

RECEIVED

NOV 21 2018

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

Cameron McGowan Currie, Senior United States District Judge

Appellate Case No. 2018-001436

Progressive Direct Insurance Company.....Plaintiff,

v.

Bryan Reeves.....Defendants.

OPENING BRIEF

J.R. Murphy, Esquire
S.C. Bar No. 7941
Megan Walker, Esquire
S.C. Bar No. 103069
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Plaintiff

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

Cameron McGowan Currie, Senior United States District Judge

Appellate Case No. 2018-001436

Progressive Direct Insurance Company.....Plaintiff,

v.

Bryan Reeves.....Defendants.

OPENING BRIEF

J.R. Murphy, Esquire
S.C. Bar No. 7941
Megan Walker, Esquire
S.C. Bar No. 103069
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Plaintiff

TABLE OF CONTENTS

Table of Authorities ii

Certified Questions1

Statement of the Case.....1

Argument3

 I. Under South Carolina Code § 38-77-350, the policy applicant’s rejection of UIM coverage is binding on all insureds under an existing policy of insurance.4

 A. By its plain terms, South Carolina Code § 38-77-350 grants a safe harbor to insurers who make a complaint offer of optional coverages to policy “applicants” – not all named insureds..... 5

 B. Under the facts of *McDonald v. South Carolina Farm Bureau Ins. Co.*, its result complies with the statutory language of South Carolina Code § 38-77-350, despite the additional language in the case..... 10

 II. The change in an insured’s status from resident relative to named insured on an existing policy is a “change” under South Carolina Code § 38-77-350(C) and, consequently, does not require an additional offer of optional coverages.....13

 III. In the alternative, the policy should not be reformed to include UIM coverage on Wayne and Jenifer Reeves’ vehicles, such coverage having been validly rejected by Wayne Reeves.16

 A. As to Wayne and Jenifer Reeves’ motorcycles, Wayne’s rejection of UIM coverage is binding under South Carolina Code § 38-77-350(B). 17

 B. To the extent reformation is required, it may be made on a vehicle-by-vehicle basis. 18

Conclusion19

TABLE OF AUTHORITIES

Page Number

CASES

<u>Allstate Fire & Cas. Ins. Co. v. Simpson</u> , 152 F. Supp. 3d 487 (D.S.C. 2016).....	9
<u>Allstate Insurance Company v. Estate of Hancock</u> , 345 S.C. 81, 545 S.E.2d 848 (Ct. App. 2001)	4-5, 9
<u>American Mut. Fire Ins. Co. v. Passmore</u> , 275 S.C. 618, 274 S.E.2d 416 (1981).....	8, 10
<u>Burrows v. Nationwide Mut. Ins. Co.</u> , 215 W. Va. 668, 600 S.E.2d 565 (2004).....	6
<u>Cohen v. Progressive N. Ins. Co.</u> , 402 S.C. 66, 737 S.E.2d 869 (Ct. App. 2013).....	17
<u>Durham v. United Companies Fin. Corp.</u> , 331 S.C. 600, 503 S.E.2d 465 (1998).....	13
<u>El-Habr v. Mountain States Mut. Cas. Co.</u> , 626 S.W.2d 171 (Tex. Ct. App. 1981).....	15
<u>Ferreira v. Integon Nat. Ins. Co.</u> , 809 A.2d 1098 (R.I. 2002).....	14
<u>Grier v. AMISUB of S.C., Inc.</u> , 397 S.C. 532, 725 S.E.2d 693 (2012).....	8
<u>Hodges v. Rainey</u> , 341 S.C. 79, 533 S.E.2d 578 (2000).....	5
<u>Holt v. State Farm Mut. Auto. Ins. Co.</u> , 870 F. Supp. 658 (D.S.C. 1994).....	5, 9
<u>Home Health Services, Inc. v. DHEC</u> , 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989).....	9
<u>Jackson v. State Farm Mut. Auto. Ins. Co.</u> , 303 S.C. 321, 400 S.E.2d 492 (1991).....	18-19
<u>Lloyd v. Lloyd</u> , 295 S.C. 55, 367 S.E.2d 153 (1988)	9
<u>Machin v. Carus Corp.</u> , 419 S.C. 527, 799 S.E.2d 468 (2017).....	6
<u>Majors v. Am. Premier Ins. Co.</u> , 334 Ark. 628, 977 S.W.2d 897 (1998).....	6-7
<u>McDonald c. South Carolina Farm Bureau Ins. Co.</u> , 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999)	10-12, 14-15
<u>McDowell v. Travelers Prop. & Cas. Co.</u> , 357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003).....	17
<u>Messerly v. State Farm Mut. Auto. Ins. Co.</u> , 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ill. Ct. App. 1996).....	7-8

