

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2007-CP-23-6453

RECEIVED

JAN 17 2013

SC Court of Appeals

Douglas Earl Stiltner and
Christine Rene Stiltner, Appellants,

v.

USAA Casualty Insurance Company, Respondent.

INITIAL BRIEF OF APPELLANTS

Blake A. Hewitt, SC Bar # 73674
John S. Nichols, SC Bar # 4210
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

 I. Whether the Circuit Court Erred in Finding That Doug Stiltner Authorized His Wife to Reject USAA’s Meaningful Offer of Underinsured Motorist Coverage.

 II. Whether the Circuit Court Erred in Finding That Doug Stiltner Ratified His Wife’s Rejection of USAA’s Meaningful Offer of Underinsured Motorist Coverage.

Statement of the Case 1

Standard of Review 4

Argument 5

 I. This Court Should Reverse the Circuit Court’s Finding That Doug Stiltner Authorized His Wife to Reject USAA’s Meaningful Offer of Underinsured Motorist Coverage 6

 A. Any Authority Renee Stiltner Had with Respect to Doug’s Policy Was Express, Not Implied, and this Supposed Authority — the Power to *Not* Change the Policy — Is Nonsensical 6

 B. There Is No Evidentiary Basis for the Finding That Renee’s Actions Did Not Change Doug’s Insurance Policy 8

 C. There Is No Reasonable Basis in Evidence for Finding as a Fact That Doug and Renee Discussed Renee’s Interaction with USAA 11

 II. Doug’s Review of His Subsequent “Declaration Pages” Cannot Establish the “Full Knowledge of the Facts” Prong of Ratification 14

Conclusion 16

TABLE OF AUTHORITIES

Cases

<i>Atkins v. Horace Mann Ins. Co.</i> , 376 S.C. 625, 658 S.E.2d 106 (Ct. App. 2008)	4,5
<i>Barber v. Carolina Auto Sales</i> , 236 S.C. 594, 115 S.E.2d 291 (1960)	14
<i>Burch v. S.C. Farm Bureau</i> , 351 S.C. 342, 569 S.E.2d 400 (Ct. App. 2002)	15
<i>Butler v. Unisun Ins. Co.</i> , 323 S.C. 402, 475 S.E.2d 758 (1996)	5
<i>City of Greenville v. Washington Am. League Baseball Club</i> , 205 S.C. 495, 32 S.E.2d 777 (1945)	7
<i>Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.</i> , 395 S.C. 40, 717 S.E.2d 589 (2011)	4
<i>Felts v. Richland County</i> , 303 S.C. 354, 400 S.E.2d 781 (1991)	4
<i>Fernander v. Thigpen</i> , 278 S.C. 140, 293 S.E.2d 424 (1982)	6
<i>Floyd v. Nationwide Mut. Ins. Co.</i> , 367 S.C. 253, 626 S.E.2d 6 (2005)	13
<i>Gastineau v. Murphy</i> , 331 S.C. 565, 503 S.E.2d 712 (1998)	10
<i>Lincoln v. Aetna Cas. & Sur. Co.</i> , 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989)	14
<i>Mathis v. State Farm Mut. Auto. Ins. Co.</i> , 315 S.C. 71, 431 S.E.2d 619 (Ct. App. 1993)	4
<i>Mebane v. Taylor</i> , 164 S.C. 87, 162 S.E.65 (1932)	14
<i>Nationwide Mut. Ins. Co. v. Prioleau</i> , 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004)	5
<i>State Farm Mut. Auto. Ins. Co. v. Wannamaker</i> , 291 S.C. 518, 354 S.E.2d 555 (1987)	5, 15
<i>Stiltner v. USAA Cas. Ins. Co.</i> , 395 S.C. 183, 717 S.E.2d 74 (Ct. App. 2011)	3, 8, 11, 15

Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) 5

Statutes and Other Authorities

S.C. Code Ann. § 38-77-160 () 15

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court Erred in Finding That Doug Stiltner Authorized His Wife to Reject USAA's Meaningful Offer of Underinsured Motorist Coverage.
- II. Whether the Circuit Court Erred in Finding That Doug Stiltner Ratified His Wife's Rejection of USAA's Meaningful Offer of Underinsured Motorist Coverage.

