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 RESPONDENTS

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II. Did the Circuit Court err in finding that South Carolina Code Ann. § 38-77-350(C) does not apply to changes regarding named insured?

STATEMENT OF CASE

This declaratory judgment action involves the availability of underinsured motorist coverage for a named insured on a policy of insurance when such person was made a named insured eight months after the policy was originally issued and has never been offered the opportunity to accept or reject UIM coverage. Progressive Northern Insurance Company ("Progressive") filed the action in Spartanburg County Court of Common Pleas on July 11, 2011 seeking a declaration that UIM coverage was not available under their policy. Corey Medlock and Stanley Medlock (collectively referred to as "Medlocks" or "Medlock Defendants") filed an Answer, Counter-claims and Cross-claims on August 23, 2011 asserting no offer of UIM coverage was ever made to Corey Medlock, therefore, Progressive's policy must be reformed to provide him UIM coverage. Progressive filed a Reply to the counterclaim on October 4, 2011.

Cross motions for summary judgment were filed by Progressive on October 5, 2011 and by the Medlocks on June 11, 2012. Affidavits with supporting Exhibits were filed by the Medlocks on June 18, 2012 and each party filed a supporting memorandum of law. A hearing was held before the Honorable J. Derham Cole on June 20, 2012.

On March 26, 2013, Judge Cole granted the Medlocks' motion for summary judgment agreeing that South Carolina Code Ann. § 38-77-350(C) does not apply to changes regarding named insured and finding that when Progressive chose to make Corey Medlock a named insured on a policy of insurance, Progressive was required under South Carolina Code Ann. § 38-77-160 to offer him UIM coverage. The order was filed on March 26, 2013 and Progressive filed its Notice of Appeal on April 23, 2013.

STATEMENT OF FACTS

The facts of this case are not in dispute and arise out of a vehicle collision on October 9, 2010 in which Corey Medlock was injured while driving a motorcycle insured by Progressive. (R. p. 53, ¶ 4, p. 54, ¶ 6 &10). The liability carrier for the at-fault vehicle tendered its limits of liability coverage in exchange for a Covenant Not to Execute and Corey Medlock filed an action in South Carolina Court of Common Pleas for the Seventh Judicial Circuit Spartanburg County captioned Corey K. Medlock v. Jon C. Owens, Civil Action Number 2011-CP-42-649 to pursue available UIM coverage. (R. p. 54, ¶ 10). Progressive entered a Notice of Appearance in that action and then filed this declaratory judgment action on July 11, 2011 (R. p. 68, ¶ 13).

On October 15, 2009, Stanley Medlock applied for a policy of insurance with Progressive to insure a 2001 Polaris Sportsman 500 4-wheeler all terrain vehicle (ATV) which he alone owned. (R. p. 55, ¶ 1). Stanley Medlock was the only applicant, the only named insured and the only person to sign the application for this policy. (R. p 55, ¶ 2, p. 128, p. 132, pp. 136-137). Corey Medlock was listed on the application by Stanley Medlock to be an authorized driver of the ATV. (R. p. 128). When making this application for coverage on the ATV, Stanley Medlock declined to purchase optional underinsured motorist coverage. (R. p. 136).

Progressive issued policy number 8513910-0 on October 15, 2009 covering the ATV from October 15, 2009 through October 15, 2010. (R. p. 103). The liability limits of the policy were $25,000/$50,000 and the underinsured coverage was shown as "Rejected". (R. p. 104). Stanley Medlock was shown as the only named insured on the policy and the primary responsible driver. (R. pp. 103-104). Corey Medlock was shown

as a driver and household resident. (R. p. 104) The annual premium for this policy was $175.00 and was always paid by Stanley Medlock. (R. p. 104).

At all times relevant to this policy, Corey Medlock was a resident relative of Stanley Medlock. (R. p 53, ¶ 2). The terms of the policy issued define Corey Medlock as a "Relative" as opposed to the named insured or his spouse. (R. p. 108, 1st column lines 1-4).

Eight months into the twelve month policy, three-fourths (3/4) of the way through the policy period, Corey Medlock purchased a Suzuki motorcycle and asked if it could be added to the existing ATV policy. (R. p. 53, ¶ 4). Progressive agreed and on June 9, 2010 added the Suzuki as a covered vehicle on the policy. (R. p. 138). But Progressive simultaneously made another change to the policy that was not requested; Corey Medlock was changed from being just an authorized driver on the policy to being a named insured. (R. p. 138). The reason given for the unrequested change was that it was the issuing agency's policy to designate all vehicle owners as named insured. (R. p. 68, ¶ 14). The annual premium increased by $118.00 for the Suzuki coverage and the pro-rated premium due when it was added was $37.00 (R p. 139) Corey Medlock paid this additional premium and has always paid the premium for the coverage on the Suzuki under the policy. (R. p. 54, ¶ 8, p. 56, ¶8).

No new offer of UIM coverage was made to Stanley Medlock at the time these changes were made to the policy. (R. p. 56, ¶ 7). Corey Medlock never filled out or signed an application to be a named insured with Progressive. (R. p. 54, ¶ 5) Prior to June 9, 2010, Corey Medlock had never been a named insured on any policy of insurance, either with Progressive or any other carrier. (R. p. 54, ¶ 7). Corey Medlock

was not given the opportunity to accept or reject UIM coverage by Progressive when it made him a named insured and he has never had the opportunity to make that informed decision. (R p 54, ¶ 5).

