

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Michael Baxley, Presiding Judge

Opinion No. 27381 Filed April 9, 2014

JOSHUA BELL Petitioner

vs.

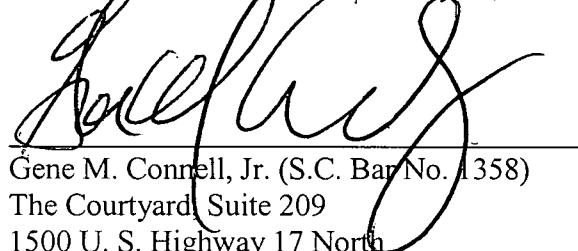
PROGRESSIVE DIRECT INSURANCE COMPANY Respondent

PETITION FOR REHEARING

The Petitioner, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its Opinion filed April 9, 2014 and received by Appellant's attorney on April 10, 2014. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM Horry COUNTY
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J. Michael Baxley, Presiding Judge

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JOSHUA BELL Petitioner

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY Respondent

MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR REHEARING

The Petitioner, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its Opinion filed April 9, 2014. Petitioner only seeks a remand for review by the trial court of the case based on the doctrine of reasonable expectations adopted by this Court.

I. BACKGROUND FACTS.

The Petitioner was involved in a car accident on March 31, 2006. The liability limits of the at-fault driver were tendered and there was no underinsured motorist (UIM) coverage on the vehicle in which he was riding. Petitioner submitted a claim for UIM benefits under a Progressive Insurance policy issued to Sarah K. Severn. At the time of the accident Petitioner was a "household resident" with Severn and their child.

Both Petitioner's and Severn's names appear on the declarations page of the policy under the heading "Drivers and household residents." The term "household resident" is undefined in the policy of insurance.

The circuit court held a hearing on the summary judgment motion on October 13, 2008. At that hearing Petitioner argued that he was entitled to coverage under the policy by virtue of the doctrine of reasonable expectations. On January 14, 2009, the circuit court entered an order granting Progressive's motion for summary judgment, rejecting Petitioner's argument that he was a "named insured" under the policy based on the doctrine of reasonable expectations. The Court of Appeals affirmed in an unpublished Opinion. See *Bell v. Progressive Direct Ins. Co.*, Op. No. 2011-UP-242 (S.C. Ct. App. filed June 23, 2011). In that opinion, the Court of Appeals refused to adopt the doctrine of reasonable expectations citing *Allstate Insurance Co. v. Mangum*, 299 S.C. 226, 231, 383 S.E.2d 464, 466-467 (Ct.App. 1989). The Court of Appeals further stated "because the doctrine cannot be reconciled with a rule that unambiguous insurance policies are subject to the general rules of contract construction, this court is precluded from adopting the doctrine as [s]uch a departure from jurisprudence must be left to our supreme court."

This Court granted the petition for review and on April 9, 2014 held as follows:

Thus, while we now hold that reasonable expectations may be used as another interpretive tool, the doctrine cannot be used to alter the plain terms of an insurance policy.

The Court further noted in Footnote 8:

... the Record is unclear regarding what expectations Petitioner held with respect to coverage under the Policy. Petitioner testified he added himself to the insurance policy to avoid being arrested for driving without insurance. He also testified he did not have an understanding of what it meant to be listed as a "household resident" under the policy, and did not state he

reasonably expected to be covered as a named insured for UIM purposes.¹
Thus, it is unclear how the doctrine would apply under these facts.

II. THIS COURT SHOULD REMAND THIS MATTER TO THE TRIAL COURT.

Petitioner's argument for adoption of the doctrine of reasonable expectations was that the term "household resident" in the policy was undefined and thus ambiguous and rendered the doctrine of reasonable expectations operable based on his reasonable expectation that he had UIM coverage at the time of the accident for coverage he purchased from Progressive.

Petitioner asserts that the court agrees with Petitioner that the doctrine of reasonable expectation can be used as an interpretive tool in this state when there are ambiguous terms such as the term "household resident." In this case Petitioner's argument that the doctrine of reasonable expectation can be used was first decided by this Court in this case on April 9, 2014. Prior to that date it was not known whether or not the doctrine of reasonable expectations would be accepted by the Court. Petitioner asserts that because of the uncertainty of this doctrine in the courts of this state, a trial should be held in this case. Further, because this matter was decided on summary judgment (a drastic remedy), this Court should remand this matter to the circuit court for consideration consistent with this Opinion.

Petitioner believes several factors support this request. First, it is well established in South Carolina that the parties seeking summary judgment must clearly establish the absence of a genuine issue of material fact. See *Miller v. Blumenthal Mills*, 365 S.C. 204,

¹ Petitioner can find no reference in his deposition testimony as to his understanding of what it meant to be listed as a "household resident." Petitioner attaches the Word Index from the deposition which supports his argument that the term household resident was not discussed. (See Exhibit A attached).

