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SC Court of Appeals

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
Case No. 2019-CP-40-06380

The Cincinnati Specialty Underwriters Insurance Company,.....Appellant,

v.

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

INITIAL BRIEF OF RESPONDENT MICHAEL HOLLAND

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1. Did the circuit court err in granting Respondent's Motion for Summary Judgment, denying Appellant's Motion for Summary Judgment, and denying Appellant's Motion to Reconsider when it found the Policy's "auto" exclusion is ambiguous under South Carolina law, rendering the "auto" exclusion unenforceable?

2. Did the circuit court err in granting Respondent's Motion for Summary Judgment, denying Appellant's Motion for Summary Judgment, and denying Appellant's Motion to Reconsider when it found that Appellant received notice of Respondent Holland's lawsuit?

3. Did the circuit court err in granting Respondent's Motion for Summary Judgment, denying Appellant's Motion for Summary Judgment, and denying Appellant's Motion to Reconsider when it found that Appellant was not substantially prejudiced?

4. Is the circuit court's denial of Appellant's Motion for Summary Judgment immediately appealable?

STATEMENT OF THE CASE

This appeal concerns the circuit court's orders granting Respondent Michael Holland's (hereinafter "Respondent Holland") Motion for Summary Judgement, denying Appellant The Cincinnati Specialty Underwriters Insurance Company's (hereinafter "Appellant") Motion for Summary Judgment, and denying Appellant's Motion to Reconsider.

On October 12, 2018, Respondent Holland was injured while operating a moped he rented from Respondent Zapp Scooters Inc. d/b/a Zapp Ride Share (hereinafter "Respondent Zapp"). On January 15, 2019, Respondent Holland filed a lawsuit against Respondents Zapp and Scozzafava.[1] At the time of the injury, Respondent Scozzafava was Respondent Zapp's CEO and sole owner. Respondents Zapp and Scozzafava did not answer the Complaint, and, by Entry of Default dated May 22, 2019, Respondents Scozzafava and Zapp were adjudged to be in default. Respondents Zapp and Scozzafava moved for the Entry of Default to be set aside on September 18, 2019. By Order dated December 30, 2019, the circuit court denied the Motion to Set Aside Entry of Default. Respondent Holland obtained a default judgment against Respondents Zapp and Scozzafava for $641,232.40 on July 28, 2021. In its Order Granting Default Judgment, the circuit court found that Respondent Holland was injured "when an electric scooter he rented from [Respondents Zapp and Scozzafava] malfunctioned, throwing [Respondent Holland] over the handlebars and causing him to suffer lacerations to his face requiring sutures and causing a broken clavicle that required two surgeries and left him with permanent fixation hardware in his shoulder." (Default Judgment Order, p. 2, ¶ 5). The circuit court further found that, "by a preponderance of the evidence, [Respondents Zapp and Scozzafava's] negligence caused the injuries and damages to [Respondent

[1] *Michael J. Holland v. Zapp Scooters, Inc., and Frank Scozzafava*, C/A No. 2019-CP-40-00288, Rich. Cnty. Cir. Ct.

Holland]." *Id*. at p. 4, ¶ 1. Respondents Zapp and Scozzafava filed neither a Motion to Set Aside the Default Judgment nor an appeal.

Appellant issued a commercial liability policy, Policy No. CSU0087939 (hereinafter "Policy"), to Respondent Zapp with effective dates of August 9, 2018, to August 9, 2019. (Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J, Ex. 2). Appellant filed this lawsuit on November 13, 2019, seeking a declaratory judgment solely based on the argument that the Policy does not provide liability coverage for Respondent Holland's injuries because the Policy's "auto" exclusion applies to preclude coverage. Neither Respondent Scozzafava nor Respondent Zapp answered the declaratory judgment complaint and by order dated August 6, 2020, were adjudged to be in default. Nearly eleven months later, on October 2, 2020, Appellant amended its declaratory judgment complaint to include, for the first time, the argument that the Policy does not provide coverage for Respondent Holland's injuries because Respondents Zapp and Scozzafava failed to comply with the notice provisions of the Policy, which Appellant alleged substantially prejudiced it.

