its bodily injury policy limits. According to Respondent MGA, the subject insurance policy provided bodily injury ("BI") liability insurance coverage with limits of $25,000 per person/$50,000 per occurrence; property damage ("PD") liability insurance limits of $25,000; uninsured motorist ("UM") bodily injury coverage with limits of $25,000 per person/$50,000 per occurrence; and UM property damage insurance limits of $25,000. Respondent MGA contended that the insurance policy did not provide underinsured motorist coverage ("UIM"). The subject policy insured two vehicles with the same limits on each vehicle. Upon request, on November 28, 2018, Respondent MGA provided Appellant with a purported UIM selection rejection/form which was missing page "4 of 6" so that it did not meet the requirements of S.C. Code Ann. § 38-77-350. First UIM Selection Rejection form from November 28, 2018 (R. pp. 1360-1365). The same day, Appellant notified Respondent MGA that the UIM Selection/Rejection form was missing page 4 of 6, and asked for a complete form. That same day, Respondent MGA provided Appellant with documentation which it purported to include the complete UIM Selection/Rejection form whereby Mendez rejected UIM coverage. Second UIM Selection Rejection form from

November 28, 2018. (R. pp. 1366-1371). This document was also missing page "4 of 6" so that it did not meet the requirements of S.C. Code Ann. § 38-77-350. The same day, Appellant notified Respondent MGA that the UIM Selection/Rejection form provided was not complete and asked that Respondent MGA send over the complete document if it existed. Respondent MGA provided Appellant with the documentation which it purported to include the complete UIM Selection/Rejection form whereby Mendez rejected UIM coverage. Third UIM Selection Rejection form from November 28, 2018 (R. pp. 1372-1378). This form was also missing page "4 of 6" so that it did not meet the requirements of S.C. Code Ann. § 38-77-350. Then, on March 17, 2019, more than three and half months later, Respondent MGA sent Appellant a UIM Selection/Rejection Form that included page "4 of 6." Complete UIM Selection Rejection form (R. pp. 1379-1383). Appellant filed suit against Respondent MGA on March 20, 2019, seeking to reform the subject insurance policy to include UIM coverage.

The insurance policy at issue in this case was purchased from Calidad. After filing suit, Appellant subpoenaed the complete file related to the subject policy from Calidad which was not a party to the case at that time. The response received from Calidad included a UIM selection/rejection form that was missing page "4 of 6." (R. pp. 1384-1395). The subpoena response also included a verification that it was a "true, accurate, and **complete** copy of the documents requested and maintained" by Calidad. (R. pp. 1384-1395)(**emphasis** added).

It is clear that Mendez was not presented with a complete UIM Selection/Rejection form that included page 4. As set forth above, when this form was requested, MGA obtained the form from Calidad. Calidad produced a form to MGA that was missing page

4, which was then passed along to Appellant. Once suit was filed, Calidad was subpoenaed and provided a response that was again missing page 4, along with a verification that this was a true accurate and complete copy of their file. We know that the form missing page 4 is what was presented to Mendez as Calidad's owner was then deposed and testified that they scan all documents that are presented to their customers, including the non-signature pages, and that is what was scanned into their system.

II. PROCEDURAL HISTORY

Appellant filed suit against Respondent MGA on March 20, 2019, seeking to reform the subject insurance policy to include UIM coverage. This case involved extensive discovery, with Appellant being forced to file six Motions for Rule to Show cause due to MGA's repeated failures to comply with discovery requests, and then to comply with Court Orders regarding discovery, with each motion being resolved in Appellant's favor. See Order Form 4 January 12, 2022, Granting Plaintiff's Motion to Compel (R. pp. 12-14). After conducting discovery, Appellant filed a Motion to Amend on January 28, 2021, to add Calidad, as a defendant, and to add claims against both MGA and Calidad for Fraud, Violation of South Carolina Unfair Trade Practice Act, S.C. Code Ann. § 39-5-10 *et seq.,* and Bad Faith. See Plaintiff's Motion to Amend Summons and Complaint January 28, 2021 (R. p. 687). A hearing was held on March 24, 2021. The Court issued an Order denying Appellant's Motion to Amend as to her causes of action for Bad Faith and Unfair Trade Practices because they were futile. See Order of May 14, 2021, Partially Granting Plaintiff's (Appellant) Motion to Amend (R. pp. 4-8). The Order granted Appellant's Motion to Amend as to her cause of action for Fraud, but noted that Appellant must establish as a predicate that Respondent's Insured was negligent in the underlying tort

pursuant to Gaskins v. Southern Farm Bureau Casualty Ins., 345 S.C. 416, 581 S.E.2d 169 (2003). See Order of May 14, 2021, Partially Granting Plaintiff's (Appellant) Motion to Amend (R. pp. 4-8). Appellant filed a Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*, and Motion to Reconsider Pursuant to Rule 52, *SCRCP* (R. pp. 894-895). The circuit court denied Appellant's Motion. Order Form 4 of June 3, 2021, Denying Plaintiff's Motion to Reconsider (R. pp. 9-11). On February 3, 2023, Appellant filed a Motion for Partial Summary Judgment as to her cause of action seeking to reform the policies to provide UIM coverage (R. pp. 750-751). On February 21, 2023, Respondents filed a Motion to Dismiss Appellant's Fraud Cause of Action. See Defendant's Notice of Motion and Motion to Dismiss November 18, 2022 (R. p 1042). A hearing was held on February 23, 2023, on Appellant's Motion for Partial Summary Judgment, and on Respondent's Motion to Dismiss and Motion for Summary Judgment. On March 20, 2023, the Court issued an Order denying Respondent's Motion to Dismiss, and Denying both Appellant and Respondent's Motions for Summary Judgment. See Order of March 20, 2023, Denying Parties' Motion for Summary Judgment and Defendant's Motion to Dismiss (R. pp. 15-17).

