IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANNA PURNELL-CHARLESTON Plaintiff Below-Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, a foreign corporation, Defendant Below-Appellee.	)	Appeal No. 494, 2011

OPENING BRIEF OF PLAINTIFF BELOW-APPELLANT DIANNA PURNELL-CHARLESTON

Appeal from the Decision of the Superior Court In and for New Castle County, C.A. No.: 10C-05-243 JRS

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NATURE AND STAGE OF THE PROCEEDINGS

Appellant, Dianna Purnell-Charleston, appeals the decision issued by The Honorable Joseph R. Slights, III, in the matter of *Dianna Purnell-Charleston versus State Farm Fire and Casualty Company,* C.A. No.: 10C-05-243 JRS. Said decision was issued on August 29, 2011, following a bench trial held on July 11, 2011.

In this appeal, Appellant seeks a reversal of the decision issued by The Honorable Joseph R. Slights, III.

SUMMARY OF THE ARGUMENT

The Superior Court erred, as a matter of law, when it concluded that State Farm had complied with its statutory obligations, set forth in 18 Del. C. § 3902, et seq., to extend Appellant a meaningful offer of uninsured / underinsured motorist coverage equal to Appellant's bodily injury liability limits.

STATEMENT OF FACTS

On May 14, 2007, Appellant, Dianna Purnell-Charleston, went to the Brian Hartle Insurance Agency to purchase a new automobile insurance policy. While at the Agency, Ms. Purnell-Charleston met with Charles Redstone, an insurance agent for State Farm. At some time during this meeting, Charles Redstone prepared a Delaware Motorists' Protection Act, also referred to as Form A (A-63 and A-64), which was ultimately signed by Ms. Purnell-Charleston, albeit in the wrong place. (A-76, p 32; A-77, p 36-37). Based on the Form A, the insurance policy that was issued provided for bodily injury liability limits of $25,000 per person and $50,000 per accident and uninsured / underinsured ("UM/UIM") motorist coverage with limits of $15,000 per person and $30,000 per accident. (A-60-61; A-63).

An insurer has an affirmative duty to make a meaningful offer of UM/UIM coverage. Drenth v. Colonial Penn Ins. Co., 1997 Del. Super. LEXIS 466; See also Harding v. N.K.S. Distribs., Inc., 1991 Del. Super. LEXIS 395 at 3. The duty to make a meaningful offer of uninsured motorist coverage arises whenever a new policy, other than a renewal, is issued. State Farm Mut. Auto. Ins. Co. v. Arms, 477 A.2d 1060; 1984 Del. LEXIS 328.

Ms. Purnell-Charleston does not have any recollection of Charles Redstone discussing with her uninsured / underinsured ("UM/UIM") motorist coverage, (A-83, p 58-59; A-85, p 67), nor does she recall him discussing with her various premiums for differing levels of

uninsured / underinsured motorist coverage. (A-86, p 70-71). Likewise, Mr. Redstone does not have any specific recollection of what he discussed with Ms. Purnell-Charleston on May 14, 2007. (A-75, p 26, 28; A-78, p 40-41). Mr. Redstone does not recall reviewing and selecting various coverages with Ms. Purnell-Charleston. (A-75, p 28; A-79, p 42). Mr. Redstone does not recall advising Ms. Purnell-Charleston that she had the option to purchase UM coverage with limits equal to the liability limits that she had selected. (A-76, p 30; A-85, p 69). Mr. Redstone did not provide Ms. Purnell-Charleston with any literature or brochures explaining the various types of coverages or setting forth the varying premiums. (A-78, p 38; A-86, p 73).

While Mr. Redstone has no recollection of what he discussed with Ms. Purnell-Charleston, he testified that it was his custom or habit to review the various types of coverages and the associated premiums with the potential insured and to utilize a computer screen to show the potential insured the associated premiums. (A-74, p 22-23; A-75, p 28; A-76, p 30-31). Because Mr. Redstone could not recall the specifics of what was discussed during the May 14, 2007 meeting, he was unable to testify with certainty that he adhered to his customary practice. No other evidence was presented to support the fact that he complied with his customary practice. Ms. Purnell-Charleston does not recall looking at Mr. Redstone's computer screen during their meeting. (A-81, p 53; A-86, p 70-71).

On June 22, 2007, Ms. Purnell-Charleston was involved in a motor vehicle accident with an underinsured driver. After resolving her personal injury claim with the responsible party, Ms. Purnell-Charleston sought to reform her automobile insurance policy with State Farm, increasing her UM/UIM limits to match that of her liability coverage, $25,000 / $50,000. State Farm denied the request for reformation and suit was commenced by Ms. Purnell-Charleston, alleging State Farm failed, at the time of the May 14, 2007 meeting between Ms. Purnell-Charleston and Mr. Redstone, to comply with its statutory obligations to make a meaningful offer of UM/UIM coverage equal to that of her bodily injury liability limits.

A Bench Trial was held on July 11, 2011. Prior to Trial, the parties submitted Joint Exhibits and Memoranda of Law. During Trial, evidence was received and testimony was provided by Ms. Purnell-Charleston and Mr. Redstone. Following Trial, the parties submitted Supplemental Memoranda of Law. Judge Slights issued a written Opinion on August 29, 2011, in which he concluded State Farm had satisfied its statutory obligation of extending a meaningful offer of UM/UIM coverage equal to that of the applicable bodily injury liability limits, to Ms. Purnell Charleston. Appellant filed the Notice of Appeal with the Supreme Court on September 13, 2011. Ms. Purnell-Charleston seeks a reversal of the lower Court's decision.

ARGUMENT

I. THE SUPERIOR COURT ERRED, AS A MATTER OF LAW, WHEN IT CONCLUDED THAT STATE FARM HAD COMPLIED WITH ITS STATUTORY OBLIGATION, SET FORTH IN 18 DEL. C. § 3902, ET SEQ., TO EXTEND APPELLANT A MEANINGFUL OFFER OF UNINSURED / UNDERINSURED MOTORIST COVERAGE EQUAL TO APPELLANT'S BODILY INJURY LIABILITY LIMITS.

QUESTION PRESENTED

Whether the Superior Court incorrectly concluded that State Farm extended a meaningful offer of UM/UIM coverage equal to Appellant's bodily injury liability limits?

Stated differently, is a signed insurance application, coupled with testimony from an insurance agent regarding his custom and practice of reviewing coverages and premiums with a potential insured, sufficient to sustain an insurance carrier's burden in demonstrating a meaningful offer was made, despite the fact that the insurance agent has no distinct recollection of what was discussed with the insured during the encounter and as such, cannot state with any certainty that he adhered to his custom and practice on a particular occasion?

STANDARD AND SCOPE OF REVIEW

Judicial construction of a statute is a determination of law and the appropriate standard of review is *de novo*. Colonial Ins. Co. of Wisconsin v. Ayers, 722 A.2d 177 (Del. 2001). Therefore, the Supreme Court will determine whether the trial court "erred in formulating or applying legal precepts." Banaszak v. Progressive Direct Ins. Co. 3 A.3d 1089, 2010 Del. LEXIS 434.

MERITS OF THE ARGUMENT

18 Del. C. §3902 (b) provides, in relevant part:

> Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.

