

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

Case No. 2017-CP-07-00241

Jamar Markel Bronner,

Appellant,

v.

GEICO Indemnity Company,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in finding Respondent had satisfied S.C. Code § 38-77-350 (Repl. Vol. 2015) with respect to its offer of underinsured motorist coverage to Appellant?
2. Did the lower court err in finding Respondent made a meaningful offer of underinsured motorist coverage to Appellant under the standards set forth in *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987)?
3. Did the lower court err in granting summary judgment in favor of Respondent and against Appellant?

STATEMENT OF THE CASE

Appellant Jamar Markel Bronner (“Bronner”) filed this action on February 10, 2017. (R. p. __). The Complaint sought a declaratory judgment and reformation related to underinsured motorist (“UIM”) coverage under an insurance policy (the “Policy”) issued by Respondent GEICO Indemnity Company (“GEICO”). R. p. __; Complaint, ¶ 26).

GEICO removed this action to federal court and initially filed its Answer and Counterclaim on March 8, 2017. (R. p. __; Answer and Counterclaim). The counterclaim sought a competing declaratory judgment with respect to UIM coverage under the Policy. (R. p. __; Answer and Counterclaim, ¶ 38).

Federal court remanded this action to state court with the parties’ consent. (R. p. __; Order on Motion to Remand). GEICO then refiled its Answer and Counterclaim in state court. (R. p. __; Answer and Counterclaim). Bronner filed a Reply to the Counterclaim on January 29, 2018. (R. p. __; Reply to Counterclaim).

Thereafter, both parties filed Motions for Summary Judgment (R. pp. __; Plaintiff’s Motion for Summary Judgment; Defendant’s Motion for Summary Judgment) and Memoranda in support of their respective positions on those motions. (R. pp. __; Plaintiff’s Memorandum in Support; Plaintiff’s Supplemental Memorandum in Support; Defendant’s Memorandum in

Support; Defendant's Supplemental Memorandum in Support). Along with their memoranda, the parties submitted evidence relating to the motions.

This matter was referred to the Honorable Marvin Dukes, Master in Equity for Beaufort County for final disposition. (R. p. ___; Order of Reference).

Judge Dukes heard the parties' Motions for Summary Judgment on October 31, 2018. (R. p. ___; Transcript, p. 1). By Order dated January 17, 2019, Judge Dukes granted GEICO's motion and denied Bronner's motion. (R. p. ___; Order).

Bronner filed a timely Motion to Alter or Amend Judge Dukes' Order on January 18, 2019. (R. p. ___; Motion to Alter or Amend). GEICO filed a Memorandum in Opposition to that motion. (R. p. ___; Memorandum in Opposition). By Form 4 Order, Judge Dukes denied the Motion to Alter or Amend on June 6, 2019. (R. p. ___; Order).

On July 5, 2019, Appellant filed a timely Notice of Appeal as to Judge Dukes' Order granting GEICO's Motion for Summary Judgment and his Order denying Bronner's Motion to Alter or Amend.

STANDARD OR REVIEW

The South Carolina Supreme Court has summarized the standard of review applicable to appeals from a grant of summary judgment as follows:

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct.

App.1995) (citing *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991)). “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *Nelson v. Charleston County Parks & Recreation Comm’n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). “However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653-54, 661 S.E.2d 791, 796 (2008).

Moreover, when a circuit judge grants summary judgment on a question of law, the appellate court should review the ruling de novo. *Wright v. PRG Real Estate Mgmt.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019), citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008).

FACTS¹

Bronner sustained bodily injuries in a vehicular collision that occurred on June 24, 2016 (the “Collision”). (R. pp. __; Bronner depo., pp. 69-70). He recovered all bodily injury liability (“BI”) coverage applicable to the motorist whose negligence caused the Collision. (R. pp. __; Complaint, ¶¶ 11-12; Bronner depo., p. 70).

On the date of the Collision, Bronner was a named insured under the Policy. (R. pp. __; Complaint, ¶ 6; Answer, ¶ 5; Defendant’s Memorandum in Opposition, Ex. 1). He made a claim with GEICO for UIM benefits as a result of injuries he sustained in the Collision. GEICO denied his claim, contending the Policy did not include UIM coverage at the time of the Collision.

Bronner purchased the Policy on April 10, 2015. On that day, he telephoned GEICO to purchase a motorcycle insurance policy and spoke with GEICO’s employee Steven Stewart. GEICO issued the Policy that day and took payment over the telephone. There is no recording of the telephone call. (R. p. __; Stewart depo., p. 58).

¹ Because this Court must view the facts and inferences in a light most favorable to Bronner, the facts are summarized in this brief from that perspective.

