IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2022-000703

Progressive Northern Insurance Company,.....Respondent,

v.

Gloria Oliver, Richard Prothro and Sharon Prothro,.....Defendants,

Of whom Gloria Oliver is the, ... Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

1. Did the Circuit Court correctly enforce a named driver exclusion in accordance with its plain language, the plain language of the excluded driver statute, and two prior South Carolina Supreme Court decisions to hold that coverage under the Progressive policy does not apply when a vehicle is operated by an excluded driver?

SUMMARY

Appellant Gloria Oliver seeks uninsured motorist ("UM") coverage under a policy issued by Progressive Northern Insurance Company ("Progressive") to Sharon Prothro. At the time of the subject auto accident, Oliver was a passenger in a vehicle operated by Richard Prothro – an excluded driver. When Sharon purchased the policy, she chose to sign a named driver exclusion, stating that coverage would not apply when any vehicle was operated by her husband Richard. Despite the plain language of the named driver exclusion, Oliver argues that the excluded driver agreement cannot apply to her claim for UM coverage. Thus, the issue before the Court is whether a named driver exclusion applies to a passenger's claim for UM coverage.

The South Carolina Supreme Court answered the very issue before this Court in *United Services Automobile Association v. Pickens*:

> This case requires us to determine whether Section 38-77-340 of the South Carolina Code (2015) permits a named driver exclusion that precludes uninsured motorist (UM) coverage to a passenger injured in an accident involving an unknown driver. We hold that it does.

434 S.C. 60, 62, 862 S.E.2d 442, 443 (2021). Thus, Appellant's claim fails as a matter of law.

STATEMENT OF THE CASE

On January 23, 2019, Progressive filed this declaratory judgment action seeking enforcement of a named driver exclusion to Appellant's claim for liability and UM coverage. On April 25, 2019, the Circuit Court entered an Order of Default as to Richard and Sharon Prothro. (R. pp. 11-12). Appellant filed an Answer on May 15, 2019.

On September 13, 2019, Progressive filed a Motion for Summary Judgment. (R. pp. 1022-1115). Appellant opposed the Motion, but she did not file a countermotion. On September 14, 2020, the Honorable Kristi F. Curtis heard arguments on Progressive's Motion via videoconference. At the hearing, Judge Curtis indicated she would be denying Progressive's Motion and that she intended to find that UM coverage applied under the Policy. However, there was no countermotion on which the Court could rule. (R. p. 1). As a result, the parties agreed that Appellant would file a motion for summary judgment for the Court's consideration. In the meantime, no order was entered on Progressive's Motion.

On May 12, 2021, before Appellant filed her motion, the South Carolina Supreme Court issued its decision in *Nationwide Insurance Company of America v. Knight*, 433 S.C. 371, 858 S.E.2d 633 (2021), holding that an excluded driver provision applied to underinsured motorist coverage. Appellant then filed her Motion for Summary Judgment on July 12, 2021. (R. pp. 93-94). On July 28, 2021, Progressive notified the Circuit Court of the Supreme Court's decision in *Knight* and also informed the Court that the Supreme Court had recently heard oral arguments in *Pickens*. As a result, Progressive asked the Court to hold its ruling in abeyance until the Supreme Court ruled in *Pickens*. (R. p. 397).

On August 11, 2021, before the Court ruled on the cross motions, the South Carolina Supreme Court issued its decision in *Pickens*. On August 20, 2021, Progressive submitted the *Pickens* decision as supplemental authority. (R. pp. 402-403). Judge Curtis asked for Appellant's position on the issue and offered to hold a WebEx hearing. (R. pp. 407-408).

The case was placed on the Non-Jury Trial Roster for the week of January 10, 2022. On January 4, 2022, counsel for Progressive wrote Judge Curtis and asked for a status conference. (R. pp. 410-411). Counsel for Appellant responded, and the Court ultimately ordered the parties to submit supplemental briefing on the Summary Judgment Motions. Progressive submitted its supplemental memorandum on January 17, 2021, and Appellant submitted a supplemental memorandum on January 18, 2021. (R. pp. 1015-1021).

On March 8, 2022, Judge Curtis ultimately found the Supreme Court's decisions in *Pickens* and *Knight* required her to change course, and she held Progressive was entitled to summary judgment, finding:

> The plain language of the [named driver exclusion] statute, as interpreted by the Supreme Court in *Pickens*, leaves no room for Oliver's arguments to the contrary. The question of whether she was an innocent guest passenger is irrelevant. The sole question is whether the excluded driver was operating the vehicle at the time of the collision. Because he was, the exclusion applies.