STATEMENT OF THE CASE

This appeal follows a bench trial in a declaratory judgment involving automobile insurance. Doug and Renee Stiltner brought this lawsuit seeking reformation of Doug's insurance policy with USAA, and the circuit court found against the Stiltners on two grounds. First, the court found Doug authorized Renee to reject USAA's meaningful offer of underinsured motorist ("UIM") coverage. Second, the court found Doug ratified his wife's rejection of UIM.

Doug and Renee Stiltner married in 1998, and they were both seriously injured in an automobile accident that occurred in March of 2007. At the time of the accident, Doug's insurance policy provided liability coverage up to \$100,000 per person, \$300,000 per accident, and \$50,000 in property damage. The policy provided a lower amount of uninsured motorist ("UM") coverage, and it did not provide any UIM coverage.

The Stiltners brought this lawsuit in October of 2007 seeking reformation of Doug's policy to include UIM in the same amount as the liability limits. (Complaint). They also sought to "stack" UIM coverage for the five (5) vehicles covered by the policy. *Id.* Doug is the named insured on the insurance policy; Renee is not.

USAA answered with a general denial. (Answer).

The case revolves around forms faxed to USAA from Renee's place of employment in October of 2000. On October 17th, Renee appears to have faxed USAA two forms, both of which had inconsistent markings. See (Exhibits 1 & 1a). These forms had handwritten "x" marks indicating selected limits of both UM and UIM, but they also had handwritten check marks indicating rejections of the offers to purchase both coverages. *Id.* Two days later, Renee appears to have faxed the same forms to USAA again. See (Exhibits 2 & 2a). Handwriting had been added to both forms. *Id.* On the UM form, the handwritten check mark was changed from marking "No" to marking "Yes" — thus indicating an election to purchase UM coverage. On the UIM form, the "x" marks selecting limits for UIM coverage were removed and the check mark rejecting this coverage remained in place.

Doug has purchased automobile insurance from USAA for over 20 years. (Trial Tr.p.8, lines 18-19). The October 2000 interactions with Renee are the only evidence USAA presented of any rejection of a meaningful offer of UIM for Doug's policy.

Renee has no recollection of dealing with any USAA insurance forms. (Trial Tr.p.53, lines 23-25). She suffered a brain injury in the 2007 accident, and her injuries affected her memory. (Trial Tr.p.11, lines 19-21; p.52, line 25 - p.53, line 1). Doug insisted that he never asked Renee to have any interaction whatsoever with USAA, see, e.g., (Trial Tr.p.10, line 24 - p.11, line 4), but both Doug and Renee acknowledged that the forms appear to bear Renee's signature. (Trial Tr.p.14, lines 18-21; p.54, lines 1-4).

A great deal of this dispute has involved Doug's testimony that although he always handled the family's automobile insurance, he would not have objected to Renee making decisions on the policy so long as the two had talked first and as long as Renee's decisions

did not change the policy's coverage. See (Trial Tr.p.61, lines 8-23). In 2009, the circuit court granted summary judgment to USAA, finding that this indicated Renee had "authority" to transact matters on Doug's insurance policy. (Order Granting Summary Judgment, pp.6-7). The Stiltners appealed, and this Court affirmed the conclusion that Renee had "implied authority" to deal with Doug's automobile insurance as long as "her actions did not change [Doug's] existing coverage and she consulted [him] before she acted." *Stiltner v. USAA Cas. Ins. Co.*, 395 S.C. 183, 190, 717 S.E.2d 74, 77-78 (Ct. App. 2011). But Doug's deposition testimony also indicated that he never discussed these forms with his wife, and because of this testimony, this Court reversed the grant of summary judgment and remanded the matter for trial. *Id.* at 190-91, 717 S.E.2d at 78.

The bench trial occurred May 8, 2012, and during the trial, Doug produced evidence that his policy previously contained UIM coverage in the same amount as his liability and UM coverages. See (Trial Tr.p.20, lines 7-20); see also (Pl's Ex.3). Doug could not explain why UIM had been removed from his policy or when that change had occurred, see (Trial Tr.p.32, line 25 - p.33, line 11), and Doug maintained that he had never reduced or canceled coverage with USAA. (Trial Tr.p.29, line 23 - p.30, line 8). Doug said that when he raised the liability limits on his policy to \$100,000/\$300,000/\$50,000 — this was sometime in 1999 or 2000 — he thought he was changing the limits of all the coverages on the policy. (Trial Tr.p.28, lines 3-14; p.34, lines 9-12; p.39, lines 16-22).

