IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANA PURNELL-CHARLESTON,	:	
Plaintiff Below-Appellant,	:	Appeal No. 494,2011
v.	:	
STATE FARM FIRE AND CASUALTY COMPANY,	:	
Defendant Below-Appellee.	:	

DEFENDANT BELOW, APPELLEE, STATE FARM FIRE AND CASUALTY COMPANY'S ANSWERING BRIEF

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Dated: January 3, 2012

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NATURE OF THE PROCEEDINGS

Plaintiff-Appellant Diana Purnell-Charleston (hereinafter "Plaintiff" or Purnell) filed suit against State Farm Fire and Casualty Company (hereinafter "State Farm") on May 27, 2010. The complaint alleges that the Plaintiff was injured in a motor vehicle accident on June 22, 2007. At the time of the accident, her policy of motor vehicle insurance provided for bodily injury ("BI") liability limits of $25,000/$50,000 and uninsured/underinsured motorist ("UM/UIM") limits of $15,000/$30,000. Although it is not clear from the complaint, the Plaintiff later contended that the tortfeasor was underinsured. She alleges that she was not offered the opportunity to purchase UM/UIM limits in an amount equal to her bodily injury liability limits and she seeks reformation of her UM/UIM limits in an amount equal to her liability limits.

Following discovery, the parties stipulated to a bench trial before The Honorable Joseph R. Slights, III. Prior to trial, the parties entered into a joint stipulation of facts and they submitted separate memoranda of law. Judge Slights tried the case without a jury on July 11, 2011. At the conclusion of the trial, Judge Slights verbally stated findings of fact. He called for additional legal memoranda, which were submitted by both parties. Judge Slights then issued an Opinion and Order on August 29, 2011.

The Court found that State Farm had made a meaningful offer of UM/UIM coverage as required by Delaware law and that the Plaintiff

had available to her the UM/UIM coverage that she accepted and purchased - $15,000/$30,000. The Plaintiff timely appealed to this court. The Opening Brief of Plaintiff Below-Appellant Diana Purnell-Charleston was filed on December 5, 2011. This is the Answering Brief of State Farm Fire and Casualty Company Defendant Below-Appellee.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court's factual findings are supported by substantial evidence and it correctly applied the law. State Farm met its burden of proof through stipulated facts, documentary evidence, eyewitness testimony, and the inference drawn from the totality of the evidence. As such, the Court's decision should be affirmed.

COUNTER STATEMENT OF FACTS

The parties entered into a Joint Stipulation of Facts, a copy of which is included in the Plaintiff's Appendix. (A7-9). In addition, two witnesses, the Plaintiff Diana Purnell-Charleston and former State Farm insurance agent, Charles "Chuck" Redstone, testified at the trial on July 11, 2011.

The parties stipulated that the Plaintiff met with Chuck Redstone of the Brian Hartle Agency on May 14, 2007, to purchase a policy of motor vehicle insurance. (A7). A copy of the Form A is attached to the Stipulation. (A7, A20). The various State Farm coverage limits are identified in the Stipulation. (A7-A8). Before being insured by State Farm, the Plaintiff was insured by AAA Mid-Atlantic for the same 2003 Toyota Highlander. (A8). The Plaintiff was not an assigned risk policy holder with State Farm. (A18).

The Plaintiff was injured in a motor vehicle accident with Adrian Jones on June 22, 2007. (A8). Jones was insured by the Nationwide Insurance Company with a policy of motor vehicle insurance providing $15,000 in single limit liability coverage. (A8). The parties agreed that if the State Farm policy is enforced as issued, then there is no underinsured motorist coverage available to the Plaintiff. The parties also stipulated that if the Court reformed the coverage to the $25,000 liability limits of the Plaintiff's policy, then State Farm would provide the $25,000

in full payment of the Plaintiff's claims.

Chuck Redstone was called as the first State Farm witness.[1] Redstone testified that he first became an insurance agent with the Peter Wolf Insurance Nationwide Agency around 2004. (A73). His job included the sales and servicing of insurance policies. (A73). He was licensed to sell automobile and home insurance. (A73). He worked at the Peter Wolf Agency for a year and a half. (A73).