This matter was placed on the trial roster for the week of October 23, 2023. On October 11, 2023, MGA and Calidad filed a Motion for Summary Judgment as to Appellant's cause of action for Fraud (R. p. 1222). MGA and Calidad's Motion was heard on October 23, 2023 as part of pretrial motions. The Court granted MGA and Calidad's Motion for Summary Judgment, and issued Orders on October 25, 2023, granting their Motion and dismissing Calidad as a party since there were no remaining causes of action as to Calidad.

See Order Form 4 of October 23, 2023, Granting Motion for Summary Judgment as to Fraud (R. pp. 18-20); Order Form 4 of October 25, 2023, Dismissing Calidad Latina, Inc. (R. pp. 21-23). A jury trial was held October 24-25, 2023, regarding Appellant's remaining cause of action for reformation of the insurance policies to include UIM coverage. At the conclusion of the trial, the jury returned a verdict that MGA had made a meaningful offer of UIM coverage (R. p. 24). On November 2, 2023, Appellant filed a Motion to Alter or Amend the Court's Order granting MGA and Calidad's Motion for Summary Judgment as to Appellant's Fraud claim. See Plaintiff's Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*, and Motion to Reconsider Pursuant to Rule 52, *SCRCP* November 02, 2023 (R. pp. 894-895). On November 3, 2023, Appellant filed a Motion for Judgment J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant To Rules 50, 52, 59, and 60, *SCRCP*. See Plaintiff's Notice of Motion and Motion for J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant to Rules 50, 52, 59, and 60, *SCRCP* November 03, 2023 (R. pp. 896-897). On November 15, 2023, the trial court issued an Order denying Appellant's Motions. See Order of November 15, 2023, Denying Plaintiff's Motion to Alter or Amend (R. pp. 25-27).

III. EVIDENCE

a) Pretrial Testimony And Evidence

The owner of Calidad, Angela Beltran, was deposed on November 24, 2020. Beltran testified that she did not know who actually met with Mr. Mendez when he purchased his policy. (R. p. 125, lines 17-19). Beltran did not know who was working in the Greenville office at the time Mr. Mendez purchased his policy. (R. p. 131, lines 19-

22). Beltran testified that she was not sure if page "4 of 6" was provided to Mendez. (R. p. 145, lines 14-16). Beltran testified that her agency scans the **complete** version of all documents provided to the customer, **including non-signature pages**. (R. p. 114, line 22-p. 116, line 6; p. 122, lines 17-21; p. 128, lines 9-17)(**emphasis** added). Beltran testified that whenever MGA would request any signed forms, she would email the PDF that was already saved to MGA. (R. p. 144, lines 12-20). However, Beltran testified that in this case Calidad sent MGA the form missing page "4 of 6" because they just printed off the pages that have signatures. (R. p. 142, lines 15-23). She also testified that the subpoena response was incomplete because they just sent the signature pages instead of the complete file as requested by the subpoena. (R. p. 114, lines 22-p. 116, line 6; p.122, lines 17-21). Beltran could not properly explain UIM coverage under South Carolina law. (R. p. 118, lines 8-14).

At her deposition, Beltran testified that she submitted the UIM Selection/Rejection form which included page "4 of 6" to Respondent MGA via email, and said that she would search for the email. (R. p. 139, line 23-p. 139, line 8). After her deposition, on November 24, 2020, Beltran forwarded Appellant the email where she sent the "complete" UIM Selection/Rejection form. This form includes page "4 of 6" which was missing from all the other copies of the documents that Appellant received from Respondent, including Calidad's subpoena response. Page "4 of 6" did not have anywhere to sign, and so it would have been easy to slip it into the other pages to create a complete UIM selection/rejection form.[2] The PDF attached to the email was analyzed by a computer expert, and it showed

[2] In fact, this is exactly what Beltran admitted that she did at trial. (R. p. 476, line 14-p. 477, line 24).

that the document was created on March 14, 2019, using an Epson office scanner- three days before it was sent to Appellant; more than three and a half months after Respondent MGA had provided Appellant with three copies of the form missing page "4 of 6;" and more than two years after Mendez had purchased the subject policy. Affidavit of William Henry Thames, III (R. pp. 1396-1406). Based on this, it was apparent that someone from Calidad inserted page "4 of 6" to create a complete form in a fraudulent attempt to create a complete UIM selection/rejection form when none existed. A 30(b)(6) deposition of MGA was conducted on August 19, 2022. MGA testified that they based their denial of UIM coverage on the UIM Selection/Rejection form that was provided by Calidad. See Deposition Transcript 30(b)(6) of MGA Insurance Company, Inc. (R. p. 253, line 11-p. 257, line 22). They further testified that, even though they originally had an incomplete form, and were later provided a complete form under suspicious circumstances, that their decision never changed. Id. MGA bases its opinion that Mendez was presented with a complete UIM selection/rejection form on the agent certification that is included on the form despite the fact that Beltran signs all forms regardless of whether she meets with the person or not. (R. p. 257, lines 13-22).

