STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

Nicky Ted Phillips and Gloria E. Phillips,

Plaintiffs,

v.

American National Property and Casualty Company, Clyde McNeill Agency, and Clyde Edwin McNeill, individually and in his capacity as agent of American National Property and Casualty Company,

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2016-CP-11-00809

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

This matter came before the Court on May 9, 2018, for a hearing on two Motions for Summary Judgment submitted on behalf of Defendants American National Property and Casualty Company ("American National"), Clyde McNeill Agency (the "McNeill Agency") and Clyde Edwin McNeill ("McNeill"). Based upon the record before the Court and the arguments made by counsel for each of the parties, the defendants' Motions for Summary Judgment are hereby GRANTED as to Plaintiffs' claims concerning their personal automobile insurance policy. This Order does not end Plaintiffs' claim for reformation of their commercial insurance policy.

Statement of Facts

This action arises from injuries the Plaintiffs sustained in an automobile accident that occurred on August 9, 2014, when the Plaintiffs' vehicle was struck from behind by another motorist. The at-fault motorist did not have sufficient insurance to cover the Plaintiffs' damages so Plaintiffs sought coverage under their own automobile insurance policies. At the time of the accident, Plaintiffs had an automobile insurance policy (the "Auto Policy") and a commercial auto

insurance policy (the "Commercial Policy")[1] issued by American National. Plaintiffs obtained the policies through their insurance agent, McNeill, who owns the McNeill Agency. The Auto Policy insured two vehicles and provided underinsured motorist (UIM) coverage with limits of $25,000 per person and $50,000 per accident. The Commercial Policy, which insured a farm truck, did not provide any UIM coverage.

Plaintiffs brought the present action against American National, the McNeill Agency and McNeill, alleging a number of causes of action concerning Defendants' alleged failure to provide more UIM coverage in the policies. Plaintiffs maintain that both policies should be reformed to include UIM coverage equal to the amount of liability coverage under the policies. Defendants argue that they are entitled to the conclusive presumption provided by S.C. Code Ann. § 38-77-350 that a meaningful offer of UIM coverage was made to the Plaintiffs, and therefore, that all of Plaintiffs' causes of action seeking reformation of the Auto Policy are barred.

The Auto Policy was first issued to Plaintiffs on or about September 30, 2010, and both Plaintiff Nicky Ted Phillips and Plaintiff Gloria Phillips were listed as named insureds on the policy. The Auto Policy, as originally issued, provided personal injury liability limits of $50,000/100,000, uninsured motorist (UM) coverage limits of $25,000/$50,000 and UIM coverage limits of $25,000/$50,000.

On October 28, 2013, Nicky Phillips went to McNeill's office wanting to discuss raising his insurance limits. Although the parties dispute aspects of the discussion that took place between

[1]At the hearing on the Defendants' Motions for Summary Judgment, the parties focused their arguments exclusively on the Auto Policy. Therefore, this Order only grants Summary Judgment to the Defendants as to Plaintiffs' claims to the extent they relate to the UIM coverage in the Auto Policy. As will be discussed below, the Court holds that the Defendants are immune from liability for any claims concerning the Plaintiffs' failure to select a higher amount of UIM coverage in the Auto Policy because Defendant's are entitled to the conclusive presumption provided by § 38-77-350 that a meaningful offer of UIM coverage was made.

McNeill and Nicky Phillips on this date, the parties agree that Nicky Phillips expressed concern that he could be sued and lose everything he and his wife had.[2] As a result of this meeting, Plaintiff ended up obtaining an umbrella insurance policy (the "Umbrella Policy"). In order to obtain the Umbrella Policy, Plaintiff had to increase the liability limits on his Auto Policy to at least $250,000/$500,000/$100,000. Plaintiff raised the liability limits on his Auto Policy to $250,000/$500,000/$100,000 and executed an "Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage" for the Auto Policy ("Auto Offer Form") on October 28, 2013.

The Auto Offer Form executed by Plaintiff Nicky Phillips on October 28, 2013, indicates that Mr. Phillips selected UIM limits in the amount of $25,000 per person and $50,000 per accident. Mr. Phillips testified that he signed the Auto Offer Form on October 28, 2013, but did not read the form prior to signing. He claims that McNeill did not go through the Auto Offer Form with him, but rather, just instructed him to sign it in various places. Mr. Phillips also maintains that the amount of UIM coverage selected in the Auto Offer Form was not handwritten on the form when he signed the Auto Offer Form.

