THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2018-001559

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 Company. . . . . *Respondents.*

FINAL BRIEF OF RESPONDENTS CLYDE MCNEILL AGENCY AND CLYDE EDWIN MCNEILL

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS CLYDE MCNEILL AGENCY AND CLYDE EDWIN MCNEILL.

STATEMENT OF THE CASE

On December 7, 2016, Appellants filed a lawsuit against American National Property and Casualty Company ("American National"), Clyde McNeill Agency ("McNeill Agency") and Clyde Edwin McNeill ("McNeill"), asserting numerous causes of action[1] concerning the amount of underinsured motorist ("UIM") coverage available in Appellants' automobile and commercial automobile insurance policies. (*See* Compl., R. pp. 15-28). The crux of Appellants' claims against Respondents is that Respondents allegedly failed to make a meaningful offer of UIM coverage to Appellants and that the policies should therefore be reformed to include UIM coverage in the amount of the policies' personal injury liability limits. *See id.*

Respondents McNeill Agency and McNeill filed a Motion for Summary Judgment as to Appellants' various causes of action on February 14, 2016, based on the ground that they are immune from liability because they are entitled to the conclusive presumption that a meaningful offer of UIM coverage was made to Appellants pursuant S.C. Code Ann. § 38-77-350. (*See* Defs.' Mot. Summ. J., R. pp. 62-63). Respondent American National filed a Motion for Summary Judgment on the same ground on February 21, 2018. After a hearing on May 9, 2016, the Honorable R. Keith Kelly entered an order on June 11, 2016, granting summary judgment to Respondents. Judge Kelly held that Respondents were immune from liability since they were entitled to the conclusive presumption that a meaningful offer of UIM coverage was made to Appellants. (Order 4, R. p. 4).

Appellants filed a timely Rule 59(e) Motion to Alter or Amend the Court's Judgment, alleging that the Court erred by finding that there were no genuine issues of material fact as to

[1] Appellants asserted the following causes of action: (1) Negligence; (2) Breach of Fiduciary Duty; (3) Negligent Misrepresentation; (4) Fraud; (5) Violation of the Unfair Trade Practices Act; and (5) an action for Declaratory Judgment. Each of these causes of action concern the alleged failure on the part of Respondents to provide Appellants with more UIM coverage under the American National policies.

whether Respondents were entitled to the conclusive presumption provided by S.C. Code Ann. § 38-77-350(B). Appellants' Motion was denied on July 17, 2018. This Appeal followed after a notice of appeal was served on or about August 15, 2018.[2]

STATEMENT OF THE FACTS

This action arises from injuries the Appellants sustained in an automobile accident that occurred on August 9, 2014, when the Appellants' motor vehicle was struck from behind by another motorist. (Compl. ¶¶ 23, 24, 27, R. p. 19). The at-fault motorist did not have sufficient insurance to cover the Appellants' damages. (*Id.* at ¶ 28). At the time of the accident, Appellants had an automobile insurance policy (the "Auto Policy") and a commercial auto insurance policy (the "Commercial Policy") issued by American National. (*See* R. pp. 168, 218). Appellants obtained the policies through their insurance agent, McNeill, who owns the McNeill Agency. The Auto Policy insured two vehicles and provided underinsured motorist (UIM) coverage with limits of $25,000 per person and $50,000 per accident. (*See* R. p. 218). The Commercial Policy, which insured a farm truck, did not provide any UIM coverage. (*See* R. p. 168). Appellants brought an action against American National, McNeill Agency and McNeill, alleging a number of causes of action concerning Respondents' alleged failure to provide more UIM coverage in the policies. (*See* Compl., R. pp. 15-28). Appellants argue that both policies should be reformed to include UIM coverage equal to the amount of liability coverage under the policies.[3] *See id.*

[2] The only issue on appeal is whether Respondents are entitled to the conclusive presumption provided by S.C. Code Ann. § 38-77-350(B), and thus, are immune from liability as to Appellants' causes of action.

[3] This Appeal only concerns the Auto Policy.