Redstone testified that when he worked at the Peter Wolf Agency he understood that if the liability limits of the policy were higher than the UM/UIM limits he had to offer equal limits. (A74). He explained how he would go over the policies with the insureds. (A74). He would show the insured the premiums by showing the computer screen which compared the different levels of coverages. (A74). The premiums changed based upon the individual insured. (A74).

Redstone began working with the Brian Hartle Agency in October of 2006. (A74). He remained at the Hartle Agency until moving to AAA Insurance in March of 2011. (A74). While he sold multiple lines of insurance, the majority of the policies that he sold were automobile insurance policies. (A74). He was shown the Form A and he identified the signatures at the bottom of the form as those of

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[1] The Court stated, and State Farm's counsel agreed, that State Farm had the burden of proof to show that the appropriate offer of coverage was made. Both Chuck Redstone and Diane Purnell-Charleston were called in State Farm's case in chief.

the Plaintiff and himself. (A74).

The witness did not specifically recall meeting with the Plaintiff in May of 2008. (A75). All of the writing on the Form A, except for the Plaintiff's signature, is that of Chuck Redstone. (A75, A77). On the top right of Form A under "Company" is listed State Farm Mutual Automobile Insurance Company and then State Farm Fire and Casualty Company. (A75). The box next to State Farm Fire and Casualty Company contains an "x". (A75). When asked how he picked the company to insure the Plaintiff he testified, "I don't decide what company to put them in, basically our computer system would decide that." (A75).

Redstone did not recall if the Plaintiff told him the coverages she had with AAA Mid-Atlantic Insurance Company. (A-75). The Hartle Agency file contained the AAA ID card, but no information about the coverages with AAA were noted. (A75). While he did not recall going over the coverages with the Plaintiff, he knows that both at the Wolf and Hartle agencies he went over the coverages with the insureds and that "99 percent of the time" the premium is an issue. (A75).

When shown the UM/UIM and liability limits of the Plaintiff's policy, Redstone testified:

> A. I don't recall telling her that but that's what we did at the agency, was show them that option.
>
> Q. Every time?
>
> A. Yes.

Q. Any how would you tell them what the premium was?

A. I would show them, like I said, on the computer. We would be able to turn the computer because the computer is basically facing the customer at that time anyway, but we would just tilt it a little bit and the system would allow us to show the original quote and then have a different quote at the same time on the screen so they can see the difference.

(A76).

Redstone identified the signatures at the end of the Form A as those of the Plaintiff and himself. (A76). He does not know why the Plaintiff signed on the wrong line because he simply turned the form around and he asked her to sign it. (A76). He would have then accepted payment for the policy and the policy was issued pursuant to the Form A application. (A76).

During cross examination, Redstone was shown the back of the Form A with various coverages and premiums. (A78). He testified that he did not show the Plaintiff the reverse of the form and that this was not his practice. (A78). Instead, it was his practice to show the insured the computer screen which contained both the coverages and the price. (A79). He testified that he "always" starts offering coverages of $100,00/$300,000 and if it is not accepted he works down. (A78, A79). He never shows the back of the Form A and he always uses the computer. (A80). He said that the computer is "laid out very easy to read." (A80).

Diana Purnell-Charleston was called as the second, and last, witness. (A80). The Plaintiff is a high school graduate with some

college. (A80). She can read and write in the English language. (A80).

The Plaintiff purchased a 2003 Toyota Highlander in 2003. (A80). The vehicle was insured by AAA Insurance Company. (A81). She could not recall why she switched from AAA to State Farm and she denied a letter from AAA stating that her AAA policy was cancelled on March 12, 2007. (A81). She testified that she was insured by AAA at the time she obtained the State Farm policy on May 14, 2007. (A81).

The Plaintiff stated that she recalls sitting down and talking to State Farm agent Chuck Redstone. (A81). She does not recall if Redstone showed her the computer. (A81). She confirmed that she was shown the Form A and she acknowledged that the signature on it was hers. (A82). When she was told that the Form A did not have any premiums on it she testified that Redstone told her about the premiums verbally. (A82).

