THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Steven DeBerry, IV, Circuit Court Judge

Case No. 2025CP2500032
Appellate Case No. 2025-001727

James Williams ……. Respondent,

v.

BITCO General Insurance Corporation and
Seckinger Forest Products, Inc……...…..Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court correctly held that BITCO failed to make a meaningful offer of UIM coverage to Seckinger.

STATEMENT OF THE CASE

On January 29, 2025, Respondent initiated this declaratory judgment action against BITCO General Insurance Corporation ("BITCO") and Seckinger Forest Products, Inc. ("Seckinger)(collectively "Appellants") by filing a summons and complaint in the Hampton County Court of Common Pleas. (R. p. 029). Prior to an answer being filed, Respondent filed an amended summons and complaint alleging that BITCO failed to make a meaningful offer of UIM[1] coverage to Seckinger based on defects in the form used by BITCO which requires reformation of the insurance policy to include UIM coverage in the amount of the liability limits of $1,000,000. (R. p. 038).

BITCO filed its Answer to the Amended Summons and Complaint on March 5, 2025, asserting numerous defenses including its position that even if the form was defective, the form in combination with Seckinger's knowledge and decision to reduce its UIM coverage prevents reformation. (R. p. 044, 053). Seckinger filed its Answer on March 6, 2025. (R. p. 169). On April 22, 2025, BITCO filed its Motion for Summary Judgment, arguing that it made a meaningful offer of UIM coverage and that reformation of the policy would be improper. (R. p. 174). On May 5, 2025, Respondent filed his Motion for Summary Judgment seeking reformation of the policy to include UIM limits of $1,000,000 on the basis that BITCO failed to make a meaningful offer of

[1] Throughout this Brief, UIM refers to underinsured motorist coverage and UM refers to uninsured motorist coverage. This distinction is critical.

UIM. (R. p. 217). Finally, Seckinger filed its Motion for Summary Judgment on May 21, 2025, on the same grounds as BITCO. (R. p. 219).

On June 9, 2025, the circuit court heard the cross motions for summary judgment. On July 2, 2025, the circuit court issued its order granting Respondent's motion for summary judgment and denying Appellants' motions for summary judgment. (R. p. 001).

Thereafter, on July 2, 2025, Appellants filed a joint Motion to Alter or Amend (R. p. 226) that was denied by the circuit court on August 2, 2025. (R. p 027). Appellants filed their Notice of Appeal on August 28, 2025. (R. p. 245).

STATEMENT OF THE FACTS

On July 23, 2024, Respondent was injured in an automobile wreck while acting within the course and scope of his employment with Seckinger, a family-owned logging business located in Hampton County, South Carolina (R. p. 40). At the time of the wreck, Respondent was operating a vehicle owned by Seckinger and insured by BITCO under an insurance policy ("the Policy") that provided liability limits of $1,000,000 (R. p. 40). After collecting the at-fault driver's minimum liability limits of $25,000 in exchange for a covenant not to execute,[2] Respondent presented to BITCO a claim for UIM coverage under the Policy and requested a copy of the declarations page (R. p. 40). The declarations page[3] of the Policy purports to provide $75,000 in UIM coverage:

[2] It is undisputed that the at-fault vehicle was underinsured, with minimum liability limits of $25,000/$50,000/$25,000 provided by Progressive.
[3] BITCO redacted all premiums from the declarations page prior to producing it to Respondent.

EXHIBIT B Page 2

BUSINESS AUTO COVERAGE FORM DECLARATIONS (Continued) **Part 2**

POLICY NUMBER: CAP 3 734 984

ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS
This Policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos." "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTOS Section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES	COVERED AUTOS	LIMIT OR DEDUCTIBLE	PREMIUM
Liability	7,8,9	$1,000,000	$ [redacted]
Personal Injury (P.I.P.) (or equivalent no-fault cov.)		Separately Stated in Each P.I.P. Endorsement Minus Deductible	
Added P.I.P. (or equivalent added no-fault cov.)		Separately Stated in each Added P.I.P. Endorsement	
Property Protection Ins. (P.P.I.) (Michigan Only)		Separately Stated in the P.P.I. Endorsement Minus Deductible For Each Accident	
Auto Medical Payments			
Medical Expense & Income Loss Benefits (Virginia Only)		Separately Stated in the Medical Expense & Income Loss Benefits Endorsement	
Uninsured Motorists (UM)	2	$ 75,000	$ [redacted]
Underinsured Motorists (when not included in UM Cov.)	2	$ 75,000	$ [redacted]
PHYSICAL DAMAGE*			
Comprehensive Coverage ^	7	Deductible For Each Covered Auto For Loss Caused By Theft Or Mischief Or Vandalism (Ded 1) OR SEE SCHEDULE Deductible For All Perils For Each Covered Auto (Ded 2)	$ [redacted]
Specified Causes Of Loss Coverage ^		Deductible For Each Covered Auto For Loss Caused By Theft Or Mischief Or Vandalism (Ded 1) OR Deductible For All Perils For Each Covered Auto (Ded 2)	
Collision Coverage	7	SEE SCHEDULE Deductible For Each Covered Auto	$ [redacted]
Towing and Labor		for each disablement of a private passenger auto, light or medium truck	

* See ITEM FOUR for hired or borrowed "autos".
^ A maximum deductible may also apply. Refer to Coverage Form for details.

Premium for Endorsements	$ [redacted]
State Charges	
Estimated Deposit Premium	$ [redacted]

This Policy May Be Subject To Final Audit.

ITEM THREE - SCHEDULE OF COVERED AUTOS YOU OWN

SEE ATTACHED AUTO SCHEDULE

ITEM FOUR - SCHEDULE OF HIRED OR BORROWED COVERED AUTO COVERAGE AND PREMIUMS

Covered Autos Liability Coverage - Cost Of Hire Rating Basis For Autos NOT Used In Your Motor Carrier Operations (Other Than Mobile Or Farm Equipment)			
Covered Autos Liability Coverage	State	Estimated Annual Cost Of Hire For All States	Premium
Primary Coverage			
Excess Coverage	SC	$ 400,000	$ [redacted]
		Total Hired Auto Premium	$ [redacted]

For "autos" **NOT** used in your motor carrier operations, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

AP-0003 (10/21) Part 2

(R. p. 204). At Respondent's request, BITCO provided a copy of the purported UIM offer and rejection form ("the form"), the relevant portion of which reads:

EXHIBIT A Page 4

DocuSign Envelope ID: 4F8D0F9C-EF7E-44F8-B1ED-6D3CD1AABA90

PLEASE SIGN AND DATE IN THE INDICATED SPACE BELOW.
PLEASE DETACH AND RETURN.

Named Insured:
SECKINGER FOREST PRODUCTS, INC.

Policy # CAP 3 734 984

Offer of Optional Underinsured Motorist Coverage

Minimum uninsured motorist coverage limits of $75,000 Combined Single Limit are automatically provided by your insurance policy. If you select optional underinsured motorist coverage, an additional premium will be charged. The schedule below indicates the premium charges for minimum and increased limits:

a. Individual Named Insureds and Married Couples

(1) Single Limits

Private Passenger Autos (premium per auto)

Limit	1	2	3-4	5-9	10-30	>30
75,000	$ 45.	$ 66.	$ 85.	$109.	$140.	$158.
250,000	84.	107.	125.	145.	169.	183.
500,000	107.	128.	145.	161.	184.	200.
1,000,000	128.	148.	161.	176.	201.	217.

