

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
R. Keith Kelly, Circuit Court Judge

Case No. 2016-CP-11-00809
Appellate Case No. 2018-001559

RECEIVED

MAY 20 2019

SC Court of Appeals

Nicky Ted Phillips and Gloria E. Phillips,Appellants,

v.

American National Property and Casualty Company,
Clyde McNeill Agency, and Clyde Edwin McNeill,
individually and in his capacity as agent of American
National Property and Casualty,Respondent.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in determining that the Auto Offer Form complied with S.C. Code Ann. §38-77-350 and in granting summary judgment to Respondents as to Appellants' causes of action in connection with the Auto Policy?
 - A. Did the trial court err in determining that the Auto Offer Form was executed complied with S.C. Code Ann. §38-77-350(B)?
 - B. Did the trial court err in determining that whether the handwritten amount of UIM coverage on the form was written before or after Appellant Nicky Ted Phillips signed the form is rendered irrelevant by the language of the acknowledgment on the form and does not create a genuine issue of fact?

STATEMENT OF THE CASE

This action arises out of the issuance of three automobile insurance policies, two insuring Appellants' personal vehicles (the "Auto Policy") and the other insuring a commercial vehicle (the "Commercial Policy").¹ Appellants brought the present action against Respondents American National Property and Casualty Company, Clyde McNeil Agency and Clyde Edwin McNeil, individually and in his capacity as agent of American National Property and Casualty Company asserting cause of action for negligence, breach of fiduciary duty, negligent misrepresentation, fraud and violation of the South Carolina Unfair Trade Practices Act. Appellants also sought a declaratory judgment that Respondents failed to make a meaningful offer of underinsured motorist (UIM) coverage and reformation of the policies to provide UIM coverage equal to the liability coverage afforded by the policies (R.pp. 14-28).

A hearing was held in Cherokee County on May 9, 2018, before R. Keith Kelly, Circuit Court Judge, in connection with the Motions for Summary Judgment filed on behalf of Respondents (R.pp. 62-63, 64-65). The trial court heard arguments of counsel and received memoranda and relevant deposition testimony and documents in support of and in opposition to the pending motions (R.pp. 293-321).

By Order filed June 11, 2018, Judge Kelly granted summary judgment to all Respondents with respect to the Auto Policy claims (R.pp. 1-10). Appellants timely filed a Motion to Reconsider and supporting memorandum on June 22, 2018. Judge Kelly denied the Motion to Reconsider via Form 4 Order filed on July 17, 2018 (R.pp. 11-13).

Appellants filed a timely Notice of Intent to Appeal on August 15, 2018.

¹ Only the Auto Policy is at issue in this appeal as the trial court did not grant summary judgment in connection with the Commercial Policy.

STATEMENT OF FACTS

Appellants Nicky Ted Phillips (“Nicky”) and Gloria E. Phillips (“Gloria”) are husband and wife (collectively referred to as the “Phillips”). They had two personal auto policies (the “Auto Policy”)² issued by Respondent American National Property and Casualty Company (“American National”) and procured through Respondent Clyde McNeill Agency (“Agency”) and Respondent Clyde Edwin McNeill, agent (“McNeill”). Each policy carried \$50,000.00 per person, \$100,000.00 per accident, and \$50,000.00 for property damage. For each policy, the Phillips chose to carry \$25,000.00 per person, \$50,000.00 per accident, and \$25,000.00 for property damage of uninsured motorist (UM) coverage and underinsured motorist (UIM) coverage in like amount. These policies were first issued on September 30, 2010 (R.p. 166, p. 218).

On October 28, 2013, Nicky went to the Agency to discuss raising his family’s policy limits. He met with McNeill for the purposes of discussing this increase. While there is a dispute as to some aspects of the conversation, the parties agree that Nicky expressed concern about the present level of their coverage and that he could be sued and lose everything they had were he or his wife to be involved in an accident. As a result of the meeting, Nicky and Gloria Phillips ended up obtaining an umbrella insurance policy (“Umbrella Policy”), which is not a part of this action. In order to obtain the Umbrella Policy, the Phillips’ were required to increase the liability limits on their Auto policy to at least \$250,000/\$500,000/\$100,000. McNeill presented Nicky with a form that contained information applicable to the purchase of the additional coverage, which form American National titled “Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage” (“Auto Offer Form”) (R.pp. 209-212). The Auto Offer Form is a four-page document which sets forth the available coverages and provides options for

²The Phillips also had a Commercial Policy, which is not a subject of this appeal. For the purposes of this appeal, the reference to “policy” is meant to include only the two auto policies covering the personal vehicles.

the proposed insured to accept or reject. It is a document provided by American National in compliance with the requirements of S.C. Code Ann. §38-77-350(A). At the conclusion of the meeting, Nicky authorized that the policies be modified as required by the Umbrella Policy to provide \$250,000/\$500,000/\$100,000 (R.pp. 269-272).