<u>Miller v. Doe</u> , 312 S.C. 444, 441 S.E.2d 319 (1994).....	6
<u>Municipal Ass'n of South Carolina v. AT&T Commc'n of Southern States, Inc.</u> , 361 S.C. 576, 606 S.E.2d 468 (2004)	12
<u>Nationwide Mut. Ins. Co. v. Prioleau</u> , 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004)	7
<u>Osborne v. Allstate Ins. Co.</u> , 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995).....	8
<u>Powell v. Ins. Co. of N. Am.</u> , 285 S.C. 588, 330 S.E.2d 550 (Ct. App. 1985).....	10
<u>Rabb v. Catawba Ins. Co.</u> , 339 S.C. 228, 528 S.E.2d 693 (Ct. App. 2000).....	17
<u>Smith v. South Carolina Ins. Co.</u> , 350 S.C. 82, 85, 564 S.E.2d 358, 360 (Ct. App. 2002)	14-15
<u>South Carolina Farm Bureau Mut. Ins. Co. v. Mumford</u> , 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989)	9
<u>State v. Landis</u> , 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).....	5-6
<u>Travelscape, LLC v. S.C. Dep't of Revenue</u> , 391 S.C. 89, 705 S.E.2d 28 (2011).....	6
<u>Traynum v. Scavens</u> , 416 S.C. 197, 786 S.E.2d 115 (2016), <u>reh'g denied</u> (June 17, 2016)	5
<u>USAA Gen. Indem. Co. v. McCullough</u> , No. 5:16-CV- 03110-JMC, 2018 WL 1036211, (D.S.C. Feb. 23, 2018)	10
<u>Wilkinson v. Louisiana Indemnity/Patterson Ins.</u> , 682 So.2d 1296 (La. Ct. App. 1996), <u>writ denied</u> , 695 So.2d 964 (La. 1997).....	16
<u>Withrow v. Pickard</u> , 905 P.2d 800 (Okla. 1995)	15

STATUTES

South Carolina Code Ann. § 38-77-350	1-6, 8-19
South Carolina Code Ann. § 38-77-160	4, 8-9, 11
South Carolina Code Ann. § 38-77-121'	18

OTHER AUTHORITIES

Merriam–Webster Dictionary, http://www.merriam-webster.com/dictionary/applicant	6
---	---

CERTIFIED QUESTIONS

- I. **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”)?**

- II. **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?**

STATEMENT OF THE CASE

The focus of this case is the interpretation of South Carolina Code § 38-77-350. The answers to these certified questions turn upon whether, under South Carolina Code § 38-77-350, a named insured applicant’s rejection of UIM coverage is binding upon all other insureds under the policy, including additional named insureds subsequently added to the applicant’s existing policy.

On November 2, 2017, Progressive Direct Insurance Company (“Progressive”) filed this declaratory judgment action seeking a declaration that the policy it issued to Wayne Reeves does not provide UIM coverage for his son Bryan Reeve’s July 30, 2017 motorcycle accident, such coverage having been validly rejected by Wayne Reeves, the named insured policy applicant. (ECF No. 1). On December 14, 2017, Bryan Reeves filed an answer and counterclaim seeking the following declarations: (1) that Progressive was required to make a meaningful offer of UIM coverage to him when he was added as a named insured to his father’s existing insurance policy; and (2) that he is entitled to reformation of the policy to include UIM coverage in the same amounts as the liability limits for all three motorcycles listed on the policy. (ECF No. 9). On May 10, 2018, the parties filed a Stipulation of Facts. (ECF No. 17). This matter came before the United States District Court for the District of South Carolina on the parties’ cross motions for summary

judgment. (ECF Nos. 18, 20, 20-1). By Order dated July 31, 2018, the District Court certified the above-stated questions of law to this Court. (ECF No. 27). By Order dated September 25, 2018, this Court accepted certification of these questions. (ECF No. 34).

The facts of the case are undisputed and were set forth in a Stipulation of Facts, which the parties filed with the District Court. (ECF No. 17). In 2012, Progressive issued a motorcycle insurance policy to Wayne Reeves (“Wayne”). (ECF No. 17 ¶ 2). The policy was issued based on the completion and execution of an online policy application and accompanying optional coverages offer form (“Offer Form”), which were completed by Wayne or his wife, Jenifer Reeves (“Jenifer”), acting as Wayne’s express and implied agent. (*Id.*). On the Offer Form, Wayne rejected optional UIM coverage. (ECF No. 17 ¶¶ 3, 7). The Offer Form satisfied the safe-harbor requirements of South Carolina Code § 38-77-350. (ECF No. 17 ¶ 3). This policy was renewed five times and remained in effect from its inception up through and including July 30, 2017, which is the date of the motorcycle accident for which Bryan Reeves (“Bryan”) now seeks UIM coverage under this policy. (ECF No. 17 ¶ 8).

Initially, Wayne was the only named insured on the policy, and his motorcycle was the only vehicle listed on the policy. (ECF No. 17 ¶ 2). In 2015, Jenifer and Bryan were added to the policy as “drivers and household residents.” (ECF No. 17 ¶ 4). On May 19, 2017, Bryan’s status on the existing policy was changed from listed driver to second named insured because he was the owner of a 2016 Harley Davidson motorcycle that was added to the policy. (ECF No. 17 ¶ 5). Because this was merely a change to Wayne’s existing policy, no new offer of optional coverage was made. (ECF No. 17 ¶ 7).

On July 30, 2017, Bryan was involved in a motor vehicle accident while driving the 2016 Harley Davidson. (ECF No. 17 ¶ 5). Throughout the life of the policy, various motorcycles were

added and removed from the policy. (*See* ECF No. 17). At the time of the accident, the policy listed three motorcycles – one owned by Wayne, one owned by Jenifer, and one owned by Bryan. (ECF No. 17 ¶ 12). Wayne remained the first named insured on the policy from inception through the date of the accident. (ECF No. 17 ¶ 13). Wayne was the only named insured to apply for this policy. (ECF No. 17 ¶ 2).