(R. p. 4). On March 15, 2022, Appellant moved to reconsider, and Judge Curtis denied the Motion on April 25, 2022.

STATEMENT OF THE FACTS

A. Sharon Prothro purchased an automobile insurance policy from Progressive and chose to exclude coverage while her husband Richard Prothro operated any vehicle.

On April 2, 2009, Sharon Prothro applied for automobile insurance from Progressive. (R. pp. 1029-1030 ¶ 4, 1031-1041). Under the "Drivers and household residents" portion of the application, Sharon's husband Richard was listed as "Excluded." (R. pp. 1031-1041). Sharon signed the application, confirming that the application reflected the coverages she was requesting. (*Id.*).

While applying for coverage, Sharon also signed a form titled "Named Driver Exclusion Election." (R. p. 1035). The excluded driver form identified Richard Prothro as an excluded driver, stating:

> No coverage is provided for any claim arising from an accident or loss involving a motorized vehicle being operated by an excluded person. . . .
>
> I declare that the driver's license of the excluded persons named in this Named Driver Exclusion election has been turned into the Department of Motor Vehicles, or that an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

(*Id.*). Thus, Sharon Prothro – the named insured – agreed that coverage under the Policy would not apply for any claim arising from an accident involving a motor vehicle operated by Richard Prothro.

The excluded driver form was approved by the South Carolina Department of Insurance, and it is undisputed that the execution of the form complied with South Carolina's excluded driver statute. (R. pp. 1087-1115).

B. Appellant Gloria Oliver was injured while riding as a passenger in a vehicle operated by Richard Prothro – who was allegedly drunk and unlicensed.

On July 24, 2016, Gloria Oliver was a passenger in a vehicle operated by Richard Prothro. According to Oliver, Richard was unlicensed and drunk. She claims Richard had consumed a half pint of vodka within the three-hour period immediately preceding the wreck. (Appellant's Br. p. 9). However, Appellant also admits she rode with Richard to the Walmart where the incident occurred. (Appellant's Br. p. 8). After Appellant finished her shopping, she got into the car. While still in the parking lot, Richard allegedly lost control of the vehicle while driving backwards at a high rate of speed, colliding with several vehicles.

Richard's license was suspended in or around 2009 due to a DUI. (R. p. 186, line 12-p. 187, line 14). As a result, Richard did not have a license on the date of the accident. (R. p. 186, lines 12-24). It is undisputed that Richard was operating the vehicle at the time of the accident.

As a result of the accident, Appellant Oliver filed a Summons and Complaint naming Richard and Sharon Prothro as defendants. (R. pp. 16-17 ¶¶ 10-15). This declaratory judgment action followed.

STANDARD OF REVIEW

"When parties file cross-motions for summary judgment, the issue is decided as a matter of law." *Pickens*, 434 S.C. at 64, 862 S.E.2d at 444 (citations omitted). "Further, the interpretation of a statute is a question of law, which [appellate courts] review de novo." *Id.* (citations omitted).

Although the Circuit Court's interpretation of a statute is reviewed de novo, "[t]he decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. Const. Art. V, § 9. Thus, the Supreme Court's interpretation of the excluded driver statute is binding here.

ARGUMENT

The Supreme Court's decision in *Pickens* controls this case. According to the plain terms of the excluded driver statute, coverage "shall not apply" when the excluded driver is operating a vehicle, and the exclusion is binding upon "every insured to whom the policy applies." S.C. Code § 38-77-340. Applying this same statutory language to a passenger in a vehicle operated by an excluded driver, the Supreme Court in *Pickens* held the exclusion applies to all coverage, including UM coverage.

Rather than address the named driver exclusion statute, Appellant asks this Court to simply ignore the excluded driver form altogether, arguing the exclusion in her case violates some unwritten public policy. However, the Supreme Court in *Knight* made clear that public policy is established by the General Assembly in the State's insurance statutes, not by courts. Appellant fails to identify any statute that prohibits the excluded driver agreement here. In fact, Appellant's

Brief fails to even reference the named driver exclusion statute. Appellant seems to hope that ignoring the statute will somehow negate its impact. As the Supreme Court held in *Knight* and in *Pickens*, the excluded driver statute expressly permits the exclusion here. Therefore, the Circuit Court's decision granting Progressive's Summary Judgment Motion was proper and should be affirmed.