Stewart does not remember the conversation. (R. p. ___; Stewart depo., p. 56). Rather, he could only testify about the call based on his training and his review of GEICO's records regarding the Policy. (R. p. ___; Stewart depo., pp. 56-57). GEICO's documentation of the telephone call did not include any express offer of UIM coverage or the details of any such offer but only reflected that Bronner "wishe[d] to reject" UIM coverage without any explanation why. (R. p. ___; Stewart depo., p. 61).

On the topic of UIM coverage, Bronner remembered Stewart "saying nothing about is this mandatory or you can reject this." (R. p. ___; Bronner depo., p. 38). He testified: "I wasn't explained this underinsured motorist thing." (R. p. ___; Bronner depo., p. 52). Bronner specifically denied that Stewart advised him of the premium amount to add UIM coverage to the Policy. (R. p. ___; Bronner depo., pp. 73-74).

Thereafter, GEICO mailed Bronner a copy of the Policy, along with a declarations page that stated "insured rejects" UIM coverage (R. pp. ___; Defendant's Memorandum in Opposition, Exs. 1 & 8), although GEICO had neither obtained a signed rejection by Bronner (R. p. ___; Stewart depo., p. 73) nor – given the substance of the preceding telephone call – an oral rejection by Bronner after a substantive, meaningful explanation of the optional coverage. Bronner did not understand what "insured rejects" meant on the declarations page because GEICO did not explain it to him. (R. pp. ___; Bronner depo., pp. 48-49, 51-52).

Along with the Policy, GEICO included within its 44-page mailing to Bronner a form purporting to offer UIM coverage. (R. pp. ___; Defendant's Memorandum in Opposition, Ex. 8, p. 9 of 44). The form failed to list the specific premium amount for the optional UIM coverage available to Bronner. (R. p. ___; Stewart depo., p. 77). Instead, the premium listed on the form for minimum limits coverage was "\$23.00 to \$780.00". (R. pp. ___; Defendant's Memorandum

in Opposition, Ex. 8, p. 10 of 44). At the time GEICO sent the form to Bronner, it knew the exact amount of the premium Bronner would have to pay to accept the offer of UIM coverage. (R. pp. __; Bettridge depo., pp. 41-42, 49-50; Stewart depo., pp. 59-61). Despite knowing the exact amount of the premium – and even though it could have included that amount on the form (R. pp. __; Bettridge depo., pp. 42-43, 47-50; Stewart depo., pp. 64-66) – GEICO sent the form to Bronner with an imprecise premium amount that varied by \$757.00, a difference that approached the total annual premium amount for all other coverages under the Policy. (R. pp. __; Defendant’s Memorandum in Opposition, Ex. 8, p. 8 of 44).

In addition, even though the Policy’s limits for liability coverage were \$25,000/\$50,000/\$25,000 (R. pp. __; Defendant’s Memorandum in Opposition, Ex. 8, p. 7 of 44), the form offered UIM coverage with limits of \$50,000/\$100,000/\$25,000 and \$100,000/\$300,000/\$50,000 (R. pp. __; Defendant’s Memorandum in Opposition, Ex. 8, p. 10 of 44), neither of which were actually available for Bronner to purchase. (R. p. __; Stewart depo., pp. 71-72).

Bronner returned the form to GEICO (R. pp. __; Defendant’s Memorandum in Opposition, Ex. 10). Bronner – not GEICO’s producer or representative – checked the selection boxes on the form and signed the form. (R. p. __; Bronner depo., p. 60; Stewart depo., p. 76).

ARGUMENT

1. An insurer’s duty to make a meaningful offer of UIM coverage.

a. General principles.

Since 1978, South Carolina Code § 38-77-160 (Repl. Vol. 2015) (or its predecessor, Section 56-9-831) has imposed a duty on motor vehicle insurers to offer insureds the option to purchase UIM coverage. South Carolina courts have interpreted this legislative mandate as requiring insurers not only to offer UIM coverage but to make a “meaningful offer” of that

coverage – that is, to provide an insured “with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage.” *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

If an insurer fails to make a meaningful offer or to obtain a valid rejection of UIM coverage, the Court must reform the policy as a matter of law to include UIM coverage equal to the policy’s liability limits. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996). When an offer is legally inadequate (*i.e.*, less than “meaningful”), the insured’s response is irrelevant; thus, reformation is proper even when an insured purchased UIM coverage with limits less than his liability limits or stated he did not desire to purchase additional coverage. *Ackerman v. The Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995).