On August 9, 2014, Nicky suffered serious injuries in an automobile accident when his car was struck in the rear by another automobile. The at-fault driver's liability carriers paid their policy limits in exchange for a covenant not to execute, and the Phillips filed their claim with American National seeking to recover their underinsured motorist (UIM) coverage. When presented with the Phillips' claim, American National informed the Phillips that their UIM limits were \$25,000 per person and \$50,000 per occurrence instead of the same amount as the Bodily Injury Limits on their policies of \$250,000 per person and \$500,000 per accident. Upon learning this information, a dispute arose between the Phillips and McNeill regarding the events of October 28, 2013, and the completion of the Auto Offer Form.

At the October 28, 2013, meeting McNeill had presented Nicky with a pre-populated Auto Offer Form. (R. pp. 209-212). Nicky testified in his deposition that he only signed the Auto Offer Form, and there were no other markings present when he signed it.

Q Okay. Okay. And is any of the other handwriting on there, besides the -- is the date -- let -- sorry. I'll hand it over here. Is the date at the bottom of Page 4, is that your handwriting?

A No, sir.

Q No?

A No, sir.

Q So the only thing that's yours is the signature page, correct?

A Yes, sir.

Q I mean the -- the actual signatures.

A That's my signature, but the rest of it's not mine. No, sir.

Q Understood. Okay.

A And it wasn't on there when I signed it.

Q So you're -- you're -- let me go back and make sure I understand that. Are you -- are you saying that it was blank when you signed it?

A Yes, sir.

Phillips, N. Dep. 43:8-44:1, July 20, 2017 (R.pp. 89, line 8 - 90, line 1).

He further testified that McNeill did not explain the form to him, and that he was not given the opportunity to read the form. (See Phillips, N. Dep. 44:5-7, July 20, 2017 (R.p.90, lines 5-7), stating that he didn't think he was given the opportunity to read it if he wished). Additionally, he testified that McNeill instructed him, "Sign" — "Here, here, and here." (See id. 44:9-11.) (R.p.90, lines 9-11).

Corroborating Nicky's testimony, McNeill testified that the only markings on the Auto Offer Form attributable to Nicky were his signatures, and every other marking on it was that of McNeill (see McNeill Dep. 84:2-89:12, December 14, 2017) (R.pp. 137, line 2 – 142, line 12) or his secretary (see id. 56:21-24) (R.p. 119, lines 21-24).

In addition to his testimony on the Auto Offer Form in dispute, when questioned about the handwriting on the "Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage" on the family's commercial vehicle (R.pp. 170-173), McNeill testified that either he or his secretary would routinely fill out the paperwork for their clients in the absence:

Q. Can you explain why you would have, I guess, your handwriting on the document, your secretary's handwriting, and then Nicky's handwriting or Ted's handwriting?

A. Oh, sure, that's no problem. From time to time, I don't think -- I don't have the greatest handwriting in the world, obviously, I mean, I think you can attest to that, but a lot of times I'll go over this paperwork, go over the forms with the client. And I'll have him sign it where he needs to sign it, obviously, he doesn't need to print out his name or where he lives or anything like that. We obviously did this on the 15th, because that's when I put the policy in effect was the 15th. And what I was going to say earlier was that these little things on the printout, although they're not on this because this is a -- this is what we call a handwritten file -- form, you know, the -- it doesn't print out automatically the coverage on the commercial policies, the UM and UI, doesn't print out like the UM and UI does on the -- I mean, doesn't print out the vehicles in all this like it does on the personal lines. So the -- so yeah, after going over the coverage with him, getting him to sign. I just submitted this to the secretary to fill in the blanks, as far as his name and address and things of that nature. Does that make sense?

Q. Yeah. Yeah. Yeah, that makes sense. Why not just get him to do it?

A. I don't know that it's really necessary, I mean, you know.

(Id. 63:15-64:21.) (R.pp. 126, line 15 – 127, line 21).

The actions by McNeill in filing in portions of the Auto Offer Form were contrary to the language on the Auto Offer Form itself. The language on the Auto Offer Form in Section III - Offer of Underinsured Motorist Coverage states in bold type “[t]his section is not to be marked by anyone other than the applicant/insured.” (R.p. 211).

Nicky testified that he and McNeill did not discuss during their meeting the type of coverage already on the Auto Policy and that he was unaware of how much UIM he had on the Auto Policy at the time he was requesting the change. In addition, he testified that he does not know what UIM coverage is intended to protect against.