The circuit court issued a written order finding in favor of USAA. (Or. Granting J. to USAA). The court found that Renee had "implied authority" to make decisions that kept Doug's policy the same, the court found that Renee's UIM form had not changed the

coverage — the UIM had already been dropped, and the court found that Doug and Renee discussed these forms before Renee sent them to USAA. *Id.* at 2-6.

The court also found that Doug ratified Renee's actions by his course of conduct. *Id.* at 6-7. Doug admitted that he received and reviewed numerous "declaration pages" which showed that he did not have UIM coverage, and in the circuit court's view, this satisfied the element of ratification that requires a principal to have full knowledge of a purported agent's acts. *Id.* at 8. The circuit court's order was signed May 17th and filed May 25th.

The Stiltners served a post-trial motion on June 1st, and the circuit court denied that motion in a written order dated June 10th and filed June 13th. See (Mot. to Alter or Amend & for a New Trial or Reconsideration) and (Or. Denying Plaintiffs' Mot. to Alter or Amend & for a New Trial or Reconsideration). The Stiltners received written notice of the entry of this order on June 15th. On Monday, July 16th, they served and filed notice of this appeal.

STANDARD OF REVIEW

This suit is a declaratory judgment, and whether the action sounds in law versus equity is determined by the nature of the underlying controversy. *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

The purpose of this suit is to determine whether coverage exists under an insurance policy. Thus, the action is an action at law. *Crossmann Cmty. of N.C., Inc. v. Harleystown Mut. Ins. Co.*, 395 S.C. 40, 46-47, 717 S.E.2d 589, 592 (2011); *Atkins v. Horace Mann Ins. Co.*, 376 S.C. 625, 629-30, 658 S.E.2d 106, 109 (Ct. App. 2008). Although one previous decision from this Court suggests that this suit sounds in equity because it seeks reformation of an insurance contract, see *Mathis v. State Farm Mut. Auto. Ins. Co.*, 315 S.C. 71, 431

S.E.2d 619 (Ct. App. 1993), this decision appears to be an outlier. This Court's subsequent decisions treat this sort of lawsuit as an action at law. See *Atkins*, 376 S.C. at 630, 658 S.E.2d at 109; and *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). In the same vein, the Supreme Court has consistently described that the "reformation" which occurs in defective meaningful offer cases occurs "by operation of law." *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996); *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 522, 354 S.E.2d 555, 557 (1987).

In an appeal of an action at law that was tried without a jury, the judge's factual findings will be affirmed unless they are without evidence which reasonably supports them. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

ARGUMENT

There are two reasons this Court should reverse the circuit court's judgment.

First, the finding that Doug authorized Renee to execute the forms in question is arbitrary. The conclusion that Renee had "implied authority" to deal with Doug's insurance is incorrect as a matter of law and is not supported by the evidence, and it is entirely possible, if not more than likely, that Renee's actions were the very actions that caused USAA to drop UIM coverage from Doug's policy. If that is the case, Renee exceeded her rather unusual alleged authority — she went beyond her implied authority to make decisions that did not change the policy.

Second, Doug's review of his policy's declaration pages cannot establish the "full knowledge of the facts" prong of ratification. Among other things, those documents did not inform Doug about the purpose of UIM coverage or the available limits of UIM coverage.

USAA's approach thus diminishes the force of South Carolina's meaningful offer jurisprudence, and it grants USAA a win despite the fact that while it is the party with the burden of proof, the details of this transaction remain very sketchy.

I. This Court Should Reverse the Circuit Court's Finding That Doug Stiltner Authorized His Wife to Reject USAA's Meaningful Offer of Underinsured Motorist Coverage.

The circuit court held that Renee had implied authority to reject UIM as long as her rejection did not change Doug's coverage and as long as she and Doug discussed her action beforehand. (Order, pp.2-3). The court then found that both of these conditions were satisfied. *Id.* at 4-6. This Court should hold that none of these findings are correct.

