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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2010-CP-02-02665

Loretta Traynum and Leonard Traynum, ... Appellants,

v.

Cynthia Scavens and Progressive
Direct Insurance Co., ... Respondents.

REPLY BRIEF

Tom Young, Jr., Bar # 11643
LAW OFFICES OF TOM YOUNG, JR.
P.O. Box 651
Aiken, SC 29802
(803) 649-0000
(803) 649-7005 (facsimile)
tyoung@tomyounglaw.com

Blake A. Hewitt, Bar # 73674
John S. Nichols, Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

A. Just as the law rejects an in-person or a mail-based transaction if the transaction was misleading, so too should the law reject *this* misleading transaction, even though it occurred electronically 2

B. A signed offer form cannot end the case because the court will not enforce the meaningful offer statutes in a way that violates their shared goal 3

i. The shared goal of the meaningful offer statutes is for customers to know their options and to make informed decisions about coverage 3

ii. Progressive does not agree that the statutes have this purpose, but Progressive's argument has already been rejected by this Court and the Supreme Court 3

iii. Progressive wants to distinguish these previous decisions, but the offered distinction is illusory and subsequent cases validate Mrs. Traynum's argument 4

C. There was no meaningful offer here, and that occurred because Progressive's process was confusing, misleading, and made it easy for Mrs. Traynum to overlook that she was being offered additional coverage which she needed to understand 6

Conclusion 8

TABLE OF AUTHORITIES

Cases

Butler v. Unisun Ins. Co.,
323 S.C. 402, 475 S.E.2d 758 (1996) 4, 5

Croft v. Old Republic Ins. Co.,
365 S.C. 402, 618 S.E.2d 909 (2005) 3

Dewart v. State Farm Mut. Auto. Ins. Co.,
296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1988) 2, 8

Floyd v. Nationwide Mut. Ins. Co.,
367 S.C. 253, 626 S.E.2d 6 (2005) 3

Garris v. Cincinnati Ins. Co.,
280 S.C. 149, 311 S.E.2d 723 (1984) 5

Grinnell Corp. v. Wood,
389 S.C. 350, 698 S.E.2d 796 (2010) 2, 3, 5

Lopez v. National Gen. Ins. Co.,
308 S.C. 342, 417 S.E.2d 864 (1992) 8

McDowell v. Travelers Prop. & Cas. Co.,
357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003) 5

Osborne v. Allstate Ins. Co.,
319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995) 4, 5

Progressive Cas. Ins. Co. v. Leachman,
362 S.C. 344, 608 S.E.2d 569 (2005) 3

Ray v. Austin,
388 S.C. 605, 698 S.E.2d 208 (2010) 5

(Other Jurisdictions)

Banaszak v. Progressive Direct Ins. Co.,
3 A.3d 1089 (Del. 2010) 8

Statutes & Other Authorities

S.C. Code Ann. § 38-77-160 (2002) 3, 4, 5

S.C. Code Ann. § 38-77-350 (2002 & Supp. 2013) 3, 4, 5

Act. No. 154, 1997 S.C. Acts 931 5

The arguments in Progressive's brief are fairly encompassed in the following points:

(1) Mrs. Traynum wants to treat electronic transactions differently;
(2) A signed offer form should always end the case; and
(3) A signed offer form is meaningful even if its delivery was misleading.

Point number one is not an accurate description of Mrs. Traynum's argument. The remaining points are not accurate statements of what the law is or what the law ought to be.

First, Mrs. Traynum does not want to treat electronic deals differently. Just as the law rejects an in-person or a mail-based transaction if the transaction was misleading, so too should the law reject *this* misleading transaction, even though it occurred electronically.

Second, a signed offer form does *not* end the Court's inquiry. The Court does not have to take Mrs. Traynum's word for it: this argument has already been litigated and lost. The reasons for this result should be apparent. Suppose we knew that a customer's signature on an offer form was obtained by outright misrepresentation. Is Progressive really suggesting that the court would find a meaningful offer even though we would know with certainty that the customer did not understand the information in question? Surely not. If the offer form ended the inquiry, the meaningful offer statutes would be written differently.

Finally, this case involves circumstances that are rather unusual in terms of this State's meaningful offer jurisprudence. Litigation often involves parties who disagree on how a transaction occurred, but we know how *these* parties interacted. We have the records.

We know that Progressive did not actually communicate a meaningful offer of UIM coverage to Mrs. Traynum. The dialogue that the law required Progressive to initiate did not occur. This happened because Progressive built its process in a way that minimized the relevant information and coaxed the consumer onward. This Court should reverse.

A. Just as the law rejects an in-person or a mail-based transaction if the transaction was misleading, so too should the law reject *this* misleading transaction, even though it occurred electronically.

