IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-02965
Appellate Case No. 2013-000923

Progressive Northern Insurance Company ..... Appellant,

v.

Stanley K. Medlock, Corey K. Medlock and The Standard Fire Insurance Company, ...Defendants,

Of Whom

Stanley K. Medlock and Corey K. Medlock.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case turns upon whether the addition of a second vehicle and a second named insured to an existing policy of insurance constitutes a change to the existing policy or the creation of an entirely new policy. Progressive Northern Insurance Company ("Progressive") filed this declaratory judgment action in the Spartanburg County Court of Common Pleas on July 11, 2011 seeking a declaration that Respondent Corey Medlock was bound by his father's signed rejection of optional underinsured motorist coverage. Corey Medlock and his father Stanley Medlock filed an Answer, Counterclaim, and Crossclaim on August 23, 2011 seeking to reform the Progressive policy to include the rejected underinsured motorist coverage. Progressive filed a Reply to the Medlocks' counterclaim on October 4, 2011.

Progressive and the Medlocks filed cross motions for summary judgment on October 5, 2011 and June 11, 2012, respectively. Each party filed a supporting memorandum, and the Honorable J. Derham Cole heard arguments at a hearing on June 20, 2012. On March 26, 2013, Judge Cole signed an Order refusing to apply South Carolina Code § 38-77-350(C) and finding that the addition of Corey Medlock as a second named insured and the addition of his vehicle as an additional automobile to an existing policy of automobile insurance required Progressive to make a second offer of

optional coverage. The Order was filed on March 26, 2013 and Progressive received written notice of entry of the Order on April 3, 2013. Progressive timely filed the Notice of Appeal on April 23, 2013.

STATEMENT OF FACTS

The facts of the case are undisputed and were set forth in a Stipulation of Facts which the parties submitted to the Trial Court. On October 15, 2009, Progressive issued a policy of insurance to Stanley Medlock covering a 2001 Polaris Sportsman 500. The policy number was 85613910-0. (R. p. 67). Corey Medlock is Stanley's son. Corey lived with his father continuously from the time the policy was issued to the date the accident occurred. The application lists Corey Medlock as a "Driver and household resident" and describes his relationship to Stanley Medlock as "child." Although Stanley Medlock owned the Polaris Sportsman, the application reveals that the Polaris Sportsman was Corey Medlock's "principal vehicle " (R. p. 128).

As part of the application, Stanley Medlock signed a form titled: "Offer of additional uninsured motorist coverage and optional underinsured motorist coverage" ("Offer Form") (R. pp. 133-137). Stanley Medlock rejected optional underinsured motorist coverage and signed the Offer Form in the space indicating his rejection of optional coverage. He also signed the "Applicant's acknowledgment" on the following page. (R. pp. 136-137). The Medlocks concede that the Offer Form and Stanley Medlock's signatures satisfied the requirements of South Carolina Code § 38-77-350(A) and entitled Progressive to a conclusive presumption of an informed, knowing rejection of optional coverage for the October 15, 2009 application. (R. p 67)

On June 9, 2010, only eight months after Stanley Medlock signed a written rejection of optional coverage, the existing policy was changed at the request of the named insured. A 2001 Suzuki motorcycle was added as a second vehicle on the original policy and Corey Medlock went from being shown as a listed driver and household resident to being shown as a second named insured on the declarations page. (R. p. 68). Corey Medlock owned the Suzuki motorcycle; however, no new policy was created. (R. p. 68). Because Progressive already had an offer form on file signed by a named insured to the policy rejecting optional coverage, Progressive did not make a second offer of optional coverage. (R. p. 68).

On February 10, 2011, Corey Medlock was involved in an accident while driving his Suzuki motorcycle. The liability carrier for the driver of the other involved vehicle tendered its limits of liability coverage in exchange for a Covenant Not to Execute. (R. p. 68). Corey Medlock then filed a civil action in the South Carolina Court of Common Pleas for the Seventh Judicial Circuit Spartanburg County, captioned Corey K. Medlock v. Jon C. Owens, Civil Action No. 2011-CP-42-649. This declaratory judgment action followed.