In Morris v. Allstate Insurance Co., the Court noted:

> An objective of §3902 (b) is to give those who carry liability coverage in excess of the minimum statutory amount the full opportunity to carry uninsured (and now underinsured) coverage in an equal amount. The duty which is imposed by statute is the duty to offer such insurance so that the insured can make an informed decision. An informed decision can be made only if all the facts reasonably necessary for a person to be adequately informed to make a rational, knowledgeable and meaningful determination have been supplied.

Morris v. Allstate Insurance Co., 1984 Del. Super. LEXIS 806 at Section 3902 (b) serves as a "disclosure mechanism [that] promote[s] informed decisions on automobile insurance coverage." Banaszak v. Progressive Direct Insurance Co., 3 A.3d 1089; 2010 Del. LEXIS 434 quoting State Farm Mut. Auto. Ins. Co. v. Arms, 477 A.2d 1060; 1984 Del. LEXIS 328 at 1064. "Section 3902 (b) was enacted to require dissemination of important information which many consumers, other than the most diligent, might not discover." Arms at 1065.

To effect the purpose of Section 3902 (b), Delaware Courts have

strictly enforced Section 3902 (b)'s requirement that insurance carriers clearly communicate offers of additional UM/UIM coverage to their policyholders. Shukitt v. USAA, 2003 Del. Super. LEXIS 303 at 9; See also Harding v. N.K.S. Distribs., Inc., 1991 Del. Super. LEXIS 395 at 4, (concluding that insurance company did not make a meaningful offer when it merely provided the amounts of available coverage and the costs without more explanation.

An insurer has an affirmative duty to make a meaningful offer of UM/UIM coverage. Drenth v. Colonial Penn Ins. Co., 1997 Del. Super. LEXIS 466; See also Harding v. N.K.S. Distribs., Inc., 1991 Del. Super. LEXIS 395 at 3. The duty to make a meaningful offer of uninsured motorist coverage arises whenever a new policy, other than a renewal, is issued. State Farm Mut. Auto. Ins. Co. v. Arms, 477 A.2d 1060; 1984 Del. LEXIS 328. If the sufficiency of the offer language is challenged, the insurer bears the burden of demonstrating compliance with Section 3902 (b). Drenth v. Colonial Penn Ins. Co., 1997 Del. Super. LEXIS 466 at 8. To carry this burden, the insurer must demonstrate the offer included "(1) the cost of the additional coverage; (2) a communication to the insured which clearly offers uninsured motorist coverage; and (3) an offer for uninsured motorist coverage made in the same manner and with the same emphasis as the insurer's other coverage." Hudson v. Colonial Penn Ins. Co., 1993 Del. Super. LEXIS 241 at 7. An essential element to the exercise of a meaningful choice is the cost of coverage. Morris v. Allstate Ins.

Co., 1984 Del. Super. LEXIS 806 at 5. Proof of a signed application form alone which is executed when acquiring initial coverage is insufficient to satisfy the specific requirements of a meaningful offer. Patilla v. Aetna Life & Casualty Ins. Co. v. The Insurance Market, Inc., 1993 Del. Super. LEXIS 161 at 3; See also Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806 at 3-5.

If an insurer cannot sustain its burden and demonstrate a meaningful offer was made, then Delaware Courts treat the offer as a continuing offer for additional coverage, which the insured can accept, even after the insured has been in an accident. Drenth v. Colonial Penn Ins. Co., 1997 Del. Super LEXIS 466 at 8. It is presumed that the policyholder would accept this offer. Eskridge v. Nat'l Gen. Ins. Co., 1997 Del. Super. LEXIS 53 at 16.

If no meaningful offer has been made, then the Court must reform the policyholder's UM/UIM coverage to match his liability coverage limits. Banaszak v. Progressive Direct Insurance Co, 3 A.3d 1089; 2010 Del. LEXIS 434. See also, generally, Shukitt v. USAA, 2003 Del. Super. LEXIS 303 and Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806.

Among the seminal cases in Delaware addressing reformation is Mason v. USAA, 697 A.2d 388; 1997 Del. LEXIS 278. In Mason, the trial court refused to reform the insured's policy and granted Summary Judgment in favor of the insurer. On appeal, the Supreme Court reversed and remanded. At issue in Mason, was a fifty page

information packet which the insurer contended satisfied its obligation to make a meaningful offer of additional UM/UIM coverage. Id. at 4. The two sections within the fifty page packet that addressed UM coverage commenced on pages 41 and 45. Id. at 5. The Supreme Court noted UM/ UIM coverage options and the costs of those coverage options were located on page 43. Id. at 6.

In concluding USAA failed to sustain its burden in demonstrating a meaningful offer was made after the insured made a material change to her policy, the Court examined the language contained in the packet. One section of the language relied upon by USAA and focused upon by the Supreme Court read, in relevant part, "$15,000 / 30,000 / 10,000 UM is automatically included unless you have rejected this coverage. Higher limits of UM, up to your Bodily Injury limits, are available." Id. at 7-8.

The Court found the previously cited language in the information packet to be ambiguous because of its location and its emphasis. Id. at 14. The Court went on to state "Most importantly, the text does not clearly state that an offer of additional insurance is being made. Rather, the materials merely obliquely indicate that additional coverage is available." Id. at 15. The Court further stated "If an insurance contract is ambiguous (as here) it must be construed against the insurance carrier that drafted it. Id. The Court ultimately held the text in the information packet was ambiguous and legally insufficient to constitute a meaningful offer of additional coverage

under 18 Del. C. §3902 (b). Id. See also Shukitt v. USAA, 2003 Del. Super. LEXIS 303 at 15, ("Mr. Shukitt's Forms 999 (DE) fail the most important consideration recognized in *Mason*: they fail to contain a clear offer of additional coverage.")

In Margavage v. GEICO, 1997 Del. Super. LEXIS 228, the Plaintiff filed a Motion for Partial Summary Judgment seeking reformation. The Court couched the issue as whether the defendant, by providing written policy information and training its employees to "upsell" policies to insureds, tendered a meaningful offer within the definition of 18 Del. C. § 3902 (b). Id. at 1. GEICO, as part of its training programs, instructed its representatives to review an insured's coverage and inform the insured of increased coverage that was available and the cost of the coverage during each telephone conversation with its insureds. Id. at 3. The Plaintiff contended she was never advised of increased coverages available, nor the costs of the increased coverage during her numerous conversations with GEICO. Id. In resisting reformation, GEICO contended that its policies and procedures of upselling increased coverage satisfied its statutory obligation to make a meaningful offer. Id.

The GEICO policy provided that uninsured / underinsured motorist coverage was optional and "available in limits up to the Bodily Injury Liability Limits or $300,000 / $300,000 whichever is less." Id. at 5. The policy also provided for a column for the insured to select 1) minimum limits for UM / UIM; 2) limits equal to Bodily Injury policy

limits; 3) other limits; or 4) to reject the coverage entirely. Id. at 5. The policy also contained the following language:

> "Uninsured / Underinsured Motorist Coverage is not mandatory, but it is required that the coverages be offered to all policyholders. This coverage is designed to pay damages for injuries that could be received in accidents caused by drivers of uninsured and underinsured vehicles. This includes $10,000 Property Damage Coverage, which applies only to accidents with uninsured vehicles and is subject to a $250 deductible."

Id.

The Court went on to note that no brochures or additional written information regarding uninsured motorist coverage were provided by GEICO to the Plaintiff. Id. GEICO contended, per its policy of upselling, the Plaintiff would have been offered higher limits of coverage and advised of the cost of the coverage each time she spoke with a GEICO representative; however, GEICO could not definitively state that any such conversations actually occurred. Id. at 6. After identifying the essential elements of a meaningful offer, the Court noted a further guideline that "if there is oral discussion of any of the proposed coverage it should include oral reference to the offer of uninsured motorist coverage." Margavage at 7, quoting Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806, at 4-5.

The Margavage Court then went on to examine GEICO's position, in light of Judge Lee's decision in Patilla v. Aetna Life & Casualty Ins. Co. v. The Insurance Market, Inc., 1993 Del. Super. LEXIS 161, where the issue of custom or habit testimony was discussed. In Patilla, the

Court found that testimony "which obliquely refers to [the] company policy of discussing increases in coverage with all clients fails to be fact-specific as to the communication of an offer to Plaintiffs and therefore, [is] unpersuasive in illustrating that an offer was made." Margavage at 7, quoting Patilla at 3. The Margavage Court also cited Humm v. Aetna Casualty & Surety Co., 656 A.2d 712, 1995 Del. LEXIS 132, for the proposition that custom or habit testimony, alone, is not sufficient to defeat a motion for summary judgment. Margavage at 7.

In Margavage, the Court concluded GEICO failed to tender a meaningful offer. Id. at 8. In support of its decision, the Court noted the language upon which GEICO relied in its application form lacked the affirmative force of a meaningful offer. Id. Identical language to that which GEICO relied upon in Margavage was examined in Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806, and was also found to have lacked the affirmative force of a meaningful offer. Morris at 5. See also Eskridge v. National General Ins. Co., 1997 Del. Super. LEXIS 53.

In Patilla v. Aetna Life & Casualty Ins. Co. v. The Insurance Market, Inc., 1993 Del. Super. LEXIS 161, the insurer contended the signed initial application form for insurance constituted a meaningful offer. Proof of a signed application form alone which is executed when acquiring initial coverage is insufficient to constitute a meaningful offer. Patilla at 3; See also Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806 at 3-5. As to the signed application

form, the Patilla Court noted:

> "This document alone does not satisfy the precise standards of proof where there is no additional evidence of a clear and unequivocal communication to the insured, particularly in light of Plaintiffs' Affidavit which indicates no offer was ever made."

Id. at 3.

The Patilla Court held an insurer's company policy of discussing increases in coverage with all of its clients failed to be fact-specific as to the communication of an offer to Plaintiff and therefore failed to satisfy the Defendant's burden of proof that a meaningful offer was tendered to its insured. Id. at 4-5. As such, the Court granted Plaintiffs Motion for Summary Judgment and ordered reformation. Id. at 6-7.

In Humm v. Aetna, 1994 Del. Super. LEXIS 369, the plaintiff sought reformation. In opposing summary judgment, Aetna, in part, sought to rely upon the deposition testimony of its agent which stated that it was his custom and practice to insist that his clients' UM/UIM coverage equal their liability limits. Id. at 7. The Humm Court went on to state "Standing alone, custom or habit testimony is not sufficient to defeat a motion for summary judgment." Id. at 8.

ANALYSIS

Relevant to the case *sub judice,* the foregoing cases establish 1) that a signed application, alone, is insufficient to establish a meaningful offer was made; 2) any application to be relied upon by the insurer, should be supported by *additional evidence* of a clear and unequivocal communication to the insured; 3) the application must be deemed to have the affirmative force of a meaningful offer and 4) evidence of custom and habit, alone, is insufficient to establish a meaningful offer was made.

I. Application - Form A

The language contained in State Farm's initial application is virtually identical to the language examined in both Margavage and Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806. In both of those cases, the Court concluded the application forms lacked the affirmative force of a meaningful offer.

The entire May 14, 2007 application was completed by the agent, Mr. Redstone, who admittedly allowed the Ms. Purnell-Charleston to sign in the wrong location (A-77, p 36-37). State Farm does not dispute that the application was improperly executed. Additionally, Mr. Redstone testified that he did not review the application after it was executed by Ms. Purnell-Charleston (A-77, p 37). At trial Mr. Redstone admitted that he completed the election of minimum UM/UIM limits at item #6 of the Form A. (A-77, p 35-36). At item #6, the Form A contains language which states

> "*uninsured motor vehicle coverage is not mandatory, but it is required that coverage be offered to all policyholders. This coverage protects the insured legally entitled to recover damages for bodily injury, including death, from the owner or operator of a hit and run or an uninsured motor vehicle (no liability coverage or coverage is denied) or an underinsured motor vehicle (insured for liability but the limits are less than the limits of this coverage). This coverage includes $10,000.00 property damage protection for uninsured losses only, subject to a $250.00 deductible." (A-63).

Mr. Redstone testified that he did not recall discussing the substance of this paragraph with Ms. Purnell-Charleston nor reading the paragraph to her. (A-80, p 47). He further admitted that it is not part of his standard practice to read that particular provision to potential insureds. (A-80, p 47).

The Form A contains the following additional language:

> "I understand my policy will be issued to reflect the options I have chosen with respect to the above coverages shown under column A above. I further understand and agree that my selection of the Uninsured Motor Vehicle Coverage, as shown above, shall be applicable to the policy of insurance on the vehicle described and on all future renewals of the policy. If I have rejected coverage, such rejection shall apply to any renewal of the policy of any reinstatement, substitution, amendment, alteration, modification, transfer or replacement, unless I subsequently request such coverage in writing." (A-63).

Though Mr. Redstone testified that he believes reading the above-referenced provision was part of his standard practice and routine, he has no specific recollection of discussing it with Ms. Purnell-Charleston. (A-80, p 47-48). Despite Mr. Redstone's testimony, it is

compelling that Ms. Purnell-Charleston did not properly sign on the "signature of named insured" line confirming her understanding of the coverages that Mr. Redstone had allegedly chosen, in column A of the application, for her.

These issues raise concerns about the thoroughness of Mr. Redstone's discussions and/or any alleged offer of uninsured/underinsured motorist coverage when he met with Ms. Purnell-Charleston. Under Patilla, the State Farm application alone does not satisfy the precise standards of proof required, in the absence of any additional evidence of a clear and unequivocal communication to the insured.

II. No Additional Evidence of a Clear and Unequivocal Communication

The record contains no additional evidence of a clear and unequivocal offer to Ms. Purnell-Charleston. State Farm bears the burden to establish there was a clear and unequivocal communication to the insured. State Farm has not sustained its burden. Mr. Redstone readily admitted that he has no distinct recollection of his conversation with Ms. Purnell-Charleston, including the specifics of any offer made. (A-75, p 26, 28; A-78, p 40; A-79, p 42).

III. Circumstantial Evidence

The Trial Court erred in its liberal acceptance and reliance upon circumstantial evidence as being sufficient enough to establish a

clear and unequivocal communication, thus purportedly sustaining State Farm's burden.

The Trial Court, at pages 9-10 of its August 29, 2011 decision, identified seven factors that "make it more likely than not that Mr. Redstone made a meaningful offer of UM/UIM coverage up to the limits of liability coverage on behalf of State Farm, and that Ms. Purnell-Charleston elected and purchased the minimum limits of UM/UIM coverage". (A-104-105). However, a close inspection of the record below confirms that the evidence presented does not support several of the seven factors relied upon by the Trial Court.

Specifically, factor number five relied upon by the Court indicated that: "(5) Ms. Purnell-Charleston could not definitely and reliably state that Mr. Redstone did not make a meaningful offer of UM/UIM coverage to her;" (A-104). While Ms. Purnell-Charleston does not bear the burden to establish that a meaningful offer of UM/UIM coverage was not extended to her, the record establishes that Ms. Purnell-Charleston definitively stated that Mr. Redstone did not make a meaningful offer of UM/UIM coverage to her at any point during their May 14, 2007 meeting. (A-83, p 58-59; A-85, p 69-72). Ms. Purnell-Charleston testified, unequivocally, that Mr. Redstone did not discuss with her the meaning of UM/UIM motorist coverage (A-85, p 69) and further testified he never discussed with her the ability to purchase UM/UIM coverage equal to the liability limits (A-85, p 69). Nor did

Mr. Redstone discuss with her the costs of various coverages. (A-86, p 70-71).

The Court's reliance upon factor number six is likewise erroneous and unsupported by the below record. The Court relied upon the fact that Ms. Purnell-Charleston testified she recalled viewing information on Mr. Redstone's computer screen. (A-105). Ms. Purnell-Charleston never acknowledged that Mr. Redstone reviewed insurance coverage and/or corresponding rates on his computer screen. To the contrary, she testified, on two (2) occasions, that she did not recall viewing Mr. Redstone's computer screen during their May 14, 2007 meeting. (A-81, p 53; A-86, p 71).

At factor number seven on page 10 of its opinion, the Court concluded that "the evidence revealed that Ms. Purnell-Charleston was attempting to save money by switching from AAA to State Farm and by lowering her coverage limits." (A-105). This conclusion is entirely speculative. In fact, there is no evidence in the lower Court record to establish that Ms. Purnell-Charleston was intentionally reducing her insurance coverage limits in a conscious effort to reduce her insurance premiums. To the contrary, she testified that the cost of coverage was not that important (A-83, p 60); She wanted "good coverage" (A-87, p 75) and wanted something equal to what she previously had. (A-87, p 75). The Trial Court's reliance upon factor number seven is premised upon circumstantial evidence and assumptions. If, in fact, Ms. Purnell-Charleston was attempting to save money by

choosing lower coverages it would have been logical to assume that she would not have selected per person liability limits of $25,000.00 but rather would have chosen minimal liability limits of $15,000.00, but this is not what occurred. Even if the Court accepts the notion that the evidence supports Ms. Purnell-Charleston's decision to save money by lowering coverages, it would be as logical to conclude that even if she carried $25,000.00 in UM/UIM limits (matching her liability limits) she would still be saving significant money on lower premiums.

IV. Custom and Habit

State Farm contends it was Mr. Redstone's custom and practice to inform an insured of the availability of increased UM/UIM coverage and to inform the insured of the cost of additional coverage. However, established Delaware law is clear that custom and practice alone are insufficient to establish a meaningful offer was extended. Even if one were to accept Mr. Redstone's testimony as to his custom and practice, there was no testimony or other evidence presented at Trial to establish that he adhered to his custom and practice during his encounter with Ms. Purnell-Charleston, as he cannot specifically recall the encounter. Under Patilla, Mr. Redstone's testimony alone is insufficient to overcome State Farm's burden to establish a meaningful offer.

The facts of the instant matter are strikingly similar to Margavage. Ms. Purnell-Charleston testified (and Mr. Redstone agreed) that she was never provided any brochures or written information

regarding UM/UIM coverage (A-78, p 38; A-86, p 73). As such, the substance of what was orally conveyed to Ms. Purnell-Charleston cannot be stated with any specificity and the application itself lacks the affirmative force of a meaningful offer.

An essential element of a meaningful offer is advising the insured of the cost of increased UM/UIM coverage. There is no evidence in the record, other than Mr. Redstone's purported custom and practice, that the cost of increased coverages were definitely presented to Ms. Purnell-Charleston. State Farm has not provided a scintilla of evidence, written or oral, that the costs of increased coverages were explained or even provided. Moreover, the application upon which State Farm relies upon is misleading. The section for UM/UIM coverage states "See Reverse Side for Rates"; however, State Farm's agent testified that he never used the rate chart on the reverse side of the application and in fact, never discussed the rate chart with Ms. Purnell-Charleston (A-78, p 39-40).

V. Totality of the Evidence - Considering Custom and Habit Together with the Application

Even when considered together, the initial application and the May 14, 2007 oral discussion between Ms. Purnell-Charleston and Mr. Redstone are nevertheless insufficient to satisfy State Farm's threshold burden. The Trial Court's analysis is flawed in that it implies that the sum of the parts equals the whole. The lower Court record and Trial Court's findings of fact are clear that Mr. Redstone

cannot definitely state whether he discussed UM coverage, coverage amounts and/or the cost of same. The analysis should end there. Delaware law is clear that neither the signed application, nor testimony regarding custom and habit can establish that a meaningful offer of UM/UIM coverage has been made. Under the authorities cited, including Patilla, the Court must reject State Farm's arguments and reform the policy to reflect coverage of $25,000.00/$50,000.00.

State Farm, in its supporting memoranda, has attempted to distinguish Margavage on the grounds that Margavage did not involve a face to face meeting between an agent and insured. The context of the discussion or offer is immaterial. What is important, rather, is the substance of the conversation, to wit, whether increased coverages and increased premiums for those coverages were discussed and whether the communication was clear and unequivocal. Given his lack of recollection of what was discussed with Ms. Purnell-Charleston on May 14, 2007, Mr. Redstone could not state specifically what information was presented and/or offered to Ms. Purnell-Charleston.

At trial, State Farm attempted to distinguish Patilla and Margavage on the grounds that the custom and habit referenced in those cases were "company wide" policies, as contrasted to Mr. Redstone's (or the local agency's) custom and practice. This argument is unpersuasive. Ms. Purnell-Charleston maintains that Mr. Redstone was acting as State Farm's agent, making his custom and practice that of State Farm. Regardless, Delaware law is clear that custom and

practice are insufficient to establish the tender of a clear and unequivocal offer. In Humm v. Aetna, the Court expressly rejected the notion that reliance upon an agent's testimony that it was his custom and practice to insist that his clients' UM/UIM coverage equal their liability limits was sufficient to constitute a meaningful offer. Humm v. Aetna, 1994 Del. Super. LEXIS 369.

State Farm also argued that reformation in this case will require all carriers and agents to recall details of every conversation, some of which occurred years prior, which would lead to an onerous burden and require reformation in every case involving an oral offer. To the contrary, the carrier's burden could be easily overcome in a manner which would allow a carrier to sustain its burden. The carrier only need to print out the computer screen to which Mr. Redstone referred which allegedly sets forth the available coverages and the cost thereof and attach that as a written addendum to the application. Alternatively, application forms that contain the various levels of coverage available and corresponding premiums can be utilized. In fact, State Farm already has these rate charts available for use, but Mr. Redstone chose not to use them when dealing with Ms. Purnell-Charleston. (A-78, p 39-40).

