

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

RECEIVED

NOV 27 2019

SC Court of Appeals

Jamar Markel Bronner,

v.

GEICO Indemnity Company,

Appellant,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

J. Olin McDougall
MCDUGALL LAW FIRM
Post Office Box 1336
Beaufort, SC 29901
(843) 379-7000
lin@mlf.law

and

Bert G. Utsey, III
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
P.O. Box 30968
Charleston, SC 29417
(843) 818-4399
butsey@pmped.com

Attorneys for Appellants

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INTRODUCTION

Pursuant to Rule 208(b)(3), SCACR, Bronner¹ submits this brief in response to the Respondent's Brief of GEICO. For ease of reference, this brief is organized by topic in the order of the argument headings used in GEICO's brief.

STATEMENT OF THE CASE

Bronner disagrees with GEICO's Statement of the Case (which incorporates a statement of the factual record).

GEICO's Statement of the Case contains contested matters, contrary to the requirements of Rule 208(1)(C), SCACR. In addition, it does not recite the evidence or the conclusions and inferences to be drawn therefrom in a light most favorable to Bronner, which is this Court's perspective in light of the applicable standard of review. *See Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

Bronner instead relies upon the Statement of the Case and the summary of Facts set forth in his primary brief.

ARGUMENT

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

GEICO contends it is entitled to a conclusive presumption that it made a meaningful offer of UIM coverage under S.C. Code Ann. § 38-77-350 (Repl. Vol. 2015). The pertinent portion of that statute states: "If *this form*² 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

¹ For the sake of consistency, this brief uses the same defined terms as Bronner's primary brief.

² "This form" refers to a form satisfying the requirements of Section 38-77-350(A).

an informed, knowing selection of coverage....” S.C. Code Ann. § 38-77-350(B) (Repl. Vol. 2015) (emphasis added). Thus, for GEICO to obtain the conclusive presumption it seeks, it must demonstrate three things:

1. Its offer form satisfies all requirements of subsection A of Section 38-77-250;
2. The form was completed by GEICO’s producer or representative; and
3. The form was signed by Bronner.

Summarized, GEICO’s argument is: “The offer form meets all requirements of Section 38-77-350(A) and Bronner signed it; therefore, GEICO is entitled to a conclusive presumption.” (See, e.g., Respondent’s Brief, pp. 17, 21-22). This argument fails for two reasons.

First, as explained in detail in Bronner’s primary brief, the form did not advise Bronner adequately about the premium cost for UIM coverage. (Appellant’s Brief, pp. 14-17). GEICO seeks refuge in the fact its form was approved by the South Carolina Department of Insurance. (Respondent’s Brief, p. 18). However, the fact the Department of Insurance approves a form does not necessarily make it a meaningful offer. *Floyd v. Nationwide*, 367 S.C. 253, 262, 626 S.E.2d 6, 12 (2005). Additionally, GEICO’s citation to *Clinton v. West American Ins. Co.*, 364 S.C. 113, 611 S.E.2d 521 (2005) is unavailing. That case did not approve a form’s failure to specify a specific premium, the deficiency with GEICO’s form; instead, on the form in *Clinton*, “[f]our limits of additional UM coverage [were] shown, along with the increased premium rate. *Id.* at 119, 611 S.E.2d at 524. The issue here was not before the Court in *Clinton*.

Second, GEICO’s argument fails to account for the statutory requirement that its producer or representative must have completed the form before Bronner signed it. That did not occur. Rather, GEICO admits the form was not completed by its agent. (Respondent’s Brief, p. 19 (“Bronner actually placed the checkmark in the rejection box...”), p. 21 (Bronner “executed”

the form), and p. 22 (“Bronner completed ... the South Carolina Option Form....”). This is inadequate to satisfy GEICO’s burden of proof. (See Appellant’s Brief, p. 18).

GEICO’s brief fails to address the fact that its notification process was unreasonable given the manner in which it handled the transaction (*see* Appellant’s Brief, pp. 13-14) except to point out that the sale of the Policy was accomplished by telephone and in writing. (Respondent’s Brief, p. 23). But this two-part approach – coupled with the additional facts discussed in Bronner’s primary brief – are precisely what made GEICO’s offer confusing, ambiguous, and less than meaningful. GEICO offers no response to this analysis.