I. The Supreme Court's decision in *Pickens* applies directly to the facts of this case and is binding.

Appellant claims a named driver exclusion is unenforceable as to her UM claim because she was an innocent guest passenger. The South Carolina Supreme Court in *Pickens* addressed this very question, and the "decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. Const. Art. V, § 9. Therefore, the Supreme Court's holding in *Pickens* controls this case.

In *Pickens*, Belinda Pickens was a named insured and a guest passenger in her vehicle operated by her excluded driver son. The vehicle was rear ended by a John Doe motorist, causing her son to run off the road and strike a brick wall. (*Belinda Pickens v. John Doe*, C/A No. 2018-CP-40-01474, Compl. ¶¶ 6-8). Pickens had previously executed a named driver exclusion form naming her son as an excluded driver. Despite the excluded driver provision, Pickens sought UM coverage, arguing that the excluded driver statute only applied to liability coverage and that UM coverage was statutorily mandated. The Supreme Court disagreed:

> We recognize that subsection 38-77-150(A) requires all insurance policies to include UM coverage.... However, excluding a named driver from all forms of coverage – even mandatory coverage – is

> permitted by section 38-77-340 and therefore does not violate section 38-77-150. Indeed, liability coverage is also mandatory, and Pickens does not suggest that it cannot be excluded under section 38-77-340.

Pickens, 434 S.C. at 66, 862 S.E.2d at 445. Thus, the fact that UM coverage is statutorily mandated was inapposite.

Like Appellant here, Pickens also argued that allowing the insurer to exclude UM coverage for a guest passenger defeated the purpose of UM coverage, but the Supreme Court rejected that argument:

> Pickens also argues that to allow USAA to exclude UM coverage here defeats the purpose of UM, particularly if the uninsured motorist at fault in this case was an unknown driver rather than Simms. We believe section 38-77-340 expressly answers that argument by stating: "The agreement, when signed by the named insured, *is binding upon every insured to whom the policy applies* and any substitution or renewal of it.

Id. at 66-67, 862 S.E.2d at 445 (quoting S.C. Code § 38-77-340) (emphasis in original).

Put simply, the Supreme Court has addressed and answered the issue before this Court. Appellant claims she cannot be excluded from UM coverage because she was an innocent guest passenger – the *Pickens* Court rejected that argument. Appellant claims application of the exclusion to her defeats the public policy behind the UM statute – the *Pickens* Court rejected that argument. The Supreme Court's holding in *Pickens* is unequivocal: "***We hold . . . where the parties agree to exclude coverage when a named driver is operating a vehicle, that exclusion extends to all forms of coverage in the policy.***" *Id.* at 65, 862 S.E.2d at 445. That is why the Circuit Court reversed itself after learning of the *Pickens* decision. Lower courts are bound by the Supreme Court's interpretation of a statute. *See* S.C. Const. Art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Thus, when the Supreme Court has already given its interpretation of a statute, the Circuit Court's role – and even this Court's role –is limited

to applying that interpretation. Therefore, the *Pickens* decision is controlling, and the Circuit Court should be affirmed.

II. The Supreme Court in *Knight* held that courts must enforce contractual provisions according to their plain terms unless they violate a specific statutory provision.

At its core, Appellant's argument relies on a plea for this Court to ignore the named driver exclusion in the policy and the named driver exclusion statute by invoking some generic public policy in favor of guest passengers. However, the Court's role is to enforce contracts as written unless they violate a specific statute enacted by the General Assembly. Far from prohibiting the excluded driver agreement, South Carolina Code § 38-77-340 expressly authorizes the exclusion. Therefore – as the Supreme Court held in *Knight* and *Pickens* – Appellant's public policy arguments fail.

"As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Knight*, 433 S.C. at 375, 858 S.E.2d at 635 (citation omitted). The Supreme Court in *Knight* held that the General Assembly – and not courts – sets forth public policy in the insurance field: "Rather, the General Assembly establishes the public policy relating to automobile insurance and enacts statutes to let the public and the courts know what that public policy is." *Id.* at 376, 858 S.E.2d at 635. The Supreme Court declined to adopt any form of court-created public policy: "To be clear . . . this Court has no authority to invalidate an automobile insurance policy provision simply because we believe it is inconsistent with our own notation of 'public policy.'" 433 S.C. at 376, 858 S.E.2d at 635. Therefore, unless Appellant points to a specific statute that prohibits the excluded driver agreement, the contract must be enforced as written.