ARGUMENT

Through the enactment of South Carolina Code § 38-77-350, the General Assembly created a safe harbor to protect insurers that comply with the statute from reformation actions. By its plain terms, the statute requires UIM coverage to be offered to policy “applicants” and makes the named insured applicant’s rejection of UIM coverage binding on all other insureds under the policy. Here, as the Defendant admits, Progressive made a statutorily-compliant meaningful offer of UIM coverage to Wayne – the named insured applicant. Therefore, under the plain terms of South Carolina Code § 38-77-350, Wayne’s rejection of UIM is binding on all other insureds under his policy – including Bryan.

Moreover, it is undisputed that Progressive made a statutorily-compliant meaningful offer of UIM coverage when it first issued the policy. It is also undisputed that the policy remained in effect from inception through the date of the accident at issue. The only relevant change that took place between the meaningful offer made at the inception of the policy and the date of the accident was the addition of Bryan Reeves as an additional named insured to the existing insurance policy. South Carolina Code § 38-77-350(C) specifically provides that an insurer is not required to make a new UIM offer “on any automobile insurance policy which renews, extends, *changes*, supersedes, or replaces an *existing policy*.” S.C. Code § 38-77-350(C) (emphasis added). Adding Bryan Reeves as a second named insured to Wayne’s pre-existing policy was a mere change to the

existing policy as contemplated by the General Assembly in South Carolina Code § 38-77-350(C). Therefore, Progressive was not required to make an additional UIM offer, having already made a meaningful offer to Wayne.

In the alternative, the policy should not be reformed to include UIM coverage on Wayne's and Jenifer's motorcycles, as Wayne's rejection of UIM coverage is binding as to these vehicles and Bryan lacks any insurable interest in these vehicles.

I. Under South Carolina Code § 38-77-350, the policy applicant's rejection of UIM coverage is binding on all insureds under an existing policy of insurance.

South Carolina Code § 38-77-160 requires automobile insurance carriers to "offer, at the option of the insured," optional UM and UIM coverage "up to the limits of the insured's liability coverage." S.C. Code § 38-77-160. In order to protect insurance carriers from claims that no such offer was made and to clarify to whom such offers must be made, the General Assembly created a safe harbor statute in South Carolina Code section 38-77-350. Specifically, South Carolina § 38-77-350(A) – (B) provides:

(A) The director 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. This form must be used by insurers for *all new applicants*.

(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.

S.C. Code § 38-77-350(A) – (B) (emphasis added). As the Court of Appeals in *Allstate Insurance Company v. Estate of Hancock* explained:

[R]equiring the [offer] form be executed by the *named insured who is the applicant* is consistent with the language in section 38-77-350(A) requiring the form be used "for all new applicants." Accordingly, we hold that the form offering UIM coverage

on a new policy of automobile insurance *must be completed by the named insured who is the applicant.*

345 S.C. 81, 87, 545 S.E.2d 845, 848 (Ct. App. 2001) (emphasis added). Thus, under the plain terms of § 38-77-350, the applicant named insured's rejection of UIM coverage is binding on all other insureds under the applicant's existing insurance policy. This reading of the statute comports with the legislative intent as embodied by the plain terms of the statute.

A. By its plain terms, South Carolina Code § 38-77-350 grants a safe harbor to insurers who make a compliant offer of optional coverages to policy “applicants” – not all named insureds.

As this Court has recognized: “Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Id.* (citations omitted). In addition, “[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). The purpose of South Carolina Code § 38-77-350 was to create a safe harbor for insurers. *Traynum v. Scavens*, 416 S.C. 197, 202, 786 S.E.2d 115, 118 (2016), *reh'g denied* (June 17, 2016) (“After *Wannamaker*, the General Assembly enacted section 38–77–350 of the South Carolina Code as a safe-harbor provision.”); *see also Holt v. State Farm Mut. Auto. Ins. Co.*, 870 F. Supp. 658, 666 (D.S.C. 1994) (holding insurer “should be allowed to rely on the protection afforded insurers” by South Carolina Code § 38-77-350).

Going step-by-step through the statutory language, first when describing to whom insurers are to “offer[] optional coverages required to be offered pursuant to law,” the statute requires

insurers to make such offer to “all new applicants.” S.C. Code § 38-77-350(A). Elsewhere in the statute, the legislature used the term “named insured” but not when describing to whom insurers are required by law to offer optional coverages – where it uses the term “applicant.” See *Machin v. Carus Corp.*, 419 S.C. 527, 545, 799 S.E.2d 468, 477 (2017) (“The legislature's use of two separate terms makes clear that it intended two separate meanings.”).

The South Carolina Motor Vehicle Financial Responsibility Act does not define the term “applicant.” “When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. This Court must apply clear and unambiguous terms of a statute according to their literal meaning.” *Landis*, 362 S.C. at 102, 606 S.E.2d at 505; see *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) (“In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning.”).¹ Merriam-Webster defines “applicant” as “one who applies.” Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/applicant>. Using this accepted meaning of the word applicant: “The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to [ones who apply] for automobile insurance policies.” S.C. Code § 38-77-350(A). Here, it is undisputed that Bryan never applied for the Progressive insurance policy. (ECF No. 17, Stipulation of Fact ¶ 15).

