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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2024-000136

The Cincinnati Specialty Underwriters Insurance Company, Appellant,

v.

Zapp Scooters Inc. d/b/a Zapp Ride Share, Frank Scozzafava, and Michael Holland, Respondents,

---

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

I. Underlying Personal Injury Action

This insurance coverage declaratory judgment action arises out of a personal injury action filed by Respondent Michael Holland ("Holland") in Richland County, South Carolina, on June 15, 2019. (R. pp. ____; Holland Complaint). Mr. Holland's state court Complaint (the "Holland Complaint") alleged causes of action against defendants Zapp Scooters, Inc., and Frank Scozzafava arising out of an alleged accident in which Mr. Holland alleged that a scooter rented from Zapp Scooters, Inc. malfunctioned while Mr. Holland was "traveling down Main Street in Columbia" and threw Mr. Holland over the handlebars, causing injury. (*Id.* at ______). According to the Complaint, "Plaintiff and the cycle slid down a hill and across the pavement until eventually coming to an abrupt stop after colliding with a parked vehicle." (*Id.* at ______). On April 8, 2019, Holland filed affidavits of service on Zapp Scooters and Frank Scozzafava, stating that on March 29, 2019, Holland served the Summons and Complaint on Frank Scozzafava, individually and as registered agent for Zapp Scooters, Inc. (R. p. ____; ________________). On May 10, 2019, Holland filed a Motion for Entry of Default based on Frank Scozzafava and Zapp Scooters, Inc.'s failure to timely file an answer or otherwise respond to the Holland Complaint. (R. p. ____; ________________). On May 22, 2019, the Richland County Clerk of Court entered default as to Zapp Scooters, Inc. and Frank Scozzafava. (R. pp. ____; May 22, 2019 Entry of Default).

In September 2019, counsel for Mr. Scozzafava and Zapp Scooters, Inc. filed an appearance and a Motion to Set Aside Default Judgment. On December 30, 2019, the Circuit

Court denied the Motion to Set Aside Default Judgment. (R. pp. ____; December 30, 2019 Order Denying Defendants' Motion to Set Aside Default).

On April 21, 2021, Holland filed a Motion for Judgment by Default. (R. pp. ____; April 21, 2021 Motion for Judgment by Default). An Order Granting Default Judgment was entered June 15, 2021. (R. p. ____; June 15, 2021 Order Granding Default Judgment). The Order indicated that the Circuit Court conducted a hearing on May 11, 2021, at which counsel for Plaintiff and counsel for Mr. Scozzafava and Zapp Scooters, Inc. were present.

The Order found, among other things, that "Defendant Scozzafava was personally served in Arizona where, upon information and belief, he then resided and to where he had moved the electric scooter business previously operated on the University of South Carolina campus." (*Id.* at ______). The Order further found that Defendant Scozzafava was "… personally served at that time as the South Carolina registered agent for Defendant Zapp Scooters, Inc." (*Id.* at ______). However, it found that "Defendants did not answer the Complaint and that by Entry of Default dated May 22, 2019, Defendants were adjudged to be in default." (*Id.* at ______). It also states that "[b]y Order dated December 30, 2019, Defendants' Motion to Set Aside Default was denied." (*Id.* at ______). The Order found that because Mr. Scozzafava and Zapp Scooters, Inc. were in default, "the factual allegations of the Complaint relating to liability are taken as true." (*Id.* at ______). The Order Granting Default Judgment thereafter awarded $99,656.40 in past medical expenses, $75,000.00 in compensation for past and future pain and suffering, $431,576.00 for loss of enjoyment of life and permanent injury, $25,000.00 for disfigurement, and $10,000.00 for inconvenience and disruption of normal daily life. (*Id.* at ______). Altogether, these awards total $641,232.40. (*Id.* at ______). A judgement for this amount was

entered by the Circuit Court on July 28, 2021 against both Mr. Scozzafava and Zapp Scooters, Inc.

II. Declaratory Judgment Action

Based on the underlying Holland Complaint and lawsuit, but prior to the default judgment in the underlying lawsuit, Appellant Cincinnati Specialty Underwriters Insurance Company ("Cincinnati") filed this action on November 13, 2019, seeking declarations that a Cincinnati Commercial General Liability insurance policy issued to Zapp Scooters Inv. DBA Zapp Ride Share (the "Policy") did not provide coverage for the allegations in the underlying Holland Complaint. (R. p. ____; November 13, 2019 Complaint). Cincinnati's declaratory judgment complaint named as defendants Zapp Scooters Inc. DBA Zapp Ride Share ("Zapp"), Frank Scozzafava ("Scozzafava"), and Michael Holland ("Holland"). (*Id.* at ______).

Cincinnati's original Declaratory Judgment Complaint sought a declaration from the Court that the Policy's Absolute Aircraft, Auto or Watercraft exclusion applied such that there was no coverage for the damages sought in the Holland Complaint, which damages allegedly arose out of the ownership, maintenance, use or entrustment to others of an "auto". (*Id.* at ______). Following the Circuit Court's entry of default and denial of the motion to set aside default in the underlying case filed by Mr. Holland, Cincinnati filed an Amended Complaint in the present action on October 2, 2020 ("Amended Complaint"). (R. p. ____; October 2, 2020 Amended Complaint). The Amended Complaint adds a second declaratory judgment cause of action seeking a declaration that Zapp and Scozzafava failed to answer the Holland Complaint and failed comply with the Policy's notice requirements, which substantially prejudiced

Cincinnati, entitling Cincinnati to a declaration that the Policy does not provide liability coverage in relation to the Holland Complaint. (*Id.* at ______).