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011) (citation omitted). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Id. at 46-47, 717 S.E.2d at 592 (citation omitted). However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. Id at 47, 717 S.E.2d at 592.

ARGUMENT

South Carolina Code Ann. § 38-77-160 requires that every automobile insurance carrier is required to offer underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist. South Carolina Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 614, 730 S.E.2d 862, (S.C. 2012). "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 motorist. The UIM and UM 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." Id. at 614 (Citing Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005)). Following this standard and the intention of the legislature as already determined by the South Carolina Courts, the Circuit Court correctly applied our existing law to this case in granting summary judgment to the Medlocks.

The arguments, inferences and policy considerations raised by Progressive have all previously been thoroughly evaluated by the South Carolina Courts in the case of McDonald v. South Carolina Farm Bureau Insurance Company, 336 S.C. 120, 518 S.E.2d 624 (S.C.App 1999) *cert denied* (2000), wherein this Court has already answered the Appellant's question of when does a carrier not have to make an offer of UIM to a named insured? This Court held that "clearly, the legislature intended for insurers to afford ***all named insured*** the opportunity to accept or reject UIM coverage" and any other interpretation of the statutes "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).

Progressive makes the same arguments in this appeal that Farm Bureau made in McDonald, with the only difference being that where McDonald was made a named insured and another named insured was removed, Stanley Medlock remained a named insured when Progressive switched Corey Medlock from a driver to a named insured. Arguing against the required liberal construction in favor of coverage, Progressive mistakenly believes it should be entitled to more protection than the insured under South Carolina Code Ann § 38-77-350 because of the offer made to the applicant Stanley Medlock eight months before Progressive unilaterally decided to make Corey Medlock a named insured. Although authority from a few different jurisdictions are offered in support of this claim, such a ruling would be contrary to the existing law in South Carolina and misconstrue the clear intention of the legislature to protect the insured.

I. The Circuit Court did not err in refusing to find that the rejection of UIM coverage by one named insured was binding under South Carolina Code Ann. § 38-77-350(B) against a new named insured added eight months into a twelve month policy period.

Progressive contends that the under South Carolina Code § 38-77-350(B), the rejection of UIM coverage signed by Stanley Medlock was effective against Corey Medlock because Stanley Medlock made such rejection and remained on the policy as a named insured. (Appellant's Brief, p. 4, lines 7-10). "To require a new offer of coverage when there was a valid one signed by the first named insured just eight months earlier .... is a burden that Progressive should not have to meet in light of the statutory framework that these cases are handled under." (R p. 82, lines 1-5). Finally, Progressive believes arguing "that by adding an additional named insured during the pendency of an existing policy, that triggers the requirement for a new offer, that seems rather ludicrous, futile,

onerous on insurance companies in derogation of the protections that were afforded them in section 350(b), (c) and (d)." (R. p. 81, lines 6-11).

This Court in McDonald most certainly weighed the burden on the carrier against the rights of a named insured before determining that the legislature intended all named insured are entitled to the offer of UIM coverage Id. at 124, 518 S.E.2d at 626 (Emphasis added). The requirement to make an offer to a new named insured added as in this case would be no more ludicrous, futile or onerous when adding one named insured and removing one named insured as in McDonald. The similarities between these cases are staggering.

In McDonald, the carrier Farm Bureau, argued that it was not required to make an offer of UIM coverage to McDonald because he was not a new applicant under S.C. Code Ann. §38-77-350(A). but was merely substituted for the existing named insured. Id. Progressive argues here that Corey Medlock was not a new applicant to be a named insured under §38-77-350(A) because (1) he was already an insured "Relative" under the policy (R p. 76, lines 9-25), and (2) the original applicant remained a named insured on the policy. (Appellant's Brief, p. 4, lines 7-10). Neither McDonald nor Corey Medlock were required to complete an application. In making this argument, both Farm Bureau in McDonald and Progressive are both arguing that §38-77-350(A) and §38-77-160 cannot be read together to require a carrier to offer UIM coverage to all insured. Id. at 123, 518 S.E 2d at 625, (Appellant's Brief, pp. 5-8). Farm Bureau had previously obtained a rejection of UIM coverage from McDonald's mother, therefore, it argued § 38-77-350 protected it from having to make a new offer and was binding on McDonald. Id. at 122, 518 S.E.2d at 625. Progressive contends it obtained a rejection from Stanley Medlock,

and is therefore protected under § 38-77-350. (Appellant's Brief, p. 4, lines 4-12). "McDonald had never been a named insured with Farm Bureau prior to the insurance on the Mercury." Id. at 124, 518 S.E.2d at 626 Prior to June 9, 2010, Corey Medlock had never been the named insured on any policy of insurance with Progressive. (R. p. 54, ¶ 7). McDonald "had never been given the opportunity to accept or reject UIM coverage." Id. Corey Medlock has never been given the opportunity to accept or reject UIM coverage, either when the policy was initially taken out or when he was made a named insured on the policy. (R. p. 67, ¶ 6, and R. p. 54, ¶ 7). "McDonald did not fill out an application..." Id. at 122 , 518 S.E.2d at 625. Corey Medlock did not fill out an application. (R. p. 54, ¶ 5).

