

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2007-CP-04-2704

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Greg Cohen and Stacy Cohen,..... Appellants,

v.

Progressive Northern Insurance Company  
And Auto-Owners Insurance Company..... Respondents.

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**FINAL BRIEF OF RESPONDENT**

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May 10, 2012

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## STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT PROPERLY HELD PROGRESSIVE'S OFFER FORM MEETS THE REQUIREMENTS UNDER WANNAMAKER AND § 38-77-350(A) GIVING COHEN THE OPPORTUNITY TO MAKE AN INTELLIGIBLE DECISION TO PURCHASE OR DECLINE OPTIONAL UIM COVERAGE.
- II. THE TRIAL COURT PROPERLY HELD, CONSISTENT WITH THIS COURT'S HOLDING IN ATKINS, THAT AN INSURER CAN USE THE OFFER FORM ALONE TO PROVE A MEANINGFUL OFFER EVEN WITHOUT THE CONCLUSIVE PRESUMPTION UNDER § 38-77-350(B).
- III. THE CIRCUIT COURT PROPERLY HELD THAT, EVEN IF THE OFFER FORM STANDING ALONE DID NOT CONSTITUTE A MEANINGFUL OFFER, THE TOTALITY OF THE TRANSACTION WITH INSURANCE AGENT THOMASON SHOWS THAT COHEN RECEIVED A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE.
- IV. PROGRESSIVE'S OFFER GAVE COHEN EVERY OPPORTUNITY TO MAKE AN INTELLIGIBLE DECISION TO PURCHASE OR DECLINE OPTIONAL UNDERINSURED MOTORIST COVERAGE.

## STATEMENT OF THE CASE

This appeal arises out of Greg Cohen's attempt to use the courts to reform a policy of insurance issued by Progressive Northern Insurance Company ("Progressive") to include underinsured motorist ("UIM") coverage that Cohen specifically rejected when applying for the policy. Cohen brought this declaratory action on August 24, 2007 in the Anderson County Court of Common Pleas. Appellant filed an Amended Declaratory Judgment Complaint on January 16, 2008. The case was tried without a jury on September 10, 2009, before the Honorable J. Cordell Maddox.

Judge Maddox issued an Order finding in favor of Progressive and against reformation of the policy on July 8, 2010. Judge Maddox found that the offer form independently showed a meaningful offer in compliance with South Carolina Code § 38-77-350(A) and Wannamaker. Judge Maddox also found that even if the form alone did not constitute a meaningful offer, the

totality of the transaction with insurance agent Meredith Thomason showed that Cohen received a meaningful offer. Furthermore, Cohen was bound by his signature on the rejection form. For all of these reasons, Judge Maddox ruled in favor of Progressive and refused to reform the policy.

Appellant filed a motion to reconsider on July 12, 2010. That motion was heard on September 2, 2011 and denied on September 8, 2011. This appeal follows.

### **STATEMENT OF FACTS**

Greg Cohen is a sophisticated business owner who oversees and conducts sales for his family textile business all over the United States and Central and South America. He applied for the subject Progressive policy in January, 2005 after purchasing a motorcycle. (R. p. 67, lines 14-16; p. 68 line 13-p. 69, line 8). He called his independent insurance agent, the Citizens Insurance Agency in Anderson, South Carolina, on January 25, 2005. (R. p. 69, lines 5-10). Meredith Thomason, an agent at the Citizens Insurance Agency who has been a licensed insurance agent since 2003 and a Certified Insurance Service Representative since 2006 spoke with Cohen and provided a quote for coverage over the phone. (R. p. 33, line 23-p. 34, line 9). Although she did not personally remember Cohen's call at trial, Thomason testified that she must have taken the call because she wrote the quote sheet. (R. p. 35, line 12-p. 36, line 6).

Thomason has a thorough standard procedure that she never deviates from when quoting automobile insurance. (R. p. 57, lines 22-25). She first gives a basic description of uninsured motorist (UM) and UIM coverage. (R. p. 48, lines 16-25). She explains to the insured that a minimum amount of UM coverage is required by law and an insured has the option of purchasing additional coverage up to the liability limits. She further explains that although UIM coverage is not required by law, it is still a good idea. (R. p. 48, lines 16-25). She recommends

that the insured purchase UM and UIM in amounts equal to his liability limits. (R. p. 49, lines 7-10). She enters the requested coverage into the computer and discusses the resulting premium with the insured. (R. p. 56, lines 14-24). Once the insured agrees to the coverage and premium amount, she then inputs the information in the application and prints it for the insured to sign. (R. p. 56, lines 19-23). She does not complete and print the application until the insured agrees to the coverage amounts and premium. (R. p. 59, lines 11-15). In Cohen's case, she would have gone through this entire process on the telephone.