On September 9, 2021, Appellant filed a Motion for Summary Judgment on its Declaratory Judgment action. (9/9/21 Mot. Summ. J.). Appellant's motion argued that no issue of material fact existed, and that Appellant's Declaratory Judgment should be granted as a matter of law. (*Id.*). Appellant also filed a memorandum in support of its Motion for Summary Judgment on September 9, 2021. (9/9/2021 Pltf.'s Memo. Supp. Mot. Summ. J.). Respondent Holland filed a Cross Motion for Summary Judgment on October 21, 2022. (10/21/22 Mot. Summ. J.). Additionally, Respondent Holland filed a memorandum in support of his Motion for Summary Judgment and in opposition to Appellant's Motion for Summary Judgment on April 12, 2023. (4/12/2023 Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J.). On May 17, 2023, Appellant filed a supplemental

memorandum in support of its Motion for Summary Judgment and in opposition to Respondent Holland's Motion for Summary Judgment. (5/17/2023 Suppl. Mem. Supp. Pltf.'s Mot. Summ. J. & Opp. Deft.'s Mot. Summ. J.) On May 23, 2023, Respondent Holland filed a Response to Appellant's supplemental memorandum. (5/23/2023 Resp. to Pltf.'s Suppl. Mem. Supp. Pltf.'s Mot. Summ. J. & Opp. Deft.'s Mot. Summ. J.)

The circuit court held a duly noticed hearing on the Cross Motions for Summary Judgment on May 24, 2023. During the hearing, the circuit court heard arguments from counsel for Appellant and counsel for Respondent Holland. (5/24/23 Transcript.) The sworn testimony offered included the Affidavit of Gerald M. Finkel, the Affidavit of Avery Wilks, the Affidavits of Officer Robert J. Paturzo, and the Affidavit of Sheri Bugher.

In an order filed September 29, 2023, the circuit court granted Respondent Holland's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment. (9/29/23 Summ. J. Order). On October 9, 2023, Appellant filed a Motion to Reconsider, asking the circuit court to reconsider its order granting Respondent Holland's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment. (10/9/23 Mot. Recons.). Respondent Holland filed a Response in Opposition to Appellant's Motion to Reconsider on October 23, 2023. (10/23/2023 Resp. Opp. Pltf.'s Mot. Recons.). The circuit court denied Appellant's Motion to Reconsider on January 2, 2024. (1/2/24 Order). On January 31, 2024, Appellant appealed the September 29, 2023, order granting Respondent Holland's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment, and the January 2, 2024, order denying Appellant's Motion to Reconsider.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citing *Bankers Trust of South Carolina v. Benson*, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976)). Summary judgment is properly regarded not as a procedural shortcut, but as an integral part of the rules of civil procedure which are designed to secure the just, speedy, and most inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, "when cross motions for summary judgment are filed, the issue is decided as a matter of law." *Neumayer v. Philadelphia Indem. Ins., Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) (citing *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). "[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Alltel Communications, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, n. 2, 731 S.E.2d 869, n. 2 (2012) (quoting *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981)).

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). A trial court may properly grant a motion for summary judgment when "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; *see also Cullum Mech. Const., Inc. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001). Appellate courts review questions of law de novo and "are free to decide a question of law with no particular deference to the circuit court." *Catawba Indian Tribe of South Carolina v. State*, 372 SC. 519, 642 S.E.2d 751 (2007) (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534

S.E.2d 672, 675 (2000)). Whether coverage exists under an insurance contract is a question of law for the Court. *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014).

ARGUMENT

I. Because the Policy's "auto" exclusion is ambiguous under South Carolina law, the ambiguity must be construed in favor of coverage rendering the "auto" exclusion unenforceable.

Appellant argues that the Policy does not provide liability coverage for injuries or damages arising out of the October 12, 2018, injury to Respondent Holland because the Policy's "auto" exclusion applies. However, as the circuit court correctly ruled, the "auto" exclusion is ambiguous and, therefore, coverage must be construed against Appellant and in favor of Respondent Holland.

The Policy excludes "'bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft . . . [ow]ned or operated by or rented or leased to any other person." (Am. Compl., p. 6; Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J, Ex. 2). The term "auto" is defined as follows:

> 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."

Here, the moped on which Respondent Holland was riding when he was injured in October 2018 meets neither of these definitions.

Where words of an insurance policy are capable of two reasonable interpretations, the construction which is most favorable to the insured will be adopted. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 318, 320, 426 S.E.2d 770, 771 (1993); *see also North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015) ("A contract is 'ambiguous' when it is capable of more than one meaning or when its meaning is unclear"). Whether language is ambiguous is a question of law for the court, and any ambiguous terms are to be construed liberally in favor the of the insured. *Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015). Further, exclusionary terms in a policy are narrowly construed to the benefit of the insured. *Id.* at 266, 777 S.E.2d at 425 (Few, J., concurring) ("Exclusions in particular are read narrowly and are enforceable only when the exclusions unambiguously bring the particular act or omission within [their] scope."); *see also McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993). Specifically, it is the responsibility of the insurer "to clearly enumerate which damages are excluded from coverage under its policy – and ambiguous provisions are to be construed strictly against the insurer[.]" *Canal Ins. Co.*, 414 S.C. at 266, 777 S.E.2d. at 424.

