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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Steven DeBerry, IV, Judicial 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 REPLY BRIEF OF APPELLANTS

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ARGUMENT

Respondent spends the lion's share of his brief inserting words into statutes and even definitions that do not exist, recreating or ignoring Seckinger's insurance history, and insulting Ms. Seckinger's intelligence simply because it does not fit his narrative. But the issues before this Court are quite simple, as outlined in Appellants' Initial Brief: the Circuit Court's fundamental misunderstanding of South Carolina law regarding underinsured motorist coverage, its misapplication of the *Wannamaker* factors, its failure to recognize leading South Carolina cases on the issue and its patriarchal view of Ms. Seckinger, led to an erroneous finding that a meaningful offer of UIM was not made to Seckinger. In turn, the resulting reformation has led to an absurd result. Respondent's brief only highlights the errors while attempting to emphasize irrelevant issues.

This Court should reverse the Circuit Court's Order and find that BITCO made a meaningful offer of UIM to Seckinger such that reformation of the Policy is unwarranted. Appellants offer the following arguments, incorporating by reference the Statement of the Case, Statement of Facts, and arguments stated in its prior Brief in reply to Respondent's Brief, and in further support of Appellants' Brief.

I. THE CIRCUIT COURT ERRED IN REQUIRING THE OPTION TO REJECT UIM IN ITS ENTIRETY.

Respondent suggests Appellants ignore the modifying phrase of "at the option of the insured" because it cannot be reconciled with Appellants' position. To the contrary, it is Respondent's position that cannot be reconciled with the plain and unambiguous statutory language and the purpose of UIM coverage and its scheme. Despite Respondent's attempt to reframe the issue through wordsmithing, the Circuit Court unabashedly injected the right to reject UIM coverage "in its entirety" into the statute. This alone was error worthy of reversal, as it

suggests, contrary to case law, that the minimum UIM limit offered to a particular insured be zero. BITCO's requirement that the insured have at least $75,000.00 in UIM limits, or the insured's acceptance of this requirement, is irrelevant to the question before the Court. South Carolina law does not prevent an insurer such as BITCO from selling policies that include greater protection than provided under the law. As noted previously, a precedent that penalizes an insurer for writing a policy that provides *higher* protection than the law requires creates an absurd result in direct contravention to the point of the statutory scheme. [1]

Respondent argues that the "insured's right to purchase those optional coverages is equally balanced by the insured's right to reject those coverages." This argument is based on the fundamentally flawed assertion that "without the right to reject, the coverage is not optional" and Respondent's suggestion that BITCO's policy issued to Seckinger converts UIM coverage into mandatory coverage. This is, at best, a misunderstanding of insurance and contract law, and at worst, a purposeful misrepresentation of the circumstances at hand. That carriers impose different requirements, including a contracted for minimum UIM limit, does not transform such coverage into mandatory coverage or an impermissible contract.

Even if one were to indulge in Respondent's argument, it is beyond dispute that Seckinger could have shopped its coverage with other carriers if it was dissatisfied with the $75,000 UIM requirement term in BITCO's policy. Thus, Appellant's suggestion that "Seckinger did not have the option to reject all coverage" is patently false. Nor is there any evidence to support Appellant's statement that the $75,000 in UIM coverage was "automatically included in the policy" with a

[1] Respondent suggests that "an offer, by definition, requires an opportunity for the offeree either to accept or reject." Resp. Br. p. 11. Yet, neither Black's Law Dictionary nor section 38-77-160, reference "reject," "rejection," or any variation thereof. In any event, Respondent's hyper technical recalibration of the statutory language and the *Wannamaker* test is unnecessary and quite telling, as common sense can and should be used to determine if a meaningful offer was made.

"mandatory premium . . . that was automatically tacked on." This misinformed and unsupported statement is clearly intended to convey that Seckinger was unaware of that negotiated, accepted, and *desired* amount of coverage, which had been in place for a number of years, another fact overlooked or ignored by Respondent and the Circuit Court.[2]

But again, these are red herrings, intentionally focused upon by Respondent to distract from the utter lack of evidence to support the Circuit Court's erroneous Order. To comply with our statutory and common law in furtherance of the inescapable purpose of UIM, Appellant BITCO is required to notify the insured of the opportunity to purchase underinsured motorist coverage up to the limits of the insured's liability coverage. In other words, a carrier complies with the statutory scheme and *Wannamaker* by offering UIM up to the liability limits, such that an insured adequately understands the amount of UIM coverages available to be purchased and corresponding costs to it to protect itself, should it so choose. The undisputed evidence before the Circuit Court is that Ms. Seckinger was offered the coverage, understood the coverage and did not want to purchase UIM coverage in an amount equal to the liability limits. That should end the inquiry.