A. Any Authority Renee Stiltner Had with Respect to Doug's Policy Was Express, Not Implied, and this Supposed Authority — the Power to *Not* Change the Policy — Is Nonsensical.

The Court should begin by correcting the previous characterizations of Renee's supposed authority as "implied authority." See (Order, pp.2, 3). Implied authority, also called implied agency, arises when "the conduct of the purported agent exhibit[s] a pretense of authority with the knowledge of the alleged principal." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). This is less its own discreet category of agency and more a description of how the agency relationship, if it exists, is proven. When one person explicitly empowers another to take actions on his or her behalf, that person has expressly created an agency relationship. When there is no such conversation — when there is no express appointment and acceptance of agency authority — an agency relationship might nevertheless be implied because the parties' conduct and the circumstances of the case

indicate that the parties intended to create an agency relationship. This Court's decision in *Nationwide v. Prioleau*, discusses these principles, see 359 S.C. at 242, 597 S.E.2d at 168, and the same is true of the Supreme Court's decision in *City of Greenville v. Washington Am. League Baseball Club*. See 205 S.C. 495, 505, 32 S.E.2d 777, 781 (1945). The terms "express" and "implied" describe the difference between direct and circumstantial evidence of an agency relationship. If there is an explicit granting of authority, the parties have expressly created an agency relationship. If the parties' actions bespeak an agency relationship, the law will imply such a relationship despite the fact that those actions were not accompanied by words.

This record does not describe agency created by implication. Doug testified that although he alone dealt with USAA, it would hypothetically have been acceptable to him if Renee interacted with USAA so long as he and Renee had discussed the interaction beforehand. (Tr.p.61, line 8 - p.62, line 2). This is "express" agency. Doug is saying that it would only be acceptable for Renee to take action if he authorized her to take action. USAA did not present the court with evidence of Doug and Renee's past course of conduct, and USAA did not argue that because of that course of dealing, the law should imply an agency relationship between the Stiltners. Instead, USAA pointed to Doug's after-the-fact testimony that he supposed it would have been acceptable for Renee to deal with USAA so long as he authorized her to do so. This authority required permission; it was not implied.

The Court should also note that this supposed agency is of a rather strange persuasion. According to the circuit court, Renee had implied authority that was conditioned on receiving express authorization from Doug, and this authority consisted of the ability to

make decisions on Doug's policy as long as those decisions did not change the policy's coverage. These were not the circuit court's exact words, but they accurately describe the theory USAA argued and the circuit court adopted.

This authority is really no authority at all — there is not much power in the power to make no changes to something — and power is not implied if it relies on receiving express permission. Moreover, when this hypothetical authority is applied to the present circumstances, it is hard to see how it would be useful for accomplishing anything other than rejecting a meaningful offer of UIM coverage. Doug's testimony does not describe an implied agency. His testimony is the result of an after-the-fact attempt to manufacture a justification for USAA's conduct by using an after-the-fact hypothetical.

The Court should analyze this case in simple terms: Doug either specifically authorized Renee to reject UIM or he did not. The Court's decision should distance itself from the "implied authority" language in the circuit court's order, and the decision should also dismiss the notion of any nonsensical implied authority that relied on express permission and that was limited to making decisions that keep the policy the same.

B. There Is No Evidentiary Basis for the Finding That Renee's Actions Did Not Change Doug's Insurance Policy.

One of the conditions on Renee's authority was that she not change Doug's coverage. (Or.p.2); see also *Stiltner*, 395 S.C. at 190, 717 S.E.2d at 77-78. The circuit court held Renee satisfied this condition, but this Court should reverse that finding as arbitrary and speculative.

In October of 1998, Doug's policy contained both UM and UIM coverages in the same amounts as his liability insurance coverage. See (Pl's Ex. 3). This was roughly two

years before Renee's interactions with USAA, which occurred in October of 2000. The circuit court found that Renee's rejection of UIM in 2000 was not the act that dropped UIM from Doug's policy because the court believed "any number of changes could have been made" to the policy during the two years between October of 1998 and October of 2000. (Or.p.4). The court opined that Doug and Renee's marriage, their subsequent move, their purchase of two vehicles, or Doug's decision to raise the limits of his liability coverage could have triggered a decision by Doug to decline UIM coverage. *Id.* at 4-5.

