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DISTRICT OF SOUTH CAROLINA

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Honorable Daniel E. Shearouse
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South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Progressive Direct Insurance Company v. Bryan Reeves
Civil Action No.: 0:17-cv-02976-CMC

Dear Mr. Shearouse:

Enclosed you will find a certified copy of an Order Certifying Questions of Law entered in the above-referenced case by the Honorable Cameron McGowan Currie, Senior United States District Judge, on July 31, 2018.

Please do not hesitate to contact me at (803) 253-3475 should you have any questions or require any further information.

Very truly yours,

ROBIN L. BLUME, CLERK OF COURT

s/Charles L. Bruorton
Deputy Clerk

Enclosure

Other Orders/Judgments

0:17-cv-02976-CMC Progressive Direct Insurance Company v. Reeves

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Docket Text:
ORDER Certifying Questions of Law to the South Carolina Supreme Court. Signed by Honorable Cameron McGowan Currie on 7/31/2018. (Attachments: # (1) Stipulation of Facts)(cbru,)

0:17-cv-02976-CMC Notice has been electronically mailed to:

John Robert Murphy jrmurphy@murphygrantland.com, sbranson@murphygrantland.com

William R Padget bpadget@finkellaw.com, chiller@finkellaw.com, mrock@finkellaw.com

Carl David Hiller chiller@finkellaw.com

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Progressive Direct Insurance Company, Plaintiff, v. Bryan Reeves, Defendant.	C/A No. 0:17-cv-2976-CMC Order Certifying Questions of Law to the South Carolina Supreme Court

Through this action, Plaintiff, Progressive Direct Insurance Company ("Progressive"), seeks a declaration a motorcycle insurance policy under which Defendant, Bryan Reeves ("Bryan"), is a named insured does not provide underinsured motorist ("UIM") coverage for an accident in which he was injured and for which he seeks damages exceeding the liability limits of the other driver's motor vehicle insurance policy. Bryan counterclaims seeking a declaration (1) Progressive was required but failed to make a meaningful offer of UIM coverage to him when he became a named insured, and (2) he is entitled to reformation of the policy providing UIM coverage at the limits of liability for each of three motorcycles covered under the policy.

The matter is before the court on the parties' cross motions for summary judgment based on stipulated facts. ECF Nos. 17, 18, 20. Resolution of these motions will turn on two questions of state law. While there is lower court authority on one of the two questions, there appears to be no controlling authority from the South Carolina Supreme Court on either issue. For this reason and because resolution of these issues has broader implications for consumers and the insurance industry, the court concludes it should certify the two determinative questions of law to the South Carolina Supreme Court pursuant to Rule 244(a) of the South Carolina Appellate Court Rules ("SCACR").

STANDARD

Rule 244(a) of the South Carolina Appellate Court Rules provides, in relevant part, as follows:

> The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States . . . , when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

SCACR 244(a); *see also Roe v. Doe*, 28 F.3d 404 (4th Cir. 1994) ("Only if the available state law is clearly insufficient should the [federal] court certify the issue to the state court.").

STIPULATED FACTS[1]

The policy for which Bryan seeks reformation was initially issued to his father, Wayne Reeves ("Wayne"), in June 2012. ECF No. 17 ¶¶ 1, 2. The policy was renewed five times, remaining in effect through and including July 30, 2017, on which date Bryan was injured in the motorcycle accident for which he now seeks UIM coverage. *Id.* ¶ 1, 2.

The policy was issued based on completion and execution of an online policy application. *Id.* ¶ 2. The application and related UIM and uninsured motorist ("UM") coverage offer form ("Offer Form") were completed by Wayne or his wife, Jennifer Reeves ("Jennifer"), acting as Wayne's express and implied agent. *Id.* The Offer Form satisfied the requirements for an offer of optional UM and UIM coverages under S.C. Code Ann. § 38-77-350(A), and was completed indicating UIM coverage was declined. *Id.* ¶ 3.