When asked if Redstone discussed the liability coverage with her, the Plaintiff said, "(w)ell, he discussed different insurance like liability and I don't recall the other one, but it was a few that he discussed." (A82). She acknowledged having $100,000 in liability insurance coverage with AAA and she testified that she did not tell this to Redstone. (A82). When asked how the liability coverage was picked she said, "(w)e talked about it and I don't remember how it came to be, I don't remember." (A82). When she was

told that the no fault coverage she purchased was less than that with AAA Mid-Atlantic, she said that she did not know why she had less. (A82).

When asked if she recalled discussing the liability coverages with Redstone, the Plaintiff said that she thinks that he did discuss that coverage with her. (A83). When asked about the no fault, physical damage, and rental coverage and whether Redstone discussed them, she said that yes he did or he "may have." The Plaintiff denied that Redstone discussed the UM/UIM coverage at all. She testified that of the six coverages all on the one page Form A, Redstone discussed all of the coverages except for the UM/UIM coverage. (A83).

When asked about costs, the Plaintiff testified as follows:

> Q. Now, speaking of the bottom line, I'm going to talk about a different one, the bottom line being the premium to you?
>
> Q. So, if it had been $1000, $5,000 or $15,000, you'd have been okay with any of that?
>
> A. No.
>
> Q. How important was it to you?
>
> A. I know that I needed insurance and I needed good insurance, good coverage, because the vehicle that I was driving was practically new.

(A83).

Although testifying that she was employed at the time of the accident, she acknowledged when shown medical records that she was on disability at the time of the accident of June 22, 2007. (A83).

Thus, she was not working at the time of the accident. (A84). When she did work she made approximately $19,000 a year. (A84).

She testified that as to every premium cost whether it be liability coverage, property damage, collision, comprehensive and no fault, Redstone told her of the premiums. (A85). However, as to the UM/UIM coverage Redstone did not discuss the coverage or the premium cost at all. (A85). On cross examination, her attorney asked her, "(n)ow, we heard your testimony with regard to your meeting with Mr. Redstone and as I understand it, he did not discuss with you in any way, shape, or form the meaning of uninsured motorist coverage during that meeting; is that right?" She answered, "(y)es, sir." (A85). Redstone also did not tell her that she had a right to purchase UM/UIM coverage in an amount equal to her liability coverage and did not show her the back of Form A. (A-86). When asked if Redstone showed her the computer screen she testified, "I don't recall looking at a computer screen." (A86).

Although claiming that she would have purchased equal limits of UM/UIM coverage to the liability coverage if Redstone had given her the option, she also testified that she didn't know what the coverages meant. (A87). She agreed that the State Farm premium was lower than the AAA Mid-Atlantic premium although "...it wasn't the object. I wanted something equal to what I had, I wanted good insurance." (A87). The following colloquy then occurred:

> Q. But at no point did you get anything equal to what you had, did you?

A. But I didn't know that at the time.

Q. The only people that would know that would be you and Mr. Redstone. He would have no reason to know because you didn't give him any of the paperwork from AAA?

A. Correct.

Q. The only person who would have known whether the coverages were equal would have been you, right?

A. Right.

Q. And none of the coverages were equal, were they?

A. But I didn't fully understand what the coverages were.

Q. Well, if you didn't understand it and he didn't have the paperwork, how would Mr. Redstone know?

A. I don't know that.

(A87).

ARGUMENT

I. THE SUPERIOR COURT DECISION SHOULD BE AFFIRMED SINCE THE COURT'S FACTUAL FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT CORRECTLY APPLIED THE LAW.

A. Standard and Scope of Review

This case was tried as a bench trial. Accordingly, Judge Slights' decision consisted of findings of fact and application of Delaware statutory law. Review of the factual findings by this Court is akin to the review of a verdict rendered by jury. It is well-settled that "[A] jury's verdict will be upheld unless it is against the great weight of evidence." *Wood v. Haines*, 906 A.2d 756, 764 (Del. 2006). As such, the factual findings of a jury may not be disturbed "if there is any competent evidence upon which the verdict could reasonably be based." *Id.* "The verdict should not be set aside unless *a reasonable jury could not have reached the result.*" *Id.* (emphasis in original).