616 S.E.2d 722 (Ct.App. 2005). Also, this Court has stated that when there is a mere scintilla of evidence then summary judgment should not be granted. *Hancock v. Mid-South Management*, 381 S.C. 326, 673 S.E.2d 801 (2009).

Petitioner also points out that the term “household resident” is ambiguous and not defined in the policy and that the record, according to this Court’s Opinion, is unclear regarding what expectations Petitioner held with respect to the coverage under the policy. In this circumstance, because this case was decided on summary judgment, this Court ought to remand on the doctrine of reasonable expectations to the trial court. Petitioner has never had the benefit of a trial. This matter was decided on summary judgment and both the circuit court and the Court of Appeals held that the doctrine of reasonable expectations did not apply. Because this was an issue of first impression, Petitioner asserts that remand is appropriate in this case. Further, because Petitioner submitted more than a mere scintilla of evidence, summary judgment was inappropriate.

III. OTHER JURISDICTIONS SUPPORT PETITIONER’S POSITION.

Petitioner also points out the case of *Moniz v. Daverede*, 40 S.3d 1027 (La.App. 4 Cir. 2010) as persuasive authority that this case should be remanded. *Moniz* is directly applicable to this case. In *Moniz*, the Louisiana Court of Appeals had an opportunity to consider what the term “driver” and “household resident” meant in a policy exactly like the policy in this case. The declaration page of the policy contained a section entitled in boldface: “Drivers and household residents.” Kelly Falgout was listed as the “named insured” on the first line under that heading. The name of the plaintiff, Kelly Pepperman, appeared on the next line, or as the plaintiff states in her brief: “Falgout is the only named insured on the policy.” In *Moniz*, Plaintiff contended that because her name appeared on the

declaration page of the policy under the category of “Drivers and household residents” she was reasonably led to believe that she was covered. The Louisiana Court of Appeals found an ambiguity and asked the following question: “Why is the plaintiff’s name shown on the declaration page of the policy if she is to be treated as a third party stranger to the policy?” The Court noted: “We have reviewed the policy in depth and can find nothing that would explain why the plaintiff’s name would appear on a declaration page if she was not intended to be an insured.” This is precisely the case here.

The Louisiana Court of Appeals also noted that an affidavit had been offered of a Progressive insurance agent that the premium was based upon both vehicles and both drivers named on the policy. 40 So.3d at 1030. Petitioner asserts because the policy is exactly the same here as in Louisiana, the Court should find Petitioner paid premium dollars for the coverage and an ambiguity exists over the meaning of the term “household resident.” Thus, remand is necessary.

IV. THE RESULT HERE IS OPPRESSIVE TO PETITIONER.

Petitioner also points out this Court’s citation in adopting the doctrine to *Clark-Pederson Co., Inc. v. Independent Insurance Assoc.*, 492 N.W.2d 675 (Iowa 1992). In that citation the Iowa Supreme Court noted “the doctrine is carefully circumscribed, it can only be invoked where an exclusion is bizarre or oppressive, eviscerates terms explicitly agreed, to or eliminates the dominate purpose of the transaction.” Here the result is oppressive and eliminates the dominant purpose of the transaction which was to cover Bell for insurance he paid for.

In this case, Petitioner asserts that there are good and valid reasons to remand this matter to the circuit court for consideration of the doctrine of reasonable expectations. One

reason offered by this Court is that an unfair result will occur otherwise. Petitioner offers these examples of the bizarre or oppressive result which occurs:

- The record indicates that Bell paid the insurance and was listed on the policy under an ambiguous term (“household resident”).
- Bell would be entitled under the policy to liability coverage but not UIM coverage on a policy he paid for.
- Bell would not be covered whereas his son with the named insured would be covered under the UIM policy.
- Bell paid extra insurance premium to be named on the policy as a household resident. (See *Moniz v. Daverede*, 40 S.3d 1027 (La.App. 4 Cir. 2010) (premium amount was based upon both vehicles and both drivers named on the policy).)
- The issue of what “household resident” means is undefined in the policy and a trap for the unwary.
- Bell paid the premium and was named as a household resident but cannot make a claim under the policy which he purchased.
- Bell was never asked in his deposition that he reasonably expected coverage as stated in this Court’s Opinion in Footnote 8. (See attached Word Index from deposition of Bell).
- The doctrine of reasonable expectation is appropriate when terms are undefined in an insurance policy such as the term “household resident” which means Bell is left in limbo as to his status under this insurance policy and Progressive retains the premiums.

