

THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Trial Case No.: 2009-CP-04-00907

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No.: 2016-000679

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SC Court of Appeals

Nationwide Mutual Fire Insurance Company Appellant

vs.

Sharmin Christine Walls, Randi Harper, Wendy Timms
in her capacity as Personal Representative of the Estate
of Christopher Adam Timms, Deborah Timms, Defendants,
Of whom, Sharmin Christine Walls, Randi Harper, and
Wendy Timms in her capacity as Personal Representative of The
Estate of Christopher Adam Timms, are the Respondents Respondents

**FINAL BRIEF OF RESPONDENTS SHARMIN CHRISTINE WALLS AND
RANDI HARPER (SUBMITTED JOINTLY)**

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STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court Judge was correct when he ruled that Nationwide's "step-down" provisions violated S.C. Code Ann. §38-77-142(c) and were unenforceable and void per Williams v. Government Employees Insurance Company (GEICO 409 S.C. 586, 762 S.E. 2d 705 (2014)).**

STATEMENT OF THE CASE

This appeal arises out of a one vehicle automobile accident involving Korey Mayfield as a driver. Mayfield was driving a Chevrolet Lumina insured by Nationwide and owned by Respondent Sharmin Walls. Walls, Christopher Timms, and Randi Harper were passengers in the vehicle when State Trooper Travis Wilson observed Mayfield crossing the yellow line and speeding. Trooper Wilson activated his blue lights. Mayfield ultimately lost control of the vehicle and ran off the road in a single-car accident that caused Timms' death, and severe injuries to Walls and Harper.

The Nationwide policy insuring the Chevrolet Lumina provided liability limits of \$100,000 per person and \$300,000 per accident. However, the policy included two exclusions relevant to this appeal: (1) a flight from law enforcement exclusion and (2) a felony exclusion. The exclusions applied "with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law..." (R. p. 109, ¶14). There was no underinsured motorist coverage carried for the vehicle. (R. p. 119, lines 21 - 22). Therefore, the recoveries for Walls and the other passengers in the Lumina are limited to the applicable liability coverage.

After the accident, Nationwide tendered the minimum limits required by the South Carolina Financial Responsibility Act, \$50,000 to the Respondents here.

Nationwide then filed this declaratory action seeking a declaration applying the felony and flight from law enforcement exclusions. The case came before the Honorable J. Cordell Maddox, Jr. for a bench trial on September 12, 2013.

On August 18, 2014, the Circuit Court entered an Order in favor of Respondents and against Nationwide (R. pp. 11-17). The August 18 Order found that Mayfield was a non-permissive user of the vehicle and, therefore, Respondents were entitled to uninsured motorist coverage (R. p. 16). On August 26, 2014, Nationwide served a Motion to Alter or Amend the August 18 Order. (R. pp. 83-84, 85-106). In particular, Nationwide argued that the Respondents had failed to raise the issue of Mayfield's non-permissive use in their pleadings, and that Respondents were precluded from seeking uninsured motorist coverage because they had recovered liability payments equal to the mandatory minimum limits from two different insurers. (R. P. 86). Nationwide also argued that the Order misapplied South Carolina law, failed to make the key factual determinations of whether Mayfield was fleeing from law enforcement at the time of the accident and committing a felony, and made factual determinations that were not supported by the record (R. pp. 88-92, 103-104). The Circuit Court held a hearing on Nationwide's Motion to Alter or Amend on March 6 2015. At the hearing Respondents withdrew their contention that the uninsured motorist coverage applied. (R.p. 123, lines 10-23). Furthermore, the Circuit Court found that Mayfield was fleeing from law enforcement at the time of the accident. (R. p. 122, lines 12-17). Subsequently, on February 26, 2016, the Circuit Court entered an Order finding Mayfield was fleeing from law enforcement at the time of the accident and that his conduct constituted a felony. (R. p. 5).

Nonetheless, the Circuit Court ruled in favor of the Respondents, based on the

Supreme Court's recent decision in Williams v. Government Employees Insurance Company 409 S. C. 586, 762 S.E. 2d 705 (2014), which held that any exclusion in an automobile liability policy issued by South Carolina that reduces the applicable limits of coverage to the minimum amount required by the financial responsibility laws is void and violates public policy pursuant to South Carolina Code Ann. §38-77-142(c). (R. pp. 6, 8, 9). This appeal followed.

