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MAY 20 2016

**SC SUPREME COURT**

**STATEMENT OF ISSUES ON APPEAL**

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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MAY 20 2016

**SC 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 Company..... Respondents.

**RETURN TO PETITION FOR REHEARING**

This Court properly considered the issues and applied the South Carolina Uniform Electronic Transaction Act to its long-standing case decisions relating to meaningful offers of optional underinsured motorist coverage. Because the written offer – as construed under the UETA – satisfied all of the requirements of South Carolina Code §§ 38-77-350(A) and (B), the conclusive presumption applies. Appellants’ Petition fails to point to any issue overlooked or misapprehended by the Court in its Decision. Therefore, the Petition should be denied.

“The purpose of a petition for rehearing is not just to have the case tried in this court a second time.” Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.

234, 238 (1933). “Usually, they are dismissed with a simple order . . . for the reason that they contain nothing but a ‘rehash’ of what the losing party said before, matter which the court already considered well and disposed of.” Id. “In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

Appellants’ petition merely rehashes the arguments already raised and ruled upon by this Court. This Court properly relied upon Progressive’s Offer Form and Appellant Loretta Traynum’s electronic signature to hold that Progressive is entitled to a conclusive presumption of a meaningful offer under South Carolina Code § 38-77-350(B). Although Appellants argue that this Court placed undue weight on the “default” insurance packages included on Progressive’s website and Loretta Traynum’s decision to change those default packages, a reading of the Court’s April 20, 2016 decision does not reveal any such emphasis.<sup>1</sup> Rather, this Court relied on the § 38-77-350(A) Offer Form and

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<sup>1</sup> Progressive has never argued that the existence of the default packages require application of the conclusive presumption. Instead, and as this Court held in its Decision, Traynum’s choice to sign the completed § 350(A) Offer Form begins and ends the analysis. If the Decision can be read otherwise, then Progressive suggests that it be amended to clarify that the Court is relying upon the electronic presentation of the offer form and Traynum’s electronic signature.

The Court’s Decision also mentions that “Progressive maintains records of all online transactions that result in a purchase which are stored as a series of images that preserve Progressive’s website exactly as it appeared to the purchaser, screen by screen.” (Slip Op. p. 6). Progressive does maintain records of online transactions resulting in a purchase, including, but not limited to, all electronically-signed forms (including the Offer Form). (ROA p.236:16-20). In many, though not all, instances Progressive also maintains a screen-by-screen record (through a separate system) of individual purchases. (ROA p.222:1-12). Consistent with § 38-77-350(A) and (B), Progressive relies upon the electronically-signed Offer Forms to verify the selection or rejection of optional uninsured and underinsured motorist coverage.

Traynum's electronic signature. (Slip op. p. 9). Because the UETA mandates that the electronic transaction be treated the same as a paper transaction, this Court held that the Offer Form and Traynum's electronic signature triggered the conclusive presumption of a meaningful offer under § 350(B). That ends this Court's analysis.

It is undisputed that Progressive's Offer Form satisfied all of the requirements of § 38-77-350(A) and (B). Moreover, Appellants' Petition for Rehearing does not appear to challenge the application of the UETA. Therefore, the Court properly applied the conclusive presumption under § 350(B). Rather, Appellants' Petition focuses on one argument: Even if an insurer is entitled to the conclusive presumption under § 350(B), it must nonetheless prove that it made a meaningful offer pursuant to Wannamaker. However, Appellants' suggested interpretation reads the plain language of § 350(B) out of existence.

A conclusive presumption is just that – conclusive. See Black's Law Dictionary, (10th ed. 2014), Presumption (“Conclusive presumption. A presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute . . .”). The presumption serves as a rule of evidence – or really, a rule of law – that if the statutory conditions are satisfied, there is a conclusive and irrefutable presumption that the insurer made a meaningful offer of coverage. Because the conclusion is not rebuttable, the Court's analysis is done, and the policy cannot be reformed.

In effect, the General Assembly's adoption of § 350(A) and (B) provides one of multiple ways in which an insurer can prove that it made a meaningful offer of coverage after this Court's decision in Wannamaker. Although the insurer could prove the offer in

other ways – such as an oral explanation by the agent, a non-signed written explanation, or otherwise – the General Assembly enacted § 350 to adopt a safe harbor method by which insurers could make an offer and confidently rely upon an insured’s signed rejection of optional coverage. If the insurer shows that it satisfied § 350(A) and (B), not only has it satisfied its evidentiary burden of proving that it made a meaningful offer of coverage, but that showing cannot be rebutted by the claimant. This is the plain effect of the conclusive presumption. In other words, satisfaction of § 350(A) and (B) constitutes a meaningful offer under § 160 as a matter of law.

This Court properly held that its precedents “thus recognize that an insurer can establish it made a meaningful offer of UIM coverage by proving *either* it is entitled to the conclusive presumption of section 38-77-350(B) *or* it satisfied the requirements of *Wannamaker*.” (Slip. Op. 5) (emphasis in original). This is not a new statement of the law. South Carolina’s appellate courts have consistently construed the meaningful offer requirements of §§ 160 and 350 to provide two alternative means by which insurers can prove a meaningful offer.

First, an insurer whose written offer satisfies §§ 350(A) and (B) enjoys a conclusive presumption of a meaningful offer. S.C. Code Ann. § 38-77-350(B); Grinnell Corp. v. Wood, 389 S.C. 305, 357, 698 S.E.2d 796, 799 (2010). As this Court held in its Decision here, if an insurer makes “a statutorily compliant offer [pursuant to § 350(A) and (B), then] consideration of Wannamaker is unnecessary. (Slip. Op. p. 10).