Rather than prohibit the excluded driver provision, the General Assembly specifically authorized excluded driver provisions. The excluded driver statute provides, in pertinent part:

> Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. . . .

S.C. Code § 38-77-340.

A plain reading of the statute refutes Appellant's argument here. For example, Appellant argues that she must receive UM coverage because she qualifies as an "insured" under South Carolina Code § 38-77-30(7). (Appellant's Br. pp. 7 & 12). However, the opening line of the excluded driver statutes states: "Notwithstanding the definition of 'insured' in Section 38-77-30...." S.C. Code § 38-77-340. Thus, the General Assembly intended the excluded driver agreement to override coverage that would otherwise apply to a statutory "insured."

Relying on the *Rollison*[1] case, Appellant also argues that, as an "insured" guest passenger, she must receive UM coverage even if the policy will not provide liability coverage. However, two parts of the excluded driver statute refute Appellant's position. First, the statute states that "coverage under such a policy of liability insurance ***shall not apply*** while the motor vehicle is being operated" by the excluded driver. S.C. Code § 38-77-340 (emphasis added). Thus, when Richard Prothro operated a vehicle, coverage under the Progressive policy did not apply.[2] Second,

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[1] *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008).

[2] The Supreme Court in *Knight* held that this language applied to all coverage under the policy, not just liability coverage. *Knight*, 433 S.C. at 380, 858 S.E.2d at 637 ("Construing section 38-77-340 in this way, [Knight] argues, indicates the General Assembly intended to allow such a provision to apply only to liability coverage, not to UIM coverage. We disagree.")

the statute states the "agreement, when signed by the named insured, is binding upon ***every*** insured to whom the policy applies . . .." S.C. Code § 38-77-340 (emphasis added). Appellant's entire argument is prefaced on her claim that she is an insured "to whom the policy applies." Therefore, the excluded driver agreement is binding upon her.

Contrary to Appellant's generalized arguments about public policy, the General Assembly enacted the excluded driver statute so that insureds could still afford coverage when they live with a difficult-to-insure relative. *See, e.g., Lincoln Gen. Ins. Co. v. Progressive Northern Ins. Co.*, 406 S.C. 534, 541, 753 S.E.2d 437, 441 (Ct. App. 2013) (citing *Lovette v. U.S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980)). Richard Prothro is a perfect example. He had a suspended license as a result of two DUIs. (R. p. 186, line 14-p.187, line 9). By excluding coverage when her husband operated any vehicle, Sharon Prothro was able to purchase affordable insurance for herself and her vehicle. Allowing Appellant to recover UM benefits for liability arising out of Richard's operation of a vehicle would defeat this statutory public policy. If UM coverage applies when Richard operates a vehicle, then Progressive would simply charge the premium that it would have applied for Richard's liability coverage to the UM coverage – defeating the goal of making coverage affordable. Therefore, the General Assembly held that coverage "shall not apply" and that the exclusion is binding upon "every insured to whom the policy applies." S.C. Code § 38-77-340. By drafting the exclusion to be all-encompassing, the General Assembly was able to ensure that people like Sharon Prothro could purchase affordable insurance.[3]

[3] As the Circuit Court acknowledged, the facts of this case are even more compelling for non-coverage than those at issue in *Pickens*. (R. p. 4). In *Pickens*, the injuries were caused by a John Doe, hit-and-run motorist. Although the excluded driver was operating a vehicle at the time of the accident, he did not cause the accident. In stark contrast here, the only driver involved in Appellant's accident was Richard Prothro – the excluded driver. Forcing Progressive to pay UM

Far from violating public policy, the excluded driver form is expressly authorized by South Carolina's excluded driver statute. Therefore, the exclusion must be enforced as written, and Appellant's public policy arguments – which are contrary to South Carolina's insurance statutes – are unavailing.

III. Appellant's reliance on *Rollison* and *Schmidt* is fatally flawed because those cases did not involve excluded driver endorsements.