STATEMENT OF FACTS

The facts of this case were largely stipulated at trial. Walls owned a Chevrolet Lumina insured by Nationwide (R. p. 2). The policy provided liability limits of \$100,000 per person, \$300,000 per accident. (R. p. 109, ¶14). Walls' medical bills exceeded \$200,000.00. However, the policy contained an exclusion that applied to any coverage in excess of the State's mandatory minimum limits if bodily injury occurred while an insured was fleeing from law enforcement or committing a felony;

B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:

6. Bodily injury or property damage caused by:
 - (a) you;
 - (b) a relative; or
 - (c) anyone else while operating your auto;
 - (1) while committing a felony; or
 - (2) while fleeing a law enforcement officer

(R. pp. 109-110, ¶14).

On July 11, 2008, Walls, Mayfield, Harper and Timms had been at Walls' residence when they left as a group with Mayfield driving Walls' Chevrolet Lumina (R. pp. 246-248). Trooper Travis Wilson observed the vehicle on South Carolina Highway 81 in Anderson, crossing the yellow line and going approximately 12 miles an hour over the speed limit. (R. pp. 108, 248). Trooper Wilson decided to pull the vehicle over and activated his blue lights. (R. p. 108, ¶4). While driving down 81 South, Trooper Wilson's vehicle reached speeds of 109 miles per hour in an effort to keep up with the Lumina (R. p. 108, ¶5).

After several turns on secondary roads, Trooper Wilson received instructions to terminate the pursuit, which he did. (R. p. 109, ¶¶ 6-8). However, by the time Trooper Wilson deactivated his siren and blue lights, the Lumina was out of sight. (R. p.109, ¶9).

Approximately a mile down the road, Mayfield had lost control of the Lumina and ran off the road in a single vehicle accident. (R. p. 109, ¶11). Trooper Wilson came upon the scene within a minute-and-a-half of terminating the chase. (R. p. 109, ¶12). The Greenville County Accident Reconstruction Team investigated and determined that Mayfield was traveling a minimum of 72 miles per hour when he lost control. (R. p. 109, ¶13 and R. p. 194)

. The speed limit on that portion of Leatherdale Road was 35 miles per hour (R. p. 109, ¶13). Timms died as a result of the accident, and Mayfield, Walls and Harper each sustained serious injuries.

Mayfield was charged with and ultimately pled guilty pursuant to North Carolina v. Alford 400 U.S. 25, 91 S.C. 160 (1970), to reckless homicide, a felony. (R. p. 110, ¶15). The Circuit Court made a factual determination that Mayfield was fleeing a

law enforcement officer at the time of the accident (R. p. 4). The Circuit Court based its factual determination on damage to the vehicle, the speed of the vehicle at the time of the accident, the dash cam video, witness statements, and the timeline (R. pp. 4-5). Even though Trooper Wilson had terminated the chase, the Circuit Court found that Mayfield's unlawful course of conduct and manner of driving continued up until the time of the crash.

Nationwide agreed to tender its \$50,000 of undisputed liability coverage, which the Respondents accepted. (R. pp. 253-263); Furthermore, Mayfield had excess liability coverage under a policy of insurance issued by State Auto. State Auto also tendered its liability limits of \$50,000. (R. pp. 20-22, 26-30). Then, Nationwide filed this declaratory judgment action seeking application of the felony and "flight from law enforcement exclusions." (R. pp. 33-40).

The Respondents do not contest that Mayfield was fleeing law enforcement and committing a felony at the time and have not appealed the lower Court's ruling in that regard. They maintain, however, that regardless of the language of the policy limiting coverage when an insured is fleeing law enforcement or committing a felony, the step-down provision is void and violates public policy pursuant to South Carolina Code Ann. §38-77-142(c). (R. p. 6 and pp. 8-9), and Williams.

STANDARD OF REVIEW

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

whether coverage exists under an insurance policy, the action is one at law.” S.C. Farm Bureau Mut. Ins. Co. v. Kennedy 398 S.C. 604, 610, 730 S.E. 2d 862, 864 (2012) (citation omitted). “In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them” Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46-47, 717 S.E. 2d 589, 592 (2011) (citation omitted); accord Townes Assocs. v. City of Greenville 266 S.C. 81, 86, 221 S.E. 2d 773, 775 (1976). See Williams v. Government Employees Ins. Co. (GEICO) 409 S.C. 586, 762 S.E. 2d 705 (2014).

ARGUMENT

The step-down provision limiting the liability coverage in the Nationwide policy is void and violates public policy as it is in direct contravention of the mandates of South Carolina Code Annotated Section 38-77-142 (c) and Williams v. Government Employees Insurance Company 409 S.C. 586, 762 S.E. 2d 705 (2014).