I. The Auto Policy

The Auto Policy was first issued to the Appellants on or about September 30, 2010, and both Appellants were listed as named insureds on the Policy. (*See* R. p. 166). The Auto Policy, as originally issued, provided personal injury liability limits of $50,000/100,000, uninsured motorist (UM) coverage limits of $25,000/$50,000 and UIM coverage limits of $25,000/$50,000. *Id.*

On October 28, 2013, Nicky Phillips came to McNeill's office wanting to discuss raising his insurance limits. (Clyde McNeill Dep. 42:1-18, R. p. 110, lines 1-18). Although the parties dispute aspects of the discussion that took place between McNeill and Nicky Phillips on this date, the parties agree that Nicky Phillips expressed concern that he could be sued and lose everything he and his wife had. (Nicky Phillips Dep. 33:12-20, R. p. 83, lines 12-20; Clyde McNeill Dep. 42:8-45:5, R. p. 110, line 8 – p. 113, line 5). As a result of this meeting, Plaintiff ended up obtaining an Umbrella insurance policy (the "Umbrella Policy"). (*See* McNeill Dep. 46:13-18, R. p. 114, lines 13-18). In order to obtain the Umbrella Policy, Plaintiff had to increase the liability limits on his Auto Policy to at least $250,000/$500,000/$100,000. (*See* McNeill Dep. 44:1-14, 74:7-11, R. p. 112, lines 1-14, R. p. 202, lines 7-11; R. pp. 205-207). Plaintiff raised the liability limits on his Auto Policy, executed the application for the Umbrella Policy and executed another[4] "Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage" for the Auto Policy (hereinafter referred to as the "Auto Offer Form") on October 28, 2013. (*See* R. pp. 205-207, 209-212).

McNeill testified that he thoroughly explained the differences between liability, UM and UIM coverage at the October 28, 2013 meeting. (*See* McNeill Dep. 43:18-46:12, R. p. 198, line

[4] An "Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage" had also been executed when Appellants originally obtained the Auto Policy in 2010. Appellants selected $25,000/$50,000 in UIM coverage at that time. (*See* R. 166).

18 – p. 201, line 12). According to McNeill, he went through the Auto Offer Form section-by-section. (McNeill Dep. 85:14-16, R. p. 203, lines 14-16). Mr. Phillips testified that he signed the Auto Offer Form on October 28, 2013, but did not read the form prior to signing. (Nicky Phillips Dep. 43:3-44:4, R. p. 89, line 3 – p. 90, line 4).[5]

II. The Auto Offer Form

Section III of the Auto Offer Form executed by Nicky Phillips concerns UIM coverage and is depicted in Figure 1 below. An "X" is marked on Section III of the Auto Offer Form indicating

III. OFFER OF UNDERINSURED MOTORIST COVERAGE

Minimum underinsured motorist coverage limits are $25,000/$50,000/$25,000. If you select *additional* underinsured motorist coverage, the premium charge will be increased. The schedule below indicates the premium charges for minimum and increased limits:

UNDERINSURED MOTORIST BODILY INJURY COVERAGE

Limits of Coverage			Premium			
			Vehicle 1	Vehicle 2	Vehicle 3	Vehicle 4
$ 25,000	/	$ 50,000	$ 44	$ 37	$ 0	$ 0
$ 50,000	/	$100,000	61	53	0	0
$100,000	/	$300,000	73	63	0	0
$250,000	/	$500,000	106	91	0	0
$300,000	/	$500,000	116	100	0	0
$500,000	/	$500,000	120	104	0	0
$500,000	/	$1 Million	138	120	0	0
$1 Million	/	$1 Million	160	138	0	0

This section is not to be marked by anyone other than the applicant/insured.

Do you wish to purchase UnderInsured Motorist Bodily Injury Coverage? Yes X No ____

If your answer is "no", then you must sign here: _____

If your answer is "yes", then specify the limits which you desire. These limits cannot exceed your automobile insurance liability limits and must be the same for all vehicles on this policy.

I select 25/50 limits.

Figure 1

that Nicky Phillips selected to purchase UIM coverage. (*See* Figure 1; *see also* R. p. 211). The numbers "25/50" are also handwritten on the line where it indicates how much UIM is being selected. *Id.* At his deposition, Nicky Phillips testified that he does not remember the handwritten

[5] Mr. Phillips testified that he just remembers McNeill telling him to "[s]ign here, here and here." (R. p. 83, lines 3-4).

numbers on the Auto Offer Form being there when he signed the form. (Nicky Phillips Dep. 57:20-24, R. p. 245, lines 20-24). However, McNeill testified that the handwritten UIM amount was on the Auto Offer Form when it was executed by Mr. Phillips. (McNeill Dep. 90:25-91:6, R. p. 267, line 25 – p. 268, line 6). Notably, this amount of UIM coverage is the same amount Nicky Phillips had maintained on the Auto Policy since he first obtained it in September 2010. (*See* R. p. 166).