Zapp and Scozzafava failed to timely answer or otherwise appear in this action, and default was entered against them by Order dated August 5, 2020. (R. p. ____; September 29, 2023 Order Granting Holland's Motion for Summary Judgment at fn. 1).

On September 9, 2021, Cincinnati filed a Motion for Summary Judgment. (R. p. ____; Cincinnati Motion for Summary Judgment). On October 21, 2022, Respondent Holland filed a Motion for Summary Judgment. (R. p. ____; Holland Motion for Summary Judgment). Holland filed a Memorandum of Law in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment on April 12, 2023. (R. p. ____; Defendant Michael Holland's Memorandum of Law in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment). Cincinnati filed a memorandum supporting its Motion for Summary Judgment and in opposition to Michael Holland's Motion for Summary Judgment on May 17, 2023. (R. p. ____; Memorandum Supporting Cincinnati's Motion for Summary Judgment and in Opposition to Michael Holland's Motion for Summary Judgment). On May 23, 2023, Holland filed a Response to Cincinnati's Memorandum. (R. p. ____; Defendant Michael Holland's Response to Plaintiff's Supplemental Memorandum Supporting Motion for Summary Judgment).

The Circuit Court conducted hearings on the cross-motions for summary judgment on May 24, 2023.

After the hearings, on September 29, 2023, the Circuit Court entered an Order denying Cincinnati's Motion for Summary Judgment and granting Holland's Motion for Summary

Judgment. (R. p. ____; September 29, 2023 Order Denying Cincinnati's Motion for Summary Judgment and granting Holland's Motion for Summary Judgment).

Cincinnati filed a Motion to Reconsider on October 9, 2023. (R. p. ____; Motion to Reconsider). The Court denied the Motion to Reconsider in a Form 4 Order on January 2, 2024. (R. p. ____; January 2, 2024 Order Denying Cincinnati's Motion to Reconsider).

Cincinnati filed a Notice of Appeal on January 31, 2024, appealing both the September 29, 2023 Order Denying Cincinnati's Motion for Summary Judgment and granting Holland's Motion for Summary Judgment and the January 2, 2024 Order Denying Cincinnati's Motion to Reconsider. (R. p. ____; Notice of Appeal).

STANDARD OF REVIEW

"Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). Questions of law are reviewed *de novo*. *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019). Thus, "[i]n reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP." *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). Further, "questions of law may be decided with no particular deference to the trial court." *Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434.

In addition, where cross motions for summary judgment are filed and the Court of Appeals reverses the grant of summary judgment to respondent, it may further instruct the trial court to enter judgment in favor of the appellant. *See id.* at 166, 705 S.E.2d at 436 (on cross-motions for summary judgment, reversing trial court's grant of summary judgment to insured, finding that the law

supported the insurer's position, and instructing trial court to enter judgment "in accordance with this opinion").

Rule 56(c), SCRCP provides that a trial court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Therefore, the proper standard in reviewing a motion for summary judgment is the "genuine issue of material fact" standard, "requiring the party opposing the motion show a 'reasonable inference' to be drawn from the evidence." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). "[T]he evidence and the inferences that can be drawn therefrom should be viewed in the light most favorable to the non-moving party." *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

FACTS

Cincinnati filed this declaratory judgment action because Cincinnati's Policy contains an "Absolute Aircraft, Auto or Watercraft" exclusion and Mr. Holland's state court complaint alleges damages arising solely out of an accident involving an "auto" in the form of a moped or electric scooter. Further, in addition, seeks a declaration of no coverage because its insured failed to provide notice of Mr. Holland's lawsuit, failed to answer the lawsuit, and was held in default, ultimately resulting in a default judgment against the insured for $641,232.40, resulting in severe prejudice to Cincinnati.

Cincinnati requests that this Court (1) reverse the Circuit Court's entry of summary judgment in Holland's favor, (2) reverse the Circuit Court's denial of Cincinnati's Motion to Reconsider, and (3) remand this matter for proceedings consistent with this Court's ruling.

I. The Underlying Suit, Entry of Default, and Judgment

As discussed below, there is relatively little dispute regarding the underlying facts. The underlying case, as indicated by the Holland Complaint, alleges that Mr. Holland was injured on October 12, 2018, when a moped or electric scooter he rented from Zapp malfunctioned, throwing him over the handlebars as he was riding it down Main Street in Columbia. (R. p. ____; (Complaint ¶ 6); (Order Granting Default Judgment ¶ 5)). Frank Scozzafava is the sole shareholder and Chief Executive Officer of Zapp. (R. p. ____; (Underlying Compl. at ¶ 4); (Order Granting Default Judgment ¶ 4)). The Underlying Complaint alleges two causes of action: negligence against Defendant Zapp and piercing the corporate veil against Defendant Scozzafava. (R. p. ____; Ex. B, Underlying Compl. ¶¶ 15-24).