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

GEICO’s brief undertakes a review of its UIM offer under *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), without addressing Bronner’s arguments that (1) such an analysis is irrelevant considering the subsequent written offer of UIM coverage and (2) the *Wannamaker* standards cannot be met based solely on a form that fails to satisfy the requirements of Section 38-77-350. Thus, Bronner’s arguments on these points (*see* Appellant’s Brief, pp. 6, 11-13) remain unrefuted.

Moreover, in discussing the *Wannamaker* analysis, GEICO recites evidence from the record in a light most favorable to it rather than to Bronner, the latter of which is the correct standard given this Court is reviewing a grant of summary judgment. In fact, GEICO does not seem to oppose Bronner’s point that the lower court should have denied summary judgment in light of the genuine issues of material fact except to argue that Bronner could have made inquiries to determine the actual premium amount and that such inquiries would not have been “burdensome.” (Respondent’s Brief, p. 23). As discussed in Bronner’s primary brief, though, the duty is on GEICO – not Bronner – to make a meaningful offer (Appellant’s Brief, pp. 6, 16-

17); therefore, the focus is on GEICO's conduct, not Bronner's. As a result, the relative difficulty for Bronner to make an inquiry is irrelevant because he had no duty to make that inquiry. Rather, GEICO was statutorily required to provide information necessary to make its offer meaningful - and GEICO certainly cannot plausibly contend it was burdensome for it to provide Bronner with the precise amount of the premium for UIM coverage under the Policy since it had possessed that information.

Otherwise, GEICO's arguments regarding the *Wannamaker* analysis are refuted by the above discussion regarding Section 38-77-350 and the arguments set forth in Appellant's Brief.

3. Bronner's arguments are correct and are supported by applicable law.

a. The Policy was issued without UIM coverage.

It is indisputable that the Policy was issued by GEICO without UIM coverage before it sent a UIM offer form to Bronner. (R. pp. ___; Defendant's Memorandum in Opposition, Exs. 1 & 8; Stewart depo., p. 73).

To accept GEICO's argument on this topic, the Court would have to agree with GEICO's view of the evidence and ignore Bronner's testimony that GEICO's agent Stewart failed to explain UIM coverage, to provide him with the cost to add UIM coverage to the Policy, and to discuss the mandatory or optional nature of that coverage. (R. p. ___; Bronner depo., pp. 38, 52, 73-74). As Bronner argued in the lower court, the existence of this testimony creates a genuine issue of material fact if the Court undertakes a *Wannamaker* analysis.

More fundamentally, GEICO's arguments on this topic demonstrate a failure to appreciate the significance of its conduct when one considers the totality of the transaction. The process by which GEICO sent Bronner the Policy with UIM coverage already "rejected" along

with other documents contributed to the ambiguous and confusing nature of its offer and resulted in its offer being less than commercially reasonable. (*See* Appellant’s Brief, pp. 13-14).

- b. GEICO did not provide Bronner with the exact premium amount for UIM coverage before it issued the Policy.

Once again, GEICO’s argument on appeal ignores genuine issues of material fact on this topic. In a light most favorable to Bronner, the facts and inferences show GEICO failed to provide premium information in the telephone call with Stewart and only provided vague, confusing, and unreliable information on its offer form.

- c. GEICO’s offer form was not “completed by an insurance producer or a representative of the insurer” as expressly required by Section 38-77-350(B).

As Bronner has maintained throughout this case, the clear and unambiguous language of Section 38-77-350(B) required GEICO’s producer or representative to complete the offer form before Bronner signed it. This did not happen. It is undisputed that GEICO’s agent did not check the boxes necessary to complete the form. Also, the Court could find that the form was not fully completed without GEICO’s producer or representative including in it the precise amount of the premium charge for UIM coverage.

GEICO not only glosses over this express statutory mandate but goes so far as to claim – without supporting authority – that the amendment which changed the requirement from “an insured must complete the form” to “an agent of the insurer must complete the form” means the Legislature intended for the statute to be satisfied when an insured completes the form. This was the precise language the General Assembly eliminated when it amended Section 38-77-350. While GEICO might believe a construction that applies the statute according to its express terms is “absurd” (Respondent’s Brief, p. 28), Bronner submits that construing the statute to allow an insurer to satisfy its burden of proof by complying with language the Legislature deleted from the statute is a far more ridiculous interpretation.

