THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS 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.

DEFENDANT'S BRIEF

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CERTIFIED QUESTIONS

1. Whether the addition of a named insured ("Added Named Insured") to an existing insurance policy under which the Added Named Insured was previously a resident relative insured is a "change" under South Carolina Code § 38-77-350(C) and, consequently, does not require an additional offer of optional coverages if an offer that satisfies South Carolina Code § 38-77-350(A) and (B) was previously made to the named insured who originally applied for the policy ("Original Named Insured")?

2. If the insurer was required but failed to make a separate offer of optional coverage to the Added Named Insured, whether reformation should be limited to vehicle(s) in which the Added Named Insured has an insurable interest?

STATEMENT OF THE CASE

This declaratory judgment action involves the availability of underinsured motorist ("UIM") coverage for a named insured on an insurance policy when such person was made a named insured after the policy was originally issued and was never offered the opportunity to accept or reject UIM coverage. Progressive Northern Insurance Company ("Progressive" or "Plaintiff") filed this declaratory judgment action on November 2, 2017 seeking a declaration that UIM coverage was not available under the policy. Bryan Reeves ("Bryan" or "Defendant") filed an Answer and Counterclaim on December 14, 2017 asserting that no offer of UIM coverage was ever made to Bryan, and therefore the policy must be reformed to provide him UIM coverage.

The parties have stipulated to the following relevant facts.[1] On June 19, 2012, Progressive issued a motorcycle insurance policy, policy number 19453115-0 to Bryan's father, Wayne Reeves, based upon the completion and execution of an online policy application and offer of additional uninsured motorist coverage and optional underinsured motorist coverage form, presented to and signed by Wayne Reeves or his wife, Jennifer Reeves, acting as his express and implied agent. The offer form presented to and executed by Wayne Reeves, and/or

[1] *See* ECF No. 17 (Stipulation of Fact).

Jennifer Reeves acting as his express or implied agent, fully satisfies the requirements of S.C. Code § 38-77-350(A).[2] Pursuant to this offer form, Wayne Reeves rejected UIM coverage.

At the policy inception (policy 19453115-0), the only covered motorcycle was a 2003 Harley Davidson FLHTCUI owned by Wayne Reeves, and Wayne Reeves was the only "named insured" on the policy.[3] The policy was renewed five (5) times and remained in effect from the inception date up through and including July 30, 2017. On or about February 3, 2015, Jennifer Reeves and Bryan were added to the policy and listed as "drivers and household residents" on the declarations page of policy 19453115-2.[4] On or about May 19, 2017, Bryan was added to the policy as a "named insured" because he was the titled owner of a 2016 Harley Davidson FLHX Street G motorcycle ("2016 Harley") that was added to the policy as a covered vehicle.[5]

Progressive **did not** provide a written offer form containing an offer of underinsured motorist coverage to Bryan, either in person, by mail, or electronically, either before or after he became a named insured on the policy. Bryan continued to be listed as named insured at the renewal of policy 19453115-4 on or about June 19, 2017.[6]

On July 30, 2017, Bryan was operating the 2016 Harley when he was involved in an accident with another motor vehicle. Bryan's claims for damages arising out of the accident exceed the liability limits of the other driver's motor vehicle insurance. At the time of the accident, the policy insured three (3) motorcycles, one owned by Wayne ("2003 Harley"), one

[2] *See* ECF No. 18, Ex. 1 (Offer of additional uninsured motorist coverage and optional underinsured motorist coverage).
[3] *See* ECF No. 18, Ex. 2 (Declaration page for policy 19453114-0).
[4] *See* ECF No. 18, Ex. 3 (Declaration page for policy 19453114-2).
[5] *See* ECF No. 18, Ex. 4 (Declaration page for policy 19453114-4).
[6] *See* ECF No. 18, Ex. 5 (Declaration page for policy 19453114-5).

owned by Jennifer ("2012 Harley") and the 2016 Harley owned by Bryan. Each motorcycle had $100,000 in liability coverage.[7]

This matter came before the United States District Court for the District of South Carolina on the parties' cross motions for summary judgment. By Order dated July 31, 2018, the District Court certified the above two questions of law. By order dated September 25, 2018, this Court granted certification.