She then repeats her explanation of UM and UIM coverage while going over the application in person. (R. p. 50, lines 8-11). She reviews the entire application with the insured and explains each page. (R. p. 60, lines 1-4). The Progressive application includes a multi-page form titled: "OFFER OF OPTIONAL UNINSURED MOTORIST COVERAGE AND OPTIONAL UNDERINSURED MOTORIST COVERAGE" ("offer form"). (R. pp. 128-133). Thomason gives the insured an opportunity to read the explanation of UM and UIM coverage set forth in the form. (R. p. 61, line 9-10). Thomason also provides a brief description as to what is contained in the typewritten parts of those pages. (R. p. 61, lines 13-17). Thomason reviews and confirms with the insured the selected or rejected coverages. (R. p. 61, lines 18-23). The insured then signs, if necessary, to confirm that he has either rejected optional coverage or chosen to purchase coverage in an amount less than his liability limits. (R. p. 63, lines 8-10). He then signs a statement acknowledging that he has read the offer form and selected or rejected optional coverage. (R. p. 63, lines 11-21). Thomason then gives the insured a separate copy of the completed application. (R. p. 60, lines 20-25). This is the same procedure she follows every time and it is the procedure she would have used with Cohen when he came to her office the following day to sign the application. (R. p. 62, lines 20-22).

While at the agent's office, Thomason presented Cohen with the offer form. (R. p. 128-133). The form is substantially identical to SCDI Form Number 2006, the form promulgated by the Department of Insurance. (Department of Insurance Bulletin No. 99-1). That form – as discussed more fully below – provides a brief explanation of uninsured and underinsured motorist coverage, explains that Cohen has the option of purchasing optional UM and UIM coverage up to his liability limits, provides the contact information for the Department of Insurance, and lists several examples of potential coverage limits and the corresponding premiums. The form has a pre-formatted check mark entered by Thomason after Cohen elected to purchase UM coverage in the same amount as his policy limits. The form also has a pre-formatted mark stating that Cohen rejected the option of purchasing UIM coverage. Thomason testified that she would not have entered this rejection in the computer without having been instructed to do so by Cohen. (R. p. 46, lines 4-12).

Cohen testified that, when asking for the motorcycle insurance, he asked for whatever coverage was on his 2001 Ford Expedition. (R. p. 69, lines 5-22). However, he also testified that he did not recall the details of his telephone conversation with Thomason. (R. p. 70, lines 18-24). He did not recall the types or amounts of coverage discussed. (R. p. 71, lines 7-10). Also, he did not recall whether they discussed UM or UIM coverage. (R. p. 71, lines 11-16). Cohen did have UIM coverage on his Ford Expedition through Auto-Owners in the amount of \$100,000/\$300,000. (R. p. 53, line 13-p. 54, line 22). However, the combined annual premium for Cohen's Auto-Owner's policy was only \$310.00. (R. p. 58, lines 22-25). The combined annual premium for the Progressive policy was \$553.00. (R. p. 124). The cost for UIM coverage in the amount of his liability limits on the Progressive policy would have been an

additional \$278.00. (R. p. 132). This amount is almost equal to the total annual premium for the Auto-Owners policy.

Although he can't remember any of the details of his telephone conversation with Thomason, Cohen claims that he never rejected UIM coverage. (R. p. 80, lines 20-22).

However, the offer form provided, in part:

Do you wish to purchase underinsured motorist coverage?

Yes \_\_\_\_\_ No X

If your answer is "no," then you must sign here.

Your Signature

X \_\_\_\_\_ (Cohen's Signature)

If your answer is "yes," then specify the limits which you desire. These limits cannot exceed your motor vehicle insurance liability limits.

REJECTED

(R. p. 123). Cohen admits that he signed the offer form. (R. p. 78, lines 18-23). He signed a half-inch below the mark indicating his choice not to purchase UIM coverage and a half-inch above the word "REJECTED." (R. p. 63, lines 5-7; p. 79, line 25-p. 80, line 3).

Although Cohen claims that he never read the offer form or saw that he was rejecting UIM coverage, he signed the following statement:

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and underinsured motorist coverage. I have indicated whether or not I wish to purchase each coverage in the spaces provided. I understand that the above explanations of these coverages are intended only to be brief descriptions of additional uninsured motorist coverage and underinsured motorist coverage, and that payment of benefits under either of these coverages is subject both to the terms and conditions of my motor vehicle insurance policy and to the State of South Carolina's laws.

(R. p. 133).

Two-and-a-half years later, Cohen was injured while riding his motorcycle. After the accident, he filed this action seeking reformation of the Progressive policy to include UIM coverage in an amount equal to his liability limits of \$100,000.

During the interim, Cohen received three declarations pages showing that UIM coverage was rejected. Progressive sent a declarations page when the policy was issued that clearly shows UIM coverage was rejected. (R. p. 109). Cohen then renewed the policy twice prior to the accident. Both times the renewal declarations clearly indicate that UIM coverage was rejected. (R. p. 81, lines 2-19).

### ARGUMENT

**I. THE TRIAL COURT PROPERLY HELD PROGRESSIVE’S OFFER FORM MEETS THE REQUIREMENTS UNDER WANNAMAKER AND § 38-77-350(A) GIVING COHEN THE OPPORTUNITY TO MAKE AN INTELLIGIBLE DECISION TO PURCHASE OR DECLINE OPTIONAL UIM COVERAGE.**

Progressive made a meaningful offer of optional UM and UIM coverage to Cohen when it presented Cohen with a written offer form that complied with South Carolina Code § 38-77-350(A) and provided all of the necessary information required under Wannamaker and § 38-77-160. Cohen may have disregarded the offer form, but Progressive acted in accordance with the statutory requirement of § 38-77-160 by providing Cohen with all the information necessary for him to make an intelligent decision regarding optional UM and UIM coverage.

South Carolina Code § 38-77-160 requires that an insurer offer, at the option of the insured, optional UM and UIM coverage up to the limits of the insured’s liability coverage. The Supreme Court in State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), adopted a test for whether an offer of optional UM and UIM coverage meets this statutory requirement. This test, commonly referred to as the Wannamaker test, requires that: “(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 insured must be told that optional coverages are available for an additional premium.” Id. at 521, 354 S.E.2d at 556.

In response to Wannamaker, the General Assembly enacted § 38-77-350(A), which provides:

- (A) The director or his designee shall approve a form which 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 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.

S.C. Code Ann. § 38-77-350(A) (Supp. 2005). If a form that complies with § 38-77-350(A) is properly completed and signed by the named insured, § 38-77-350(B) creates a conclusive presumption that there was a meaningful offer.

Progressive does not contend that it is entitled to the conclusive presumption under § 38-77-350(B).<sup>1</sup> However, whether Progressive is entitled to the statutory presumption under § 38-77-350(B) is only one step in a two-part analysis. If Progressive gets the benefit of the presumption, the analysis ends. If not, the analysis moves on to whether a meaningful offer was made under the Wannamaker test. In this case, the trial court properly held that, although Progressive did not benefit from the statutory presumption, it still proved that Cohen received a meaningful offer under the Wannamaker analysis.

**A. THE PROGRESSIVE OFFER FORM MEETS THE FIVE REQUIREMENTS OF § 38-77-350(A).**

Cohen concedes that the contents of the offer form complied with subsection § 38-77-350(A). (Appellant's Br. 15). As discussed more fully below, the form provides a brief and concise explanation of the coverage, lists a range of available limits along with the corresponding premiums, provides a space for the insured to mark his selected coverage, provides a space for the insured to sign an acknowledgment that he has been offered optional coverage, and provides the mailing address and telephone number of the Department of Insurance. Therefore, the offer form complies with the five requirements of § 38-77-350(A).

**B. THE PROGRESSIVE OFFER FORM MEETS THE FOUR WANNAMAKER REQUIREMENTS.**

The offer form also meets each of the four requirements under Wannamaker. South Carolina courts have previously held that the identical form signed by Cohen, Form Number

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<sup>1</sup> The Supreme Court in Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2006) held that a form is not "properly completed" unless the named insured marks the space rejecting or accepting optional coverage. Because the mark indicating Cohen's rejection of UIM coverage was filled in electronically for Cohen by Thomason, the form was not "properly completed" under § 38-77-350(B). However, the General Assembly quickly reversed the Floyd decision by amending § 38-77-350 to make it clear that the conclusive presumption applies as long as the named insured signs the form after it has been completed by an insurance agent. See Jedziniak, Lee P., et. al., The Law of Automobile Insurance in South Carolina (6th Ed. 2009).

2006 promulgated by the South Carolina Department of Insurance, satisfies the requirements of § 38-77-350(A) and Wannamaker. Clinton v. West American Ins. Co., 364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005) (citing Osborne v. Allstate Ins. Co., 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995) *superceded by statute as stated in* Moody v. Dairyland Ins. Co., 354 S.C. 28, 579 S.E.2d 527 (Ct. App. 2003) (“The South Carolina Court of Appeals has specifically held that the form used by West American, Form 2006, meets the requirements of § 38-77-350.”)); Burch v. South Carolina Farm Bureau Mut. Ins. Co., 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002) (finding a form that was almost identical word-for-word to the Progressive form “falls within the requirements of South Carolina’s statutory and case law, such that [insurer] made a meaningful and effective offer of UIM coverage to [insured].”).

**1) PROGRESSIVE’S NOTIFICATION PROCESS WAS COMMERCIALY REASONABLE.**

The first requirement under Wannamaker is that “the insurer’s notification process must be commercially reasonable, whether oral or in *writing*.” Wannamaker, 291 S.C. at 521, 534 S.C. at 556 (emphasis added). Progressive’s offer was given in written form on the UM/UIM offer form provided to Cohen. Use of a written form is commercially reasonable. See Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 658 S.E.2d 106 (Ct. App. 2008) (holding that mailing an offer and rejection form to the insured is a commercially reasonable means); Jackson v. State Farm Mut. Auto. Ins. Co., 303 S.C. 321, 400 S.E.2d 492 (1991) (sending a renewal notice containing a statement directing the insured to refer to an insert for further explanation of optional uninsured and underinsured motorist coverage complies with Wannamaker and § 38-77-160). Moreover, use of a form is the approach adopted by the General Assembly in § 38-77-350(A). Therefore, Progressive’s use of an offer form is commercially reasonable under Wannamaker.

**2) PROGRESSIVE'S FORM SPECIFIED THE LIMITS OF OPTIONAL COVERAGE.**

The second requirement under Wannamaker is that “the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms.” Wannamaker, 291 S.C. at 521, 354 S.C. at 556. The Progressive form clearly specifies the limits for both optional UM and UIM coverage, providing:

**II. Offer of additional uninsured motorist coverage.**

Limits of Coverage	Amounts of Increased Premium (These increased premium charges must be filled in by your insurance company or insurance agent prior to your decision and signature.)
\$15,000/\$30,000/\$10,000	Minimum limits of uninsured motorist coverage are automatically provided by your insurance policy.
\$25,000/\$50,000/\$10,000	- premium \$71
\$50,000/\$100,000/\$25,000	- premium \$84
\$100,000/\$300,000/\$50,000	- premium \$101
\$250,000/\$500,000/\$100,000	- Not Available
\$300,000 Combined Single Limit (each accident)	- Not Available
\$500,000 Combined Single Limit (each accident)	- Not Available

\_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Your Policy's Liability Limits:

\$100,000/\$300,000/\$50,000	- Premium \$101
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**III. Offer of additional underinsured motorist coverage**

Limits of Coverage	Amounts of Increased Premium (These increased premium charges must be filled in by your insurance company or insurance agent prior to your decision and signature.)
\$15,000/\$30,000/\$10,000	- premium \$165
\$25,000/\$50,000/\$10,000	- premium \$191
\$50,000/\$100,000/\$25,000	- premium \$224
\$100,000/\$300,000/\$50,000	- premium \$278

\$250,000/\$500,000/\$100,000 - Not Available  
\$300,000 Combined Single Limit (each accident) - Not Available  
\$500,000 Combine Single Limit (each accident) - Not Available

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

Your Policy's Liability Coverage Limits:

\$100,000/\$300,000/\$50,000 - premium \$278

(R. pp. 131-132). Therefore, the offer form satisfies the second requirement under Wannamaker.

**3) PROGRESSIVE'S OFFER FORM INTELLIGENTLY ADVISED COHEN OF THE NATURE OF THE OPTIONAL COVERAGE.**

The third requirement under Wannamaker is that "the insurer must intelligibly advise the insured of the nature of the optional coverage." Wannamaker, 291 S.C. at 521, 354 S.C. at 556. The Atkins Court held that an offer form clearly explains the nature of UIM coverage when "various options of UIM coverage limits are set out, every appropriate selection is made, each signature block is signed, and the form adequately explains where the insured is to seek out additional information if he or she has questions." Atkins, 376 S.C. at 631, 658 S.E.2d at 109-110. Progressive's form intelligibly advises the insured of the nature of the optional coverage because it sets out various options of UIM coverage limits and explains where the insured is to seek out additional information if he has questions. Specifically, the form briefly and clearly describes UM and UIM coverage, stating:

Uninsured motorist coverage compensates you, or other persons injured under your motor vehicle insurance policy, for amounts which you may be legally entitled to collect as damages from an owner or operator of an at-fault uninsured motor vehicle. An uninsured motor vehicle is a motor vehicle which either has no liability insurance coverage or is operated by a hit-and-run driver. By law, your motor vehicle insurance policy automatically must provide uninsured motorist coverage of \$15,000/\$30,000/\$10,000. All uninsured motorist coverages provide for a \$200 deductible for property damage claims.

\* \* \*

Underinsured motorist coverage compensates you, or other persons insured under your motor vehicle insurance policy, for amounts which you legally may be entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle which is covered by some form of liability insurance, but that liability insurance coverage is not sufficient to fully compensate you for your damages.

(R. p. 129). As noted in the previous sub-section, the form sets out various options of UIM coverage limits. Finally, the form explains that an insured can seek out additional information if he has questions, providing:

Please read this Form carefully. Your insurance agent or your insurance company must answer any questions which you may have. If you have any further questions, then you should contact the State of South Carolina Department of Insurance. Its address and telephone number are:

Office of Consumer Services  
State of South Carolina Department of Insurance  
300 Arbor Lake Dr., Suite 1200  
Post Office Box 100105  
Columbia, South Carolina 29202-3105  
(803) 737-6180  
(803) 768-3467  
Email Address: CnsmMail@doi.state.sc.us

(R. p. 130). Further, Cohen's signatures indicate that every appropriate selection was made by Cohen and marked by the agent. The UM selection form indicates that Cohen purchased coverage matching his liability limits and was therefore not required to sign the form. (R. p. 131). The UIM selection form clearly indicates that Cohen did not wish to purchase UIM coverage. (R. p. 132). Cohen signed this form indicating his decision to reject UIM coverage. Finally, Cohen signed the form a second time, acknowledging that he had read the explanations and offers of additional UM and UIM coverage and that the forms indicated whether or not he

wished to purchase each coverage. (R. p. 133). Therefore, Progressive's offer form satisfied the third requirement under Wannamaker. See also Progressive Casualty Ins. Co. v. Leachman, 362 S.C. 344, 608 S.E.2d 569 (2005) (holding a form allowing the insured to choose different amounts of coverage up to the amount of liability coverage "gave the insured the opportunity to make an intelligent and informed decision to purchased UIM coverage"); Burch, 351 S.C. 342, 569 S.E.2d 400 (holding that the form met the case law requirements when the form advised the insured he could purchase UIM coverage in limits up to limits of his liability coverage).

**4) PROGRESSIVE'S OFFER FORM TOLD THE INSURED THAT OPTIONAL COVERAGES ARE AVAILABLE FOR AN ADDITIONAL PREMIUM.**

The fourth requirement under Wannamaker is that "the insured must be told that optional coverages are available for an additional premium." Wannamaker, 291 S.C. at 521, 354 S.C. at 556. As the list in the previous section shows, Progressive's offer form clearly specifies the additional premium for each option of coverage. For example, UIM limits chosen by Cohen of \$25,000/\$50,000/\$10,000 would cost an additional premium of \$191.

Moreover, the form provides the following statement:

Your motor vehicle insurance policy does not automatically provide any underinsured motorist coverage. However, you have the right to buy underinsured motorist coverage in limits up to the limits of liability coverage which you will carry under your motor vehicle insurance policy. Some of the more commonly-sold limits of underinsured motorist coverage, together with the additional premiums which you will be charged, have been printed by your insurance company on this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits in the blanks provided. If your insurance company is allowed to market those limits within this State, then your insurance agent will fill in the amounts of increased premium.

(R. p. 129). The Supreme Court in Bower v. National General Ins. Co., 351 S.C. 112, 119-20, 569 S.E.2d 313, 317 (2002), quoted a nearly identical statement promulgated by the Department

of Insurance, advising: “We strongly encourage insurers to include such language on their offer forms. While the DOI’s exact language need not be provided, we believe that this or similar language *certainly would make the offer of UIM coverage in any amount up to the liability limits truly meaningful to the insured.*” (emphasis added). Therefore, the form certainly complies with the fourth requirement under Wannamaker.

Whether reviewed under the five requirements of § 38-77-350(A) or the four requirements of Wannamaker, Progressive made a meaningful offer of optional UM and UIM coverage to Cohen. Cohen signed this form in two separate places. First, he signed the form specifically rejecting optional UIM coverage. (R. p. 132). This signature is immediately below the space checked “No” for whether he wished to purchase uninsured motorist coverage. Immediately below his signature is the statement: “If your answer is ‘yes,’ then specify the limits which you desire. . . .” under which is the word “REJECTED.” Cohen would need to wear the narrowest of blinders in order to avoid seeing these clear statements rejecting UIM coverage.

On the following page, Cohen signed the following statement: “By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and underinsured motorist coverage. I have indicated whether or not I wish to purchase each coverage in the spaces provided. . . .” (R. p. 133). Cohen’s two signatures clearly indicate that he not only received the form, but that he validly rejected UIM coverage. Therefore, the trial court properly held that the Progressive offer form standing alone constitutes a meaningful offer of UIM coverage, which Cohen rejected.

**C. THE TRIAL COURT PROPERLY HELD THAT COHEN IS BOUND BY HIS SIGNATURES AFFIRMING HIS DECISION TO REJECT UIM COVERAGE.**

Cohen signed the offer form twice, first indicating that he was rejecting optional UIM coverage, and second indicating that he had read the description of coverage and selected/rejected the marked coverages. His signatures bound him to the agreement and he cannot now claim that he should be relieved of the clear choice he made to reject optional UIM coverage. Under South Carolina law, “a competent person is usually presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress.” Floyd, 367 S.C. at 263, 626 S.E.2d at 12. There is no exception to this rule for dealings between insurance carriers and insureds. See, e.g., Evans v. State Farm Mut. Auto. Ins. Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977) (“[W]e have consistently followed the rule that ordinarily one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning”); Horton v. Atlantic Life Ins. Co., 187 S.C. 155, 197 S.E.2d 512, 514 (1938) (ruling that “in the absence of any showing of mistake or fraud” the terms of the table in policy controlled).

In a factually similar case, the United States District Court for the District of South Carolina found a meaningful offer after the insured checked and signed an offer form rejecting optional UIM coverage. The insured, who was the manager of an aluminum plant, admitted that the offer form bore his signature, but he did not recall reading the form or receiving any explanation of UIM coverage. McLeod, 672 F. Supp. at 906. The District Court, relying upon the written offer form, found a meaningful offer, holding that:

Generally, one has a duty to read a written instrument and inform himself of its contents before signing it. One cannot complain about the contents of a written instrument if the truth could be ascertained by reading it, except where the party is ignorant and unwary. This exception is strongly interpreted by the courts.

Id. Cohen, an owner of a family textile business who does sales internationally throughout the United States and Central and South America, admitted that his signature appears twice on the offer form. He also stated that he did not recall reading the form or receiving any explanation of UIM coverage. Like the insured in McLeod, Cohen is bound by the documents he signs whether he remembers reading them or not. He had the opportunity to read the offer form and his failure to do so is his own fault.

As noted above, Floyd only applies to cases in which a conclusive presumption is sought. Since Progressive has never asserted that it was entitled to a conclusive presumption under § 38-77-350(B), any reliance on Floyd to determine whether a meaningful offer was made in the first instance is erroneous.

Moreover, a document signer cannot avoid the binding effect of the documents he signs by arguing that he did not read the information contained in the forms or that the other party did not explain the terms to him. In Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), this Court held: “A person who signs a contract or other written document *cannot avoid the effect of the document by claiming he did not read it*” and that “the law does not impose a duty on the [contracting party] to explain to an individual what he could learn from simply reading the document.” Id. at 663-64, 582 S.E.2d at 440 (emphasis added). This is consistent with the first Wannamaker factor that it is commercially reasonable to provide the information in *either* oral or written form. An insurer need not orally describe the optional coverage when its written form suffices.

**II. THE TRIAL COURT PROPERLY HELD, CONSISTENT WITH THIS COURT'S HOLDING IN ATKINS, THAT AN INSURER CAN USE THE OFFER FORM ALONE TO PROVE A MEANINGFUL OFFER EVEN WITHOUT THE CONCLUSIVE PRESUMPTION UNDER § 38-77-350(B).**

The trial court properly held that an insurer may still use the offer form alone to prove that it made a meaningful offer even in the absence of the statutory presumption under § 38-77-350(B). In Floyd,— a case which Appellant relies heavily upon — the Supreme Court found that the benefit of the § 38-77-350(B) conclusive presumption does not inure to the benefit of an insurer if the agent checks the box rejecting or selecting the amount of UIM coverage. Id. at 263, 626 S.E.2d at 12. However, the Supreme Court in Floyd explicitly stated:

Our decision does not resolve the question of whether Insurer made a meaningful offer to [Insured] in this case. We simply conclude that Insurer, by allowing an agent or his employee to partially complete the offer form in a manner inconsistent with the plain terms of Section 38-77-350, is denied the benefit of the conclusive statutory presumption a meaningful offer was made. Such a case presents a factual issue for resolution by the factfinder, with the insurer bearing the burdens of proof and persuasion in demonstrating whether a meaningful offer was made to the insured pursuant to the *Wannamaker* analysis.

Id. at 264, 626 S.E.2d at 12 (citations omitted); see also Wiegand v. United States Auto. Assoc., 391 S.C. 159, 164, 705 S.E.2d 432, 435 (2011) (It is important to note “[f]ailure to comply with section 38-77-350(A) does not automatically require judicial reformation of a policy. Rather, even where an insurer is not entitled to the presumption [in section 38-77-350(B)] that it made a meaningful offer, it may prove the sufficiency of its offer by showing that it complied with Wannamaker.”) (citations omitted).

Appellant mistakenly quotes — on three separate occasions — from Hanover Ins. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 389 S.E.2d 657 (1990), that “a noncomplying offer has the legal effect of no offer at all” and mistakenly states that this is a part of the Supreme Court’s

holding in Floyd. This clearly was not the holding in Floyd. Moreover, the quote is taken out of context.

Appellant first asserts that an offer that does not meet the specific requirements of § 38-77-350(B) is a “noncomplying” offer. However, § 38-77-350(B) did not even apply in Hanover because the statute was enacted after the events giving rise to that lawsuit occurred. The Law of Automobile Insurance in South Carolina, 223 (stating that § 38-77-350 only applied to new applications for insurance taken out after December 1, 1989). Hanover dealt with whether an offer of UIM coverage complied with Wannamaker and § 38-77-160. The insurance agent only offered UIM coverage in an amount equal to the insured’s liability limits. Hanover, 301 S.C. at 56, 389 S.E.2d at 658. Because the insurer failed to offer coverage “up to the limits of the insured liability coverage” – i.e., in amounts less than his liability limits – the offer was not meaningful because it did not intelligibly advise the insured of his ability to purchase UIM coverage. The failure to provide certain *information* made the offer noncompliant with the statutory requirement of § 38-77-160. Therefore, a “noncomplying” offer as stated in Hanover is an offer that fails to intelligibly advise the insured as required by Wannamaker and § 38-77-160. It has nothing whatsoever to do with whether an insurer gets the benefit of the statutory conclusive presumption under § 38-77-350(B).

Appellant then goes on to claim that, because a “noncomplying offer has the legal effect of no offer at all”, a form that does not comply with § 350(B) can never meet the Wannamaker requirements. This reasoning flies in the face of the court’s holding in Floyd, and the approach taken by the Court in Wiegand.

In this case, the offer *is* “compliant” because it meets the four requirements under Wannamaker and the five requirements under § 38-77-350(A). It merely does not reach the

*higher* hurdle of § 38-77-350(B) that would award Progressive with the statutory presumption. The Supreme Court took this two-tiered approach to determine whether an offer form met the § 38-77-350(A) requirements and if so, then whether it received the benefit of § 38-77-350(B) in the recent case of Wiegand. First, the Supreme Court considered whether the form met the requirements of § 38-77-350(A). After finding that it did, the Supreme Court considered whether the insurer was entitled to the conclusive presumption under § 38-77-350(B).

Appellant argues that without the § 38-77-350(B) conclusive presumption, the insurer must produce extrinsic evidence beyond the form itself to prove a meaningful offer. However, South Carolina appellate courts have *repeatedly* upheld UM and UIM rejections based solely upon written forms without explicitly applying the conclusive presumption. See Jackson, 303 S.C. 321, 400 S.E.2d 492 (1991); Tucker v. Allstate Ins. Co., 337 S.C. 128, 522 S.E.2d 819 (Ct. App. 1999); Rabb v. Catawba Ins. Co., 339 S.C. 228, 528 S.E.2d 693 (Ct. App. 2000); Burch, 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002); Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004); Clinton, 364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005); Leachman, 362 S.C. 344, 608 S.E.2d 569 (2005); Atkins, 376 S.C. 625, 568 S.E.2d 106 (Ct. App. 2008); McLeod, 672 F. Supp. 903 (D.S.C. 1987).

In Atkins, this Court found that an offer form complied with § 38-77-160 and Wannamaker although there was no statutory presumption under § 38-77-350(B). In that case, the trial court found that the insurer was not entitled to the conclusive presumption of a meaningful offer under § 38-77-350(B). The insurer did not appeal that finding. Atkins, 376 S.C. at 629, 658 S.E.2d at 108. Because there was no conclusive presumption, this Court analyzed whether there was a meaningful offer under § 38-77-160 and § 38-77-350 and Wannamaker. The insured and his agent never spoke to one another. Instead, the insurer sent

the offer form via mail. Atkins signed the offer form rejecting coverage and mailed it back to his agent. This Court found that the written offer form standing alone met all of the Wannamaker factors even without any additional communications between the agent and the insured. Id. at 631, 658 S.E.2d at 109-110.

By presenting Cohen with a written offer form that met all of the requirements of § 38-77-350(A) and Wannamaker, Progressive fully satisfied its duty to make a meaningful offer. South Carolina does not require anything more. Whether or not Cohen took the time to review his application or read the descriptions in the form is irrelevant. Progressive's offer form contains all the information that South Carolina law requires an insurer to provide an applicant in order to satisfy the meaningful offer requirement. Cohen made his decision after seeing this information and therefore, validly rejected UIM coverage.

**III. THE CIRCUIT COURT PROPERLY HELD THAT, EVEN IF THE OFFER FORM STANDING ALONE DID NOT CONSTITUTE A MEANINGFUL OFFER, THE TOTALITY OF THE TRANSACTION WITH INSURANCE AGENT THOMASON SHOWS THAT COHEN RECEIVED A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE.**

Although use of the offer form alone constitutes a meaningful offer, the Trial Court also found that the totality of the transaction between Thomason and Cohen showed that Cohen received a meaningful offer. In addition to the information conveyed in the written offer form, Thomason described in detail the method she follows when taking an application for insurance.

This Court can affirm on any ground appearing in the record. Rule 220(c), SCACR; Ross Marine, LLC v. Query, Sautter, & Gliserman, LLC, 380 S.C. 494, 497, 671 S.E.2d 604, 606 (2009). The Supreme Court in Floyd held that even if the agent fills in the blanks on the form, this “does not resolve the question of whether Insurer made a meaningful offer” of UIM coverage. Floyd, 367 S.C. at 264, 626 S.E.2d at 12. The issue becomes “a factual issue for

resolution by the factfinder, with the insurer bearing the burdens of proof and persuasion in demonstrating whether a meaningful offer was made to the insured pursuant to the Wannamaker analysis.” Id. As the factfinder, the Trial Court properly determined that the totality of the transaction showed that a meaningful offer was made to Cohen.