Some of the circuit court's recitation is inaccurate. For example, Doug and Renee's marriage did not occur in the interim period between the 1998 policy — which ended in April of 1999, see (Pl's Ex.3) — and October of 2000. Doug and Renee got married in 1998. (Trial Tr.p.10, lines 15-16). It would not be reasonably possible for Doug and Renee's marriage to cause Doug to drop UIM after the 1998 policy. When Doug had UIM coverage, he and Renee were already married and Renee was already listed on the policy.¹

The circuit court also recited, twice, that Doug and Renee testified that no changes were made to the policy as the result of Renee's actions. (Or.pp.3, 4). That is not correct. Doug said he did not know whether UIM coverage was on his policy when Renee was corresponding with USAA in October of 2000, see (Trial Tr.p.38, lines 5-8), and the only fair reading of Renee's testimony is that although she did not remember ever dealing with USAA, she did not *think* she would have been trying to change anything on Doug's policy. (Trial Tr.p.57, line 20 - p.58, line 2). Here again, this part of the order is not correct.

¹This portion of the circuit court's judgment appears to contain a typographical error in that it references a period from April of 1999 to October of 2001. See (Or.p.5). Nobody in this litigation has yet attached to significance to any actions occurring in the year 2001.

All of the reasoning on this point was speculative. There was no evidence that Doug himself dropped UIM coverage or did so because he and Renee got married, were moving, or had purchased additional vehicles — there was not even any evidence of exactly when UIM dropped off his policy. In reasoning that Doug *could* have made such a decision and that these subsequent events *might* have caused him to make such a decision, the court was engaging in guesswork, and beyond being guesswork, some of these potential justifications do not make sense. Because Renee had been listed on Doug’s policy since at least October of 1998, it is hard to see how their marriage would have any impact on the policy. There was no evidence of such impact introduced at trial. Similarly, USAA did not introduce any evidence that moving from one city to another would impact Doug’s automobile insurance premiums. The trial record never references Doug and Renee changing their city of residence or purchasing new vehicles. In those instances, the order relies on facts that are not in evidence.

It is permissible for factual findings to rest on circumstantial evidence, but the circumstantial evidence must lead to the fact-finder’s conclusion “with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation.” *Gastineau v. Murphy*, 331 S.C. 565, 570 n.2, 503 S.E.2d 712, 714 n.2 (1998). Put differently, “the existence of a fact cannot rest in speculation, surmise or conjecture.” *Id.* at 570 n.2, 503 S.E.2d at 714 n.2.

There is no reasonable certainty that Renee’s acts were not the reason USAA removed Doug’s UIM coverage. At worst, the competing possibilities are equally probable. The only evidence offered as to when Doug raised the liability limits on his policy was

Doug's testimony, and Doug testified that he did this sometime in 1999 or 2000. (Tr.p.28, lines 3-14). Doug also said — firmly — that he never dropped or reduced any coverage on his policy, (Tr.p.29, line 23 - p.30, line 3; p.45, line 23; p.49, lines 8-14), and USAA's interaction with Renee might well have been part of USAA's response to Doug's request to raise his policy limits. Renee's interaction with USAA might thus have been the point at which USAA (a) dropped Doug's UIM coverage and (b) left his UM at the same amount it had been since at least 1998, instead of increasing it along as his liability coverage increased.

All of this is speculating. Multiple scenarios are reasonably possible, and because the evidence does not reveal a principled basis for picking one version over the other — the only way to pick is to guess — the Court should hold that the finding below is arbitrary.

C. There Is No Reasonable Basis in Evidence for Finding as a Fact That Doug and Renee Discussed Renee's Interaction with USAA.

The other condition on Renee's authority was that she consult with Doug before she acted. (Or.p.2); see also *Stiltner*, 395 S.C. at 190, 717 S.E.2d at 77-78. The circuit court held Renee satisfied this condition, but here too, that finding is arbitrary and speculative.