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[1] The complete Stipulation of Facts is attached to and incorporated into this order by reference. ECF No. 17.

Initially, the only named insured was Wayne and the policy covered a single motorcycle owned by him. *Id.* ¶ 2. Jennifer and Bryan were added to the policy in February 2015 and listed as "drivers and household residents." *Id.*¶ 4.

Bryan was designated a named insured in May 2017, because he was the owner of a 2016 Harley Davidson motorcycle ("2016 Harley") that was added as a covered vehicle at that time. *Id.* ¶ 5.[2] Progressive did not provide Bryan with an Offer Form compliant with Section 38-77-350 or otherwise make an offer of optional UM or UIM coverage to Bryan when he became a named insured or at any other time. *Id.* ¶ 7.

At the time of Bryan's accident on July 30, 2017, the policy covered three motorcycles, one of which was owned by Wayne, one by Jennifer, and one by Bryan. *Id.* ¶¶ 1, 12. Bryan and Wayne were, at that time, both listed as named insureds, though Wayne remained the first named insured. *Id.* ¶ 6, 13. Bryan was driving his 2016 Harley when the accident occurred and suffered injuries for which he seeks damages exceeding the liability limits of the other driver's motor vehicle insurance policy. *Id.* ¶ 16.

PROCEDURAL BACKGROUND

Progressive filed this action on November 2, 2017, seeking a declaration the policy does not provide Bryan UIM coverage for the July 30, 2017 accident. ECF No. 1. Bryan filed an Answer and Counterclaim seeking a declaration Progressive was required but failed to make a meaningful offer of UIM coverage to Bryan when he became a named insured and seeking reformation of the policy to provide UIM coverage at the limits of liability for each of the three

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[2] Although she also owned covered motorcycles at various times, Jennifer was apparently never made a named insured.

motorcycles covered under the policy. The Counterclaim expressly relies on S.C. Code Ann. § 38-77-160, S.C. Code Ann. § 38-77-350, and *McDonald v. S.C. Farm Bureau Ins. Co.*, 518 S.E.2d 624 (S.C. Ct. App. 1999). ECF No. 9 ¶ 16.

The parties subsequently filed the Stipulation of Facts summarized above, and cross motions for summary judgment. After an initial review of the cross motions and available law, the court requested the parties' positions on whether the underlying legal issues should be certified to the South Carolina Supreme Court. *See* ECF No. 24 (docket text order). Progressive responded in favor of certification and Bryan responded in opposition. ECF Nos. 25, 26.

QUESTIONS OF LAW

Resolution of the cross motions for summary judgment turns on two related questions of law involving interpretation of and interplay between S.C. Code §§ 38-77-160 and 38-77-350(A)-(C):

1. Whether the addition of a named insured ("Added Named Insured") to an existing insurance policy under which the Added Named Insured was previously a resident relative insured is a "change" under South Carolina Code § 38-77-350(C) and, consequently, does *not* require an additional offer of optional coverages if an offer that satisfies South Carolina Code § 38-77-350(A) and (B) was previously made to the named insured who originally applied for the policy ("Original Named Insured")?
2. If the insurer was required but failed to make a separate offer of optional coverage to the Added Named Insured, whether reformation should be limited to vehicle(s) in which the Added Named Insured has an insurable interest?

AVAILABLE AUTHORITY

Two decisions of the South Carolina Court of Appeals address issues related to the first question. *McDonald*, 518 S.E.2d at 626; and *Progressive N. Ins. Co. v. Medlock*, 2014 WL 2968933 (S.C. Ct. App. 2014). However, as explained below, the key language in the earlier decision (*McDonald*) is arguably dicta, and the later decision (*Medlock*) is unpublished, thus lacks precedential value. *See* SCACR 220(a) ("memorandum opinions shall not be published in the official reports and shall be of no precedential value"). There appears to be no controlling precedent in the decisions of the South Carolina Supreme Court.[3] *McDonald*, *Medlock*, and a district court opinion applying *McDonald* (*Allstate Fire and Cas. Ins. Co. v. Simpson*, 152 F. Supp. 3d 487 (D.S.C. 2016)), are summarized below.