In short, before examining an insured’s response to an offer, the Court must inquire whether the insurer complied with its statutory duty. Because the law imposes this duty on the insurer, *the focus of the inquiry is on the insurer, not the insured.*

“The insurer bears the burden of establishing that it made a meaningful offer.” *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 348-49, 608 S.E.2d 569, 571 (2005). An insurer cannot rely upon a UIM offer by another insurer to satisfy its duty to make a meaningful offer. *Ackerman*, 318 S.C. at 142, 456 S.E.2d at 410-11. Instead, it must independently comply with the statutory mandate to make a meaningful offer. Moreover, where an insurer undertakes to make a “new” offer of UIM coverage to its insureds – that is, an offer subsequent to a previous offer of UIM, even when not required to do so – its new offer must satisfy statutory standards. *Antley v. Nobel Ins. Co.*, 350 S.C. 621, 567 S.E.2d 872 (Ct. App. 2002).

South Carolina courts have often addressed insurers claims that they have satisfied the statutory duty to make a meaningful offer and have obtained informed rejections of optional

UIM coverage. In doing so, the courts have focused on three aspects of the optional coverage transaction: (1) the insurer's *communication* of the offer to the insured; (2) the *content* of the offer; and (3) the insured's *response* to the offer.

b. Defining a "meaningful offer."

i. The *Wannamaker* analysis.

In the seminal case *State Farm Mut. Auto. Ins. Co. v. Wannamaker, supra*, the South Carolina Supreme Court adopted the following analysis (the "*Wannamaker* analysis"), which provides standards applicable to the first two aspects of the transaction:

- (1) the insurer must use a commercially reasonable notification process (which addresses the first aspect – *communication* of the offer);
- (2) the offer must offer optional coverage with specific limits (which relates to the second aspect – *content* of the offer);
- (3) the offer must intelligibly explain the nature of the optional coverage (which also relates to the second aspect – *content* of the offer); and
- (4) the offer must advise the insured that optional coverages are available for an additional premium (which also relates to the second aspect – *content* of the offer).

Wannamaker, 291 S.C. at 521, 354 S.E.2d at 556. These standards are intended to achieve the fundamental policy behind the mandatory offer provisions of Section 38-77-160: to provide an insured "with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage." *Id.* at 521, 354 S.E.2d at 556.

Because an insurer must comply with these standards when offering UIM coverage, if it fails to make a meaningful offer, an insured's rejection of UIM coverage is not an informed response the courts will enforce.² Stated differently, an offer that fails to comply with the above

² Courts have recognized a limited exception to this conclusion if the insured is a sophisticated purchaser of insurance such as a commercial insured's professional risk manager – a person experienced in dealing with vehicle insurance coverage and fully aware of the nature and purpose of UIM coverage – who is purchasing coverage for a fleet of company vehicles. *See*,

standards is not meaningful and “has the legal effect of no offer at all.” *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990); *Cohen v. Progressive Northern Ins. Co.*, 402 S.C. 66, 76, 737 S.E.2d 869, 874 (Ct. App. 2013).

To satisfy the first requirement of the *Wannamaker* analysis (the manner of communicating of the offer), an insurer must employ both a reasonable method of communication and an approach that is “reasonably calculated to bring the offer to the insured’s attention.” *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 153-54, 370 S.E.2d 915, 917 (Ct. App. 1988).

While the Court of Appeals in *Dewart* recognized that use of the mails can be a reasonable method to communicate with an insured, it also noted this fact alone did not demonstrate the insurer’s process satisfied *Wannamaker*. Instead, it analyzed the circumstances under which the insurer presented the written offer of coverage to the insured in concluding that inclusion of written UIM offers as “stuffers” or “junk mail” with premium notices “was not a method reasonably calculated to draw the insured’s attention to the nature of the offer.” *Dewart*, 296 S.C. at 155, 370 S.E.2d at 918.

Similarly, in *Lopez v. National Gen. Ins. Co.*, 308 S.C. 342, 417 S.E.2d 864 (1992), the Supreme Court endorsed the Court of Appeals’ holding in *Dewart* and ruled an insurer failed to offer UIM coverage meaningfully when it mailed a form to the insured with “several other inserts” including a separate notice that “contained a reference to an increase in coverage, which could be construed as underinsured coverage.” *Lopez*, 308 S.C. at 346-47, 417 S.E.2d at 867.

