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.

REPLY

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I. The plain language of South Carolina Code § 38-77-350 answers the first certified question, not the extraneous language in *McDonald v. South Carolina Farm Bureau Ins. Co.*, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999).

In his Brief, Defendant repeatedly argues that *McDonald v. South Carolina Farm Bureau Ins. Co.* provides the clear answer to the first question in this case – whether South Carolina Code § 38-77-350 requires an insurer to make a new offer of UIM coverage when a second named insured is added to an existing insurance policy. (Def.'s Br., pp. 8-14). If *McDonald* is the clear answer to this question, then why did the District Court certify this question to this Court? Why did this Court accept certification of this question? What is clear is that the factual situation in *McDonald* was different from the one in this case and that the extra language in *McDonald*, which attempts to interpret the term "applicant" in South Carolina Code § 38-77-350, is contrary to this State's rules of statutory construction, the plain language of the statute, and the legislative intent behind the statute.[1]

A. *McDonald* involved a different factual situation, such differences being outcome determinative with regard to application of South Carolina Code § 38-77-350.

Despite Defendant's arguments to the contrary and unlike *McDonald*, this case involves the continuation of another named insured's pre-existing policy. In *McDonald*, Ms. Wells had an auto policy insuring a single vehicle, a Mercury Tracer. 336 S.C. at 122, 518 S.E.2d at 625. When she applied for the policy, the insurer offered Ms. Wells UIM coverage. *Id.* Several years later,

[1] Defendant's Brief also repeatedly cites to the unpublished South Carolina Court of Appeals opinion of *Progressive Northern Ins. Co. v. Medlock*, No. 2014-UP-270, 2014 WL 2968933 (S.C. Ct. App. June 30, 2014). (Def.'s Br., pp. 10-11, 14-15). According to the South Carolina Appellate Court Rules, unpublished South Carolina Court of Appeals' opinions have no precedential value and should not be cited. Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."); *see also* Rule 220(a), SCACR; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 338 S.C. 343, 349 n. 3, 526 S.E.2d 253, 256 n.3 (Ct. App. 2000), *aff'd as modified*, 349 S.C. 356, 563 S.E.2d 331 (2002).

Ms. Wells sold the Mercury Tracer to her non-resident son, Michael McDonald. *Id.* At that time, her policy was void because Ms. Wells, the sole named insured, no longer had an insurable interest in the insured property. *Id.*[2] Thereafter, Ms. Wells was removed from the policy, and Mr. McDonald was substituted as the sole named insured. *Id.* at 125, 518 S.E.2d at 626.

As the *McDonald* court recognized, South Carolina Code § "38-77-350(C) provides, '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.'" *Id.* at 124–25, 518 S.E.2d at 626 (quoting S.C. Code § 38-77-350(C)). The court rejected the insurer's argument that substitution of McDonald for Wells as the named insured was a "change" to an "existing policy" within the meaning of Section 38-77-350(C) because there was no existing policy. As the court explained:

> Removing Wells from the policy and substituting McDonald as the named insured was not a mere policy change. It was the creation of a new insurance policy with a new named insured.

Id. at 125, 518 S.E.2d at 626. Thus, McDonald was not an additional named insured but a "new applicant" for a new policy, such that he was required to be offered UIM coverage in accordance with the plain terms of South Carolina Code § 38-77-350(A). *See* S.C. Code § 38-77-350(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**." (emphasis added)).

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[2] *See American Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 620, 274 S.E.2d 416, 417 (1981) ("[I]insurance 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).