While Respondent wants to turn the process on its head, it is fundamentally clear that the overarching purpose of the meaningful offer requirement is to protect the insured by explaining to the insured what UIM is, what it covers, that it can be purchased up to the liability limits, and that a premium will be charged. Indeed, our courts are reminded to not apply *Wannamaker* "in a manner

[2] Respondent's parade of horribles which rests upon the faulty premises that BITCO's UIM coverage was mandatory and BITCO's reasons for requiring UIM were ill-intentioned, is not only misguided, it is likewise irrelevant. As noted above, South Carolina law does not prevent an insurer such as BITCO from selling policies that include greater protection than provided under the law. If the general assembly wishes to prohibit carriers from imposing additional requirements on insureds, which in turn provided greater, not less, protection, it can do so in the form of legislation, but "[i]t is not the province of the courts to perform legislative functions." *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 348, 428 S.E.2d 889, 893 (Ct. App. 1993).

that contravenes the very purpose behind the meaningful offer requirement[, which] is to protect insureds—to give them the opportunity 'to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Ray v. Austin*, 388 S.C. 605, 614, 698 S.E.2d 208, 213 (2010) (citing *Floyd v. Nationwide Mut. Ins. Co.,* 367 S.C. 253,262–63, 626 S.E.2d 6, 12 (2005) (internal quotation omitted)).

II. RESPONDENT AND THE CIRCUIT COURT MISCONSTRUE AND IGNORE EVIDENCE.

In an effort to bolster the Circuit Court's erroneous Order, Respondent takes liberties with his characterization of actual evidence as opposed to mere conjecture, brazenly stating that no one ever explained to Seckinger the various and different premium costs and presuming that no one ever asked whether Seckinger wanted to select a greater amount of UIM coverage than the $75,000. Respectfully, Respondent has simply created a narrative out of whole cloth, trying to fit a square peg into a round hole and avoid the overwhelming evidence supporting a finding of a meaningful offer.

Respondent ignores that for years, Seckinger purchased $1,000,000 in UIM coverage from BITCO and then, in 2021, made a business decision to significantly scale the coverage down in light of rising costs and other types of insurance coverage to protect itself and its employees. Thus, Respondent's repeated reminder that a third party can contest the offer even if the insured states it would have rejected UIM loses its sting when, as here, Seckinger knew what higher limits of UIM cost, analyzed the other available insurance products to protect her employees (some of whom are family members) and made a business decision to limit those costs where feasible.

Yet, Respondent advocates and the Circuit Court adopted a patriarchal view of the evidence, finding that Ms. Seckinger did not mean what she said and did not understand what she purchased because her position is adverse to her employees and therefore, "demonstrates a

fundamental misunderstanding of the coverage." Resp. Br., pg. 17. But this was the exact "adverse" position as the insureds in the *Grinnell* and *Ray* cases, two seminal cases directly supporting Appellants which Respondent now painstakingly attempts to distinguish.

Just like the Circuit Court in its Order, Respondent in his brief attempts to create a mountain out of a mole hill, spending a disproportionate amount of time discussing the differences in premiums Seckinger allegedly did not understand and allegedly was not advised of. In one of his several discussions about the premiums, Respondent explains in great detail that $86 minus $32 is a mere $54 and, more importantly, alleges that Ms. Seckinger clearly did not understand that there was an additional premium for UIM coverage or how to ascertain the actual difference in premiums because she did not verbatim explain that she, a CPA of over twenty (20) years, could not do rudimentary math. *But see McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 124, 590 S.E.2d 514, 517 (Ct. App. 2003) (offer satisfies *Wannamaker* when it lists a specific premium amount that corresponds to each optional level of coverage *or* when the premiums are otherwise "*readily ascertainable*.") (emphasis added)). Yet, these assumptions stated as fact are simply not in the record. The only evidence in the record indicates she did understand the difference in premiums (however incidental it may seem to Respondent), its effect on her business (again, however insignificant to Respondent), and in the face of rising costs and other adequate insurance for Seckinger's business and employee interests, Seckinger did not choose to purchase any additional UIM coverage up to the limits of liability beyond the $75,000.

It is one thing for a court to discount an insured's steadfast rejection when they have never purchased UIM coverage before—it is quite another to ignore a history of purchasing UIM up to the limits of liability coverage for years and then consciously scaling back for business and

economic reasons. That Respondent takes issue with Seckinger's business priorities is irrelevant, though it is rather telling.