The last page of the Auto Offer Form contained a section titled "Applicant's Acknowledgment". (*See* R. p. 212). Nicky Phillips signed underneath the following language within this section of the Auto Offer Form:

> By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of additional uninsured motorist coverage and optional underinsured motorist coverage. . . .
>
> My signature below further acknowledges that I understand the coverages as they have been explained to me, **and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.**
>
> (*Id.*)(Emphasis added).

Subsequent to Nicky Phillips increasing his liability limits and executing the Auto Offer Form, the Auto Policy was renewed for an additional 6-months after the current term ended.[6] (*See* R. p. 218). Appellants received a renewal declaration page showing the increased liability coverage limits and the UIM coverage Mr. Phillips had previously selected. (*See id.*; Nicky Phillips Dep. 46, R. p. 240). At no point did Nicky Phillips advise McNeill, the McNeil Agency or American National that the amount of UIM coverage listed on the declarations page was incorrect. (*See id.*).

[6] It was during the coverage period under this renewal declarations page that the automobile accident in which Nicky Phillips was injured occurred. (Nicky Phillips Dep. 46:8-19, R. p. 240, lines 8-19).

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997)(citing Rule 56(c), SCRCP). While the appellate court should review the evidence and inferences to be derived therefrom in a light most favorable to the non-moving party, *Lanham*, at 362, 563 S.E.2d at 333, summary judgment should be upheld where the evidence is susceptible of only one reasonable interpretation, *see Brooks*, at 403, 489 S.E.2d at 648 (citing *Clyburn v. Sumter County Sch. Dist. No. 17,* 317 S.C. 50, 52, 451 S.E.2d 885, 887–88 (1994)). In determining whether to grant summary judgment, a court must view the facts in a light most favorable to the non-moving party, but "a court cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423 (2000) (internal citations and quotation marks omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).

ARGUMENT

The crux of Appellants' brief is that a question of fact exists concerning whether the handwritten amount of UIM selected on the Auto Offer Form was written before or after Plaintiff Nicky Phillips executed the Auto Offer Form. Appellants thus argue that there is a genuine issue of material fact as to whether the Auto Form was executed in compliance with S.C. Code Ann. § 38-77-350(B).[7] However, as will be discussed below, the circuit court judge correctly held that no such *genuine* issue of material fact exists because Nicky Phillips signed the acknowledgment section on the Auto Offer Form, affirming that the amount of UIM on the form was written at the time of his signature and that this amount was selected by him.

I. THE TRIAL COURT PROPERLY HELD THAT CLYDE MCNEILL AGENCY AND CLYDE EDWIN MCNEILL WERE ENTITLED TO THE CONCLUSIVE PRESUMPTION THAT A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE WAS MADE TO THE APPELLANTS.

Appellants maintain that a genuine issue of material fact exists as to whether Respondents complied with § 38-77-350(B). However, the evidence in the record establishes that Respondents are entitled to the conclusive presumption provided by § 38-77-350(B). According to § 38-77-350(B),

> [i]f [the UIM offer 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.

(Emphasis added).

[7] Appellants do not dispute that the Auto Offer Form executed by Nicky Phillips complied with S.C. Code Ann. § 38-77-350(A).

Appellants rely heavily on *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253 (2005) to argue that the circuit court erred by relying on the signed acknowledgment to hold that there was no genuine issue of material fact concerning whether the handwritten amounts of UIM on the Auto Offer Form were written prior to the form being signed by Nicky Phillips. Specifically, Appellants argue that the circuit court's "reliance on basic contract principles to enforce the terms of the Auto Offer Form . . . erodes the purpose behind [§ 38-77-350(B)]." (Appellants Brief 10). As an initial matter, this argument should not be considered by the Court, as it was raised for the first time in Appellants' Rule 59(e) Motion and Memorandum to Alter or Amend the Court's Judgment, and thus, is not preserved for appellate review. (*e.g.*, *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (noting that an argument raised for the first time in a Rule 59(e) Motion is not preserved for appellate review)).

However, to the extent this Court deems Appellants' arguments preserved on appeal, *Floyd* is inapposite to the issue at hand and Appellants' reliance on *Floyd* is misplaced. In *Floyd*, the South Carolina Supreme Court addressed the following certified question from the federal district court:

> Is an offer form in which the blanks were filled in by an insurance agent or his employee in the presence of the named insured, and the form was then signed by the named insured, properly completed and executed pursuant to S.C. Code Ann. § 38-77-350(B) (2002), such that the form may be conclusively presumed to constitute a meaningful offer of UIM coverage?