b) Trial Testimony And Evidence

Respondent had the burden of proof at trial. Essentially all of Respondent's evidence came in the form of the testimony of Angela Beltran. At trial, Beltran provided testimony that was diametrically opposite of her pretrial testimony. Beltran offered several different confusing and conflicting explanations as to the process that her agency goes through when it sells an auto insurance policy to a customer. She testified that her agency only scans signature pages of documents in direct contradiction to her deposition testimony

where she testified that they scanned every single page of documents provided to their customers. Trial of October 23-25, 2023 Transcript, (R. p. 462, lines 19-p. 462, line 1). She also testified that when she sent the "complete" UIM Selection Rejection Form, she inserted page "4 of 6" into the form to create a complete form when one otherwise did not exist when she had previously testified that she had pulled the signature pages from the complete form and emailed it to MGA. (R. p. 476, line 14-p. 478, line 24).

At trial, Beltran suddenly remembered that she probably met with Mr. Mendez, and also remembered who was working in the Greenville office at the time Mr. Mendez purchased the policy. (R. p. 469, line 18-p. 470, line 17; p. 491, line 10-23). However, upon cross examination, she admitted that she actually did not know who met with him or what was said to him. (R. p. 535, line 20-p. 536, line 20). Beltran testified that the fact that she signed the policy means that she met with Mendez in contradiction to her deposition testimony that she signs all policies regardless of who meets with the customer. (R. p. 470, line 18-p. 471, line 18). She also testified as to the purported general process at the agency when someone purchases car insurance, without providing detail of what exactly is explained to clients with regard to UIM coverage. (R. p. 493, lines 7-13). At trial she still could not properly explain what UIM coverage was. (R. p. 468, line 17-p. 469, line 17). Beltran's testimony at trial so opposite of her pretrial testimony that it cannot be based on mistake or misunderstanding.

Beltran was impeached with her deposition testimony at trial. When confronted with her conflicting testimony, Beltran attempted to claim that she had somehow been serially confused or mistaken. For example, see Trial of October 23-25 Transcript p. 466,

ll. 10-13. However, her testimony at trial was so at odds with her deposition testimony, that the difference could not be the product of confusion or misunderstanding.

At trial, the evidence also showed that Alfredo Palafox Mendez was an unsophisticated insurance purchaser. Mr. Mendez has difficulty hearing. (R. p. 559, line 20-p. 560, line 7). He can understand some spoken English, but cannot read English. (R. p. 561, lines 3-6). Despite this, the insurance agent at Calidad just had him sign pre-filled forms and didn't really explain anything, with the whole process taking about fifteen minutes. (R. p. 561, lines 11-p. 562, line 4; and p. 562, line 22-p. 563, line 2).

The evidence further showed that when Mendez arrived at Calidad, they had already filled out the insurance application for Respondent MGA, and told him that this was the cheapest one. (R. p. 570, lines 9-18). Mendez even purchased an additional coverage known as reimbursement motor club, even though he didn't know what it was or why he was purchasing it. (R. p. 564, lines 8-11).

MGA testified through their 30(b)(6) deposition. MGA testified that they based their denial of UIM coverage on the UIM Selection/Rejection form that was provided by Calidad. (R. p. 596, line 17-p. 600, line 5). They further testified that, even though they originally had an incomplete form, and were later provided a complete form under suspicious circumstances, its decision never changed. Id. MGA bases its opinion that Mendez was presented with a complete UIM selection/rejection form on the agent certification that is included on the form despite the fact that Beltran signs all forms regardless of whether she meets with the person or not. (R. p. 600, lines 6-16).

c) Conflicting Testimony Of Angela Beltran

Below is a table setting out the conflicting testimony of Angela Beltran. As this table illustrates, Beltran's testimony at trial changed completely on almost every key point. This is especially important in this case, as Beltran's testimony constitutes essentially the entire proof presented by Respondent at trial in support of its position that a meaningful offer was made.

Pretrial Testimony	**Trial Testimony**
She did not know who actually met with Mr. Mendez when he purchased his policy. (R. p. 125, lines 17-19)	She met with Mendez when he purchased his policy. (R. p. 469, line 18-p. 470, line 17; p. 470, line 18-p. 471, line 18.)
She signs all policies so the fact that she signed Mendez' policy does not mean she met with him. (R. p. 131, lines 13-18)	Her signature on the policy means she met with Mendez (R. p. 470, line 18-p. 471, line 18)
Did not know who was working in the Greenville office at the time Mr. Mendez purchased his policy. Deposition of (R. p. 131, lines 19-22)	Remembers the names of the people working in the Greenville office when the policy was sold to Mendez (R. p. 491, lines 10-23)
Not sure if page "4 of 6" was provided to Mendez. (R. p. 145, lines 14-16)	She's sure the complete form was presented to Mendez. (R. p. 471, line 19-p. 472, line 14)
Her agency scans the **complete** version of all documents, including pages with no signatures. (R. p. 114, lie 22-p. 116, line 6; p. 122, line 17-21; p. 128, lines 9-17)(**emphasis** added)	Her agency only scans signature pages (R. p. 462, line 19-p. 463, line 1).
Whenever MGA would request any signed forms, she would email the PDF that was already saved to MGA. (R. p. 144, lines 12-20)	Her company does not have a policy with regard to forwarding documents. (R. p. 474, line 17-p. 475, line 7)
The subpoena response was incomplete because they just sent the signature pages instead of the complete file as requested by the subpoena. (R. p. 114, line 22-p. 116, line 6; 122, lines 17-21)	She did not pull out signature pages when responding to subpoena. They only scan signature pages. (R. p. 483, line 14-p. 485, line 16)