Numerous courts in other states also have UIM statutes that use the term “applicant” and give the term its ordinary meaning, recognizing the practical realities of how families apply for insurance policies. See, e.g., *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 675-76, 600 S.E.2d 565, 572-73 (2004); *Majors v. Am. Premier Ins. Co.*, 334 Ark. 628, 632, 977 S.W.2d 897,

¹ See also *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) (“When faced with an undefined statutory term, the Court must interpret the term in accordance with its usual and customary meaning.”).

900 (1998). The Illinois Court of Appeals interpreted the term “applicant” in this way in *Messerly v. State Farm Mutual Automobile Insurance Company*, 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ill. Ct. App. 1996) (which the South Carolina Court of Appeals cited in *Nationwide Mutual Insurance Company v. Prioleau*, 359 S.C. 238, 243, 597 S.E.2d 165, 168 (Ct. App. 2004)). In *Messerly*, the claimant was a named insured on the policy, but her husband handled the insurance transaction. 277 Ill. App. 3d at 1066, 662 N.E.2d at 148-49. Because only her husband received an offer and rejected optional coverage, the claimant sought to reform the policy arguing that the insurer had a duty to make an offer to “all named insureds.” *Id.*

The Illinois Court of Appeals rejected this contention, holding instead that the named insured that applies for the insurance policy can receive the offer and reject coverage and that his rejection of coverage binds all other insureds on the policy regardless of whether they are named insureds. *Id.* at 1070-71, 662 N.E.2d at 151-52. The Court of Appeals reasoned, “[b]oth 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.” *Id.* Therefore, because the common practice is for one insured to apply for the policy on behalf of all insureds, that same insured’s rejection of coverage binds all insureds under the policy.

Moreover, the Illinois Court of Appeals addressed the impracticality of a rule requiring that each named insured receive an offer and sign a written rejection:

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 customers benefit. . . . An offer of UM coverage was made as required by the statute and, as the applicant and a named insured, [the Husband] rejected the offer, thereby binding all insureds under the policy.

Id. The *Messerly* decision appropriately recognizes the practical realities of how family insurance policies are procured and interprets the legislative intent of the word “applicant” accordingly. In the same way, the use of the word “applicants” in § 38-77-350(A) reflects the General Assembly’s intent to provide a practical method for insurers to extend an offer of optional coverage to the individual named insured with whom they actually enter into the insurance contract and allows the rejection by that applicant to bind all other insureds.

As this Court instructed, “[i]t is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute’s plain language.” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695–96 (2012). Here, having only new applicants be offered UIM coverage is not “a result so patently absurd that the General Assembly could not have intended it.” In fact, as described above, numerous states’ courts have done just that, and application of the literal meaning of “applicant” comports with the practical realities of how families apply for insurance policies. In addition, any person with an insurable interest in a vehicle is entitled to apply for his or her own policy of insurance. If he or she does so, such person is entitled to his/her own offer of UIM coverage under the plain terms of South Carolina Code § 38-77-350. *See American Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 620, 274 S.E.2d 416, 417 (1981) (“Liability insurance, like other forms of insurance, must be supported by an insurable interest in the named insured.”).² Therefore, since the plain

² “Sections 38-77-160 and 38-77-350 cover the same subject matter, i.e., the offer of optional insurance coverages for automobiles, and, therefore, must be construed together and as explanatory of each other.” *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 484, 462 S.E.2d 291, 294 (Ct. App. 1995). Section 38-77-160 requires insurers to “offer, at the option of **the insured**, underinsured motorist coverage up to the limits of the insured liability coverage...” S.C. Code § 38-77-160 (emphasis added). Like § 38-77-350, this statute does not use the phrase “named insured” when stating to whom such offer is to be made, even though such phrase is used elsewhere in § 38-77-160. S.C. Code § 38-77-160. By using the term “applicants” rather than “all named insureds,” the General Assembly clarified the offer requirement in § 38-77-160 by mandating that the offer be

language of South Carolina Code § 38-77-350(A) does not lead to “a result so patently absurd that the General Assembly could not have intended it,” the inquiry into legislative intent ends with the plain language of the statute. This language protects an insurer from liability to other insureds once it has made a compliant offer of optional coverage to the policy “applicant.”³ S.C. Code § 38-77-350. “Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.” *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

made to the individual named insured who undertakes the application process and submits the application. *Estate of Hancock*, 345 S.C. at 87, 545 S.E.2d at 848 (stating that term “insured” used in § 38-77-160 cannot mean any insured but “requiring the form be executed by *the named insured who is the applicant* is consistent with the language in section 38-77-350(A) requiring the form be used ‘for all new applicants.’” (emphasis added)). The way to construe the two statutes together to produce a single harmonious result is to require that named insured applicants be offered optional coverages, not to require all named insureds to be offered optional coverages. *See Home Health Services, Inc. v. DHEC*, 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989) (stating that statutes which deal with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result). Otherwise, such an interpretation would undermine the legislature’s use of the term “applicant” in § 38-77-350, the later enacted statute. *See Holt*, 870 F. Supp. at 666 (comparing § 38-77-160 and § 38-77-350 and stating “as a general rule, later legislation takes precedence over earlier enacted legislation” (citing *Lloyd v. Lloyd*, 295 S.C. 55, 367 S.E.2d 153, 155 (1988))).

