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.

FINAL BRIEF OF APPELLANT

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1. WHETHER A CHANGE IN POLICY LIMITS IS A MATERIAL CHANGE SUCH THAT AN INSURANCE COMPANY IS REQUIRED TO MAKE A NEW MEANINGFUL OFFER OF COVERAGE.

STATEMENT OF THE CASE

On July 2, 2019, Barbara Brooks, as Personal Representative of the Estate of James Macomson, brought this Declaratory Judgment Action against State Farm Mutual Automobile Insurance Company ("State Farm") asserting that State Farm failed to make a meaningful offer of UIM (underinsured motorist) coverage, as required after a policy change. (R. pp. 12-14). State Farm answered alleging that a meaningful offer was made at the time the initial policy was created and that a new meaningful offer of coverage was not required after a change in liability limits. (R. pp. 15-19). Brooks and State Farm filed Cross Motions for Summary Judgment. (R. pp. 20-31). On May 6, 2020, the Circuit Court granted Summary Judgment in favor of State Farm and denied Brooks' motion. (R. pp. 1-3). The Appellant filed a Rule 59(e) Motion to Alter or Amend, which was denied on May 19, 2020. (R. p. 32). Ms. Brooks timely filed a notice of appeal and served the Notice of Appeal on State Farm on June 3, 2020.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Grinnell Corp. v. Wood*, 389 S.C. 350, 689 S.E.2d 796 (2010); *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). 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. When a circuit court grants summary judgment on a question of law, the appellate court will 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, 662 S.E.2d 40 (2008)). The question of coverage under an insurance policy is a matter of law. *Auto-Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006).

FACTUAL BACKGROUND

On August 11, 2018, James Macomson was involved in an automobile collision as the result of the negligence of Jodie Michelle Tyler, a driver insured by Safeco. Macomson died as a direct and proximate result of the collision. Safeco tendered its liability policy limit of $100,000.00 before suit was filed. The Court of Common Pleas approved the settlement between Tyler and Macomson's estate. Because Tyler's liability insurance is less than the total damages sustained by the decedent, the Appellant made a UIM (underinsured motorist) claim with State Farm, the decedent's insurer.

State Farm issued Macomson an automobile insurance policy on June 13, 2002 with liability limits of 50,000/100,000/50,000. At that time, Macomson was presented with a selection-rejection form wherein he selected additional UM (uninsured motorist) coverage for an additional premium of $1.80 and declined to purchase UIM at the additional premium of $28.80. On May 16, 2012, Macomson changed his policy limits, lowering his liability coverage to 25,000/50,000/25,000. In 2016, Macomson changed the vehicle on his policy from a 1995 Dodge Dakota to a 2003 Jeep Liberty, which was the vehicle that he was driving at the time of the collision that caused his death. The parties agree that State Farm did not make a meaningful offer of coverage to the decedent after June 13, 2002.

ARGUMENTS

I. South Carolina law requires an insurance company to make a meaningful offer of coverage after any material change to an automobile insurance policy.

Section 38-77-160 of the South Carolina Code of Laws provides, in part, "[a]utomobile insurance carriers shall offer, at the option of the insured, […] underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are

sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist […]" S.C. Code Ann. § 38-77-160. In *State Farm Mut. Auto Ins. Co v. Wannamaker,* 291 S.C. 518, 354 S.E.2d 555 (1987), the South Carolina Supreme Court adopted the Supreme Court of Minnesota's four-part test for determining whether an insurer has complied with its requirement to offer additional coverage. Under *Wannamaker*:

> (1) the insurer's notification process must be commercially reasonable whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. 291 S.C. at 521.

Section 38-77-350 outlines the requirements of forms used to offer optional coverage.

Each of these sections, along with the remainder of Chapter 38-77 of the South Carolina Code of Laws, "is to be liberally construed in order to achieve its purposes," which include the purpose "that every automobile insurance risk which is insurable on the basis of the criteria established in this chapter is entitled to automobile insurance." S.C. Code Ann. § 38-77-10; *S.C. Farm Bureau Mutual Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (1989) footnote 3: "The Legislature directs that the Act shall be liberally construed to achieve its purposes." "Moreover, a statute must be given a practical, reasonable and fair construction consonant with the purpose and policy expressed by the lawmakers." *Mathis v. State Farm Mut. Auto. Ins. Co.*, 4313 S.E.2d 619, 621-622 (Ct. App. 1993) citing *Browning v. Hartvigsen*, 307 S.C. 122, 414 S.E.2 115 (1992).