On March 26, 2019, Zapp and Scozzafava were served with the Underlying Complaint and failed to timely answer or otherwise defend. (R. p. ____; Order Granting Default Judgment ¶¶ 6-7). By Entry of Default dated May 22, 2019, Zapp and Frank Scozzafava were adjudged to be in default in the underlying action. (Id. at ¶ 7). At no time prior to this entry of default in the underlying action was Cincinnati informed of the Underlying Complaint. (R. p. ____; Aff. of Sheri Bugher ¶¶ 7-9). Cincinnati was first informed of the October 12, 2018 accident and the Underlying Complaint by Michael Holland's counsel on August 16, 2019. (Id. at ¶ 8).

On September 18, 2019, Zapp and Frank Scozzafava moved to set aside entry of default, but this motion was denied on December 30, 2019. (R. p. ____; Order Denying Defendants' Motion to

Set Aside Default). On April 21, 2021, Holland filed a motion for judgment by default. (R. p. ____; Motion for Judgment by Default).

The Circuit Court entered default judgment against the insured on June 15, 2021, for $641,232.40. (R. p. ____; Order Granting Default Judgment). The default judgment order finds, among other things:

- That Mr. Holland's injuries occurred "on October 12, 2018, when an electric scooter he rented from Defendants malfunctioned, throwing Plaintiff over the handlebars…." (*Id.* at 2).
- That defendants were served via personal service on Frank Scozzafava individually and as registered agent for Zapp. (*Id.* at 2).
- That defendants did not answer the Complaint and that by Entry of Default dated May 22, 2019, defendants were adjusted to be in default. (*Id.* at 2).
- That defendants' Motion to Set Aside Default was denied by Order dated December 30, 2019. (*Id.* at 2).
- That defendants and their counsel were served with the motion and notice of the damages hearing. (*Id.* at 2).
- That by nature of the defendants' default, the factual allegations of the Complaint relating to liability are taken as true. (*Id.* at 1).
- That Plaintiff is granted a judgment against defendants totaling $641,232.40.

Following entry of the default judgment order, the Circuit Court entered a judgment against Zapp Scooters, Inc. and Frank Scozzafava on July 28, 2021, which judgment also ended the underlying case. (R. p. ____; July 28, 2021 Judgment).

In short, it is undisputed that Mr. Holland alleges injuries arising out of a moped or motor scooter while he was operating the vehicle on a public road. It is undisputed that the insured was served and did not provide notice to Cincinnati of the Holland Complaint. It is undisputed that Cincinnati had no notice of the lawsuit until after default was entered against the insured. It is

undisputed that Circuit Court denied the insured's Motion to Set Aside Default. It is undisputed that default judgment was entered against the insured as a result. Finally, it is undisputed that Mr. Holland seeks to collect the $641,232.40 from Cincinnati.

II. The Cincinnati Policy

The issues before this Court concern whether, under the facts of this case, Cincinnati's Policy provides coverage. The Policy at issue is a commercial general liability policy Cincinnati issued to Zapp Scooters, policy number CSU0087939, issued for the period from August 9, 2018 to August 9, 2019. (the "Policy"). (R. p. ____; Policy at 2).

Cincinnati's declaratory judgment action sought declarations from the Circuit Court that the Policy does not provide coverage for two principal reasons. First, Cincinnati asked the Circuit Court to find no coverage under the Policy because the Holland Complaint alleges damages arising out of a moped or motor scooter (i.e. an "auto"), and the Policy contains an absolute auto exclusion. Second, Cincinnati asked the Circuit Court to find no coverage under the Policy because the Policy requires the insured to provide Cincinnati notice of lawsuits, which the insured failed to do, resulting in severe prejudice to Cincinnati after the insured was placed in default and Mr. Holland obtained default judgment against the insured.

As to the issue of the absolute auto exclusion, the Policy's insuring provision is relevant because it indicates that Cincinnati provides coverage only to bodily injury to which the Policy applies. In particular, it provides in relevant part as follows:

> **COMMERCIAL GENERAL LIABILITY COVERAGE FORM**
>
> ***
>
> **SECTION I – COVERAGES**
>
> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply….

(R. p. ____; Policy at p. 18).

There are several types of bodily injury to which the Policy does *not* apply, including bodily injury arising out of an "auto". Specifically, the Policy's Absolute Aircraft, Auto or Watercraft Exclusion (referred to herein as the "Absolute Auto Exclusion") provides in relevant part as follows:

EXCLUSION – ABSOLUTE AIRCRAFT, AUTO OR WATERCRAFT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

A. Exclusion **g.** is of Paragraph **2. Exclusions** of **Section I** – **Coverage A** – **Bodily Injury and Property Damage Liability** is deleted and replaced by the following:

This insurance does not apply to:

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft:

1. Owned or operated by or rented or loaned to any insured; or

2. Owned or operated by or rented or leased to any other person.

Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved any aircraft, "auto" or watercraft.

***

(R. p. ____; Policy at p. 50).

The term "auto," including as used in the above exclusion, is a defined term in the policy. Also relevant is the term "mobile equipment" because "mobile equipment" is excluded from the definition of "auto." The terms "auto" and "mobile equipment are defined as follows under the Policy:

SECTION V – DEFINITIONS

***

2. "Auto" means:

a. a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment."

***

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing

equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos."

***

(R. p. ____; Policy at p. 30, 32).

