IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000987

Randall Dixon ..... Appellant.

v.

Nationwide Property & Casualty Insurance Company..... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises out of Appellant Randall Dixon's attempt to invalidate a signed rejection of optional underinsured motorist (UIM) coverage that his wife Jessica Dixon signed on his behalf while acting as his authorized agent. At trial, Randall Dixon admitted that his wife acted as his authorized agent. Therefore, the Circuit Court correctly applied this Court's holding in *Nationwide Mutual Insurance Company v. Prioleau*, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004), and found that Nationwide Property & Casualty Insurance Company ("Nationwide") made a meaningful offer of optional UIM coverage.

On March 6, 2014, Appellant filed a Complaint in the Anderson County Court of Common Pleas seeking declaratory judgment against Nationwide asserting bad faith and seeking to reform a policy of insurance issued by Nationwide to include UIM coverage. (R. pp. 6–9). Dixon voluntarily dismissed the bad faith action before trial. (R. p. 1).

The case came before the Honorable J. Cordell Maddox, Jr. at a bench trial on June 18, 2015. Appellant raised two arguments at trial. First, Appellant argued that Nationwide was required to offer UIM coverage in amounts less than the mandatory minimum limits for liability and UM coverages. Second, Appellant argued Nationwide failed to make a meaningful offer to both named insureds on the policy.

On April 18, 2016, Judge Maddox entered an Order finding Nationwide made a meaningful offer of optional UIM coverage and that Appellant's wife – acting as his authorized agent – validly

rejected optional UIM coverage. (R. pp. 4–5). In particular, Judge Maddox relied upon South Carolina Code § 38-73-470 and this Court's holding in *Moody v. Dairyland Ins. Co.*, 354 S.C. 28, 579 S.E.2d 527 (Ct. App. 2003), to find that Nationwide was not required to offer UIM coverage in amounts less than the mandatory minimum limits. (R. pp. 3–4). Likewise, Judge Maddox found – based upon Appellant's own testimony – that Jessica Dixon acted as Appellant's authorized agent when she received a meaningful offer of UIM coverage and validly rejected optional UIM coverage in writing. (R. pp. 4–5). This appeal followed.

STATEMENT OF THE FACTS

On September 7, 2013, Dixon was operating a 2003 Suzuki motorcycle when he was involved in a collision with a vehicle operated by an underinsured motorist. The underinsured motorist's liability carrier tendered its full liability limits of $100,000. (R. p. 19, lines 13–20). At the time of the accident, Dixon had a personal auto policy and a motorcycle policy, both with Nationwide. (R. p. 2). The personal auto policy insured two personal automobiles each with limits of $50,000 per person and $100,000 per accident for bodily injury liability, UM and UIM coverage. (R. p. 2).

On February 11, 2013, Dixon went to the Bagwell Agency in Williamston, South Carolina and applied for the Nationwide policy at issue in this case covering his 2003 Suzuki motorcycle. (R. p. 2) (R. p. 15, lines 19–23). Dixon signed the application and a form entitled "Offer of Optional Additional Uninsured and Underinsured Registered Motor Vehicle Insurance Coverage" (hereinafter "UIM Offer Form"). (R. p. 80–82); (R. p. 2). All three documents Dixon signed –

the quote, application, and the UIM Offer Form – confirmed Dixon's decision to reject UIM coverage.[1] (R. p. 39); (R. pp. 81–82); (R. p. 21, line 13–p. 21, line 14).

On the first page of the application, in the section titled "Coverages and Limits of Liability" the space for UIM coverage is marked "No Cov." (R. p. 78). Likewise, the February 14, 2013 Offer Form bears Appellant's signature confirming that he was rejecting optional UIM coverage. (R. pp. 81–82). Appellant admitted at trial that he signed, rejecting optional UIM coverage when he applied for the Suzuki policy. (R. p. 24, lines 5–14).

A few months later in June, the policy covering the 2003 Suzuki lapsed due to an administrative error. (R. p. 3) (R. p. 16, line 17–p.17, line 24). Appellant received notice of the lapse and called the Bagwell Agency to correct the error and get the policy reinstated. Appellant spoke with Amber Methany, an agent at the Bagwell Agency, who requested that he sign a new UIM Offer Form. (R. p. 3) (R. p. 16, line 17–p.17, line 24). Because he was an on-the-road trucker, Appellant asked Methany if his wife Jessica Dixon could sign the form on his behalf. (R. p. 18, lines 6–25). Methany advised Appellant that his wife could sign the form. (R. p. 3). Appellant also admitted at trial that his wife was authorized to sign "whatever needed to be signed," including the selection/rejection form. (R. p. 18, lines 18–23; p. 28, lines 6–16; p. 29, lines 14–19).