At no point in Mrs. Traynum's principal brief did she argue that this transaction should be treated differently because it occurred over a website. Cf. (R. p.195) (agreeing that the internet is a reasonable means of communication). The brief's argument headings should make this plain. The first part of the argument is that this offer was invalid because an offer cannot be meaningful if it was confusing or hidden. The second part of the argument is that applying a conclusive presumption to this case would violate the intent of the meaningful offer statutes. Mrs. Traynum is not suggesting that electronic signatures are invalid. This case is not about whether an electronic signature is what it purports to be.

Instead, this case is about whether Mrs. Traynum's electronic signature was obtained through a process that was forthright and meaningful. Did Progressive obtain Mrs. Traynum's signature because it actually informed her about UIM coverage and because she made an educated decision to decline that coverage, or was the signature a result of a misleading process that left Mrs. Traynum *un*informed? This is an important question. If Mrs. Traynum's signature was obtained through misrepresentation or confusion, the consequences seem clear. Under *Dewart v. State Farm* and its progeny, misleading offers are invalid even if they are signed. It also seems clear under *Grinnell Corp v. Wood* that a court will not enforce the meaningful offer statutes in a way that violates the statutes' intent.

People can be unscrupulous, writings can be misleading, and a website can be built in a way that conceals critically important information. No one is asking for electronic transactions to be treated differently. All misleading transactions should be treated the same.

B. A signed offer form cannot end the case because the court will not enforce the meaningful offer statutes in a way that violates their shared goal.

South Carolina's two UIM statutes—section 38-77-160 and section 38-77-350—have a shared goal. This goal is for customers to know their insurance options and to make informed decisions when purchasing (or rejecting) automobile insurance coverage.

i. The shared goal of the meaningful offer statutes is for customers to know their options and to make informed decisions about coverage.

This principle is lifted from the Supreme Court's decision in *Progressive Casualty Insurance Co. v. Leachman.* See 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005). Similar statements appear in *Floyd v. Nationwide Mutual Insurance Co.*, *Croft v. Old Republic Insurance Co.*, and *Grinnell Corp. v. Wood.* See *Floyd*, 367 S.C. 253, 262-63, 626 S.E.2d 6, 12 (2005); *Croft*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005); *Grinnell*, 389 S.C. 350, 355-56, 698 S.E.2d 796, 799 (2010). *Grinnell* puts the point forcefully. After writing that the purpose of a meaningful offer is for a customer to know his or her options and to make an informed decision, the court explains that "[a]ll law with respect to [meaningful offers] must be applied so as to effectuate this stated purpose." *Id.* at 356, 698 S.E.2d at 799.

ii. Progressive does not agree that the statutes have this purpose, but Progressive's argument has already been rejected by this Court and the Supreme Court.

Progressive does not agree. In its view, the conclusive presumption statute—section 38-77-350—was designed to eliminate lawsuits involving defective offers.

Mrs. Traynum has not been able to discover a single case that articulates such a purpose. None. The reason why is that this argument has been litigated and lost.

The first time this argument was litigated was in *Osborne v. Allstate*. See 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995). It was litigated again in *Butler v. Unisun*. See 323 S.C. 402, 475 S.E.2d 758 (1996). In both cases, the insurance company contended that as long as the offer form satisfied section 38-77-350, the conclusive presumption applied and the case was over. In both cases, the appellate courts rejected this argument.

Both decisions articulated the reasons for this rejection. When the legislature added section 38-77-350 to the Code, the legislature also re-codified the other meaningful offer statute—section 38-77-160. *Osborne* and *Butler* observe that by amending both statutes at the same time, the legislature must have intended for both statutes to continue in force. Section 38-77-350 provides a list of "the minimum" information that a written offer form must contain, but the offer itself is still subject to the Supreme Court's interpretation of section 38-77-160 and what constitutes a "meaningful" offer. See *Osborne*, 319 S.C. at 486, 462 S.E.2d at 295; *Butler*, 323 S.C. at 407-08, 475 S.E.2d at 761. This is a common sense conclusion. Statutes that cover the same subject matter will be construed in a way that reaches a harmonious result. See, e.g., *Osborne*, 319 S.C. at 484-85, 462 S.E.2d at 294. If a hypothetical offer complied with the letter of section 38-77-350, but failed the meaningful offer test articulated in *Wannamaker*, the decision to validate the offer would produce discord between these statutes, not harmony.

iii. Progressive wants to distinguish these previous decisions, but the offered distinction is illusory and subsequent cases validate Mrs. Traynum's argument.

Osborne and *Butler* are similar decisions. Both cases involved written offers that did not give the customer the option of purchasing UIM in an amount that was below the

minimum limits required by statute. This made the offers defective because at the time of *Osborne* and *Butler*, the Supreme Court had interpreted section 38-77-160 to require an insurance company to offer UIM "in any amount," even below the minimum limits. See *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 154, 311 S.E.2d 723, 726 (1984). The legislature eliminated this requirement in 1997—two years after *Osborne* and one year after *Butler*. See Section 3 of Act No. 154, 1997 S.C. Acts 950-51.