Despite his attempt to distinguish, Respondent's argument in this regard falls squarely within in *Ray v. Austin*, 388 S.C. 605, 698 S.E.2d 208 (2010). In *Ray*, the Supreme Court easily found three of the four Wannamaker factors met where consistent with their ten-year course of dealings, the agent met with the insured's purchasing agent, to discuss the insurance options available to the insured, where the agent explained to the purchasing agent that the insured had the option to purchase UIM coverage, and where the agent presented the purchasing agent with the form offering UIM coverage that advised the insured of the nature of UIM coverage and explained that UIM coverage is triggered when liability coverage is insufficient to cover the damages of the insured, and where the form stated that UIM coverage was available for an additional premium. Addressing the factor of whether the insured specified the limits of UIM coverage and did not merely offer such coverage in general terms, the Court stated:

> Lumbermens contends it satisfied this prong of the *Wannamaker* test by advising Cintas of its option to purchase UIM coverage 'up to the limits of liability coverage' If we were to find that such a general statement satisfied this prong of the *Wannamaker* test, we would essentially do away with this element altogether. On the other hand, if we were to find Lumbermens failed to make a meaningful offer of UIM coverage because it failed to offer coverage in more specific terms, *we would reach the absurd result of reforming the insurance policy to give Cintas coverage it understood, did not want, and clearly rejected. Moreover, in reaching this absurd result, we would turn the policy objective behind the meaningful offer requirement in* Wannamaker *on its head.*

Ray, 388 S.C. at 614, 698 S.E.2d at 213 (emphasis added). Here, despite Respondent's less than subtle attacks on Ms. Seckinger's intelligence, to reform the policy here to give Seckinger "coverage it understood, did not want, and clearly rejected [after having purchased it in years past], an absurd result would be reached."

Moreover, Appellants did not simply proclaim that Ms. Seckinger was intelligent and sophisticated as Respondent flippantly suggests. Rather, Appellants cited to her affidavit, wherein she describes her history of purchasing insurance for her family business, as well as her business acumen in her role as CFO of a law firm. Yet, Respondent suggests that only representatives of global insureds possess the requisite knowledge and intelligence to procure commercial automobile insurance policies intelligibly. Shockingly, Respondent says the quiet part out loud, doubling down on Ms. Seckinger's alleged "glaring misunderstanding," despite her history of purchasing insurance and changing the limits as needed for her company's business interests. Throughout the brief, Respondent bolds phrases like "full awareness" or "options" or "expressed a desire" to suggest Ms. Seckinger was lacking all of these, despite no actual evidence to support such a faulty suggestion. Moreover, it reflects a painfully tedious attempt to distinguish *Grinnell* and *Ray* from the case sub judice, despite the circumstances of those cases being nearly identical.

Yet the attack on Ms. Seckinger, and to a lesser extent Mr. Watts, is the paper-thin foundation upon which Respondent's house of card rests. Indeed, if this Court determines, as the record indicates it should, that Ms. Seckinger meant what she said and knew what she was doing, in light of her years of experience, her history of purchasing insurance, and her thoughtful consideration of the reduction in UIM from years past, then Respondent cannot contravene the very purpose of the UIM statute and Wannamaker and cannot be the windfall beneficiary by way of an absurd result.

III. RESPONDENT'S RELIANCE ON THE FORM'S PERCEIVED DEFICIENCIES IS UNAVAILING.

Respondent conflates the UIM offer form and *Wannamaker*. The case law is categorically clear that a carrier can still make a meaningful offer and comply with *Wannamaker* despite an imperfect form. While Appellants do not concede that the form is faulty, Respondent spends

numerous pages suggesting that any deficiencies in the form carries the day. Not only is it not true, it flies in the face of *Wannamaker* and its progeny.

After *Wannamaker*, the General Assembly enacted section 38–77–350 of the South Carolina Code as a safe-harbor provision, creating a conclusive presumption of a meaningful offer of UIM coverage under certain conditions. *Traynum v. Scavens*, 416 S.C. 197, 202, 786 S.E.2d 115, 118 (2016). But the statute which the General Assembly passed in response to *Wannamaker* is intended to provide a safeguard for compliance, not impose additional requirements. Thus, an insurer can establish it made a meaningful offer of UIM coverage by proving *either* it is entitled to the conclusive presumption of section 38–77–350(B) or it satisfied the requirements of *Wannamaker. See, e.g., Ray,* 388 S.C. at 612, 698 S.E.2d at 212 ("Even where the insurer is not entitled to the statutory presumption that a meaningful offer of UIM coverage was made, the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under *Wannamaker*" (citing *Floyd v. Nationwide Mut. Ins. Co.,* 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005)).