ARGUMENT

The General Assembly created a safe harbor statute in South Carolina Code § 38-77-350 protecting insurers like Progressive from reformation actions when the insurer obtains a signed rejection of optional coverage on a form designed to convey a meaningful explanation and offer of optional coverage. In order to give effect to its purpose of protecting insurers from reformation actions, the General Assembly created a conclusive presumption when the form is properly completed by a named insured

applicant. Moreover, once a named insured applicant rejects coverage, his rejection remains binding upon all other insureds for any subsequent change, renewal or replacement policy.

The Medlocks concede that Progressive made a meaningful offer of underinsured motorist coverage to Stanley Medlock when he initially applied for the policy. Stanley Medlock signed the offer form rejecting optional underinsured motorist coverage. Because Stanley Medlock remained a named insured on the policy continuously from the time he applied for coverage to the date of the accident, his signed rejection of optional coverage continued to bind all other insureds on the policy – whether named insureds or not. Moreover, adding a second named insured and a second vehicle did not create a new policy of insurance, but merely reflected a change to the existing policy as contemplated by the General Assembly in South Carolina Code § 38-77-350(C).

I. The Trial Court erred by failing to hold that the signed rejection of optional underinsured motorist coverage by Stanley Medlock binds all other insureds, including his son Corey Medlock.

When read together, South Carolina Code Sections 38-77-160 and 38-77-350 require an insurer to make an offer of optional coverage to the named insured who applies for the insurance policy. Once the applicant signs a rejection of optional coverage, that rejection is binding upon all other insureds on the policy whether or not they are named insureds.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Howell v. United States Fidelity and Guar. Ins. Co., 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006) (citation omitted). Therefore, Courts must consider the language of the statute as a whole and cannot focus on a single section. Id.

(citation omitted). "Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result." Id. (citation omitted).

Sections 38-77-160 and 38-77-350 address the same subject matter and complement one another. Therefore, they must be construed to give effect to the language in both statutes and the General Assembly's intent. While § 38-77-160 provides a requirement that insurers offer optional coverage to "the insured" in vague terms, § 38-77-350 provides specific guidance to insurers as to how those offers must be made and provides a safe harbor protection for insurers guaranteeing that – once an offer has been made – insurers can rely upon a named insured's rejection of optional coverage.

Section 38-77-160 provides in pertinent part:

> Automobile insurance carriers shall offer, at the option of ***the insured***, uninsured motorist coverage up to the limits of ***the insured's*** liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of ***the insured,*** underinsured motorist coverage up to the limits of the insured liability coverage . . . . If, however, ***an insured or named insured*** is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that ***the insured or named insured*** is protected only to the extent of the coverage he has on the vehicle involved in the accident. . . .

S.C. Code Ann. § 38-77-160 (emphasis added). Section 38-77-350 expounds on § 38-77-160, providing:

> (A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered to ***applicants*** for automobile insurance policies. This form must be used by insurers for all ***new applicants***. The form, at a minimum, must provide for each optional coverage required to be offered:

* * *

(3) a space to mark whether ***the insured*** chooses to accept or reject the coverage and a space to state the limits of coverage ***the insured*** desires;

(4) a space for ***the insured*** to sign the form that acknowledges that ***the insured*** has been offered the optional coverage

(5) the mailing address and telephone number of the insurance department that ***the applicant*** may contact if ***the applicant*** has questions that the insurance agent is unable to answer.

(B) If this form is signed by ***the named insured*** . . . it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to ***the named insured or another insured*** under the policy for ***the insured's*** failure to purchase optional coverage or higher limits.

(C) An automobile insurer is not required to make a new offer of optional coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.

(D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person . . . is liable in an action for damages on account of the selection or rejection made by ***the named insured.***

S.C. Code Ann. § 38-77-350 (emphasis added).

Section 38-77-350 clarifies the intent of § 38-77-160 in a number of ways. First, § 38-77-350(A) provides the various requirements that insurers must include in a written offer form to satisfy the meaningful offer requirement of § 38-77-160. For example, an insurer must provide "a brief and concise explanation of the coverage; a list of available limits and the range of premiums, [and] a space to mark whether the insured chooses to

accept or reject the coverage . . . ." S.C. Code Ann. § 38-77-350(A). Furthermore, an insurer must use a form approved by the Department of Insurance. S.C. Code Ann. § 38-77-350(A).