Defendant's Brief attempts to improperly divorce the holding in *McDonald* from the facts of that case, in particular the fact that McDonald's policy was a new policy with a new applicant rather than a pre-existing policy with its own prior applicant.[3] As explained in Progressive's Opening Brief, this fact alone allows the court's holding in *McDonald* to comply with the plain language of South Carolina § 38-77-350(A), which requires "new applicants" to be offered optional coverages. (Pl.'s Br., pp. 10-13). As explained below, without the fact that McDonald's policy was a new policy with a new applicant, the *McDonald* court's holding would not comply with the plain terms of South Carolina § 38-77-350(A). Looking at the language of the statute, this is THE outcome determinative fact.[4]

Here, the plain terms of South Carolina Code § 38-77-350 dictate a different outcome because THE outcome determinative fact – the existence of a new policy with a new applicant – is not present. Defendant is a second named insured added to an existing policy, not a "new applicant" for a new policy to whom an insurer would be required to offer UIM coverage in accordance with South Carolina Code § 38-77-350(A). *See* S.C. Code § 38-77-350(A) (stating offer form to be used for "new applicants"). 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, continuing at all times as the first named insured. (ECF No. 17, Stipulation of Fact ¶¶ 2, 5, 8, 13). Unlike the policy in *McDonald*, the Progressive policy never become void for lack of an insurable interest. Unlike the policy in *McDonald*, the Progressive policy is not a new policy but

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[3] *See* (Def.'s Br., p. 15 (stating that the holding of *McDonald* "does not expressly require that a new policy be issued for an offer of UIM coverage to be required")).

[4] Moreover, the court in McDonald articulates this fact in the closing paragraph of its opinion to justify its decision not to apply South Carolina Code § 38-77-350(C). *Id.* at 125, 518 S.E.2d at 626; *see* S.C. Code § 38-77-350(C) (stating that insurer is not required to make new offer of optional coverages when there is a change to "an existing policy").

the continuation of a pre-existing policy issued to policy applicant Wayne Reeves.[5] Thus, unlike the insured in *McDonald*, Defendant Bryan Reeves is not a "new applicant" entitled to an offer of UIM coverage under South Carolina Code § 38-77-350.

B. Defendant's and the *McDonald* court's interpretation of the phrase "new applicant" in South Carolina Code § 38-77-350 is contrary to this State's rules of statutory construction, the plain language of the statute, and the legislative intent behind the statute.

In *McDonald*, the court improperly interpreted the phrase "new applicant" in South Carolina Code § 38-77-350(A) to mean "[named insureds] who had never had an opportunity to reject UIM coverage." *McDonald*, 336 S.C. at 124, 518 S.E.2d at 626. This is a forced construction that expands the statute's operation beyond the literal meaning of "applicants" to all named insureds. *See Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation.").The correct interpretation of the phrase is that given by the South Carolina Court of Appeals in its subsequent decision of *Allstate Insurance Company v. Estate of Hancock*:

> [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). Unlike the court's interpretation in *McDonald*, this interpretation is consistent with South Carolina's rules of statutory construction, the plain language of the statute and the legislative purpose of the statute.

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[5] In his Brief, Defendant argues that "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." (Def.'s Br., p. 15). However, Defendant cites no published opinion or statute recognizing this supposedly inevitable conclusion. *See* (Def.'s Br., p. 15).

(i) South Carolina Rules of Statutory Construction

Despite this being a case concerning the interpretation of a statute, Defendant's Brief does not address any rules of statutory construction. This is likely because Defendant's interpretation of South Carolina Code § 38-77-350's phrase "new applicants" – based on the *McDonald* court's interpretation of such phrase – is inconsistent with those rules. First, this Court has repeatedly stated that unless the plain language of a statute "leads to a result so patently absurd that the General Assembly could not have intended it," the inquiry into the meaning of a statute begins and ends with its plain language. *See, e.g., Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695–96 (2012); *South Carolina Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 8, 809 S.E.2d 223, 226 (2018) ("This Court looks beyond a statute's plain language **only** when applying the words literally would lead to a result so patently absurd that the General Assembly could not have intended it." (emphasis added)); *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 196, 712 S.E.2d 416, 425, 427 (2011) ("A merely conjectural absurdity is not enough; the result must be so patently absurd that it is clear that the General Assembly could not have intended such a result....We must ensure that the absurd results exception to the plain language rule of statutory construction remains an exception and apply it only when the absurdity is clear.").