A. A moped is not a "land motor vehicle" under the "Auto" definition.

As an initial matter, Appellant concedes that the vehicle at issue is a moped. (Tr. pp. 7-8). The question before the Court is whether a moped is a "land motor vehicle" under definition 2.a. of "auto." The Policy, however, does not define the term "motor vehicle", thereby creating a latent ambiguity. To resolve this ambiguity, the circuit court correctly referenced controlling South Carolina statutory law to interpret whether the moped at issue is a "motor vehicle." *See Myers v. Government Employees Ins. Co.*, 279 S.C. 70, 72-73, 302 S.E.2d 331, 333 (1983) (finding where

an insurance policy did not define "motorcycle" the court turned to statutory definitions to determine that a motorized minibike was a "motor driven cycle" and not a "motorcycle").

At the time of Respondent Holland's injury on October 12, 2018, South Carolina statutory law specifically excluded mopeds from the definition of "motor vehicle." In every section of Title 56 in which the term "motor vehicle" was defined, except for one, the law makes clear that a moped is not a motor vehicle. For example, in Chapter 3 ("Motor Vehicle Registration and Licensing") of Title 56, "motor vehicle" was defined as:

> Every vehicle which is self-propelled, ***except mopeds***, and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

S.C. CODE ANN. § 56-3-20(2) (Supp. 2017) (emphasis added). Several other South Carolina statutes also define "motor vehicle" to exclude mopeds. *See, e.g.*, S.C. CODE ANN. § 56-5-130 (Supp. 2017)[2] (defining "motor vehicle" as "Every vehicle which is self-propelled, ***except mopeds***….") (emphasis added); S.C. CODE ANN. § 56-9-20(4) (Supp. 2017)[3] (defining "motor vehicle" as "Every self-propelled vehicle designed for use upon a highway, . . . but ***excepting*** . . . ***mopeds***. . . .") (emphasis added); S.C. CODE ANN. § 56-19-10(16) (Supp. 2017)[4] (defining "motor vehicle" as "every vehicle which is self- propelled, ***except mopeds***….") (emphasis added).

Appellant argues that the one statutory section in which mopeds are not excluded, 56-1-10(7), should be applied in this case. Under § 56-1-10(7), "'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." Although this definition does not exclude "mopeds" like the four other statutory definitions previously cited, it is important to note that the

[2] Chapter 5 ("Uniform Act Regulating Traffic on Highways").
[3] Chapter 9 ("Motor Vehicle Financial Responsibility Act").
[4] Chapter 19 ("Protection of Titles to and Interests in Motor Vehicles").

introductory language to § 56-1-10(7) states that, "For purposes of this title, ***unless otherwise indicated***, the following words, phrases, and terms are defined as follows:. . . ." (emphasis added). Clearly, the legislature indicated otherwise by defining "motor vehicle" to exclude mopeds in four, subsequent statutory sections. *See* S.C. CODE ANN. §§ 56-3-20(2), 56-5-130, 56-9-20(4), and 56-19-10(16).[5] Statutes must be read *in pari materia*. *See Amisub of S.C., Inc. v. S.C. Dep't of Health Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d. 408, 416 (2014) ("[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). Appellant concedes as much in its brief.

Appellant also relies on an incomplete portion of deposition testimony from Respondent Holland's expert, Gerald Finkel, in an attempt to support its argument that the definition of "motor vehicle" found under S.C. CODE ANN. § 56-1-10(7) is the only acceptable definition. A more accurate depiction of Mr. Finkel's deposition testimony supports reading all of the statutes together:

> 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.
> Q: And this is a definition section that would apply throughout Title 59 unless otherwise indicated. Correct?
> A: Title 59? You mean Title 56.
> Q: I'm sorry. Title 56, that's right.
> A: The answer is no.
> Q: Tell me why that is.
> A: ***Because it's modified by other subsequent code sections. And in order to read the code properly, it has to be read in pari materia with one another.***
> Q: Correct. And if I didn't qualify it this way, I mean to. So Title 56-1-10 subsection 7 provides the definition for motor vehicle for Title 56 unless otherwise indicated?
> A: That's correct.
> Q: So is it still accurate then, in your opinion, that Title 56 consistently defines motor vehicle as excluding mopeds?
> A: Yes.

