IN THE STATE OF SOUTH CAROLINA

In the South Carolina Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-02965
Appellate Case No. 2013-000923
Op. No. 2014-UP-270 (S.C. Ct. App. filed June 30, 2014)

Progressive Northern Insurance Company ..... Petitioner,

v.

Stanley K. Medlock, Corey K. Medlock and The Standard Fire Insurance Company, ...Defendants,

Of Whom

Stanley K. Medlock and Corey K. Medlock.....Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 4, 2014.

QUESTIONS PRESENTED

I) Whether a Writ of Certiorari should be granted when the Court of Appeals failed to apply the plain language of South Carolina Code § 38-77-350(B) and this Court has never addressed whether a signed rejection of optional UIM coverage by one named insured binds all other insureds?

II) Whether a Writ of Certiorari should be granted when the Court of Appeals failed to apply the plain language of South Carolina Code § 38-77-350(C) and this Court has never construed the term "change" as used by the General Assembly?

STATEMENT OF THE CASE

This appeal turns upon whether Progressive Northern Insurance Company ("Progressive") had a right under South Carolina Code § 38-77-350(B) and (C) to rely upon a written rejection of optional underinsured motorist (UIM) coverage by one named insured at the time of initial application for insurance when his son, who had been a listed driver on the policy since the initial application, was subsequently changed from a listed driver to a second named insured. This Court has never interpreted these statutory provisions to clarify whether a signed rejection by one named insured "applicant" binds all other insureds, who is an "applicant" as that phrase is used in the statute or what constitutes a "change" under the statute. By this petition, Progressive asks this Court to answer these important, novel issues that impact every automobile insurance company, agent and customer in the State of South Carolina.

The facts of the case are undisputed and were set forth in a Stipulation of Facts which the parties submitted to the Trial Court. On October 15, 2009, Progressive issued a policy of insurance to Stanley Medlock covering a 2001 Polaris Sportsman 500. (R. p.

67). Corey Medlock is Stanley's son and lived in Stanley's household continuously from the time the policy was issued up through the date of his accident. The application lists Corey Medlock as a "Driver and household resident" and describes his relationship to Stanley Medlock as "child." Although Stanley owned the Polaris Sportsman, the application reveals that the Polaris Sportsman was Corey's "principal vehicle." (R. p. 128).

As part of the application, Stanley signed a form titled: "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form") (R. pp. 133-137). Stanley rejected optional UIM coverage and signed the Offer Form in the spaces indicating his rejection of optional coverage. (R. pp. 136-137). The Medlocks concede that the Offer Form and Stanley's signatures satisfied the requirements of South Carolina Code § 38-77-350(A) and entitled Progressive to a conclusive presumption of an informed, knowing rejection of optional coverage for the October 15, 2009 application. (R. p. 67).

On June 9, 2010, only eight months after Stanley signed a written rejection of optional coverage, the existing policy was changed at his request. (R. p. 56). A 2001 Suzuki motorcycle was added as a second vehicle on the original policy. Corey owned the 2001 Suzuki. In order to make sure that Corey was in compliance with South Carolina Code § 56-10-10, the insurance agent changed Corey's status on the policy from listed driver and household resident to a second named insured on the declarations page. (R. p. 68). No new policy was created, no new application was made and the Medlocks received a multi-vehicle discount by choosing to add the vehicle to the existing policy rather than purchase a separate policy. (R. p. 68). Furthermore, the effective dates of the

policy did not change. Because the policy was merely changed and Stanley remained the primary named insured on the policy, Progressive did not make a second offer of optional coverage. (R. p. 68).

On February 10, 2011, Corey was involved in an accident while driving his Suzuki motorcycle. The liability carrier for the driver of the other involved vehicle tendered its limits of liability coverage in exchange for a Covenant Not to Execute. (R. p. 68). Corey then filed a civil action in the South Carolina Court of Common Pleas for the Seventh Judicial Circuit Spartanburg County, captioned Corey K. Medlock v. Jon C. Owens, Civil Action No. 2011-CP-42-649.

Progressive filed this declaratory judgment action in the Spartanburg County Court of Common Pleas on July 11, 2011 seeking a declaration that Corey was bound by his father's signed rejection of optional UIM coverage. Corey and his father filed an Answer, Counterclaim, and Crossclaim on August 23, 2011 seeking to reform the Progressive policy to include the rejected underinsured motorist coverage. Progressive filed a Reply to the Medlocks' counterclaim on October 4, 2011.