On June 10, 2013, Appellant's wife – acting as his authorized agent – came to the Bagwell Agency and signed the UIM Offer Form rejecting optional UIM coverage. (R. p. 3) (R. pp. 74–77). The agent explained the form to her. (R. p. 39, line 13–p. 33, line 4). The rejection of optional UIM coverage was consistent with Appellant's own prior written rejection of optional UIM

[1] The Offer Form reveals that the premium for optional UIM coverage on Dixon's motorcycle was significantly higher than for UIM coverage for his personal automobiles.

coverage for his 2003 Suzuki. (R. pp. 81–82) (R. p. 30, line 5–p. 31, line 4). Moreover, at trial, Appellant admitted that he authorized his wife to sign for him, and that all her actions for him were within the scope of her authority. (R. p. 3). Relying on the written rejection of optional UIM coverage, Nationwide reinstated the Suzuki policy with the same policy number and with the same coverages. (R. p. 27, line 7–p. 28, line 5) (R. p. 41). Nothing in the policy changed. (R. p. 31, lines 10–24). Therefore, the policy did not provide UIM coverage.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Nationwide Mutual Insurance Company v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004) (citation omitted). Because the underlying issue in this case involves a coverage determination on an insurance policy, the action is one at law. *Id.* (citation omitted). Therefore, "the trial judge's factual findings will not be disturbed on appeal unless a review of the record reveals there is no evidence which reasonably supports the judge's findings." *Id.* (citation omitted).

ARGUMENT

The Circuit Court correctly held that an offer of optional UIM coverage to a named insured – acting as the authorized agent of the only other named insured – binds all insureds under the insurance policy. Appellant admitted that his wife acted as his authorized agent when she received the offer of optional UIM coverage and signed the rejection of coverage. Moreover, Appellant's wife herself was a named insured who received a meaningful offer of optional UIM coverage and rejected the coverage in writing. Therefore, the Circuit Court correctly refused to reform the policy.

To avoid the binding effect of the signed rejection of optional coverage, Appellant makes two inconsistent arguments. First, Appellant argues Nationwide was required to make a second, separate offer of optional UIM coverage to Appellant's wife because she ***was*** a second named insured.[2] Second, Appellant argues that his wife could not sign the rejection on his behalf because she was ***not*** a named insured. The first argument is controlled by this Court's decision in *Prioleau*, and the second argument is controlled by this Court's decision in *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 717 S.E.2d 74 (Ct. App. 2011). Under either scenario, a meaningful offer and rejection of optional UIM coverage by Appellant's agent is binding upon him.

I. Pursuant to this Court's holding in *Prioleau*, Appellant's wife's rejection of optional UIM coverage while acting as his authorized agent binds Appellant as a matter of law.

Two things cannot be reasonably disputed in this case: 1) the Offer Form that Nationwide presented to Jessica Dixon complies with all of the requirements of § 38-77-350(A); and 2) Jessica Dixon acted as Appellant's authorized agent when she signed the rejection of optional UIM coverage. Appellant does not challenge the content of the Offer Form in his brief. Moreover, Appellant admitted at trial that his wife was his authorized agent and that she acted within the scope of his authority when she signed the rejection of optional UIM coverage. This Court addressed nearly the same factual scenario in *Prioleau* and found a meaningful offer. Like the insurer in that case, Nationwide made a meaningful offer of optional coverage to Appellant – via his agent – and his agent's rejection of optional UIM coverage on his behalf is binding.

[2] At trial, Appellant testified that his wife was never intended to be a named insured on the policy. (R. p. 20, lines 11–15). He admitted that it was a mistake for his wife to be included as a named insured. (R. p. 25, line 4–p.26, line 4).

A. South Carolina Code Section 38-77-350(B) provides a conclusive presumption of a meaningful offer because Nationwide presented Appellant's authorized agent with the written offer of UIM coverage, and Appellant's authorized agent rejected the coverage in writing.