Although agreeing with this Court's reasoning in McDonald that "Sections 38-77-160 and 38-77-350 cover the same subject matter....and, therefore, must be construed together and as explanatory of each other," Progressive attempts a new spin by arguing that § 38-77-160 is "vague" and that § 38-77-350 is necessary to determine when an offer must be made. Id. at 124, 518 S E.2d at 626, (Appellant's Brief p. 5, lines 6-10). This Court in McDonald made the same analysis Progressive is asking this Court to make in this matter and determined there was "no inconsistency" in the terms of these sections. Id. This Court even went further in clarifying its analysis in stating:

> **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."**

Id at 124, 518 S.E.2d at 626 (Emphasis Added).

Farm Bureau argued in McDonald that it was not required to make a new offer because McDonald was not a "new applicant" under § 38-77-350(A) since he had not filled out an application. Id. at 123-124, 518 S.E.2d at 625-626 Progressive makes the exact same argument here. After asserting § 38-77-160 is "vague" as to exactly who an offer must be made to (Appellant's Brief, p 5, lines 6-10), Progressive states that "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." (Appellant's Brief, p. 7, lines 19-20). And therefore, since Corey Medlock did not fill out an application to be a named insured, he was not entitled to an offer of UIM coverage. Regardless of how Progressive attempts to spin it, they are attempting the exact same argument decided in McDonald where this Court held:

> **"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).

In attempting to distinguish its argument from McDonald, Progressive asserts that § 38-77-350(A) provides that "the applicant must be a named insured," (Appellant's Brief, p. 7). With this alleged requirement and citing Allstate Ins Co. v Estate of Hancock, 345 S.C. 81, 87, 545 S.E.2d 845, 848 (Ct. App. 2001), Progressive contends the legislature thereby intended such "offer be made to the individual named insured who undertakes the application process and submits the application." (Appellant's Brief, p. 7, line 22-p. 8, line 2). Section 38-77-350(A) contains no such requirement that the applicant be the named insured. S C Code Ann § 38-77-350(A). Additionally, Allstate

did not hold that the applicant must be a named insured, but rather in order for carrier to get the protection of a valid rejection under § 38-77-350, the offer form had to be signed by the named insured. Id.

However, despite this Court having addressed these same arguments in McDonald, Progressive's spin on the argument relies entirely on the assertion that "the named insured" as used in § 38-77-350(B) was only intended to only be used in the singular form "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." (See Appellant's Brief, p. 8, lines 9-11). However, "the insured" as a noun is actually both the singular and plural forms of the word. ("the insured." Cambridge Dictionaries Online. 2013. http://dictionary.cambridge.org/us/dictionary/business-english/the-insured (17 August 2013)).

This Court "cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." Cain v. Nationwide Property and Cas. Ins Co., 378 S.C. 25, 29, 661 S.E.2d 349, 352 (S.C. 2008)(citing New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C 307, 310, 649 S.E.2d 28, 29-30 (2007)). "Further, when a plain reading of the statute "lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly." Id. (citing Kennedy v. South Carolina Ret. Sys., 345 S.C 339, 348, 549 S.E.2d 243, 247 (2001)).

In order for this Court to accept the argument of Progressive that the legislature intended "the named insured" to be singular as used in § 38-77-350(B), you would necessarily have to ignore the plain and ordinary meaning of "insured" as a plural noun to limit the scope of "which" named insured must receive the offer and sign the rejection, which holding would be in direct contradiction of Cain and New York Times Co. referenced above. At the very the worst, the statute is capable of "two equally logical interpretations" as referenced in Cain and Kennedy above, in both the singular or plural tense, which do not conflict with each other. "Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning " South Carolina Coastal Conservation League v South Carolina Dept. of Health and Environmental Control, 669 S.E.2d 899, 380 S.C. 349 (S.C.App. 2008)(Citing Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

But if that wasn't enough, the legislature provided further direction on its intent regarding the singular or plural use of "Insured" in the statute's definitions when it provided.

> **"Insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either...and any person who uses with the consent... and a guest in the motor vehicle...of any of the above."**

South Carolina Code Ann. § 38-77-30(7) (Emphasis added). If the legislature had intended the term to only be used in its singular form, it would have used the word "or" in the definition rather than "and".

While I agree with Progressive that the legislature did not intend that § 38-77-160 should be read to require insurers make offers "to all insureds under the policy," (Appellant's Brief, p. 7, lines 9-10), the legislature clearly specified under § 38-77-

350(B) what insured needs to sign the rejection to be effective for the protection sought by Progressive. By specifying "the named" to describe which "insured" must receive the offer and sign the rejection, the legislature clearly intended such requirement to apply to "all named insured" as already found by this Court in McDonald.

The only support Progressive offers in support of its position is a Court of Appeals decision from Illinois, Messerly v. State Farm Mutual Automobile Insurance Company, 277 Ill. App. 3d 1065, 662 N.E.2d 148 (Ill. Ct. App. 1996) where that Court stated that the Illinois legislature did not intend "every named insured to receive a meaningful offer " (Appellant's Brief, p. 9, line 20-p. 10, line14). Although their reliance on Messerly is misplaced, Progressive does correctly point out that this Court has already addressed the same situation as under South Carolina law in Nationwide Mutual Insurance Company v. Prioleau, 359 S.C. 238, 243, 597 S.E.2d 165, 168 (Ct. App. 2004)). It is therefore not necessary to look to the foreign authority of Illinois.