The parties have cited and this court has found no published decision from either the South Carolina Supreme Court or Court of Appeals addressing the second question. While there are multiple cases reforming policies, some of which extend reformation to multiple vehicles, the court has found none that address circumstances such as those presented here, where (1) the policy covers multiple vehicles; (2) a proper offer was made to the Original Named Insured but not to the Added Named Insured; and (3) the Added Named Insured does not have an insurable interest in all vehicles for which he seeks reformation. While these circumstances were present in *Medlock*,

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[3] Bryan asserts the South Carolina Supreme Court has "effectively held that there exists no novel issue of law" here because it denied petitions for a writ of certiorari in both *McDonald* and *Medlock*. ECF No. 26 at 2. While the existence of a novel issue is one ground on which the South Carolina Supreme Court may grant a writ of certiorari, that court has significant discretion whether to grant such a writ and does so "only where there are special and important reasons." *See* SCACR 242(b). Thus, the South Carolina Supreme Court's failure to grant a writ of certiorari does not compel the conclusion it found the issues raised were not novel or lend precedential weight to either decision.

that decision is unpublished and the court did not address whether reformation extends to coverage of vehicles owned by the Original Named Insured who was properly offered and expressly declined UIM coverage.

McDonald. *McDonald* addresses the interplay between Section 38-77-160, which states "insurance carriers shall offer, at the option of the insured" both additional UM and optional UIM coverage, and Section 38-77-350, which requires, in part, that the offer be made to "*applicants* for automobile insurance policies" and specifies content for a form to be "used by insurers for all *new applicants*." S.C. Code §§ 38-77-160, 38-77-350(A) (emphasis added). When these requirements are satisfied, Section 38-77-350 provides a safe harbor for the insurer against claims for reformation of the policy through the following provisions:

> (B) If this form is signed by *the named insured*, after it has been completed by an insurance producer . . . , 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 or higher limits.
>
> (C) An automobile insurer is *not required to make a new offer* of coverage on any automobile insurance policy which renews, extends, *changes*, supersedes, or replaces an existing policy.
>
> (D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages . . . and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by *the named insured.*

S.C. Code § 38-77-350(B)-(D) (emphasis added).

The specific question in *McDonald* was whether the safe harbor created by Section 38-77-350 applied where a mother, who had received a proper offer of UIM coverage, transferred both her vehicle *and the insurance policy* to her son, thus *substituting* the son for the mother as named insured. Despite being substituted as the sole named insured and paying a membership fee to the

insurance company, the son did not complete any application for coverage or receive an offer of UIM coverage. *McDonald*, 625 S.E. 2d at 625. The court rejected the insurer's argument substitution of the son for the mother as the named insured was a "change" falling within Section 38-77-350(C), explaining as follows: "Removing [the mother] from the policy and substituting [the son] as the named insured was not a mere policy change. It was the *creation of a new insurance policy with a new named insured*." *Id.* at 626 (emphasis added); *see also* ECF No. 26 at 3 (Bryan's memorandum conceding *McDonald* involved a "new policy"). Because the court held there was a new policy, the safe harbor created by Section 38-77-350(C) did not apply.

Before reaching this issue, the court addressed whether Section 38-77-350(A)'s reference to "new applicants" conflicts with Section 38-77-160's reference to "insured[s]." *Id.* at 625. The court found no conflict explaining as follows:

> *Clearly, the legislature intended for insurers to afford all named insured[s] the opportunity to accept or reject UIM coverage.* In using the term "new applicant," the legislature simply distinguished between those who had never had an opportunity to reject UIM coverage and others, such as insureds renewing policies, who previously had made informed decisions about UIM coverage.