ARGUMENTS

I. Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801, 802 (2009) citing, *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

In *Hancock* the Supreme Court held “that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” 381 S.C. 326, 327, 673 S.E.2d 801, 803 (2009).

II. The trial court erred in determining that the Auto Offer Form complied with S.C. Code Ann. §38-77-350 and in granting summary judgment to Respondents as to Appellants’ causes of action in connection with the Auto Policy.

In granting summary judgment to Respondents, Judge Kelly found that Respondents were entitled to the conclusive presumption that they made a meaningful offer of UIM coverage because Appellant Nicky Phillips had executed a UIM offer form that complied with S.C. Code Ann. §38-77-350(A) and (B) (R.pp. 4, 5, 6). The Appellants contend that a full reading of §38-77-350(B), including the legislative intent thereof, makes clear that any writing on the Auto Offer Form after its execution by Nicky Phillips would render it not in compliance with the statute and that a genuine issue of fact exists as to whether or not the writing was of someone other than Nicky Phillips and was made after he executed the Auto Offer Form. Appellants would argue that there was not a

meaningful offer as required by the statute and that there are sufficient factual issues in dispute as to this contention such as to render summary judgment inappropriate at this stage.

A. Lack of Compliance with S.C. Code Ann. §38-77-350(B)

In South Carolina, there are two ways for an insurer to make a meaningful offer of underinsured motorist coverage: (1) the statutory presumption outlined in S.C. Code Ann. §38-77-350 and/or (2) the four-part test outlined in *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987).

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Moreover, statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole, considered in light of its manifest purpose. *Jackson v. Charleston County School Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). “The Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless.” *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) citing, *Hinton v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004).

“A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words.” *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

In light of the foregoing, 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. *Cobb v. Benjamin*, 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct. App. 1997). “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.” *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6, 10 (2005).

This statute imposes a duty on automobile insurance carriers to offer, at the option of the insured, UIM coverage up to the limits of the insured’s liability coverage, and the insurer bears the burden of establishing that it made a meaningful offer of UIM and additional UM coverages. *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 348, 608 S.E.2d 569, 571 (2005); *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996).

§38-77-350 provides, in pertinent part:

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

- (1) a brief and concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (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 coverages;
- (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, **after it has been completed by an insurance producer or a representative of the insurer**, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured’s failure to purchase optional coverage or higher limits.

...

(D) Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

(Emphasis added).

The current version of the statute was revised in 2006 when the Legislature made the following changes to subsection (B) (striking the language where stricken and inserting the language that is underlined):

If this form is ~~properly completed and executed~~ signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor ~~any~~ an insurance agent ~~has any liability is liable~~ is liable to the named insured or ~~any other~~ another insured under the policy for the insured's failure to purchase ~~any~~ optional coverage or higher limits.

(See *South Carolina General Assembly, 116th Session, 2005-2006, Journal of the Senate – Committee Amendment Adopted, Carried Over H. 4622 (April 19, 2006)*)

While “[a]n insurer enjoys a presumption it made a meaningful offer when a form is executed in compliance with this statute, *Progressive Cas. Ins. Co.*, 362 S.C. at 349, 608 S.E.2d at 571-72 . . . , a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. *Butler*, 323 S.C. at 408-409, 475 S.E.2d at 761. The purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage “is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.” *Progressive Cas. Ins. Co.*, 362 S.C. at 352, 608 S.E.2d at 573.

The Court’s reliance on basic contract principles to enforce the terms of the Auto Offer Form is misguided and erodes the purpose behind the statute: “[F]or insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs.” *Progressive Cas. Ins. Co.*, 362 S.C. at 352, 608 S.E.2d at 573. Although it may seem contrary to

basic contract principles, the law requiring meaningful offers of UM and UIM coverage has developed to protect insureds, and it's not a typical arm's length transaction.

As the *Floyd* Court stated,

We acknowledge that a competent person usually is presumed to have knowledge and understanding of a document he signs, absent evidence his signature was obtained by misrepresentation, fraud, forgery, or duress. [The insured] in the present case [has] not asserted [her] signature was improperly obtained. However, this fact is not dispositive in this case because of the **plain and unambiguous language of §38-77-350**, emphasized above in the quoted portions of the statute.

Floyd, 367 S.C. 253, 626 S.E.2d at 12 (emphasis added).