Floyd, at 258-59.

Importantly, the version of § 38-77-350(B) at issue in *Floyd* was an earlier version of the statute that required an offer form to be "properly completed and executed by the named insured." Both parties in *Floyd* acknowledged that the amounts of UIM in the offer form were not marked by the named insured, but the parties disputed whether the statute's language required the named

insured to *personally* complete the form, or if the form could just be signed by the named insured. *Floyd,* at 259-60. The *Floyd* Court determined that the Legislature intended the named insured personally "mark, select and sign the UIM offer form" in order for the insurer to be entitled to the conclusive presumption that a meaningful offer was made. *Id.* at 263.

Unlike in *Floyd*, here, the interpretation of § 38-77-350(B)'s language is not at issue. Respondents do not dispute that § 38-77-350(B) requires the named insured to sign the offer form **after** the amount of UIM coverage is marked on the form by the insurance agent.[8] Rather, what is at issue in the present case is whether a *genuine* issue of material fact exists concerning whether the amount of UIM was written on the Auto Offer Form at the time Nicky Phillips signed it. The circuit court judge correctly held that no such factual issue exists because Plaintiff signed the acknowledgement section of the Auto Offer Form.

Essentially, Appellants misinterpret the circuit court's reliance on the executed acknowledgment in the present case when they cite to the *Floyd* decision. In *Floyd*, the parties agreed that the UIM amount on the offer form was written by the insurer, but disputed whether this complied with the then existing version of § 38-77-350(B). Thus, the acknowledgment signed by the Plaintiff in *Floyd*, indicating that the Plaintiff had read and understood her coverage choices, was not dispositive[9] and did not change the statute's requirement that the form had to be personally

[8] To the extent Appellants argue "any writing on the Auto Offer Form after its execution by Nicky Phillips would render [the form] not in compliance with the statute," (Appellants' Brief 7), Respondents reject this overly broad interpretation. The notion that an insurer would not be entitled to the conclusive presumption, if for example, an insurance agent inputted an insured's address on the form or printed the insured's name after it had been executed by the insured would be an absurd interpretation of § 38-77-350(B) that puts form over substance. The statute clearly intends that the amount and type of coverage be marked by the insured before the form is signed, not standard information like an insured's name or mailing address. Moreover, Appellants' argument that McNeill should not have filled in the UIM amount because the Auto Offer Form indicates the UIM section is to be filled in by the insured lacks merit. (Appellants' Brief 6). Section 38-77-350(B) clearly allows an insurance agent to fill in the Auto Offer Form.

[9] Importantly, the *Floyd* Court did not hold that a signed acknowledgement on a UIM offer form can never serve as conclusive proof that the form was executed properly. Rather, the *Floyd* Court simply held that the signed offer form

filled out by the named insured when it admittedly wasn't. Notably, in reaching its conclusion, the *Floyd* Court opined that the Legislature likely recognized that requiring the named insured to personally complete the offer form would "more likely [] accomplish the important goal of adequately informing insured persons about coverage options, enabling them to make an informed decision of which type and amount of coverage will best suit their needs." *Floyd*, at 263. However, this policy rationale is not undermined in the present case given that the Legislature amended § 38-77-350(B) shortly after the *Floyd* decision to clarify its intent that an insurer is still entitled to the conclusive presumption that a meaningful offer of UIM was made where the offer form is filled out by an insurance agent and only signed by the named insured. *See* § 38-77-350(B). By so amending the statute, the Legislature made its intent clear that a named insured need not personally fill out a UIM offer form to make an informed decision of which type and amount of coverage will best suit his needs. *See id.*

This case is factually more similar to *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159 (2011), which was also decided under the former version of § 38-77-350(B) at issue in *Floyd*. In *Wiegand*, the insurer, USAA, argued that it was entitled to the conclusive presumption that it made a meaningful offer of UIM coverage to the named insured, who had died in a motor vehicle accident. *Id.* at 161. Unlike in *Floyd*, the parties in *Wiegand* disputed who had actually completed the offer form at issue. *Id.* at 162. In particular, the named insured's wife argued that no one could testify who checked the "no" boxes in the UIM section of the form signed by the named insured. *Id.* at 166. The Court ultimately determined that USAA was entitled to the presumption that it had made a meaningful offer pursuant to § 38-77-350(B). *Id.* The Court determined that USAA "presented