The circuit court offered four justifications for this finding. First, it pointed out that the forms had been faxed to USAA from Renee's workplace. (Or.p.5). Second, the court said there was no evidence Renee did not discuss the forms with Doug. *Id.* Third, the court opined that the time period between the first transmission and the second transmission — the faxes occurred 2 days apart — would have provided time for Doug and Renee to discuss the forms and the options with respect to coverage. (Or.p.6). Fourth, the court noted that Doug never complained about UIM coverage being dropped from his policy. *Id.*

It is difficult to see how some of these observations justify the order's conclusion. For example, there is no explanation why the fact that the forms were faxed from Renee's workplace has a tendency to prove that Doug and Renee discussed the forms. The order supplies no logical nexus between the location of the fax transmission and why that location means Doug and Renee probably had a conversation about automobile insurance.

Similarly, it is hard to see how the fact that the forms were faxed two days apart proves that Doug and Renee discussed the forms. USAA might have received the forms on the 17th and made a follow-up phone call to Renee on the 19th. There apparently was some dialogue between Renee and a USAA representative because both of the forms sent to USAA on the 19th had handwriting added to them, and Doug and Renee both testified that some of this handwriting did not appear to be Renee's handwriting. Doug and Renee both testified that the handwritten name "Karen" and a phone number, both written on the UM form, were not in Renee's writing. See (Ex.2) (the form) and (Tr.p.16, lines 17-21; p.54, lines 12-14) (the trial testimony). On the second UIM form, the words "not mandatory" were handwritten at the top of the form, see (Ex.2a), and here again, both Doug and Renee testified that this handwriting was not Renee's. (Trial Tr.p.17, lines 2-7; p.54, lines 15-17).

The fact that Doug never complained about UIM coverage being dropped could go either way. In the realm of possibility, it is certainly possible that Doug knew UIM coverage had been dropped from his policy. At the same time, it is also possible that Doug inadvertently overlooked the removal of UIM from his policy. Doug explained that he generally kept only his most recent "declaration page" outlining his coverage, and that when he received a new page from USAA, he would discard the previous one. (Tr.p.25, lines 1-4).

Under these circumstances, the erroneous removal of UIM coverage from Doug's policy might have continued to go undetected as the result of only one instance of oversight.

The observation that there is "no" evidence Doug and Renee did not discuss these forms is incorrect. Doug testified that he never authorized Renee to handle any business with USAA. (Tr.p.10, line 24 - p.11, line 4; p.15, lines 13-24; p.61, lines 18-23). And the Stiltners do not have the burden of proof here — they do not have to prove that they did not discuss these forms; USAA has the burden of proving that they did. See *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 264, 626 S.E.2d 6, 12 (2005) (providing that the insurer has the burden of proof and persuasion in meaningful offer cases).

This part of this dispute amounts to the following: (a) Doug and Renee both agree that Renee would generally not have interacted with USAA unless she had talked with Doug; (b) Doug adamantly denies that such a discussion occurred; and (c) because Renee suffered a brain injury, she has no independent recollection of anything. While it is certainly fair to consider Doug and Renee's testimony about what their usual course of conduct would have been, Renee's actions in this instance might have been outside that usual course of conduct — she might have taken actions that were *unusual*. It appears to have been unusual for Renee to have any contact at all with USAA. Doug testified that he knew of no other point in his 22 year history with USAA when Renee had any dealing with the company. See (Tr.p.15, line 25 - p.16, line 3). Doug also said that he always handled his dealings with USAA, and that he always did so over the phone. (Tr.p.27, lines 1-25).

A finding of fact cannot rest on guesswork and conjecture, see *Gastineau*, 331 S.C. at 570 n.2, 503 S.E.2d at 714 n.2, and because the evidence in this case is so thin, it was not

reasonably possible to pick one version of events over the other without guessing at what might have occurred. The Court should therefore hold that this finding is arbitrary and reverse.

II. Doug's Review of His Subsequent "Declaration Pages" Cannot Establish the "Full Knowledge of the Facts" Prong of Ratification.

