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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000857

Barbara Brooks, as Personal Representative of the Estate of James Macomson — Appellant,

v.

State Farm Mutual Automobile Insurance Company — Respondent,

INITIAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

When the Appellant changed his liability limits downward from $50,000/$100,000/$25,000 to $25,000/$50,000/$25,000, was State Farm required to make a new offer of optional underinsured motorist coverage in light of S.C. Code Ann. § 38-77-160(C) which provides that no new offer of optional coverage is required for any policy which "renews, extends, changes, supersedes, or replaces an existing policy"?

FACTS

State Farm Mutual Automobile Insurance Company ("State Farm") issued Macomson an automobile policy on June 13, 2002 with liability limits of $50,000/$100,000/$25,000. At that time, Macomson was presented with a selection-rejection form consistent with S.C. Code § 38-77-350 wherein he rejected purchasing optional underinsured motorist coverage. That form contained various options including an amount equal to his liability limits of $50,000/$100,000/$25,000 for $27.80 additional premium per six months. He also rejected underinsured motorist coverage at lower levels of $15,000/$30,000/$10,000 for $13.00 additional premium, $25,000/$50,00/$10,000 for $19.00 additional premium. (See Selection–Rejection Form, R. __)

The selection-rejection form (R. __) contained language mirroring the South Carolina Department of Insurance form required to be promulgated by S.C. Code § 38-77-350(a). SCDOI Form Number 2006, Revised Effective March 1, 1999. https://online.doi.sc.gov/Eng/Public/Bulletins/Bulletin991.aspx The language provided:

> In the future, if you wish to increase or to decrease your limits either of additional uninsured motorist coverage or of underinsured motorist coverage, then you must then contact either your insurance agent or your insurance company. You will not be presented with another copy of this Form by your insurance agent or by your

> insurance company upon the renewal of your automobile liability insurance policy. You will not be presented with another copy of this Form by your insurance agent or by your current insurance company when you extend, change, supersede, or replace your automobile liability insurance policy.

On May 16, 2012, Macomson requested a change in his liability coverage on his policy from $50,000/$100,000/$25,000 to $25,000/$50,000/$25,000. (Affidavit of S. Anderson, R. __) No new offer of underinsured motorist coverage was made by State Farm because this was a change to an existing policy. In 2016, Macomson changed the vehicle on the policy from a 1995 Dodge Dakota to a 2003 Jeep Liberty. (Affidavit of S. Anderson, R._) No new offer of underinsured motorist coverage was made by State Farm because this was a change to an existing policy.

On August 11, 2018, Macomson was fatally injured in an automobile collision as a result of the negligence of another driver. Macomson collected the liability limits of the at-fault motorist and made claim against State Farm for underinsured motorist benefits. State Farm denied the claim on the grounds no underinsured motorist coverage had been purchased.

ARGUMENT

Reducing liability limits on an automobile liability policy is a "change" to an existing policy which should not require a new offer of optional underinsured motorist coverage within the context of S.C. Code § 38-77-350(C) which provides: "An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy."

The plaintiff argues the decision of the Court in Progressive Direct Ins. Co. v. Reeves, 427 S.C. 291, 831 S.E.2d 422 (2019) requires a new offer of optional underinsured motorist

coverage must be made when the insured's liability limits change. However, the Progressive Direct decision found that neither adding vehicles nor changing the named insured constituted a material change requiring a new offer. The only reported decision where South Carolina has required a new offer of optional coverage to be made was McDonald v. South Carolina Farm Bureau Insurance. Co., 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999). In that case, the vehicle's title and the policy itself was transferred from the mother's name to the son's name. Id. at 123-25, 518 S.E.2d at 625-26. The Court found this was a new policy and not a change within the meaning of S.C. Code § 38-77-350(C). The Court of Appeals explained "[r]emoving [the mother] from the policy and substituting [the son] as the named insured was not a mere policy change. It was the creation of a new insurance policy with a new named insured." Id. at 125, 518 S.E.2d at 626.