ARGUMENT

I. As a new named insured, Bryan Reeves must be offered the opportunity to accept or reject UIM coverage.

Automobile insurance carriers **must** offer "at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage..." S.C. Code Ann. § 38-77-160 (emphasis added). The insurer bears the burden of establishing that it made a meaningful offer of UIM coverage. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). "[A] noncomplying offer has the legal effect of no offer at all." *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage 'is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.'" *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 262–63, 626 S.E.2d 6, 12 (2005) quoting *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 352, 608 S.E.2d 569, 573 (2005).

S.C. Code Ann. § 38-77-350 specifies the form insurers must use when offering optional coverages, such as UIM coverage, for all "new applicants." The form is to assure that all new applicants have been provided sufficient information to make an informed choice whether to buy

[7] *See Id.*

such optional coverage. *See Ray v. Austin*, 388 S.C. 605, 698 S.E.2d 208 (2010). If this form is properly completed by the named insured, there is a presumption of the insured's informed coverage selection. S.C. Code Ann. § 38-77-350(B). No such offer form was provided to the Bryan, a named insured in this case. Therefore, the policy must be reformed to provide such coverage.

A. In South Carolina, all new named insureds must be offered the opportunity to accept or reject UIM coverage.

For nearly two decades, South Carolina courts have followed the rule that all "named insureds" on a policy must be offered the opportunity to reject optional UIM coverage. *See McDonald v. South Carolina Farm Bureau Ins. Co.* 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999). In *McDonald*, a woman applied for and obtained an automobile insurance policy. *Id.* at 122, 518 S.E.2d at 625. During the application she was properly offered and rejected UIM coverage. *Id.* Three years later she sold the insured automobile to her son and had the policy transferred in his named, but he did not complete an application or sign any document indicating he had become a named insured. *Id.* He was never offered UIM coverage. *Id.* That same year, the son was involved in a serious accident. The at-fault driver's liability insurer paid the full amount of its policy, but the son's damages exceeded the available liability coverage. He filed a declaratory judgment action for a determination that his insured was required to make him a meaningful offer of UIM coverage. *Id.*

In *McDonald*, the insurer argued that § 38-77-350(A), which specifies the form a carrier must use for all "new applicants," conflicts with § 38-77-160, which requires a carrier to offer UIM coverage to all "insureds." *Id.* at 123, 518 S.E.2d at 625. Relying on the fact that the son did not fill out an application for insurance, the insurer argued it did not have to offer the son UIM coverage because he was not a "new applicant." *Id.*at 123-24, 518 S.E.2d at 626. The South

Carolina Court of Appeals rejected the insurer's argument holding that there is "no inconsistency in the term 'new applicant' in § 38-77-350(A) and 'insured' in § 38-77-160" and that the statutes require that "all named insured(s) be offered UIM coverage." *Id.* at 124, 518 S.E.2d at 626.

As the insurer argued in *McDonald*, Progressive also argues that § 38-77-350(A) only requires it to offer UIM coverage to "new applicants" rather than all "named insureds,[8]" and Progressive is seeking that this Court interpret these statutory terms as such. However, the Court of Appeals in *McDonald* **already interpreted** these terms and the legislature's intentions:

> Clearly, the **legislature intended for insurers to afford all named insured 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.
>
> ...
>
> McDonald had **never been a named insured** with Farm Bureau prior to the insurance on the Mercury. **He had never been given the opportunity to accept or reject UIM coverage.** Although McDonald did not fill out an application, he paid a membership fee to become a named insured of Farm Bureau. Regardless of the manner in which Farm Bureau processed McDonald's request for his own insurance policy, McDonald was a new named insured with the carrier, entitled to an offer of UIM coverage. **Any other construction of the statute would defeat the legislature's intent that all named insured be offered UIM coverage.**

Id. at 124, 518 S.E.2d at 626 (emphasis added). *See also Government Employees Insurance Company v. Draine*, 389 S.C. 586, 594, 698 S.E.2d 866, 87- (Ct. App. 2010) reaffirming that a "new applicant" is someone who has never had an opportunity to reject UIM coverage.

In the present case, like the son in *McDonald*, Bryan was not previously a named insured with Progressive, and after becoming a named insured under the policy, he was never given the opportunity to accept or reject UIM coverage. Pursuant to the clear holding of *McDonald*, Progressive was required to make Bryan, a new named insured, an offer of UIM coverage. For

[8] *See* Plaintiff's Opening Brief, pgs. 4-13

two decades this has been well-settled law, and the legislature has **not** sought to clarify the *McDonald* holding of its intention that all named insureds must be offered UIM coverage.

In 2014, the South Carolina Court of Appeals reaffirmed the holding of *McDonald* in *Progressive Northern Ins. Co. v. Medlock,* No. 2014-UP-270, 2014WL2968933 (S.C. Ct. App. 2014).[9] Importantly, *Medlock* is almost factually identical to the case at bar. In *Medlock,* a father applied with an insurer for an insurance policy for his ATV and was listed on the policy as the named insured. *See Progressive Northern Ins. Co. v. Medlock,* No. 2011-CP-42-02965, 2013WL2968933 (S.C.Com.Pl. 2013)[10] (affirmed by the Court of Appeals in *Medlock*, No. 2014-UP-270, 2014WL2968933). His son was originally listed on the policy as a "Child." *Id.* at *2. The application contained an offer of UIM coverage which the father rejected. *Id.* Subsequently, the policy was renewed adding a motorcycle owned by the son and adding the son as a named insured. *Id.* The son was not provided an offer of UIM coverage. *Id.* The son was later involved in an accident, and a declaratory judgment action was filed to determine if the insurer was required to make the son a meaningful offer of UIM coverage. *Id.* at *1. The trial court, applying *McDonald,* held that **"making [the child] a named insured created a new policy with a new named insured** and that he was entitled to an offer of UIM coverage and opportunity to reject UIM coverage." *Id.* at *3. The trial court also reasoned:

> when [the child] was made a named insured, he no longer only stood to benefit but became burdened with the obligations under the policy as well. The legislature recognized this in its distinguishing between a named insured and an insured relative under the law. An insured relative has no legal authority, even if he so desires, to require the insurer to provide him UM or UIM coverage under that policy as a matter of law.

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[9] See ECF No. 18, Ex. 6. It should be noted that insurer and its counsel are the same in *Medlock* as this case, and many of the same arguments rejected by the trial court and South Carolina Court of Appeals have been raised again in this case.

[10] See ECF No. 18, Ex. 7.

Id. at *5.

The Court of Appeals, citing exclusively to *McDonald*, affirmed the order of the trial court finding that the insurer was required to make a meaningful offer to all named insureds, including those that were subsequently added to a policy, and that the insurer had failed to do so. *See Medlock*, 2014WL2968933 at *1.

In 2016, the South Carolina District Court relied on the holding of *McDonald* in *Allstate Fire & Cas. Ins. Co. v. Simpson*, 152 F. Supp. 3d 487 (D.S.C. 2016). In *Simpson*, the named insured declined UIM coverage at the time the policy was issued. *Id.* at 489. At that time, the named insured was living with her boyfriend, who did not have his own insurance. A year later they married. *Id.* at 490. The husband was subsequently added to the policy as a named insured, but no offer of UIM was made to him. *Id.* The couple was involved in an accident, and the insurance company filed a declaratory judgment action seeking a declaration that it was not obligated to pay or provide UIM coverage to the husband. *Id.* Applying the clear holding of *McDonald*, the district court held that because the husband was a named insured at the time of the accident, the insurance company was "required to make a meaningful offer of UIM coverage to [him] because he, along with [his wife], was a named insured on the policy." *Id.* at 492-93.

McDonald, *Medlock* and *Simpson* all illustrate the well-settled and consistent rule of law in South Carolina—**that all named insureds must be offered UIM coverage**. If a meaningful offer of UIM coverage is not made, then Progressive cannot rely on the safe harbor provisions of S.C. Code Ann. 33-77-350(A) and (B).

B. Wayne Reeves cannot reject UIM coverage on behalf of Bryan Reeves, a new named insured.

Plaintiff contends that South Carolina law and the policy allow Wayne Reeves, Bryan's father and original named insured on the policy, to reject UIM coverage on behalf of Bryan. Defendant cites to § 38-77-350(B) for support:

> If 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.

Defendant's contention would be accurate if Bryan was simply a resident relative or another insured under the policy, but once he became a named insured, an offer of UIM coverage must then be made to him and he must have the opportunity to reject it under the holding of *McDonald.*

For support, Progressive cites to several out of state cases including *Messerly v. State Farm Mutual Automobile Insurance Company*, 277 Ill. App. 3d 1065 (Ill. Ct. App. 1996). However, *Messerly* is not applicable to the facts of this case as it is a spousal coverage case where the Illinois Court of Appeals held a husband's application for himself and his wife and subsequent rejection of optional UM coverage were binding on her as well. The case at bar involves a parent/child relationship, not a spousal relationship. Further, although an implied agent can effectively reject UIM coverage on behalf of a principle in South Carolina,[11] there has been no evidence presented by Progressive that Wayne Reeves was Bryan's agent. More importantly, there was never an opportunity for an implied agent to reject UIM coverage on Defendant's behalf because a written offer of UIM coverage was never made after he became a named insured.

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[11] *See Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 240, 597 S.E.2d 165, 166 (Ct. App. 2004).

Plaintiff also cites to its own policy language, "[t]he action of one named insured will be binding on all persons provided coverage under this policy." Again, this provision effectively contradicts the statutory provisions and legislative intent expressed by *McDonald* to offer all named insureds UIM coverage. Therefore, it contravenes South Carolina statutory law. "It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid." *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975).

C. Bryan Reeves being added as a named insured to the policy is not a "change" under South Carolina Code § 38-77-350(C).

The court in *McDonald* also addressed S.C. Code Ann. § 38-77-350(C), which provides, "[a]n 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." In *McDonald*, the insurer also argued under S.C. Code Ann. § 38-77-350(C) that it was not required to offer UIM coverage because the mother substituted her name for that of her son's on the policy; thus, the substitution was merely a "change," and the insurer was not required to provide a new UIM coverage offer. *Id* at 125, 518 S.E.2d at 626. The Court of Appeals rejected this argument as well, finding that the statutory terms "new offer of coverage" contemplate that an "old offer" had been previously made to the named insured. *Id.* (citing to *Ackerman v. Travelers Indem. Company*, 318 S.C. 137, 456 S.E.2d 408 (Ct.App.1995)). In *Ackerman*, the Court of Appeals held:

> [W]here § 38–77–350(C) states that the insurer is not required to make a "new" offer, it clearly envisions the circumstance where the insurer already made an "old" offer.
> ...
>
> Thus, the only reasonable way to interpret the language in § 38–77–350(C) is to recognize that the insurer may rely on the effective past offers it has given to its

> insureds when these insureds continue coverage with the same insurer. Had the General Assembly meant to require no offer in the interim period, it would have said "no" offer rather than no "new" offer.

Id. 142-43, 456 S.E.2d at 410. If no "old offer" was ever made, then § 38-77-350(C) simply does not apply. *See Id.* Further, the Court in *McDonald* expressly held that the addition of a new named insured who "had never been given the opportunity to accept or reject UIM coverage" was not a "change" contemplated under § 38-77-350(C).