Ratification is a person's confirmation of an act performed or entered on his behalf by another person who at the time "assumed to" act as his agent. *Barber v. Carolina Auto Sales*, 236 S.C. 594, 599, 115 S.E.2d 291, 294 (1960) (quoting *Mebane v. Taylor*, 164 S.C. 87, 92-93, 162 S.E.65, 67 (1932)). Ratification can be express or implied, *Barber*, 236 S.C. at 599, 115 S.E.2d at 294, and it has three elements. First, the principal must accept the benefits of the purported agent's acts. Second, the principal must have full knowledge of the facts. Third, the circumstances must indicate an intention to adopt the unauthorized arrangements. These elements are outlined in this Court's decision in *Lincoln v. Aetna Casualty & Surety Co.*, 300 S.C. 188, 191, 386 S.E.2d 801 803 (Ct. App. 1989), and the circuit court's order correctly recited them. See (Or.p.7).

The circuit court found that Doug Stiltner had "full knowledge of the facts" because the fact that his policy contained that coverage in the past meant that Doug knew what UIM coverage was. The court also relied on the fact that Doug failed change his policy after receiving numerous declaration pages which omitted UIM coverage. (Or.p.8).

Here again, the order's reasoning is circular and relies on guesswork. While Doug's policy had contained UIM coverage at one time, there was no evidence presented that tended to show that Doug purchased UIM coverage because he knew what it provided. The October

of 2000 interactions with Renee were the only evidence USAA had of any dialogue — ever — with respect to a meaningful offer on Doug’s policy, and in October of 2000, Doug had already had his policy for 10 years. It is entirely possible that Doug had UIM coverage despite not knowing exactly what that coverage provided. Doug said he thought his policy contained all the coverage he needed, that his lawyer was the first person to explain UM and UIM coverage to him, and that the reason he raised his coverages was that he wanted better coverage. (Trial Tr.p.14, lines 7-15; p.19, lines 5-8; p.26, lines 21-25).

At bottom, all USAA has to support ratification is Doug’s silence, and as this Court noted previously in this case, silence does not constitute ratification “unless the silence . . . cannot be explained on any other theory[.]” *Stiltner*, 395 S.C. at 191-92, 717 S.E.2d at 78.

As for the declarations pages, South Carolina’s statutory law and its meaningful offer jurisprudence are based in part on the notion that a declarations page does not operate to fully inform an insured of the coverage he or she lacks and the nature of that coverage.² These declaration pages are in the record, and at no point do they describe what UIM coverage (or any other coverage) provides. See, e.g., (Ex.3). None of these forms provided Doug “with adequate information, and in such a manner, as to allow [him] to make an intelligent decision of whether to accept or reject [] coverage.” *Burch v. S.C. Farm Bureau*, 351 S.C. 342, 346, 569 S.E.2d 400, 402 (Ct. App. 2002) (quoting *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556). This is an attempt to open a back-door around the meaningful offer requirement. The declaration pages do not tend to prove that Doug knew Renee dropped his UIM coverage,

²The meaningful offer statute is currently codified at section 38-77-160 of the South Carolina Code.().

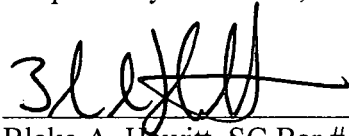
and unless the pages comply with *Wannaker*'s requirements for a meaningful offer, they do not show that Doug had full knowledge of the nature of the coverage he had and lost.

CONCLUSION

The Court should hold that the circuit court erred in concluding that Renee had "implied authority" to deal with Doug's insurance, and the Court should hold that it is at least reasonably possible that Renee's actions were the actions that caused USAA to drop UIM coverage from Doug's policy. The Court should also hold that the evidence does not reasonably support the conclusion that Doug and Renee discussed Renee's interaction with USAA, and the Court should hold that Doug's review of his policy's declaration pages cannot establish the "full knowledge of the facts" prong of ratification. The Court should accordingly reverse the circuit court's judgment in favor of USAA and order that Doug Stiltner's policy be reformed to include UIM coverage in the same amount as his liability coverage.

January 17, 2013

Respectfully submitted,



Blake A. Hewitt, SC Bar # 73674

John S. Nichols, SC Bar # 4210

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

Post Office Box 7965

Columbia, South Carolina 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2007-CP-23-6453

RECEIVED

JAN 17 2013

SC Court of Appeals

Douglas Earl Stiltner and
Christine Rene Stiltner, Appellants,

v.

USAA Casualty Insurance Company, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Brief and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

J.R. Murphy, Esquire
John M. Grantland, Esquire
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

December 12, 2012



Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC