

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2016-CP-26-05356
(Court of Appeals Case No. 2020-001245)

RECEIVED

Apr 14 2021

SC Court of Appeals

Progressive Northern Insurance Co. Respondent,

v.

Brandon Lawrence and Ashley Outlaw.....Defendants,
Of whom Brandon Lawrence is the Appellant and Ashley Outlaw is a Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN NOT FINDING RESPONDENT PROGRESSIVE FAILED TO MAKE A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE BENEFITS TO APPELLANT AS REQUIRED BY S.C. CODE ANN. §38-77-160?

2. DID THE TRIAL COURT ERR BY FINDING RESPONDENT OUTLAW EXERCISED THE LAW OF AGENCY TO REJECT UNDERINSURED MOTORIST BENEFITS FOR APPELLANT?

STATEMENT OF THE CASE

Respondent Ashley Outlaw ("Outlaw") and Appellant Brandon Lawrence ("Appellant") lived in the same home with their children from 2008 to 2013. (R. p. 301, lines 9-18; p. 330, lines 13-20; p. 351, lines 3-25). They were not married. (R. p. 354, lines 13-15). Lawrence owned and possessed a 2004 motorcycle, which is the motor vehicle driven by Lawrence at the time of this wreck. On August 19, 2009, Respondent Progressive ("Progressive") issued a South Carolina Motorcycle Policy with Progressive covering Lawrence's 2004 Big Dog Chopper motorcycle. (R. p. 119). The Application for Insurance ("Application") listed both Outlaw and Lawrence as named insureds. (R. p. 119). Outlaw was listed on the application as "Married" and as an "Insured," and Lawrence was listed as "Married" and as the "Spouse." Outlaw ultimately paid the premium for the policy and was reimbursed by Lawrence. (R. p. 336, lines 3-11; p. 376, lines 14-18; p. 379, lines 3-8). Lawrence testified at trial that he "assumed" that Outlaw would purchase UIM coverage. (R. p. 249, lines 3-4). Lawrence did not sign a rejection form regarding optional UIM coverage nor did Lawrence direct Outlaw to sign the rejection form for him. (R. p. 246, lines, 4-10). Progressive mailed the application to Outlaw and Lawrence. The Application with the included rejection form only contained one (1) signature line. The last page of the Application only required Outlaw to acknowledge and understand the coverages. (R. p. 129). During Outlaw's deposition, she testified that she did not remember specifically talking to Lawrence about the additional underinsured motorist coverage. (R. p. 377, lines 19-21). On September 9, 2009, only Outlaw signed and dated the Application. On May 13, 2013, Lawrence was involved in a motor vehicle wreck in Surfside Beach, South Carolina while operating his motorcycle insured with Progressive. On August 12, 2016, Progressive filed its declaratory judgment in the Court of Common Pleas in Horry County to avoid inclusion of underinsured motorist coverage. The

Complaint included attachments in the form of exhibits A and B. Exhibit A marked Progressive's South Carolina Motorcycle Policy for the Defendants. Exhibit B marked the instructional cover letter consisting of two (2) pages directed to Outlaw and the Application for Insurance. The Declaration Page of the policy provided policy number 85576341-0 issued to Outlaw and Lawrence. On October 21, 2016, Lawrence filed his Answer and Counterclaim to Plaintiff's Declaratory Judgment. Progressive served its Reply to Lawrence's Counterclaim on November 22, 2016.

This Declaratory Judgment Action was tried before the Honorable Clifton B. Newman on October 18, 2017 for a non-jury trial. The parties agreed to submit the action for ruling based upon their trial briefs and the exhibits attached thereto, the depositions of the Defendants and the live testimony of Lawrence, as well as arguments made by the parties in their trial briefs and orally at the hearing. **(R. p. 14)**. The trial court filed its Order and Judgment regarding the Declaratory Judgment non-jury trial on November 28, 2017, finding Progressive made a valid, meaningful and effective offer of UIM coverage to Lawrence through his appointed agent, Outlaw, who, pursuant to the authorization given her by Lawrence, rejected Progressive's meaningful offer of underinsured motorist's coverage and UIM coverage is not available under the subject policy. **(R. p. 23)**.

Subsequent to the issuance of the trial order filed by the Court on November 28, 2017, Lawrence timely filed a Rule 59(e) motion pursuant the South Carolina Rules of Civil Procedure. On June 16, 2020, the trial court remotely held a hearing and heard Lawrence's Rule 59(e), Motion to Alter, Amend, and/or Reconsider the Court's Order dated November 28, 2017. **(R. p. 4)**. On August 31, 2020, the trial court issued its order and denied Lawrence's Motion to Alter,

Amend, and/or Reconsider the Court's Order dated November 28, 2017. Lawrence timely filed his Notice of Appeal to the August 31, 2020 Order on September 15, 2020.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

"When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011).

"In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Id. at 46–47, 717 S.E.2d at 592. However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. Id. at 47, 717 S.E.2d at 592.

ARGUMENT

1. DID THE TRIAL COURT ERR IN NOT FINDING THAT RESPONDENT PROGRESSIVE FAILED TO MAKE A MEANINGFUL OFFER OF UNDERINSURED MOTORIST COVERAGE BENEFITS TO APPELLANT AS REQUIRED BY S.C. CODE ANN. §38-77-160?

Appellant believes he is entitled to underinsured ("UIM") benefits because Progressive failed to make a meaningful offer to him as required by law. Under South Carolina law, automobile insurance carriers must offer "at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage" S.C. Code Ann. § 38-77-160 (Supp.2000). In Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984), the South

Carolina Supreme Court wrote that "underinsured motorist coverage in any amount up to the insured's liability coverage must be offered to a policyholder." Id. at 154, 311 S.E.2d at 726.

The insurer bears the burden of establishing it made a meaningful offer of UIM coverage. Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758 (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 (1990). Should an insurer fail to make a meaningful offer, the policy will be reformed by operation of law to include UIM coverage up to the insured's liability limits. Bower v. National General Ins. Co., 351 S.C. 112, 569 S.E.2d 313 (S.C. 2002), citing Butler, supra.

From reviewing the four corners of the Application, an insured can consider that only Outlaw was required to sign the UIM rejection form, especially in light of page nine (9) of the Application naming Outlaw as the only insured to verify coverages. S.C. Code Ann. §38-77-350(A) provides requirements for forms used by South Carolina insurers in making offers of optional UIM coverages. This section of law provides:

[t]his form must be used by insurers for **all new applicants**. 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; and

(5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38–77–350(A) (emphasis added).

Subsection (B) provides that

[i]f this form 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 an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits.

S.C. Code Ann. § 38–77–350(B) (emphasis added).

Clearly, Progressive's Application for Insurance, lists Ashley Outlaw and Brandon Lawrence [sic] as named insureds. **(R. p. 121)**. After Outlaw requested the insurance coverage over the telephone, Progressive mailed Outlaw the "Application for Insurance" and demanded as a requirement for the insurance to "[p]lease review and **sign where indicated**" (emphasis added). **(R. p. 119)**. The first page of the Application contains the heading "Application for Insurance Please review and sign where indicated". The last page of the Application for Insurance only reflects Outlaw signed as a named insured. **(R. p. 124)**. Lawrence's signature is not on the Application for Insurance as required by S.C. Code Ann. § 38–77–350(B), even though he is a named insured. Since Progressive mailed the application to Outlaw and Lawrence, Progressive should have required the signatures of all named insureds or at least direct Lawrence's attention to read the Application and forms.

The wording of S.C. Code Ann. § 38–77–350(A)(4) clearly requires "a space for **the insured to sign the form** that acknowledges that the insured has been offered the optional

coverages.” (emphasis added). The statute requires Progressive to make a meaningful offer to each insured. A meaningful offer was made to Outlaw, but there is no indication that the offer to accept or reject additional coverage was made to Lawrence.

Further, the language of the Application includes that “[i]f you do not complete this form and return it to your insurance company or insurance agent within 30 days, your insurance company is required by law to add . . . optional underinsured motorist coverage . . .” (R. p. 126). Lawrence did not sign the Application. (R. p. 246, lines 4-10). Since Outlaw signed the rejection form, she is barred from the optional coverage; however, Lawrence did not and since he is a named insured, the terms of the policy provide that Progressive is required by law to add the optional underinsured motorist coverage.

Progressive knew that the named insureds did not share a surname. Therefore, Progressive was put on some notice that Outlaw and Lawrence were not married, and was required to ensure that the named insureds signed the Application for Insurance rejecting optional UIM coverage, as required by S.C. Code Ann. § 38-77-350. Progressive offered insurance coverages and placed both the names of Outlaw and Appellant on the policy and was required to follow the statute by making a meaningful offer of UIM coverage to both applicants.