Moreover, those South Carolina cases that have found a second named insured was entitled to an offer of optional coverage all involved second named insureds who were also policy applicants. *See, e.g., Allstate Fire & Cas. Ins. Co. v. Simpson*, 152 F. Supp. 3d 487, 493 (D.S.C. 2016) (“Joseph was also an applicant on the Policy.”).

³ The remainder of the statutory language of South Carolina Code § 38-77-350 also supports this view of the legislative intent. Section (C) of that statute states an 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*.” S.C. Code § 38-77-350(C). This section is easily read together with Section (A) because when there is an “existing policy” there is no new “applicant” to whom an insurer could be required to make an offer of optional coverages.

B. Under the facts of *McDonald v. South Carolina Farm Bureau Ins. Co.*, its result complies with the statutory language of South Carolina Code § 38-77-350, despite the additional language in the case.

As in *McDonald*, where a new policy is created, there is necessarily a “new applicant” thereby requiring an offer of UIM coverage in accordance with the plain language of South Carolina Code § 38-77-350. In *McDonald*, the South Carolina Court of Appeals answered the specific question of whether the safe harbor created by Section 38-77-350 applied when a mother, who had received a compliant offer of UIM coverage, transferred both her vehicle *and the insurance policy* to her son, thus substituting the son for the mother as the named insured. The mother in *McDonald* had an auto policy insuring a single vehicle. 336 S.C. 120, 122, 518 S.E.2d 624, 625 (Ct. App. 1999). Several years after the policy was issued, she sold her vehicle to her non-resident son, thereby voiding her auto policy as she no longer had an insurable interest in the vehicle. *Id.*⁴ The mother was then removed from the policy and her son was substituted as the named insured. *Id.* at 122, 518 S.E.2d at 625.

Despite the son being substituted as the sole named insured and paying a membership fee to the insurance company, the insurer did not have him complete any application for coverage or offer him UIM coverage. *Id.* The court rejected the insurer’s argument that substitution of the son for the mother as the named insured was a “change” to an “existing policy” within Section 38-77-350(C). As the court explained:

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.

⁴ *Passmore*, 275 S.C. at 620, 274 S.E.2d at 417 (1981) (“[I]nsurance must be supported by an insurable interest in the named insured.”); *Powell v. Ins. Co. of N. Am.*, 285 S.C. 588, 589–90, 330 S.E.2d 550 (Ct. App. 1985) (“In this country, it is a rule of law that one cannot insure for his own benefit the property of another in which he has no interest.”); *USAA Gen. Indem. Co. v. McCullough*, No. 5:16-CV-03110-JMC, 2018 WL 1036211, at *4 (D.S.C. Feb. 23, 2018) (holding auto policy void where vehicle owned by non-resident son rather than named insured).

Id. at 125, 518 S.E.2d at 626. Because the court held there was a new policy, the safe harbor created by Section 38-77-350(C) did not apply. Here, Bryan concedes that this case does not involve the creation of a new policy. (ECF No. 21, p. 2 (“[A] new policy was not issued in this case...”). Unlike in *McDonald*, Bryan was not substituted for his father on the Progressive policy, and Wayne continued to have an insurable interest in vehicles listed on his “existing policy.” (ECF No. 17 ¶¶ 12-13)

To the extent the additional language of the Court of Appeals in *McDonald* can be read to apply to cases where an existing policy is at issue, such language conflicts with the plain language of South Carolina Code § 38-77-350. Before reaching the above-described ultimate issue, the Court of Appeals in *McDonald* addressed whether there was any inconsistency between the term “new applicant” in Section 38-77-350(A) and the term “insured” in Section 38-77-160. *Id.* at 124, 518 S.E.2d at 626. 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.*⁵ As the District Court in this case recognized: “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.” (ECF No. 27, Order Certifying Questions, p. 7) (emphasis in orig.).

As shown above, for an insurer to be entitled to the statute’s safe harbor, the plain language of South Carolina Code § 38-77-350 only requires that “applicants” for an insurance policy be

⁵ See discussion *supra* note 2 (addressing proper way to construe the two statutes together to produce a single harmonious result that does not ignore the plain language used by the legislature in each statute).

offered optional coverages, not all named insureds added to an existing policy. S.C. Code § 38-77-350. The statute itself makes this legislative intent even more apparent where § 38-77-350(B) requires a singular named insured to sign the offer form and states that insured's signature is binding on all other insureds. S.C. Code § 38-77-350 (B) ("If this form is signed by *the named insured*...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." (emphasis added)). In further support, § 38-77-350(C) states an insurer is not required to make a new offer of optional coverage "on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an *existing policy*." S.C. Code § 38-77-350(C) (emphasis added). If the legislature had intended for all named insureds to be offered optional coverages, it could have simply used the phrase "all named insureds" in § 38-77-350, rather than the term the legislature actually used – "applicant."⁶

Essentially, the statute creates a process where the UIM offer form is offered once for