The purpose of 18 Del. C. § 3902 is to allow individuals who carry liability coverage in excess of the minimum statutory amount an opportunity to carry equal uninsured and underinsured coverage. Shukitt v. USAA, 2003 Del. Super. LEXIS 303.

The lower Court concedes that Delaware law is clear that the Form A itself is not dispositive evidence that State Farm made a meaningful offer of UM/UIM coverage. (A-101). Furthermore, the Court concedes that Delaware law is clear that general testimony regarding an insurance company's standard practices with regard to offering UM/UIM coverage is not sufficient to allow the insurance company to carry its burden of establishing that a meaningful offer was made in a particular case. (A-102, A-103).

The lower Court was persuaded by the fact that the meeting between Ms. Purnell-Charleston and Mr. Redstone took place face to face and attempted to distinguish the instant facts from a long line of well-established precedent. As indicated, the context of the meeting is irrelevant. The substance of what was discussed is critical. In view of the fact that Mr. Redstone, like the corporate level or agency level manager referenced by the Margavage Court, could not speak to the specifics of the interaction with Ms. Purnell-Charleston, his testimony regarding his standard practice is simply insufficient to overcome the burden that it is more likely than not he made a meaningful offer of UM/UIM coverage to Ms. Purnell-Charleston during the May 14, 2007 interaction.

Allowing the lower Court's decision to stand will lead to public policy implications and subvert the legislative intent behind the meaningful offer requirement, to wit, requiring an individual to be adequately informed to enable them to make a rational, knowledgeable

and meaningful determination on coverage. Understanding insurance coverage is difficult enough for those who deal with it on a daily basis and for those who don't, the monumental task of understanding insurance is that much more difficult. This is the precise reason the statute and legislative intent supporting it require that all coverage options, particularly with uninsured and underinsured coverage, are fully and completely explained to individuals. Most people do not appreciate the concept that UM/UIM coverage is protection for themselves, their family and loved ones. Only by having a full and complete understanding of coverage, to include the option to purchase higher limits of UM/UIM coverage and the costs associated with those coverages, can an individual make an informed decision about the protection they want to afford themselves.

To allow the lower Court's decision to stand it will create a dangerously slippery slope and will effectively erase the requirement that a meaningful offer, made in a clear and unequivocal fashion, be made. No longer will a carrier have to demonstrate that a meaningful offer was made. Rather, the carrier's threshold burden will be easily overcome in every scenario where an agent simply asserts that he/she followed a customary practice of complying with the mandates of 18 Del. C. §3902. The carrier will only need to present testimony from an agent that he or she (typically) offers increased UM/UIM coverage and explains the coverage to an insured, without ever actually having to specifically demonstrate or prove that the agent adhered to custom

or habit in any one particular instance. This will effectively circumvent the legislature's intent that individuals, when deciding upon insurance coverage, have all the pertinent facts to allow them to make an informed decision on automobile insurance coverage.

In summary, the evidence presented below is insufficient for State Farm to carry its burden of demonstrating a meaningful offer was extended to Ms. Purnell-Charleston. It cannot be said that Ms. Purnell-Charleston knew "all of the facts reasonably necessary for a person to be adequately informed to make a rational, knowledgeable and meaningful determination." Morris v. Allstate Insurance Co., 1984 Del. Super. LEXIS 806.

The factors relied upon by the Court below do no establish that State Farm extended a clear and unequivocal meaningful offer of coverage to Ms. Purnell-Charleston. When these "factors" are removed from the lower Court's analysis, it is readily clear that Defendant did not sustain its burden.

As such, the lower Court's decision should be reversed with direction to enter judgment in favor of Ms. Purnell-Charleston.

CONCLUSION

WHEREFORE, for the reasons set forth above, Appellant Dianna Purnell-Charleston respectfully requests that this Honorable Court reverse the lower court ruling and remand this matter for entry of judgment in favor of Plaintiff Below.

UNREPORTED CASE

Analysis
As of: Dec 01, 2011

Margavage/White v. GEICO

C.A. No. 95C-05-038 SCD

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1997 Del. Super. LEXIS 228

April 28, 1997, Date Submitted
May 23, 1997, Date Decided

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

DISPOSITION: Plaintiff's motion for partial summary judgment GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff insured filed a motion for partial summary judgment as to the insurer's failure to tender a meaningful offer of higher uninsured motorist coverage within the definition of *Del. Code Ann. tit. 18, § 3902(b)*, in her action against defendant insurer.

OVERVIEW: After the insured's daughter was injured in a car accident involving an uninsured party within the meaning of the insurer's policy, the insured filed a motion for partial summary judgment contending that she was not tendered a meaningful offer of higher uninsured motorist coverage within the definition of *Del. Code Ann. tit. 18, § 3902(b)*. The court granted the motion and reformed the policy to reflect an increase in uninsured and underinsured limits. The insurer contended that pursuant to its policy of upselling, the insured would have been offered higher limits and told of the cost of such coverage. However, the insurer could not definitely state that such a conversation occurred, and custom or habit testimony alone could not defeat a motion for summary judgment. The insured testified that she never received any information about uninsured motorist coverage and the court accepted her testimony as uncontested.

OUTCOME: The court granted the insured's motion for partial summary judgment as to the insurer's failure to tender a meaningful offer of higher uninsured motorist coverage in her action against the insurer.

CORE TERMS: coverage, uninsured, insured, bodily injury, underinsured, summary judgment, uninsured motorist coverage, matter of law, liability coverage, insurance policies, per person, underinsured motorist coverage, insurer's, partial, upsell, issue of material fact, moving party, liability policy, bodily injury liability, underinsured motor vehicle, option to purchase, training, tendered, brochures, genuine, driver, custom, habit, named insured, per occurrence

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1] A motion for partial summary judgment, like a motion for summary judgment, is appropriate where the moving party shows that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Del. Super. Ct. R. Civ. P. 56(c). The court accepts as established all undisputed factual assertions made by either party, and accepts the nonmovant's version of any disputed facts. All rational inferences which favor the non moving party are drawn from those accepted facts. To survive a motion for summary judgment, the plaintiff must show that no genuine issue of material fact exists and that the case can be decided as a matter of law.

Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > Exhaustion Requirements
Insurance Law > Motor Vehicle Insurance > Limitations on Liability > Per-Occurrence Liability
Insurance Law > Motor Vehicle Insurance > Limitations on Liability > Per-Person Liability
[HN2] *Del. Code Ann. tit. 18, § 3902(b)*, provides that every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $ 100,000 per person and $ 300,000 per accident or $ 300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage. (1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his legal representative are legally entitled to recover from the driver of an underinsured motor vehicle. (2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy. (3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments.

Insurance Law > Claims & Contracts > Contract Formation > Offer & Acceptance
Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview
[HN3] An offer of the option to purchase additional coverage must provide the insured with the opportunity to make an informed decision based upon the information provided. To constitute a meaningful offer, the elements necessary are: 1) an explanation of the cost of the coverage; 2) a communication clearly offering the specific coverage; 3) with this communication being made in the same manner and with as much emphasis as was on the insured's other coverage. If there is oral discussion of any of the proposed coverage it should include oral reference to the offer of uninsured motorist coverage.