Insurers must offer, "at the option of the insured, [UIM] coverage up to the limits of the insured liability coverage." S.C. Code Ann. § 38-77-160. The Supreme Court has interpreted section 38-77-160 to require a meaningful offer that provides the insured "with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987). "After *Wannamaker*, the General Assembly enacted section 38-77-350 of the South Carolina Code as a safe-harbor provision, creating a conclusive presumption of a meaningful offer of UIM coverage under certain conditions." *Traynum v. Scavens*, 416 S.C. 197, 202, 786 S.E.2d 115, 118 (2016) (citation omitted). In other words, the presumption cannot be rebutted. *See* PRESUMPTION, *Black's Law Dictionary* (10th ed. 2014) (defining "conclusive presumption" as "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.").

Subsection (A) of section 38-77-350 "requires the Department of Insurance (the Department) to promulgate a form for insurers to use when making the required offer of optional coverages to new applicants" which must include certain information. *Id.* In this case, Appellant does not challenge the content of the Offer Form. Therefore, the informational requirements of subsection (A) have been satisfied.

Subsection (B) of section 38-77-350 provides the safe harbor protection to an insurer that uses the section 38-77-350(A) form:

> If this form is signed by the named insured, after it has been completed . . . *it is conclusively presumed that there was an*

> *informed, knowing selection of coverage* and neither the insurance company nor an insurance agent is liable to the named insured ***or another insured*** under the policy for the insured's failure to purchase optional coverage . . . .

(emphasis added). The Supreme Court in *Traynum* held that the subsection (B) safe-harbor provision creates a conclusive presumption of a meaningful offer. 416 S.C. at 202, 786 S.E.2d at 118.

In this case, it is undisputed that Appellant's wife – acting as his authorized agent – received the Offer Form containing the informational requirements of subsection (A). Moreover, it is undisputed that Appellant's wife signed the Offer Form rejecting optional UIM coverage. Thus, pursuant to section 38-77-350(B), Nationwide is entitled to a conclusive presumption that it made a meaningful offer, and the Circuit Court correctly refused to reform the policy to provide coverage that the named insured Appellant expressly rejected in writing.

B. The facts addressed by this Court in *Prioleau* are nearly identical to the facts in this case, and this Court's holding that one spouse can sign a rejection of coverage while acting as the agent of another spouse is binding in this case.

The facts of this case are nearly identical to those in *Prioleau*. In the *Prioleau* case, a husband and wife were both listed as named insureds on a Nationwide policy. However, only the husband applied for the insurance policy, only the husband received the offer of optional coverage, and only the husband signed the rejection of UIM coverage. *Id.* at 239, 597 S.E.2d at 166-167. After the wife was involved in an accident with an underinsured motorist, she sought to reform the policy claiming that she should have received her own offer of optional UIM coverage. The trial court agreed, and reformed the policy. *Id.*

This Court reversed. *Id.* at 239, 597 S.E.2d at 166. Relying on principles of agency law, this Court held "the relationship of agency between a husband and wife is governed by the same rules which apply to other agencies, and no presumption arises from the mere fact of the marital

relationship that one spouse is acting as agent for the other." *Id.* at 242, 597 S.E.2d at 168. In *Prioleau*, the wife testified that she never gave her husband express authority to apply for the policy or to reject coverage. *Id.* at 240-41, 597 S.E.2d at 167. Nonetheless, this Court held the evidence showed the husband had implied authority to reject coverage on his wife's behalf:

> Here, [Wife] and [Husband], by their conduct, placed themselves in such a position as required an agency relationship to be inferred by the courts, and the only reasonable conclusion from the facts of this case is that an implied agency existed between [Wife] and [Husband]. Otherwise, [Wife] is repudiating the very contract under which she seeks reformation.

Id. at 243, 597 S.E.2d at 168. Therefore, presentation of a meaningful offer to the husband who applied for the policy on his family's behalf satisfied the meaningful offer requirement, and the husband's written rejection of optional UIM coverage was binding on all other insureds under the policy, including the wife. *Id.* at 244, 597 S.E.2d at 168-69.

The facts in this case are even more compelling than those before the Court in *Prioleau*. In that case, the wife denied that she ever authorized her husband to act on her behalf in applying for the policy and rejecting optional coverage. Therefore, this Court relied upon the doctrine of implied authority to find that the husband acted as his wife's agent. *Id.* In contrast, Appellant in this case admitted at trial that his wife was authorized to receive, review, and sign the Offer Form on his behalf. (R. p. 29, lines 14–19).[3] Moreover, unlike the wife in *Prioleau* who never personally saw the offer form, Appellant himself had previously signed a written rejection of optional UIM coverage for this very policy. (R. pp. 81–82). Then, when his wife signed the new Offer Form on his behalf, she also saw the Offer Form and had an opportunity to read the explanation of the optional coverages. (R. pp. 74–77). Therefore, unlike the wife in *Prioleau* who had never

[3] Q. But she did so with your full authority. In fact, you had advised the Agency and asked their permission, letting them know that she was going to be the one to just sign the form at that time?
A. Yes, sir.

personally seen the offer form, ***both*** Appellant ***and*** his wife had an opportunity to see the Offer Form in this case. *See also McLeod v. Home Ins. Co.*, 672 F. Supp. 903 (D.S.C. 1987) (holding that a husband's rejection of optional coverage was done for himself and as an agent of his wife without the need for multiple signatures).

The Circuit Court correctly relied upon this Court's holding in *Prioleau* to find that Appellant is bound by his wife's written rejection of optional coverage. Appellant admitted that his wife acted as his authorized agent and within the scope of her authority. (R. p. 29, lines 14–19). Moreover, Appellant's wife merely made the same coverage selections that Appellant himself made earlier that year when applying for the same policy. Therefore, Nationwide made a meaningful offer of optional coverage, and Nationwide is entitled to the safe-harbor protections of the conclusive presumption set forth in section 38-77-350(B).

C. If Appellant's wife is not a named insured, her rejection of optional UIM coverage still binds him because she acted as his authorized agent pursuant to this Court's holding in *Stiltner*.

Appellant argues that his wife could not receive a meaningful offer and reject coverage on his behalf if she was not herself a named insured. However, this Court has already addressed that issue. In *Stiltner*, this Court held that a non-named insured spouse ***can*** act as an agent of the named insured by receiving an offer of optional coverage and rejecting the offer. Therefore, Appellant's argument fails as a matter of law.

In the *Stiltner* case, USAA issued a policy of insurance to the named insured. Later, the named insured married and added his new wife to the policy as an operator, but not as a named insured. 395 S.C. at 186, 717 S.E.2d at 75. Sometime after adding the wife as an operator to the policy, USAA mailed the named insured a new offer form. *Id.* Ultimately, the wife completed, signed, and returned the offer form rejecting optional UIM coverage. *Id.* at 186-87, 717 S.E.2d at 76. Then, after the husband and wife were involved in an automobile accident, they sought to

avoid the signed rejection arguing the offer and rejection were invalid because the wife – who signed the rejection – was not a named insured. *Id.*

The Circuit Court in *Stiltner* granted summary judgment in USAA's favor. On appeal, this Court agreed that the wife was an agent of her husband's, but reversed because there were questions of fact as to whether the wife acted within the scope of her agency authority. *Id.* at 190-191, 717 S.E.2d at 78. In other words, this Court held that a wife who is not a named insured can act as her named insured husband's authorized agent in receiving an offer of optional coverage and rejecting optional coverage as long as she acts within the scope of her agency.

On remand, the *Stiltner* case was tried and the Circuit Court made a factual determination that the wife was acting within the scope of her agency authority with her husband when she signed the rejection of optional UIM coverage. The case came back before this Court on appeal, and this Court unanimously affirmed judgment in favor of USAA, holding "[e]vidence in the record supports the circuit court's finding that [Wife] acted within the scope of authority given to her by [Husband] when she signed the UIM rejection forms." *Stiltner v. USAA Cas. Ins. Co.*, 2014 WL 2579972 (Dec. 10, 2013).

Unlike the first *Stiltner* decision, this case has already been tried and the finder of fact determined that Appellant's wife acted within the scope of her agency authority for Appellant when she received and rejected the offer of optional UIM coverage. (R. p. 4). Moreover, that factual determination is supported by Appellant's own testimony at trial that his wife acted with his full authority. (R. p. 29, lines 14–19). Therefore, to the extent Appellant's wife was not a named insured, this Court's second *Stiltner* decision directly applies, and her signature as Appellant's agent binds him.

Regardless of whether Appellant's wife was a named insured, her offer and rejection of optional UIM coverage binds him. If she was a named insured, then this Court's holding in *Prioleau* is controlling. If she was not, then this Court's holding in *Stiltner* is controlling. The critical question is not whether she was a named insured. Instead, the critical question is whether she acted within the scope of her authority. By Appellant's own admission, she did. Therefore, the Circuit Court correctly entered judgment in Nationwide's favor.

II. South Carolina Code Section 38-77-350(A) only requires a written rejection by the named insured who applies for coverage.