With respect to the fourth requirement of the *Wannamaker* analysis (the insurer must advise the insured that optional coverages are available for an additional premium), our appellate

e.g., *McDowell v. Travelers Prop. & Cas. Co.*, 357 S.C. 118, 590 S.E.2d 514 (Ct. App. 2003). There is no evidence this exception applies to Bronner.

courts have noted this means that the insurer must not only advise the insured about an increased premium cost generally but that it must “tell the insured that optional coverages are available for an additional *stated* premium.” *Dewart*, 296 S.C. at 153, 370 S.E.2d at 917 (emphasis added); *accord American Security Ins. Co. v. Howard*, 315 S.C. 47, 51, 431 S.E.2d 604, 607 (Ct. App. 1993); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 440, 442, 392 S.E.2d 472, 474 (Ct. App. 1990), *aff’d as modified*, 303 S.C. 321, 400 S.E.2d 492 (1991). Thus, in *Dewart*, the court held the insurer satisfied the fourth element of *Wannamaker* when it offered optional coverage with limits of \$15,000/\$30,000/\$5,000 for the specific premium amount of \$93.00. On the other hand, the *Howard* court held an offer form was inadequate because it did “not provide the insured with *a separately stated premium amount* for coverage at the specified limits” of available UIM coverage. 315 S.C. at 51, 431 S.E.2d 607 (emphasis added). Likewise, in *Jackson*, the court held the insurer failed to make a meaningful offer because its form “fail[ed] to state *the amount of additional premium the insured must pay* for underinsured motorist coverage at the specified limits.” 301 S.C. at 442, 392 S.E.2d at 474 (emphasis added).

ii. The effect of S.C. Ann. § 38-77-350.

The Legislature addressed the second aspect of the optional coverage transaction (the content of the offer) and the third aspect of the transaction (the insured’s response) when it enacted S.C. Code Ann. § 38-77-350 (Repl. Vol. 2015). This statute allows insurers to use a form which – *if it complies with the following requirements and is properly completed and executed by the insured* – gives rise to a presumption of an informed decision regarding acceptance or rejection of optional coverage:

(A) ... 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.

S.C. Code Ann. § 38-77-350(A) (Repl. Vol. 2015). If an insurer uses a form that complies with these requirements, it is entitled to a conclusive presumption that it made a meaningful offer of UIM coverage, provided the form is “completed by an insurance producer or a representative of the insurer” and then signed by the named insured. *Id.*, § 38-77-350(B).

Notably, while this statute addresses the content of the offer (the second part of the optional coverage transaction) in subsections (A)(1), (A)(2), and (A)(5) and the insured’s response to the offer (the third part of the transaction) in subsections (A)(3) and (A)(4), it does not speak to the requirements for the insurer’s communication of the offer to the insured (the first part of the transaction). As a result, the *Wannamaker* analysis remains the only standard that deals with that aspect of the meaningful offer analysis and should therefore continue to guide the courts on that topic, even when analyzing an offer under Section 38-77-350.

Section 38-77-350 sets forth the minimum requirements for a form offering UIM coverage. *Butler*, 323 S.C. at 408, 475 S.E.2d at 761. “[A] form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance.” *Floyd v. Nationwide*, 367 S.C. 253, 262, 626 S.E.2d 6, 12 (2005).

An insurer must comply strictly with Section 38-77-350 to receive its conclusive presumption. For example, in *Floyd*, the court considered an earlier version of the statute that required the form to include “a space for the insured to mark whether the insured chooses to

accept or reject the coverage and a space *for the insured to select* the limits of coverage he desires” and conditioned the presumption of compliance on the form being “properly completed and executed by the named insured.” *Id.* at 262, 626 S.E.2d at 12 (emphasis in original).³ In light of this language, the court held that the “plain and unambiguous terms of the statute” required that the insured complete the offer form (*i.e.*, mark the form’s selection boxes) to trigger the presumption and, because the insurer had completed the form and the insured only signed it, the insurer did not satisfy the statute. *Id.* at 263, 626 S.E.2d at 12.

If an offer fails to comply with the requirements of Section 38-77-350, the insurer is denied the presumption of an informed rejection; however, the insurer may still argue it made a meaningful offer under the *Wannamaker* analysis. *Id.* at 264, 626 S.E.2d at 12. Regardless, “[w]hether the analysis is focused primarily on the written form, the *Wannamaker* analysis, or both, 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.’” *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 421, 618 S.E.2d 909, 918-19 (2005), quoting *Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. at 352, 608 S.E.2d at 573.

Under the *Wannamaker* analysis, a court can consider a form that is not properly completed under the statute. *Cohen v. Progressive Northern Ins. Co.*, *supra*. Nevertheless, an insurer cannot satisfy its burden of proof by relying solely upon an offer form that fails to satisfy Section 38-77-350. See *Grinnell Corp. v. Wood*, 389 S.C. 350, 358, 698 S.E.2d 796, 800 (2010). In *Grinnell*, the South Carolina Supreme Court held: “If the only evidence presented in this

³ As noted above, the current version of the statute – which was amended before the transaction at issue in this case – requires completion of the form “by an insurance producer or a representative of the insurer.” S.C. Code Ann. § 38-77-350(B) (Repl. Vol. 2015).