In violation of S.C. Code Ann. §38-77-142, the Nationwide policy improperly excludes liability coverage in excess of the State’s minimum required limits of coverage while an insured is committing a felony or is fleeing from law enforcement. It is conceded by the Respondents that the step-down provision in the Appellant’s policy unambiguously limits coverage through its provision where the insured driver (1) while committing a felony or (2) while fleeing a law enforcement officer. However, in Williams, it was likewise the case that a step-down provision was found to unambiguously reduce the limits of coverage, but was still void for a violation of public policy. Williams at 711-712, 717.

In Williams the GEICO policy at issue sought to reduce liability coverage available to an injured family member of the insured, commonly known as a “family step-down provision”. The Court addressed three arguments against the family step-down provision by the personal representatives of the deceased family members affected by the provision.

The personal representatives first argued that the provision was ambiguous. The Court declined to adopt that argument, finding that “it is... apparent upon examination that there is an unambiguous limitation in this regard because it may only be understood one way.” Williams at 711. Here, that the provision is unambiguous is conceded by the Respondents.

Next, the personal representatives argued that public policy was violated by the provision in Williams on the basis that (1) the family step-down provision was in contravention of §38-77-142(c); and (2) that the provision is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.

The Williams Court found that the provision violated public policy on both bases and thus was void. Id. at 717. It should be noted, however, the provision was found to be void on the basis of *either* violation *individually*, and did not require that both bases be present to invalidate the provision.

(a) The Nationwide step-down provision violates S.C. Code Ann. §38-77-142(c) and therefore is void.

While the Appellants have a right to contract with its customers, the right to create a contract to meet their every decision term or condition is not without limits. They are subject to the laws of the State.

“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. *B.L.G. Etners., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E. 2d 327, 330 (1999); *Burns v. State Farm Mut. Auto Ins. Co.* 297 S.C. 520, 523, 377 S.E. 2d 569, 570 (1989); *Cobb v. Benjamin*, 325 S.C. 573, 580-81, 482 S.E. 2d 589, 593 (Ct. App. 1997). While parties are generally permitted to contract as they see fit, freedom of contract is not absolute and coverage that is required by law may not be omitted. *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 214 S.E. 2d 818, 820 (1975). Statutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid. *Allstate Ins. Co. v. Thatcher*, 283 S.C. 585, 587, 325 S.E. 2d 59, 61 (1985); *Jordan*, 264 S.C. at 297, 214 S.E. 2d at 820; *Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 319, 195 S.E. 2d 706, 707 (1973).”

Williams v. Gov’t Employees Ins. Co. (GEICO) 409 S. C. 586, 598-99, 762 S.E. 2d 705, 712 (2014).

Here. S. C. Code Ann. §38-77-142(c) limits the Appellant’s right to a step-down in coverage.

“(c) Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void. S.C. Code Ann. §38-77-142(c) (2002).”

The Williams Court found that S.C. Code Ann. §38-77-142(c) prohibits reduction of the liability limits stated in the declarations page of the policy through the use of a policy step-down provision. The language set forth below effectively answers and negates the Appellant’s argument as to “within the coverage/within the limits”. The

Declaration Page of the Walls policy is essentially the same as that referenced in the Williams case. (Walls Nationwide Policy, p. 1).

“In viewing the plain wording of §38-77-142, we find subsections (A) and (B) require a policy for liability insurance to contain a provision insuring the named insureds and permissive users against liability for damage incurred “within the coverage of the policy”. Subsection (B) additionally contains a provision regarding notice that states the mere failure to turn over a motion or complaint will not void coverage. Finally, subsection (c) provides that no policy provision may limit *or reduce* the coverage required by *this section* which refers to section 38-77-142, or else it is void.

We think it is significant that §38-77-142 provides insurers must provide liability coverage to insureds “within the coverage of the policy” and may not limit or reduce liability coverage in the policy below the amount provided *in this section* meaning §38-77-142. Thus, it is the face amount of the coverage that is relevant under §38-77-142, not the statutory minimum limits of liability coverage set forth in §38-77-140, which are not even mentioned in the statute”.

Therefore, once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage (emphasis added). Any other interpretation of §38-77-142(c) would render the section useless, and the General Assembly is presumed not to perform useless acts. See *Denene, Inc v. City of Charleston*, 352 S.C. 208, 212, 574 S.E. 2d 196, 198 (2002). (“The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” (Citing *TNS Mills, Inc. v. S.C. Dept. Of Rev* 331 S.C. 611, 503 S.E. 2d 471 (1998)). After agreeing on a policy with \$100,000 in stated liability coverage for the named insureds, GEICO should not be permitted to subsequently reduce it with what it deems an “exclusion” in the policy.