The insurer has the burden of proving that a meaningful offer of optional coverage has been made to the insured. *Butler v. Unisun Ins. Co.*, 475 S.E. 2d 758, 759 (1996). "A noncomplying offer 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. "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of the liability insurance carried by the insured." *Butler* at 760, citing *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1998).

Under Section 38-77-350(C), "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." S.C. Code Ann. § 38-77-350(C). The South Carolina Supreme court has "acknowledge[d] that in the context of section 38-77-350(C), the word 'change' is ambiguous" and has recently held that "an insurance company must make a new offer of coverage when there has been a *material* change to the policy." *Progressive Direct Ins. Co. v. Reeves*, 427 S.C. 291, 296, 831 S.E.2d 422 (2019). Equity certainly favors the appellant in this case, as this ambiguity stands to harm the appellant much more than the respondent. See *Smothers v. US Fidelity and Guar. Co.*, 470 S.E.2d 858, 861 (1996): "[c]ourts of equity will protect those who are unable to protect themselves and those of whom an undue advantage has been taken."

II. A change in policy limits is a material change such that State Farm was required to make a meaningful offer of UIM coverage to Mr. Macomson.

Applying the Court's rationale in *Progressive v. Reeves,* this Court should find that a change in the liability limits of a policy is a material change such that State Farm was required to make a new meaningful offer of UIM coverage. In *Progressive,* the Court recognized that "[c]learly, not all 'changes' are the same. The question then becomes at what point a 'change' rises to a level that escapes the reach of section 38-77-350(C) and thus triggers a duty to reoffer UIM coverage." In reaching this conclusion, the South Carolina Supreme Court reviewed and cited a number of cases from other jurisdictions, deciding to "follow the framework that other states have utilized." *Progressive* at 296 citing *Kerr v. State Farm Mut. Auto. Ins. Co.*, 434 So. 2d 970, 971

(Fla. Dist. Ct. App. 1983) ("[T]he test for whether a new rejection of UM coverage had to be obtained is whether the original policy has been changed in any material respect." (internal quotation marks omitted)); *Allstate Ins. Co. v. Kaneshiro,* 998 P.2d 490, 497 (Haw. 2000) ("[W]hen a material change is made to an existing policy, the resulting policy is not a `renewal or replacement policy' and a new offer of UM/UIM coverage is required."); *Wilkinson v. La. Indem./Patterson Ins.,* 682 So. 2d 1296, 1300 (La. Ct. App. 1996) (finding husband's addition of wife as a named insured did not have the effect of altering coverage, and, thus was not a material change and no new offer of optional coverage was required).

As interpreted by the South Carolina Supreme Court and cited in *Progressive,* Louisiana courts have recognized that a change altering coverage is a material change. There is no more material a change than a change in policy limits. Coverage is the raison d'être for insurance for both prospective insureds and for South Carolina public policy. The South Carolina Legislature highlights the importance of covering risk in three of its four declared purposes of Chapter 77-38 and orders the liberal construction of statutes within this section to ensure that those purposes can be achieved. S.C. Code Ann. § 38-77-10. A liberal construction of the relevant UIM statutes to meet the Legislature's stated objects would extend the benefit of coverage to the largest possible class and resolve any doubts in favor of the injured party. It would also serve public policy by ensuring that more drivers are covered by insurance policies and protected from risk.

In the present case, the decedent did not just change his liability coverage, he reduced it. This would have noticeably lowered the cost of his premium and made both the overall cost of his policy and the estimated cost of UIM coverage equal to his liability limits more affordable. It is likely that, under these circumstances, the decedent might have chosen to purchase UIM coverage, especially as the decedent chose to purchase additional UM coverage – at a significantly lower

cost – when those coverages were offered to him. Under *Progressive*, he should have been given the opportunity by being presented with a meaningful offer when he materially changed his policy.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests the Court find that a change in the liability limits of a policy is a material change, such that State Farm was required to make a new meaningful offer of UIM coverage. The Appellant further respectfully requests the Court find that, since no meaningful offer was made, the decedent's policy be reformed to include UIM coverage up to the amount of the decedent's liability coverage of 25,000/50,0000/25,000.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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