⁶ The court in *McDonald* opined that: "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." *McDonald*, 336 S.C. at 124, 518 S.E.2d at 626. However, under subsection (C) of South Carolina § 38-77-350, the legislature had already made clear through the use of the specific terms "renew" and "existing policy" that those who "previously had made informed decisions about UIM coverage" were not entitled to another offer. *See* S.C. Code 38-77-350(C) (stating that an insurer is not required to make a new offer of optional coverage "on any automobile insurance policy which *renews*, extends, changes, supersedes, or replaces an *existing policy*."). To read the term "applicant" in subsection (A) of § 38-77-350 as having the same purpose ignores the plain meaning of that term and resorts to a forced construction of the term to limit the statute's operation as a safe harbor. *See Municipal Ass'n of South Carolina v. AT&T Commc'n of Southern States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) ("[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.").

each policy at the same time that the applicant applies for the policy. *See* S.C. Code § 38-77-350. Here, the action of changing Bryan from a listed driver to a named insured did not create a new policy of insurance. It is undisputed that the Progressive policy remained in effect from its inception date through the date of the accident with the policy applicant, Wayne Reeves, as the first named insured. (ECF No. 17 ¶¶ 2, 5, 8, 13). Therefore, applying the additional language of *McDonald*, which was not essential to its result, to the facts of this case would conflict with the legislative intent of § 38-77-350, as embodied in the statute's plain terms. *See Durham v. United Companies Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998) (“In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.”).

By its plain terms, South Carolina Code § 38-77-350 grants a safe harbor to insurers who make a compliant offer of optional coverages to policy “applicants,” by making the named insured “applicant's” rejection binding on all insureds under an existing policy. S.C. Code § 38-77-350(A)-(B). To interpret the statute as Defendant suggests – requiring all named insureds added to existing policies to be offered UIM coverage – is a forced construction of the statute, which limits its operation as a safe harbor and ignores its plain terms.

II. The change in an insured's status from resident relative to named insured on an existing policy is a “change” under South Carolina Code § 38-77-350(C) and, consequently, does not require an additional offer of optional coverages.

South Carolina Code § 38-77-350(C) also makes clear that Bryan, as an insured whose status was changed on an existing policy, was not entitled to a separate offer of optional coverages.

Section (C) provides:

(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*.

S.C. Code § 38-77-350(C) (emphasis added). Because the act of changing Bryan’s status from resident relative to named insured on Wayne’s policy did not result in the creation of a new policy, it is a “change” within the meaning of § 38-77-350(C).

A similar factual scenario was addressed by the Supreme Court of Rhode Island in *Ferreira v. Integon Nat. Ins. Co.*, 809 A.2d 1098 (R.I. 2002). In that case, Natalia Lopes was originally the named insured on the policy. Lopes declined UM coverage by executing a rejection notice and warning form, as required under Rhode Island law. *Id.* at 1099. She then married Leno Ferreira, who was added as a named insured to Lopes’ policy. *Id.* The insurer did not obtain a new signed rejection. Like in South Carolina, Rhode Island statutes require a written rejection of optional coverage at the time an application for insurance is made. *Id.* at 1100-1101 (citing R.I. Gen. Laws § 27-7-2.1(a)). However, after an initial rejection is signed, the Rhode Island law does not require an additional written rejection for a subsequent “renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy.” *Id.* at 1101 (citing R.I. Gen. Laws § 27-7-2.1(d)). The Supreme Court held that the addition of the husband as a named insured “changed the policy’s terms, but did not represent the new issue or delivery of a policy.” *Id.* Because the addition of a named insured was merely a “change” to the existing policy, the original rejection remained binding upon both named insureds. *Id.* The Supreme Court rejected the argument that a new offer should be made under these circumstances, noting that a change “that would impose this arguably onerous burden on insurers should be made by duly enacted legislation.” *Id.*

The “change” at issue in this case – changing a listed driver on an existing policy to a named insured – is much more similar to the “change” in *Smith* than to the termination of the existing policy and creation of a new policy in *McDonald*. In *Smith v. South Carolina Insurance Company*, the insured added another vehicle to an existing insurance policy. 350 S.C. 82, 85, 564

S.E.2d 358, 360 (Ct. App. 2002). After an auto accident, the insured sought reformation of the policy arguing that the addition of another vehicle to the existing insurance policy required an additional offer of UIM coverage. *Id.* The court held that the addition of another vehicle to an existing policy constituted a “change” in coverage within the meaning of South Carolina Code § 38-77-530(C), such that the insurer was not required to make an additional offer of UIM coverage. *Id.* at 88, 564 S.E.2d at 362.

The critical distinction is whether the act at issue is merely a change to an existing policy or whether it results in the creation of a new policy. *See Smith*, 350 S.C. 82, 89, 564 S.E.2d 358, 362 (Ct. App. 2002) (*comparing El-Habr v. Mountain States Mut. Cas. Co.*, 626 S.W.2d 171, 172 (Tex. Ct. App. 1981) (holding an endorsement to an existing insurance policy which added a new vehicle “did not create a new contract of insurance, but was merged with and became a part of the original policy”), *with Withrow v. Pickard*, 905 P.2d 800 (Okla. 1995) (noting the addition of a vehicle constitutes a new policy distinct from the original which requires that uninsured coverage be offered in conjunction with the new vehicle)). The plain language of the statute states that an “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*.” S.C. Code § 38-77-350(C) (emphasis added).