Williams vs. Gov’t Employees Ins. Co. (GEICO), 409 S.C. 586, 604 762 S.E. 2d 705, 715 (2014).

The Williams case is directly on point with the case now before the Court.

Nationwide issued a policy to Sharmin Walls providing a face amount of coverage of 100,000/300,000 split limits liability coverage in the declarations page of the policy.

The Appellant’s step-down provision conflicts with the liability limits stated in the declarations and purports to effectively retract the stated coverage. This is precisely the actions that the Williams Court found to be prohibited.

The step-down provision in this case violates public policy because it violates the mandates of S.C. Code Ann. §38-77-142(c) as interpreted by the Supreme Court in Williams. The provision is therefore void.

“A provision that is against public policy is void *ab initio* and, because it is deemed legally never to have come into existence, it is incapable of being enforced by courts. 16 Richard A. Lord, *Williston on Contracts* §49:12 (4th Ed. 2000). We see no reason to depart from this procedure here, as suggested in the concurrence/dissent, as it would be a hollow victory indeed for the prevailing parties if we were to enforce the offending provision here and restrict relief to prospective cases only. Where courts have found insurance provisions to be void against public policy, there have, as a matter of course, refused to give any effect to those provisions in the appeals before them. See generally *Lewis v. W. Am. Ins. Co.*, 927 S.W. 2d 829, 836 (Ky. 1996); *Watters v. Dairyland Ins. Co.* 50 Ohio App 2d 106, 361 N.E. 2d 1068 (1976); *Ryan vs. Knoller* 695 A. 2d 990 (R.I. 1997)”

Williams v. Gov’t Employees Ins. Co. (GEICO) 409 S.C. 586, 608, 762 S.E. 2d 705, 717 (2014).

The Respondents, therefore, are entitled to have the policy construed in the absence of the step-down provision. Thus the applicable policy limits are \$100,000/\$300,000.

(b) The Nationwide step-down provision violates public policy of the State in that the provision is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare and therefore is void.

The step-down provision in the Nationwide policy also has the effect of eliminating coverage to the named insured, Sharmin Walls, who was an innocent passenger, as well as the purchaser of the \$100,000 coverage, in addition to the other innocent passengers. This is similar to the Factory Mutual Liability Insurance Company of America v. Kennedy 256 S.C. 376, 380-81, 182 S.E. 2d 727, 729 (1971) where the

Court stated “Liability insurance not only affords protection to insured motorists, it serves the important public purpose of affording protection to innocent victims of motor vehicle accidents”, *Williams supra*, p. 716.

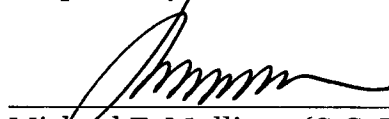
The Circuit Court recognized the inequities of this case as applied to the innocent passengers in its holding as violating the public policy of this State. See Unison Insurance Company vs. Schmidt 339 S.C. 362, 529 S.E. 2d (2000). As stated in the *Williams* case *supra*, “it [the step-down provisions] even reduces the policy’s coverage to the *named insureds*... The legislative purpose of affording protection to the innocent victims of motor vehicle accidents is eviscerated by the GEICO’s reduction in coverage ...”

The argument set forth in the Brief of Appellants would require that the Court ignore the plain meaning of S.C. Code Ann. §38-77-142 and the plain meaning and statements of law set forth by the Supreme Court in the *Williams* case.

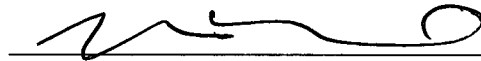
CONCLUSION

For the reasons stated above, the holding by the Honorable Cordell Maddox should be upheld on the basis that the step-down provisions contained in the Nationwide Policy violate S.C. Code §38-77-142 and are unenforceable pursuant to the Supreme Court's holding in Williams v. Government Employees Insurance Company.

Respectfully submitted,



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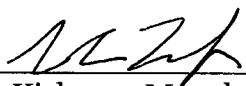
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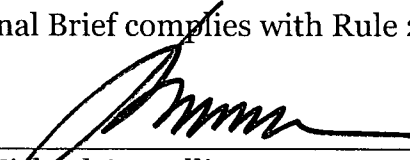
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CERTIFICATE OF COUNSEL

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



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