As for Judge Slights' application of Delaware law, this Court reviews questions of law *de novo*. *Sheenhan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011).

B. Merits of the Argument

On June 30, 2011, the parties filed a joint stipulation of facts. (A7). Both Purnell and State Farm submitted Memoranda of Law on July 5, 2011. Judge Slights sitting without a jury heard testimony from the Plaintiff and the State Farm insurance agent, Chuck Redstone, both of whom were called in State Farm's case in

chief. There was additional post trial briefing and Judge Slights issued his decision on August 29, 2011, finding in favor of State Farm.

The majority of the Plaintiff's brief is spent on case law which is of no relevance to the matter before the Superior Court or this Court and the remainder is spent quibbling with Judge Slight's findings of fact. While some of Judge Slights' findings were the only logical conclusions to be drawn from the testimony and documentary evidence, the other findings were the most logical conclusions. The Plaintiff argues with both. Although Judge Slights was empowered to hear the testimony and to make findings of fact based upon all of the evidence, the Plaintiff attempts to reargue the matter in this Court.

State Farm agreed both in the July 5, 2011 Memorandum of Law and at the beginning of trial that it had the burden to establish the appropriate offer of UM/UIM coverage to the Plaintiff. (A64). As such, Judge Slights asked State Farm to present its case first.

The basic facts are quite simple. Diana Purnell-Charleston met with Chuck Redstone of the Brian Hartle Agency on May 14, 2007, to purchase a policy of motor vehicle insurance for a 2003 Toyota Highlander. (A80). Before purchasing insurance with State Farm on May 14, 2007, the vehicle was insured by AAA Mid-Atlantic Insurance Company. (A8, A22, A25).

The AAA Mid-Atlantic policy provided for BI limits of

$100,000/$300,000; property damage limits of $50,000 for each accident; physical damage coverage with a $100 deductible; no fault limits of $100,000/$300,000 and UM/UIM limits of $100,000/$300,000. The State Farm policy, however, provided for BI limits of $25,000/$50,000; property damage limits of $50,000; no fault limits of $15,000/$50,000; physical damage coverages provided for a $250 deductible for comprehensive and $500 for collision; and UM/UIM coverage limits of $15,000/$30,000. Every coverage, except for the property damage, was less with State Farm than had previously been afforded by the AAA Mid-Atlantic policy of motor vehicle insurance. (A17-A19, A20).

Chuck Redstone testified that he met with the Plaintiff on May 14, 2007 to complete the application for the State Farm insurance. (A74). He does not specifically recall meeting with the Plaintiff on that date, however every part of the Form A application for insurance is in his handwriting except for the signature and date which was entered by the Plaintiff.(A20, A75).

At the end of the trial, Judge Slights issued several factual findings. First, he concluded that Ms. Purnell-Charleston had a reason for changing her coverage from AAA Mid-Atlantic to State Farm. (A93). He also concluded that she may have seen the computer screen for some reasons and not for others. (A93). He rejected the Plaintiff's testimony that there was no discussion of the uninsured and underinsured motorist coverage at all. (A93). He found that

neither party remembered the meeting clearly. Judge Slights interpreted the legal issue as whether Chuck Redstone's testimony about custom and practice was sufficient when coupled with the Form A application to meet State Farm's burden of proof. (A94).

The August 29, 2011 decision supplemented the factual findings made on July 11, 2011. Judge Slights found the Form A to be persuasive evidence that Redstone did discuss that UM/UIM coverage was available up to the bodily injury liability limits. While Form A itself is not dispositive evidence of the meaningful offer, it is probative of what was discussed and it is to be considered in the "mix of evidence." The Court found that based upon the Redstone testimony it was State Farm's standard practice, the Hartle Agency's standard practice, and Redstone's standard practice to review with automobile insurance customers all available coverage, including UM/UIM coverage. Further, it was Redstone's standard practice to explain to automobile insurance customers that they may purchase UM/UIM limits up to the liability limits. It was also Redstone's standard practice to pull up the specific and most current costs for the coverage on his computer screen and show it to the customer and that he would have done so for the Plaintiff. While general testimony as to a practice may not be sufficient, it was sufficient in this case because Redstone's standard practice suggested to the court that this action was more likely than not followed with the Plaintiff.