The second set of policy provisions related to this declaratory judgment action are the Policy's notice provisions, which are duties the Policy places on the insured. Here, the Policy includes the following notice provisions:

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

***

2. Duties In The Event of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim….

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit";

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

***

These Notice Provisions are at issue in this case because it is undisputed that Cincinnati's insured was served with the Holland Complaint, failed to timely answer, and went into default. It is also undisputed that Cincinnati was not notified of the Holland lawsuit until after the entry of default. (R. p. ____; ______ Order at 2). Thereafter, Cincinnati retained defense counsel for the insured, and counsel for the insured filed a motion to set aside default, which motion was denied. Default judgment followed. (R. p. ____; ______ Order at 2). As a result, Cincinnati contends that, as a matter of law, the insured failed to provide proper notice and that Cincinnati was prejudiced as a result.

ARGUMENTS

III. BECAUSE THE MOPED AT ISSUE IS UNAMBIGUOUSLY AN "AUTO", THE ABSOLUTE AUTO EXCLUSION APPLIES AND THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, AND DENYING APPELANT'S MOTION TO RECONSIDER.

"Insurance policies are subject to the general rules of contract construction." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006). "The court must give policy language its plain, ordinary, and popular meaning. *Id.* "Although exclusions in a policy are construed against the insurer, 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 a statutory prohibition." *Id.* Further, "[t]he court cannot torture the meaning of policy language to extend coverage not intended by the parties." *Id.* at 353, 638 S.E.2d at 105. "Courts may look to a dictionary to determine the meaning of ambiguous, undefined terms. *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, 185 F. Supp. 2d 614, 617 (D.S.C. 2001) (citing *Greenville Cnty. v. Ins. Rsrv. Fund, a Div. of S.C. Budget & Control Bd.*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994)). S*ee also S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 383, 588 S.E.2d 643, 646 (Ct. App. 2003) ("dictionaries can be helpful tools for the purpose of defining terms"); *Schulman v. Axis Surplus Ins. Co.*, 90 F.4th 236, 243 (4th Cir. 2024) ("Traditionally, to supply contractual language with its ordinary and accepted meanings, this Court consults the dictionary definition of such terms.").

The Policy excludes coverage for "bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any "auto" owned, operated by or rented to any person. (R. pp. ____; Policy at 50). The Policy defines "auto" as: (1) a land motor vehicle

designed for travel on public roads; or (2) any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. (R. pp. ____; Policy at 30). It is undisputed that under the Policy, the term "auto" includes a "land motor vehicle." (*See, e.g.*, R. pp. ____; September 29, 2023 Order at 4-5). The Circuit Court's error lies in its finding that it is ambiguous whether a moped is a motor vehicle.

The Policy's "auto" definition is unambiguous for a host of reasons. (R. pp. ____; September 29, 2023 Order at 4). First, the plain language of the Policy—including its definitions, inclusion of an "absolute" auto exclusion, and other provisions—encompasses mopeds within the definition of "motor vehicle". Second, a "moped" is a "motor vehicle" under South Carolina case law, under dictionary definitions of "motor vehicle," and under South Carolina statutory law. Third, the insured considered the mopeds to be "motor vehicles," including as indicated by the Zapp Scooters Member Agreement and the fact that the insured purchased a policy with an "Absolute" auto exclusion, which specifically applies to autos "rented or leased" to any other person. Fourth, the officer responding to Mr. Holland's accident treated the moped as a "motor vehicle" and as governed by motor vehicle traffic laws, indicating the moped fits under the plain, ordinary, and popular definition of "motor vehicle." For these and other reasons, the Circuit Court's Order finding an ambiguity is in error.

IV. A "moped" is a "motor vehicle" under a plain reading of the Policy.

Under the Policy, an "auto" includes a land motor vehicle designed for travel on public roads. (R. pp. ____; Policy at 30). Respondent contends, and the Circuit Court agreed, that despite this definition, it is ambiguous whether a "moped" is a "motor vehicle."

However, there is no other category in the Policy else the moped could be. It is undisputed that it has a motor, it is a vehicle, and it was being used on a public road for personal transport at the time of the accident. The Policy includes certain exceptions for "mobile equipment," a term specifically defined by the Policy, but mopeds are not included in the definition of mobile equipment, and so they are not excepted from the definition of the terms "motor vehicle" or "auto" under the Policy. There is no other category of motorized vehicle excepted from the definition of motor vehicle and as such, there is no ambiguity that a "moped" is a "motor vehicle" under the Absolute Auto exclusion.

The Circuit Court's Order nonetheless finds that the Policy contains an internal inconsistency that renders the term "motor vehicle" or "auto" ambiguous. Specifically, the Circuit Court states that certain items of "mobile equipment" operate on land and have motors but yet are excluded from the Policy's definition of "auto."

Contrary to the Circuit Court's Order, however, there is no internal consistency here. An inconsistency would exist if, for example, the Policy defined "auto" to include mopeds and then later defined "auto" to exclude mopeds, without indicating which definition controlled. This is not what the Policy does, however. Instead, the Policy broadly defines "auto" to include all land motor vehicles designed for use on public roads, a category that would include mopeds. The Policy then clarifies that " mobile equipment"—e.g. bulldozers, cranes, or vehicles not used primarily to transport persons or cargo—do not qualify as "autos" under the Policy. (R. p. _____; Policy at p. 32). Mopeds are *not* included in the term "mobile equipment." *Id.* This is precisely what definitions do: identify items that fit under a term, while identifying items that do not fit under that term.