Progressive and the Medlocks filed cross motions for summary judgment on October 5, 2011 and June 11, 2012, respectively. Each party filed a supporting memorandum, and the Honorable J. Derham Cole heard arguments at a hearing on June 20, 2012. Nine months later, on March 26, 2013, Judge Cole signed an Order refusing to apply South Carolina Code § 38-77-350(C) and granting summary judgment to the Medlocks. In doing so, the Circuit Court relied upon the Court of Appeals' holding in McDonald v. South Carolina Farm Bureau Insurance Company, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 2000), and held that the change making Corey a second named insured was

no different from the transfer of coverage from one named insured mother wholly to her son as the new and sole named insured on the policy. The Circuit Court also relied upon *dicta* in McDonald in which the Court of Appeals stated that "applicant" in § 38-77-350(A) means "all named insureds." The Order was filed on March 26, 2013 and Progressive received written notice of entry of the Order on April 3, 2013. Progressive timely filed a Notice of Appeal on April 23, 2013.

Considering the great deal of uncertainty regarding what constitutes a "change" to an existing policy under § 38-77-350(C) and the misunderstanding of the General Assembly's intent in using the word "applicant" in § 38-77-350(A), Progressive appealed the trial court's decision in expectation that the Court of Appeals would provide much needed guidance on these important questions affecting the insurance industry and insureds throughout South Carolina. The Court of Appeals, however, relied upon McDonald and affirmed without addressing either of these significant issues.

Specifically, the Court of Appeals held that "all new applicants" means "all new named insureds," without addressing why the General Assembly used the term "named insured" elsewhere in § 38-77-350, but used the term "applicant" when addressing who must receive the written offer. Likewise, the Court of Appeals held that Progressive was required to make a new offer to Corey because there was no "old offer." However, there indeed was an "old offer" because Progressive offered optional coverage to Stanley, a named insured on the policy. The Court of Appeals failed to address the impact of § 38-77-350(B) and (C), which provide that a written rejection by one named insured applicant binds all other insureds on the policy and that no new offer is required when the policy is merely changed. The Court of Appeals' decision also fails to explain what constitutes a

"change" and what actions create an entirely new policy requiring a new offer of coverage.

Progressive now petitions this Court for a Writ of Certiorari to review the decision of the Court of Appeals.

ARGUMENT

This case presents two important questions of law that have never been addressed by this Court even though they affect nearly every purchase of automobile insurance in this State. The General Assembly served two goals by enacting § 38-77-350: (1) ensure that applicants receive a meaningful offer by requiring the use of a written form approved by the Department of Insurance; and (2) reduce reformation actions and provide clarity to insurance companies by defining who must receive the offer and creating a conclusive presumption that insurance companies can rely upon when dealing with their insureds. Although this Court has often addressed the importance of the first legislative goal, there remains substantial confusion regarding what insurance companies and agents must do to gain the benefits of the safe harbor provision. In this case, the Court of Appeals interprets two words in a way that fails to apply the statute's plain and ordinary meaning and that defeats the General Assembly's goal of creating a safe harbor provision. This Court's guidance and clarification is essential to effectuating the General Assembly's intent, which has been defeated by the current holding of the Court of Appeals.

I) Writ of Certiorari should be granted when the Court of Appeals' interpretation of a statutory provision that has never been interpreted by this Court fails to apply the plain meaning of the statute and to give effect to the General Assembly's intent.

When the General Assembly enacted § 38-77-350(A) and (B), it required the use of a written offer form and clarified who must receive the offer by stating that insurers

must use the form for any new "applicant" and that the "applicant" must be a "named insured." S.C. Code Ann. § 38-77-350(A) and (B). If a named insured "applicant" signs a completed written offer form, the statute creates a conclusive presumption of a meaningful offer as to the "applicant" named insured and all other insureds on the policy. S.C. Code § 38-77-350(B). In other words, the statute only requires an offer to the applicant – i.e., the person who actually handles the insurance transaction by applying for coverage – and the applicant's signature binds all other insureds.

This Court has never interpreted the term "applicant" in § 38-77-350. "Applicant" has a plain and ordinary meaning of "someone who formally asks for something" or "someone who applies for something." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/applicant. In the insurance context, this means the person who deals with the agent or insurance company to negotiated coverage and applies for the policy. However, the Court of Appeals, in *dicta*, has chosen to define the term "applicant" far differently than its plain and ordinary meaning. In McDonald v. South Carolina Farm Bureau Ins. Co., 336 S.C. 120, 124, 518 S.E.2d 624, 626 (Ct. App. 1999), the Court of Appeals defined "applicant" to mean all "named insureds" who have not previously received a meaningful offer. Not only does this definition fail to give "applicant" it's plain and ordinary meaning, but it also ignores the General Assembly's use of the separate term "named insured" in the same statute. Because this interpretation creates confusion where the General Assembly intended to provide clarification and fails to apply a plain reading of the statute, this Court's guidance is severely needed.