Like in *Smith*, here the Progressive policy is an existing policy under which a meaningful offer of UIM coverage was already made to the policy applicant. (ECF No. 17 ¶¶ 2-3). The act of transferring Bryan from a listed driver on the policy to an additional named insured did not terminate the existence of the original policy or create a new policy. In contrast, in the *McDonald* case, the mother’s combined acts of selling the only listed vehicle to her son, removing herself from the policy and substituting her son as named insured were “not a mere policy change” but

resulted in “the creation of a new insurance policy with a new named insured.” 336 S.C. at 125, 518 S.E.2d at 626. Here, Wayne maintained an insurable interest in a motorcycle listed on the Progressive policy, and the policy under which Bryan seeks coverage is his father’s existing policy. (ECF No. 17 ¶¶ 8, 13). Thus, the act at issue is a “change” under South Carolina Code § 38-77-350(C) and not the creation of a new policy as in *McDonald*.⁷ In accordance with South Carolina Code § 38-77-350(C), Progressive was not required to make a new offer of coverage for this change to an existing policy.

III. In the alternative, the policy should not be reformed to include UIM coverage on Wayne and Jenifer Reeves’ vehicles, such coverage having been validly rejected by Wayne Reeves.

Despite Bryan’s admission that Wayne Reeves signed a valid UIM offer form rejecting such coverage for his motorcycle and the other vehicles listed on his policy, Defendant not only seeks reformation to include UIM coverage on his motorcycle but also on Wayne and Jenifer Reeves’ motorcycles. (ECF No. 9 ¶ 18); (ECF No. 21 p. 5).⁸ Under these circumstances, it would be improper to allow reformation of the policy to include UIM coverage on Wayne and Jenifer Reeves’ vehicles.

⁷ See also *Wilkinson v. Louisiana Indemnity/Patterson Ins.*, 682 So.2d 1296 (La. Ct. App. 1996), writ denied, 695 So.2d 964 (La. 1997) (holding addition of named insured to husband’s existing policy “did not constitute a new policy requiring the execution of a separate UM selection/rejection form” where statute provided that after initial valid rejection of optional coverage, rejection remains valid for renewal, reinstatement, or substitute policies (citing LSA-R.S. 22:1406(D)(1)(a)(i)).

⁸ As the parties have stipulated, Wayne, either personally or through his agent Jenifer, rejected UIM coverage by executing the Progressive Offer Form, which satisfied the requirements of South Carolina Code § 38-77-530(A). (ECF No. 17, Stipulation of Facts ¶¶ 2-3). At all relevant times, Jenifer Reeves was a “driver and household resident” on the policy. (ECF No. 17, Stipulation of Facts ¶ 4); (ECF No. 1-4, Declarations Page). At the time of the accident, the policy listed three motorcycles as insured vehicles – one owned by Wayne, one owned by Jenifer, and one owned by Bryan. (ECF No. 17 ¶ 12).

A. As to Wayne and Jenifer Reeves' motorcycles, Wayne's rejection of UIM coverage is binding under South Carolina Code § 38-77-350(B).

Bryan neither owned nor controlled Jenifer of Wayne's motorcycles, and the owners of those vehicles are bound by Wayne's rejection of UIM coverage. The Progressive policy explicitly provides that "[t]he action of one named insured will be binding on all persons provided coverage under this policy." (ECF No. 20-3, Policy Excerpts p. 30). Wayne Reeves, the first named insured on the policy, specifically rejected UIM coverage and never paid premiums for such coverage. (ECF No. 17 ¶¶ 2-3). In accordance with the policy terms and South Carolina law, Wayne Reeves' rejection was binding on Jenifer Reeves' vehicle, as she was listed as a "driver and household resident" on the policy at all applicable times. Numerous South Carolina courts have held that the applicant/named insured's rejection of UIM coverage is binding as to that person and other non-named insureds under the policy. *See, e.g., Rabb v. Catawba Ins. Co.*, 339 S.C. 228, 230, 528 S.E.2d 693, 693 (Ct. App. 2000); *Cohen v. Progressive N. Ins. Co.*, 402 S.C. 66, 69, 737 S.E.2d 869, 870 (Ct. App. 2013) (where claim brought by husband and wife, finding of rejection of meaningful offer of UIM coverage by applicant husband was binding on husband and wife); *McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 125, 590 S.E.2d 514, 517 (Ct. App. 2003) (holding applicant/named insured employer's rejection of UIM coverage was binding on insured employee).

South Carolina Code § 38-77-350(B) specifically provides that if the named insured signs a conforming UIM offer form, "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." (emphasis added). S.C. Code § 38-77-350(B). To allow reformation of the UIM policy limits of these two vehicles would be to allow Bryan to accept the benefit of being on a multi-vehicle policy comprised of others' vehicles without also accepting the

coverage decisions another named insured has made for his own vehicles.⁹ Reformation of the policy to this extent would create liability for Progressive that South Carolina § 38-77-350(B) specifically prevents.