Second, and more important to this appeal, § 38-77-350(A) clarifies ***which*** insured must receive the offer of optional coverage. Although § 38-77-160 requires that carriers offer optional coverage to "the insured," it does not clarify which "insured" must receive the offer. In fact, § 38-77-160 only uses the phrase "named insured" when paired in the phrase "an insured or named insured" and never specifically provides that the offer must be made to "the named insured." However, it would be absurd to read § 38-77-160 as requiring insurers to make offers to all insureds under the policy. See Enos v Doe, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."). It is obvious that the statute cannot intend for all "insureds" to receive an offer because the omnibus definition of "insured" includes permissive users. See S.C. Code Ann. § 38-77-30(7) ("'Insured' means the named insured . . . and any person who uses with consent . . . of the named insured the motor vehicle to which the policy applies . . . ."). Therefore, § 38-77-160 fails to provide clear guidance on who must receive the offer of optional coverage.

Section 38-77-350(A) answers the question regarding to whom insurers must make the § 38-77-160 offer by requiring that the offer be received by "new applicants" and that the applicant must be a named insured. See S.C. Code Ann. § 38-77-350(A) ("This form must be used by insurers for all new ***applicants***.") By using the term "applicants" rather than "all named insureds," the General Assembly clarified the offer

requirement in § 38-77-160 by mandating that the offer be made to the individual named insured who undertakes the application process and submits the application. See Allstate Ins. Co. v. Estate of Hancock, 345 S.C. 81, 87, 545 S.E.2d 845, 848 (Ct. App. 2001) ("Moreover, requiring the form be executed by the named insured who is the applicant is consistent with the language in section 38-77-350(A) requiring the form be used 'for all new applicants.'").

Section 38-77-350(A) requires that the insurer use an approved offer form to offer coverage to "all new applicants" rather than "all named insureds." S.C. Code Ann. § 38-77-350(A). The term "applicant" separates the individual named insured who signs the insurance application from other insureds (household residents or listed drivers) or named insureds who may ultimately be listed on the policy. The statute goes on to provide that the form must include a space for "the insured" to mark his or her selections of coverage and for "the insured" to sign the form acknowledging that "the insured has been offered the optional coverages." S.C. Code Ann. § 38-77-350(A). Furthermore, "If this form is signed by the named insured," the signature binds "another insured under the policy." S.C. Code Ann. § 38-77-350(B) By using the phrase "named insured" in the same section that it uses the term "applicants," the General Assembly intended that the two terms bear different meanings. Moreover, because a named insured is included in the class of "applicants," "applicant" must be a more narrow term than "named insured." By reading "applicants" to mean those named insureds that actually deal with the insurer or agent to procure the policy, both the terms "named insured" and "applicants" have distinct meanings under § 38-77-350.

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

The Illinois Court of Appeals rejected this contention, holding instead that the named insured that applies for the insurance policy can receive the offer and reject coverage and that his rejection of coverage binds all other insureds on the policy regardless of whether they are named insureds. Id. at 1070-71, 662 N.E.2d at 151-52. The Court of Appeals reasoned, "[b]oth the case law and common sense show us the way the majority of families obtain insurance: one person representing the family meets with an insurance agent, applies for coverage, signs the necessary documents, and lists those to be covered under the policy." Id. Therefore, because the common practice is for one insured to apply for the policy on behalf of all insureds, that same insured's rejection of coverage binds all insureds under the policy.

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

> Requiring every potential "insured," or "additional insured," or "household member" who may be covered under a policy to visit or speak with an insurance agent in order to be given an offer of additional UM/UDIM

> coverage would be impractical. The legislature amended section 143a-2 of the Code to state only the *applicant* must be given a description of and may waive the offer of additional UM/UDIM coverage and the *applicant's* waiver is to be binding on all insureds under the policy.
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> * * *
>
> Requiring offers of UM/UDIM coverage to be made to all insureds under automobile policies would be contrary to reasonable business practices from which both insurers and customers benefit. . . . An offer of UM coverage was made as required by the statute and, as the applicant and a named insured, [the Husband] rejected the offer, thereby binding all insureds under the policy.

Id.

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

If the General Assembly wanted to require every named insured to receive a meaningful offer and reject such an offer in writing, it could have easily made that intent clear by stating that insurers must offer optional coverage to "all named insureds" and obtain signed rejections from "all named insureds." However, the statutes do not reflect this intent. Section 38-77-160 requires that insurers "shall offer, at the option of ***the*** insured" optional coverage. The phrase "the insured" is used consistently throughout § 38-77-160. S.C. Code Ann. § 38-77-160. Likewise, § 38-77-350(A), after clarifying that offers must be made to "applicants," provides that the applicant must be a named

insured by stating that if the form is signed by "the named insured" applicant, it binds all other insureds.