The Court also found it to be important that the Plaintiff moved from higher limits of coverage with AAA Mid-Atlantic to lower coverages with State Farm. Judge Slights found this to be indicative of the Plaintiff's desire to save money on her premiums and thus to have made a knowing election to purchase minimum limits of UM/UIM coverage as a means to save money. He then made seven specific findings of fact at pages 9 and 10 of his decision all of which lead to the conclusion that State Farm met its burden of proof.

The Plaintiff's brief reads as a primer on the law of uninsured and underinsured motorist coverage. However, at no point does the Plaintiff dispute the basic legal ruling made by the Superior Court at pages 2 and 3 of the August 29, 2011 decision. State Farm agreed in the legal memoranda submitted to the Superior Court on July 6, 2011, that it had the burden to establish, per 18 *Del. C.* § 3902 and *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060 (Del. 1984) and its progeny, that a meaningful offer of UM/UIM limits equal to the bodily injury limits was made. For the offer to be meaningful, it must include the cost of the additional coverage, a communication to the insured which clearly offers the coverage, and an offer in the same manner and with the same emphasis as the other coverages. State Farm knew the burden and what it must prove going into the trial.

Essentially, the Plaintiff makes two main points in her

appeal. First, she quibbles with the factual inferences that Judge Slights drew from the testimony and the evidence. Secondly, she contends that absent a clear recollection or written proof, State Farm must lose. It is to these two points that State Farm addresses its brief.

1. *The Superior Court Correctly Found That State Farm Met Its Burden Of Proof Showing That The Plaintiff Was Provided A Meaningful Offer To Purchase UM/UIM Coverage Up To Her Liability Limit.*

Uninsured and underinsured motorist coverages are governed by 18 *Del. C.* § 3902. Section 3902(b) requires an insurer to offer the insured the option of purchasing additional UM/UIM up to a limit of $100,000/$300,000, but not to exceed the bodily injury limits of the basic policy. It has been clear since *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060 (Del. 1984), that the consequence of failing to make such an offer is that the offer remains open for the insured to accept at any time and even after the accident. Subsequent to the *Arms* decision, the Superior Court issued an Order in the matter of *Morris v. Allstate Ins. Co.* holding that the insured must be given sufficient information to make an informed decision, including the cost of the additional premium. 1984 LEXIS 806, C.A. No. 82C-OC-23 (Del. Super. July 10, 1984); *see also Mason v. USAA*, 697 A.2d 388 (Del. 1997); *Sammarco v. USAA*, 878 A.2d 457 (Del. 2005). Later, the Delaware courts added the requirement that the offer must be made in the same

manner and with the same emphasis as the insured's other coverage. *Bryant v. Federal Kemper Ins. Co.*, 542 A.2d 357, 351 (Del. Super. 1988); *Humm v. Aetna Cas. Sur. Co.*, 656 A.2d 712, 715 (Del. 1995); *Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089 (Del. 2009).

There are numerous cases from the *Arms* case in 1984 to the present addressing what the insurer must do to meet its burden of proof. Most, if not all, of the cases are in the context of a summary judgment motion. Secondly, all of the emphasis cases deal with insurers such as USAA, Progressive and Hartford which primarily communicate with their insureds by written offers or packages.

The present case is unique for several reasons. First, the matter was tried before a Superior Court Judge. He was charged with the responsibility to decide both the law and the facts. Secondly, the persons who testified are the actual people who met on May 14, 2007, at the inception of the Purnell-Charleston/State Farm policy of insurance. There were no changes in the policy from its inception to the point of the Purnell-Charleston/Jones accident on June 22, 2007, five weeks later. Cases which speak of emphasis in the writings, ambiguity of the language of a brochure or pamphlet, or generalities about what in insurer may or may not do in any given circumstance are not relevant to the present case.

It is clear that Diana Purnell-Charleston and Chuck Redstone met at the Brian Hartle Agency on May 14, 2007. The purpose of the

meeting was for the Plaintiff to purchase a policy of motor vehicle insurance from State Farm insuring a 2003 Toyota Highlander. The parties stipulated to these facts and both the Plaintiff and Mr. Redstone testified to these circumstances.

The Plaintiff had previously insured the 2003 Toyota Highlander with AAA Mid-Atlantic. The stipulation at paragraph 3 included the various coverages afforded by the AAA Mid-Atlantic policy. (A8). In addition, the stipulation had the various premium notices appended to it. (A22-A26). The coverages were as follows:

Bodily Injury	$100,000/$300,000
Uninsured/Underinsured Motorist	$100,000/$300,000
Personal Injury Protection	$100,000/$300,000
Physical Damage	$100 deductible
Property Damage	$50,000

Following the meeting with Chuck Redstone, and per the Form A application, the State Farm coverages were as follows:

Bodily Injury	$25,000/$50,000
Uninsured/Underinsured Motorist	$15,000/$30,000
Physical Damage	$250 Deductible Comp/ $500 Collision
Property Damage	$50,000

Every single coverage purchased by the Plaintiff on May 14, 2007, except for the property damage coverage, was less and substantially less than the coverage previously afforded for the vehicle by AAA Mid-Atlantic. The Plaintiff testified that she did not tell Chuck Redstone the amount of the coverage that she had with AAA Mid-Atlantic. (A82). She did not give him any of the

forms from AAA Mid-Atlantic so the only person at the Purnell-Charleston/Redstone meeting on May 14, 2007 who knew the amount of the AAA Mid-Atlantic coverage for the 2003 Toyota Highlander was Diana Purnell-Charleston. (A87)

The Form A application is a one page form. (A63). Although it was completed by Chuck Redstone, the form was signed by the Plaintiff on May 14, 2007, and she was given a copy of the form to take with her. (A82, A86). There is no allegation that the policy issued by State Farm does not comport to the coverages on the application.

When the Complaint and Answer were filed by counsel, both parties demanded a jury trial. On June 1, 2011, the parties agreed to a bench trial and Judge Slights agreed to hear the matter without a jury on June 7, 2011. (A3; Superior Court Docket Entries 21, 22). Although heard without a jury, had a jury been empaneled, it would have been entitled to several instructions. One instruction would have been:

> CREDIBILITY OF WITNESSES-WEIGHING CONFLICTING TESTIMONY
>
> You are the sole judges of each witnesses's credibility. That includes the parties. You should consider each witness's means of knowledge; strength of memory, opportunity to observe, how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all of the circumstances that, according to the evidence, could affect the credibility of the testimony.
>
> If you find the testimony to be contradictory, you may try to reconcile it, if reasonably possible, so as to make one

> harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

Delaware Superior Court Pattern Jury Instructions for Civil Practice, 23.9. As the trier of fact, Judge Slights was not bound by the rules of construction for summary judgment motions. He did not have to decide the matter on a cold record or decide whether a fact was material or immaterial or to infer facts in the light most favorable to one party or the other. He had the same right as any jury to judge the witnesses based upon applicable standards. Although it was not necessary for State Farm to call the Plaintiff as part of its case in chief and it could reasonably have relied upon cross examination to establish the relevant points, it did rely upon both the Plaintiff and Chuck Redstone to prove its case.

It is uncontradicted that an insurance application was completed on May 14, 2007. Since the Form A contains no premium costs as to any of the purchased coverages and since the Plaintiff was required to make a payment before she left the Hartle Agency to effect the coverage the premiums must have been explained to her. The Plaintiff acknowledges that Redstone told her of the premiums. (A82). She also acknowledges making a partial premium payment before she left the agency on May 14, 2007. (A86-A87). Redstone testified that a payment of some sort would have to have been made on May 14, 2007, for the policy to take effect. (A76). The only logical conclusion is that there was a discussion between the

Plaintiff and Redstone on May 14, 2007 about the cost of the purchased coverages or the Plaintiff would not have been able to make the payment and State Farm would not have issued the policy.

It is also logical to assume that the Plaintiff had some reason to switch from AAA Mid-Atlantic and there was some reason for all of the coverages to be reduced from the AAA-Atlantic policy to the State Farm policy. As between the Plaintiff and Redstone, only the Plaintiff knew what coverages were on the AAA Mid-Atlantic policy. While she claims to have wanted good insurance or "equal" insurance, the fact is that every coverage but one was substantially less than the previous coverages. (A87). Since the Plaintiff testified that she made $19,000 when she worked and she was on disability at the time of the accident, cost was an object notwithstanding her denials.

The Plaintiff also testified that Chuck Redstone explained every coverage and every premium but one, the uninsured motorist coverage. (A83). Although Judge Slights gave the Plaintiff the benefit of the doubt on the issue, the Plaintiff was quite clear that Redstone did not explain this coverage all. (A85). Just in case the point was missed on direct examination, Plaintiff's counsel pursued the same point on cross examination in the following exchange:

> Q. And during that meeting with Mr. Redstone in May, 2007, in recognizing that you told us he didn't discuss uninsured motorist with you at all, but I just want to make sure the record is clear, did he

discuss with you the various coverages for uninsured motorist?

A. No sir.

Q. Did he discuss with you various premiums for what it would cost for different coverages of uninsured motorist?

A. No sir.

(A86).

There is no logical reason Redstone would have discussed every coverage but one. The only reasonable conclusion that Judge Slights could have drawn is that Redstone discussed all of the coverages and all of the premiums.

Redstone testified that it was his practice to show the insured the computer screen which showed the various coverages. (A74, A76). There is no doubt that he used the computer because the particular insurer, State Farm Fire and Casualty Company, was actually selected for the insured by the computer. (A75). Redstone understood that if the liability limits were higher than the UM/UIM limits that equal limits had to be offered. (A74). He would use the computer to show the insured the different costs of the premiums. He testified that he informed the insured of the option to purchase equal limits of UM and BI coverage "every time." (A76). He would then turn the computer screen toward the insured to show the difference in the costs. (A76).

On cross examination, Redstone testified that when he sold coverage he would start at $100,000/$300,000 and then work down.

(A78, A79). He would also explain to the insured what UM and UIM coverages were. (A79).

The persona adopted by the Plaintiff at trial was that of a person who had little knowledge of any aspect or anything other than what she was told by Redstone. She claimed not to have understood her AAA Mid-Atlantic coverage, her State Farm coverage or, for that matter, the coverage that she purchased from Progressive Insurance Company subsequent to the State Farm coverage, which was current as of the trial in July of 2011. (A84). She claimed to be unaware of what insurance she had, what the limits were on any of her coverages, and what uninsured motorist and no fault coverages were as of July 11, 2011. (A85).

On the other hand, Redstone had been an insurance agent since 2004, first with Nationwide and then with State Farm. His primary focus was home and automobile insurance. He testified that he knew of his obligation to offer equal limits of UM/UIM and bodily injury coverages and that part of that obligation included explaining the different premiums. He also explained how he did it. He certainly had no reason to sell coverage in a lesser amount when any logical practice would be to offer higher limits. The only fault that Plaintiff's counsel found at trial is that the Plaintiff signed the application in the wrong spot and he blamed Redstone for not catching the mistake. Since she signed in the assigned risk spot and everyone agrees that she was not assigned risk, the mistake is

of no relevance.

Habit and routine practice is admissible. D.R.E. 406. To be probative evidence under Rule 406 it must consist of specific semiautomatic conduct that is capable of consistent repetition. *Brett v. Berkowitz*, 706 A.2d 509, 517 (Del. 1998).

Redstone sold automobile insurance. He knew that he had to offer equal limits. Doing this required no more than telling the insured of the option and then showing the insured the screen with the various coverages. There is little discretion and little variety involved. Redstone was not testifying about someone else's practice, something that he did not do or something that someone else was told to do. Redstone was speaking of himself. There was no discussion about general practices or certain circumstances. The testimony was specific to Chuck Redstone, with experience as an agent first for Nationwide agent and later for State Farm.

Although the Plaintiff complains that the evidence was circumstantial, it is exactly the kind of evidence that a jury would be instructed to accept. A standard instruction given to a jury on every relevant occasion is the instruction on circumstantial evidence. In relevant part, the instruction states:

> As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that a jury find the facts from all of the evidence in the case; both direct and circumstantial.