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO AMEND TO ADD CAUSES OF ACTION FOR BAD FAITH AND FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICE ACT, S.C. CODE ANN. § 39-5-10 *ET SEQ.*, AGAINST RESPONDENT MGA AND CALIDAD LATINA, INC.

a) Standard Of Review

South Carolina law is clear that leave shall be freely given to a party to amend his/her pleadings. "Rule 15(a) provides that when a party asks to amend his pleading, 'leave shall be freely given when justice so requires and does not prejudice any other party.' Rule 15(a), SCRCP. 'This rule strongly favors amendments and the court is encouraged to freely grant leave to amend.' Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). 'Rule 15(a) is substantially the same as the Federal Rule,' Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's 'freely given' provision as a 'mandate' that 'is to be heeded,' Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962). The Foman Court continued:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

Patton v. Miller, 804 S.E.2d 252, 261–62 (S.C. 2017), reh'g denied (Sept. 27, 2017).

b) Argument

Appellant sought to amend her Complaint to add Calidad as a defendant and to add causes of action for Bad Faith, Fraud, and for Violation of the South Carolina Unfair Trade Practices Act. The Court issued an order granting Appellant's motion in part, and denying it in part. Specifically, the Court allowed Appellant to amend her Complaint to add Calidad as a defendant and to add a cause of action for Fraud. However, the Court denied Appellant's motion to add causes of action against both MGA and Calidad for Bad Faith and violation of the UTPA on the grounds that these claims would be futile. See Order of May 14, 2021, Partially Granting Plaintiff's Motion to Amend (R. pp. 4-8). In its Order, the Court stated that a claim for Bad Faith would be futile as Appellant is not the named insured under MGA's insurance policy. The Court also held that a claim pursuant to the UTPA would be futile as the conduct complained of is regulated by the S.C. Department of Insurance, and is exempt from the UFTPA pursuant to S.C. Code Ann. § 39-5-40. However, as set forth below in greater detail, in the first party context such as this case, there is no requirement that a person be a named insured in order to bring a bad faith action claim against an insurer. Appellant was an insured under the subject insurance policy, and, in the first party context, an insured may bring a Bad Faith action against the insurer. Further, the conduct complained of by Appellant is not exempted from the UFTPA, so that Appellant's claim would not be futile.

i. Appellant's Cause of Action for Bad Faith Is Not Futile

In its Order, the Trial Court held that Appellant's action for bad faith was futile. The Court stated "Plaintiff does not have a contract with Defendants. Rather, Alfredo Mendez has a policy with Defendants. Plaintiff is not the proper party to bring a cause of

action for bad faith under South Carolina law. The South Carolina Supreme Court held in Klecklev v. Northwestern Nat'l Cas. Co., that actions for bad faith refusal to pay claims to third parties who are not named insured are not permitted under South Carolina law. 338 S.C. 131, 526 S.E.2d 218 (2000). The Court further stated 'South Carolina has never extended the concept of an 'insured' to include parties whose rights arise from the contract between the first party insured and the insurer.' Id. at 136." See Order of May 14, 2021, Partially Granting Plaintiff's Motion to Amend (R. pp. 4-8).

This is a first party case, as MGA insured the vehicle Appellant was driving. First UIM Selection/Rejection form from November 28, 2018 (R. pp. 1360-1365). Appellant is a Class I insured as her husband owned the vehicle she was driving. Further, she was listed on the insurance policy. First UIM Selection/Rejection Form (R. pp. 1360-1365). It is well settled that in the first party setting, an insured may bring a bad faith claim against their insurer. See Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616, 619 (S.C. 1983). In Nichols, our Supreme Court held "that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." Id. It's important to note that in Nichols the court did not limit its holding to a named insured- instead, it held that an insured can bring a claim. Here, Appellant is an insured, and the actions alleged by Appellant in her amended complaint are certainly in bad faith, and unreasonable. Therefore, the Trial Court erred in denying Appellant's Motion to Amend to include her bad faith cause of action against MGA and Calidad.

In its order, the court cites to Kleckley v. Northwestern Nat'l Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000), for the proposition that someone other than the named insured may not bring a claim for a bad faith refusal to pay a claim. In Kleckley, the plaintiff slipped and fell at a Hardees restaurant. She then brought a bad faith claim against Hardee's insurer, Northwestern Mutual. Kleckley is inapplicable to the present case, as Kleckley involves a person who was injured due to the negligence of a third party bringing suit against the negligent third party's liability carrier, not an injured person brining suit against their own insurance carrier for bad faith in handling a claim for first party underinsured motorist coverage. Conversely, in the present case, like in Nichols, Appellant was an insured and sought to bring a first party bad faith claim against her own insurer for its actions in handling her underinsured motorist claim. Kleckley is inapplicable to the present case, as it deals with a third party bad faith claim, while the present case is a first party bad faith claim where Appellant is an insured of Respondent. In Kleckley, the court reaffirms its holding in Nichols, stating "in Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983) we recognized a tort action for an insurer's bad faith refusal to pay first-party benefits." Kleckley v. N.W. Nat. Cas. Co., 526 S.E.2d 218, 219 (S.C. 2000). The court also reaffirmed the difference between first party bad faith claims, which may be brought by an injured insured, and third party bad faith claims, which can only be brought by the named insured- not the party who suffers the injury. Id.