(ii) Plain Language of the South Carolina Code § 38-77-350(A)

At no point has Defendant argued, nor could he plausibly argue, that giving the term "applicant" its plain and ordinary meaning – one who applies – creates a result that is "so patently absurd" that the General Assembly could not have intended it.[6] The rule created by the statute is

[6] Merriam–Webster defines "applicant" as "one who applies." Merriam–Webster Dictionary, http://www.merriam-webster.com/dictionary/applicant. Using this usual and customary meaning of the word applicant, the statute reads as follows: "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).

both rational and easy to apply – a single offer of optional coverages per policy "to be completed by the named insured who is the applicant." *See Estate of Hancock*, 345 S.C. at 87, 545 S.E.2d at 848. Not only has the South Carolina Court of Appeals in *Hancock* recognized this as a reasonable result but so have numerous other state courts when interpreting the term "applicant" in their UIM statutes.[7] As further explained in Plaintiff's Brief, this result comports with the practical realities of how families apply for insurance policies. (Pl.'s Br., pp. 7-9). As the Illinois Court of Appeals in *Messerly v. State Farm Mutual Automobile Insurance Company* recognized:

> Both 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.

277 Ill. App. 3d 1065, 1070, 662 N.E.2d 148, 151 (1996). Thus, "requiring offers of UM/[UIM] coverage to be made to all insureds under automobile policies would be contrary to reasonable business practices from which both insurers and consumers benefit." *Id.*

Here, it is undisputed that Bryan never applied for the Progressive insurance policy. (ECF No. 17, Stipulation of Fact ¶ 15). Rather, his father applied for the Progressive policy and was made a meaningful offer of UIM coverage. (ECF No. 17, Stipulation of Fact ¶ 13); (Def.'s Br., pp. 5-6).

[7] *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, 900 (1998); *Messerly v. State Farm Mutual Automobile Insurance Company*, 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ill. Ct. App. 1996).

Defendant attempts to distinguish *Messerly* on the basis that this case "involves a parent/child relationship, not a spousal relationship," but such distinction is immaterial. *See* (Def.'s Br., p. 12). "It is well-settled that the relationship of agency between a husband and wife is governed by the same rules which apply to other agencies, and no presumption arises from the mere fact of the marital relationship that one spouse is acting as agent for the other." *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) (citing *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984)).

(iii) Legislative Purpose Behind South Carolina Code § 38-77-350

Moreover, a plain language interpretation of South Carolina Code § 38-77-350 comports with the legislative purpose behind the statute. Defendant's Brief generally extols the remedial nature of UIM statutes but ignores the legislative purpose behind the specific statute at issue. *See* (Def.'s Br., pp. 19-20). In *Traynum v. Scavens*, this Court explicitly recognized that "the General Assembly enacted section 38-77-350 of the South Carolina Code as a safe-harbor provision [for insurers], creating a conclusive presumption of a meaningful offer of UIM coverage under certain conditions." 416 S.C. 197, 202, 786 S.E.2d 115, 118 (2016). As this Court in *Traynum* recognized, section 38-77-350 was enacted in response to *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987). *Id.* The decision in *Wannamaker* first established the requirement that insurers make meaningful offers of optional coverages. *Id.* South Carolina Code § 38-77-350 is intended to be a step-by-step guide for insurers to comply with that requirement in order to reduce litigation on this issue. The entire purpose of the statute is defeated if insurers cannot rely on the plain terms of South Carolina Code § 38-77-350, specifically the term stating that the offer form is to be used for all new "applicants" and that no new offer is required for a "change" to the policy. *See* S.C. Code § 38-77-350(A), (C); *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). The literal interpretation of the statute's terms in *Hancock* is consistent with the legislative purpose of South Carolina Code § 38-77-350 – to create a safe harbor for insurers. The forced construction of the statute's terms in *McDonald* is not.

C. The addition of a named insured to an "existing policy" is a "change" within the contemplation of South Carolina Code § 38-77-350(C).