[5] Appellant concedes this point in its brief wherein it states, "the default definition of 'motor vehicle' for all of Title 56" is section 56-1-10(7) "***unless explicitly stated otherwise***." (Appellant's Initial Br., p. 22.) The four other sections explicitly state otherwise.

(Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J, Ex. 5) (emphasis added).

Appellant also incorrectly states that, of the 22 chapters in Title 56, 18 include "moped" within the definition of "motor vehicle" as set forth in § 56-1-10. (Appellant's Initial Br., p. 23.) This not an accurate statement. The remaining 18 chapters have nothing to do with mopeds, for example, Chapter 11 – Road Tax on Motor Carriers, Chapter 15 – Regulation of Manufacturers, Distributors, and Dealers; Chapter 16 – Regulation of Motorcycle Manufacturers, Distributors, and Dealers, Chapter 27 – Professional House moving, or Chapter 35 – Idling Restrictions for Commercial Diesel Vehicles. Therefore, there is no need to differentiate a "moped" from a "motor vehicle" as those 18 other chapters under Title 56 are irrelevant to the ownership and operation of a moped.

Moreover, with the passage of the new moped law that became effective on November 19, 2018, known as 2017 S.C. Act No. 89 (H.3247),[6] the South Carolina legislature did not rewrite the definition of "motor vehicle" under § 56-1-10(7). It did, however, include a new definition of "moped" in that section to mean "a cycle, ***defined as a motor vehicle***, with or without pedals, to

[6] This comprehensive legislation rewrote the treatment of mopeds under South Carolina law. Among the significant changes are the following:

- A moped was redefined to be recognized as a "motor vehicle," for the first time. *See* S.C. CODE ANN. § 56-1-10(26) (Supp. 2019).
- The minimum age for receiving a moped, or Class G, operator's license is now 15. *See* S.C. CODE ANN. § 56-1-1720(A) (Supp. 2019). Previously, a 14-year-old could apply for a moped license. *See* S.C. CODE ANN. § 56-1-1720 (Supp. 2017).
- Mopeds must now be registered and licensed with the Department of Motor Vehicles in the same manner as passenger vehicles. *See* S.C. CODE ANN. § 56-2-3010(A) (Supp. 2019). Previously, mopeds were not required to be registered and licensed.
- Mopeds are now required to display a special size and class of license plates with distinctive numbering and lettering so as to be identifiable to law enforcement. *See* S.C. CODE ANN. § 56-2-3010(B) (Supp. 2019). Previously, only a seller/dealer of mopeds was required to attach a metal identification plate to each moped without pedals identifying the vehicle as a moped. *See* S.C. CODE ANN. § 56-5-3750(A) (Supp. 2017).
- Mopeds are now subject to the infrastructure maintenance fee. *See* S.C. CODE ANN. § 56-3-627. Previously, mopeds were subject to the general sales tax.

Despite these substantial changes to the moped laws in November 2018, mopeds are *still not required* to be titled or insured in this State, nor are they subject to property taxes in the county in which the owner lives. *See* S.C. Code Ann. §§ 56-2-3010(C) and (D) (Supp. 2019).

permit propulsion by human power, that travels on not more than three wheels in contact with the ground whether powered by gasoline, electricity, alternative fuel, or a hybrid combination thereof." S.C. CODE ANN. § 56-1-10(26) (Supp. 2019) (emphasis added). The fact that the term "moped" is now defined in § 56-1-10 to specifically state that it is a "motor vehicle" compels but one conclusion: prior to November 2018, mopeds were not viewed by the legislature as "motor vehicles."

After glossing over the importance and relevance of those statutory definitions that explicitly exclude "mopeds" from the definition of "motor vehicle," Appellant then points to the former definition of "motor vehicle" under Title 38, South Carolina's Insurance Code. Former section 38-77-30(9) defined "motor vehicle" as "every self-propelled vehicle which is designed for use upon a highway . . . ." S.C. CODE ANN. § 38-77-30(9) (Supp. 2013). However, section 38-77-30(9) was amended with the passage of the new moped laws in November 2018. The definition now specifically states that, "Mopeds are considered to be ***motor vehicles*** for the purposes of uninsured motor vehicle insurance coverage and underinsured motor vehicle insurance coverage ***only***." *See* S.C. CODE ANN. § 38-77-30(9) (emphasis added). If the pre-November 2018 definition of "motor vehicle" was so clear as to encompass mopeds within the definition of "motor vehicle," then there would be no need for the legislature to have specifically stated that mopeds are now considered "motor vehicles" for purposes of uninsured and underinsured coverage ***only***. That would have been self-evident from the definition itself.