This matter was addressed in UFP E. Div., Inc. v. Sel. Ins. Co. of S.C., No. CV 4:15-2801-RMG, 2017 WL 499083, at *5 (D.S.C. Feb. 6, 2017). In UFP, the defendant insurance company argued that it was "entitled to summary judgment on UFP's bad faith claim because UFP is an additional insured, not a named insured, under the insurance

policy, yet South Carolina law only permits named insureds to bring bad faith actions, and so UFP cannot bring a bad faith action against." In dismissing this argument and finding that UFP could bring a bad faith action, the Court stated:

> "[t]he South Carolina Court of Appeals addressed an additional insured's bad faith claim in *BMW of N. Am.*, *LLC v. Complete Auto Recon Services*, *Inc.*, 731 S.E.2d 902, 907 (S.C. Ct. App. 2012). The Court of Appeals held that defendant Colony Insurance Company was entitled to summary judgment on the bad faith claim brought by BMW, an additional insured under a policy issued by defendant, because the subject matter of the claim was not covered by the insurance agreement. There is no suggestion that BMW lacked standing to bring a bad faith claim against Colony Insurance at all. Further, this Court can discern no apparent reason why a party identified as an insured in the insurance contract should not be able to bring a bad faith claim regarding the handling of its claim for insurance benefits brought under the insurance contract. The many cases Selective cites to support its position are inapposite because they concern claims by third-party tort victims suing tortfeasors' liability providers for coverage of underlying tort claims, not additional-insured tortfeasors suing their own insurers for breach of contract." Id.[2]

Because Appellant's Bad Faith Claim against MGA and Calidad is a first party claim, she has a valid cause of action which would not be futile. Therefore, the Trial Court erred in denying Appellant's motion to amend her Complaint to include a cause of action for Bad Faith, and the Order should be reversed so that Appellant may bring her bad faith claim against Respondent and Calidad.

ii. Appellant's Cause Of Action Pursuant To The South Carolina Unfair Trade Practices Act Is Not Futile

Appellant sought to amend her Complaint to add a cause of action pursuant to the South Carolina Unfair Trade Practices Act ("UFTPA"). Respondent objected on the

[2] While this is a United States District Court case, and is not binding precedent, Appellant cites the opinion in detail as it does an excellent job of summarizing South Carolina law on this issue.

grounds that this cause of action would be futile as the conduct complained of would be exempt from the UFTPA pursuant to S.C. Code Ann. § 39-5-40. The Court denied Appellant's motion, finding that the conduct complained of is regulated by the S.C. Department of Insurance, and is exempt from the UFTPA pursuant to S.C. Code Ann. § 39-5-40. As set forth below, the conduct complained of by Appellant is not exempted from the UFTPA, so that Appellant's claim would not be futile, and Appellant should be allowed to amend her Complaint to include a claim pursuant to the UFTPA.

a.The South Carolina Unfair Trade Practices Act Does Not Generally Exempt Acts And Practices Of Insurance Companies.

Only actions or transactions "permitted under laws administered by any regulatory body" are exempted from the UFTPA. See 39-5-40(a). Appellant's proposed claims under the UFTPA are based on Respondent and Calidad's actions in inserting a missing page to create a complete UIM selection/rejection form when one otherwise did not exist, and in then using said incomplete form to refuse to provide UIM coverage. This conduct is clearly not "permitted" conduct by the Insurance Commission. Since Respondent and Calidad's conduct is not "permitted" conduct by the Insurance Commission, the acts or practices complained of are not exempt. In addressing the scope of the "regulated industry" exception under § 39-5-40(a), the South Carolina Supreme Court has concluded: "We believe that the exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes.... [W]e believe that the intent of our Legislature was to exclude activities which would otherwise be allowed or authorized." Johnson v. Collins Entertainment Co., 349 S.C. 613, 564 S.E.2d 653 (2002), quoting Ward v. Dick Dyer and Associates, 304 S.C. 152, 403 S.E.2d 310, 312

(1991). The Supreme Court therefore rejected the argument that all "general activity" within a regulated industry is subject to the § 39-5-40 exclusion. This issue was also discussed in Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.(2d) 310 (1991), where the SC Supreme Court adopted the following approach at determining exemptions from the UTPA:

> "The purpose of the exemption is to insure that a business is not subject to a lawsuit under the Act [UTPA] when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendant's interpretation of the exemption would deprive consumers of a meaningful remedy in many situations." (Citing from Skinner v. Steele, 730 S.W.(2d) 335 (Tenn. App. 1987)).

The Supreme Court went on to state:

> "We find this reasoning persuasive and applicable to our statutory exemption. In addition we find that this conclusion is buttressed by the fact that Section 39-5-160 of the Act provides that '[t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.'"

Finally, while not specifically addressing the scope of the exception, in Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct. App. 2000), the Court of Appeals reversed the trial court's dismissal of a UFTPA claim against insurance carrier and its claims representative for, among other things misrepresentation of available coverage for a claim.

