THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2018-CP-29-00794

Appellate Case No. 2019-001685

NGM Insurance Company, …… Appellant,

v.

Miles Insurance Agency, Inc.……..…..…… Respondent.

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

The language of an indemnity agreement determines the indemnitee's right to recovery from the indemnitor. An agent promised to indemnify an insurance company for causing its liability to the insured. Because of the agent's error in making a legally mandated offer of UIM coverage, a court reformed the company's policy to include coverage previously rejected by its insured, thus creating a heretofore-nonexistent liability. Following the reformation and the agent's failure to discharge the liability, the company sued the agent for breach of contract and contractual indemnification.

Did the trial court err by sidestepping the implications of the agent's contractual promise and denying the recovery because—by virtue of the insured's ex-post-facto-expressed intent to buy UIM coverage—the insurance company could not have suffered an actual loss?

STATEMENT OF THE CASE

On June 29, 2019, NGM Insurance Company (NGM) filed a complaint in the Lancaster County Court of Common Pleas, asserting causes of action of breach of contract and contractual and equitable indemnity against its agent, Miles Insurance Agency, Inc. (R. pp. 23–28.) NGM alleged that Miles Agency had failed to make a meaningful offer of underinsured motorist coverage (UIM) to its insureds, Janet and Jerry Webster, which failure led to the reformation of the policy resulting in NGM's loss comprising $300,000 paid to the Websters and the attorneys' fees and costs incurred in the reformation action. (Id.)

On July 27, 2018, Miles Agency answered the complaint denying that NGM was entitled to recovery and asserting several affirmative defenses. (R. pp. 35–38.)

On November 20, 2018, Miles Agency moved for summary judgment on the grounds that NGM could not prove it had suffered damages because of Miles Agency's acts or omissions in offering UIM coverage to the Websters. (R. pp. 39–40.)

On February 15, 2019, NGM cross-moved for summary judgment on its causes of action for breach of contract and contractual indemnity. (R. pp. 47–70.) NGM cited, among other things, the deposition testimonies of an employee of Miles Agency and its owner as establishing Miles Agency's errors in offering UIM coverage to Janet Webster that led directly to the reformation of the Websters' policy, thus exposing NGM to a liability it would not otherwise have; all in violation of the terms of NGM's Agency Agreement with Miles Agency. (Id.)

On March 4, 2019, the Honorable Kristi F. Curtis, Circuit Judge, heard the motions. (R. pp. 76–108.) At the hearing, the counsel for Miles Agency argued that NGM could not prove damages: the offer of UIM coverage had to be made at the option of the insured and, therefore, the insured's trial testimony that she would have accepted the offer—had she been explained what UIM coverage was—meant that NGM did not suffer a loss beyond unpaid premiums. (R. p. 101, line 25–p. 102, line 9.) The counsel for NGM, on the other hand, argued that NGM was entitled to recovery under plain language of the agency agreement: Miles Agency's failure to properly fill out the UIM offer form, or to otherwise make meaningful offer of UIM coverage to Mrs. Webster,

violated NGM's explicit instructions and led directly to the reformation of the policy, regardless of the insured's intent at the time. (R. p. 106, lines 7–22.)

By an order entered on May 30, 2019, Judge Curtis denied the cross-motions, citing lack of evidence as to Mrs. Webster's intent of purchasing UIM coverage at the time and that there was a genuine issue as to whether NGM suffered damages. (R. pp. 7–13.) NGM moved for reconsideration on the grounds that the ex-post-facto-expressed intent was not dispositive, there was no evidence suggesting that if the form had been properly filled Mrs. Webster would not have signed it, and that NGM's liability and its causal link with Miles Agency's errors were self-evident. (R. pp. 74–75.) Meanwhile, Miles Agency moved to alter or amend the order, pointing to an excerpt from the trial transcript with relevant testimony of Mrs. Webster. (R. pp. 71–73.)

Judge Curtis granted Miles Agency's motion without a hearing, holding that because there was evidence that Mrs. Webster would have bought the UIM coverage had it been meaningfully offered to her, Miles Agency was entitled to judgment as a matter of law. (R. pp. 3–6.) NGM now appeals the Order Granting Defendant's Motion to Alter or Amend, Denying Plaintiff's Motion for Reconsideration and Granting Summary Judgment to Defendant.

* * *

STATEMENT OF THE FACTS

Miles Insurance Agency, Inc. is an independent insurance agency in Lancaster, SC, solely owned by Mr. Richard Miles. (R. p. 116, lines 13–21.) Mr. Miles has been licensed to sell casualty insurance since 1987. (R. p. 116, lines 13–21.) Through the years, Miles Agency has had relationships with various insurance companies, among them National Grange Mutual Insurance Company, later renamed NGM Insurance Company. (R. p. 116, lines 22–25.)

In 1994, NGM and Miles Agency entered into an Agency Agreement that authorized Miles Agency to solicit and bind auto insurance contracts for NGM. (R. pp. 388–92.) In 2007, Miles Agency and NGM executed an MSA Agency Agreement, which replaced the 1994 contract. (R. pp. 200–03.) Both documents contain the same language and provide, among others, that the "Agent will hold the Company harmless against liability it may incur to or on behalf of its policyholder, actual or alleged, based on error or omission of the Agent if the Company has not contributed to or compounded such error or omission." (R. p. 202 at § XI. a.)

* * *

On January 5, 2001, Mrs. Janet Webster visited Miles Agency with the purpose of insuring her and her husband's cars. (R. pp. 287, lines 5–12, 294, lines 5–10, 295, lines 1–18, 296, lines 14–18.) The Websters had been Miles Agency's clients for quite some time. (R. pp. 308, lines 17–21, 309, lines 3–11.) Mrs. Webster's visit to Miles Agency was prompted by its letter informing the Websters that because their insurer,

General Accident, was withdrawing from South Carolina, their policies could not be renewed. (R. p. 140, line 25–p. 141, line 18; p. 295, line 4–p. 296, line 20.) Miles suggested switching to National Grange Mutual Insurance Company, as NGM was then known. (Id.)

While at the agency, Mrs. Webster talked to the clerk at the counter. (R. p. 308, lines 6–16.) She might have also met with both Mr. Miles and his employee Candice Short. (R. p. 248, lines 9–18; p. 312, line 22–p. 313, line 4; p. 316, line 9–p. 317, line 9.) Ms. Short had been employed with Miles Agency for over three years. (R. p. 208, line 21–p. 209, line 2.) Although her primary role was customer service, she was a duly licensed insurance agent, familiar with the relevant laws. (R. p. 210, line 8–p. 211, line 20.) Ms. Short had been aware that the law required insurance agents to make a meaningful offer of UIM to the customers purchasing auto insurance. (R. p. 211, lines 15–20.)

Ms. Short filled out—partially—the form ACORD 61 SC (2000/01) entitled "South Carolina Auto Supplement" that NGM had supplied to Miles Agency and required its use for making offers of UIM coverage. (R. p. 221, lines 4–17; p. 216, lines 16–20; p. 231, line 13–p. 232, line 24; p. 243, lines 19–25; p. 252, lines 3–8; pp. 260–263; p. 125, lines 7–13; p. 170, lines 15–19.) Under the NGM's underwriting and rate manuals, which were furnished to Miles Agency, the agent was to fill out all relevant forms. (R. p. 168, lines 21–23.) On two separate pages, and in four different locations, the Auto Supplement form contained an instruction: "These increased premium charges

must be filled-in by your insurance agent prior to your decision and signature." (R. pp. 261–62.)

Despite the instruction, Ms. Short did not fill out the blank spaces for listing the increased premiums. (R. pp. 233, lines 1–8, 253, lines 3–9.) Miles Agency's standard procedure, when offering UIM coverage, was to show the premiums to an applicant on a separate quote sheet instead of filling out the form as instructed. (R. p. 233, lines 4–8; p. 253, lines 18–21; p. 170, line 22–p. 171, line 4.) Ms. Short also checked the box indicating rejection of UIM coverage, which was contrary to the statutory requirements, and Mrs. Webster signed the Auto Supplement form without having read it, trusting the agent to fill it out correctly. (R. pp. 232, lines 14–24, 295, line 1, p. 304, lines 2–3, p. 320, lines 8–9.) By countersigning the application form, Mr. Miles, as an authorized independent agent of NGM, bound NGM to a policy that did not include UIM coverage, apparently rejected by Mrs. Webster. (R. p. 169, line 19—p. 170, line 14.) Through the years, the Websters have added cars to the policy, covering eventually seven vehicles. (R. p. 288, lines 8–12.)

* * *

In the summer 2012, Mr. Jerry Webster had a traffic accident while driving one of the NGM-insured vehicles and suffered serious injuries. (R. p. 33.) In 2014, the Websters sued the at-fault driver. (R. pp. 33–34.) They also served the pleadings on NGM, which appeared in the case; NGM denied that UIM coverage was available to Mr. Webster under the policy. (R. p. 30.)