record were the statutorily deficient and incorrectly executed offer form, the court of appeals opinion would have to be affirmed.” The court of appeals had held: “It is axiomatic that a form which fails under the requirements of section 38-77-350(A) would not meet the requirements of *Wannamaker* without evidence outside of the offer form. ... To meet its burden of proof, an insurer must provide evidence outside of the offer form itself to prove satisfaction of the *Wannamaker* test.” *Grinnell Corp. v. Wood*, 378 S.C. 458, 663 S.E.2d 61, 68-69 (Ct. App. 2008).⁴

As the United States District Court for the District of South Carolina recognized in applying these cases, when an offer form is insufficient to prove the insurer made a meaningful offer, the court should consider “the totality of the transaction and its impact on the [insured’s] subjective understanding of the optional coverage.” *Liberty Mut. Fire Ins. Co. v. McKnight*, 125 F. Supp. 3d 602, 616 (D.S.C. 2015).

2. The lower court erred in concluding GEICO satisfied S.C. Code § 38-77-350 with respect to its offer of UIM coverage to Bronner.

a. The Court should analyze the written UIM offer form to determine whether GEICO made a meaningful offer.

As discussed above, the first contact between the parties regarding UIM coverage was a telephone call between Bronner and GEICO’s employee Stewart. The parties disagree about the substance of that call. However, regardless of what transpired in the call, it is undisputed GEICO thereafter sent Bronner a written offer form, the response to which is the basis for GEICO’s claim that the Policy does not provide UIM coverage.

This subsequent written offer should be the focus of the Court’s inquiry in this appeal because either the telephone call did not constitute an offer of UIM coverage (R. p. __; Bronner

⁴ In contrast, in *Cohen*, the Court of Appeals found there was a meaningful offer based upon the UIM offer form *plus* evidence that the agent who took the policy application had reviewed the form with the insured and orally explained UIM coverage to the insured.

depo., pp. 38, 52, 73-74), Bronner's alleged declination of coverage during the call was not an adequate rejection by GEICO's standards (R. p. ___; Stewart depo., p. 73-74), or the written offer was a subsequent "new" offer that must be independently scrutinized. *See Antley*, 350 S.C. at 635, 567 S.E.2d at 879 (when an insurer undertakes to make a "new" offer of UIM coverage, even if not required to, the new offer must satisfy statutory standards).

b. GEICO did not use a commercially reasonable notification process to communicate the UIM offer form.

GEICO issued the Policy with UIM coverage "rejected" after a telephone call where (considering the evidence most favorable to Bronner) it made no meaningful offer of UIM coverage and before it provided the offer form to Bronner. Obtaining the insured's selection without educating him about the nature of the coverage (or satisfying the other aspects of the *Wannamaker* analysis) and then memorializing that choice by issuing the policy without UIM coverage – and sending the offer form to the insured after he had purchased the Policy (R. p. ___; Stewart depo., p. 72), along with documents stating that UIM had already been rejected – was not a notification process that was commercially reasonable or "reasonably calculated to bring the offer to the insured's attention." *See Dewart*, 296 S.C. at 153-54, 370 S.E.2d at 917. In short, GEICO executed its obligation to advise Bronner in reverse order: It ostensibly got an oral rejection of coverage first and then sought to explain the coverage in writing later. Under these circumstances, GEICO did not make the offer via a reasonable method of communication and in a fashion that was reasonably calculated to bring the offer to the Bronner's attention.

Rather, GEICO's representation that Bronner had rejected UIM coverage – which implied his rejection was valid and enforceable⁵ – was false given the legal requirement that a

⁵ Under Section 38-77-350(E), the purported rejection could not be valid absent a validly executed offer form. GEICO's policies also required a written rejection. (R. p. ___; Stewart depo., pp. 73-74).

meaningful offer precede a valid rejection. This misrepresentation, along with the obvious conflict it created with GEICO's duty to provide and Bronner's right to receive a meaningful offer of UIM coverage, rendered ambiguous the 44-page "initial package of materials" GEICO sent to Bronner (R. p. ___; Defendant's Memorandum in Opposition, Ex. 8). Because GEICO's offer was ambiguous, it was not a meaningful offer.⁶ See *Bower v. National General Ins. Co.*, 342 S.C. 315, 319, 536 S.E.2d 693, 695 (Ct. App. 2000) (applying to UIM offers the general rule that ambiguous provisions of insurance policies must be construed in favor of coverage), *aff'd* 351 S.C. 112, 569 S.E.2d 313 (2002).

As such, GEICO failed to meet the first prong of the *Wannamaker* analysis of whether it satisfied its statutory duty to make a meaningful offer of UIM coverage.

c. GEICO failed to adequately specify the premium applicable to the UIM limits it offered.