South Carolina Code Section 38-77-350(A) requires insurers to make a written offer of optional coverage to "all new applicants." Relying upon *dicta* in this Court's holding in *McDonald v. South Carolina Farm Bureau Ins. Co.*, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999), Appellant argues that an insurer must make an offer of optional coverage to all named insureds on a policy. However, the General Assembly did not require an offer to "all new named insureds." Instead, the General Assembly chose to use the phrase "all new applicants." *See* S.C. Code § 38-77-350(A). Therefore, the statute only requires a written offer to the individual who applies for coverage on behalf of a household or company.

An "applicant" is "someone who requests something . . . ." APPLICANT, *Black's Law Dictionary* (10th ed. 2014). In the insurance context, one family member will routinely deal with an insurance agent and apply for coverage on behalf of an entire household. *See e.g.*, *McLeod*, 672 F. Supp. at 904 (recounting testimony of agents "that it is standard practice for an insurance agency to obtain only one signature when one person is acting on behalf of the entire family."). In fact, this Court in *Prioleau* cited favorably from the Illinois Appellate Court's decision in *Messerly v. State Farm Mutual Automobile Insurance Company*, 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ct. App. 1996). Like South Carolina, the Illinois offer statute requires an insurer to offer coverage to

"applicants." Ill. Rev. Stat. 1991, ch. 73, pars. 755a-2(1), (2), (3). The Appellate Court recognized that requiring "applicants" receive the meaningful offer comports with the typical insurance transaction:

> Both 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. We hold a legally sufficient offer of UM and UDIM coverage made to one named insured satisfies the offer requirement of section 143a-2 of the Code. . . .
>
> Requiring every potential "insured," or "additional insured," or "household member" who may be covered under a policy to visit or speak with an insurance agent in order to be given an offer of additional UM/UDIM coverage would be impractical. The legislature amended section 143a-2 of the Code to state only the *applicant* must be given a description of and may waive the offer of additional UM/UDIM coverage and the *applicant's* waiver is to be binding on all insureds under the policy.
>
> Requiring offers of UM/UDIM coverage to be made to all insureds under automobile policies would be contrary to reasonable business practices from which both insurers and consumers benefit. Furthermore, it would be inconsistent to find plaintiff is covered under the terms of a policy which benefit her but is not bound by the terms which do not benefit her.

Id. at 1070, 662 N.E.2d at 151.

The Supreme Court in *Traynum* recently recognized the public policy of adopting constructions of the offer statute that benefit consumers: "We also note that the ability to purchase insurance online benefits consumers by allowing them to shop from the comfort of their own homes and avoid the time constraints and pressures associated with face-to-face interactions with sales agents." 416 S.C. at 207, 786 S.E.2d at 121. Likewise, the General Assembly's use of the word "applicant" reflects its recognition that one individual will typically apply for the coverage on behalf of an entire household. This practice benefits families and potential insureds because it reduces the transaction costs by avoiding the need for an entire household to meet with an agent

together to procure the coverage. Like online purchases, the end result is that more people will have insurance. More importantly, this interpretation comports with the plain language of the statute, which only requires offers to be made to "new applicants," not "new named insureds."

Even if South Carolina law did require an offer to all named insureds, Nationwide made a meaningful offer to both Appellant and his wife at the same time. The reason Appellant is bound by an offer to his agent is that "notice to the agent under such circumstances is imputed to the principal." *McLeod*, 672 F. Supp. at 906 (citing *Palmer v. Sovereign Camp, W.O.W.*, 197 S.C. 379, 15 S.E.2d 655 (1941)). Thus, Appellant is deemed to have received a meaningful offer of optional coverage ***because*** his wife received a meaningful offer of coverage. Certainly, when a principal is deemed to have received information via his agent, the agent cannot be heard to deny that she received the information as well. Appellant's wife received the written Offer Form. She held the form in her hands, and she signed the form. Therefore, it strains credulity to argue that she did not receive a meaningful offer of optional coverage.

CONCLUSION

Appellant admitted at trial that his wife acted as his agent and within the scope of her authority when she received a written offer of optional UIM coverage and signed the Offer Form confirming his rejection of optional coverage. Regardless of whether Appellant's wife was also a named insured, her signature constitutes a valid and binding rejection of optional UIM coverage. If she was a named insured, then this Court's analysis is controlled by its prior decision in *Prioleau*. If she was not a named insured, then this Court's analysis is controlled by its prior decision in *Stiltner*. Either way, the Circuit Court's holding should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Wesley B. Sawyer, 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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