Here, the Policy's definitions of "auto" and "mobile equipment" work together, defining those items that qualify as "autos" and those that do not. The term "moped" fits squarely within the definition of "auto" and it falls outside the definition of "mobile equipment." There is no internal inconsistency.

V. A "moped" is a "motor vehicle" under dictionary definitions, South Carolina case law, legal treatises, and statutory law.

While the Policy language needs no further clarity, additional sources further bolster Cincinnati's position.

As an initial matter, this Court recently addressed whether the term "motor vehicle" is ambiguous in *Jack's Custom Cycles*, *Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 885 S.E.2d 433 (Ct. App. 2023), reh'g denied (Apr. 26, 2023). There, the South Carolina Court of Appeals considered whether ATVs and UTVs were "motor vehicles." *Id.* The *Jack's* decision is highly probative here because it analyzed the definition of "motor vehicle" under similar rules of construction.[1] Further, *Jack's* lays out in extensive detail the sources it consulted in its analysis of the term "motor vehicle." These sources included (1) dictionary definitions; (2) South Carolina common law; (3) legal treatises; and (4) South Carolina statutes. *See id.* at 45, 885 S.E.2d at 438-39.

[1] While *Jack's* involved statutory interpretation rather than contract interpretation, the rules of construction applied there are nearly identical to those applied here. Specifically, in *Jack's*, the term "motor vehicle" was construed in favor of the taxpayer and against the state (i.e. against the party that drafted the statute). Here, Respondent similarly asks the Court to construe "motor vehicle" in favor of the insured and against Cincinnati (i.e. against the party that drafted the Policy). In *Jack's*, the Court rejected the taxpayer's argument that the term "motor vehicle" was ambiguous. Here, the Court should likewise reject Mr. Holland's argument that the term "motor vehicle" is ambiguous.

VI. Dictionary Definitions

Like ATVs and UTVs in *Jack's*, mopeds plainly and unambiguously meet dictionary definitions of "motor vehicle." For example, the Court in *Jack's* cited Merriam Webster's Collegiate Dictionary, which defines a motor vehicle as an "automotive vehicle not operated on rails." *Jack's* at 46, 885 S.E.2d at 439. Similarly, the American Heritage College Dictionary defines a motor vehicle as a "self-propelled wheeled conveyance, such as a car or truck, that does not run on rails." *Id.* Mopeds meet both definitions.

This holds for other dictionaries as well. For example, Black's Law Dictionary defines "motor vehicle" as "[a] wheeled conveyance that does not run on rails and is self-propelled, esp. one powered by an internal-combustion engine, a battery or fuel-cell, or a combination of these." (R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 5). Dictionary.com defines "motor vehicle" as "an automobile, truck, bus, or similar motor-driven conveyance". (*Id.*).The term "moped" fits each of these definitions.

Moreover, Respondent Holland's expert witness, Gerald Finkel, admitted that that "moped" fits under dictionary definitions of "motor vehicle." (*See* R. p. ___________; Deposition of Gerald Finkle, November 17, 2022, **Exhibit 5 to Mr. Holland's Memorandum in Support of Summary Judgment**, at 78:8-19) ("Q. And would moped fit under the definition of motor vehicle in the dictionary definitions that you looked at? A. Probably so….").

The Circuit Court's Order does not cite a single dictionary definition to the contrary. Instead, in a single, three-sentence paragraph, the Order rejects dictionary definitions entirely, stating that "*to apply a common, everyday definition* to 'motor vehicle' to include a 'moped'

would gloss over the special recognition the legislature had intended for them." (R. p. ___________; September 29, 2023 Order at 7) (emphasis added).

The Circuit Court's analysis is erroneous for several reasons. First, the circuit court's reliance on a "special" definition from the legislature over the "common, everyday" definition of "motor vehicle" departs from black letter South Carolina law requiring courts to give policy language its "plain, ordinary, and popular meaning." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006). The Circuit Court's interpretation of South Carolina legislation is itself erroneous, as discussed in Section I.b.iii. below. However, even if it were not, a specialized interpretation from a source outside the Policy cannot supplant the plain, ordinary, and popular meaning the Court must apply when interpreting Policy provisions. The Circuit Court correctly found that "moped" fits within the common, everyday definition of "motor vehicle." The analysis should have stopped there.

Second, in rejecting the common, everyday dictionary definitions, the Circuit Court departed from ample South Carolina law indicating that courts should look to dictionary definitions to determine the meaning of undefined terms in insurance policies. *See, e.g., Greenville Cnty. v. Ins. Rsrv. Fund, a Div. of S.C. Budget & Control Bd.*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994) (looking to *Websters* and *Black's Law Dictionary* to determine the meaning of undefined insurance policy terms); *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 383, 588 S.E.2d 643, 646 (Ct. App. 2003) (looking to *Black's Law Dictionary* and *The American Heritage Dictionary* to interpret undefined terms in an insurance policy and citing South Carolina law holding that "dictionaries can be helpful tools for the purpose of defining

terms”). Thus, the Circuit Court rejected the primary tool it was authorized under South Carolina law to consult regarding undefined insurance policy terms.