GEICO's offer form did not advise Bronner of the exact premium for each level of coverage available even though GEICO knew the exact amount of the premium for the optional coverage. (R. p. ___; Stewart depo., p. 77). Instead, it listed the annual premium for minimum limits coverage as "\$23.00 to \$780.00" – a difference of \$757.00. Given this lack of clarity, a reader of the form desiring to purchase minimum limits UIM coverage would not know how much that coverage would cost. (R. p. ___; Stewart depo., pp. 81-82). He would be left with the dilemma of either (1) selecting UIM coverage and risking increasing the policy's existing premium by almost double or (2) declining UIM coverage because of the confusion created by GEICO's form.

Under S.C. Code Ann. § 38-77-350(A)(2) (Repl. Vol. 2015), a UIM offer form, "at a minimum, must provide ... a list of available limits and the range of premiums for the limits."

⁶ Additionally, there is evidence that Bronner was confused by the ambiguity. (R. p. ___; Bronner depo., pp. 48-49).

GEICO argues its premium quote of “\$23.00 to \$780.00” was permissible because the statute authorizes an insurer to offer UIM coverage with a “range of premiums.” But it uses this phrase out of context.

Section 38-77-350(A)(2)’s language “a list of available limits and the range of premiums for the limits” must be read as a whole and not piecemeal. *See Smith v. Tiffany*, 419 S.C. 548, 556-57, 799 S.E.2d 479, 483 (2017) (a statute must be read “as a whole” to determine legislative intent). Such a reading demonstrates that the use of the term “range of premiums” refers to the specific premiums applicable to the various available limits.⁷ Specifically, the statute requires a “list” of limits from which an insured can choose. Implicit in that term is that the form will offer different coverage limits and there will be different premiums for each. When the statute uses the phrase “for the limits” it is referring back to the “list of available limits”. In other words, the term “range of premiums” is modified by the immediately following phrase “for the limits” which, in turn, relates to the range of optional coverage levels on the “list”. In sum, a form should have a range of premiums when it has a range of available limits; however, each of these premium amounts should be a specific amount related to a specific optional coverage level.⁸

⁷ Although decided under the *Wannamaker* analysis, the following cases are also relevant in determining the Legislature’s intent in passing Section 38-77-350(A)(2) because they reflect the state of the law regarding premiums on UIM offer forms at the time that statute was enacted. *American Security Ins. Co. v. Howard*, 315 S.C. at 51, 431 S.E.2d at 607 (a UIM offer form must state the dollar amounts of available optional coverages and must list a separate premium amount for each of the specified limits); *Ackerman*, 318 S.C. at 144-45, 456 S.E.2d at 412 (the failure to provide specific premium amounts for each optional coverage amount on a UIM offer form is “fatal and renders the offer ineffective”), citing *American Security Ins. Co. v. Howard*, *supra*.

⁸ Further proof of legislative intent can arguably be gleaned from the chapter of the Insurance Code dealing with insurance trade practices. Specifically, S.C. Code Ann. § 38-57-180 (Repl. Vol. 2015) mandates: “Where the premium or charge for insurance is included in the overall purchase price or financing of the purchase of merchandise or property, the vendor or lender shall separately state and identify the amount charged and to be paid for the insurance and the classifications if any, upon which based.” This demonstrates that, in matters dealing with the

Where, as here, only one optional limit was legally available (because this was a minimum-limits policy), there should be only one specific premium listed. As noted above, GEICO had the ability to do that on its offer form but simply failed to do so, opting instead for a generic, standardized form it uses for all customers. (R. p. ___; Bettridge depo., pp. 47-48).

GEICO also argued in the lower court that despite listing vastly different premiums on its offer form for one set of coverage limits, its statement on the form that Bronner could contact GEICO for additional information (*see* R. p. ___; Stewart depo., pp. 82-83) was sufficient to satisfy its duty to make a meaningful offer. This is not an approach expressly sanctioned by Section 38-77-350, nor does it achieve the goals of that statute.

The United States District Court for the District of New Mexico rejected a similar argument in *Sinclair v. Zurich American Ins. Co.*, 141 F. Supp. 3d 1162 (D.N.M. 2015). There, the insurer argued it adequately advised the insured about the premium cost for optional UM/UIM coverage when it provided the insured with a formula it could use to calculate the premium and advised the insured how it could obtain additional information about the actual premium cost. *Id.* at 1167. The court rejected the argument, reasoning:

These actions fall far short of compliance with the premium disclosure requirement.