Insurance Law > Claims & Contracts > Contract Formation
[HN4] Testimony which obliquely refers to a company policy of discussing increases in coverage with all clients fails to be fact-specific as to the communication of an offer to plaintiffs and, therefore, is unpersuasive in illustrating that an offer was made.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Evidence > Relevance > Routine Practices
[HN5] Custom or habit testimony, alone, is not sufficient to defeat a motion for summary judgment.

COUNSEL: Curtis J. Crowther, Esquire, Roeberg, Moore & Associates, P.A., Wilmington, DE.

Dawn L. Becker, Esquire, Tighe, Cottrell & Logan, P.A., Wilmington, DE.

JUDGES: Judge Susan C. Del Pesco

OPINION BY: Susan C. Del Pesco

OPINION

Before me is Plaintiffs' Motion for Partial Summary Judgment. The issue in this motion is whether the defendant, by providing written policy information and training its employees to "upsell" policies to insureds, tendered a meaningful offer within the definition of *18 Del. C. § 3902(b)* or did it fail to do so, thereby requiring reformation of the policy to reflect the higher uninsured motorist coverage available to the plaintiffs. This is the Court's decision on the motion.

[HN1] A motion for partial summary, like a motion for summary judgment, is appropriate where the moving party shows that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Super.Ct.Civ.R.56(c). The Court accepts as established all undisputed factual assertions made by either party, [*2] and accepts the nonmovant's version of any disputed facts. *Merrill v. Crothall-American, Inc, Del.Supr., 606 A.2d 96, 99-100 (1992)*. All rational inferences which favor the non moving party are drawn from those accepted facts. *Id.* To survive a motion for summary judgment, the plaintiff must show that no genuine issue of material fact exists and that the case can be decided as a matter of law. *Moore v. Sizemore, Del.Supr., 405 A.2d 679 (1979)*.

The relevant facts are as follows. On September 25, 1992, Plaintiff Patricia White ("White") was injured in a car accident involving a motorist who was uninsured within the meaning of the defendant's policy. White's mother, Plaintiff Beatrice Margavage ("Margavage"), was the named insured on an automobile liability policy issued by defendant Government Employees Insurance Company ("GEICO"). Margavage has been insured by GEICO for more than 25 years. White was also a named insured under an "off-shoot" policy. This policy provided bodily injury coverage with limits of $ 50,000 per person and $ 100,000 per occurrence. The underinsured/uninsured limits were $ 15,000 per person and $ 30,000 per occurrence.

Throughout the time that [*3] Margavage was principally responsible for the upkeep of the policy, she would review the insurance documents and contact GEICO by phone whenever she sought a change in coverage. She was solely responsible for making all decisions regarding the coverage on the vehicles.

According to GEICO, it is its practice to "upsell" its insurance coverage during telephone conversations with insureds. In essence, GEICO, through its training programs, instructs its representatives to review an insured's coverage and inform the insured about increased coverage and costs during each telephone inquiry. Margavage contends that she initiated any changes to her policy and nothing was ever suggested to her in the way of increased coverage and costs. She further believed that she could "only get so much [uninsured coverage]" from GEICO. Margavage Dep. at 14.

Plaintiffs contend that Margavage was not tendered a meaningful offer within the definition of *18 Del. C. § 3902(b)*. Defendants, in response, argue that its policy and procedures regarding increased coverage comply with the clear reading of the statutory requirement. [HN2] *Section 3902(b)* provides:

> Every insurer shall offer to the insured the [*4] option to purchase additional coverage for personal injury or death up to a limit of $ 100,000 per person and $ 300,000 per accident or $ 300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.
>
> (1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.
>
> (2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy.
>
> (3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have [*5] been exhausted by payment of settlement or judgments.

A review of the GEICO insurance policy shows that uninsured/underinsured motorist coverage is optional and "available in limits up to the Bodily Injury Liability limits or $ 300,000/$ 300,000 whichever is less." Additionally, the policy provides a column for the insured to select 1) minimum limits for uninsured/underinsured; 2) limits equal to the Bodily Injury policy limits; 3) other limits; or 4) to reject the coverage entirely. At the end of this section there is the following language:

> Uninsured/Underinsured Motorist Coverage is not mandatory, but it is required that the coverage be offered to all policyholders. This coverage is designed to pay damages for injuries that could be received in accidents caused by drivers of uninsured and underinsured vehicles. This includes $ 10,000 Property Damage Coverage, which applies only to accidents with uninsured vehicles and is subject to a $ 250 deductible.

No brochures or additional written information regarding uninsured motorist coverage were provided by GEICO to Margavage. GEICO contends that pursuant to its policy of upselling, Margavage would have been offered [*6] higher limits and told of the cost of such coverage when she spoke with GEICO representatives on various occasions. GEICO cannot definitely state that such a conversation occurred. Margavage testified that she never received any information about uninsured motorist coverage and that she initiated any changes to her policy on her own accord.

Delaware jurisprudence defines what constitutes an offer of the option to purchase additional coverage. [HN3] The offer must provide the insured with the opportunity to make an informed decision based upon the information provided. *State Farm Mut. Auto. Ins. Co. v. Arms, Del.Supr., 477 A.2d 1060, 1064 (1984)*; *Morris v. Allstate Ins. Co., 1984 Del. Super. LEXIS 806*, Del.Super., C.A. No. 82C-OC-023, Taylor, J. (July 10, 1984) at 4; *O'Hanlon v. Hartford Acc. & Indem. Co., D.Del., 522 F. Supp. 332, 335 (1981)*, aff'd., 3rd Cir., *681 F.2d 806 (1982)*.

To constitute a meaningful offer, the elements necessary are: 1) an explanation of the cost of the coverage; 2) a communication clearly offering the specific coverage; 3) with this communication being made in the same manner and with as much emphasis as was on the insured's other coverage. *Bryant v. Federal Kemper Ins. Co.,* [*7] *Del.Super., 542 A.2d 347, 350-51 (1988)*; *Tomasevich v. Nationwide Ins. Co., 1992 Del. Super. LEXIS 286*, Del.Super., C.A. No. 87C-OC-030, Del Pesco, J. (July 10, 1992); *Morris, supra, Ritter v. Amica Mut. Ins. Co., D.Del., 633 F. Supp. 362 (1986)*; *Walsh v. State Farm Mut. Auto. Ins. Co., D.Del., 624 F. Supp. 1093, 1098 (1985)*.

Morris also sets forth further guidelines that "if there is oral discussion of any of the proposed coverage it should include oral reference to the offer of uninsured motorist coverage." *Morris,* at 4-5.

GEICO argues that a fact issues is created by its policy to upsell coverage. In *Patilla v. Aetna Life & Casualty Ins. Co. v. The Insurance Market, Inc., 1993 Del. Super. LEXIS 161*, Del.Super., C.A. No. 91C-01-010, Lee, J. (Apr. 22, 1993) Mem. Op., the issue of custom or habit testimony was addressed. The Court found that [HN4] testimony "which obliquely refers to [the] company policy of discussing increases in coverage with all clients fails to be fact-specific as to the communication of an offer to Plaintiffs and, therefore, [is] unpersuasive in illustrating that an offer was made." *Patilla,* at 3. [HN5] Custom or habit testimony, alone, is not sufficient to defeat a motion for summary judgment. [*8] *Humm v. Aetna Casualty & Surety Co., Del.Supr., 656 A.2d 712 (1995)* (insurer's statutory duty to provide minimum level of uninsurance coverage is separate and distinct from duty to offer additional uninsured/underinsured coverage up to amount of basic liability policy). Additionally, where there is no evidence to the contrary, it is presumed that the insured would have accepted the offer of higher coverage. *Patilla,* at 4-5; *Eskridge,* at 6.