If South Carolina law is going to require every family member listed as a named insured on the policy to go to the insurance agency, get a meaningful explanation of optional coverage, and sign an offer form, then such an onerous burden on both the insureds and insurers should be explicitly spelled out in the statute. However, the statutes do not create such an unwieldy rule. Rather, the General Assembly adopted the reasonable solution of requiring that the individual insured that applies for the policy and deals directly with the insurance agent on behalf of all other insureds can receive the offer, sign a waiver, and bind all other insureds, both named insureds and otherwise.

II. The Trial Court erred by failing to treat the addition of a second vehicle and a second named insured as a "change" to the policy pursuant to South Carolina Code Ann. § 38-77-350(C).

The Trial Court confused the substitution of a new and different named insured that took place in McDonald v. South Carolina Farm Bureau Insurance Company, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 2000), with the addition of a second named insured to an existing policy of insurance. Although the former constitutes a new policy of insurance because one entire side of the contracting equation has changed, the latter constitutes a mere change to the existing policy of insurance which continues in force between the original insurer and the original named insured. The Trial Court incorrectly applied the dissimilar facts in McDonald to this case.

A. Because Stanley Medlock remained a named insured on the policy after the changes took effect, the addition of Corey Medlock as a second named insured is only a change to the existing policy and not a new policy.

In this case, when Progressive issued the policy to Stanley Medlock, Corey Medlock was a listed class I insured. The Medlocks concede that Progressive made a meaningful offer of optional coverage to Stanley Medlock and he validly signed a rejection of optional underinsured motorist coverage. (R. p. 67). That rejection remained binding when Corey's status was changed from a listed driver to an additional named insured. This comports with the general insurance principle that, when parties mutually agree to change certain terms of the insurance agreement, the remaining terms go unchanged:

> In general, in the absence of an agreement to the contrary, a presumption follows, on a mutual agreement to modify a policy in some particular, that the agreement contemplates that the other terms and conditions shall continue and apply to the modified policy and that it shall differ only as to the matters upon which the parties have agreed. ***As a consequence, a modification which adds a new insured generally renders that insured subject to the existing terms and conditions of the policy.***

2 Couch on Ins. § 25:5 (emphasis added).

South Carolina's appellate courts have not addressed whether the addition of a second named insured to an existing policy requires a new offer. However, appellate courts in other jurisdictions have. For example, the Ohio Court of Appeals contrasted the issue addressed in McDonald from the issue in the case *sub judice* by reaching different results in Johnson v. Great American Ins. Co., 44 Ohio App. 3d 71, 541 N.E.2d 100 (Ct. App. 1988) and McKnight v. Grange Mutual Cas Co., 110 Ohio App. 3d 282, 673 N.E.2d 1012 (Ct. App. 1996). In the Johnson case, the original and sole named insured

on the policy reduced optional coverage below the maximum amount available under Ohio law. Id. at 72, 541 N.E.2d at 101. Several years later, he requested that his new wife be added as an additional named insured. Id. Both before and after this modification, he remained a named insured on the policy. Id. Ohio's statute required that "the named insured" had the right to reject optional coverage and that no new offer is needed for any supplemental or renewal policy. Id. at 74, 541 N.E.2d at 103 (citing 138 Ohio Laws, Part I, 1458). The Court of Appeals held "at the time that the name of a new insured is added to an existing policy, the new insured is bound by the policy's existing terms absent a specific request otherwise." Id. Therefore, the husband's pre-marriage rejection of optional coverage applied equally to his new wife when she was added to the policy.

In contrast, the Ohio Court of Appeals in McKnight dealt with similar facts to those in McDonald where one named insured was completely substituted for a new and different named insured. A husband and wife swapped vehicles and insurance policies completely. 110 Ohio App. 3d at 285, 673 N.E.2d at 1014 The husband, who was originally the only named insured on the policy insuring the accident vehicle, signed a written rejection of optional coverage. Id. When the two swapped policies, the insurer used the same policy number and did not provide a new offer to the wife. Id. After the swap, the wife became the sole named insured on the policy that previously only belonged to her husband. Id. The two were never joint named insureds. Id.