First, the offer was commercially reasonable. Thomason offered optional coverage to Cohen both over the phone and in person, orally and in writing. She initially described UIM coverage during her telephone conversation with Cohen while preparing the quote. When Cohen came to the agency the following day, Thomason presented the offer form, which Cohen had the opportunity to read and which he signed twice. She also described UIM coverage again while going over the forms with Cohen at the agency. If use of a written offer form alone is commercially reasonable, Thomason’s approach goes above and beyond what is required by Wannamaker.

Second, the offer specified the limits of optional coverage. Thomason described the limits of optional coverage up to Cohen’s liability limits. Moreover, the written offer form listed available coverage limits and corresponding premiums.

Third, the offer intelligibly advised Cohen of the nature of optional UM and UIM coverage. Thomason orally described optional UM and UIM coverage. She explained that UM coverage protects the insured if someone does not have any insurance and that UIM protects the insured if someone doesn’t have enough insurance to cover the insured’s damages. She explained that minimum limits of UM are required by law, but that Cohen could purchase more if he desired and UIM is not mandatory, but she recommended that the Cohen purchase it. The written offer form also provided a description that has been approved by the Department of Insurance and South Carolina courts in numerous cases.

Finally, the offer form advised Cohen that he could buy additional optional coverages for an additional premium. Although the written offer form alone meets each of the Wannamaker requirements, Thomason's oral explanations both over the telephone and in person further advised Cohen of the nature and availability of optional UIM coverage. The Trial Court properly held that the totality of the transaction showed that Cohen received a meaningful offer. Any possible defect in the use of the form by itself is corrected by Thomason's detailed and thorough approach.

**IV. PROGRESSIVE'S OFFER GAVE COHEN EVERY OPPORTUNITY TO MAKE AN INTELLIGIBLE DECISION TO PURCHASE OR DECLINE OPTIONAL UNDERINSURED MOTORIST COVERAGE.**

The policy goal underlying South Carolina Code § 38-77-160 and Wannamaker is to ensure that every insured has the information available to make an informed decision regarding optional coverage. South Carolina Code § 38-77-160 "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 coverage." Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556 (emphasis added). The Supreme Court in Leachman found that the offer was meaningful because it "gave the insured the *opportunity* to make an intelligent and informed decision on whether to purchase UIM coverage. 362 S.C. at 350-51, 608 S.E.2d at 572 (emphasis added). The four requirements under Wannamaker and the five requirements under § 38-77-350(A) are intended to meet this public policy goal. The goal is not to require that every insured *understand* UM and UIM coverage, but merely to make sure that every insured is provided the *information* necessary to make an informed decision.

Progressive's offer form gave Cohen all the information needed to make an intelligible decision whether to purchase or decline optional UIM coverage. Once he had the information in

hand, he could do with it whatever he chose. In this case, Cohen chose to disregard the information provided by Progressive and reject UIM coverage. Progressive is not required to shove optional coverage down Cohen's throat. In fact, the Department of Insurance held an insurer cannot default on the side of providing UIM coverage at the policy's liability limits for every policy until an insured specifically requests that it be removed. See The Law of Automobile Insurance in South Carolina, 223 ("[T]he Department [of Insurance] ruled in its Bulletin No. [88-2] that this method was in the nature of a negative sale and was illegal under section 38-77-160.").

Progressive's offer form provided all the information Cohen needed to make an intelligent decision regarding UIM coverage. Cohen's signatures not only prove that he was given the form, but confirm his decision to reject UIM coverage. Therefore, the trial court properly held that Cohen validly rejected UIM coverage after receiving a meaningful offer under South Carolina statutory law as stated in § 38-77-160 and 38-77-350(A) and common law as stated in Wannamaker.

### **CONCLUSION**

Based on the above, Progressive respectfully requests this Court affirm the decision of the trial court and find that Progressive made a meaningful offer of UIM coverage and therefore, Cohen's rejection of UIM coverage is valid and binding.

***(SIGNATURE ON FOLLOWING PAGE)***

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'J.R. Murphy', is written over a horizontal line.

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May 10, 2012

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ANDESRON COUNTY  
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

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Case No. 2007-CP-04-2704

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Greg Cohen and Stacy Cohen,..... Appellants,

v.

Progressive Northern Insurance Company  
And Auto-Owners Insurance Company..... Respondents.

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**CERTIFICATE**

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I, J.R. Murphy, Esquire, attorney for Respondent, certify that the Final Brief of Respondent complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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**PROOF OF SERVICE**

I certify that I have served the Final Brief of Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on May 11, 2012, addressed to Daniel L. Draisen, Esquire, Krause, Moorhead & Draisen, P.A., 207 East Calhoun Street, Anderson, SC 29621 and Attorney for Auto-Owners Ins. Co., J. Victor McDade, Esquire, P.O. Box 2125, Anderson, SC 29622.

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