In his Brief, Defendant argues that South Carolina Code § 38-77-350(C) does not apply because the statute only applies if an "old offer" was made and when a new named insured is added "an 'old offer' never existed." (Def.'s Br., p. 14). The flaw in Defendant's logic is his focus on an offer with respect to a specific individual, rather than an offer with respect to an "existing policy." The focus of section (C) of South Carolina § 38-77-350 is on the "existing policy." *See* S.C. Code § 38-77-350(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***." (emphasis added)).

Here, the "existing policy" is Wayne Reeves' policy with Progressive. The Court of Appeals in *Ackerman v. Travelers Indem. Co.* held:

> [T]he 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**.

318 S.C. 137, 142, 456 S.E.2d 408, 411 (Ct. App. 1995) (emphasis added); *see also* (Def.'s Br., pp. 14-15 (quoting same passage)). Wayne Reeves continued coverage with Progressive, and the parties agree that Wayne Reeves had already received a meaningful offer of UIM coverage in compliance with § 38-77-350(A)-(B). (ECF No. 17, Stipulation of Fact ¶¶ 2-3, 13); (Def.'s Br., pp. 5-6). Contrary to Defendant's arguments, the addition of an another named insured to Wayne Reeves' existing insurance policy does not vitiate the prior offer made to Wayne Reeves for this policy.[8] To so argue ignores the focus of this section of the statute – changes to an "existing policy" and the practical realities of coverage decisions already having been made for this policy.

[8] *See* (Def.'s Br., p. 14 (arguing that the addition of a new named insured to Wayne Reeves' existing policy means that "an 'old offer' never existed.")).

Taking Defendant's argument to its logical conclusion – (1) policy applicant/named insured Wayne Reeves rejects UIM coverage; (2) the policy is issued without UIM coverage; (3) Defendant is added to the policy as an additional named insured; (4) Defendant is offered and accepts UIM coverage; (5) the policy is re-issued with UIM coverage and a corresponding increased premium for such coverage – Wayne Reeves becomes legally bound to pay the increased premium for coverage he specifically rejected. If an insurer is required to offer optional coverages to every named insured added to an existing policy, then the policy applicant named insured's decisions can always be overruled. In practicality, Defendant's proposed interpretation leads to inequitable results.

The better rule is that set forth by the statute – to make the decision of the named insured who is the applicant binding on all other insureds under the same policy and not require a new offer for any changes to that policy:

> (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 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.
>
> (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(A)-(C) (emphasis added). With this reading of the statute, the first named insured's coverage decisions are not overridden, and the added named insured has the choice to

either: (1) accept those choices and be added to the policy; or (2) apply for his own policy and make his own choices. Both the plain language of the statute and the practicalities of insurance transactions require that adding a named insured to an existing policy be classified as a "change" under § 38-77-350(C).

II. The principle that UIM coverage is personal and portable does not entitle Defendant to stack UIM coverage from the other two vehicles on the policy, both of which are bound by a valid rejection of UIM coverage.

In his Brief, Defendant argues that he is entitled to stack $300,000 in UIM coverage, including $100,000 from Wayne Reeves' motorcycle and $100,000 from Jenifer Reeves' motorcycle, because UIM coverage is personal and portable. (Def.'s Br., pp. 16-17). The heading for this section of Defendant's Brief is: "The policy should be reformed to provide a total of $300,000 in UIM coverage because UIM coverage is personal and portable." (Def.'s Br., p. 16). For this proposition, Defendant cites *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). However, in that case, this Court specifically stated that the principle that UIM coverage is personal and portable has no application to stacking. *Rhoden*, 398 S.C. at 401 n.5, 728 S.E.2d 477, 481 n.5 (2012). As this Court stated, there are "different public policy considerations in a stacking context." *Id.*

With regard to the second certified question, Defendant's arguments are misplaced because this is a reformation case, not a stacking or porting case. The issue presented by the second certified question is the relationship between reformation and an insurable interest in the vehicle:

