

THE STATE OF SOUTH CAROLINA  
In The Supreme Court.

**RECEIVED**

MAY - 5 2016

**SC SUPREME COURT**

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.

**PETITION FOR REHEARING**

This petition is filed pursuant to Rule 221, SCACR, which governs petitions for rehearing. The petition is timely: the Court issued its decision fifteen days ago, on April 20.

\*

The decision focuses on two points that are true: Progressive's "default" insurance packages included UIM coverage and Mrs. Traynum took affirmative action to customize the coverage she purchased, which lacked UIM. Slip op. at 9.

But the greatest value of both points is that they are the worst points for Mrs. Traynum and they still do not answer the question whether Progressive's website, which Progressive had already changed by the time of trial to provide customers like Mrs. Traynum

with more information as to UIM coverage at the time of selection, employed a procedure that was designed to actually inform Mrs. Traynum about coverage that is optional, but important. Mrs. Traynum is certainly an architect of her predicament, but that says nothing about whether Progressive gave her the required information so she could make *an informed decision* about her coverage selection, as required by statute.

This is crucial. The same criticism the Court makes of Mrs. Traynum could apply to the customer in *Ackerman v. Travelers*, who was only concerned about “[getting] by with state law.” 318 S.C. 137, 145, 456 S.E.2d 408, 412 (Ct. App. 1995). Travelers argued the customer was not going to buy UIM regardless of a meaningful offer, but the Court of Appeals correctly held “a noncomplying offer has the effect of no offer at all.” *Id.*

The criticism could also have been leveled at the customers in *Dewart v. State Farm* and *Lopez v. National General*. See 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1988) (*Dewart*) and 308 S.C. 342, 417 S.E.2d 864 (1992) (*Lopez*). Sure, Mrs. Traynum could—and should—have read Progressive’s offer form, just as the customers in *Dewart* and *Lopez* could have taken the time to review the UIM inserts that were mailed to them with their policy renewals. Yet, the offers in *Dewart* and *Lopez* were deemed deficient not because of their contents, but because the presentation was misleading.

Here, as was true in *Dewart* and *Lopez*, the insurance company employed a process where the customer made the coverage selection without the benefit of being informed at the time the selections were made. This is a significant watering down of the meaningful offer requirement and cannot be reconciled with the longstanding intent of the meaningful offer law which is that the consumer must be informed of his or her options in order to make an

educated selection of coverage. The record is uncontradicted: Mrs. Traynum did not understand what UIM coverage was and Progressive cannot prove what explanation—if any—would have been provided by way of any hyperlink that existed on the internet page at the time Mrs. Traynum was required to make her UIM selections.<sup>1</sup>

\*\*

The decision ends by reasoning that compliance with the conclusive presumption statute renders consideration of *State Farm v. Wannamaker* unnecessary. Slip op. at 10. If this statement means what it says, the Court has overruled significant parts of *Osborne v. Allstate*, *Butler v. Unisun*, and *Grinnell Corporation v. Wood*. A central premise of *Osborne* and *Butler* is that the legislature re-codified the meaningful offer statute at the same time it added the “conclusive presumption” statute to the Code, indicating the legislature intended both statutes to continue in full force. See *Butler*, 323 S.C. 402, 407-408, 475 S.E.2d 758, 761 (1996) (adopting *Osborne*, 319 S.C. 479, 462 S.E.2d 291 (Ct.App.1995)). *Grinnell* explains “[a]ll law” with respect to meaningful offers must be applied to the purpose of an insured knowing his or her options and making an informed decision about coverage. 389 S.C. 350, 356, 698 S.E.2d 796, 799 (2010). These statements from precedent are no longer true if a signed offer form is truly the end of the analysis, especially where the uncontradicted fact is that the consumer did not understand what UIM coverage was and when there is no evidence the insurance company provided any explanation of coverage

---

<sup>1</sup>While the UETA encourages internet transactions, the UETA still mandates that information be communicated in a certain way if required by other law. See S.C. Code Sec. 26-6-80(B). That language incorporates the longstanding prerequisites associated with South Carolina’s UIM meaningful offer law.

either before or at the time the consumer selected coverage. It will not matter if the signature on the offer form was procured by confusion, misrepresentation, or even fraud. If the form is signed, the game is over. That is the upshot of the Court's analysis. The words "conclusive presumption" admittedly connote finality, but *Osborne, Butler, and Grinnell* wisely supply a limiting principle: if the facts show the offer was not meaningful, the presumption cannot apply because the statutes' purpose would be thwarted.