This Court finds that GEICO failed to tender a meaningful offer to Margavage as required by statute. As in *Morris,* the language which defendant relies upon in its application form lacks the affirmative force of a meaningful offer. *Id.* at 5. The language in both cases is identical. *Accord Eskridge v. National General Ins. Co., 1997 Del. Super. LEXIS 53*, Del.Super., C.A. No. 95C-06-011, Graves, J. (Feb. 18, 1997). No brochures or supplementary material were provided to the plaintiff about the coverage. Further, the Court accepts as uncontested Margavage's testimony that she was not informed or offered additional or greater uninsured/underinsured motorist coverage.

For the foregoing reasons, the Court finds as a matter of law [*9] that GEICO failed to tender a meaningful offer to Margavage. Plaintiffs' motion for partial summary judgment is GRANTED. Accordingly, the policy is reformed to reflect an increase in uninsured/underinsured limits equal to the liability limits of $ 50,000/$ 100,000.

IT IS SO ORDERED.

Judge Susan C. Del Pesco

TRIAL COURT'S JUDGMENT AND RATIONALE

Attached is a copy of the Opinion of The Honorable Joseph R. Slights, III, dated August 29, 2011.

EFiled: Aug 29 2011 11:14AM EDT
Transaction ID 39527482
Case No. N10C-05-243 JRS

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

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Re: ***Diana Purnell-Charleston v. State Farm Fire and Casualty Co.***
C.A. No. 10C-05-243 JRS

Dear Counsel:

To follow is my decision after bench trial regarding Plaintiff's claim for reformation of her automobile insurance policy. This decision supplements my oral findings of fact as stated on the record following the conclusion of the trial on July 11, 2011.

Plaintiff, Diana Purnell-Charleston, seeks reformation of her automobile insurance policy with State Farm and Casualty Company ("State Farm") to reflect

uninsured/underinsured motorist ("UM/UIM") coverage in an amount equal to her bodily injury liability limits. She alleges that the State Farm agent who sold her the policy, Charles Redstone, failed to meet his statutory obligation to make a meaningful offer of UM/UIM coverage up to her bodily injury liability limits and that she is entitled, therefore, to have the Court reform the policy to reflect such coverage. State Farm does not deny its statutory obligation to make a meaningful offer of UM/UIM coverage equal to Plaintiff's bodily injury liability limits, nor does it dispute that reformation of Plaintiff's automobile insurance policy is the appropriate remedy should the Court determine that State Farm did not make a meaningful offer of such coverage to Plaintiff. The sole issue for the Court to determine, therefore, is whether the evidence supports Plaintiff's demand for a judgment declaring that State Farm failed to comply with its statutory obligation to make a meaningful offer of UM/UIM coverage equal to Plaintiff's bodily injury liability limits.

The parties agree that State Farm bears the burden of proof in this case.[1] To carry its burden, the insurer must demonstrate that the offer included: "(1) the cost of the additional coverage; (2) a communication to the insured which clearly offers uninsured motorist coverage; and (3) an offer for uninsured motorist coverage made

[1] *Drenth v. Colonial Penn Ins. Co.*, 1997 WL 720459, at *3 (Del. Super. Sept. 15, 1997).

in the same manner and with the same emphasis as the insurer's other coverage."[2] If the insurer cannot meet this burden, then Delaware courts treat the offer as a continuing offer for additional coverage, which the insured may accept even after the insured's accident.[3] It is presumed that the policy holder would accept this offer.[4] If no meaningful offer has been made, the Court must reform the policy to increase the policy holder's UM/UIM coverage to match her liability coverage limits.[5]

The Court made several factual findings at the conclusion of the bench trial on July 11. In summary, the Court determined that neither Ms. Purnell-Charleston nor Mr. Redstone had a clear memory of the discussion during which Mr. Redstone reviewed the various coverages available under State Farm's automobile insurance policy and Ms. Purnell-Charleston, in turn, indicated which coverages (and in what amounts) she wished to acquire. This lack of memory is not surprising given that the meeting occurred on May 14, 2007, more than four years prior to trial. Notwithstanding their general lack of memory, the Court did find that both Ms. Purnell-Charleston and Mr. Redstone had testified that Mr. Redstone reviewed the

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[2]*Hudson v. Colonial Penn Ins. Co.*, 1993 WL 331168, at *3 (Del. Super. July 21, 1993).

[3]*Drenth*, 1997 WL 720459, at *3.

[4]*See Shukitt v. United Services Automobile Association*, 2003 WL 22048222, at * 3 (Del. Super. Aug. 13, 2003).

[5]*Id.*

Delaware Motorists' Protection Act ("Form A")[6] with Ms. Purnell-Charleston during the meeting on May 14, 2007. Beyond recalling that the form was discussed, however, the Court concluded that neither Mr. Redstone nor Ms. Purnell-Charleston were able to offer a reliable description of the specifics of their discussion.

Within Form A, State Farm outlines the available coverages in its automobile insurance program, and provides places within the form for the customer to indicate which coverages she would like to purchase and at what coverage limits. Specifically, Form A lists the following available coverages: "(1) bodily injury liability; (2) property damage liability; (3) no-fault; (4) physical damage; (5) car rental expense; and (6) uninsured motor vehicle coverage."[7] With respect to each coverage, the customer may elect the minimum limits required by law or some greater limit as specified on Form A. With regard to UM/UIM in particular, Form A states that the customer may elect "Minimum Limits ($15,000/$30,000)" or may elect to purchase additional coverage "[a]vailable in limits up to the Bodily Injury Liability Limits or $250,000/$500,000 whichever is less."[8] Also with regard to UM/UIM, Form A explains:

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[6]Joint Ex. 4.

[7]*Id.*

[8]*Id.*

> Uninsured Motor Vehicle Coverage is not mandatory, but it is required the coverage be offered to all policy holders. This coverage protects the insured legally entitled to recover damages for bodily injury, including death, from the owner or operator of a hit and run or an uninsured motor vehicle (no liability coverage or coverage is denied) or an undersinsured motor vehicle (insured for liability but the limits are less than the limits of this coverage). This coverage includes $10,000 property damage protection for uninsured losses only, subject to a $250 deductible.
>
> . . .
>
> I [ ] understand and agree that my selection of the Uninsured Motor Vehicle Coverage as shown above, shall be applicable to the policy of insurance on the vehicle described and on all future renewals of the policy. If I have rejected coverage, such rejection shall apply to any renewal of the policy or any reinstatement, substitution, amendment, alteration, modification, transfer or replacement, unless I subsequently request such coverage in writing.[9]

According to Form A, Ms. Purnell-Charleston elected "Minimum Limits ($15,000/$30,000)" for her UM/UIM coverage and "$25,000/$50,000 Bodily Injury Limits."[10] Ms. Purnell-Charleston signed and dated Form A, albeit in the wrong signature block.[11]

Form A is persuasive evidence that Mr. Redstone did discuss the fact that UM/UIM coverage was "available [to Plaintiff] in limits up to the Bodily Injury Liability Limits" she elected to purchase. While it is true that Form A is not

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[9] *Id.*

[10] *Id.*

[11] *See Id.*

dispositive evidence that State Farm made a "meaningful offer" of UM/UIM coverage,[12] it is certainly probative of what was discussed when Mr. Redstone met with Ms. Purnell-Charleston to discuss her automobile insurance coverages and may be considered in the mix of evidence presented during the trial. Stated differently, Form A may be placed on State Farm's side of the evidentiary scale as evidence tending to support State Farm's contention that a meaningful offer of UM/UIM coverage was made to Plaintiff.