At the time Respondent Holland was injured, the South Carolina legislature clearly intended to recognize and treat mopeds as vehicles *other than* "motor vehicles." Nevertheless, in an attempt to draw attention away from this clear legislative intent, Appellant argues that *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 885 S.E.2d 433 (Ct. App.) *reh'g denied*

(Apr. 26, 2023) is probative. However, the circuit court correctly considered the applicability of the *Jack's Custom Cycles* case and determined that it was inapplicable here.

In *Jack's Custom Cycles*, this Court reviewed an administrative law decision concerning the taxation of all-terrain vehicles (ATVs) and side-by-side or utility task vehicles (UTVs) by the South Carolina Department of Revenue. At issue in that case was whether ATVs and UTV's qualified as "motor vehicles" for purposes of the partial sales tax exemption found in S.C. CODE ANN. section 12-36-2110(A). For the following reasons, Appellant's reliance on the *Jack's Customs Cycles* case is misplaced.

Unlike the issue before this Court, the *Jack's Customs Cycles* involved the statutory interpretation of a tax statute, not the interpretation of exclusionary language in an insurance contract where "ambiguous terms are to be construed liberally in favor the of the insured." *Canal Ins. Co.*, 414 S.C. at 260, 777 S.E.2d at 421. Additionally, whether an ATV or UTV is a "motor vehicle" is irrelevant to the analysis of whether a moped is under the Policy. In October 2018 when Respondent Holand was injured, an ATV/UTV was treated differently under Title 56. In fact, at that time, Title 56 defined an ATV as a "***motor vehicle*** measuring fifty inches or less in width. . . ." *See* S.C. CODE ANN. § 56-1-10(20) (Supp. 2017) (emphasis added). As previously discussed, it was not until November 19, 2018, that the definition of "moped" was rewritten to mean "a cycle, ***defined as a motor vehicle***, with or without pedals. . . ." S.C. CODE ANN. § 56-1-10(26) (Supp. 2019) (emphasis added). Prior to that time, and at the time of Respondent Holland's injury, a "moped" clearly was not recognized as a "motor vehicle."

Appellant also relies on the *Jack's Custom Cycles* opinion to argue that the circuit court erred by not considering dictionary definitions, South Carolina common law, and legal treatises in determining the meaning of "motor vehicle." (App.'s Initial Brief at 18-21; Pltf.'s Mem. Supp.

Mot. Summ. J. & Opp. Def't.'s Mot. Summ. J. at 4-6). Respondent Holland still maintains that South Carolina courts look to available statutory definitions when interpreting undefined insurance policy terms. *See Myers v. Government Employees Ins. Co.*, 279 S.C. 70, 72-73, 302 S.E.2d 331, 333 (1983) (finding where an insurance policy did not define "motorcycle" the court turned to statutory definitions to determine that a motorized minibike was a "motor driven cycle" and not a "motorcycle"). As the circuit court correctly notes, "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." (Order, p. 7).

Importantly, the cases cited by Appellant to support its argument that the circuit court should have looked at sources other than the controlling statutory definition can be differentiated. For example, the 1960 case of *Gunn v. Burnett* dealt with a wrecker and not a moped. 236 S.C. 496, 115 S.E.2d (1960). Whether a wrecker qualifies as a "motor vehicle" is irrelevant to whether a moped does. In *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 588 S.E.2d 643 (Ct. App. 2003), Appellant omits the fact that the court in *Oates* also looked to the South Carolina criminal statutes for guidance on how South Carolina law defined the word "abuse." In *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, the district court notes that "[c]ourts ***may*** look to a dictionary to determine the meaning of ambiguous, undefined terms." 185 F. Supp. 2d 614, 621 (D.S.C 2001) (emphasis added). The court's use of the permissive word "may" is telling. Finally, the Motor Vehicles Chapter of Corpus Juris Secondum cited by Appellant is persuasive, not binding, authority.

The most important case cited by Appellant is *Grenville Cnty. v. Ins. Rsrv. Fund, a Div. of S.C. Budget & Control Bd.*, 313 S.C. 546, 443 S.E.2d 552 (1994), which is referenced in the *Sunex Int'l.* case. In the *Greenville Cnty.* case, the parties filed cross motions for summary judgment in a

declaratory judgment action concerning the interpretation of the word "sudden" under an insurance policy exclusion. *Id.* at 547, 443 S.E.2d at 552-53. Thus, the question before the supreme court was whether the policy term "sudden" was ambiguous. *Id.* at 547, 443 S.E.2d at 553. Acknowledging that "[w]here the words of an insurance policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured," the supreme court reviewed how that term had been defined in other jurisdictions, which evidenced a split of authority. *Id.* In doing so, it noted, "That different courts have construed the language of an insurance policy differently is some indication of ambiguity." *Id.* at 548, 443 S.E.2d at 553. The court also consulted the *Webster's Third New International Dictionary* and *Black's Law Dictionary* for the definition of "sudden." Reversing the court of appeals, the supreme court held:

> In view of the holding by numerous jurisdictions, along with the definitions found in both *Webster's* and *Black's,* we find the term is ambiguous and susceptible of more than one reasonable interpretation. Construing the ambiguity, as we must, in favor of the insured, we hold that "sudden" is to be interpreted as "unexpected."