Id. Because the policy at issue was a *new* policy with a *new* named insured, the broad rule stated in the first sentence quoted above is arguably dicta.[4]

Medlock. What is arguably dicta in *McDonald* is central to the holding in *Medlock*. There the court relied on *McDonald* in holding an insurer was required to offer UIM coverage to an insured when he became a named insured. *Medlock*, 2014 WL 2968933, Slip. Op. at 1. Also

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[4] Progressive maintains this language is dicta. Bryan maintains it is, in fact, the holding and the language relating to there being a "new policy" is dicta.

relying on *McDonald*, the court held altering an insured's status to named insured was not a mere change under Section 38-77-350(C). While essentially on point, *Medlock* is unpublished and, consequently, non-precedential. SCACR 220(a).[5]

Simpson. In *Simpson*, the district court applied *McDonald* in holding the insurer was required to make a meaningful offer of UIM coverage to both named insureds, Amanda and Joseph Simpson. *Simpson*, 152 F. Supp. 3d at 493. The policy at issue was obtained by Amanda, who was properly offered and declined UIM coverage, and listed both Amanda and her then boyfriend (later husband) as named insureds. The court rejected an argument Amanda acted as Joseph's agent in obtaining the policy, either distinguishing or declining to follow a pre-*McDonald* decision of the South Carolina Court of Appeals addressing implied agency. *See Nationwide Mut. Ins. Co. v. Prioleau,* 597 S.E.2d 165 (S.C. Ct. App. 2004).

While the three decisions discussed above suggest a consistent result (favoring the insured), they are of limited precedential value as the key language in *McDonald* appears to be dicta, *Medlock* is unpublished, and *Simpson* is a district court decision relying on *McDonald.* Certainly, none is a decision of the South Carolina Supreme Court.

Decisions in Other States. Courts applying the law of other states have reached varying results applying those states' corresponding laws. Variations in statutory language limit the usefulness of these decisions in construing South Carolina law. *See, e.g.*, *Burrows v. Nationwide Mut. Ins. Co.*, 600 S.E.2d 565 (W. Va. 2004) (holding insurer was not obligated to make offer to

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[5] Like Bryan, the Added Named Insured in *Medlock* was a resident relative (thus a Class 1 insured) before he became a named insured (due to his ownership of a covered vehicle). Thus, the circumstances in *Medlock* appear comparable to those here.

second named insured, even after death of first named insured, where statute required offer be made to "the applicant or a named insured" and provided rejection by such a person was binding "on all persons insured under the policy"); *Ferreira v. Integon Nat'l. Ins. Co.*, 809 A.2d 1098 (R.I. 2002) (holding requirement insurer obtain written rejection by "the named insured" applied only when policy was initially issued, not when another named insured was added, where statute only required notice of availability of coverage be sent upon "amendment, modification, or renewal" of policy).

Broader Implications. Whether Sections 38-77-160 and 38-77-350, read together, require an offer of optional coverages be made to (and if rejected, be rejected by) every named insured, or whether they require only an offer to the named insured who completes the insurance application, has broad implications for both insurance consumers and insurers. This is true for future policy applications and additions of named insureds as well as for existing policies with more than one named insured. Given the broader implications of this legal issue, this court concludes it should defer to the South Carolina Supreme Court.

Scope of Reformation. While multiple cases have reformed UM or UIM coverage on policies covering multiple vehicles, no published opinion of the South Carolina Supreme Court or Court of Appeals appears to have required such reformation where there are multiple named insureds, one of whom rejected the optional coverage and who holds the only insurable interest in some of the covered vehicles. Thus, there appears to be no precedential decision from either the South Carolina Supreme Court or Court of Appeals addressing the second issue.

CONCLUSION

For reasons set forth above, the court concludes there are two unresolved issues of state law determinative of the claims and counterclaim in this action on which there is no clear guidance

from the South Carolina Supreme Court and which are appropriate for certification under SCACR 244(a). The court, therefore, certifies the questions set forth above under "Questions of Law" to that Court for consideration in its discretion.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
July 31, 2018

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION
CASE NUMBER: 17-cv-02976-CMC

Progressive Direct Insurance Company,

Plaintiff,

v.