As noted, in addition to Form A, State Farm presented the testimony of Mr. Redstone who was, at the relevant time, an insurance agent for State Farm. Mr. Redstone testified regarding his meeting with Ms. Purnell-Charleston on May 14, 2007 at the Brian Hartle Insurance Agency. Although Mr. Redstone could not recall the specifics of his conversation with Ms. Purnell-Charleston, he did testify that it was State Farm's standard practice, Brian Hartle Insurance Agency's standard practice and his own standard practice to review with automobile insurance customers all available coverages, including UM/UIM coverage. He testified that it was also his standard practice to explain to automobile insurance customers that they may

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[12] *Drenth*, 1997 WL 720459, at * 2 (holding that 18 *Del. C.* § 3902(b) requires the insurer to make a "meaningful offer as UM/UIM coverage."); *Pattila v. Aetna Life & Cas. Ins. Co.*, 1993 WL 390256, at * 3 (Del. Super. Apr. 18, 1995) (holding that Insurance Commissioner Form A standing alone was not sufficient evidence to establish that the insurer made a proper offer of UM/UIM coverage).

purchase UM/UIM coverage up to the limits of liability coverage they elected to purchase. Mr. Redstone testified that he had no reason to believe that he would have deviated from his standard practice and that, although he cannot specifically recall doing so, he believes that he would have followed his standard practice during his meeting with Ms. Purnell-Charleston.

With regard to the costs of the various coverage, Mr. Redstone testified that he did not use the cost breakdown that appears on the back of Form A. Rather, it was his standard practice to "pull up" the specific and most current costs on his computer screen and then to show the screen to the customer so that he could review the costs coverage-by-coverage. He believes that he followed his standard practice during his meeting with the plaintiff. For her part, Ms. Purnell-Charleston testified that she recalled reviewing information on Mr. Redstone's computer screen, although she could not recall specifically what that information was.

Here again, Delaware case law is clear that general testimony regarding an insurance company's standard practices with regard to offering UM/UIM coverage is not sufficient to allow the insurance company to carry its burden of establishing

that a meaningful offer was made in a particular case.[13] The evidence of "routine practice" is more persuasive in this case, however, since State Farm was able to present the testimony of the agent who met directly with the plaintiff as opposed to a corporate-level or agency-level manager who could not speak to the specific interaction between the agent and customer. In this case, Mr. Redstone's testimony regarding his standard practice - - including his practices in reviewing both coverages, coverage limits and costs of coverage - - suggests to the Court that it was more likely than not that he followed his standard practice during his interaction with Ms. Purnell-Charleston.

Finally, the Court notes that other circumstantial evidence points to a conclusion that Plaintiff was offered UM/UIM coverage up to her liability coverage limits and that she knowingly rejected such coverage. Ms. Purnell-Charleston acknowledged at trial that, at the time she met with Mr. Redstone, she had just given up her automobile insurance coverage with AAA Mid-Atlantic Insurance Company ("AAA") with substantially higher limits for liability and UM/UIM coverage ($100,000/$300,000). It is reasonable to conclude from Plaintiff's election of lower

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[13] *See Pattila*, 1993 WL 189473, at *3 (holding that testimony of an insurance agency's manager that the agency routinely discussed increasing limits of UM/UIM coverage with customers was not alone sufficient to carry the insurer's burden of proving that a meaningful offer of UM/UIM coverage was made); *Humm v. Aetna Life & Cas. Ins. Co.*,1994 WL 465553 (Del. Super. July 20, 1994), *aff'd*, 656 A.2d 712 (Del. 1995) (same); *Margavage v. GEICO*, 1997 Del. Super. LEXIS 228, at *5-6 (same).

limits on her State Farm automobile insurance policy (for both liability and UM/UIM) that she was seeking to pay less money for her new coverage. It is, therefore, reasonable to conclude that Ms. Purnell-Charleston made a knowing election to purchase minimum UM/UIM coverage as a means to save money.

In summary, upon considering all of the evidence, the Court finds that the following factors, in combination, make it more likely than not that Mr. Redstone made a meaningful offer of UM/UIM coverage up to the limits of liability coverage on behalf of State Farm, and that Ms. Purnell-Charleston elected to purchase the minimum limits of UM/UIM coverage: (1) Form A, signed by Plaintiff, makes clear that Plaintiff could purchase UM/UIM coverage up to the limits of liability coverage she elected to purchase; (2) Form A reflects that Ms. Purnell-Charleston elected to purchase liability coverage with limits of $25,000/$50,000 but expressly elected to purchase the minimum limits ($15,000/$30,000) of UM/UIM coverage; (3) Mr. Redstone testified that his standard practice was to review all available coverages, including the extent of UM/UIM coverage required by law, with all of his customers, including pricing for such coverages; (4) Mr. Redstone testified clearly that he would have had no reason to deviate from his standard practice when he met with Ms. Purnell-Charleston; (5) Ms. Purnell-Charleston could not definitively and reliably state that Mr. Redstone did not make a meaningful offer of UM/UIM coverage to her;

(6) Ms. Purnell-Charleston acknowledged that Mr. Redstone did review some information with her on his computer screen which is consistent with Mr. Redstone's testimony regarding his standard practice; and (7) the evidence revealed that Ms. Purnell-Charleston was attempting to save money by switching from AAA to State Farm and by lowering her coverage limits.

An insurer need not present "written verification" that enhanced UM/UIM coverage was offered to a customer in order to sustain its burden of establishing a "meaningful offer."[14] Rather, it is sufficient if, in the totality of the evidence, the insurer establishes that the insurer's offer "provided the insured with the opportunity to make an informed decision based upon the information provided."[15] Here, the preponderance of the evidence indicates that Mr. Redstone provided Ms. Purnell-Charleston with information regarding the cost of the additional UM/UIM coverage, offered her the opportunity to purchase UM/UIM coverage up to the limits of the liability coverage she had purchased, and did so in the same manner and with the same emphasis that was utilized in connection with the other offers of coverage. Accordingly, the Court finds that State Farm made a meaningful offer of UM/UIM coverage as required by Delaware law and that Plaintiff has available to her the

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[14] *Margavage v. GEICO*, 1997 Del. Super. LEXIS 213, at * 4.

[15] *Margavage*, 1997 Del. Super. LEXIS 228, at * 6.

amount of UM/UIM coverage she was offered and accepted - - $15,000/$30,000.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Respectfully submitted,

BIFFERATO GENTILOTTI

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DATE: December 5, 2011