VII. South Carolina common law and legal treatises

In addition to dictionary definitions, mopeds clearly fit under the definition of “motor vehicle” discussed in South Carolina case law, including as discussed in the *Jack’s* decision. For example, *Jack’s* cites *Gunn v. Burnette*, 236 S.C. 496, 499, 115 S.E.2d 171, 172 (1960), which discussed “motor vehicle” as follows:

> The word ‘vehicle’ is derived from the Latin word ‘vehere,’ meaning to carry, and Webster defines the noun as that in or on which a person or thing is or may be carried from one place to another, etc. In 60 C.J.S. Motor Vehicles § 1, p. 109 a motor vehicle is defined as one which is operated by a power developed within itself and used for the purpose of carrying passengers or materials.

Jack's Custom Cycles at 45–46, 885 S.E.2d at 439). The Court next cited 60 C.J.S. Motor Vehicles § 1, 118-119 (2012), which defines “motor vehicle” to “ordinarily mean[]”:

> [T]he term ‘motor vehicle ordinarily means a vehicle which is self-propelled and is designed primarily for travel on the public highways even though the vehicle is not one which may legally be self-propelled or operated upon a highway.... Generally, a motor vehicle is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials, and it is commonly defined as including all vehicles propelled by any power other than muscular power except traction engines, road rollers, and such motor vehicles as run only upon rails.

Id. at 46, 885 S.E.2d at 439. Here, mopeds clearly fit under both the definitions of “motor vehicle” set forth by both *Gunn* and 60 C.J.S. Motor Vehicles.

VIII. South Carolina statutory law

It appears that South Carolina courts prefer to consult dictionaries over statutory law to find the plain, ordinary and popular meaning of words in an insurance policy. However, to the

extent statutory law is appropriate for consideration, South Carolina statutes supports Cincinnati's position that "mopeds" are motor vehicles.

As an initial matter, S.C. Code Ann. § 56-1-10(7) provides the default definition of "motor vehicle" for all of Title 56. Under this definition, unless explicitly stated otherwise, "motor vehicle" means "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails." Mopeds plainly fall within this definition. Neither the Circuit Court nor Mr. Holland dispute this. (R. pp. ____; September 29, 2023 Order at 6; Holland's Response to Plaintiff's Supplemental Memorandum Supporting Motion for Summary Judgment at pp. 4-5). Mr. Holland's expert, Gerald Finkel, also conceded this definition. (*See* R. p. _____; Finkel Dep. at 69:20-70:1; 70:2-5 ("Q. So here in the definitions section that addresses the entirety of Title 56, motor vehicle does not exclude moped. Correct? A. No, it doesn't.")). In other words, it appears undisputed that the default definition of "motor vehicle" under Title 56 *includes* vehicles such mopeds; mopeds are "motor vehicles" *unless* they are specifically excluded. (*See* R. p. _____; Finkel Dep. at 79:22-80:1 (Q. And you would agree that in each chapter of Title 56 of which you're aware where mopeds are not included in the definition of motor vehicle, they are specifically exclusive. A. That is correct.)).

The Circuit Court, however, rejects the default definition of "motor vehicle" in § 56-1-10(7) in favor of four exceptions—each contained in subsections of Title 56—that depart from the default definition for specific, limited purposes. (*See* R. pp. ____; September 29, 2023 Order at 5-6). These "exceptions" within Title 56, though, prove Cincinnati's case because the default definition of "motor vehicle" *includes* mopeds. To exclude mopeds from the general definition,

the statutory subsections must explicitly state that mopeds are being excluded. Also, the Order makes its findings based on only four chapters of Title 56, each of which are exceptions to the default rule. *Id.* However, Title 56 includes 22 chapters in total. *See* S.C. Code Ann. § 56-1-1 *et seq.* Thus, in approximately 18 of the 22 chapters in Title 56, the default definition of "motor vehicle" would apply, which definition *includes* "moped" within the definition of "motor vehicle" set forth in § 56-1-10. (*See* R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 6). In other words, the plain and ordinary meaning of "motor vehicle" under Title 56 includes "mopeds."

Other statutes follow suit. For example, South Carolina Code § 38-77-30(9) defines "motor vehicle" to mean "every self-propelled vehicle which is designed for use upon a highway," with certain specific exceptions, none of which include electric scooters or mopeds. "Highway" simply means "[t]he entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel…". S.C. Code Ann. § 56-5-430. (*See also* R. p. ___________; Finkle Dep. at 74:24-75:11; 76:22-77:1). Here, it is undisputed that, at the time of the accident, Mr. Holland was using a self-propelled vehicle designed for use on a publicly maintained way (or "highway") and that he was, in fact, operating the motor vehicle on such a "highway" at the time of the accident. (*See* R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 6-8).

In summary, to the extent statutory law is relevant to this analysis, mopeds are included under the default and ordinary meaning of "motor vehicles" under both Title 56 and Title 38.

Therefore, a moped is a "motor vehicle" under South Carolina law, and the Circuit erred in finding that it was not.

a. BECAUSE CINCINNATI'S INSURED DID NOT PROVIDE NOTICE OF THE LAWSUIT AND PREJUDICED CINCINNATI, THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, DENYING CINCINNATI'S MOTION FOR SUMMARY JUDGMENT, AND DENYING APPELANT'S MOTION TO RECONSIDER.