On the last page of the Auto Form is a section titled "Applicant's Acknowledgment". Mr. Phillips signed underneath the following language within this section of the Auto Offer Form:

> 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 optional underinsured motorist coverage. . . .

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[2] Nicky and Gloria Phillips each testified that two events prompted Mr. Phillip's desire to raise his insurance limits: (1) an accident involving Plaintiffs' daughter; and (2) an accident involving the uncle of Plaintiffs' son-in-law. Plaintiffs' daughter's accident had occurred years before the Auto Policy was first obtained in September 2010. Meanwhile, the accident involving Plaintiffs' son-in-law's uncle's accident had occurred in 2013, much closer in time to the October 28, 2013 meeting. With respect to the uncle's accident, Nicky Phillips testified that the people who the uncle had hit "were going to sue him and take what he had. And the only thing I knew is I need to raise my insurance." It was the uncle's experience that led to Mr. Phillips meeting with McNeill to increase his insurance.

> **My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.**

(Emphasis added).

Mr. Phillips claims he told McNeill at the October 28, 2013 meeting that he wanted to "[r]aise my insurance, all of it," and that this request included raising the Auto Policy's UIM limits. However, Mr. Phillips testified that he and McNeill did not discuss the type of coverage already on the Auto Policy at the meeting and that he was unaware of how much UIM he had on the Auto Policy at the time. In addition, Mr. Phillips testified that, to this day, he does not know what UIM coverage is for. Mr. Phillips has further failed to offer any testimony as to the specific amount of UIM coverage he requested McNeill add to the Auto Policy on October 28, 2013.

Plaintiffs filed the present action against Defendants, alleging causes of action for negligence, breach of fiduciary duty, negligent misrepresentation, fraud and violation of South Carolina's Unfair Trade Practices Act.[3] Plaintiffs also seek a declaratory judgment that Plaintiffs failed to make a meaningful offer of UIM coverage to Plaintiffs, and thus, that the Auto Policy should be reformed to equal the amount of liability insurance on the policy. Defendants argue that they are entitled to the conclusive presumption provided by § 38-77-350 that a meaningful offer of UIM coverage was made to the Plaintiffs, and that they are therefore immune from any liability. As discussed below, the Court agrees that Defendants are entitled to the conclusive presumption and immunity provided by § 38-77-350 as to Plaintiffs claims relating to the UIM coverage under the Auto Policy.

[3] All of these causes of action concern the Defendants' alleged failure to provide an increased amount of UIM coverage as Plaintiff Nicky Phillips alleges he requested on October 28, 2013.

Discussion

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCRCP 56(c). When a party makes a motion for summary judgment that is supported by evidence, the adverse party may not rest on the allegations of the Complaint to overcome the motion but must demonstrate, by affidavit or other evidence, that a genuine issue of fact exists. *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). The nonmoving party must make an affirmative effort to set forth specific facts showing that there is a genuine issue for trial in order to overcome a summary judgment motion. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Moreover, while a court must view the facts in a light most favorable to the non-moving party, "a court cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423 (2000) (internal citations and quotation marks omitted).

An automobile insurer is required to make a meaningful offer of UIM coverage to its insured. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 705 S.E.2d 432 (2011); S.C. Code Ann. 38-77-160. "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." *Floyd v. Nationwide Mut. Ins. Co.,* 367 S.C. 253, 261, 626 S.E.2d 6, 11 (2005). The insurer has the burden of proving that it made a meaningful offer. *Cohen v. Progressive N. Ins. Co.*, 402 S.C. 66, 72, 737 S.E.2d 869, 872 (Ct. App. 2013). An insurer is entitled to a conclusive presumption that it made a meaningful offer of UIM coverage

where an insured executes a UIM offer form that complies with S.C. Code Ann. §§ 38-77-350(A) and (B). *Floyd*, at 262, 626 S.E.2d at 11; *see also* S.C. Code Ann. §§ 38-77-350(A)-(B).