Id. Like *Greenville Cnty.*, if this Court were to consider the additional sources for defining "motor vehicle" that Appellant urges, the ambiguity in Appellant's Policy is only magnified.

Appellant cites to four different dictionary definitions in support of its argument that a moped is a motor vehicle, two of which come from the *Jack's Customs Cycles* case, and none of which define "motor vehicle" the same. (*See* Appellant's Initial Br., p. 19). Most importantly, all four dictionary definitions of "motor vehicle," as well as the 1960 definition cited in *Gunn v. Burnette* and the definition in the Motor Vehicles Chapter of *Corpus Juris Secondum*, conflict with the four previously cited statutory definitions provided in Title 56. "Where the words of an insurance policy are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured." *Greenville Cnty.*, 313 S.C. at 547, 443 S.E.2d at 553.

Furthermore, there is a split of authority as to whether a "moped" is a "motor vehicle." *Compare Larimer v. American Family Mut. Ins. Co.*, 926 N.W.2d 472, 476 (S.D. 2019) ("Therefore, after considering the definitions used by American Family throughout the Endorsement, Car policy, and Umbrella policy we conclude that American Family has not met its burden of proving Nehemiah's moped clearly fell outside of policy coverage."); *Allstate Ins. Co. v. Pacheco*, 851 F.2d 257, 259 (9th Cir. 1988) ("In doubt as to the meaning of 'motorized land vehicles' in relation to mopeds, we hold that a moped is not excluded by Allstate's Deluxe Homeowners Policy."); *Farmers Ins. Exchange v. Galvin*, 170 Cal.App.3d 1018, 1023, 216 Cal. Rptr. 844, 846-47 (Cal. Ct. App. 1985) ("The exclusion must be interpreted narrowly in favor of the insured; under plaintiff's exclusionary clause, a moped is not a motor vehicle.") *with Royal-Globe Ins. Co. v. Schultz*, 385 Mass. 1013, 434 N.E.2d 213, 214 (Mass. 1982) ("Therefore, we conclude that moped is included in the definition of 'land motor vehicle.'"); *Pontieri v. State Farm Ins. Companies*, 225 A.D.2d 510, 639 N.Y.S.2d 386, 387 (1996) ("The moped is clearly a 'motor vehicle' under the policy[.]"); *Neal v. American Family Mut. Ins. Co.*, 945 F.Supp. 1198, 1202 (S.D. Ind. 1996) ("The liability provisions clearly illustrate that the moped, unquestionably a motor vehicle, would have been insured under the policy."). Such a split in authority is evidence of the Policy exclusion's ambiguity, and such ambiguity must be construed in favor of the insured, Respondent Holland.

As for Appellant's reliance on the testimony of Respondent Holland's expert witness, Gerald Finkel, Mr. Finkel's testimony on the issue must be read in its entirety and not be limited to the incomplete passage cited by Appellant. Mr. Finkel's complete answer to the question of whether a "moped" fits under the dictionary definitions of "motor vehicle" that he looked at was this: "Probably so, ***but the dictionary definition isn't what's controlling in South Carolina.***

What's controlling in South Carolina is South Carolina law." (Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J., Ex. 5) (emphasis added).

Here, the circuit court correctly found that assigning a dictionary definition to "motor vehicle" to include a "moped" would conflict with the legislature's specific intent to recognize and treat mopeds differently. That is, as something other than a "motor vehicle." To adopt Appellant's argument that a moped is a motor vehicle would contravene South Carolina law. *Neumayer v. Philadelphia Indem. Ins., Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) ("An insurer may impose conditions on a policy provided they do not contravene public policy or violate a provision of law."). "To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010).

Because a moped was not a "motor vehicle" under South Carolina law at the time of Respondent Holland's injury in October 2018, it cannot be a "land motor vehicle" under subsection 2.a. of the "auto" definition.

B. Mopeds are not subject to South Carolina's compulsory and financial responsibility laws.

The second definition of "auto" states:

> 2.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.