The Circuit Court erred in finding that Cincinnati received proper notice of the Holland Complaint and in finding that Cincinnati was not prejudiced by improper notice. "[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999). Under South Carolina case law, the enforceability of notice provisions has long been recognized. *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019) (discussing history and enforcement of notice provisions). As the South Carolina Supreme Court in *Neumayer* explained:

> Nearly every insurance policy contains a provision requiring the insured to timely notify its insurer when a lawsuit is filed against the insured. Common sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured.

Id. An insurer can invoke notice clauses to deny coverage, "provided the insurer can prove that it was substantially prejudiced by its insured's failure to comply with the provision." *Id.* at 273, 831 S.E.2d at 412; *see also Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729–30 (1971); *Hatchett v. Nationwide Mut. Ins. Co.,* 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964) ("It is well settled that…the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made

conditions precedent to liability, will bar recovery."); *Greenwood Dev. Corp. v. Cincinnati Ins. Co.*, No. CV 9:08-2602-SB, 2012 WL 12981762, at *11 (D.S.C. Feb. 16, 2012) ("[I]f the insured's failure to forward to the insurer a copy of the lawsuit (or otherwise provide notice of the lawsuit) substantially prejudices the insurer, the notice and cooperation clauses of the policy preclude coverage.").

IX. The Circuit Court erred in finding proper notice where the insured never provided notice and where it is undisputed that Cincinnati did not receive any form of notice until after entry of default against the insured.

Under the Policy's notice provisions, Zapp Scooters was required to: (1) notify Cincinnati as soon as practicable of an "occurrence" which may result in a claim; (2) notify Cincinnati as soon as practicable if a "suit" is brought against any insured, immediately recording the specifics of the "suit" and the date received; (3) immediately send Cincinnati copies of the legal papers received in connection with the "suit"; and (4) cooperate with Cincinnati in the investigation/defense of the "suit." (R. p. ____; Policy, pp. 27-28).

However, Zapp Scooters failed to provide notice of the Holland Complaint, an issue conceded by the Circuit Court Order. The Order provides the following timeline:

- on January 15, 2019, the Holland Complaint was filed;
- on March 26, 2019, Defendants Zapp and Scozzafava were served with the Underlying Complaint; and
- on May 22, 2019, the circuit court entered default against Zapp and Scozzafava.

(R. p. ____; Order, p. 10).

Despite the undisputed failure of Zapp Scooters to provide notice to Cincinnati, the Circuit Court's Order finds that Cincinnati received proper notice when, on May 28, 2019—eight days

after default had already been entered—a company called Livingston Insurance Agency forwarded a subpoena to Cincinnati. (*Id.* at _____; Order, pp. 10-11). The Circuit Court's findings are in error for several reasons. First, it is undisputed that by the time Livingston forwarded the subpoena on May 28, 2019, Zapp Scooters was already in default. (*See id.* at ____; Order, p. 10). As a result, even if Livingston could step into the insured's shoes to satisfy the Policy's notice conditions, notice provided on May 28, 2019, was notice provided far too late because the insured had already been placed into default.

Second, it is undisputed that Livingston sent only a subpoena to Cincinnati—and not the Holland Complaint. (*See id.* at ____; Order, p. 10). A subpoena is not notice of a claim by an insured for a defense or indemnity, nor does it provide any operative Complaint to an insurance carrier that would otherwise satisfy the plain terms of the Policy's notice provisions.

Third, the Circuit Court erred in finding, as a matter of law, that Livingston was *Cincinnati's* agent rather than the insured's agent. (*See id.* at ____; Order, p. 10-12). This was an extensively disputed and genuine issue of material fact below. (*See*, e.g., R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 11-13). This was thus an inappropriate finding for the Circuit Court to make at the summary judgment stage and Cincinnati respectfully requests the Court to reverse the Circuit Court's findings that Livingston was, as a matter of law, Cincinnati's agent.

The Circuit Court cites *Noisette v. Ismail*, 299 S.C.243, 251, 384 S.E.2d 310, 315 (S.C. Ct. App. 1989), rev'd on other grounds, 403 S.E.2d 122 (S.C. 1991), for the principle that an insurer cannot rely on a notice provision to bar coverage where it receives notice of a complaint

from another source. However, the Circuit Court's holding is misplaced for two reasons. First, the Court of Appeals in *Noisette* found that notice to an *insurer's* agent constituted notice to the insurer. *Id.* at 248, 384 S.E.2d at 313. In other words, the Court of Appeals' decision was premised on the fact that the agent and the insurer entered a written agreement wherein the insurer specifically authorized its agent "to receive and accept proposals for insurance including binding authority, covering such ... risks as [the insurer] may ... authorize to be insured." *Id.* No such relationship has been established here, and to the contrary, Cincinnati has extensively contested any suggestion that Livingston was Cincinnati's agent. (*See*, e.g., R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 11-13).

Second, even if Livingston had been Cincinnati's agent—which it was not—the insurer or insurer's agent must still timely receive notice of a claim. There is nothing in the record suggesting that Zapp Scooters at any time provided notice of a claim or provided a copy of the Holland Complaint to Cincinnati or Livingston. To the contrary, by its default in Cincinnati's declaratory judgment action, Zapp Scooters is held to have conclusively admitted the factual allegations against it, including that it did not provide timeline notice and that Cincinnati was prejudiced. (*See*, e.g., R. p. ___________; Cincinnati's Memorandum in Support of its Motion for Summary Judgment and Opposing Holland's Motion for Summary Judgment at 9-11). Thus, the Circuit Court erred in granting summary judgment to Holland and in denying summary judgment to Cincinnati.