Both Messerly and Nationwide dealt with the same fact situation where one spouse applied for a policy for both spouses to be named insured. The applying spouse rejected UIM coverage and the non-applying spouse sought reformation to provide coverage. Messerly at 1066, 662 N.E.2d at 148-149, Nationwide at S.E 2d 166-167. But in Messerly, the Court was interpreting a former version of Illinois Code § 143a-2(1) that the trial court had held required an offer be made to all named insured. Id. at 1065, 662 N.E.2d at 148. The Court confirmed that at the time the policy was taken out, the statute was not clear on "who" the offer must be made to. Id. at 1067, 662 N.E.2d at 149. However, almost immediately after the policy was issued, the Illinois legislature amended § 143a-2(1) to clarify that "the applicant" rather than "insured" was the one

who may reject UIM coverage. Id. at 1069, 662 N.E.2d at 150-151 (citing 215 Ill. Comp. Stat § 5/143a-2(1), (2)(West 1994)). Based on this specific revision by the legislature, the Court concluded the prior statute must have been intended to reflect the same, that only the applying named insured needed to sign the rejection.

But this Court in Nationwide v. Prioleau faced the **exact** same argument being made by Progressive in this case. In that case, the policy issued "listed both 'Julius and Paula Prioleau'" as the named insured. Id. at S.E.2d 167. And the issues presented to this Court were stated as:

> **Nationwide argued the rejection of UIM coverage form signed by Julius Prioleau was a valid rejection under South Carolina law, and it was not required to also obtain the signature of Paula rejecting UIM coverage, as Julius was the named insured and the only applicant for the policy. Alternately, Nationwide claimed that the form was sufficient because Julius was acting as the agent for his wife when he obtained the insurance policy.**

Id. at S.E.2d 167. But this Court did not address the first issue, which under Progressive's theory would have been the easiest conclusion to draw, and skipped directly to addressing the agency question between a husband and wife Id at S.E.2d 167 If this Court had felt there was an ambiguity in the use of the term "the named insured" as suggested by Progressive, it would have certainly addressed such ambiguity at that time.

If this Court desires to examine authority from the jurisdiction of Illinois, then the case of Nila v. Hartford Ins Co., 312 Ill.App.3d 811, 728 N.E.2d 81 (Ill.App. 2 Dist. 2000) is a more recent and far more similar case to the one at hand interpreting Illinois law on the subject. In Nila, the husband took out the insurance policy as the only named insured in 1987. Id at 813, 728 N.E.2d at 83. The wife was listed as an additional driver, and like the terms of Progressive's policy, defined the terms "you" and "your" to

include the named insured and their spouse. Id. at 813, 728 N E.2d at 84. They continued to renew this policy every year through the husband's death in 1994. Id. at 814, 728 N.E.2d at 84. When the husband passed away, the carrier issued an endorsement changing the wife from a listed driver to the named insured on the policy. Id. Following his death, the wife bought a new car to replace the one insured previously and added it to the policy. Id. at 820, 728 N.E.2d at 88. The Court stated that the wife then purchased a one-year policy on the renewal date, but did not fill out an application and the new policy on the new vehicle was given the same number as the prior policy of the husband. Id. at 814, 728 N.E.2d at 84. The wife then died in an accident in 1996 in the new vehicle and the Court had to determine if she had been entitled to a new offer of UIM or was bound by the husband's. Id. The Court based its decision that a new offer was required on the fact that this was the first time she had ever been the named insured on a policy and as such now carried the responsibility for the decisions on the type and amount of coverage. Id at 820, 728 N.E.2d at 88-89. The Court further held that she had "never had the opportunity to make an informed and intelligent decision regarding uninsured motorist coverage. Id. at 820, 728 N.E.2d at 89.

The rational was confirmed and further explained by the Illinois Court very recently in Nicholson v. State Farm Mut. Auto Ins Co., 409 Ill.App.3d 282, 949 N.E.2d 666, Ill.Dec. 874 (Ill App.2 Dist. 2010). The Nicholson Court reviewing Nila stated.

> **We then held that this statutory purpose would be frustrated if an insured who had never elected any level of UM coverage were issued a policy without having been offered equal UM coverage on the ground that it was simply a continuation of the old policy under subsection (2).**

Id. at 291, 949 N.E.2d at 673-674. The Court went on to confirm the same reasoning had been used prior to Messerly in stating:

> **Similarly, in Burnett v. Safeco Insurance Co. of Illinois, 227 Ill.App.3d 176, 174 169 Ill.Dec. 113, 590 N.E.2d 1032 (1992), another district of the appellate court held that an insurer's issuance of a policy to a daughter in her own name was a new policy requiring an offer of equal UM coverage, rather than a continuation of her parents' policy, under which she had been a listed driver.**

Nicholson at 292, 949 N.E.2d at 674.