The Supreme Court of South Carolina has interpreted this mandate-to-offer language as requiring that “the insured ... be provided with adequate information, and in such 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, 354 S.E.2d 555, 556 (1987). Stated otherwise, “the insurer’s offer of UIM coverage must be ‘meaningful.’ ” Cohen v. Progressive N.

Appeals in Dewart made this finding because the renewal notice failed to contain any language directing the customer to read the insurance explanation insert. Id. The Court further found that without a warning to the customer to read the insurance explanation insert, the customer would likely throw the insurance explanation insert away without reading it. Id.

The case at bar is similar to Dewart in that the issue was whether or not the insurance company made an intelligible explanation of coverage as required by Wannamaker. In our case, the Appellant does not believe an intelligible explanation of coverage was made because the documents regarding explanation of UIM coverage and rejection were only directed to Outlaw by the salutation “Dear Ashley Outlaw” and page nine (9) of the Application containing only Outlaw’s name and address above the signature line. (R. p. 119; 129). The first paragraph of page 9 of the Application is the only portion of the Application that provides “By my signature, I acknowledge that I have read – or I have had read to me – the above explanation and offers of additional uninsured motorist coverage and optional underinsured motorist coverage.” Directly below the first paragraph is the final paragraph of the Application and it provides as follows:

My signature below further acknowledges that I understand the coverages as they have been explained to me and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.

Type or Print Your Name ASHLEY OUTLAW
YOUR ADDRESS PO BOX 50173
 MYRTLE BEACH, SC 29579

Clearly, the Respondent made an intelligible explanation of optional coverages to Outlaw, and clearly directed Outlaw’s attention as where to sign; however, there is nothing in the

Ins. Co., 402 S.C. 66, 737 S.E.2d 869, 872 (2013) (quoting, Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 658 S.E.2d 106, 109 (2008)).

"[T]he requirement of a meaningful offer of additional UM and UIM coverage is intended to protect an insured. A meaningful offer of additional UM and UIM makes as certain as possible that an insured has actual knowledge of his options with respect to such coverages and is therefore able to make an informed decision with respect to his desired coverage." Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796, 800 (2010) (citing Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6, 12 (2005)). Consequently, "[a]ll law with respect to a meaningful offer of additional UM and UIM coverage must be applied so as to effectuate this stated purpose." Id. at 799. ("[T]he UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons' and 'should be construed liberally to effect the purpose intended by the Legislature.'" Grinnell Corp. v. Wood, 389 S.C. 350, 698 S.E.2d 796, 800 (2010) (quoting Floyd, 626 S.E.2d at 10)). Accordingly, the insurer bears the burden of establishing that it made a meaningful offer of UIM coverage. Floyd, 626 S.E.2d at 11 (citing Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 608 S.E.2d 569, 571 (2005); Butler v. Unisun Ins. Co., 323 S.C. 402, 475 S.E.2d 758, 759 (1996)). Whether an insurer has met its burden in this regard is a question of fact. Cohen, 737 S.E.2d at 872; See Floyd, 626 S.E.2d at 12. "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 liability insurance carried by the insured." Floyd, 626 S.E.2d at 11 (quoting Butler, 475 S.E.2d at 760).

Our Supreme Court opined in State Farm Mutual Automobile Insurance Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), the four criteria to establish an effective meaningful offer of underinsured motorist coverage under S.C. Code Ann. § 38-77-160 (1989).

These four criteria must be met at the time of each policy renewal. Knight v. State Farm Mut. Auto. Ins. Co., 297 S.C. 20, 374 S.E.2d 520 (Ct.App.1988); Dewart v. State Farm Mut. Auto. Ins. Co., 296 S.C. 150, 370 S.E.2d 915 (Ct.App.1988).

The Wannamaker test is as follows for the offer of insurance coverage to be considered "meaningful":

- (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.

Liberty Mut. Fire Ins. Co. v. McKnight, 125 F.Supp.3d 602 (D. S.C. 2015), citing Id.

In Dewart, supra, our Court of Appeals considered an insurance premium renewal notice that included an insert sent to the insureds purporting to explain underinsured motorist coverage. Zeigler v. South Carolina Farm Bureau Mut. Ins. Co., 393 S.E.2d 166, 168; 301 S.C. 543, 545 (S.C. 1990) The Court of Appeals found the purported insurance explanation insert did not constitute an intelligible explanation of the coverage pursuant to Wannamaker. Id. The Court of

Application to give the Appellant any opportunity, once the documents were mailed to his and Outlaw's home, to indicate whether or not he had any right to select additional UIM coverage.

Appellant's position is that with the cover page to the Application being directed solely to Outlaw by the salutation "Dear Ashley Outlaw," the Wannamaker third prong requiring Progressive to make an intelligible explanation of coverage was not made to Lawrence. Additionally, by Progressive only directing Outlaw's attention to review the coverages and additional premiums, fees and only include her name above the signature pages to review the coverages as shown on page 9 of the Application, Progressive failed to fulfill the fourth prong of Wannamaker. (**R. p. 119, pp. 7-9**). Even though the Application shows both Lawrence and Outlaw as named insureds, the cover letter to the Application gives a salutation only to Outlaw as "Dear Ashley Outlaw." Application Cover Letter. Progressive could have avoided this miscommunication and put Lawrence on notice of his option to accept or reject UIM coverage by addressing the salutation to both Outlaw and Lawrence and including Lawrence's name on page 9 of the Application with Outlaw's above the signature line.

2. DID THE TRIAL COURT ERR BY FINDING RESPONDENT OUTLAW EXERCISED THE LAW OF AGENCY TO REJECT UNDERINSURED MOTORIST BENEFITS FOR APPELLANT?

Progressive argues that Appellant is bound by the law of agency. However, Progressive's agency argument ignores the statutory law enacted by the South Carolina general assembly.

Further, the Supreme Court of Alabama dealt with these same issues of agency and a person signing an uninsured ("UM") rejection form. The court held as follows:

We need not decide whether, under our case law, general principles of agency would allow an individual to waive UM coverage by signing a rejection form *as an agent* for another, because Jeanette signed the rejection form *in her own name*, not in the name of the named insured. Our statute makes no provision for waiver by anyone other than the named insured. Section 32-7-23(a) flatly declares "*that the named insured shall have the right to reject such coverage.*" (Emphasis added.) The purposes of 32-7-23(a) are to "assure that a person injured by an uninsured motorist will be able to recover the total amount of [her] damages and that the *insurer will not be allowed to insert provisions in the policy limiting the insured's recovery.*" Star Freight, Inc. v. Sheffield, 587 So.2d 946, 957 (Ala.1991) (some emphasis added; some emphasis omitted). "[A] person relying on another to make him or her a named insured may reasonably expect that the coverages obtained will be those mandated by law." Nationwide Insurance Company v. Nicholas, 868 So. 2d 457, 462 (Ala. Civ. App. 2000) (quoting Preferred Risk Ins. Co. v. Cooper, 638 N.W.2d 717, 719 (Iowa 2002)). What Jeanette signed does not purport to be a waiver of UM coverage by the named insured. Instead, it merely purports to be a rejection of UM coverage by Jeanette herself, acting only in her individual capacity.

Progressive Specialty Ins. Co. v. Gore, 1 So.3d 996, 999 (Ala., 2008).

Similarly, in the case at bar, Outlaw only signed for herself as a named insured on the rejection forms, as required by Progressive. (R. p. 127-129). There is no indication on the rejection forms that Outlaw signed on a signature line for Lawrence or signed his name for him. One would expect that she would sign his name with the indication that she was signing "for Brandon Lawrence" or place her initials beside his name. Progressive should have included both of the named insured's names even if there's only one signature line. This inclusion of both names above the signature line would have put both named insureds that the signature of one was binding on both. Since Progressive typed in Outlaw's name above the signature line on the applicant's acknowledgement page of the Application and did not put Lawrence's name at all, one would consider that only Outlaw should read and sign the Application. (R. p. 127-129). Here there is no indication of anyone signing on behalf of Mr. Lawrence. Additionally, a reasonable person would read the Application as only requiring Outlaw to sign because on the Applicant's acknowledgement page, only Outlaw's name is in the body of the acknowledgement.

The offer of optional and additional UIM coverage cannot be meaningfully made if the body of the documents and form do not competently and sufficiently make the named insured know whose signatures are required. Unfortunately, to some degree, the days of going into an insurance company's office and signing documents procuring insurance are replaced by telephone and mailing of forms through the mail. When Progressive mailed the insurance forms through the mail, Appellant's position is that his insurance company has a duty to meaningfully put him on notice and direct his attention to who is to sign and where. The insurance application form was completely void of any indication that the Appellant's signature was required at all. Only Outlaw's name was listed on the acknowledgment form and provided for only one named insured to sign the rejection form.

CONCLUSION

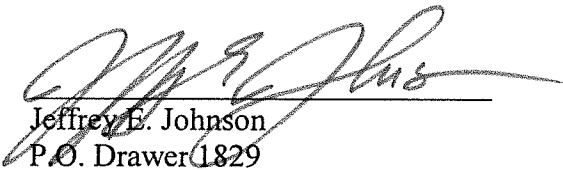
The trial court erred in its finding the Appellant failed to present facts showing that Progressive failed to adhere to the statutory a case law of South Carolina requiring insurance companies to give notice of optional underinsured motorist coverage to the named insureds and obtain the named insureds' signature to evidence a meaningful offer. The statutory law of South Carolina requires the named insured to sign the optional coverage for acknowledging that the insured has been offered the optional coverages.

The Court in Wannamaker required, as one of the prongs to determine a meaningful offer was made, an intelligible explanation of optional coverages be conveyed to the named insured. Here, Progressive mailed the Application to both Outlaw and Lawrence at their home address but only put Outlaw on any notice of his right to select the optional coverages. The Application in no way gave any indication to Lawrence of his duty to read the Application and rejection of coverage

forms. The cover letter of the Application was only directed to Outlaw and gave her no notice to share the Application and acknowledgement forms with Lawrence. Without this required notice to Lawrence to read the Application when mailed to his home, as on the optional coverage page of the form any notice to read, as in Dewart, he may have likely disregarded the insurance documents. Therefore, a meaningful offer was not made to Lawrence at the time the Application and optional UIM coverage offer was made. Progressive assumed an agency relationship and unilaterally left Lawrence's right to select optional coverage solely to Outlaw at the time the offer was made.

The important issue in this case is that one must look at the time the meaningful offer was made. One must not look solely at the time the telephone call was made and subsequently when Progressive placed the meaningful offer documents in the mail to determine an agency relationship. Had the meaningful offer been made within Progressive's agent's office, Progressive could have relied upon an agency relationship but not after the meaningful offer is in the mail and to be contemplated by the named insureds days later. Appellant prays for this Court to reform the policy by operation of law to include the optional UIM coverage.

Respectfully Submitted,



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April 13, 2021

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Brandon Lawrence and Ashley Outlaw.....Defendants,
Of whom Brandon Lawrence is the Appellant and Ashley Outlaw is a Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Appellant's Final brief complies with Rule 211(b), SCACR.

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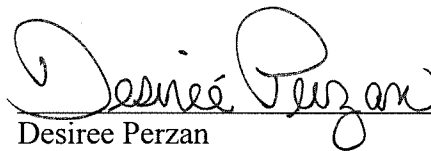
v.

Brandon Lawrence and Ashley Outlaw.....Defendants,
Of whom Brandon Lawrence is the Appellant and Ashley Outlaw is a Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2021, addressed to its attorney of record William P. Davis of Baker Ravenel & Bender, LLP, P.O. Box 8057, Columbia, South Carolina 29202 and Respondent Ashley Outlaw, 2824 Bethune Highway, Bishopville, SC 29010.

April 14, 2021



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SC Court of Appeals

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The Honorable Jenny Abbott Kitchings
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RE: Progressive Northern Insurance Co. v. Brandon Lawrence
Appellate Case Number: 2020-001245

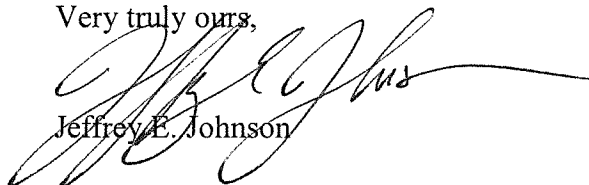
Dear Ms. Kitchings:

Pursuant to SCACR Rule 211, 267, and SC ORDER 20-0026, please find enclosed for filing in the above-referenced case, one (1) bound copy of the Appellant's Final Brief and Proof of Service with regard to the above matter. It is my understanding the original unbound Final Brief is not necessary at this time as it was uploaded via EMAIL.

By copy of this correspondence I am hereby serving all counsel and parties of record with same.

With kind regards, I remain

Very truly yours,



Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: William P. Davis, Esq.
Ashley Outlaw
William V. Josephs III, Esq.
Client