The Ohio Court of Appeals held that only the wife, as the sole named insured on the policy after the swap, had authority to reject optional coverage. Therefore, the insurer should have provided a new offer and should have obtained a new written rejection from

the wife. Its failure to do so required reformation of the policy. Id. at 287, 673 N.E.2d at 1015-16. The McKnight Court compared its facts with those in Johnson and held:

> The facts in *Johnson* are not similar or identical to those in the matter *sub judice*. The *Johnson* case involved a situation where one named insured was added to an existing policy in which the other named insured had already expressly rejected UM coverage. Herein, [the Wife] and [Husband] never held a joint policy of insurance as co-named insureds.

McKnight, 110 Ohio App. 3d at 287, 673 N.E.2d at 1016.

The facts of this case match those in Johnson and should be distinguished from the facts in McDonald. In McDonald – like in McKnight – one named insured was completely substituted in place of the original named insured and, therefore, a new policy was created because one side of the contracting equation completely changed. However, in the present case, – as in Johnson – Stanley Medlock remained a named insured both before and after the modification of the policy and Corey Medlock was simply added as an additional named insured on the policy. Importantly, while Ohio's statute states that the rejection remains binding in "supplemental" or "renewal" policies, § 38-77-350(C) is much broader and makes a written rejection binding upon any policy that "renews, extends, ***changes***, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C). The General Assembly used broad language reflecting its intent in § 38-77-350 of balancing the requirement that insurers make a meaningful offer with the importance of providing a safe harbor to protect insurers from the harsh consequence of reforming a policy for optional coverage that was never purchased and, as in this case, was specifically rejected.

The Supreme Court of Rhode Island addressed a similar situation in Ferreira v. Integon National Insurance Co., 809 A.2d 1098 (R.I. 2002). In that case, the original named insured applied for coverage and signed a written rejection of optional uninsured coverage in 1995. He later married and added his wife as an additional named insured to the existing policy in 1996. Ferreira, 809 A.2d at 1099. The insurer never obtained a written rejection from the wife, who then suffered injuries in an accident with an uninsured motorist. Id.

Rhode Island's insurance statutes – like South Carolina's – provided that "***the named insured*** shall have the option of selecting a limit in writing less than the bodily injury coverage," but only after signing a form approved by the director of business regulation. Id. at 1100-01 (citing R.I. Gen Laws § 27-7-2.1(a) (emphasis added)). The statute also provides that an insurer must notify insureds of optional coverage "in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy" but does not need to obtain a new written rejection.[1] Id. (quoting R I. Gen. Laws § 27-7-2.1(d)). The Supreme Court held: "In the case before us, the addition of plaintiff to the policy ***changed*** the policy's terms, ***but did not represent the new issue or delivery of a policy***." Id. at 1101 (emphasis added).

In reaching its conclusion, the Supreme Court of Rhode Island rejected the idea that a new offer and written rejection were required when a second named insured is added to the policy because such a burdensome requirement must be created by proper

[1] The Trial Court below held that because South Carolina does not have a comparable statute requiring that the insurer notify an insured upon any amended, altered, or modified policy, that Ferriera was not applicable However, the important issue in the Ferriera case was that if the addition of a new named insured was the creation of a ***new*** policy rather than an amendment, alteration, or modification to the existing policy, then the insurer could not rely upon the notice and was required to obtain a new rejection Therefore, the issue in Ferriera is exactly the same as the issue in this case does the addition of a second named insured constitute the creation of a new policy or merely a change to an existing policy?

legislation rather than through judicial action. Id. ("Any change in these clear statutory provisions that would impose this arguably onerous burden on insurers should be made by duly enacted legislation.")

Although not addressing the addition of a second named insured, other jurisdictions appear to recognize the distinction between when an insured is added to an existing policy and when an insured is substituted. Compare Nila v. Hartford Ins Co. of the Midwest, 312 Ill. App. 3d 811, 728 N.E.2d 81 (Ct. App. 2000) (substituting wife for deceased husband as sole named insured required new offer of optional coverage) with Isaacson v. Country Mut Ins Co., 328 Ill App. 2d 982, 767 N.E.2d 862 (Ct. App. 2002) (addition of daughter as an insured driver did not require new offer); Allstate Ins. Co. v. Kaneshiro, 93 Hawai'i 210, 998 P.2d 490 (2000) (substituting ex-wife for ex-husband as sole named insured required a new offer) with Lee v. Government Employees Ins Co., 911 F. Supp. 2d 947 (D. Haw. 2012) (adding vehicle and newly-licensed driver to policy did not require new offer).