So, although we have clear binding authority in South Carolina, should this Court deem it necessary to consult Illinois authority in affirming the Circuit Court's decision in this matter, Burnett, Nila, and Nicholson all confirm the same standard as used by South Carolina in McDonald would apply in that jurisdiction as well. As a result, the grant of summary judgment by the South Carolina Circuit Court would also be affirmed in Illinois.

Progressive's argument for a such a limited reading of § 38-77-160 and § 38-77-350 has already been addressed and the intention of the South Carolina legislature has been determined that all named insured are entitled to make a choice regarding UIM coverage. Any other interpretation would be contrary to all existing binding authority in South Carolina. Based on these circumstances, the grant of summary judgment by the Circuit Court must be affirmed by this Court.

II. The Circuit Court did not err in finding that South Carolina Code Ann. § 38-77-350(C) does not apply to changes regarding named insured?

Progressive next contends that the addition of a new vehicle and the addition of a new named insured constitute changes to an existing policy such that they are not required to issue a new offer under South Carolina Code § 38-77-350(C) and that

McDonald does not apply because unlike McDonald where "one entire side of the contracting equation has changed," only adding a new named insured doesn't substantially change the existing policy in force. (Appellant's Brief, p. 11, lines 14-20). Not only is this proposition directly contradictory to the terms of the policy and the rationale in McDonald, it is completely contrary to existing law in South Carolina.

Progressive contends McDonald is distinguishable from the present circumstances in that Corey Medlock was already insured under the policy as a relative and "he's not entitled to any more coverage now that he's a named insured than he was when he wasn't a named insured." (R. p. 80, lines 9-14). In advancing this position, Progressive stated "the legal relationship between Progressive and Corey Medlock **did not change.**" (R. p. 63, line 7). Progressive is arguing to treat the unilateral change in the designation in the policy from "driver" to "named insured" as nothing more than a clerical change.

A. Changing Corey Medlock from a listed driver to a named insured changed his legal status under the terms of the policy thereby creating a new contract as between Corey Medlock and Progressive.

The policy issued to Stanley Medlock is very clear as to the difference between the named insured and an insured relative under the policy. The term "Relative" is specifically defined in the policy as "a person residing in the same household as **you**, and related to **you** by blood marriage or adoption.. " (R. p. 108, 1st column lines 1-2). The term "you" is defined in the policy as (a) "a person shown as the named insured on the declarations page" and (b) "the spouse of the named insured if residing in the same household at the time of the loss." (R. p. 108, 1st column lines 24-27). If Progressive's position that Corey Medlock's legal status was no different, why does the policy define them differently? A review of the provisions of the policy reveal the answer, many

provisions covering rights, responsibilities and obligations only apply to either the named insured or insured relatives, but not both.

For Example, under **Part I – Liability to Others**, and the section titled **Exclusions**, in paragraph 13, Progressive excludes coverage for "**bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any motorcycle owned by a **relative**, other than a **covered motorcycle** for which this coverage has been purchased." However "this exclusion does not apply to **your** maintenance or use of such motorcycle." (R. p. 109, 1st column lines 39-43). Plaintiff is clearly providing coverage to the named insured and not providing the same coverage to an insured relative under the policy.

Under **Part II – Motorcycle Medical Payments Coverage**, the "Insuring Agreement" states "If **you** pay the premium for this coverage, **we** will pay the reasonable expenses incurred for necessary **medical services** received...." (R. p. 110, 2nd column line 5-6). Under this provision, if the named insured" did not pay the premium, the insured relative would not be entitled to the coverage. Again, under the **Exclusions** section, the policy does not apply to injuries "sustained by any person while **occupying** or when struck by any vehicle owned by a **relative** or furnished or available for the regular use of a **relative**, other than a **covered motorcycle** for which this coverage has been purchased." However, "this exclusion does not apply to **you**." (R. p. 111, 1st column lines 19-22).

Although there are many similar examples in the policy, I'll conclude with the most appropriate **Part III – Uninsured/Underinsured Motorist Coverage** provision where the "Insuring Agreement" for the UIM coverage states, "If **you** pay the premium

for this coverage, **we** will pay for damages that an **insured person** is legally entitled to recover from the owner or operator." (R p. 112, 1st column lines 5-6). Therefore, under these terms of the Underinsured Motorist Coverage of the policy, if the named insured, i.e. Stanley Medlock, does not pay the premium, an insured relative, i.e. Corey Medlock is not entitled to the coverage.

Now again, under Progressive's argument, this situation is somehow different from McDonald because the original contract between Stanley Medlock and Progressive did not change. But that is simply not true under the terms of this policy. Before Corey Medlock was made a named insured, only Stanley Medlock had the ***legal right*** to make the premium payment for the UIM and force the coverage to remain in effect, by the terms of the policy. After Corey Medlock was made a named insured, he now also had that right irrespective of the wishes or intentions of Stanley Medlock.

Beyond the premiums, the policy terms restrict other significant rights and obligations to only the named insured, such as the duty to report changes (R. p. 119, 2nd column lines 15-23), reliance on the information contained in the application (R. p. 120, 1st column lines 1-10), the ability to cancel the policy (R p. 120, 1st column lines 38-2nd column line 24), and the entitlement to a refund of any premium refund, p 120, 2nd column lines 26-31).