Plaintiff cites to *Smith v. South Carolina Insurance*, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002) for support. However, *Smith* is factually distinguishable from this case. The "change" in *Smith* was only the addition of a new vehicle to the policy, not the addition of a new named insured. *Id.* at 85, 564 S.E.2d at 260.

Because there is clear South Carolina law applicable to the case at bar, Plaintiff's reliance on foreign state law is also misplaced. As it did in *Medlock*, Plaintiff erroneously relies on *Ferreira v. Integon Nat. Ins. Co.*, 809 A.2d 1098 (R.I. 2002) to support the proposition that the addition of a named insured was merely a "change" to an existing policy.[12] In *Medlock*, the trial judge distinguished *Ferreira* finding that the holding is based Rhode Island's statutory scheme provides that an insurer is required to, "notify the policyholder, in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy, as to the availability of that coverage or optional limits." *Medlock* 2013 WL2968933 at *5 quoting *Ferriera*, 809 A.2d at 1101. South Carolina has no such ongoing notice requirement because S.C. Code Ann. § 38-77-350(C) specifically relieves a carrier of the obligation to make a new offer in such an event, **except** when a new named insured is added and therefore an "old offer" never existed. *Id.*

[12]*See* Plaintiff's Opening Brief, pg. 14.

D. Modifying Bryan from a resident driver to a named insured altered his legal status under the terms of the policy; thereby effectively creating a new contract for insurance.

It is undisputed that Progressive made Bryan Reeves a named insured under the policy and thereby afforded him the statutory rights and privileges that accompany that legal status. However, Progressive is seeking that this Court carve out the legal right that is afforded every other named insured – that he/she be provided the sufficient information to make an informed decision about the coverage he/she is entitled to. In support of this argument, Progressive relies on the fact that a new policy number was not issued when Bryan became a named insured under the policy. While the holdings of *McDonald* and its progeny do not expressly require that a new policy be issued for an offer of UIM coverage to be required,[13] when a person is added as a named insured under a policy, there is no other conclusion to be drawn but that a new contract for insurance with that individual has effectively been created. *See Smith* at 88, 564 S.E.2d at 361 citing to *McDonald* (when McDonald became the named insured on the policy, **"it altered the legal relationship of the parties."**) (emphasis added). *See also Medlock,* No. 2011-CP-42-02965, 2013WL2968933 at *3 (**"making a named insured created a new policy with a new named insured"**) (emphasis added). Progressive's ministerial failure to create a new policy number does not relieve it of its obligations under well-settled South Carolina law.

In this case, the moment that Progressive decided to change Bryan's status as a resident driver to a named insured, it altered their legal relationship and effectively created a new contract of insurance. This was no "mere change,"[14] but effectively altered Bryan's legal status and rights. As a named insured, Bryan is now liable for any debts incurred on the insurance policy. In addition, Bryan could also elect to obtain additional coverage, less coverage, or cancel the policy

[13] *See* subsections a-c, *supra.*

[14] Plaintiff's Opening Brief, pg. 3.

altogether—all of which he could not have done as a resident driver. Thus, since a new policy was effectively created between Bryan and Progressive, a new offer of UIM coverage must have been made.

II. The policy should be reformed to provide a total of $300,000 in UIM coverage because UIM coverage is personal and portable.

There are two insurance principles that govern whether reformation should be limited to vehicle(s) in which the added named insured has an insurable interest. First, it is well settled that if an insurer fails to make a meaningful offer of UIM coverage 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. *Butler* at 405, 475 S.E.2d at 760. Second, "it is our state's well-settled public policy that UIM coverage is personal and portable." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 480 (2012). Based on these two settled principles, the policy in this case must be reformed to provide coverage under the 2016 Harley in the amount of $100,000, as well as under the 2003 Harley and the 2012 Harley (Wayne Reeves' and Jennifer Reeves' vehicles insured under the Policy at the time Bryan was made a named and insured and at the time of the accident) for $100,000 each for a total of $300,000 in available UIM coverage.