Other Than Private Passenger Autos (premium per auto)

Limit	1	2	3-4	5-9	10-30	>30
75,000	$ 30.	$ 44.	$ 56.	$ 71.	$ 92.	$103.
250,000	55.	70.	82.	95.	110.	120.
500,000	70.	84.	95.	106.	121.	130.
1,000,000	84.	97.	106.	115.	131.	142.

b. Other Than Individual Named Insureds and Married Couples

Limit	Private Passenger Autos	Other Than Private Passenger Autos (Prem. Per Auto)
75,000	$ 43.	$ 28.
250,000	82.	53.
500,000	105.	68.
1,000,000	126.	82.

Do you wish to purchase additional uninsured motorist coverage? Yes _____ No x

If your answer is "no", you must sign here: x Jeanne Seckinger

If your answer is "yes", specify the limits your desire. These limits cannot exceed your automobile insurance liability limits.

_____ I select _____ single limit

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(R. p. 201). A simple review of the form in conjunction with the declarations page reveals that the form did not constitute a meaningful offer of UIM coverage. First, under the heading of "Offer of Optional Underinsured Motorist Coverage," the form explains that "[m]inimum **uninsured** limits

of $75,000 Combined Single Limit are automatically provided by your insurance policy." (R. p. 201) (emphasis added). The form then explains that "[i]f you select **optional underinsured** motorist coverage, an additional premium will be charged." (R. p. 201) (emphasis added). Then the form ostensibly lists different levels of optional coverage with the corresponding additional premium. Then, at the bottom, the form asks, "Do you wish to purchase additional **uninsured** motorist coverage?" Jeanne Seckinger checked the "no" box to purchase **additional** uninsured coverage only and signed. (R. p. 201). Nowhere on the form is the insured given an opportunity to purchase or reject **optional underinsured** motorist coverage. This problem is compounded by the fact that the declarations page purports to provide $75,000 in underinsured motorist coverage and in fact BITCO contends the Policy **required** the purchase of underinsured coverage.

Because the form is clearly defective and did not constitute a meaningful offer of UIM coverage, Respondent requested the circuit court reform the Policy as required by S.C. Code Ann. § 38-77-350 to include UIM coverage in the amount of the liability limits under the Policy.[4] (R. p. 042). After the declaratory judgment action was filed, BITCO tendered $75,000 in UIM coverage to Respondent without prejudice to Respondent's right to seek reformation of the policy.

In his Amended Complaint, Respondent set forth allegations that the insurance carrier had failed to make a meaningful offer of UIM coverage. (R. pp. 039–043). In their Answers, Appellants asserted numerous defenses including their position that even if the form was defective, the form in combination with Seckinger's knowledge and decision to reduce its UIM coverage constituted a meaningful offer. (R. pp. 044–053). Appellants moved for summary judgment,

[4] Respondent did not contend that the Policy should be reformed to include UIM up to the amounts of the excess liability provided by the Policy.

relying on the affidavits of Jeanne Seckinger, co-owner and treasurer of Seckinger, and Donald E. Watts, Jr., insurance agent for Seckinger, as proof that a meaningful offer was made. (R. p. 174; p. 219).

In their affidavits, because the form obviously did not satisfy the statutory requirements for a meaningful offer, both Jeanne Seckinger and Mr. Watts asserted that Jeanne Seckinger is a sophisticated purchaser of insurance who knew her options and made an informed decision to decline any optional underinsured coverage. (R. pp. 192–197; pp. 205–209). Significantly, however, in her affidavit, Jeanne Seckinger confuses UM coverage and UIM coverage, confirms her understanding, based on misinformation provided by BITCO and Mr. Watts, that Seckinger was required to purchase UIM coverage of $75,000 such that it was not optional, and confirms that she did not understand the additional cost that would apply had she selected an amount of UIM coverage greater than $75,000.[5] (R. pp. 192–197). Mr. Watts' affidavit is basically a mirror-image of the Seckinger affidavit.[6] (R. pp. 205–209). Both affidavits demonstrate that even at the

[5] It is significant to note that the "cost" of **additional** underinsured coverage is not accurately represented on the form because UIM was not optional to begin with, i.e., since Seckinger was already paying for the required UIM, the "additional" premium is not as great as the price represented on the form.

[6] From the redacted declarations page (R. p. 204), it is apparent Seckinger paid a premium for this $75,000 in UIM coverage. Comparison of the form (R. p. 201) with the declarations page (R. p. 204) indicates that the additional premium for the $1 million in UIM coverage would be, at a maximum, only $54 ($82 for $1 Million UIM-$28 for $75K UIM=$54). This is assuming that the premium BITCO automatically charged for $75,000 UIM was the $28 reflected on the "offer" form, but we cannot be certain because BITCO conveniently redacted the amount of the UIM premium on the declarations page. While the redaction could indicate that BITCO charged more than $28 for $75,000 UIM, it definitely indicates that an extra premium in some amount was charged which necessarily makes the premiums listed on the "offer" form meaningless to anyone other than BITCO. This in itself illustrates why BITCO's "offer" was no offer at all and most definitely not meaningful.

time Ms. Seckinger signed her affidavit, she still did not understand and had not been properly provided a meaningful explanation of the coverages and the opportunities to purchase, as required by law, that she had the right under South Carolina to reject all UIM coverage, or of the actual cost to Seckinger of purchasing UIM. (R. pp 192–197; pp. 205–209). Again, the form seems to suggest optional UIM of $75,000 could be purchased for an amount, but $75,000 of UIM was not optional under the Policy so that "cost" is wrong, making all the other numbers wrong (R. p. 201).

STANDARD OF REVIEW

This is an appeal of a summary judgment. An appellate court evaluates summary judgment under the same standard as the circuit court. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 355, 698 S.E.2d at 789. In the context of cross motions for summary judgment, the issue becomes a question of law to be reviewed by the court de novo. *Wiegand v. U. S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Further, the interpretation of a statute is a question of law for the court to review de novo. *DomaninsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce*, 423 S.C. 295, 300, 814 S.E.2d 513, 516 (2018).

ARGUMENT

The circuit court properly held that BITCO failed to make a meaningful offer of underinsured motorist coverage. First, the circuit court properly construed South Carolina law governing the optional nature of UIM coverage and the insurer's duty to make a meaningful offer

of UIM coverage. Next, the circuit court properly held that BITCO failed to make a meaningful offer of UIM coverage, first because its form did not comply with S.C. Code Ann. § 38-77-350(A), and secondly, because BITCO failed to meet its burden of proving the offer was meaningful under *State Farm Mut. Auto. Ins. Co. v. Wannamaker,* 291 S.C. 518, 354 S.E.2d 555 (1987). Lastly, notwithstanding the affidavits of Seckinger and Watts, or perhaps because of the affidavits, reformation of the policy does not lead to an absurd result that mandates reversal. Accordingly, the circuit court correctly ordered reformation of the policy to include underinsured motorist coverage in the amount of the liability limits. For these reasons, this Court should affirm the circuit court's order.

I. THE CIRCUIT COURT PROPERLY CONSTRUED SOUTH CAROLINA COMMON LAW AND STATUTORY LAW GOVERNING UIM COVERAGE AND AN INSURER'S OBLIGATIONS REGARDING THE SAME.

The controlling statutes are S.C. Code Ann. §§ 38-77-160 and 38-77-350. Section 38-77-160 provides in relevant part:

> Automobile insurance carriers **shall** offer, **at the option of the insured**, uninsured motorist coverage up to the limits of the insured's liability coverage **in addition to the mandatory coverage prescribed by Section 38-77-150.** Such carriers **shall** also offer, **at the option of the insured**, underinsured motorist coverage up to the limits of the insured's 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 (emphasis added). Because no amount of UIM coverage is mandatory in South Carolina, the section of 38-77-160 addressing UIM does not speak to "additional" UIM,

as opposed to the first sentence addressing UM coverage which has a mandatory minimum limit, but rather simply mandates that insurers also are required to offer optional UIM coverage in amounts up to the limits of liability coverage purchased by the insured. Perhaps most importantly for purposes of the issue on appeal is the identical language included in both sentences: "at the option of the insured." The legislature very intentionally inserted this modifying phrase after the verb "shall offer" to make it clear that the insurer must give the insured sufficient information for the insured to intelligibly make the decision to **accept** or **reject** the optional coverages addressed by § 38-77-160, i.e. UM coverage above the statutory minimum limits and **all** UIM coverage. This is the language that Appellants choose to ignore because they cannot reconcile this language with their position.

Consistent with the legislature's clear pronouncement and applicable case law including *Wannamaker* and its progeny requiring a meaningful offer, § 38-77-350(A) sets forth requirements concerning a form that insurers are required to use in offering the optional coverages:

> (A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. 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.

(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.

(C) An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.

(D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

(E) If the insured fails or refuses to return an executed offer form within thirty days to the insurer, the insurer shall add on uninsured motorist and underinsured motorist coverages with the same policy limits as the insured's liability limits.

S.C. Code Ann. § 38-77-350 (emphasis added). If the form meets the requirements listed in subparts (1) through (5) and is properly signed by the insured, a conclusive presumption arises that the insurer made a meaningful offer. One of those requirements is a space for the insured **to reject or accept** the optional coverage for a price. This requirement is necessary to carry out § 38-77-160's requirement that the offer be "at the option of the insured" to provide the opportunity to

understand the option and to either accept or reject it. After all, an offer, by definition, requires an opportunity for the offeree either to accept or reject. The only reason the statute includes the redundant, modifying phrase, "at the option of the insured," is to emphasize the fact that the insured has the absolute right to reject UIM coverage in its entirety which is what makes a "meaningful" offer critical.

Appellants' Policy converts UIM coverage into mandatory coverage, at the option of the **insurer,** instead of at the option of the **insured**. Contrary to their argument, it is in fact Appellants, and not the circuit court, who invert the statute's requirement. According to Appellants, "[t]he governing statute and case law require only that the insured be offered the right to purchase coverage up to the limits of liability" (App. Brief, p.11) and does not prevent an insurer from "requiring an insured to purchase some amount of UIM coverage." (*Id.* at 12). This confuses the actual issue which is does the form as written satisfy the insurer's obligations. Accepting Appellants' argument will allow insurers to require the purchase of UIM coverage in any amount the insurer chooses while technically misrepresenting the true cost of the optional coverage above what the carrier has required.

Appellants' argument that "[i]t is not the option to reject, but the option to *purchase*, which is key" is simply wrong *(Id.* at 12). Sections 38-77-160 and 38-77-350 make it patently clear that, in the arena of optional coverages, i.e. additional UM coverage and ALL UIM coverage, the insured's right to purchase those optional coverages is equally balanced by the insured's right to reject those coverages. After all, without a right to reject, the coverage is not optional which makes the form misleading. *See*, *State Farm Mut. Auto. Ins. Co. v. Wannamaker,* 291 S.C. 518, 354 S.E.2d

555, 556 (1987)(discussing in detail the insured's right either "to accept or reject" UIM coverage); *see also, infra* pp. 13-14).

Similarly, Appellants' argument that a right to reject UIM in its entirety is "contrary to the fundamental purpose involved in the mandatory insurance statutory scheme, which is to provide more protection, not less" is based on a mistaken view of South Carolina law (App. Brief pp. 12-13). Part of the protection for the insured that the legislature deemed necessary was the insured's right to reject certain coverages to reduce the insured's premium. Clearly the purpose behind the insured retaining this right is making sure the insured receives a "meaningful offer" in order to make an informed decision. If a carrier requires UIM, but the form it uses does not acknowledge that requirement and corresponding cost to the insured, then whenever a form like the one at issue here is used, it will misrepresent the actual cost of the optional coverage. Similarly, part of the protection for the insured that the legislature deemed necessary was the insured's right to purchase UIM coverage in limits up to the liability limits and to be advised of the **incremental increases** in the premium for each limit of UIM coverage. Here, the insured had neither type of protection. Seckinger did not have the option to reject all coverage. Rather, $75,000 in UIM coverage was automatically included in the Policy but the form does not mention that fact. The significance is that the mandatory UIM of $75,000 came with a mandatory premium of at least $28 per vehicle that was automatically tacked on, without ever explaining to Jeanne Seckinger that $1,000,000 in UIM coverage would only cost an extra $54 or even asking whether Seckinger wanted to select a greater amount of UIM coverage than was already being required. Why would BITCO do this? The answer is simple. On the one hand, BITCO's method of "offering UIM" guaranteed BITCO

an extra premium of some amount per vehicle and also removed the risk to BITCO of having to provide $1,000,000 in UIM for what appears to be only a small increase in premium. BITCO's process gave BITCO the best of both worlds and illustrates a calculated decision on its part to look out for its own bottom line at the expense of its insured. To reverse the circuit court and find that BITCO made a meaningful offer of UIM coverage, this Court must necessarily hold that an insurer is not required to make a meaningful offer in compliance with either the applicable statutes or *Wannamaker* and its progeny or even give the insured accurate information with respect to its actual cost. Such a holding will allow insurers to make any amount of UIM coverage mandatory, in direct contravention of South Carolina law, and then misrepresent the true cost of the other optional coverages. That is exactly what BITCO did here and illustrates why South Carolina law requires that the insurer must intelligibly advise the insured. These are the absurd results that must be avoided.

Appellants attack the circuit court by latching on to language in the Order concerning the insured's right to reject UIM in its entirety which BITCO argues leads to the absurd result that the Policy will be reformed to include $1 million in UIM instead of no coverage at all. The problem with BITCO's argument is that it ignores the rationale underlying the requirement for a "meaningful" offer. If the offer of UIM makes it clear that all UIM is optional and then lists the premiums for each optional amount of UIM coverage up to the liability limits, then the actual premium for each corresponding amount of UIM coverage will be clearly stated in the offer. Here, the circuit court recognized that by not allowing the insured the option to reject all UIM coverage but instead requiring minimum limits of UIM for a required premium while not explaining the

actual cost to the insured for a higher amount of UIM, BITCO failed to make a meaningful offer. This is true even assuming that an insurer is allowed by law to require the purchase of minimum limits of UIM coverage. That is the fallacy of Appellants' argument.

II. THE CIRCUIT COURT PROPERLY HELD THAT BITCO FAILED TO MAKE A MEANINGFUL OFFER OF UIM.

As set forth above, § 38-77-160 requires an insurer to offer UIM coverage up to the limits of the insured's liability coverage and set out the costs of such coverages. Case law establishes that the insurer's offer must be meaningful. *See*, *State Farm Mut. Auto. Ins. Co. v. Wannamaker,* 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987); *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005). The meaningful offer requirement is so important that an insurer's failure to comply requires reformation of the policy to provide the optional coverage in the amount of the insured's liability limits. *Id.; see also*, S.C. Code Ann. § 38-77-350(E). Interpreting § 38-77-160, *Wannamaker* explains: "The legislature further required that the insured shall have the option of **accepting or rejecting** the offer. We hold the statute mandates the insured to be provided with **adequate information**, and in such a manner, as to allow the insured **to make an intelligent decision of whether to accept or reject the coverage**." *Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). Similarly, *Floyd* explains that "[t]he purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Floyd*, 367 S.C. 253, 262-263, 626 S.E.2d 6, 12 (2005)(other citations omitted). Significantly, "a noncomplying offer has the legal effect of no offer at all." *Ray v. Austin*, 388 S.C. 605, 611, 609 S.E.2d 208, 212 (2010)(citing *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301

S.C. 55, 389 S.E.2d 657 (1990)). Lastly, "[t]he insurer bears the burden of establishing that it made a meaningful offer of UIM coverage." *Ray v. Austin*, 388 S.C. 605, 611, 609 S.E.2d 208, 212 (2010); *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 618 S.E.2d 909 (2005).

One way to establish a meaningful offer is compliance with S.C. Code § 38-77-350 which creates a conclusive presumption that the insurer made a meaningful offer of UIM coverage provided the insurer uses a form that complies with the minimum requirements set forth in § 38-77-350 and is signed by the insured. Section 38-77-350(A) sets forth the minimum requirements:

> (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.

Id. If the insurer's form complies with these minimum requirements and is properly executed by the insured, a conclusive presumption arises in favor of the insurer that a meaningful offer was made in compliance with *Wannamaker*.

Conversely, if the insurer fails to comply with § 38-77-350, the insurer does not enjoy a conclusive presumption. In that event, the insurer must meet its burden of proving a meaningful offer by establishing each of the four requirements established by *Wannamaker*:

(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 insurer must be told that optional coverages are available for an additional premium.

291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). Further, for purposes of proving the third *Wannamaker* factor, an insurer may present "[e]vidence of the insured's knowledge or level of sophistication [which] 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." *Grinnell Corp. v. Wood*, 389 S.C. 350, 357, 698 S.E.2d 796, 800 (2010)(other citations omitted). *See also, Ray v. Austin*, 388 S.C. 605, 609 S.E.2d 208 (2010); *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 618 S.E.2d 909 (2005).[7] However, regardless of the insured's knowledge or level of sophistication, "a noncomplying offer has the legal effect of no offer at all." *Ray v. Austin,* 388 S.C. 605, 611, 609 S.E.2d 208, 212 (2010)(citing *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 389 S.E.2d 657 (1990)). As explained in *Croft v. Old Republic Ins. Co.*, automobile insurers who sell commercial policies "are not exempt from the meaningful offer requirement

[7] It is important to note that evidence of the insured's knowledge and level of sophistication is only relevant when evaluating whether an offer complies with *Wannamaker* and not when evaluating whether a form creates the conclusive presumption: "Evidence of an insured's knowledge or level of sophistication is not relevant when the analysis is confined to whether a particular written form complies with the statutory requirements, such that the insurer enjoys a presumption that it made a meaningful offer. That analysis simply involves a review of the written form itself." *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 609 S.E.2d 909 (2005).

contained in Section 38-77-160 because the Legislature has recognized that commercial insureds, like non-commercial insureds, undoubtedly run the gamut from the ill-informed to knowledgeable purchasers." 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005).[8] Accordingly, and contrary to Appellants' arguments, "an automobile insurer selling a […] policy to a commercial insured is required to comply with *Wannamaker* and its progeny in order to make a meaningful offer of UIM coverage **even though the insured has expressed a desire not to purchase such coverage**." *Id.* (emphasis added). As such, "a third party not privy to the contract may assert the lack of an adequate offer and [seek] reform[ation] of the contract to increase the coverage." *Ackerman v. Travelers Indemnity Co.,* 318 S.C. 137, 145, 456 S.E.2d 408, 412 (Ct. App. 1995)(citing *American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993)(where an insured consistently rejected UIM in the past and indicated she was only interested in purchasing mandatory liability coverage at the lowest premium cost and would have rejected the optional

[8] The realization that some commercial insureds are ill-informed and less sophisticated underlies the rule that allows evidence of an insured's level of sophistication to be relevant in the determination of the *Wannamaker* factors but not conclusively determinative as argued by the Appellants. In the setting of this declaratory action decided on summary judgment, it is the court's role to evaluate that evidence to determine what exactly the insured understood in light of the insured's level of sophistication and the information provided to the insured by the insurer. After all, if an insured is not presented all the information and all the required options, an insured might think she understands when she actually does not. This rule protects the insured against an insurer in making a selection and thereby promotes the underlying purpose of the meaningful offer requirement which is to ensure that the insured understands her options and makes an informed decision. Clearly, the fact that Seckinger has taken an adverse position to its driver here demonstrates its fundamental misunderstanding of the coverage or the effect reformation would have on it—which is no effect at all.

coverage even if the required information had been included in the offer, a third party may still attack the adequacy of the offer and seek reformation of the policy)).[9]

A. The Circuit Court properly held that BITCO's form does not comply with § 38-77-350(A) and BITCO is therefore not entitled to a conclusive presumption that it made a meaningful offer.

In determining whether the form complies with 38-77-350(A), the court is limited to reviewing the form itself. *See, Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 609 S.E.2d 909 (2005)("Evidence of an insured's knowledge or level of sophistication is not relevant when the analysis is confined to whether a particular written form complies with the statutory requirements, such that the insurer enjoys a presumption that it made a meaningful offer. That analysis simply involves a review of the written form itself."). Accordingly, the affidavits of Seckinger and Watts are irrelevant for purposes of determining whether the form is valid; the form must stand on its own.

Here, as stated above, Bitco's form does not meet the requirements of S.C. Code Ann. § 38-77-350(A). The purported offer of UIM coverage is properly labeled, "Offer Optional Underinsured Motorist Coverage." (R. p. 201). The form then explains that "[m]inimum **uninsured** motorist coverage limits of $75,000 Combined Single Limit are automatically provided by your insurance policy. If you select optional **underinsured** motorist coverage, an additional

[9] This is particularly true and relevant here, where the Appellant is a third-party driver who was negatively impacted by the protections BITCO stripped away from Appellant's employer and could have been adequately protected by $1 million UIM coverage for an additional $54 at the very most, a price he would have gladly paid himself given the opportunity or if he understood the option.

premium[10] will be charged." At the bottom, the form asks, "Do you wish to purchase additional **uninsured motorist coverage**?" Ms. Seckinger placed an X next to the option for "No" and then signed. (R. p. 201). However, we know this election did not mean she was electing to NOT purchase **UIM**, because even though she placed an X next to the "No" option, the policy included and charged a premium for UIM coverage in the amount of $75,000. Also, as explained above, this misrepresentation then leads to a mistaken understanding of what it would cost to purchase additional coverage.

There are several obvious defects in the form. First, as written, the form does not ask or address whether the insured wishes to purchase or reject **underinsured motorist coverage**; rather, the offer on page 4 is specifically limited to **uninsured coverage**. Therefore, on the face of the form, no offer of **underinsured motorist coverage** was made. Even if these are typographical or clerical errors as argued by Appellants, they create defects in the form that render the form noncompliant with § 38-77-350(A).

Further, even if these are typographical or clerical errors that can somehow be ignored by the court, the form still does not meet the requirements of § 38-77-350(A). For instance, if the purported typographical errors were corrected and the word "uninsured" were replaced with the word "underinsured" throughout page 4, the form would read:

> Minimum underinsured motorist coverage limits of $75,000 Combined Single Limit are automatically provided by your

[10] This form made it impossible for Jeanne Seckinger to know what premium was "additional" because BITCO was already charging an extra premium, maybe $28 or maybe more, for $75,000 in UIM. Because BITCO conveniently redacted the additional premium from its declarations page, all we know for sure is that a premium was in fact paid. It is very possible the additional premium was even more that $28 per vehicle which would result in an even smaller difference for the $1,000,000 in UIM coverage.

> insurance policy. If you select optional underinsured motorist coverage, an additional premium will be charged.
>
> [limits and premiums omitted]
>
> Do you wish to purchase additional underinsured motorist coverage?"

The problem with this hypothetical configuration of the form is three-fold. First, while the first two pages of the offer form (R. pp. 198–199) explain that underinsured motorist coverage is optional, this hypothetical configuration takes away the optional nature of underinsured coverage by automatically including UIM in the policy, for an extra premium no less, in direct contradiction to the explanation on the previous pages of the form that UIM is completely optional. Such an ambiguity makes the meaning of the form indecipherable.

Secondly, in the very next sentence the form confuses the matter even more by listing UIM limits of $75,000 and a corresponding premium as one of the levels of UIM coverage that the insured can purchase (R. p. 201). If that amount of UIM is already included with an increased premium, why is the form asking if the insured wants to purchase the same amount that is already included? If a premium is already included, by listing the premium for the mandatory UIM with the other levels of "optional" UIM, how is the insured supposed to know the true amount of increase between the different levels of coverage? Should the premium listed on form not be zero? The fact that this hypothetical version of the form says, on the one hand, that the policy automatically includes $75,000 in UIM (even though the form previously describes UIM as optional), but then offers that very same amount of UIM for an additional premium that is in fact already included, renders this hypothetical version even more confusing, and therefore not

meaningful. How could anyone, even the most sophisticated insured, be expected to reconcile that ambiguity?

Third, by automatically including $75,000 of UIM in the Policy, the form, by its very terms, strips the insured of the right to reject UIM coverage, also making the "explanation" more confusing. As set forth in detail above, both the statutory law and case law make abundantly clear that UIM coverage is optional coverage and an offer must give the insured the option to either accept or reject UIM coverage. As the statute clearly sets forth, all offers must be "at the option of the insured."[11] That the offer form in this case ignores that the insurer required the insured to purchase UIM in the amount of $75,000 necessarily means that the form does not comply with § 38-77-350; this defect in the form is only compounded by the glaring ambiguity it creates. Therefore, the circuit court correctly held that the form does not comply with the statute, and the insurer is not entitled to a conclusive presumption that it made a meaningful offer.[12]

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[11] The underlying theme of Appellants' arguments is that § 38-77-350(A)(3) does not specifically say "in its entirety." As set forth in detail above, § 38-77-160 requires insurers to offer, **at the option of the insured,** UIM coverage up to the insured's liability limits. Section 38-77-350(A) then requires the form to give the insured the choice to **accept or reject** the coverage. It is impossible to imagine how this language could be interpreted to mean that it is okay for an insurer to make some amount of UIM mandatory in the policy provided that the insured is given the right to reject at least some amount of UIM coverage. All the mental gymnastics in the world cannot support such a tortured reading.

[12] In footnote 6 of its brief, BITCO argues for the very first time that "[b]ecause the Policy at issue was a renewal of an existing policy with existing limits, BITCO was not even required to make a new "offer," let alone a "meaningful" one, to Seckinger." Because Appellants failed to raise this argument below and there is no evidence of a prior offer of UIM in the record, the argument is improper and should not be considered. That BITCO chose not to rely on some other form is likely because the other form, if one exists, is the same defective form that is the subject of this appeal. Regardless, for purposes of meeting their burden of proof, they cannot show and have not shown there was ever a meaningful offer. Certainly, the original offer would have to comply even if the "renewal" did not require another meaningful offer. Plus, more importantly, they made a new one which is noncomplying for the reasons stated above.

B. The Circuit Court properly held that BITCO failed to meet its burden of proving a meaningful offer under *Wannamaker.*

Because the form does not comply with the statute and there is no conclusive presumption of a meaningful offer, BITCO must prove a meaningful offer by establishing compliance with each of the four *Wannamaker* factors. For this analysis, the affidavits of Seckinger and Watts can be considered in conjunction with the form, and they make it clear that no meaningful offer was made.[13]

1. BITCO failed to intelligibly advise the insured of the nature of the optional coverage. Accordingly, BITCO's offer did not satisfy the THIRD *Wannamaker* factor.

In the first five paragraphs of her affidavit, Jeanne Seckinger sets forth her background and experience and claims that she is an intelligent and sophisticated purchaser of insurance (R. pp 192–193). However, just because you have purchased insurance before, even a lot of insurance, does not mean you understand it. In paragraphs six, seven, and eight, she sets forth the history and rationale underlying her decisions in this case (R. pp. 193–194). The real issue with her affidavit arises in paragraph eight when she begins referring to the limits required by BITCO. In paragraph

[13] Because the circuit court focused its attention on the third *Wannamaker* factor, Respondent will address the analysis of the third factor first. This same analysis applies to the first, second, and fourth *Wannamaker* factors and makes it clear that BITCO has failed to show compliance with **any** of the four *Wannamake*r factors. As to the first factor, it is hard to imagine how a notification process can be commercially reasonable when the insurer gives the insured confusing or misinformation. As to the second and fourth *Wannamaker* factors, while the form does specify different limits of coverage up to the limits of liability coverage and sets forth the corresponding premiums, the form also ignores thats UIM of $75,000 was mandatory and that an additional premium was already charged for that coverage so any additional premium is misrepresented. charges a premium for that coverage. Further, the affidavits make it abundantly clear not only that Mr. Watts provided misinformation to Seckinger that made it impossible for Seckinger to make an informed decision but also that Seckinger still believes the misinformation provided.