Clearly, the intention of Progressive under the policy terms was to treat a named insured different from an insured relative. Allowing Progressive to claim that a named insured and an insured relative are treated as the same solely for the purposes of avoiding the requirements of §38-77-160 and §38-77-350 would be unjust and in conflict with the intention of the parties pursuant to the terms of the policy. Such a reading would also go

against the long held standard in South Carolina that "ambiguous or conflicting terms in an insurance policy **must** be construed liberally in favor of the insured and strictly against the insurer." State Farm Mut. Auto Ins. Co. v. James, 522 S E.2d 345, 337 S.C 86 (S.C.App. 1999)(citing Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995))(Emphasis added).

When such substantial changes are made to a contract that the terms of the contract take on new meaning, there is no other conclusion to draw but that a new contract has been created. That was the basis for this Court's decision in McDonald as this Court further clarified its holding on §38-77-350(C) in Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (S.C.App. 2002) stating "When McDonald became the named insured on the policy, ***it altered the legal relationship of the parties.*** As we observed:

> **Where Section 38-77-350(C) states the insured is not required to make a "new" offer, it clearly envisions the circumstances where the insurer has already made an "old" offer."**

Id. at 88, 564 S.E.2d at 361. (Emphasis added).

As already indicated in the discussion above, Progressive contends its offer to Stanley Medlock was sufficient to constitute the "old" offer referenced by this Court. What Progressive is asking this Court to decide is that even though Progressive decided on its own to make Corey Medlock a named insured and give him all the rights and privileges associated with that definition within the contract, that Progressive is not required to treat him like every other new insured and provide him sufficient information to make an informed decision about the coverage he desires. I cannot believe our

legislature would have intended to give carriers such unfettered discretion to ignore the mandate of § 38-77-160.

As with its prior argument, Progressive provides no South Carolina authority for this proposition but relies on Ohio, Rhode Island, Illinois and Hawaii case law to support its position. (Appellant's Brief p. 12, line 24-p. 16, line 14). At the Circuit Court, Progressive relied heavily on Wilkerson v. Louisiana Indemnity/Patterson Ins., 682 So.2d 1296 (La. Ct. App. 1996), to establish that Louisiana law was that the addition of a named insured did not constitute a new policy thereby requiring a new rejection form. (R. p. 76-82 and R. p. 62, line 9-p. 64 line 5). Such abandonment is clearly as a direct result of the decision in a companion case of Dempsey v. Automotive Cas. Ins., 2108 La App. 1 Cir. 6/28/96, 680 So.2d 675 (La.App. 1 cir. 1996) where the Louisiana Court completely agreed with the Medlocks' position finding under Louisiana law,

> **...when there are changes in the insurance policy which involve the addition of insureds or vehicles, the jurisprudence indicates that the policy is not a substitute policy, but is a new policy, which requires the execution of new UM selection/rejections forms.**

Id. at So.2d 680.

Progressive's attempts to convince this Court to rely on other jurisdictions instead of South Carolina are equally flawed. The authority from Illinois has already been addressed above through Burnett, Nila, and Nicholson and will not be re-argued here. The Hawaii case of Lee v. Government Employees Ins. Co., 911 F. Supp. 2d 947 (D. Haw. 2012) used to argue Hawaii does not require a new offer when adding a vehicle and newly-licensed driver is not only inapplicable because the added driver was not added as a named insured, but as appropriately pointed out by Progressive, it conflicts with the established law in Hawaii under Allstate Ins. Co. v. Kaneshiro, 93 Hawaii 210, 998 P.2d

490 (2000) and is currently pending appeal to the Ninth Circuit Court of Appeals, Case Number 13-15524, Filed March 22, 2013.

Progressive's reliance on Rhode Island law through Ferreira v. Integon National Insurance Co., 809 A.2d 1098 (R.I. 2002) is equally misplaced. As the Circuit Court correctly found, Rhode Island has a completely different statutory scheme regarding notice of the opportunity to purchase UIM coverage and it was this basis upon which the Court in Ferreira based its decision, as properly found by the Circuit Court below:

> **In *Ferreira v. Integon Nat. Ins. Co.*, 809 A.2d 1098 (R.I. 2002), the Court's decision hinged on Rhode Island General Law § 27-7-2.1(d), which provides in pertinent part:**
>
> > **"After the selection of limits by the named insured *** the insurer or any affiliated insurer shall be 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." (Emphasis added) *Ferreira* at 1101.**
>
> **The carrier had carried out this duty when Ferreira had been added to the policy and failed to take action at that time. *Id.* at 1101. The failure to seek coverage when notice was provided was the reason the Court held the original rejection valid as to the additional named insured. South Carolina has no such mandatory notice requirement when a policy is changed; in fact S.C. Code §38-77-350(c) specifically relieves a carrier of the obligations to make a new offer when a policy "renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. §38-77-350(c)(Supp. 1998).**

(R. pp. 9-10).