Section 38-77-350(A) provides that "[t]he director . . . 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." Later, in part (B) of the section, the General Assembly uses the term "named insured," requiring that the form be "signed by the ***named insured***." S.C. Code Ann. § 38-77-350(B) (emphasis added). By requiring the insurer to make a written offer to the "applicant," the General Assembly clarified that the offer must be made to the individual named insured who undertakes the application process and submits the application.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Howell v. United States Fidelity and Guar. Ins. Co., 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006) (citation omitted). When the same statute uses two different terms, the Court must presume that the General Assembly intended different meanings for each term. See Abbott v. Abbott, 560 U.S. 1, 130 S. Ct. 1983 (2010) (dissent) (citing Rusello v. United States, 464 U.S. 16, 22-23, 104 S. Ct. 296, 300 (1983)) ("In interpreting statutory text, [courts] ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning."); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing."). Courts must consider the language of the statute as a whole and cannot focus on a single section. Id. (citation omitted).

Section 38-77-350 uses the distinct terms "applicant" and "named insured" in different parts of the same statute. The Court must presume that the General Assembly used these distinct terms intentionally to confer different meanings. However, the Court

of Appeals in McDonald and in this case treats the two terms as interchangeable. Despite the General Assembly's use of two distinct terms, the Court of Appeals construed "new applicants" to mean all "named insureds" who "never had an opportunity to reject UIM coverage." 336 S.C. at 125, 518 S.E.2d at 626. In other words, "all new applicants" means "all new named insureds." The Court of Appeals applied this reading despite § 38-77-350(B), which states that a signed rejection by the applicant named insured binds all other insureds on the policy.

The Court of Appeals' holding creates a substantial and unreasonable burden on both insureds and insurance companies throughout the State. One spouse can no longer deal with the insurance application on behalf of the family if both spouses own the vehicle.[1] Each vehicle owner in the household must go to the insurance agency, receive a written offer form and select or reject coverage. Likewise, in a business context, one named insured can no longer be relied upon to apply for and purchase automobile insurance. Rather, each person to be named on the policy must receive a separate written offer of coverage.

South Carolina has a stated public policy of making sure that every vehicle registered in the State is insured. See S.C. Code Ann. § 56-10-10. Burdening insureds by requiring that every person listed on the policy comes to the agency to complete the transaction creates an unnecessary and nonsensical hurdle to obtaining insurance and decreases the likelihood that individuals will obtain coverage. As a result, fewer cars in South Carolina will be insured. The General Assembly designed § 38-77-350 to avoid

[1] South Carolina Code § 56-10-10 requires the owner of a motor vehicle registered in South Carolina to maintain insurance. Therefore, each owner of a vehicle has a statutory duty to obtain insurance.

this burden and adopted an approach that comports with common business practices by requiring insurance companies to communicate a written offer of coverage to the named insured who actually goes to the agency and applies for coverage. See S.C. Code Ann. § 38-77-350(A). That applicant's signature binds all other insureds on the policy, negating the need for each named insured to go to the agency. S.C. Code Ann. § 38-77-350(B).

The Illinois Court of Appeals adopted the same plain language reading of "applicant" that Progressive argues for in this case in Messerly v. State Farm Mutual Automobile Insurance Company, 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ill. Ct. App. 1996). The Illinois Court of Appeals reasoned, "[b]oth the case law and common sense show us the way the majority of families obtain insurance: one person representing the family meets with an insurance agent, applies for coverage, signs the necessary documents, and lists those to be covered under the policy." Id. at 1070-71, 662 N.E.2d at 151-52.[2]

Rule 242(b) of the South Carolina Appellate Court Rules provides that the grant of a Writ of Certiorari is appropriate to answer novel issues of law. Rule 242(b), SCACR. This Court has never interpreted the term "applicant" in § 38-77-350, and the Court of Appeals interpretation of the word highlights the significant need for clarification from this Court. Section 38-77-350 was created to give clarity and predictability for insurance companies, agents and the courts as to what constitutes a meaningful offer and when and to whom agents must convey offers. The Court of

[2] To the extent that §§ 38-77-160 and 38-77-350 are designed to require insurers to make a meaningful offer of optional coverage when issuing a new policy of insurance, there is no dispute that those goals were satisfied in this case. The Medlocks agree that the written offer of optional coverage to Stanley when the policy was issued satisfies every requirement of § 38-77-350(A) and entitles Progressive to the statutory conclusive presumption of § 38-77-350(B). However, the Court of Appeals held that a written rejection of optional coverage by Stanley, the named insured who applied for the coverage, was not enough despite the plain language of § 38-77-350(A) and (B).