B. To the extent reformation is required, it may be made on a vehicle-by-vehicle basis.

An analogous Supreme Court case, *Jackson v. State Farm Mut. Auto. Ins. Co.*, demonstrates that the presence or absence of a meaningful offer may be determined on a vehicle-by-vehicle basis. 303 S.C. 321, 400 S.E.2d 492 (1991). In this case, Andrea Jackson owned four vehicles insured with State Farm: (1) a 1977 Dodge, (2) a 1971 Datsun, (3) a 1947 Chevrolet, and (4) a 1972 Chevrolet. *Id.* at 322, 400 S.E.2d at 492. As is State Farm's practice, each vehicle was listed on a separate policy. *Id.* None of the vehicles had UIM coverage. *Id.* at 323, 400 S.E.2d at 492. When Mrs. Jackson was injured in an auto accident, she filed an action against State Farm seeking reformation to include UIM coverage on each vehicle. "[T]he Court of Appeals was faced with whether State Farm had made a meaningful offer of underinsured motorists coverage as to her four vehicles." *Id.* at 325, 400 S.E.2d at 494. The Court of Appeals found that "State Farm had not made a meaningful offer of underinsured coverage as to the 1971 Datsun" and ordered reformation to include UIM coverage "on that vehicle." *Id.* at 323, 400 S.E.2d at 493. The Court of Appeals failed to address "whether State Farm made a meaningful offer of underinsured motorist coverage on the other three vehicles", and this Court granted certiorari on this issue. *Id.* "As to each of these three vehicles," this Court found that State Farm had made a meaningful offer

⁹ Some of these benefits include, but are not limited to, multi-vehicle premium discounts, policies of first-time accident forgiveness that are extended to long-term insureds, as well as a prohibition against cancellation and nonrenewal. *See* (ECF No. 1-2 (policy declarations page listing multi-vehicle discount)); S.C. Code § 38-77-121 (allowing for cancellation without cause during first 90 days policy is in effect).

of UIM coverage and denied reformation, despite reformation being granted for one of Ms. Jackson's vehicles. *Id.* at 325, 400 S.E.2d at 494.

As demonstrated by this case, once an insurer has made a meaningful offer with regard to an insured's vehicle, reformation as to that vehicle is not appropriate even if the insurer has not made a meaningful offer of UIM coverage for another vehicle. This is even more so the case here where Defendant does not own the other two motorcycles at issue and has no insurable interest in those two motorcycles. (*See* ECF No. 17 ¶ 12). Progressive received a valid rejection from Wayne for his and his wife's motorcycles, and reformation as to these two vehicles would be improper. (*See* ECF No. 17 ¶¶ 7, 12).

CONCLUSION

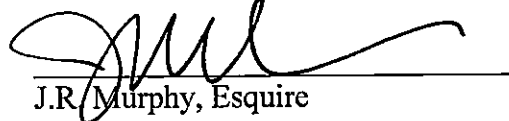
For the above-stated reasons, this Court should answer "Yes" to the first certified question. The plain language of South Carolina Code § 38-77-350 requires insurers to offer UIM coverage to "applicants" and makes the named insured applicant's rejection binding on all other insureds under the policy, without any exception for subsequently added named insureds. Thus, any addition of a named insured to an existing policy is a "change," as contemplated by the General Assembly in South Carolina Code § 38-77-350(C), such that no additional offer of UIM coverage is required.

For the above-stated reasons, this Court should either declare the second certified question moot or also answer "Yes" to the second certified question. As to Wayne and Jenifer Reeves' vehicles, Wayne's rejection is binding, and Bryan must accept his fathers' coverage determinations as to these two vehicles in which Bryan lacks any insurable interest.

[Signature Page to Follow]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'JRM', is written over a horizontal line.

J.R. Murphy, Esquire

S.C. Bar # 7941

Megan Walker, Esquire

S.C. Bar # 103069

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Plaintiff

Columbia, South Carolina
November 20, 2018

RECEIVED

NOV 21 2018

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Cameron McGowan Currie, Senior United States District Judge

Appellate Case No. 2018-001436


Progressive Direct Insurance Company.....Plaintiff,

v.

Bryan Reeves.....Defendant.

CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Plaintiff, certify that the Plaintiff's Opening Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



J.R. Murphy, Esquire
S.C. Bar No. 7941
Megan Walker, Esquire
S.C. Bar No. 103069
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Plaintiff

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

NOV 21 2018

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA S.C. SUPREME COURT

Cameron McGowan Currie, Senior United States District Judge

Appellate Case No. 2018-001436

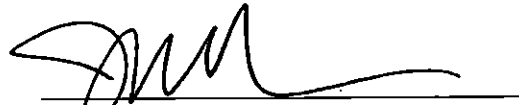
Progressive Direct Insurance Company.....Plaintiff,

v.

Bryan Reeves.....Defendants.

PROOF OF SERVICE

I certify that I have served the Opening Brief on Bryan Reeves by depositing a copy of it in the United States Mail, postage prepaid, on November 21, 2018, addressed to his attorneys of record, William R. Padget, Esquire and Carl D. Hiller, Esquire, Finkel Law Firm, LLC, Post Office Box 1799, Columbia, SC 29202.



J.R. Murphy, Esquire
S.C. Bar No. 7941
Megan Walker, Esquire
S.C. Bar No. 103069
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Plaintiff