Finally, Progressive presents that Ohio law supports its position through Johnson v. Great American Ins. Co., 44 Ohio App 3d 71, 541 N.E.2d 100 (Ct. App. 1988) and contrasts it with McKnight v. Grange Mutual Cas. Co., 110 Ohio App. 3d 282, 673 N.E.2d 1012 (Ct. App. 1996) being more similar to McDonald. Once again, the Ohio statutory provisions are very different from South Carolina. At the time of the Johnson decision, that Court specifically noted that the statute required UIM to be offered "to each

applicant for new automobile or motor vehicle liability insurance **and** to each named insured policyholder at the time of the first policy renewal." Id. at 73, 541 N.E.2d at 102. Also of particular note is that in Ohio, "Insurance companies shall not be required to obtain or retain written rejections of such coverage." Id Such a significant deviation from South Carolina law should not be considered to disregard the clear existing holding of McDonald.

Although Progressive attempts to offer this authority only for the purpose of demonstrating that a new policy should not be construed to be created just at the addition of a new named insured, an examination of every case offered and argued show they only deal with the addition of a **spouse** to the policy. As has been argued above, Corey Medlock is not about the addition of a spouse, but the addition of a new named insured who was not a spouse. Under the policy terms in Progressive's policy as well as the rationale used in every case offered by Progressive, a spouse of a named insured is treated exactly the same with all the same benefits and obligations as the named insured. Because of their being treated the same under the policy, the argument that the policy is not changed by making a spouse a named insured may very well carry more weight, **but that is not the facts of the current case.**

Corey Medlock was not defined the same under the policy before and after he was made a named insured. His legal rights changed substantially, his legal obligations changed substantially, and Stanley Medlock's legal rights changed substantially as well. There is simply no other logical decision under these facts but to conclude that when Progressive made Corey Medlock a named insured, they created a new insurance policy as it related to Corey Medlock.

B. Changing Corey Medlock from a listed driver to a named insured changed his legal status under South Carolina law thereby creating a new contract as between Corey Medlock and Progressive.

Changing Corey Medlock from an insured relative to a named insured not only changed his legal status under the terms of the policy, but changed his legal status in the eyes of the law as well. Progressive may argue that as used in Chapter 77 of the South Carolina Code, named insured and an insured relative are synonymous as both are included in the definition of "insured", but the legislature clearly intended that they be treated differently under the law based on the different rights and obligations provided each.

Progressive would certainly agree that § 38-77-350(B) requires that the offer be rejected by "the named insured". Therefore, Progressive would also necessarily have to agree that a signed rejection form by any other insured that is not the named insured would not be valid under this statute. Giving this specific authority to only "the name insured" clearly implies the General Assembly did not intend the signature of any other insured under the policy, including a resident relative to carry the same protection to the insurer.

Progressive cannot have it both ways under this statute. If Progressive contends that the legislature intended the named insured and relatives residing in the household to be treated the same under the statute, then the statute would necessarily require that the offer be made to all insured and that the insurance company would only be entitled to the protection under §38-77-350 (B) if they obtained the signatures of all insured on the offer form. But Progressive has clearly stated that "it would be absurd to read § 38-77-160 as requiring insurers to make offers to all insureds under the policy." (Appellant's Brief, p.

7, lines 9-10 & p 19, lines 18-21). Since Progressive insists that the language of §38-77-350(B) provides it the presumption of a valid offer because one was signed only by the named insured, then Progressive would necessarily have to agree that the legislature intended a named insured be treated differently under this statute than a resident relative.

Consider the ramifications if Progressive's interpretation of the statute is adopted. It would open the floodgate for carriers to completely escape the requirements of §38-77-160 and §38-77-350. Most children that become of age to get their drivers license are not of legal age to execute contracts and still live at home with their parents. When they begin to drive, the parents add them to their existing policies as insured relatives or drivers. The child grows older, but while still living at home, he buys his own car which is added to mom and dad's policy and the child is changed to a named insured, just like Corey Medlock. Subsequently, the child moves out and the mailing address for him on the policy is changed and his notices are mailed to a separate address than his parents. Under Progressive's position, all of those changes would fall under §38-77-350(C) and the carrier would never be required to make that child an offer of UIM coverage because they would never be a new applicant under South Carolina law. As such, the child would always be bound by the election of UIM coverage that their parent made, without ever having the opportunity to make their own informed choice, even though they were not even legally able to make that decision on their own when the parents made it because of their age.

The legislature would not have intended §38-77-350(C) to be used to avoid the mandatory requirement to offer all named insured the opportunity to purchase UIM

coverage. This Court in McDonald believed the same to be true citing its holding in Ackerman v. Travelers Indem. Company, 318 S.C. 137, 456 S.E.2d 408 (Ct.App.1995):

> **"If §38-77-350(C) were interpreted to relieve [carrier] of the general requirement of offering [the insured] underinsured motorist coverage up to the liability limits of the policy, it would amount to an absolute repeal of §38-77-160, which mandates that an automobile insurer offer underinsured motorist coverage up to the limits of the insured's liability coverage."**

Id. at 142, 456 S.E.2d at 411.

Beyond that statute, other clear indications of the intent to treat a named insured differently from other insured exist in other statutes such as under S.C. Code Ann. §38-77-120(a), wherein the legislature provided the named insured with a significant legal right that was not provided to an insured relative, the right to notice of cancellation.