"Stacking refers to an insured's recovery of damages under more than one insurance policy in succession until all of his damages are satisfied or until the total limits of all policies have been exhausted." *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 60, 496 S.E.2d 875, 883 (Ct. App.1998). Stacking of UIM coverage, which is a statutorily required coverage, is governed specifically by statute. *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 405, 496 S.E.2d 631, 632 (S.C. 2002) (citing S.C. Code Ann. § 38–77–160). "To this extent, stacking cannot be contractually prohibited." *Id.* "South Carolina courts have interpreted [section 38–77–160] to

allow Class I insureds to stack UIM coverage from multiple automobile insurance policies." *Kay v. State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 449, 562 S.E.2d 676, 678 (Ct. App. 2002).

Pursuant to the holdings of *Butler* and *Kay*, the policy must be reformed to provide $100,000 in UIM coverage for **each** vehicle. The rationale is simple, if Bryan had been offered UIM coverage as a named insured as legally required, he could have elected to have it on each of the vehicles insured under the policy up to the amount of liability insurance provided on each vehicle ($100,000 each). As a Class I named insured, Bryan would then be allowed to stack the available coverages for a total of $300,000 in available UIM benefits. *See Floyd v. Nationwide Mut. Ins. Co.*, No. CIV.A.6:04-1305-GRA, 2006WL4730588 at *4-5 (D.S.C. May 17, 2006), *aff'd.* 221 F. App'x 207 (4th Cir. 2007). In *Floyd* the district court judge held that the subject policy should be reformed to include UIM and further that the insureds are entitled to stack the coverage on the vehicles until they are "made whole or the UIM coverage is exhausted," thereby clearly indicating that the policy should be reformed to provide UIM coverage for all vehicles under the policy. *Id. See also State Farm Mut. Auto. Ins. Co. v. Wannamaker,* 291 S.C. 518, 522, 354 S.E.2d 555, 557 (S.C. 1987) (holding that the insured was not allowed to stack the reformed policy **only** because none of the insured's vehicles were involved in the wreck) (emphasis added).

Progressive argues that it would be inequitable to reform the policy to allow UIM coverage on Wayne Reeves' and Jennifer Reeves' motorcycles (2003 Harley and 2012 Harley) because they were actually offered UIM coverage and validly rejected it. This argument fails to recognize that Defendant is seeking that the policy be reformed to provide UIM coverage for the 2003 Harley and 2012 **for himself alone** because he was the only one not offered an opportunity to accept or reject UIM coverage on any of the vehicles under the policy.

Further, Progressive improperly cites to *Jackson v. State Farm Mut. Auto. Ins. Co.*, 303 S.C. 321, 400 S.E.2d 492 (1991) as controlling precedent that reformation may be done on a vehicle-by-vehicle basis. Progressive's reliance on *Jackson* is misplaced for two reasons. First, *Jackson* occurred prior to the adoption of S.C. Code Ann. § 38-77-350, which is the primary statute at issue in this case. *Jackson* simply applied the longstanding "meaningful offer" test originally set forth in *Wannamaker*. Second, in *Jackson* the insured had **four different policies** on four different vehicles. *Id* (emphasis added). In that case, the Court of Appeals determined that the insurer had failed to prove that a meaningful offer of UIM coverage had been made under **only one** of the four policies and therefore remanded the case for the trial judge to reform that one policy to afford UIM coverage. *See Jackson v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 440, 392 S.E.2d 472 (Ct. App. 1990). The South Carolina Supreme Court granted certiorari to determine whether the insured was entitled to have the remaining three policies reformed to include UIM coverage as well. *Jackson,* 303 S.C. 321, 400 S.E.2d 492 (1991). It was under those circumstances that the Court held that reformation of the three remaining policies was not proper because the insured had been made a meaningful offer and properly rejected UIM coverage on all three. *Id.* at 325, 400 S.E.2d at 494. In this case, we have a **single** policy with three covered vehicles, and Bryan never accepted or rejected UIM coverage on any of the covered vehicles because he was never given the opportunity. Thus, the holding in *Jackson* is simply not applicable to this case.