A year later, the Websters sued NGM and Miles Agency seeking reformation of the policy to include UIM coverage in an amount equal to the limits of the liability coverage, alleging that the defendants failed to make a meaningful offer of UIM coverage. (R. pp. 29–32.) NGM tendered the defense in that action to Miles Agency in accordance with the indemnification clause of the MSA Agency Agreement. (R. pp. 376–77.) Miles Agency refused to defend and hold harmless NGM. (R. p. 378.)

Following a bench trial held on November 29, 2017—during which Janet Webster, Candice Short n/k/a Candice Grau, and Richard Miles testified—the Honorable John C. Hayes, III, Circuit Judge, found that because of the unfilled blanks in the Auto Supplement form the defendants lost the presumption that a meaningful offer of UIM coverage had been made and that "Mrs. Grau and Mr. Miles offered no evidence of premiums being discussed to show there was a meaningful offer." (R. pp. 18, 21.) The Court reformed the policy to include underinsured motorist coverage. (R. p. 22.) Under the reformed policy, the Websters had a right to stack coverages for all of their vehicles listed in the policy for the total amount of $350,000.

On February 23, 2018, NGM demanded that, in accordance with the indemnification clause of the Agency Agreement, Miles Agency pay $350,000 to the Websters. (R. pp. 25, 36.) Miles Agency refused. (Id.) To mitigate its damages, NGM reached a compromise with the Websters and settled for $300,000 (Id.) On April 6, 2018, NGM demanded indemnification from Miles Agency in the amount of $300,000 that had been paid to the Websters and $21,894.46 in attorneys' fees incurred by NGM

for its defense in the reformation action. (R. pp. 25, 36, 379–80.) Miles Agency refused to indemnify NGM and this lawsuit followed. (R. p. 25, 36.)

STANDARD OF REVIEW

A grant of summary judgment is reviewed by this Court under the standard that governs the trial court under Rule 56(c), SCRCP. *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). The trial court should render summary judgment if, upon consideration of the entire record, it determines that 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.

An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). In other words, summary judgments that implicate questions of law are subject to de novo review. *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007).

ARGUMENT

NGM was damaged by Miles Agency's failure to perform its promise to hold NGM harmless against a liability Miles Agency's errors brought about.

A. The language of an indemnification agreement establishes an indemnitee's right to recovery from the indemnitor.

Under South Carolina law, "[i]ndemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500

(Ct.App.1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992). "A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity." *Id*.

Contractual indemnity is "an obligation that arises by virtue of express contractual language establishing a duty in one party to save another harmless upon occurrence of specified circumstances." 41 Am. Jur. 2d *Indemnity* § 7 (2015). Thus, "the threshold question whether the fact situation is covered by the contract generally requires only a straightforward analysis of the facts and the contract terms." 41 Am. Jur. 2d *Indemnity* § 13 (2015).

Indemnity contracts are construed "in accordance with the rules for the construction of contracts generally." *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 313 S.C. 451 (Ct. App. 1993). Thus, "if the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 579 S.E.2d 132 (2003). The ultimate goal of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Id*. In other words, an indemnity clause has to be construed "as to cover such losses, damages, or liabilities which reasonably appear to have been intended by the parties to be covered." 42 C.J.S. *Indemnity* § 15 (2017).

Depending on the language of the relevant clause, a contract may provide for indemnity against liability or indemnity against loss, or both. *See Jones v. Builders Inv.*

Grp., LLC, 415 S.C. 321, 331 n. 8, 781 S.E.2d 737, 743 n. 8 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 1557 S.C. 106, 154 S.E. 106 (1930)). "In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred." *Jones*, 415 S.C. at 331 n. 8, 781 S.E.2d at 743 n. 8.

B. Miles Agency had agreed to hold NGM harmless against the liability incurred to the Websters because of the reformation of the policy.

In its § XI, entitled "Indemnification," the Agency Agreement provides that Miles Agency "will hold the Company harmless *against liability it may incur to* or on behalf of *its policy holder*, actual or alleged, *based on error or omission of the Agent* if the Company has not contributed to or compounded such error or omission." (R. p. 202.) (emphasis added) Thus, the agent's error or omission must be the basis of the company's liability. Put another way, Miles Agency promised to protect NGM from liability to the insured that would arise due to Miles Agency's errors.

C. NGM's liability to the Websters occurred upon judicial determination of Miles Agency's errors in handling their insurance application—no other factor was the basis for the reformation of the policy.