According to § 38-77-350(A), the director of the South Carolina Department of Insurance or his designee "shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies." The form must contain, at a minimum, the following:

> (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 to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
>
> (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
>
> (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

§ 38-77-350 (A). Whether an offer form complies with section 38–77–350(A)'s requirements is a question of law for the court. *Weigand*, at 163. Moreover,

> [i]f this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, **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.**

§ 38-77-350(B) (Emphasis added). Subsection (D) further provides that

> [c]ompliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits 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.**

§ 38-77-350 (D). The insurer has the burden of establishing that the requirements have been met in order to take advantage of this presumption. *Weigand*, at 165.[4]

Here, it uncontested that the Auto Offer Form complies with Subsection 38-77-350 (A) and that Mr. Phillips signed the Auto Offer Form. Plaintiffs' sole contention is that a question of fact exists as to whether the manner in which the Auto Offer Form was executed complied with Subsection § 38-77-350(B) because the parties dispute whether the handwritten amount of UIM coverage on the form was written before or after Mr. Phillips signed the form. The Court finds that no such question of fact exists since Mr. Phillips signed the acknowledgment statement on the Auto Offer Form indicating that "[m]y signature below further acknowledges that . . . the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase." Mr. Phillips's signature thus establishes that he made a knowing and voluntary selection of UIM coverage. *See Weigand*, at 165 (holding no issue of fact precluding insurer's entitlement to the conclusive presumption where plaintiff argued there was no direct evidence that the named insured was the one who checked "no" on the boxes on the UIM select/reject form he signed, noting that "[i]t is enough that [the named insured]

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[4] Even when an offer form does not comply with § 38-77-350, an insurance carrier's offer of UIM coverage will still be deemed meaningful if it satisfies the four-part *Wannamaker* test. *Id.*, at 164; *Cohen*, at 76. In *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), the South Carolina Supreme Court adopted the following test for determining whether an offer of UIM was meaningful:

> (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.

Wannamaker, at 521, 354 S.E.2d at 556. "The question of whether an insurer met its burden of proving it made a meaningful offer of UIM coverage [under the *Wannamaker* test] is a question of fact." *Cohen*, at 72.

signed the acknowledgment . . .."). Moreover, Plaintiffs' attempt to create an issue of fact by claiming the handwritten amount of UIM coverage selected was not on the Auto Offer Form when Mr. Phillips signed it lacks merit in light of Mr. Phillips's admission that he didn't even read the Auto Offer Form prior to signing.[5] Therefore, the Auto Offer Form complies with § 38-77-350 and none of the defendants can be held liable for Plaintiffs' failure to select a higher amount of UIM coverage. *See* § 38-77-350(B) and (D).

Furthermore, although Gloria Phillips did not sign the Auto Offer Form, defendants are still entitled to the conclusive presumption that a meaningful offer of UIM coverage was made to Plaintiffs and that the form is binding as to her. Our courts have held that the rejection of UIM coverage by one spouse can be binding against the other where the spouse was impliedly or expressly authorized to act on the other's behalf as his agent. *E.g.*, *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004) (finding an implied agency relationship existed between the husband and wife as a matter of law). Here, both Plaintiffs testified that Nicky Phillips was authorized to change the Auto Policy on behalf of Gloria Phillips. Thus, the amount of UIM coverage selected by Nicky Phillips is enforceable against Gloria Phillips as he was acting as his wife's agent when he signed the Auto Offer Form.

NOW, THEREFORE, based upon the foregoing,

IT IS HEREBY ORDERED that summary judgment be entered in favor of the defendants in the above-captioned action as to Plaintiffs' causes of action concerning the Auto Policy. This Order does not end Plaintiffs' claim for reformation of their commercial insurance policy.

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[5] The fact that Nicky Phillips claims he did not actually read the Auto Offer Form before signing it does not preclude this Court from finding that his signature under the acknowledgment statement establishes Defendants complied with § 38-77-350(B). *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("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 IT IS SO ORDERED.

The Honorable R. Keith Kelly
Circuit Court Judge
Seventh Judicial Circuit

June ____, 2018
Spartanburg, South Carolina

Cherokee Common Pleas

Case Caption: Nicky Ted Phillips , plaintiff, et al VS American National Property And Casualty Company , defendant, et al

Case Number: 2016CP1100809

Type: Order/Summary Judgment

It is so Ordered.

s/ R. Keith Kelly - 2165