(Emphasis added). As an initial matter, mopeds are not required to be insured under South Carolina law. S.C. CODE ANN. § 56-2-3010(C) (Supp. 2019) ("Mopeds are not required to be titled or insured in this State."). In fact, they have never been required to be insured.

Although Appellant does not argue the applicability of subsection 2.b. here, the language of this section is revealing and helps provide context to the meaning of "auto." As the circuit court aptly notes:

> [I]t is important to point out the Policy's use of the word "other" in the phrase, "Any ***other*** land vehicle that is subject to a compulsory or financial responsibility law. . . ." (emphasis added). If section 2.a. was all-encompassing and included any vehicle designed for travel on public roads, including mopeds as Plaintiff argues, then there would be no need to include section 2.b. catching "any other vehicle." Those "other" vehicles would have already been subsumed in section 2.a., rendering section 2.b. superfluous. The use of the word "other" when read in conjunction with section 2.a. implies that only those vehicles subject to state automobile insurance requirements are intended to fall within the definition of "auto," of which a moped is not.

(Order at 8). The circuit court correctly concluded that a moped does not meet either definition of "auto" under the Policy.

C. The Policy contains conflicting internal definitions and terms that render it ambiguous.

The "auto" exclusion conflicts with various internal definitions and terms when read in conjunction with other provisions of the Policy. To illustrate, the definition of "auto" under the Policy states that it does not include "mobile equipment."

> "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:
>
> i) Power cranes, shovels, loaders, diggers, or drills or
>
> ii) Road construction or resurfacing equipment such as graders, scrapers, or rollers.
>
> . . . .

(Mem. Supp. Def't.'s Mot. Summ. J. & Opp. Pltf.'s Mot. Summ. J, Ex. 2) (emphasis added). Each of the above vehicles operate on land ***and*** have motors. As such, the Policy excludes from the

definition of "auto" vehicles with motors that travel on land, creating a conflict in the Policy language and making it impossible to conclude that any motorized vehicle that travels on land is an "auto."

In *Larimer v. American Family Mutual Ins. Co.*, 926 N.W.2d 472 (S.D. 2019), a teenager, Nehemiah, was killed while driving a moped. After receiving the limits of the at-fault automobile driver's coverage, Nehemiah's estate sought underinsured benefits under a car policy that insured Nehemiah and his family. *Id.* at 474. There were five automobiles listed in the car policy, but the moped was not listed. *Id.* The carrier denied coverage pursuant to an exclusion providing that underinsured motorist coverage did not apply to bodily injury suffered "[w]hile occupying, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by you or any resident of your household." *Id.* Therefore, at issue was whether the policy's definition of "motor vehicle" unambiguously included the moped. *Id.* at 475. The policy defined "motor vehicle" as:

> [A] land motor vehicle or a trailer, but it does not mean a vehicle:
>
> a. Operated on rails or crawler-treads.
>
> b. Which is a farm type tractor or equipment designed for use mainly off public roads, while so used.
>
> c. Parked for camping or housekeeping purposes.

Id. The policy did not define "land motor vehicle." *Id.*

The *Larimer* court noted that, while a moped is operated on land, it was unclear whether the policy would contemplate that a moped was a motor vehicle simply because it had a motor. This uncertainty came from the fact that the three exceptions from the definition of "motor vehicle" indicated that not all vehicles with motors are classified as "motor vehicles" under the policy, and that the policy "lack[ed] sufficient criteria to allow a reasonable inference as to why the excepted vehicles are in fact *not* motor vehicles as defined by the Endorsement, but a moped should be so

considered." *Id.* at 476 (emphasis in original). The *Larimer* court concluded that the carrier failed to meet its burden of proving that the moped clearly fell outside of policy coverage. *Id.*

As in *Larimer*, the Policy at issue here fails to define "land motor vehicle" yet contains an exception to the exclusion for "mobile equipment," which is also defined to include vehicles that have motors. Thus, the circuit court correctly found that the Policy is ambiguous as to whether or not "land motor vehicles" is intended to include all vehicles with motors. Because there are vehicles with motors that fall within the definition of "mobile equipment," and are therefore not defined as "autos," the fact that a vehicle has a motor does not permit the conclusion that the vehicle is a "land motor vehicle" subject to the auto exclusion. At a minimum, the Policy is ambiguous and conflicting, requiring that its terms be construed in favor of the insured. *See McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 318, 426 S.E.2d 770 (1993). The decision of the circuit court should be affirmed.

II. Because Appellant received notice of the lawsuit and was not substantially prejudiced, Respondent Holland is entitled to coverage under the Policy.