Progressive's brief recites this history, but then it posits that this history indicates a legislative design of "reducing" the number of meaningful offer cases and "expanding" the conclusive presumption. This is not so. The 1997 amendment changed the variety of coverage that has to be *involved* in a meaningful offer. It did not alter the principle that in order to be a valid offer, an offer of coverage has to be *meaningful*.

There is no statute and no court decision that modifies *Butler* and *Osborne*'s conclusion that the two meaningful offer statutes complement one another and are aimed at the same purpose. Indeed, subsequent cases reinforce this principle.

Consider *McDowell v. Travelers*, *Ray v. Austin*, and *Grinnell Corp. v. Wood*. All of these cases involved written offers that were invalid under section 38-77-350, yet in all of these cases, the court applied a *Wannamaker* analysis and refused to reform the policies.

If the law was as Progressive would like it to be, *Wannamaker* would have been irrelevant to these decisions. After all, according to Progressive, section 38-77-350 was a hostile response to *Wannamaker* and was intended to eliminate reformation claims. If the form is "the beginning and the end," it would seem to follow that just as a valid form will give the insurance company a win, so too will an invalid form spell victory for the customer.

The reason the law is *not* as Progressive would like it to be is that a literal application of the conclusive presumption statute would produce absurd results. People can be unscrupulous, sales processes can be deceiving, and on the other side, an offer can be meaningful even though a written form is defective. South Carolina courts use the *Wannamaker* analysis to save these statutes from absurd application. *Grinnell* puts the point directly: these are not uncompromising statutes that will be mechanically applied. Instead "[a]ll law" with respect to meaningful offers will be applied to further the purpose of ensuring that customers know their options and make informed decisions. 389 S.C. at 356, 698 S.E.2d at 799. If the legislature disagreed with this approach, it would have responded.

C. There was no meaningful offer here, and that occurred because Progressive's process was confusing, misleading, and made it easy for Mrs. Traynum to overlook that she was being offered additional coverage which she needed to understand.

One fortunate feature of this case is that the Court can view the records of this transaction for itself. The Court can flip through the 12 different snapshots of Mrs. Traynum's on-line interaction with Progressive, and through those dozen pages, the Court can watch this transaction unfold. See (R. pp.52-63).

Progressive says that its website operates just like a "live" agent who hands a written offer to a customer. The Court can judge for itself, but it seems difficult to see how displaying only two-paragraphs of a 5-page form is equivalent to handing the entire form to the customer so the customer can sign all three (3) of the form's signature lines. Compare (R. p.58) with (R. pp.64-68). The analogy only works if the live agent hands over a single page which provides "by signing this, I am signing this form and *another* form."

Progressive says that its process emphasizes the offer's importance to the customer. The Court can judge for itself, but the instructions on the relevant screen did not tell Mrs. Traynum to make sure that she read about optional insurance coverage and understood it. The following words and phrases appear in bold: "**Your Electronic Signature is Required**," "**electronically sign**," and "**continue**." See (R. p.58). Mrs. Traynum may be mistaken, but it seems like if Progressive's goal was to make sure that Mrs. Traynum actually read and understood this information, the directions on this page might contain a warning that the 5-page document in question contains important material that might be new to a layman, and that in order for the customer to ensure that he or she is making an informed decision, it is important for the customer to pause, study the document, and make sure that he or she does not have any questions. The goal is not to give the customer the *option* of understanding this coverage. The goal is for the insured to *actually* understand this coverage.

We know that this did not happen here. Mrs. Traynum testified that she was not familiar with UM or UIM coverage, (R. p.243-244), and Progressive has not presented any evidence attacking that testimony. We also know that Progressive's website did not educate Mrs. Traynum about this coverage because we know that Mrs. Traynum did not visit the relevant page for a long-enough time. Progressive says that this time-based argument was not presented to the lower court, but the transcript says different. See (R. p.162). We know that although Mrs. Traynum signed this form, the purpose of the form was not fulfilled.

It seems like it would be easy to organize this process differently. It seems like it would be easy to build a process that treats the relevant information as its central feature and makes it difficult for a customer to remain uninformed. A laymen may assume (as Mrs.

Traynum did) that "minimum limits" will always provide coverage if the insured's vehicle is involved in an accident. See (R. p.254). This is obviously inaccurate, and this misunderstanding is one of the reasons why the meaningful offer requirement exists. But instead of being forthright about the information in question, Progressive's process takes everything in reverse. It asks the customer to choose a policy and to sign an application that omits optional coverage, and it does not even attempt a meaningful offer of this coverage until later. Cf. *Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089 (Del. 2010) (reforming a policy because of a similar defect). This is backwards, and it allowed Mrs. Traynum to overlook that she was being offered optional coverage which she needed to understand.

CONCLUSION

The common thread that appears in *Dewart*, *Lopez*, and the present case is that all of these cases involve offers that *could* have been meaningful if they had not been presented in a misleading fashion. The law required Progressive to communicate a meaningful offer to Mrs. Traynum, and we know that this did not happen. This Court should reverse the circuit court and reform the Traynums' policy.

Respectfully submitted,

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Blake A. Hewitt
John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Appellants