For these reasons, it is clear that insurance companies such as Respondent MGA, and insurance agents such Calidad, are not generally exempt from claims under the UFTPA.

b. The UFTPA Only Specifically Exempts Unfair Trade Practices Covered And Regulated Under Title 38, Chapter 57, §§ 38-57-10 Through 38-55-320. The UFTPA Does Not Exempt Improper Claims Practices As Defined In Title 38, Chapter 59, §§ 38-59-10 Through 38-59-270.

The UFTPA provides "(c) This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40. The Chapter referenced by the UFTPA is the "Trade Practices" section of Title 38- Insurance. However, Title 38- Insurance also includes Chapter 59- "Claims Practices." The UFTPA does not exclude claims for actions that would violate the Claims Practices chapter of Title 38- Insurance.

Among other things, the Claims Practices chapter provides that it is an improper claims practice to "(1) Knowingly misrepresenting to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages." S.C. Code Ann. § 38-59-20. Respondent's conduct falls squarely within this definition of an improper claims practice. Here, the evidence shows that Respondent and its agent inserted a missing page to create a complete UIM selection/rejection form when one otherwise did not exist and then attempted to pass the cobbled together form off as a complete form. Because it falls within the Claims Practices chapter, it is not part of the "Trade Practices" chapter of Title 38- Insurance which is the only thing exempted under the UFTPA.

Further, the Insurance section of the S.C. Code makes clear that the penalties and administrative remedies contained therein are not exclusive. S.C. Code Ann. § 38-2-10,

which sets out Penalties for Title 38- Insurance, provides that "(B) The penalties in subsection (A) are in addition to any criminal penalties provided by law or any other remedies provided by law. The administrative proceedings in subsection (A) do not preclude civil or criminal proceedings from taking place before, during, or after the administrative proceeding." Thus, it is clear that civil remedies against insurance companies and insurance agents, such as those in the UFTPA, are not precluded by the insurance statutes.

Finally, Respondent and Calidad bear the burden of proving that their conduct is exempted from scrutiny under the Act. Section 39-5-40 states: "For the purpose of this section, the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption." Respondent must prove that their acts and practices toward Appellant are exempted from the UFTPA. Respondent has offered no evidence to show that its acts in inserting a missing page into the UIM selection/rejection form and using said form to refuse to provide UIM coverage are exempted from the UFTPA.

For these reasons, Appellant's claims pursuant to the UFTPA are not exempted. Therefore, Appellant requests that the Court overturn the trial court's order and allow Appellant to bring her claims for unfair trade practices as set forth in her Amended Complaint.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR J.N.O.V., MOTION FOR A NEW TRIAL ABSOLUTE, AND MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULES 50, 52, 59, AND 60, *SCRCP*

a) Standard Of Review

"On review from a trial court's denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court and views the evidence and all reasonable

inferences in the light most favorable to the nonmoving party. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004). Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). A motion for JNOV should be granted if no reasonable jury could have reached the challenged verdict. A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mutual Auto. Ins. Co., 307 S.C. 354, 357, 415 S.E.2d 393, 395 (1992). Gastineau v. Murphy, 503 S.E.2d 712, 713 (S.C. 1998).

Further, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.' Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000)." Allegro, Inc. v. Scully, 791 S.E.2d 140, 144 (S.C. 2016), abrogated by Hall v. UBS Fin. Services Inc., 866 S.E.2d 337 (S.C. 2021)

b) Argument

Respondent had the burden of proving that a meaningful offer of UIM coverage was made, either by having Mr. Mendez sign a complete form that complied with the requirements of S.C. Code § 38-77-350(B), or orally by satisfying the factors set forth in State Farm Mut. Auto. Ins. Co. v. Wannamaker, 354 S.E.2d 555, 556 (S.C. 1987). Respondent failed to present evidence proving that a meaningful offer was made by either method. Respondent's bar for compliance is low.[3] Under Slice v. Liberty Mut. Fire Ins.

[3] Appellant is not arguing against these standards- only pointing that out.

Co. and other such cases, an agent may testify that it is their practice to keep only the signature pages from the UIM Selection/Rejection form. No. C.A. 3:09-00571-CMC, 2009 WL 4730639, at *3 (D.S.C. Dec. 7, 2009). The bar for compliance with Wannamaker is similarly low. Based on Cohen v. Progressive N. Ins. Co., an agent may testify as to their general practice if met with a customer, but do not specifically remember meeting with a customer. 737 S.E.2d 869, 872-873 (S.C. App. 2013).

While the bar is low, the agent must actually take the required steps. An agent simply stating that he or she took the required steps after the fact in the face of overwhelming evidence to the contrary is not enough. Here, the evidence shows that Respondents did not comply with Wannamaker in making an oral offer, or with the requirements of S.C. Code Ann. § 38-77-350 in using a written form. The court should reverse this matter as no reasonable jury could believe Respondent's transparent attempt to change their testimony at trial to conform with Cohen and Slice.