As a general matter, reformation is an equitable remedy meant to rectify a mutual mistake of the parties to a written contract. *See 56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 769 S.E.2d 242 (Ct. App. 2014). It is granted upon judicial determination that the instrument does not reflect the actual intent of the parties. *See, e.g., Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747

S.E.2d 178 (2013). Unlike a typical contract reformation, however, reformation of a policy to include UIM coverage occurs by operation of law, regardless of the insured's intent. *See Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6, 11 (2005). Indeed, the Websters' complaint initiating the reformation action against Miles Agency and NGM makes no mention of the plaintiffs ever intending to buy UIM coverage. (R. pp. 29–32.) The failure to make a meaningful offer of UIM coverage is the only necessary and sufficient ground for reformation. *See, e.g., American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993).

The irrelevance of the insured's intent to the reformation of the policy is best illustrated by the facts of *Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). In that case an injured driver sought reformation even though he was not privy to the insurance contract—it was his employer to whom UIM coverage was to be offered. *Id*. The court reformed the policy while rightfully disregarding the evidence of the employer's intent to reject the additional coverage. *Id.* In affirming the trial court's decision to reform the policy, the *Ackerman* court referenced the opinion in *American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993). In *Howard*, the insured's husband was entitled to reformation of his wife's policy even though she "consistently rejected underinsured motorist coverage in the past, indicating she was only interested in purchasing mandatory liability coverage at the lowest premium cost and would have rejected the optional coverages even if the required information had been included in the offer." *Id.* at 52, 431 S.E.2d at 608.

Likewise here, the court reforming the policy did not inquire into Janet Webster's intent. (R. pp. 14–22.) Judge Hayes found that Miles Agency's employees failed to properly fill out the offer form, thus depriving NGM of the conclusive presumption under § 38-77-350, and that they did not discuss the premiums with Mrs. Webster in a manner consistent with the criteria of a meaningful offer set forth in *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 534 S.E.2d 555, 556 (1987). The court concluded that "*[b]ecause of those failures,* the policy issued on all the vehicles as of the date of January 5, 2001, and any additional vehicles added as of the accident date of June 30, 2012 . . . should be reformed to include underinsured motorist coverage." (R. p. 22.) (emphasis added)

Thus, Miles Agency's errors caused NGM's liability to the Websters. These errors—and not Mrs. Webster's subjunctive statement of intent—were the sole basis for establishing NGM's liability.

D. By declining tender of defense and then refusing to pay $350,000 to the Websters, Miles Agency breached its duty to hold NGM harmless and damaged NGM.

Miles Agency expressly agreed to "hold [NGM] harmless *against liability* it may incur to . . . its policy holder . . . based on [Miles Agency's] error or omission . . . ." (R. p. 390.) This contractual promise entailed Miles Agency's duty to step in and pay the Websters upon the court's reformation order that established Miles Agency's errors. NGM indeed demanded that Miles Agency pay the Websters $350,000—the amount

equal to the UIM benefits the Websters became entitled to recover from NGM. Miles Agency refused, damaging NGM. That in light of Mrs. Webster's trial testimony—she would have bought UIM had it been explained to her—NGM would have had to extend the coverage and become liable to the Websters has no bearing on Miles Agency's duty to absolve NGM of such a liability if it is based on the agency's errors.

The Websters' intent of purchasing UIM coverage played no role in the reformation of the policy. Likewise, it should not matter to the determination of the damage caused by Miles Agency's breach of its contractual duty. The trial court, however, treated the intent as a material fact that had to be established in order to determine whether and to what extent NGM was damaged.

In its order denying cross-motions for summary judgment the trial court stated the issue preventing resolution of the case as follows: "whether NGM suffered damages, and if so what amount, by virtue of Miles Agency's negligence in failing to properly complete the insurance application." (R. pp. 7–13.) The damages NGM suffered, however, were not by virtue of Miles Agency's negligence but rather by its failure to perform a contractual promise.

Miles Agency did not discharge the liability its errors created despite the promise to hold NGM harmless against it. The $321,894.46 NGM had to expend is the measure of expectation damages NGM is entitled to.

CONCLUSION

For the reasons stated above, the appellant, NGM Insurance Company, respectfully request this Court to reverse the trial court's Order Granting Defendant's Motion to Alter or Amend, Denying Plaintiff's Motion for Reconsideration and Granting Summary Judgment to Defendant.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this final brief of the Appellant, NGM Insurance Company, complies with the requirements of Rule 211(b), SCACR.

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