Appellant relies almost entirely on the Supreme Court's decision in *Rollison* and its predecessor *Unisun Insurance Company v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000). However, neither of those cases involved an excluded driver endorsement or a statutory exclusion. Therefore, as the South Carolina Supreme Court held in *Pickens*, those cases are inapposite.

Appellant argues that *Schmidt* and *Rollison* stand for the rule that a passenger who qualifies as a "guest" is entitled to UM coverage even if the policy insuring the vehicle does not provide liability coverage. As to *Schmidt* – the precursor to *Rollison* – the Supreme Court in *Pickens* expressly held that the case was not relevant when dealing with an excluded driver provision, holding *Schmidt* "did not involve an agreed-upon named driver exclusion and [was] therefore inapposite." *Pickens*, 434 S.C. at 66 n.5, 862 S.E.2d at 445 n.5. This same distinction applies with equal force to *Rollison*.

Even if the Court were to consider *Rollison* – after the Supreme Court in *Pickens* held that cases involving excluded driver agreements are different – the case does not address the excluded driver agreement or the excluded driver statute. In *Rollison*, the question was not whether an

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coverage for injuries caused by Richard's operation of a vehicle would ignore the plain language of the excluded driver agreement, the intention of the parties to the Progressive contract, and the purpose of the excluded driver statute. However, the Court need not address these issues because the Supreme Court has already addressed this issue in *Pickens*.

excluded driver endorsement applied, but whether certain occupants of the vehicle qualified as insureds. Here, Progressive does not dispute that Appellant qualifies as an insured. However, merely qualifying as an insured does not entitle her to UM coverage because the policy contains an applicable exclusion – the excluded driver exclusion. Because the exclusion applies, Appellant's status as an "insured" is immaterial.

The insurer in *Rollison* argued that the at-fault driver was not a permissive user – so there was no liability coverage for him – and the passengers were not "guests" because they were not authorized by the named insured – so there was no UM coverage. The *Rollison* court took a two-step analysis. First, it looked at whether the driver was a permissive user. The factfinder found he was not, and thus he was not entitled to liability coverage. 378 S.C. at 606, 663 S.E.2d at 486. However, a finding that the driver was not an insured for liability coverage did not otherwise invalidate the remainder of the policy. Therefore, once it was determined that there was no coverage under the liability coverage part, the Supreme Court moved on to determine whether the claimant guest passengers were entitled to coverage under the UM coverage part. *Id.* at 608, 663 S.E.2d at 488. Even though liability coverage did not apply, the Supreme Court found that the passengers qualified as "guests" under the UM coverage. *Id.* at 612, 663 S.E.2d at 490.

The two-part analysis in *Rollison* does not work when there is a named driver exclusion. Unlike the permissive user analysis in *Rollison*, coverage under the entirety of the Progressive Policy "shall not apply" when Richard Prothro operated a vehicle. S.C. Code § 38-77-340. Specifically, the Named Driver Exclusion form stated, "No coverage" – an unqualified term – "is provided for any claim" – again, unqualified – "from an accident or loss involving a motorized vehicle being operated by an excluded person." This language is consistent with the Supreme Court's holding in *Pickens* that "when a named driver is operating a vehicle, that exclusion extends

to all forms of coverage in the policy." 434 S.C. at 65, 862 S.E.2d at 445. Thus, when Richard Prothro was operating the vehicle, no coverage applied for any claim – whether under liability, collision, UM, or otherwise. Simply put, the Policy was not in effect when Richard Prothro was behind the wheel. The question of whether Appellant was a "guest" is simply irrelevant because there was no coverage in effect at the time of the accident.

CONCLUSION

After reviewing the Supreme Court's decisions in *Knight* and *Pickens*, the Circuit Court correctly found itself bound to apply those decisions and to enforce the excluded driver provision as written. The Supreme Court's interpretation of South Carolina Code § 38-77-340 and its holdings in *Pickens* and *Knight* are squarely on point and binding in this case. Therefore, the Circuit Court should be affirmed.

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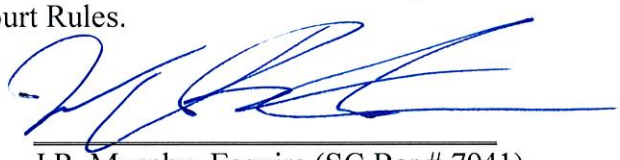
CERTIFICATE OF COMPLIANCE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Final Brief of Respondent complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Appellate Court Rules.



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