The evidence that Respondent did present at trial in the form of testimony by Angela Beltran was so utterly unbelievable that no reasonable jury could rely on it. Respondent failed to provide evidence on which a jury could reasonably conclude that a meaningful offer of UIM was made. Therefore, the trial court erred in refusing to grant Respondent's Motion J.N.O.V., Motion for a New Trial Absolute, and Motion to Alter or Amend Judgment Pursuant To Rules 50, 52, 59, And 60, SCRCP.

i. Applicable Law

An insurance company must make a meaningful offer of UIM Coverage. "Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages

are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute." S.C. Code Ann. § 38-77-160.

a. Offer Via Written Form

An insurance company can make a meaningful offer of UIM coverage by having their insured sign a form that complies with the requirements of S.C. Code § 38-77-350(B). An insurance company bears the burden of proving that a meaningful offer was made. An insurance company bears the burden of proving that the insured was presented with a UIM Selection/Rejection form that complies with SC Code Ann. § 38-77-350. See Liberty Mut. Fire Ins. Co. v. McKnight, 125 F. Supp. 3d 602, 608 (D.S.C. 2015) ("the insurer bears the burden of establishing that it made a meaningful offer of UIM coverage."). "If the form does not comply with the statute, the insurer may not benefit from the protections of the statute." Progressive Cas. Ins. Co. v. Leachman, 608 S.E.2d 569, 572 (S.C. 2005). "(B) If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits." S.C. Code Ann. § 38-77-350(B). The form, at a minimum, must provide for each optional coverage required to be offered: "(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 to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires; (4) a space for the insured to sign the form that acknowledges that the insured has

been offered the optional coverages; (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer." S.C. Code Ann. § 38-77-350. If the form does not comply with SC Code Ann. § 38-77-350(A), then the insurer does not get the presumption of a meaningful offer. Osborne v. Allstate Ins. Co., 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct.App.1995). Furthermore, a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. Croft v. Old Republic Ins. Co., 618 S.E.2d 909, 918 (S.C. 2005).

b. Oral Offer

An insurer may also make a meaningful offer of UIM coverage other than by using a form. The offer is meaningful if it meets certain requirements: "(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, 354 S.E.2d 555, 556 (S.C. 1987). When deciding if a meaningful offer has been made, the fact finder must consider the insured's knowledge or level of sophistication. "However, evidence of the insureds knowledge or level of sophistication is relevant and admissible when analyzing, under *Wannamaker,* whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM coverage. It is a subjective inquiry to the extent the insured may offer evidence of his understanding, or lack thereof, of the nature of UM or UIM coverage. It also is an objective inquiry because the factfinder should consider the

insureds knowledge and level of sophistication in determining whether the insurer intelligibly explained such coverage to the insured." Croft v. Old Republic Ins. Co., 618 S.E.2d 909, 918 (S.C. 2005). "A noncomplying offer has the legal effect of no offer at all. Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). 'If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured.' Butler, 323 S.C. at 405, 475 S.E.2d at 760." Croft v. Old Republic Ins. Co., 618 S.E.2d 909, 917 (S.C. 2005).

ii. There Is No Evidence To Show That A Meaningful Offer Of UIM Coverage Was Made By Form Pursuant To S.C. Code Ann. § 38-77-350(B)

Respondent bore the burden of proving that a meaningful offer of UIM was made to Alfredo Mendez. Respondent did not produce evidence to show that a complete UIM selection rejection form was presented to Alfredo Mendez. Instead, the evidence shows that Mendez was presented with a form that was missing page 4. Page 4 of the application includes the explanation of UIM coverage and the mailing address and telephone number of the insurance department, both of which are required by S.C. Code Ann. § 38-77-350. This information is not found on the other pages of the form. Without this information, the form does not comply with the statute and therefore does not constitute a meaningful offer. The evidence provided at trial was such that no reasonable jury could find that a complete copy of the application was presented to Mendez when he purchased the policy.

Respondent's entire case is dependent upon the testimony of Angela Beltran. At trial, Beltran directly contradicted her prior deposition testimony and was repeatedly

impeached. At trial, Beltran testified that she was sure that a complete UIM selection rejection form was presented to Mendez, in direct contradiction to her deposition testimony where she was not sure if Mendez had been presented with a complete form. (R. p. 471, line 19-p. 472, line 14). She testified that her agency only scans signature pages of documents in direct contradiction to her deposition testimony where she repeatedly claimed that her agency scans every single page that was presented to the customer. (R. p. 462, line 19-p. 463, line 1). Beltran also testified that her company did not have a policy to forward the PDF's that were scanned into their system when a document was requested. (R. p. 474, line 17-p. 475, line 7). This directly contradicts her deposition testimony wherein she stated that when documents were requested, her company would just forward the already scanned PDF that was in its system. Beltran also admitted that she had inserted a missing page into the UIM selection/rejection form which was then presented as a complete form. (R. p. 476, line 14-p. 477, line 24). She then could not offer an explanation for why the email in which she sent the purportedly complete form said that "[t]his is the same pdf document we have in our files for Alfredo Palafox Mendez[]" when at trial she testified that this complete form was not actually a PDF saved in Calidad's system. (R. p. 477, line 15-p. 478, line 24). Presumably, if it was company policy to only maintain signature pages, Respondent and Beltran would have stated this at the time instead of attempting to pass off a cobbled together form as a complete form.

In order to find for Respondent, a jury would have to believe that Calidad only maintains the signature pages, and not the complete documents. A jury would have to believe this in spite of Beltran's earlier testimony that was diametrically opposite, and Beltran's admission that she had inserted a missing page into the form in order to make a

complete form that complied with S.C. Code Ann. § 38-77-350, and then attempted to pass it off as a complete document. The testimony is such that no jury could reasonably find that Mendez was presented with a complete form in compliance with S.C. Code Ann. § 38-77-350. Therefore, Respondent was not entitled to a presumption that a meaningful offer was made.