Under New Mexico law, an insurer is required to meaningfully offer UM/UIM coverage and the insured must knowingly and intelligently act to reject such coverage before it can be excluded from an insurance policy. Concerned that insurers continued to offer UM/UIM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice, *Jordan [v. Allstate Ins. Co.]*, 149 N.M. 162, 245 P.3d 1214, 1219 (2010) “detail[ed] for the first time the technical requirements for a valid rejection of UM/UIM coverage in an amount equal to liability limits.” 245 P.3d at 1222. Under *Jordan's* second requirement, insurers must provide the insured with “the premium charge for [the] maximum amount of UM/UIM coverage” available, the “premium cost for the minimum amount of UM/UIM coverage allowed by Section 66-5-301(A) ... as well as the relative costs for any other levels of UM/UIM coverage offered to the

disclosure of insurance premiums, the Legislature intends for sellers of insurance to provide specific information to consumers.

insured.” *Id.* at 1221. “[B]y including premium prices for each available UM/UIM coverage level, insurance carriers meaningfully enable consumers to make a knowing and intelligent purchase or rejection of UM/UIM coverage.” *Id.*

...

Rather than requiring insureds to take actions to determine UM/UIM premiums, the “*Jordan* Court intended to require insurers to fully inform their insureds regarding UM/UIM coverage options and corresponding premium costs.”

[The insured] had no obligation to use a formula to calculate the premiums for UM/UIM coverage or to contact Zurich or the insurance broker to get additional information about the cost of the premiums. Under New Mexico law, the burden is not on the insured to request information about UM/UIM coverage. Insureds cannot make an informed decision about UM/UIM coverage “without first receiving information from the insurance company.”

Sinclair, 141 F. Supp. 3d at 1167-68 (some citations omitted).

GEICO’s argument fails because, as recognized by the *Sinclair* court, it would have the effect of shifting to Bronner the duty to determine the information necessary to make GEICO’s offer meaningful and to allow Bronner to make “an intelligent decision of whether to accept or reject the coverage.” *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556. The Legislature has squarely imposed this duty on insurers. *Butler*, 323 S.C. at 404-05, 475 S.E.2d at 759 (Section 38-77-160 creates a statutory duty with which insurers must comply).

If it were to accept GEICO’s argument, this Court would in effect establish a rule that creates a duty of inquiry on insureds rather than a duty of providing information on insurers. As such, it would contravene the Legislature’s intent. The lower court erred in reaching this conclusion in support of its grant of summary judgment to GEICO.

d. The form offered limits not authorized by statute.

Under S.C. Code § 38-77-160 (Repl. Vol. 2015), an insurer must offer UIM coverage “up to the limits of the insured liability coverage.” GEICO does not sell UIM coverage with limits greater than liability limits, even though that is what it offered to Bronner. (R. p. __; Stewart depo., pp. 71-72). The form offered UIM coverage with limits that were not available for

Bronner to purchase and limits that contravened the terms of Section 38-77-160. The lower court therefore erred in finding the form complied with Section 38-77-350.

e. The form was not properly completed as required by Section 38-77-350(B).

The offer form was not completed as required by S.C. Code § 38-77-350(B) (Repl. Vol. 2015) because Bronner – not GEICO – checked the boxes before signing it. In order for an insured’s rejection of UIM coverage to be valid and to trigger the statute’s conclusive presumption, Section 38-77-350(B) requires that the offer form be “completed by an insurance producer or a representative of the insurer.” Since the form was not completed consistently with the express, “plain and unambiguous” provisions of the statute, GEICO cannot benefit from the statute’s statutory presumption. *See Floyd v. Nationwide*, 367 S.C. at 262-63, 626 S.E.2d at 12 (“The insurer may not benefit from the protections of the statute when the form does not comply with the statute.”).

Moreover, because the offer form was not completed consistent with the requirements of Section 38-77-350(A), Bronner’s signature on GEICO’s offer form does not trigger the statutory presumption that GEICO made a meaningful offer and the lower court erred in concluding that his signature was dispositive.

For all of the reasons set forth above, the lower court erred in finding GEICO complied with Section 38-77-350 and in granting summary judgment to GEICO.

3. The lower court erred in concluding GEICO made a meaningful offer of UIM coverage to Bronner under the *Wannamaker* analysis.

As discussed above, the Court’s focus should be on GEICO’s written offer of UIM coverage and not the alleged oral offer during the parties’ initial telephone call. However, if the Court disagrees and concludes it is necessary to consider that call to determine whether GEICO

made a meaningful offer, it should conclude that there are genuine issues of material facts such that the lower court should have denied summary judgment.

Under the *Wannamaker* analysis, an insurer cannot satisfy its burden of proof by relying solely upon an offer form that fails to satisfy Section 38-77-350. See *Grinnell Corp. v. Wood*, 389 S.C. 350, 358, 698 S.E.2d 796, 800 (2010). “To meet its burden of proof, an insurer must provide evidence outside of the offer form itself to prove satisfaction of the *Wannamaker* test.” *Grinnell Corp. v. Wood*, 378 S.C. 458, 663 S.E.2d 61, 68-69 (Ct. App. 2008).