Both before and after the addition of Corey Medlock and the second vehicle to the insurance policy, Stanley Medlock was a named insured. Stanley Medlock was the party who contracted for the policy when it incepted, and party to the policy today. If Corey had been substituted in place of his father, then a new policy of insurance would have been made. However, that is not what happened. Corey Medlock was simply added to the existing policy with all other terms of the policy and Stanley Medlock's role as a named insured remaining the same. Therefore, the Trial Court erred by failing to recognize this important distinction and by applying this Court's holding in McDonald to the facts of this case.

B. McDonald does not stand for the rule that the addition of a second named insured will create a new policy of insurance.

This Court held in McDonald that if one entire side of the contracting equation leaves the agreement and is substituted for a new contracting party, then a new policy of insurance is created However, it does not follow that the addition of a second named insured to an existing policy creates the same result.

In McDonald, a new named insured was completely substituted for the original named insured. The insured, Wells, sold her car to her son, McDonald – who was not a resident relative and was not an insured on the policy. Wells requested that the policy be transferred to her son. McDonald, 336 S.C. at 122, 518 S.E.2d at 625. Although the policy number remained the same, her son went from being a stranger to the insurance policy to being the sole named insured under the policy. Id. The son did not have to fill out a new application, but he was required to pay a membership fee. Id. After the transaction, the mother was no longer a named insured on the policy.

Farm Bureau relied upon § 38-77-350(C) and argued that the substitution of one named insured for an entirely different named insured was only a "change" to the existing policy of insurance and did not create a new policy. Id. at 123, 518 S.E.2d at 626. This Court rejected that argument and held that: "***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 (emphasis added).

In an earlier case, Ackerman v. Travelers Indemnity Company, 318 S.C. 137, 142, 456 S.E.2d 408, 410 (Ct. App. 1995), this Court addressed the other side of the equation where the insurer changed. In that case, the insured purchased a garage liability policy

from Travelers to replace two policies issued by Canal Insurance Company and American Mutual Insurance Company. Travelers relied upon South Carolina Code § 38-77-350(C) to argue that it was not required to make a new offer because its policy merely "replaced" the prior policies issued by different insurers. Id. This Court held that Travelers – as a new insurer to the contract – could not rely on the offer from the previous insurer – who was no longer a party to the insurance contract. Id. In doing so, this Court held that: "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." Id. at 143, 456 S.E.2d at 411.

Together, McDonald and Ackerman consistently reflect the principle that § 38-77-350(C) will not protect an insurer from the requirement of making a new offer of optional coverage when either the original insurer or the original named insured who received the written offer is no longer a party to the contract. However, neither McDonald nor Ackerman should be interpreted to abrogate the General Assembly's intent of providing a safe harbor under § 38-77-350 when an insurer has made an offer to one named insured applicant and that applicant remains a named insured under the policy. Both before and after Corey Medlock and the second vehicle were added to the policy, Progressive was the insurer and Stanley Medlock was a named insured. This fact distinguishes this case from Ackerman and McDonald and places it squarely within the protections of § 38-77-350(C).

C. The Trial Court relied upon overly broad language from McDonald that conflicts with the plain language of South Carolina Code § 38-77-160 and § 38-77-350.

The Trial Court relied upon this Court's reasoning in McDonald which has been restated in Smith v. South Carolina Insurance Company, 350 S.C 82, 546 S.E.2d 358 (Ct. App. 2002), and Government Employees Insurance Company v. Draine, 389 S.C. 586, 698 S.E.2d 866 (Ct. App. 2010). In McDonald, this Court held that "the legislature intended for insurers to afford all named insured the opportunity to accept or reject UIM coverage." 336 S.C. at 124, 518 S.E.2d at 626. Therefore, this Court construed the term "new applicant" as meaning "those who . . . never had an opportunity to reject UIM coverage." Id. at 125, 518 S.E.2d at 626.

This Court in Smith contrasted the facts of McDonald with those where a second vehicle is added to an existing policy of insurance and held that the addition of a second vehicle is a "change" to an existing policy rather than the creation of a new policy.[2] Smith, 350 S.C. at 89, 564 S.E.2d at 362. In doing so, this Court repeated the language used in McDonald regarding old and new offers. Id. at 88, 564 S.E.2d at 361.