The Court in Progressive Direct did look to other states for guidance and support. However, a close examination of those states does not support the conclusion that a change of policy limits would require a new offer based on the language of South Carolina's statute. The Progressive Direct decision cited Kerr v. State Farm Mut. Auto. Ins. Co., 434 So. 2d 970, 971 (Fla. Dist. Ct. App. 1983); Allstate Ins. Co. v. Kaneshiro, 93 Haw. 210, 998 P.2d 490, 497 (Haw. 2000); and Wilkinson v. La. Indem./Patterson Ins., 682 So. 2d 1296, 1300 (La. Ct. App. 1996)

All three of these cases involved the issue of adding or substituting a named insured. This was understandable, as the issue in the Progressive Direct case was principally related to adding a named insured. However, these cases provide no guidance as to whether a change in liability coverage limits would require a new offer of optional coverage and State

Farm submits that the instant case should be measured against South Carolina's S.C. Code § 38-77-350(C) as opposed to the statutes of other states.

In Kerr, the 5th District Court of Appeals for Florida considered a situation where the widow was substituted in the place of her deceased husband at a time when the statutory law of Florida provided a new offer had to be made any time a policy was issued, other than a renewal policy. Thus, the question in Florida at the time of Kerr was whether the policy was a "renewal" policy. See Metro. Prop. & Liab. Ins. Co. v. Gray, 446 So. 2d 216 (Fla. Dist. Ct. App. 1984) (referencing old statute). The Court in Kerr concluded that substituting the widow was not a material change, was a renewal and thus did not require a new offer. The Kerr decision is seemingly inconsistent with the South Carolina decision in McDonald as to wholesale substation of insureds and does not indicate whether a change in liability limits would require a new offer. After Kerr, Florida statutory law changed to provide a new offer was not required as to any "policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits when an insured . . . had rejected the coverage." See Atlanta Cas. Co. v. Evans, 668 So. 2d 287, 289 (Fla. Dist. Ct. App. 1996).

In Allstate Ins. Co. v. Kaneshiro, 93 Haw. 210, 998 P.2d 490 (2000), the court considered a situation where a policy was issued to Clyde Kaneshiro as the only named insured. Clyde was married at that time and his wife and daughter were listed as drivers. He declined optional uninsured/underinsured coverage. The following year, Clyde advised his agent that he was getting divorced and wanted his name taken off the policy. His daughter Ann Kaneshiro was substituted in his place. Another vehicle was also added the policy. An accident injured Ann Kaneshiro, who sought uninsured/underinsured benefits. The Court

examined whether a new offer had to be made to Ann. A statute provided "once an insured has been provided the opportunity to purchase the coverages under the options, no further offer is required to be included with any renewal or replacement policy issued to the insured." The Court determined a material change to an existing policy would not constitute a “renewal or replacement” policy. The Court concluded the substitution of the named insured and the addition of a vehicle to the policy constituted a material change such that the policy was not a “renewal or replacement.” Once again, this case itself gives no indication as to the effect of a change in the liability limits.

In Wilkinson v. La. Indem./Patterson Ins., 682 So. 2d 1296, 1300 (La. Ct. App. 1996), the named insured signed the selection-rejection form. His wife was listed as a driver. He and his wife separated, and the wife was removed from the policy. Another vehicle was added to the policy and the insured added his new wife as an additional driver shortly thereafter. Louisiana statutes provided, in pertinent part, a new offer need not be provided for “a renewal, reinstatement, or substitute policy where the named insured has rejected the coverage or selected lower limits in connection with a policy previously issued to him by the same insurer or any of its affiliates.” LSA-R.S. § 22:1406(D)(1)(a)(i) now La.R.S. § 22:1295(1)(a)(i) The question faced by the Louisiana court was not whether there was a change or material change, but whether it was a new policy. Interestingly, an addition of a vehicle not previously covered or a named insured who was not already covered by terms of the policy constitutes a new policy in Louisiana, Waller v. Auto. Cas. Ins., 680 So. 2d 675 (La. App. 1996) which is clearly not the result in South Carolina.

Macomson argues a change in limits should trigger a new offer of optional underinsured because the cost of the policy would be going down, thus enabling him to purchase underinsured. This argument is faulty on several grounds. First, the premium charged to a person is constantly changing. It may change with inflation. It may change due to the accidents or tickets or a lack thereof. It may change as certain drivers are noted to be household residents. None of these involve any change at all to the policy itself, just the premium. The measure of whether a new offer must be made should not hinge on changes to the premium.