- The decision in this case leads to an oppressive result. Bell, the person who paid for the coverage, is left without UIM benefits—which was the dominant purpose of the transaction.
- If it is unclear how the doctrine would apply under these facts as stated by the Court, then summary judgment should not be granted and this case should be returned to the trial court.
- Bell and Severn used the car to go to work, drive on the weekend and Bell drove it all over -- creating a reasonable expectation of coverage.
- The dominant purpose of the transaction, i.e., the purchasing of the insurance, was to have insurance protection for Bell, Severn and their child.
- No explanation is offered by Progressive for the term “household resident.”

V. **THE COURT’S CITATION IN FOOTNOTE 8 OF THE OPINION IS NOT IN THE RECORD.**

The Court in Footnote 8 of its Opinion cites:

He also testified he did not have an understanding of what it meant to be listed as a “household resident” under the policy, and did not state he reasonably expected to be covered as a named insured for UIM purposes.

Joshua Bell v. Progressive Direct Ins. Co., Appellate Case No. 2011-195286, Opinion No. 27381, filed April 9, 2014.

Petitioner respectfully states that he has combed the record in this case and that this statement does not appear in the testimony of Joshua Bell. Petitioner also has attached the Word Index from the Deposition of Bell and respectfully points out that this statement is not in the record. Further, because this statement is not in the record and because “household resident” has not been defined, the doctrine of reasonable expectation should apply to this case.

As an example, Petitioner has reviewed Black's Law Dictionary 2d Ed. for the definition of the term "Household." Black's Law Dictionary defines "Household" as follows:

A family living together. *May v. Smith*, 48 Ala. 4S8; *Woodward v. Murray*, 18 Johns. (N.Y.) 402; *Arthur v. Morgan*, 112 U.S. 495, 5 Sup.Ct. 241, 28 L.Ed. 825. Those who dwell under the same roof and compose a family. Webster. A man's family living together constitutes his household, though he may have gone to another state. Belonging to the house and family; domestic. Webster.

The plain, ordinary and popular meaning of the term "Household" indicates that Bell was a family member and thus there is an ambiguity in the policy. Obviously, if the term "Household" defines Bell as a family member as used in Black's Law Dictionary, then he would be covered as an insured person under Progressive's policy because a family member is by definition a relative.

Petitioner respectfully suggests that the term "household resident" is ambiguous when read in the policy with the term "named insured." Accordingly, Petitioner requests that the Court remand this matter to the circuit court for a trial under the doctrine of reasonable expectations consistent with this Court's Opinion of April 9, 2014.

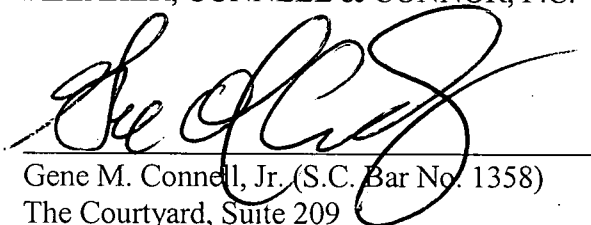
VI. CONCLUSION

Petitioner requests that the Court remand this matter consistent with its Opinion regarding the doctrine of reasonable expectations to the trial court. The basis of this argument is that the record is unclear according to the Court's Opinion as to what the Plaintiff's expectations were when the policy was purchased. Petitioner could not have known nor did he have the opportunity to present evidence about the doctrine of reasonable expectations which was not adopted by this Court until April 9, 2014. The record at minimum establishes that summary judgment was inappropriate because Bell lived with

Severn, had a son with her, was a household resident (which is undefined), paid all the bills, paid the insurance premium, and finally there is a tension between the definitions in the policy. (Named insured, relative, household resident.) Thus, Petitioner believes remand is the appropriate remedy for a full trial to determine Bell's reasonable expectations in light of this Court's ruling that the doctrine is applicable in this state.

Respectfully submitted,

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April 17, 2014
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EXHIBIT "A"

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM Horry COUNTY
Court of Common Pleas

J. Michael Baxley, Presiding Judge

Opinion No. 2011-UP-242 Filed May 24, 2011
Withdrawn, Substituted and Refiled June 23, 2011

JOSHUA BELL Petitioner

vs.

PROGRESSIVE DIRECT INSURANCE COMPANY Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., Attorneys at Law, and that she has served the **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

J.R. Murphy, Esquire
Murphy & Grantland, PA
P. O. Box 6648
Columbia, SC 29260

DATE OF MAILING: April 17, 2014

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 17th day of April, 2014

Sharon M. Taylor
Notary Public for South Carolina
My Commission Expires: 2-25-19