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was not dispositive due to the plain and unambiguous language of the prior version of § 38-77-350(B), which required the named insured to personally mark the offer form. *Floyd*, at 263. In fact, in a subsequent decision, the South Carolina Supreme Court held that a signed acknowledgment was proof that a UIM offer form had been properly completed in compliance with § 38-77-350(B). *See Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159 (2011).

sufficient evidence to show that [the named insured] both completed and executed the form." *Id.* at 165. The court found significant the fact that the named insured had signed an acknowledgment on the form which included the sentence "'I have indicated whether or not I wish to purchase each coverage in the space provided.'" *Id.* at 166. The Court also noted that USAA provided other evidence to show that the named insured had completed and executed the form. *Id.* For example, the court noted that the named insured had been insured by USAA for 15 years and received annual reports indicating that his policy did not include UIM coverage, and the named insured never informed USAA that a mistake had been made and that he actually wanted UIM coverage. *Id.*

Similar to the facts in *Wiegand*, the parties in the present action dispute whether the Auto Offer Form was filled out properly—i.e. whether the UIM amounts in the Auto Offer Form were written before or after the form was signed by Nicky Phillips. Moreover, like in *Wiegand*, here, the named insured signed an acknowledgment indicating that the amounts "marked" on the form were selected by him. (*See* R. p. 212).

The circuit court also cited to other evidence establishing that there was no genuine issue of fact as to whether the Auto Offer Form was signed after the UIM amounts had been marked on the form. For example, Nicky Phillips admitted that he didn't even read the Auto Offer Form prior to signing it and that McNeill simply told Nicky Phillips where he should sign on the form. If Nicky Phillips's testimony is to be believed, this means he didn't even look at the UIM section of the Auto Offer Form.[10] Appellants' attempt to create an issue of fact by claiming the handwritten amount of UIM coverage selected was not on the Auto Offer Form when Nicky Phillips signed it is absurd and self-contradictory in light of Nicky Phillips's testimony that he didn't even read the

[10] Since Nicky Phillips purchased $25,000/$50,000 in optional UIM coverage, his signature was not required on this section of the form. (*See Figure* 1; R. p. 211).

Auto Offer Form prior to signing it. Plaintiff's feeble attempt to create a *genuine* issue of fact where none exists contradicts the record and should not preclude summary judgment for Respondents. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Additionally, similar to the facts of *Wiegand*, Nicky Phillips testified that after executing the Auto Offer Form he received a renewal declarations page. This renewal declarations page reflected the amount of UIM coverage selected on the Auto Offer Form. At no point did Nicky Phillips inform American National or McNeill that a mistake had been made and that he had actually wanted more UIM coverage than reflected on the declarations page. Finally, it is also noteworthy that Nicky Phillips had been insured by American National since September 30, 2010. The amount of UIM coverage provided by the Auto Policy since that time has been $25,000/50,000. The fact that the Auto Policy at issue has contained the same amount of UIM coverage throughout this time is further evidence that this is the amount of coverage selected by Nicky Phillips on the Auto Offer Form.

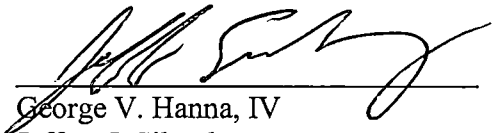
Here, the parties dispute whether the amount of UIM was written on the Auto Offer Form at the time it was executed by Nicky Phillips. Respondents and the circuit court are not relying on the signed acknowledgment to argue that an otherwise incorrectly executed offer form meets the requirements of § 38-77-350(B). Rather, like in *Wiegand*, Nicky Phillips signature under the Applicant's Acknowledgement, along with other evidence, serves as conclusive proof that the Auto Offer Form was executed correctly—i.e. it was executed after the amounts of UIM were marked on form. By signing the acknowledgement, Nicky Phillips affirmed that "the type and

amounts of coverage **marked** on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase." (R. p. 212)(Emphasis added). Therefore, there is no genuine issue of material fact that the Auto Offer Form was completed in compliance with § 38-77-350(B).

CONCLUSION

For the reasons discussed above, as well as for any other ground appearing on the record, Respondents respectfully requests this Court affirm the circuit court's grant of summary judgment.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Brief of Respondents Clyde McNeill Agency and Clyde Edwin McNeill* complies with Rule 211(b), SCACR.

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