Finally, regarding whether Bryan as a named insured has an insurable interest in the other two vehicles under the policy, this Court has held that an insurable interest "does not depend upon the named insured having either a legal or equitable interest in the property, 'but it is enough that the insured may be held liable for damages to its operation and use.'" *American Mut.*

Fire Ins. Co. v. Passmore, 275 S.C. 618, 620-21, 274 S.E.2d 416, 417-18 (1981) quoting *Nationwide Mutual Ins. Co. v. Douglas,* 273 S.C. 243, 255, 255 S.E.2d 828 (1979)(Lewis, C.J., dissenting). As a Class I insured (named insured and resident relative), Bryan could be held liable for his use of any of the vehicles under the policy and liability coverage would be provided. As such, he has an insurable interest in all of the vehicles. A ruling that a named insured or resident relative must have an ownership interest in the vehicles to stack UIM coverage would toss aside twenty years of case law relating to UIM stacking.

III. Public Policy supports Defendant's position with respect to both certified questions.

"In answering a certified question raising a novel question of law, [the] Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008). In light of this standard of review, the public policy considerations behind these statutes are instructive.

It is well settled that the UIM and uninsured motorist statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the legislature. *South Carolina Farm Bureau Mut. Ins. Co. v. Kennedy,* 398 S.C. 604, 614, 730 S.E.2d 862 (2012) (*citing Floyd* at 260, 626 S.E.2d at 10). "The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorists." *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 615, 735 S.E.2d 515, 518 (2013). An individual need merely be a Class I insured in order to be entitled to stack UIM benefits. *Concrete Services v. United States Fid. & Guar.*, 331 S.C. 506, 514, 498 S.E.2d 865, 868-69 (1998).

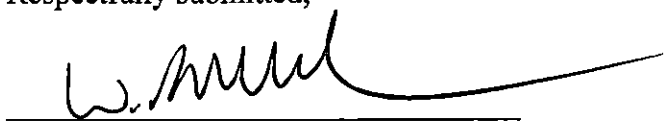
Therefore, in light of the remedial nature of the statutes, public policy would mandate that Bryan be given the full statutory rights of all named insureds, including the right to accept and reject UIM coverage when being added as a named insured to a policy. Moreover, adopting a vehicle specific insurable interest requirement for UIM coverage would fundamentally alter existing UIM coverage practice by eliminating UIM benefits for injured motorists and passengers who do not "own" the vehicle in question. This would deny UIM benefits to spouses and children within households who may not be titled owners of vehicles, but would otherwise be class I insureds entitled to stack UIM coverage under existing law. Such a rule would eviscerate the central purpose of the UIM statute. Likewise, the policy must be reformed to provide for UIM coverage up to the liability limits on all three vehicles insured under the policy.

CONCLUSION

"If at first you don't succeed, try, try again."[15] On multiple occasions in recent years, Progressive has sought to have South Carolina courts upend two decades of precedent plainly requiring an insurer to make an offer of UIM insurance to ***all*** new named insureds under a policy of automobile insurance. Moreover, Progressive seeks to limit its legal responsibility under well-settled stacking principles by introducing an insurable interest requirement that will effectively eliminate UIM coverage where claims are made by insureds or resident relatives who are not owners of the insured vehicle in question. Defendant respectfully requests this Court answer both certified questions in the negative and reinforce decades of UIM case law requiring a meaningful offer to a new named insured and permitting UIM stacking to a named insured for all vehicles under the policy at issue where the insurer has failed to make the statutorily required offer.

[15] The proverb has been traced back to 'Teacher's Manual' by American educator Thomas H. Palmer and 'The Children of the New Forest' by English novelist Frederick Maryat (1792-1848).

Respectfully submitted,



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January 22, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS 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 OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Defendant's Brief on Progressive Direct Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on January 22, 2019, addressed to its attorney of record, John Robert Murphy, P.O. Box 6648, Columbia, South Carolina 29260.

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