Second, if an insurer fails to make an offer that entitles it to a conclusive presumption under § 350(B), Wannamaker serves as a “fallback position.” (Slip op. p.

10). Once again, this is not a new statement of the law. This Court in Wiegand v. U.S. Automobile Association, held

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.

391 S.C. 159, 165, 705 S.E.2d 432, 435 (2011) (citations omitted). To the extent that this Court's holding in Wiegand was in any way unclear, the Court of Appeals clarified it in Cohen v. Progressive Northern Insurance Company: "We now expressly recognize it, and hold that an insurer's noncompliance with subsection 38-77-350(B) does not render the use of the subsection 38-77-350(A) form a 'noncomplying offer.' . . . Rather, it simply means the trial court must make the factual determination of whether the insurer made a meaningful offer." 402 S.C. 66, 76, 737 S.E.2d 869, 874 (Ct. App. 2013); See also Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2006) (remanding case for factual determination under Wannamaker after finding that insurer was not entitled to the § 350(B) conclusive presumption under prior version of the statute); Ray v. Austin, 388 S.C. 605, 612, 698 S.E.2d 208, 212 (2010) ("Even where the insurer is not entitled to the statutory presumption . . . the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under Wannamaker."). Therefore, Wannamaker sets the standard for a meaningful offer when the insurer does not enjoy the benefits of a § 350(B) conclusive presumption.

Appellants also argue that this Court's ruling that the § 350(B) conclusive presumption renders the Wannamaker analysis unnecessary somehow overrules significant portions of prior decisions. However, the cases cited by Appellants each deal

with situations where the offers failed to comply with § 350(A) because the forms did not contain all the information required by the statute. See Osborne v. Allstate Ins. Co., 319 S.C. 479, 487, 462 S.E.2d 291, 295 (Ct. App. 1996) (finding that the offer form failed to “comply with the requirements of §§ 38-77-160 and 38-77-350(A)”); Butler v. Unisun, (same).<sup>2</sup> Moreover, this Court’s decision in Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796 (2010) deals with the situation in which the insurer fails to make a § 350(A) and (B) offer and resorts to proving a meaningful offer under Wannamaker. Therefore, the Court’s holding is not only correct, but it is wholly consistent with South Carolina precedent.

Appellants fail to point to any misapprehension by the Court. With the exception of applying the South Carolina Uniform Electronic Transactions Act, the Court’s Decision does not break any new ground. This Court has long held that § 350(B) provides a conclusive presumption if the statute is satisfied and, if it is not, the insurer can still prove a meaningful offer under Wannamaker. Because this Court properly considered and ruled on the issues raised by Appellants and did not misconstrue any material points, the Petition for Rehearing should be denied.

Ultimately, Appellant’s arguments appear to rest on the false declaration that the meaningful offer requirement mandates that the insurer prove that insured understood UM and UIM coverage prior to making her coverage decision. This has never been the law, whether under § 160, Wannamaker, or § 350. The statute requires a meaningful offer, not a meaningful decision. The insurer can never ensure that the insured

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<sup>2</sup> It is also noteworthy that Osborne and Butler were both effectively overruled by the General Assembly. See S.C. Code § 38-73-470 (providing that insurers are not required to offer UIM coverage at limits less than the statutorily required limits).

understands UM or UIM coverage because the insurer can not force the insured to read or understand the Offer Form. Rather, the statutes and this Court's precedent require the insurer to provide the insured with information by which she – if she chooses to do so – can educate herself to make an informed decision. Therefore, proof that the insurer provided the insured with a § 350(A) Offer Form – which contains all the information necessary for the insured to make an informed decision – and the insured's signed rejection on that form proves that the insurer satisfied the meaningful offer requirement and ends the analysis.<sup>3</sup>

### **CONCLUSION**

This Court properly applied the Uniform Electronic Transaction Act and § 350 to the undisputed facts of this case. By enacting § 350, the General Assembly created a safe harbor whereby an insurer that complies with the statute knows that it has made a valid, binding, and meaningful offer. When satisfied, § 350(B) serves as irrefutable evidentiary proof of a meaningful offer. Therefore, after applying the UETA to find Progressive's offer satisfied § 350(A) and (B), the Court properly ended its analysis. Because

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<sup>3</sup> Even if the § 350(B) conclusive presumption did not apply, providing the insured with a written § 350(A) Offer Form in a printable, savable format and requiring the insured to sign the form to prove that she received and had an opportunity to review the form constitutes a meaningful offer under Wannamaker. See Cohen, 402 S.C. at 73, 737 S.E.2d at 873 (holding that a § 350(A) form, even if not executed in accordance with § 350(B), serves as evidence of a meaningful offer that satisfies the informational requirements of Wannamaker and § 350(A)).

Appellants have not identified any points which this Court either overlooked or misapprehended, the Petition for Rehearing should be denied.

Respectfully submitted,

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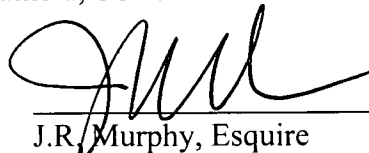
Cynthia Scavens and Progressive  
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**PROOF OF SERVICE**

I certify that I have served the Respondent's Return to Petition for Rehearing on Loretta Traynum and Leonard Traynum by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2016, addressed to their attorneys of record:

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