Delaware Superior Court Pattern Jury Instructions for Civil Practice, 23.1. This is exactly what Judge Slights chose to rely

upon.

Little need be said about the Plaintiff's choices of how State Farm should meet its burden of proof. She suggests that the agent should have printed the computer screen. It could have changed the application forms. He could have or should have used the rate charts (although Redstone testified that the rates changed depending upon the insured). What the agent must do is required by statute. How State Farm meets its burden of proof is not statutory. There is nothing in the statute requiring any particular form of proof or any particular type of form. The agent is not limited to a written offer or any kind of verbal offer. The form of the proof may go to the weight and credibility of the witness or the strength of the particular case. However, a clear recollection or written documentation is not a requirement of proof. State Farm did not rely solely upon the Form A and the memorandum of law supplied to the Court before the trial made it clear that State Farm knew its legal obligations. It relied upon the totality of the evidence, which included the prior AAA Mid-Atlantic documents, the Form A, and the testimony from both the Plaintiff and Chuck Redstone.

2. *The Superior Court's Factual Findings Were Reasonable and Supported By The Totality Of The Evidence.*

Although the Plaintiff claims that the Superior Court erred in its interpretation of the law, she also alleges error in Judge Slights factual conclusions. She claims that Judge Slights'

conclusion that the Plaintiff reduced her coverages to save money was "speculative." (Opening Brief, at 21). She claims that there was no evidence to support this conclusion and she cites the Plaintiff's testimony that she wanted "good coverage" and something equal to what she had. However, it is apparent from a comparison of the AAA Mid-Atlantic and the State Farm coverages that most of the coverages were reduced. The only person who knew that was the Plaintiff. Further, Chuck Redstone was obligated to put actual coverages on the Form A so that the premium could be calculated and the policy issued. What was he do to with a general subjective statement that the insured wanted "good coverage?"

Plaintiff also contends the Court erred in its conclusion that the Plaintiff was shown the computer screen. However, the Plaintiff never denied seeing the screen and she does acknowledge being told the premiums. Since it was Redstone's testimony that he always used the computer screen to tell the insured of the premiums so they could be easily viewed, what reason would he have for not doing this for the Plaintiff?

Plaintiff also asserts that since she signed the form in the wrong spot there is evidence of Chuck Redstone's carelessness and, if he was careless because of the Plaintiff's failures, then this is evidence that he didn't do what he testified he typically did. However, and while it is hard to see why the Plaintiff's mistake speaks of greater failures on the part of Chuck Redstone, this was

a credibility issue for the trier of fact to decide. It is not for this court to decide that a witness lacks credibility. This issue is for the jury, or, in this instance, the trial judge to decide.

CONCLUSION

Although the Plaintiff spends much of her brief providing a recitation of the law on the issue of uninsured and underinsured motorist coverage, only one matter is significant: whether State Farm through Chuck Redstone made a meaningful offer of uninsured and underinsured motorist coverage as required under 18 *Del. C.* § 3902(b). Judge Slights very clearly ruled that Chuck Redstone did make such an offer. The Court made factual findings and conclusions based upon written documentation and testimony. Its legal conclusions are correct and the factual findings are unassailable.

The Plaintiff is asking the Court to rule that only two forms of evidence can be used to meet a burden of proof, written evidence and clear recollection. While she suggests what types of proof a Court should accept, she is telling this Court that only these forms of proof are acceptable. She is saying that a witness may not testify to habit or practice and that a fact finder cannot consider circumstantial evidence. The Plaintiff's arguments are even more difficult in this case because the person who heard the evidence and who decided the law was an experienced and knowledgeable Superior Court Judge. She cannot point to a failure to follow previous case law or statutory authority. She is telling this Court that Judge Slights could not follow the trail to its logical end and that this Court should follow the same trail to a

different end. The documentary evidence and the testimony lead to the inevitable conclusion that Judge Slights reached. Accordingly, State Farm asks that the decision of the Superior Court be affirmed.

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Date: January 3, 2012