B. A Genuine Issue of Fact Exists as to Whether or Not the Auto Offer Form Was Completed in Compliance with the Statute

The record is replete with testimony regarding the execution of the Auto Offer Form and the fact that the amount of UIM coverage was neither present at the time Nicky Phillips executed the form nor placed there by him during or after the fact. It is quite clear from the record that this information was supplied by either Clyde McNeill or his assistance, in direct contravention of American National's own instructions, which appear to be so crucial to the proper and complete execution of the Auto Offer Form that they are setoff in bold typeface (R.p. 211). However, Judge Kelly erroneously ruled that none of this mattered because Nicky Phillips executed an acknowledgement indicating that he made a knowing and voluntary selection of UIM coverage (R.p. 7). While Appellants agree that Nicky Phillips signed the acknowledgement, they are left to wonder how someone can be held to the acknowledgement of something that was not there at the time of execution. Thus, it should be left to the finder of fact to determine when and how the writing got there and whether or not Nicky Phillips should be held to account for the acknowledgment.

In ruling that Nicky Phillips' "signature thus establishes that he made a knowing and voluntary selection of UIM coverage" (R.p. 7), the Court leaned heavily on *Weigand v. United States Auto. Ass'n.*, 391 S.C. 159, 705 S.E.2d 432 (2011), but contrary to the Court's reliance on *Weigand*, it is not dispositive of the issue.

Through each iteration of the statute and the case law interpreting it, one thing remains constant: in order to enjoy the statutory presumption of §38-77-350 insurers must strictly adhere to the language of the statute, and *Weigand* is no different. *Weigand* does not erase the strict adherence to the statute. On the contrary, it held that the statute matters. The *Weigand* Court held the following:

USAA presented sufficient evidence to show that Wiegand both completed and executed the form. The offer form was processed by USAA and never returned to Wiegand to complete, which it would have been if the form was not completed correctly. Wiegand signed the bottom of the form indicating whether he wished to purchase coverage and signed his name under the check marks, which were similar to check marks made by Wiegand on similar forms. Wiegand was insured by USAA from 1990 to 2005 with annual reports sent from USAA that stated no UIM coverage was applicable to his vehicles; Wiegand never informed USAA that a mistake had been made and he actually wanted UIM coverage.

Wife argues that USAA cannot meet its burden because no one can testify who checked the "no" boxes on the form signed by Wiegand. While this is true, nothing in the statutes, rules, or case law requires direct evidence as to who checked the boxes for the burden to be met. It is enough that Wiegand signed the acknowledgment which included the sentence "I have indicated whether or not I wish to purchase each coverage in the space provided" along with the other evidence mentioned above to find that USAA met its burden.

Id., 391 S.C. 159, 705 S.E.2d at 435.

Therefore, *Weigand* does not stand for the singular notion that a signature on a form approved by the Legislature grants an insurer the statutory presumption. If that were the case, it would render the statute meaningless.

As stated earlier, the current iteration of the statute provides the following:

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

§38-77-350(B) (emphasis added). The unambiguous language inserted by the Legislature in 2006 cannot be ignored and must be given its nature meaning.

§38-77-350(B) requires that the form must be completed before the it is signed by the named insured. See *Jennings v. Jennings*, 401 S.C. 15, 736 S.E.2d 651 (2012) (“Where language is unambiguous, the Court’s inquiry is over, and the statute must be applied according to its plain meaning.”). If it is completed after the insured signs the form, the insurer cannot enjoy the statutory presumption of a meaningful offer.

Given the testimony of both Nicky Phillips and Clyde McNeill, there is a clear issue of fact to be considered with respect to the execution of the Auto Offer Form. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433 (2003) quoting, *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In the instant case, the services of a fact finder are both appropriate and necessary. Should the fact finder determine that the writing pertaining to the amount of UIM coverage was not placed there by Nicky Phillips and was not there at the time of his execution of the Auto Offer Form, then the fact finder could similarly conclude that Respondents failed to comply with §38-77-350(B) and the Auto Offer Form, thus, did not comply with the statute. Appellants would then be entitled to reformation of the policy to include UIM coverage in the same amount as the limits of the liability coverage.

CONCLUSION

If this Court's interpretation of the statute and misplaced reliance on *Weigand* were the law, it would render the portion of the statute that was carefully crafted, duly debated and inserted by the Legislature in S.C. Code Ann. §38-77-350(B) in 2006 superfluous, which would effectively neuter that statute, and it would read: "If this form is signed by the named insured; ~~after it has been completed by an insurance producer or a representative of the insurer,~~ it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits." Clearly that was not the legislative intent. Accordingly, the genuine issue of fact as to the handwriting on the Auto Offer Form, the time of same and the execution of the Form should be left to testimony and a determination by the finder of fact.

The Court is respectfully requested to find that the grant of summary judgment to the Respondents is not appropriate or supported by the facts and applicable law in this case and to remand to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLAINE

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCRAC.

May 15, 2019



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