Appeals' interpretation of § 38-77-350 defeats the General Assembly's intent by creating substantial uncertainty both as to whom offers must be made and when new offers are required. Therefore, Progressive petitions for Writ of Certiorari so that this Court can re-establish the certainty and clarity intended by the General Assembly in enacting the safe harbor provisions of § 38-77-350.

II) Writ of Certiorari should be granted so this Court can provide guidance to the lower courts, insurance companies and agents as to what constitutes a "change" under § 38-77-350(C) and when a new offer must be conveyed.

As part of the statutory scheme to create a safe harbor for insurance companies and reduce reformation actions, the General Assembly included § 38-77-350(C), which provides that, after making an initial offer to the applicant when the policy is issued, "[a]n automobile insurer is not required to make a new offer . . . on any . . . policy which renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C). One of the more predictable "changes" that may take place during the life of an insurance policy is the addition of a second named insured, such as a newlywed spouse. Other jurisdictions have held that the addition of a second named insured spouse does not require a new signed rejection of optional coverage. See Ferreira v. Integon National Ins. Co., 809 A.2d 1098 (R.I. 2002) (holding that the addition of a newlywed spouse did not require a new rejection of coverage because the addition did not create a new policy, but merely changed, altered or modified the policy); Johnson v. Great American Ins. Co., 44 Ohio App. 3d 71, 541 N.E.2d 100 (Ct. App. 1998) (holding that the addition of a spouse as a second named insured did not require a new rejection of coverage).

The case *sub judice* involved the change in status of the original named insured's son, who was already a listed driver on the policy, rather than the addition of a new

spouse to the policy, but the effect is the same. The same policy remained. Stanley was still the primary named insured on the policy and no new policy was issued. Stanley was the one who applied for the policy and his written signed rejection remained in effect. Corey's status was merely changed from that of listed driver and household resident to second named insured. Therefore, the modification merely constitutes a "change" to the existing policy. Section 38-77-350(C) plainly provides that this sort of change to an existing policy does not trigger a duty to make a new offer of coverage.

The Court of Appeals' holding defeats the legislative intent of § 38-77-350(C) and ignores a plain reading of the term "change." Moreover, the Court of Appeals relied upon language in McDonald that was not necessary for the holding in that case. In McDonald, a mother sold her car to her son. She asked that her insurance policy be transferred to her son, removing her as the only named insured and making her son the new and sole named insured. In other words, the mother was no longer a party to the insurance contract and the son, previously a complete stranger to the insurance contract, was then the sole named insured. The Court of Appeals held that this constituted the creation of a new policy that required a new offer of optional coverage to the only named insured on the policy. Specifically, the Court of Appeals held that: "***Removing*** [mother] from the policy ***and substituting*** [son] as the named insured was not a mere policy change. It was the creation of a new insurance policy with a new named insured."[3] 336 S.C. at 125, 518 S.E.2d at 626 (emphasis added).

[3] Progressive does not contend that the result in McDonald was wrong. Rather, the facts of McDonald are simply different from those in the case *sub judice*. In fact, the Court of Appeals of Ohio has distinguished facts similar to the those in McDonald from those in this case. Compare Johnson, supra (holding that addition of spouse as second named insured did not require new rejection) with McKnight v. Grange Mutual Cas. Co., 110 Ohio App. 3d 282, 673 N.E.2d 1012 (Ct. App. 1996) (holding that where one spouse is fully substituted with another spouse as the sole named insured on a policy, a new offer and rejection is required).

Under the facts of McDonald, the Court of Appeals only had to determine whether a new policy was created when the son was substituted for his mother as the sole named insured on the policy. Section 38-77-350(C) only allows an insurer to rely upon a previous written rejection of optional coverage for any policy which "renews, extends, changes, supersedes, or replaces an existing policy." Thus, when the Court of Appeals determined that the transaction at issue created a new policy, there was no need to go any further. Nonetheless, the Court of Appeals in McDonald went beyond the facts at issue and addressed who must receive a meaningful offer under § 38-77-350(A), interpreting "applicant" to mean all named insureds who have not previously received a meaningful offer.