As discussed above, § 38-77-160 does not state which insured must receive an offer and does not state that the offer must be made to "named insureds." However, common sense dictates that § 38-77-160 does not require a meaningful offer to ***all*** insureds because it would be impossible for insurers to make offers to permissive users, who are defined as "insureds" under the statute. See S.C. Code § 38-77-30(7). Section 38-77-350 governs which insured must receive the meaningful offer by providing that the

[2] In Smith, this Court also concluded that "[a]ny limitation in the scope of this statute's [§ 38-77-350(C)] application is a matter best left for the consideration of our legislature " Id

applicant, i.e. the named insured that actually deals with the insurance carrier or agent, must receive the offer and sign a written rejection.

The word "applicants" must be construed in a way that gives effect to every part of § 38-77-350, including part (C). South Carolina's "legislature intends to accomplish something by its choice of words, and would not do a futile thing." Gordon v Phillips Utilities, Inc., 362 S.C. 403, 405, 608 S.E.2d 425, 427 (2005) (citation omitted) "The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (citations omitted). "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done so by any reasonable construction." Hinton v. South Carolina Dep't of Probation, Parole and Pardon Services, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) (citations omitted).

"Applicant" cannot mean all those named insureds who never had an opportunity to reject UIM coverage. If that were the case, there would be no reason for § 38-77-350(C) because § 38-77-350(A) only requires an offer to be made to "new applicants." Once a named insured receives an offer, he or she is no longer one who never had "the opportunity to accept or reject UIM coverage." Therefore, no new offer would be required after any change, substitution, renewal, replacement or superseding policy because the insured was no longer an "applicant" as this Court interpreted that term in McDonald. Rather, "applicant" must mean the individual named insured who handles dealings with the insurer or insurance agent and completes the insurance application.

This gives effect to all parts of § 38-77-350 and reasonably specifies which individual must receive the offer required by § 38-77-160

Applying this reasoning, Progressive was not required to make a new offer to Corey Medlock because a named insured on the policy had already received a meaningful offer. This interpretation further comports with the reasoning in Ackerman, which this Court later relied upon in McDonald, that "where § 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." Ackerman, 318 S.C. at 142, 456 S.E.2d at 410. In this case, there is an "old" offer. Specifically, Progressive made an offer to Stanley Medlock, the "applicant," when he applied for the policy. Moreover, the offer to Stanley Medlock is binding upon all other insureds on the policy and remains binding until he is no longer a named insured on the policy. S.C. Code § 38-77-350(C). Therefore, giving the word "applicant" a meaning that gives effect to all parts of § 38-77-350 and comports with the General Assembly's requirement of a meaningful offer pursuant to § 38-77-160, Progressive made a meaningful offer to Stanley Medlock that binds Corey Medlock. Moreover, the addition of a second vehicle to the policy and changing Corey Medlock from a listed insured to a named insured was a "change" to the existing policy that did not require a new offer of optional coverage.

CONCLUSION

It is undisputed that Progressive made a meaningful offer of optional coverage to Stanley Medlock when he first purchased the insurance policy and that Stanley Medlock rejected optional coverage pursuant to § 38-77-350(A) and (B). As the applicant for the policy, Stanley Medlock's rejection of optional coverage binds all other insureds on the

policy regardless of whether they are classified as named insureds, insured drivers, or household residents. South Carolina Code § 38-77-350(C) provides a safe harbor allowing insurers like Progressive to rely upon a written rejection by the applicant when the policy is subsequently changed, so long as the change does not create a new policy of insurance. The addition of a second vehicle and a second named insured to an existing policy of insurance is only a "change" to the existing policy under § 38-77-350(C). Therefore, Progressive was not required to make a new offer of optional coverage and Stanley Medlock's signed rejection of optional coverage bound all other insureds on the policy.

Respectfully submitted,

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October 28, 2013

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-02965
Appellate Case No. 2013-000923

Progressive Northern Insurance Company..... Appellant,

v.

Stanley K. Medlock, Corey K. Medlock and The Standard Fire Insurance Company, ... Defendants,

Of Whom

Stanley K. Medlock and Corey K. Medlock..... Respondents.

CERTIFICATE

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

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Stanley K. Medlock, Corey K. Medlock and the Standard Fire Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on October 28, 2013, addressed to their attorneys of record:

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