Additionally, a comprehensive reading of section 38-77-350 reveals that Respondent's over reliance on the supposed deficiencies in the form signed by Seckinger in 2021, which Appellants refute, is even misplaced and misguided. Section 38–77–350(A), which sets forth the basic requirements for the UIM offer form to create the presumption that a meaningful offer was made, states that the offer form must be used for "new applicants." S.C. Code Ann. § 38–77–350(A) (Supp. 2009). Additionally, it provides that the form must be used "in offering optional coverages *required to be offered pursuant to law.*" § 38-77-350(A) (emphasis added).

In the present case, Seckinger was not a "new applicant," as it has been a BITCO insured since 2016. In the context of UIM cases, this Court has previously construed the term "new

applicant" as meaning "those who ... never had an opportunity to reject UIM coverage and others, such as insureds renewing policies, who previously had made informed decisions about UIM coverage." *McDonald v. S.C. Farm Bureau Ins. Co.,* 336 S.C. 120, 124, 518 S.E.2d 624, 626 (Ct. App. 1999); *See also Gov't Emps. Ins. Co. v. Draine*, 389 S.C. 586, 594–95, 698 S.E.2d 866, 870–71 (Ct. App. 2010). In *McDonald*, the Court of Appeals found that because McDonald was a newly added named insured to an existing policy, the carrier was required to make a new offer of UIM. Here, Seckinger became a BITCO policyholder in 2016 and was properly offered UIM coverage, which it accepted up to the liability limits of $1,000,000. (R. pp. 54-63; 193; 206) Those UIM limits remained until 2021, when Seckinger decided to reduce its UIM coverage to $75,000. (R. pp. 64-71; 194; 206) Therefore, when Seckinger sought to renew its existing policy in 2021, it did not constitute a "new applicant" as contemplated by section 38–77–350(A). *Draine*, 389 S.C. at 594–95, 698 S.E.2d at 870–71.

Section 38–77–350(C) expressly provides that "[a]n 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." S.C. Code Ann. § 38–77–350(C) (2002) (emphases added). Although this Court has held that section 38–77–350(C) is inapplicable when the insurer has not made a previous effective offer of optional coverage, in this case, Seckinger obtained the maximum UIM available in 2016, and there is no evidence in the record to suggest BITCO's offer of UIM coverage was ineffective. Pursuant to the statute and case law, BITCO was not even required to offer UIM coverage to Seckinger when it renewed in 2021 (or 2023). *See Draine*, *supra*; *see also McDonald v. S.C. Farm Bureau Ins. Co.*, 336 S.C. 120, 124–25, 518 S.E.2d 624, 626 (Ct. App. 1999) (Where Section 38–77–350(C) states the insurer is not required to make a "new" offer, it clearly envisions the circumstances where the insurer has already made an "old"

offer.); Burnet R. Maybank, III et al., *The Law of Automobile Insurance in South Carolina* IV–37 (4th ed. 2000) ("The insurer is not required to make another offer of optional coverages pursuant to [section 38–77–350] at renewal time provided a properly completed and executed form has been previously obtained from the insured being renewed.").

Thus, Respondent's heavy reliance on his perceived deficiencies in the form is not only weak, it is wholly irrelevant. Furthermore, section 38-77-350's nuanced but important distinction between "new applicants" and others only further highlights Respondent's and the Circuit Court's complete disregard of Seckinger's history with BITCO, its procuring of UIM up to the liability limits, and its conscious decision to reduce such coverage. These considerations mandate reversal.

CONCLUSION

Respondent downplays the absurd result reached, suggesting that reformation is simply the carte blanche penalty for failing to adhere to his version of a meaningful offer. But *Ray* implores litigants and courts to analyze the entirety of the circumstance and to reach the result which most accurately supports—not contravenes—*Wannamaker* and the policy behind it. *See Ray*, 388 S.C. at 614, 698 S.E.2d at 213 ("[I]n reaching this absurd result, we would turn the policy objective behind the meaningful offer requirement in *Wannamaker* on its head.").

As demonstrated above and in Respondents' Initial Brief, the Circuit Court erred in denying Appellants' Motions for Summary Judgment and Granting Respondent's Motion for Summary Judgment. Based on the statutory scheme, the public policy behind the same, and the uncontroverted and unequivocal evidence in the record, no genuine issue of material fact exists and BITCO was entitled to a declaratory judgment that its UIM offer to Seckinger was meaningful and that reformation was not warranted. Any other conclusion is based on a patriarchal view of the evidence and leads to an absurd result. The evidence in the record proves as a matter of law

that Seckinger knowingly rejected the offer to purchase UIM coverage up to the liability limits, which satisfies the *Wannamaker* test.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief and Reply Brief of Appellants complies with Rule 211, SCACR.

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