As an additional ground, it is well established in South Carolina that "[a] party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be

clearly established by the facts." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 565, 813 S.E.2d 292, 304 (Ct. App. 2018). Moreover, "[an] agency may not be established solely by the declarations and conduct of an alleged agent." *Id.* at 566, 813 S.E.2d at 304. Holland's contentions that Livingston was Cincinnati's agent rather than Holland's agent must be clearly established by fact; however, there is no reference to any agency agreement, any deposition testimony, any affidavit, or any other competent evidence of an agency relation, especially one that would give Livingston authority—apparent or otherwise—to bind Cincinnati to coverage or especially to receive notice of a lawsuit on Cincinnati's behalf. Moreover, if there is a question regarding whose agent Livingston was, that creates a question of fact on which summary judgment is not appropriate.

For these reasons, the Circuit Court's findings that Cincinnati received proper notice of the Holland Complaint are in error.

X. Because the insured failed to provide timely notice of the lawsuit and went into default, resulting in default judgment, the Circuit Court erred in finding that Cincinnati was not prejudiced.

The Circuit Court incorrectly found that Cincinnati was not substantially prejudiced by the insured's failure to provide timely notice. Substantial prejudice arises not only when a court enters default judgment against an insured, it can also arise once there is an entry of default:

> "Although South Carolina appellate courts have never held the entry of default alone clearly establishes prejudice, the South Carolina Supreme Court has offered guidance on how prejudice to an insurer can arise through the entry of default." *Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, 761 F. App'x 178, 183 (4th Cir. 2019) (citing *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434, 137 S.E.2d 608, 612-13 (1964)). In *Hatchett*, an insured brought suit against an uninsured motorist. 244 S.C. at 428, 137 S.E.2d at 609. The insured did not notify its insurer of the suit until the uninsured motorist was in default. *Id.* at 434, 137 S.E.2d at 613. The South Carolina Supreme Court noted the insured had made no effort to establish a reason for his "failure to comply with the terms of the

> contract" requiring him to give notice "as soon as practicable." *Id.* at 434, 137 S.E.2d at 612-13. The court found the insurer had the right to provide a defense to the uninsured motorist but the insured "refused to waive the default and permit an answer to be filed" by the insurer. *Id.* at 432-34, 137 S.E.2d at 612-13. Instead, the insured "chose to rest his position upon the rights he had acquired through default which operated to the prejudice of the" insurer. *Id.* at 434, 137 S.E.2d at 613. **The court found the insurer was "deprived of the opportunity . . . to investigate promptly, to negotiate a settlement without the handicap of a default position, or to" provide a defense, to make certain the insured recovered a fairly established amount.** *Id.*

Portrait Homes - S.C., LLC v. Pennsylvania Nat'l Mut. Cas. Ins. Co., No. 2020-000735, 2023 WL 8610277, at *18 (S.C. Ct. App. Dec. 13, 2023) (emphasis added).

Here, substantial prejudice is particularly apparent because not only was default entered against the insured before Cincinnati ever had notice of the suit, but after receiving notice, Cincinnati further retained defense counsel in an attempt to set aside the default. (*See* R. p. ____; Order, p. 2). That motion was denied, resulting in default judgment against the insured. Cincinnati was never able to investigate promptly, negotiate a settlement, or provide a defense without the handicap of a default position. (*See id.*). Entry of Default was entered on May 22, 2019; Cincinnati was first informed on August 16, 2019; Zapp and Frank Scozzafava moved for the entry of default to be set aside on September 18, 2019; the Court denied their motion on December 30, 2019; Holland filed a motion for judgment by default on April 21, 2021; and the Court entered judgment against Zapp and Scozzafava on June 15, 2021. (*See id.*). In short, Cincinnati never had the opportunity to do anything except try to get default set aside, which efforts were denied.

Moreover, under South Carolina law, "prejudice is clearly established by the fact that a default judgment was entered against the insured" in the underlying lawsuit. *Merit Ins. Co. v. Koza*, 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980); *Selective Ins. Co. of Am. v. Wacha*, No.

4:18-CV- 00468-RBH, 2019 WL 2358949, at *5 (D.S.C. June 4, 2019) ("South Carolina courts have held that prejudice is established when a default judgment has been entered against the insured."); *Neumayer*, 427 S.C. at 273 n.6, 831 S.E.2d at 412 n.6 (noting that "substantial prejudice exists as a matter of law" where insurer did not receive notice until over eighteen months after entry of default judgment).

In this case, default judgment was entered, and now, Holland seeks to collect more than half a million dollars from Cincinnati. Therefore, Cincinnati asks this Court to find that the Circuit Court erred in finding that Cincinnati was not prejudiced.

CONCLUSION

For the reasons set forth above, Appellant requests that this Court (1) reverse the Circuit Court's order granting Defendant Holland's Motion for Summary Judgment and (2) grant Cincinnati's Motion for Summary Judgment or, in the alternative, remand this matter with instructions to the Circuit Court to enter judgment accordingly.

Respectfully submitted,

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