Here, the only source for additional evidence was the telephone conversation between Bronner and GEICO’s employee Stewart.

In the light most favorable to Bronner, the facts demonstrate that Stewart did not explain UIM coverage, did not discuss the option of rejecting UIM coverage, and did not advise Bronner of the premium to add UIM coverage to the Policy. (R. p. ___; Bronner depo., pp. 38, 52, 73-74). In the absence of evidence that GEICO provided Bronner with necessary information about UIM coverage in the telephone conversation, the Court could not validly find or conclude that GEICO satisfied the *Wannamaker* analysis because the only other evidence was the offer form that did not comply with Section 38-77-350.

Notably, even under a view of the facts favorable to it, GEICO could not satisfy the *Wannamaker* analysis because of the issues with the form discussed with respect to Section 38-77-350 above, coupled with its failure to advise Bronner of the specific premiums applicable to the range of available limits. *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556 (“the insurer must specify the limits of optional coverage ... [and] the insured must be told that optional coverages are available for an additional premium”); *American Security Ins. Co. v. Howard*, 315 S.C. at 51, 431 S.E.2d at 607 (the form must state the dollar amounts of available optional

coverages and must list a separate premium amount for each of the specified limits). The failure to provide specific premium amounts for each optional coverage amount is “fatal and renders the offer ineffective.” *Ackerman v. The Travelers Indem. Co.*, 318 S.C. at 145, 456 S.E.2d at 412, citing *American Security Ins. Co. v. Howard, supra*.⁹

Considering the specific problems outlined above as well as the totality of the transaction, GEICO failed to make a meaningful offer of UIM coverage because it failed to provide Bronner “with adequate information, and in such a manner, as to allow [him] to make an intelligent decision of whether to accept or reject the coverage.” *Wannamaker*, 291 S.C. at 521, 354 S.E.2d at 556. Accordingly, the lower court erred in granting summary judgment to GEICO.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the lower court granting GEICO’s Motion for Summary Judgment and should instead enter judgment in favor of Appellant. Alternatively, in the event this Court concludes this matter should be decided solely under the *Wannamaker* analysis, it should remand this action to Circuit Court for a trial on the merits given the genuine issues of material facts applicable to that topic.

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⁹ It is also noteworthy that *Hastings v. United Pac. Ins. Co.*, 318 N.W.2d 849 (Minn. 1982) and *Cloninger v. National Gen. Ins. Co.*, 109 Ill.2d 419, 488 N.E.2d 548 (1985), the cases relied upon by the *Wannamaker* court to establish its four-part test, have been construed to mean that a meaningful offer must either list the exact premiums for the optional coverage levels or state that the additional cost to purchase the coverage is “modest.” See *League General Ins. Co. v. Tvedt*, 317 N.W.2d 40, 42-43 (Minn. 1982); *Watson v. Hartford Cas. Ins. Co.*, 562 N.E.2d 1261, 1264-65 (Ill. App. 1990). GEICO’s offer form stated neither. Moreover, the upper end of the possible premiums listed by GEICO could not in any way be considered a modest additional cost when compared to the total premium cost for the other coverages provided by the Policy.

and



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October 30, 2019
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

Case No. 2017-CP-07-00241

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SC Court of Appeals

Jamar Markel Bronner,

Appellant,

v.


GEICO Indemnity Company,

Respondent.

PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF APPELLANT and DESIGNATION OF MATTER TO BE INLCUDED IN THE RECORD ON APPEAL upon the Respondent herein by mailing same via U.S. First Class Mail, postage prepaid, on October 30, 2019, addressed to:

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October 30, 2019

The Hon. Jenny Abbott Kitchings
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RE: Jamar Markel Bronner v. GEICO
Appellate Case No. 2019-001096

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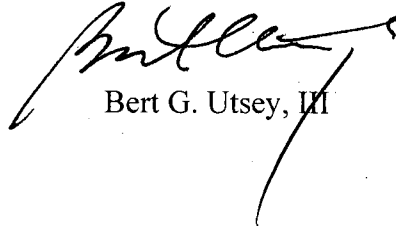
Dear Ms. Kitchings:

Enclosed are original and one copy each of the Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal in the above-referenced matter. Please file the originals, clock the copies and return same to me in the provided self-addressed stamped envelope for my file.

By copy of this transmittal to counsel of record, I am serving copies of the enclosed upon the Respondent herein.

Thank you for your kind assistance with this request.

Sincerely,



Bert G. Utsey, III

BGU/hd
Enclosures

cc: Thomas H. Milligan, Esquire
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