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***

2. If the insurer was required by 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?

(Def.'s Br., p. 5). As to Wayne and Jenifer Reeves' motorcycles, Progressive argued in its Brief that reformation is improper because the owners of these vehicles received a meaningful offer of UIM coverage and validly rejected it. (Pl.'s Br., pp. 16-19). Defendant argues that he was entitled to a separate opportunity to select or reject UIM coverage for each of these motorcycles. (Def.'s Br., p. 17). Defendant attempts to support this argument by interchangeably using the separate concepts of: (1) stacking; (2) portability; and (3) reformation. (Def.'s Br., pp. 16-19).[9] However, both the public policy considerations and the required interest for each of these concepts are different.[10]

Moreover, Defendant inconsistently argues that for purposes of stacking the holding in *Jackson v. State Farm Mut. Auto. Ins. Co.*[11] does not apply because "we have a **single** policy" while arguing a few pages earlier that he is not bound by Wayne Reeves' rejection of UIM coverage "since a new policy was effectively created between Bryan and Progressive." (Def.'s Br.,

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[9] Defendant also cites *Floyd v. Nationwide Mut. Ins. Co.*, No. CIV.A.6:04-1305-GRA, 2006 WL 4730588, at *2 (D.S.C. May 17, 2006), *aff'd,* 221 F. App'x 207 (4th Cir. 2007) for the proposition that the policy should be reformed to provide UIM coverage for all vehicles under the policy. (Def.'s Br., p. 17). *Floyd* is blatantly distinguishable. In *Floyd*, the court found that no meaningful offer was ever made to the named insured who applied for the policy. 2006 WL 4730588, at *2. Consequently, the policy was reformed in total to include UIM coverage for all vehicles. *Id.* at *7. In this case, it is undisputed that Progressive made a meaningful offer of UIM coverage to the policy applicant, Wayne Reeves. (ECF No. 17, Stipulation of Fact ¶ 3); (Def.'s Br., pp. 5-6). This is why there is even a question as to whether reformation, if required, would apply to those vehicles with owners who are bound by a valid rejection of UIM coverage.

[10] As this Court explained in *Rhoden*, stacking cases are distinguishable from portability cases. Rhoden, 398 S.C. at 402 n.5, 728 S.E.2d at 482 n.5. Stacking cases only require that an insured "have" a vehicle involved in the accident – i.e. qualify as a Class I insured. *Id.* Ownership is not a prerequisite in a stacking case. *Id.* However, as this Court further explained in Rhoden, portability cases have "different public policy considerations," and a distinction can be made between owners and non-owners. *Id.* However, this is not a stacking or porting case. At this point there is not UIM coverage on Wayne and Jenifer Reeves' vehicles to stack or to port.

[11] 303 S.C. 321, 400 S.E.2d 492 (1991).

pp. 16, 18 (emphasis in orig.)). Which is it? Defendant inconsistently argues for both because he wants to accept the benefits of being on his father's existing policy, while at the same time avoiding acceptance of his father, the policy applicant's, coverage choices.[12] Reformation is an equitable concept, and it would be inequitable to allow an insured to make coverage choices for property he does not own, particularly choices directly contrary to the owner's choices.

CONCLUSION

For the above stated reasons and the additional reasons set forth in Plaintiff's Brief, Progressive respectfully requests that this Court answer "Yes" to the first certified question and declare the second certified question moot.

Respectfully submitted,

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[12] Some of these benefits include, but are not limited to, a multi-vehicle premium discount, a home owner discount, a claim free renewal discount, as well as a statutory prohibition against cancellation and nonrenewal. *See* (ECF No. 1-3 (policy declarations page listing multi-vehicle discount, home owner discount, claim free renewal discount)); S.C. Code § 38-77-121 (allowing for cancellation without cause during first 90 days policy is in effect).

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CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Plaintiff, certify that the Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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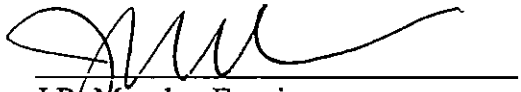
PROOF OF SERVICE

I certify that I have served the Reply Brief on Bryan Reeves by depositing a copy of it in the United States Mail, postage prepaid, on February 1, 2019, 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.



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