9, she addresses the form and states, "That form explained to me that minimum limits of $75,000 were automatically provided by the policy, but that I had the option of purchasing additional limits including $250,000.00, $500,000.00, and $1,000,000.00."[14] (R. p. 194). Then in paragraph 12, she states: "Prior to this current controversy, I do not recall noticing that the question did not match the title of the page, and I presumed that what I was signing was a rejection of additional **uninsured** coverage above the $75,000 minimum required by BITCO."[15] (R. p. 195). Lastly, in paragraph 15, she discusses her decision to maintain the same coverage after this dispute arose: "For that reason, when our policy came up for renewal after this controversy, we maintained our previous decision and reaffirmed our decision to purchase only the minimum **required** limits of $75,000.00." (R. p. 196).

Ms. Seckinger's affidavit shows three critical things. First, even now, she interchanges uninsured for underinsured just like the form does. There is no indication in the affidavit that she understands the difference between the two types of coverage which is a critical distinction. Secondly, she repeatedly speaks of the minimum required limits of $75,000.00. The affidavit shows not only that she did not understand that all UIM is optional, but also and more importantly she did not understand that the premium for the "required UIM" was already being charged and that each additional level of UIM would result in just a small increase representing the difference between the premium already charged and the premium listed for a higher UIM limit. Nor is there

[14] "Automatically" sounds like free or no cost. It was not.

[15] This sentence shows, in Seckinger's very own words, that she thought she was rejecting **uninsured** coverage, not **underinsured** coverage. This sentence alone should end the inquiry into whether the affidavit provides evidence of sophistication that shows compliance with *Wannamaker*.

any indication that Mr. Watts, or anyone else on behalf of BITCO, ever explained to her what the additional cost would actually be for each increment of additional UIM coverage in light of the fact that Seckinger was already being charged for the "required" UIM. Mr. Watts' affidavit shares these same deficiencies (R. pp. 205-209). He does not claim to have explained any of these things to Ms. Seckinger. It would have been very easy to insert into each affidavit that Mr. Watts explained to Ms. Seckinger and she understood that UIM, unlike UM, is completely optional, that she was already being charged the premium for the "required" $75,000 in UIM, and that the additional premium for each higher limit of UIM would be only the difference between the amount already being charged and the premium for the higher limit. But these critical details are not included in the affidavits because it did not happen that way. Rather, in claiming that she understood the additional premiums, she references the information set forth on the form (R. p. 194); as set forth throughout this brief, it is impossible to determine from the form how much the "additional" premium would be since the premium for the "required" UIM was already being charged. While the intent of the affidavits was to overcome the deficiencies in the form, they actually corroborate those deficiencies and confirm that Ms. Seckinger was misinformed. Third, Ms. Seckinger's glaring misunderstanding undercuts her claim of sophistication in insurance.

Further, for purposes of proving the third *Wannamaker* factor, an insurer may present "[e]vidence of the insured's knowledge or level of sophistication [which] 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." *Grinnell Corp. v. Wood*, 389 S.C. 350, 357, 698 S.E.2d 796, 800 (2010)(other citations omitted); *Ray v. Austin*, 388 S.C. 605, 609

S.E.2d 208 (2010); *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 618 S.E.2d 909 (2005). However, regardless of the insured's knowledge or level of sophistication, "a noncomplying offer has the legal effect of no offer at all." *Ray v. Austin,* 388 S.C. 605, 611, 609 S.E.2d 208, 212 (2010)(citing *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 389 S.E.2d 657 (1990)). As explained in *Croft v. Old Republic Ins. Co.*, automobile insurers who sell commercial policies "are not exempt from the meaningful offer requirement contained in § 38-77-160 because the Legislature has recognized that commercial insureds, like non-commercial insureds, undoubtedly run the gamut from the ill-informed to knowledgeable purchasers." 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005).[16] Accordingly, and contrary to Appellants' arguments, "an automobile insurer selling a […] policy to a commercial insured is required to comply with *Wannamaker* and its progeny in order to make a meaningful offer of UIM coverage **even though the insured has expressed a desire not to purchase such coverage**." *Id.* [17] As such, "a third party not privy to the contract may assert the lack of an adequate offer and [seek] reform[ation] of the contract to increase the coverage" even when the insured insists it understood what appears to be unintelligible. *Ackerman*

[16] The realization that some commercial insureds are ill-informed and less sophisticated underlies the rule that allows evidence of an insured's level of sophistication to be relevant in the determination of the *Wannamaker* factors but not conclusively determinative as argued by the Appellants. In the setting of this declaratory action decided on summary judgment, it is the court's role to evaluate that evidence to determine what exactly the insured understood in light of the evidence of the insured's level of sophistication and the information provided to the insured by the insurer. After all, if an insured is not presented all or accurate information and required options, an insured might think she understands when she actually does not. This rule promotes the underlying purpose of the meaningful offer requirement which is to ensure that the insured knows his options and makes an informed decision.

[17] This is especially important where the third party, here an employee who drove log trucks for the insured, could conceivably elect to pay the difference in the premium if the additional premium was correctly understood and offered to the insured.

v. Travelers Indemnity Co., 318 S.C. 137, 145, 456 S.E.2d 408, 412 (Ct. App. 1995)(citing *American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993)(where an insured consistently rejected UIM in the past and indicated she was only interested in purchasing mandatory liability coverage at the lowest premium cost and would have rejected the optional coverage even if the required information had been included in the offer, a third party may still attack the adequacy of the offer and seek reformation of the policy)); *see also*, *Croft v. Old Republic Ins. Co.,* 365 S.C. 402, 618 S.E.2d 909 (2005)(estate of deceased employee allowed to seek reformation of employer's automobile insurance policy to include UIM coverage). In other words, the insured's intent is not determinative; a proper offer is still required.

Here, both Ms. Seckinger and Mr. Watts assert their opinions that Ms. Seckinger is an experienced and sophisticated purchaser of insurance. According to Appellants, if Seckinger claims to be experienced and sophisticated and testifies post hoc that she purchased exactly what she wanted, that is enough to defeat Respondent's quest to have the policy reformed. Appellants rely on *Grinnell Corp. v. Wood*, 389 S.C. 350, 698 S.E.2d 796 (2010) and *Ray v. Austin,* 388 S.C. 605, 609 S.E.2d 208 (2010). Contrary to Appellants' assertions, these cases do not mean that an insured's proclamation of sophistication must be accepted by the court; rather, these cases make clear that it is the court's duty to determine the insured's level of sophistication based on the evidence presented. After all, while evidence of sophistication is relevant, it is not conclusive of the third *Wannamaker* factor.

In *Grinnell,* the employer's employee was injured in a wreck while driving the employer's vehicle. The employee filed a civil action against a known at-fault party and an unknown at-fault

party, seeking both UIM and UM coverage under the employer's insurance policy. However, the policy in question did not provide any UIM coverage or additional UM coverage. The employer was a subsidiary of a global corporate interest, Tyco International. The subsidiary filed a declaratory judgment action seeking a declaration that it had successfully rejected UIM coverage and additional UM coverage and that its policy should not be reformed. On cross-motions for summary judgment, the court first found that the employer and insurer were not entitled to a conclusive presumption that a meaningful offer was made because the form did not meet the requirements of § 38-77-350(A) and the form was not properly executed by Mr. Goetz, the vice president of risk management for Tyco International and all its subsidiaries and the person who procured the policy in question. Therefore, the burden fell on the employer and the insurer to prove that a meaningful offer of optional UIM and additional UM was made under *Wannamaker*. To meet their burden, the employer and the insurer presented the testimony of Mr. Goetz. The court noted "[i]t is undisputed that Goetz was well educated and experienced in the areas of insurance and risk management" and that "Goetz considers himself to be a sophisticated purchaser with regard to insurance policies" having "procured twenty-two policies of insurance annually" and that his "duties with Tyco include the procurement of all its global insurance policies and overseeing the risk management programs for the company." *Id.* at 353, 797-798. Further, Goetz' testimony showed that he understood the available insurance coverages and "intended to decline optional UM and UIM." *Id.* Specifically, the court noted: "At the time of the execution of the policy at issue, Goetz was fully aware of the **options** related to UM and UIM coverage." *Id.* at 354, 798. In other words, he knew and understood that UIM coverage was not required by law and he had

the option to reject UIM coverage in its entirety; he also knew and understand that UM coverage above the statutorily required minimum limits was not required by law and he had the option to reject additional UM coverage. Further, he understood what Tyco would be charged for each additional level of UIM coverage. With that information, he made an informed decision. That is the factor that distinguishes *Grinnell* from the facts currently before this court: Mr. Goetz' claim of sophistication was evidenced and bolstered by his expansive knowledge of UM and UIM coverage and there was NO evidence that misinformation was provided to him that negatively impacted his understanding of the coverages. [18]

Similarly, in *Ray v. Austin*, 388 S.C. 605, 698 S.E.2d 208 (2010), an employee of Cintas Corporation was injured in a wreck while driving a vehicle owned by Cintas and insured under a policy that provided no UIM. The employee filed a declaratory judgment action against the insurer seeking to have the policy reformed to include UIM coverage on the grounds that a meaningful offer was not made. Because the form did not comply with the statute, the insurer had to prove a meaningful offer under *Wannamaker*. The court recognized that "[t]he insurer is required to make a meaningful offer of UIM coverage to commercial insureds **even if the insured has expressed a desire not to purchase such coverage**." *Id.* at 613, 213 (citing *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 618 S.E.2d 909 (2005)(emphasis added)).[19] In determining whether the insurer had intelligibly advised the insured, the court first reviewed the form. Even though the form did not

[18] Appellants' reliance on Justice Pleicones' concurrences in *Grinnell* and *Ray* is misplaced as the concurrences are based on facts that obviously show the insured had a correct understanding of the coverages and options. That is not the case here where Seckinger's own affidavit proves her misunderstanding and the misinformation provided to her by Watts.

[19] This is significant because the court recognized that the insured's intent is not determinative; rather, a meaningful offer that meets the *Wannamaker* factors is required.

create a conclusive presumption because it was not correctly filled out, the court found that the form did intelligibly and accurately advise the insured of the nature of UIM coverage. Then the court considered the oral dealings between the insured and insurer and concluded that the insured was sophisticated in procuring insurance, was properly advised, and in fact understood the optional nature of UIM coverage. Specifically, the insured "made [the decision to reject all UIM coverage] with **full awareness** of the nature of the coverage it was rejecting." *Id.* at 614, 213 (emphasis added). Accordingly, the court held the insurer made a meaningful offer of UIM coverage.

The difference between *Grinnell* and *Ray* and the case currently before the court is obvious. Ms. Seckinger's declaration that she is an experienced and sophisticated purchaser of insurance means nothing if that same declaration proves that she did not have an accurate understanding of the nature of UIM coverage or its costs and an insured's statutory rights concerning that coverage because she was misinformed by the insurer. Seckinger's lack of understanding matters, and it is her lack of understanding that undercuts Appellants' argument as all of the case law, including *Ray* and *Grinnell*, requires an informed decision after being intelligibly advised.

Appellants also latch onto *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 608 S.E.2d 569 (2005), and describe it as a case that shuts the door on the circuit court's reasoning. In *Leachman*, the insured purchased a $300,000 combined single limit liability policy. The UIM offer form presented to the insured included eleven options of UIM coverage up to the single limits of $300,000, and Leachman selected split UIM limits of $100,000/$300,000/$100,000 and signed the form. Leachman then argued that because the form did not include a blank line for him to write in a different amount of UIM coverage, the offer was not meaningful. Unsurprisingly, the

court held that no blank line was necessary because the form offered all the coverage amounts the insurer was authorized to sell by the Department of Insurance. The court justified its holding by noting that "[b]ecause this offer gave the insured the opportunity to make an intelligent and informed decision **on whether to purchase UIM coverage**, we hold that [the insurer] made a meaningful offer." *Id.* at 351, 572. Further, "[t]here are also policy reasons for finding that Progressive made a meaningful offer. The goal, as set forth in *Wannamaker,* is to provide an insured with adequate information to make an intelligent decision on whether to **accept or reject** UIM coverage." *Id.* Here, as discussed at length above, BITCO's written form was not only defective and ambiguous but it did not disclose that BITCO required the purchase of $75,000 in UIM coverage **for a premium**; likewise, its oral communications with Seckinger relayed misinformation and transformed $75,000 of UIM into mandatory coverage, making the most salient issue the difference in premium rather than the misstated "cost." Again, if the insured was already required to pay $32 for the required $75,000 in UIM coverage, the true cost of $1 million would only be the additional $54, not the $86 shown on the form. After all, even assuming that the law allows BITCO to require the purchase of $75,000 UIM which Respondent disputes, BITCO must still make a meaningful offer of UIM coverage up to the limits of the liability limits. BITCO failed in this endeavor and both the written and oral communications stripped the insured's right to accept or reject and created the antithesis of a meaningful offer.

South Carolina law clearly requires a meaningful offer of UIM, **at the option of the insured**. For that reason, *Wannnamaker* requires the insurer to intelligibly advise the insured of the nature of the coverage which by statute requires a distinction between UM and UIM coverage;

requires the option to reject UIM coverage; and requires the option to purchase UIM coverage in amounts up to the liability limits with the actual cost of each increase disclosed. An offer that is partially compliant does not suffice; a partial option to reject does not suffice; an "offer" that does not disclose the actual cost associated with the purchase of each level of coverage does not suffice. The law simply does not allow a piecemeal analysis; either it was a meaningful offer or it was not. Without a meaningful offer, reformation is required. Here, no offer was made because a noncomplying offer has the effect of no offer at all. *Ray v. Austin,* 388 S.C. 605, 611, 609 S.E.2d 208, 212 (2010) (citing *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 389 S.E.2d 657 (1990)). As such, instead of bolstering Appellants' position, the Watts and Seckinger affidavits have the opposite effect. They actually show that Ms. Seckinger did not understand her options and was not intelligibly advised.[20] If she was not intelligibly advised and did not understand her options, she could not have made an informed decision. Therefore, no meaningful offer was made.

2. BITCO's notification process was not commercially reasonable, whether oral or in writing. Accordingly, BITCO's offer did not satisfy the FIRST *Wannamaker* factor.

For each of the reasons set forth above, the form itself was defective and ambiguous in numerous ways. Although Appellants submitted the affidavits of Seckinger and Watts to overcome the deficiencies in the form, the affidavits prove that Watts did not adequately explain UIM coverage to Seckinger; that he in fact provided misinformation to her; and that Ms. Seckinger

[20] Appellants argue that Respondent offered no proof in the motions for summary judgment to rebut the affidavit testimony of Seckinger and Watts. First, it is BITCO's burden to prove a meaningful offer; BITCO failed in its endeavor. In fact, it was because these affidavits clearly support Respondent's position that Respondent chose to rely on them. No evidence in rebuttal was necessary because BITCO's "evidence" rebutted itself.

therefore did not understand her options, the difference between UM and UIM, or the actual cost associated with each level of UIM coverage. Proof of multi-year communications, both written and oral, cannot magically transform the notification process into a reasonable one when the multi-year communications only show that the same misinformation produced the same misunderstanding during the totality of those multi-year communications. It is hard to imagine how BITCO's notification process, both the written and oral portion, could be considered commercially reasonable.

3. BITCO failed to properly specify the limits of optional coverage and not merely offer additional coverage in general terms. Accordingly, BITCO's offer failed to satisfy the SECOND *Wannamaker* factor.

It is undisputed that BITCO made minimum limits of UIM coverage mandatory, both in its written and oral communications with Seckinger. Accordingly, BITCO's offer does not meet this second *Wannamaker* factor because the offer violates the optional nature of UIM coverage as well as misrepresents the costs as described above.

4. BITCO failed to tell the insured that optional coverages are available for an additional premium. Accordingly, BITCO's offer failed to satisfy the FOURTH *Wannamaker* factor.

Again, as described above, because BITCO made minimum limits of UIM coverage mandatory and charged a premium for the "required" coverage and then failed to explain not only the optional nature of UIM but also the actual "cost" of the "additional" premium, it is impossible for the offer to meet this fourth *Wannamaker* factor.

III. REFORMATION OF THE POLICY IS REQUIRED TO AVOID THE ABSURD RESULT THAT WILL ALLOW INSURERS TO MAKE UIM COVERAGE MANDATORY IN SOUTH CAROLINA.

A finding that BITCO made a meaningful offer in this case will create absurd results. First, and most simply, it will allow insurers to require the purchase of UIM coverage, not just in the amount of $75,000 as in this case but in any amount up to the limits of an insured's liability coverage. That cannot be the meaning or the legislature's intention in S.C. Code Ann. § 38-77-160. The legislature clearly made a distinction between the mandatory nature of minimum limits of UM coverage and the completely optional nature of UIM coverage. A holding that BITCO made a meaningful offer will effectively be an amendment of the statute.

Secondly, a finding that BITCO made a meaningful offer in this case will allow insurers to intentionally minimize their risk on UIM coverage while still collecting the most favorable premium. A review of the offer form in this case shows that the $75,000 in UIM required by BITCO cost the insured $28 per vehicle. That premium was automatically charged by BITCO to pay for the "required" UIM of $75,000. The premium for UIM coverage of $1 million is listed as $82 per vehicle. That means that for UIM coverage of $75,000, BITCO charged a premium representing roughly .037 percent of the amount of coverage provided. For UIM coverage of $1 million, the percentage of the premium decreased to only .0082 percent. In other words, the insured pays (and the insurer charges) a significantly higher rate per dollar of coverage for **the lower amount** of coverage. In this way, BITCO was able to charge Seckinger the higher rate per dollar of coverage while simultaneously capping its exposure at only $75,000 in UIM coverage. That was clearly a smart financial move on BITCO's part.

BITCO's notification process presents two possibilities: (1) either BITCO made an honest mistake in drafting its form and Watts, its agent, misunderstood the coverage because of the form; or (2) BITCO intended to make $75,000 in UIM mandatory for the higher rated premium and intended to make it appear that UIM coverage of $1 million would actually cost the insured $82 more per vehicle when actually that greater coverage would have cost the insured an extra $54, only a fraction of what was actually stated on the form. Considering the sophistication and knowledge that BITCO must possess as a global insurance seller, the first option seems highly unlikely to say the least. In fact, the obvious answer is the second option. By requiring the purchase of at least $75,000, BITCO automatically makes more money on each policy because an extra premium comes along with that mandatory purchase of $75,000 in UIM coverage; further, by not notifying the insured that the "required" coverage comes with a "required" premium, BITCO makes it appear that higher levels of coverage will cost the insured the full amount of the listed premium when actually the greater coverage would result only in a fraction of that listed premium after deducting the "required premium" already charged for the "required coverage"; to compound the deficiency in the process even more, by using such a form that does not contain any language actually offering "additional UIM coverage," BITCO essentially prevents the insured from purchasing any greater limits because BITCO knows the greater limits are actually the "better buys" for the insured.

This particular form that BITCO describes as its standard form was presumably presented to all of BITCO's insureds. This begs the question of BITCO's motive which was obviously to make more money while controlling its risk.

While it might seem appealing at first glance to hold that reforming a policy is absurd when the insured says all she ever wanted was $75,000 in UIM, a deeper analysis shows the fallacy of such a holding which underlies the rationale of requiring a meaningful offer to protect the insured's right to make an informed decision to either accept or reject an offer. Accordingly, the policy must be reformed to include UIM in the amount of the liability limits under the policy as required by § 38-77-350(E). This is the only way to avoid the absurd result that BITCO is attempting to achieve here..

CONCLUSION

For each of the reasons set forth above, the circuit court committed no error in denying Appellants' Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment. The circuit court properly interpreted and applied South Carolina statutory and case law in finding that BITCO's form did not create a statutory conclusive presumption of a meaningful offer of UIM; that BITCO did not meet its burden of proving a meaningful offer under *Wannamaker*; and that the policy must be reformed to include UIM in the amount of the liability limits of $1,000,000. Any other holding will result in the absurd result of allowing insurers to require the purchase of UIM for an additional premium without disclosing the actual cost of UIM coverage in greater amounts, for the purpose of making a greater profit on each policy while simultaneously limiting the insurer's exposure. Therefore, Respondent respectfully requests this Court affirm the circuit court's order.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Steven DeBerry, IV, Circuit Court Judge

Case No. 2025CP2500032
Appellate Case No. 2025-001727

James Williams ……. Respondent,

v.

BITCO General Insurance Corporation and
Seckinger Forest Products, Inc…….. Appellants.

CERTIFICATE OF COUNSEL

I, Laine B. Gooding, certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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