Mrs. Traynum believes Progressive's procedure was disjointed and confusing, but the Court obviously disagrees, and if the Court is resolute in that view, in spite of the uncontradicted facts about Mrs. Traynum's insufficient knowledge of UIM coverage and the lack of information available to her both before and at the time she selected her coverage, then Mrs. Traynum loses.

But the reason she loses is *not* because the conclusive presumption statute trumps everything and because *Wannamaker* does not apply. She loses because she electronically signed a form—a fact she readily admits—at the end of transaction the Court has deemed to not be misleading and to therefore be meaningful. *That* approach is faithful to precedent. Reading *Wannamaker* to be a fallback for insurance companies—and *only* insurance companies—is not.

## CONCLUSION

It is difficult to understand the Court's decision in light of the uncontested facts. Nobody contests Mrs. Traynum did not know what UIM coverage provides. Nobody contests Progressive did not present the meaningful offer form until after Mrs. Traynum customized a package that did not include UIM. Despite the Court's statement to the

contrary, nobody knows what sort of explanation the hyperlink contained, if any, and everybody knows Mrs. Traynum did not read the meaningful offer form. It is hard to reconcile the decision with precedent; particularly *Progressive v. Leachman*, which held “insureds are to know their options and to make an informed decision as to which amount of coverage will best suit their needs.” 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005). This did not happen here. There is an understandable tendency to set responsibility at Mrs. Traynum’s feet. That is true in many (if not most) meaningful offer cases. But the customer does not have the burden, precisely because the customer is often uninformed. The legislature has given the insurance company the burden of communication. That command must be honored.

Nobody suggests Progressive set out to deceive or mislead customers like Mrs. Traynum, but it is equally evident that if Progressive truly wanted customers like Mrs. Traynum to actually read and understand its offer of UIM coverage, its website would have been built differently. You don’t bold only the words **electronically sign** and **continue** if you want to signal that a form contains important information the user should **stop** and **read**.

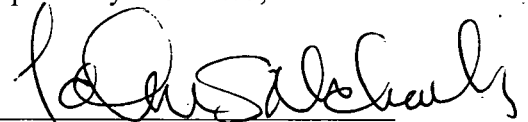
The circuit court’s original decision was correct and should be reinstated. The conclusive presumption statute does not have a shared purpose with the meaningful offer statute if the conclusive presumption will apply in the face of evidence showing no meaningful offer was delivered.

If this Court disagrees and is resolute in its view that Progressive’s process was not misleading and that Progressive carried its burden of showing a meaningful offer was made to an informed consumer, it should affirm on *that* basis, and it should strike the decision’s

last paragraph of reasoning, which contradicts this Court's previous decisions observing that the conclusive presumption statute and the UIM statute have a shared purpose and operate in tandem.

May 5, 2016

Respectfully submitted,



Blake A. Hewitt, SC Bar # 73674

John S. Nichols, SC Bar # 4210

BLUESTEN, NICHOLS,

THOMPSON & DELGADO

P.O. Box 7965

Columbia, SC 29202

(803) 779-7599

(803) 779-8995 (facsimile)

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

**RECEIVED**

MAY - 5 2016

**SC SUPREME COURT**

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.

---

**PROOF OF SERVICE**

---

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Petition for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

J.R. Murphy  
Wesley B. Sawyer  
MURPHY & GRANTLAND  
Post Office Box 6648  
Columbia, South Carolina 29260

May 5, 2016



---

Erin Bridges  
BLUESTEIN, NICHOLS,  
THOMPSON & DELGADO, LLC