When taken a as a whole, there is no evidence on which a jury could reasonably determine that a complete form was presented to Mr. Mendez, so that a meaningful offer of UIM coverage was made.

iii. There Is No Evidence To Show That A Meaningful Offer Of UIM Coverage Was Made Orally In Compliance With Wannamaker

Respondent bore the burden of proving that a meaningful offer of UIM was made to Alfredo Mendez. Respondent did not produce evidence to show that a meaningful offer of UIM coverage was made to him orally. In order to prove that a meaningful offer was made, the insurer must prove that: "(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, 354 S.E.2d 555, 556 (S.C. 1987). When deciding if a meaningful offer has been made, the fact finder must consider the insured's knowledge or level of sophistication. "However, evidence of the insureds knowledge or level of sophistication is relevant and admissible when analyzing, under Wannamaker, whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM

coverage. It is a subjective inquiry to the extent the insured may offer evidence of his understanding, or lack thereof, of the nature of UM or UIM coverage. It also is an objective inquiry because the factfinder should consider the insureds knowledge and level of sophistication in determining whether the insurer intelligibly explained such coverage to the insured." Croft v. Old Republic Ins. Co., 618 S.E.2d 909, 918 (S.C. 2005). Respondent's proof fails at every requirement. Respondent failed to offer proof upon which a jury could reasonably conclude that an oral offer was made. Respondent could not offer proof as to what was told to Mendez or who told it to him. Instead, their only proof was vague assertions as to company policy.

Respondent did not offer proof of who met with Mendez. At trial, for the first time, Beltran attempted to claim that she met with Mendez. (R. p. 469, line 18-p. 470, line 17). She further attempted to claim that the fact that she signed the policy meant that she met with him. (R. p. 470, line 18-p. 471, line 18). However, upon cross examination, Beltran admitted that she did not actually know who met with Mendez, and that she signs all the policies, so her signature does not mean that she met with him. (R. p. 470, line 18-p. 471, line 18; p. 535 line 20-p. 536, line 20). Beltran provided vague testimony that her agents explain coverages to customers without going into any detail. (R. pp. 493, lines 7-13). However, Respondent failed to provide enough detail to determine if their general practice complied with the requirements of Wannamaker. When asked, Beltran failed to properly explain UIM coverage. (R. p. 468, line 17-p. 469, line 17). While she did not provide detail as to what is explained to customers, the explanation provided by Beltran would not be sufficient to satisfy Wannamaker. Ms. Beltran also testified that it was company policy to inspect vehicles and fill out an inspection form, yet the inspection form for Mendez' vehicle

was left blank showing that no inspection was performed. (R. p. 499, lines 9-21; p. 508, lines 8-11; R. pp. 1384-1395).

In Cohen, the court found that a meaningful offer of UIM was made. 737 S.E.2d 869. In Cohen, the evidence showed that the customer was presented with a complete UIM Selection/Rejection form that was not properly filled out. Id at 872-873. Further, the agent who actually met with the customer testified as to her general practice when meeting with a customer. Id. In Cohen, the agent spelled out her general practice in great detail. Id. The evidence presented in this case paints a much different picture. The evidence shows that Mendez was not presented with a complete UIM Selection/Rejection form that contained an explanation of UIM coverage. Further, Respondent could not identify who actually met with Mendez. Finally, unlike in Cohen, Respondent failed to provide detail as to her agency's general practice, instead just vaguely stating that they explained coverages. Of course, the only explanation provided of UIM coverage by Beltran was incorrect, and would not constitute a sufficient explanation of UIM coverage in order to constitute a meaningful offer.

The evidence showed that Mendez was an unsophisticated purchaser of insurance and would require a more in depth explanation to comply with Wannamaker. Mr. Mendez has difficulty hearing. (R. p. 559, line 20-p. 560, line 7). He can understand some spoken English, but cannot read English. (R. p. 561, lines 3-6). Despite this, the insurance agent at Calidad just had him sign pre-filled forms and didn't really explain anything, with the whole process taking about fifteen minutes. (R. p. 561, line 11-p. 562, line 4; p. 562, line 22-p. 563, line 2). The evidence further showed that when Mendez arrived at Calidad, they had already filled out the insurance application for Respondent MGA, and told him that

this was the cheapest one. (R. p. 570, lines 9-18). It is also notable that Mendez purchased an additional coverage known as reimbursement motor club which cost more than UIM coverage would have cost, even though he didn't know what it was or why he was purchasing it. (R. p. 564, lines 8-11). Given Mendez' lack of sophistication, additional explanation would be required to ensure that Mendez was "intelligibly advised…of the nature of the optional UM or UIM coverage[.]" Croft, 618 S.E.2d at 918.

As set forth above, it is clear that Respondent failed to provide sufficient evidence on which a reasonable jury could find that an oral offer of UIM coverage was made to Mendez in compliance with Wannamaker. Therefore, the Circuit Court erred in denying Appellant's Motion for J.N.O.V., and the Order should be reversed.

CONCLUSION

The trial Court erred in denying Appellant's Motion to Amend to add causes of action for Bad Faith and violation of the Unfair Trade Practices Act. Further, at trial, Respondent failed to produce evidence upon which a reasonable jury could find for Respondent, and the trial court erred in refusing to grant Appellant's Motion for JNOV. As set forth above, these Orders should be reversed, and the case remanded to the trial court.

RESPECTFULLY SUBMITTED,

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