Bryan Reeves,

Defendant.

STIPULATION OF FACT

The parties hereby stipulate to the following facts:

1. On July 30, 2017, Defendant Bryan Reeves was operating a 2016 Harley Davidson FLHX Street G motorcycle when he was involved in an accident with another motor vehicle. Bryan Reeves' claims for damages arising out of the accident exceed the liability limits of the other driver's motor vehicle insurance.

2. Progressive Direct Insurance Company issued policy 19453115-0 to Wayne Reeves based upon the completion and execution of an online policy application and offer of additional uninsured motorist coverage and optional underinsured motorist coverage form, presented to and signed by Wayne Reeves or his wife, Jenifer Reeves, acting as his express and implied agent on June 19, 2012. At the policy inception, the only covered motorcycle was a 2003 Harley Davidson FLHTCUI owned by Wayne Reeves. The policy was renewed five (5) times and remained in effect from the inception date up through and including the above referenced accident that occurred on July 30, 2017.

3. The offer form fully satisfies the requirements of S.C. Code § 38-77-350(A) and was completed and executed by Jenifer Reeves on behalf of Wayne Reeves on or about June 19, 2012 (attached hereto as Exhibit "1").

4. On or about February 2, 2015, Jenifer M. Reeves and Bryan J. Reeves were added to the policy and listed as "drivers and household residents" on the declarations page of policy 19453115-2.

5. On or about May 19, 2017, Bryan J. Reeves was added to the policy as the named insured because he was the owner of a 2016 Harley Davidson FLHX Street G motorcycle that was added to the policy as a covered vehicle. Wayne Reeves continued to be listed as the first named insured on the policy.

6. Wayne Reeves and Bryan J. Reeves continued to be listed as named insureds at the renewal of policy 19453115-4 on or about June 19, 2017 and continuing on to the renewal policy number 19453115-5.

7. Progressive did not provide a written offer form to Bryan J. Reeves, either in person, by mail or electronically, after he became a named insured on the policy originally issued to his father, Wayne Reeves. Progressive had a signed rejection on file from Wayne Reeves, a named insured.

8. The policy renewed five (5) times and remained in effect from inception date up through and including the above-referenced accident.

9. The fourth renewal of the policy, policy number 19453115-4 insured the 2003 Harley Davidson FLHTCUI along with a 2007 Harley Davidson FLHR Road King and a 2010 Harley Davidson FLSTC Heritage.

10. On or about August 9, 2016, the 2010 Harley Davidson FLSTC Heritage was removed from the policy. Subsequently, on or about August 25, 2016, a 2012 Harley Davidson FLD Switch Back was added to the policy. The 2010 Harley Davidson and 2012 Harley Davidson motorcycles were titled in the name of Jenifer Reeves.

11. The 2007 Harley Davidson FLHR Road King was removed from the policy and a 2016 Harley Davidson FLHX Street G was added to the policy. The 2007 Harley Davidson and 2016 Harley Davidson were owned by Bryan Reeves.

12. At the time of the accident, the motorcycles listed on the policy were the 2003 Harley Davidson owned by Wayne Reeves, the 2012 Harley Davidson owned by Jenifer Reeves and the 2016 Harley Davidson owned by Bryan Reeves.

13. Wayne Reeves remained the first named insured on the policy at all times from the policy's inception through the date of the accident.

s/J.R. Murphy
J.R. Murphy, Esquire
MURPHY & GRANTLAND, P.A.
Fed. I.D. No. 3119
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Plaintiff

s/Carl D. Hiller
William R. Padget, Esquire
Carl D. Hiller, Esquire
Finkel Law Firm, LLC
1201 Main Street, Suite 1800
P.O. Box 1799
Columbia, SC 29202
(803) 765-2935
Attorney for Defendant

May 8, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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