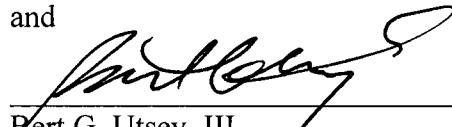
GEICO's argument is more in the nature of a policy argument which is similar to the one the insurer made - and the Supreme Court rejected - in *Floyd v. Nationwide*, 367 S.C. at 260, 626 S.E.2d at 10 ("Nationwide contends the interpretation of the statute suggested by Plaintiffs would lead to an absurd result because the Legislature could not have intended to disallow the presumption of a meaningful offer in such circumstances."). As the court held there, this Court should apply Section 38-77-350 according to its "plain and unambiguous terms," *id.* at 263, 626 S.E.2d at 12, rather than invading the province of the Legislature by making its own policy decisions that contradict express statutory language.

CONCLUSION

The Court should reverse the judgment of the lower court granting GEICO's Motion for Summary Judgment and should instead enter judgment in favor of Bronner. Alternatively, in the event this Court concludes it should decide this matter 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 fact applicable to that topic.

J. Olin McDougall
MCDUGALL LAW FIRM
Post Office Box 1336
Beaufort, SC 29901
(843) 379-7000
lin@mlf.law

and



Bert G. Utsey, III
PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.
P.O. Box 30968
Charleston, SC 29417
(843) 818-4399
butsey@pmped.com

November 25, 2019
Charleston, South Carolina

Attorneys for Appellants

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
PROFESSIONAL ASSOCIATION

JOHN E. PARKER
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
RONNIE L. CROSBY
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
GRAHAME E. HOLMES
LEE D. COPE
MATTHEW V. CREECH
WILLIAM F. BARNES, III
LEAGUE B. CREECH
STEVEN D. MURDAUGH
AUSTIN H. CROSBY
NEIL E. ALGER
JOHN E. PARKER, JR.

706 ORLEANS ROAD, SUITE 101
CHARLESTON, SOUTH CAROLINA 29407
WWW.PMPED.COM
TEL: (843) 818-4399
FAX: (803) 914-6716
EMAIL: butsey@pmped.com

RANDOLPH MURDAUGH, SR
(1887-1940)
RANDOLPH MURDAUGH, JR.
(1915-1998)
J. ROBERT PETERS, JR.
(1927-2008)
J. PAUL DETRICK
(1948-2016)
CLYDE A. ELTZROTH, JR.
(INACTIVE)
RANDOLPH MURDAUGH, III
(OF COUNSEL)

November 25, 2019

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211-1629

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RE: Jamar Markel Bronner v. GEICO
Appellate Case No. 2019-001096

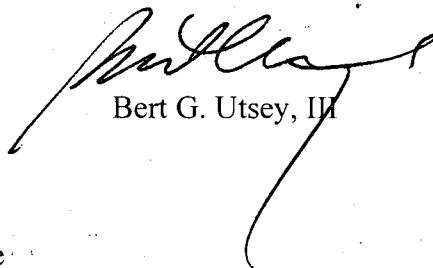
Dear Ms. Kitchings:

Enclosed please find original and one copy of the Initial Reply Brief of Appellant in the above-referenced matter. Please file the original, clock the copy 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 a copy 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
J. Olin McDougall, Esquire

OTHER OFFICES: 101 MULBERRY STREET EAST, P.O. BOX 457, HAMPTON, SOUTH CAROLINA 29924 | TEL.: (803) 943-2111
690 NORTH GREEN STREET, P.O. BOX 2500, RIDGELAND, SOUTH CAROLINA 29936 | TEL.: (843) 726-6131
123 SOUTH WALTER STREET, P.O. BOX 1164, WALTERBORO, SOUTH CAROLINA 29488 | TEL.: (843) 549-9544

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Case No. 2017-CP-07-00241

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PROOF OF SERVICE

I certify that I have served the INITIAL REPLY BRIEF OF APPELLANT upon the Respondent herein by mailing same via U.S. First Class Mail, postage prepaid, on November 25, 2019, addressed to:

Thomas H. Milligan, Esquire
MILLIGAN & HERNS, P.C.
721 Long Point Rd., Ste. 401
Mt. Pleasant, SC 29464



Bert G. Utsey, III
SC Bar No. 10093
Post Office Box 30968
Charleston, SC 29417
(843) 818-4399
Attorney for Appellant

November 25, 2019
Charleston, South Carolina

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, PA
706 ORLEANS ROAD, SUITE 101
CHARLESTON, SOUTH CAROLINA 29407



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The Hon. Jenny Abbott Kitchings
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Post Office Box 11629
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