> **"No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails *to the named insured* at the address shown in the policy a written notice of the cancellation or refusal to renew."**

South Carolina Code Ann. §38-77-120(a). There is no legal requirement to notify an insured relative that the policy has been cancelled or will not be renewed. Insured relatives do not have that right and would have no legal recourse against the insurer if they were operating a vehicle believing the policy was still in place because they had not been notified it had been cancelled Taking this process even further, under S.C. Code Ann §38-77-123, the legislature specifically eliminated any liability on insurers from having to send notice of cancellation or refusal to renew to ***"anyone other than the named insured, any person designated by the named insured and any other person to whom such notice is required to be given by the terms of the policy."*** South Carolina Code Ann. §38-77-123(C).

Clearly, if the legislature fully intended a named insured and insured relative to be treated the same, they would have provided both with this most basic right to be notified when the policy was cancelled. Otherwise, under Progressive's theory that they should be treated the same, insurers would become liable to insured relatives for damages they suffer as a result of the insurer not sending them the Notice of Cancellation. Once again, Progressive cannot have it both ways; either that the legislature intended named insured and insured relatives be treated the same and carriers would incur liability for not sending notices to all insured, or the legislature intended for them to be treated differently as indicated by the statute.

Outside the provisions of the Automobile Insurance statutes, the difference between being a named insured and an insured relative makes a huge difference under other South Carolina statutes. As the legal owner of the Suzuki, South Carolina law requires that Corey Medlock maintain liability insurance on that vehicle. South Carolina Code Ann. §56-10-10. When the vehicle was registered, he had to certify that he had liability insurance on that vehicle and his failure to maintain liability insurance on that vehicle, by law, will cause him to lose his privilege to drive in the state and be guilty of a misdemeanor subject to criminal penalties. South Carolina Code Ann. §56-10-30 and §56-10-225(C). As explained above, an insured relative under this policy has no legal right to keep the policy in place as he is not given the right to pay the premiums in order to assure he can keep the coverage in place Certainly carriers could accept the premium from him, but there is no legal requirement for them to do so. Only the named insured has the legal standing to require the policy remain in force. These legal requirements coupled with the fact that under S.C. Code Ann. §38-77-120 and §38-77-123, an insured

relative is not entitled to notice of cancellation and has no recourse for not getting such notice makes it a near legal impossibility for an insured relative to assure that he is in full compliance with the law at all times as the owner of the vehicle. To the contrary, a named insured does have the legal right under the policy to pay the premium to keep coverage in place and the law specifically requires the insurer to notify him of the policy being cancelled or non-renewed so that he is on notice to take measures to stay in compliance with the law.

There is no question that when Progressive made Corey Medlock a named insured on June 9, 2010, that the legal relationship between Corey Medlock and Progressive changed significantly. Such a substantial change is what the existing authority has relied on, as in McDonald, to determine that this is not a mere change, but the creation of a new policy. Once he was a named insured, Corey Medlock was in the exact same position as McDonald. They both now had significant legal rights under a policy of insurance issued by the insurance carrier under the laws of the State of South Carolina, but had not filled out an application or been given the opportunity to accept or reject UIM coverage as required by the statutes. As such the holding in McDonald applies and Progressive was required to offer Corey Medlock UIM coverage.

III. The Circuit Court correctly applied South Carolina law in this case.

Although every attempt has been made to address all of Progressive's arguments and attempts to point to errors made by the Circuit Court below, the Record of the proceedings below can also stand on its own in demonstrating that the decision of the Circuit Court was appropriate, correct and should be affirmed. As a result, should this Court finds some degree of persuasion to Progressive's arguments, those arguments are

wholly insufficient to overcome the rightful and just logic, reasoning and application of the law by the Circuit Court below.

Therefore, in addition to the arguments presented herein directly against the alleged issues on appeal, Respondent would also contend that there are other reasons for this Court to affirm the decision of the Circuit Court and if such reason be found by this Court, then pursuant to Rule 220(c) of the South Carolina Appellate Court Rules, such reason shall also dictate that the decision of the Circuit Court must be affirmed.

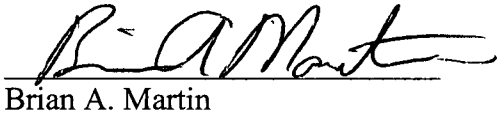
CONCLUSION

When Progressive made Corey Medlock a named insured on a policy of insurance, it did far more than change his label on the policy; it changed the legal status and created a new policy between Progressive and Corey Medlock. As a result, Corey Medlock was entitled to an offer of UIM coverage under South Carolina Code Ann. § 38-77-160 and § 38-77-350. Progressive's failure to comply with these statutes and make such offer requires reformation of the policy to include such UIM coverage.

For the reasons stated above, as well as any other ground existing in the record on Appeal, the decision of the Circuit Court granting summary judgment to the Medlocks and denying summary judgment to Progressive must be Affirmed.

Respectfully submitted,

BRIAN A. MARTIN, LLC



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October 15, 2013

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.

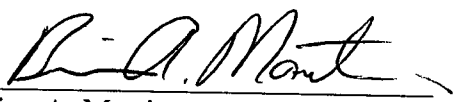
Stanley K. Medlock, Corey K. Medlock and The Standard Fire Insurance Company..... ..... Defendants,

Of Whom

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

CERTIFICATE

I, Brian A. Martin, Esquire, attorney for Respondent, certify that the Respondent's Final Brief 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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