The other compelling point is that Macomson was given the option of purchasing 25/50 underinsured bodily injury limits when he purchased 50/100 liability limits. He was previously provided with a notice that would have allowed him to select $25,000/$50,000 in underinsured coverage. He also had the option, per the form, to list some other limit which he would be allowed to purchase at a rate set by State Farm if State Farm was authorized to sell that amount. Both the Insurance Department form and the State Farm form provided: "If there are other limits in which you are interested, but which are not shown upon this Form, then fill-in those limits in the blanks provided. If your insurance company is allowed to market those limits within this State, then your insurance agent will fill-in the amounts of increased premium.'' (Selection-Rejection Form, R. _)

South Carolina's statute specifically provides a new offer of optional underinsured coverage is not required when a policy "changes" or "extends" or "supersedes" an existing policy. S.C. Code Ann. § 38-77-350(C). A change in policy limits is a common "change" in an existing policy. It does not create a new policy. Nor is it a more material change than other

things such as a change or addition of vehicles, a change in drivers or the additional of named insureds, all of which have already been declared not to be a material change. In addition, all of those things might impact the premium the customer is being charged and might change the equation of what a customer might be able to afford, but they are not the type of change which should require a new offer of optional coverage, particularly where the insured had an opportunity to purchase the lower limits at the inception of the policy and declined to do so.

Contrary to the suggestion of the Appellant, there is no remedial purpose accomplished by construing the statute in favor of providing coverage where none was purchased. There is no provision that states that all the statutes should be construed in favor of providing coverage or against insurance companies. There is no public policy requiring automobile insurers to have to repeatedly tell customers of an opportunity to purchase optional coverage they have already declined once. The public policy at stake is to avoid making decisions that are properly legislative decisions. To require a new meaningful offer of underinsured coverage when liability limits change is something within the power of the Legislature, but South Carolina's legislature has not elected to state that requirement.

For example, under Oregon law, their legislature specifically stated a new offer is not required for a change, unless there is a change in liability limits. Oregon § 742.502 (c) ("A statement electing lower limits need not be signed if vehicles are either added to or subtracted from a policy or if the policy is amended, renewed, modified or replaced by the same insurer or an insurer within a group of companies that is under common ownership or control, unless the liability limits of the policy are changed.")(emphasis added).

As noted above, under Florida law as it presently exists (not as it existed at the time of the Kerr decision), a new offer of optional uninsured coverage is not required for any "policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits . . ." Fla. Stat. § 627.727(1) (emphasis added). Thus a new offer is required if the bodily injury liability limits change per the statutory language because that is what the Florida legislature expressly provided.

In contrast, in Pennsylvania, the statute is silent as to a new offer for changes in limits. The courts there have concluded where uninsured/underinsured coverage is rejected at the policy's inception, no new rejection is required when the insured later increased the liability coverage limits. Smith v. The Hartford Ins. Co., 849 A.2d 277 (Pa. Super. 2004), appeal denied 581 Pa. 708, 867 A.2d 524 (2005).

Under Connecticut law, optional underinsured and uninsured will be included unless a written request is on a particular form declining such coverage. "Such written request shall apply to all subsequent renewals of coverage and to all policies or endorsements that extend, change, supersede or replace an existing policy issued to the named insured, unless changed in writing by any named insured." CT Gen Stat § 38a-336(a)(2). There is no case requiring a new offer if the limits change.

Under Illinois law, a new offer of optional uninsured/underinsured is not required for any "substitute, amended, replacement or supplementary" policies. 215 § ILCS 5/143a-2(2). No reference is made in the statute to changes in liability limits requiring a new offer. A change in liability limits does not require a new offer. Alshwaiyat v. Am. Serv. Ins. Co., 986 N.E.2d 182, 193 (Ill. App. 2013)

CONCLUSION

Mr. Macomson was given the opportunity to purchase optional underinsured coverage at various levels at the inception of his policy and was advised no additional offers would be made for any policies which extend, change, supersede, or replace his automobile liability insurance policy. He declined to purchase any optional underinsured coverage. Other states which require a new offer of optional uninsured/underinsured for changes in liability coverage limits are following statutes which either expressly require a new offer for liability limit changes or require a new offer unless the policy is a renewal which is construed as the same terms as an existing policy. It is easy to see how in those states a new offer of optional coverage is required. Otherwise, a change in liability limits is common occurrence. If the South Carolina Legislature wanted to require a new offer of optional coverages for policies where the policyholder changes liability limits, it could have easily done so.

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