In this case, the Court of Appeals did not rely upon the conclusion that the substitution of one named insured for another constitutes the creation of a new policy. In fact, it couldn't because Stanley remained a named insured on the policy. Rather, the Court of Appeals relied upon the *dicta* in McDonald and held that Corey was required to receive an offer of optional UIM coverage regardless of whether the policy was only "changed" because he was a named insured who had never previously received a meaningful offer. However, this conclusion ignores the factual distinctions between the case *sub judice* and those in McDonald and, more importantly, ignores the fact that Stanley was the applicant, not Corey. Stanley completed the application and purchased the policy. Stanley requested that the policy be changed to add Corey's vehicle to the exiting policy, which gave him a multi-vehicle discount. Neither Corey nor Stanley even asked that Corey be added as a second named insured, but the agency made this change to ensure that Corey was in compliance with South Carolina law.

The word "applicant" must be construed in a way that gives effect to every part of § 38-77-350, including part (C). South Carolina's "legislature intends to accomplish something by its choice of words, and would not do a futile thing." Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 405, 608 S.E.2d 425, 427 (2005) (citation omitted). "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citations omitted). "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done so by any reasonable construction." Hinton v. South Carolina Dep't of Probation, Parole and Pardon Services, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) (citations omitted).

"Applicant" cannot mean all those named insureds who have never had an opportunity to reject UIM coverage. If that were the case, there would be no reason for § 38-77-350(C) because § 38-77-350(A) only requires an offer to be made to "new applicants." Once a named insured receives an offer, he or she is no longer one who never had "the opportunity to accept or reject UIM coverage." Therefore, no new offer would be required after any change, substitution, renewal, replacement or superseding policy because the insured was no longer an "applicant." Rather, "applicant" must mean the individual named insured who handles dealings with the insurance company or insurance agent and completes the insurance application. This gives effect to all parts of § 38-77-350 and reasonably specifies which individual must receive the offer required by § 38-77-160. Moreover, the construction serves the General Assembly's purpose of

reducing reformation claims and protecting insurance companies that have communicated a meaningful offer and obtained a written rejection of coverage.

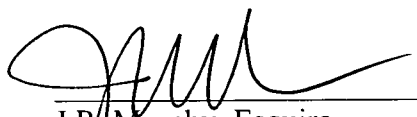
Insurance companies, agents and consumers should be able to rely upon the plain reading of a statute when conducting business. The purpose of taking an issue away from the common law and establishing it in a statute is to supply certainty and clarity. Section 38-77-350 created just that by providing that offers must be made to "applicants" and that a written rejection of coverage is binding on all other insureds and remains in effect for any subsequent "change" to the policy. This Court has never construed "applicant" or "change." However, the Court of Appeal's interpretation of these terms ignores the plain language of the statute and creates substantial uncertainty. Therefore, Progressive respectfully requests that this Court provide clarification and predictability for the lower courts, insurance companies, agents and consumers.

CONCLUSION

For the above-stated reasons, Progressive respectfully petitions this Court to grant a Writ of Certiorari to review and reverse the decision of the Court of Appeals and find that Progressive's meaningful offer to Stanley Medlock, the named insured applicant, binds Corey and that the change of Corey from a listed driver to a second named insured was a "change" to the policy.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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APPEAL FROM SPARTANBURG COUNTY
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Stanley K. Medlock, Corey K. Medlock and The Standard Fire Insurance Company, ...Defendants,

Of Whom

Stanley K. Medlock and Corey K. Medlock.....Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari and Appendix on Stanley K. Medlock, Corey K. Medlock and the Standard Fire Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on January 5, 2015, addressed to their attorneys of record:

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January 5, 2015

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Re: Progressive Northern Insurance Company vs. Stanley K. Medlock, Corey K. Medlock and The Standard Fire Ins. Co.
Civil Action No.: 2011-CP-42-02965
Appellate Case No.: 2013-000923
Claim No.: 10-5041541
Date of Loss: 10/09/10
Our File No.: 1115-2016

Dear Mr. Shearouse:

Enclosed please find herewith for filing with the Court the original and ten (10) copies of a Petition for Writ of Certiorari and one (1) original unbound and five (5) bound copies of the Appendix in the above-referenced matter. Also enclosed please find my firm's check in the amount of $100.00 for filing same. I would appreciate your filing the originals and returning the clocked copies to me by individual delivering same. By copy of this letter I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,

J. R. Murphy

JRM/sb
Enclosures

cc: Jenny A. Kitchings (hand delivery)
Brian A. Martin, Esquire
William P. Davis, Esquire

The Supreme Court of South Carolina

Murphy & Grantland. PA

01/05/2015

RECEIPT #74687

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	45673
Check/Money Order Date:	01/05/2015
Comments:	Progressive Northern Ins. Co. v. Stanley K. Medlock