Appellant next argues that the circuit court erred because Respondents Zapp and Scozzafava were required to notify Appellant of the underlying suit filed by Respondent Holland and that their failure to do so substantially prejudiced Appellant. "[W]here the rights of innocent parties are threatened by a failure of the insured to comply with the notice requirements of the policy, the insurer must show that its rights have been substantially prejudiced by the insured's failure to provide notice[.]" *Founders Ins. Co. v. Richard Ruth's Bar & Grill, LLC*, 761 Fed. Appx. 178, 183 (4th Cir. 2019) (unpublished) (applying South Carolina law) (citing *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994)). The burden of proof is "upon the insurer to show not only that the insured has failed to perform the terms and conditions invoked

upon him by the policy contract but in addition that it was substantially prejudiced thereby." *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67 145 S.E.2d 673, 677 (S.C. 1965).

A. Appellant received notice of Respondent Holland's lawsuit through its agent, Livingston Insurance Agency.

Under South Carolina law, notice to the insured's agent constitutes notice to the insurer if the agent received knowledge within the scope of its agency relationship with the insurer. *W. Heritage Ins. v. Guiliani*, 38 Fed. Appx. 974, 978 (4th Cir. 2002); *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). The knowledge of an insurance agent received within the scope of his agency is imputable to the insurance company. *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215 (1926).

In South Carolina, an agent's authority consists of "actual authority, whether expressed or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying." *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 115 (S.C. 2005)). Actual authority is "expressly conferred upon the agent by the principal," and apparent authority is "when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority." *Id.* (citing *Moore v. North Am. Van Lines*, 423 S.E.2d 116, 118 (S.C. 1992)). Apparent authority means a "principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 297, 468 S.E.2d 292 (1996). However, "those dealing with [a general insurance agent] without notice of restrictions upon his authority have the right to presume that his authority is coextensive with its apparent scope, and as broad as his title indicates." *Noisette*, 299 S.C. at 250, 384 S.E.2d at 314 (quoting *J. Appleman and J. Appleman, Insurance Law and Practice § 8693* at 259-61

(1981)). Specifically, "[t]he restrictions and limitations existing upon the authority of a general agent as between such agent and the company are not binding upon policyholders in their dealings with such agent, in the absence of knowledge of [sic] their part of such limitations." *Rickborn*, 321 S.C. at 298, 468 S.E.2d at 296-97.

Appellant argues the circuit court erred in ruling that notice to Livingston constituted notice to Appellant. Specifically, Appellant argues that the court's reliance on *Noisette v. Ismail* is misplaced because the decision in *Noisette* was based on the fact that the agent and the insurer entered into a written agency agreement. However, the court in *Noisette* actually relied on the *apparent authority*, and not the actual authority, of the agent to hold that notice to the agent is notice to the insurer.[7] *See Noisette*, 299 S.C. at 251, 384 S.E.2d at 314 ("We therefore affirm the trial court's finding that Penn National had clothed Bulwinkle with the apparent authority to act on its behalf."); *see also Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 301, 468 S.E.2d 292, 305 (1996) ("We find that the evidence supports the special referee's conclusion that Glasser was Liberty Life's agent, that he was clothed with apparent authority, and that his negligence was imputable to Liberty Life.") If an agent has the apparent authority to act on the behalf of the insurer, actual authority is not required. *See Rickborn,* 321 S.C. 291, 468 S.E.2d 292.

In *Noisette v. Ismail*, the South Carolina Court of Appeals held that Penn National's claim for failure to notify, as required by its insurance policy, was meritless. 299 S.C. 243, 384 S.E.2d 310 (S.C. Ct. App. 1989), *rev'd on other grounds*, 403 S.E.2d 122 (S.C. 1991). In that case, Ismail

[7] Appellant cites to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 565, 813 S.E.2d 292, 304 (Ct. App. 2018) for the proposition that "[an] agency may not be established solely by the declarations and conduct of an alleged agent." *Hodge*, 422 S.C. at 566, 813 S.E.2d at 304. The court in *Hodge* continues, however, to explain that "such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish agency." *Id.* As discussed below, Respondent Holland has presented evidence, other than the statements and conduct of Livingston, to show that an apparent agency existed between Appellant and Livingston such as: Appellant listing Livingston as the point of contact on the Policy at issue; Appellant promoting Livingston as one of its agents on its website; and allowing Appellant's insureds to make insurance premium payments through Livingston's website.

was driving a car owned by Owens when he collided with Noisette. *Id.* at 253-54. Noisette claimed that Owens' Penn National garage liability insurance policy extended to the accident. *Id.* at 253. Owens obtained the Penn National policy through the Bulwinkle Agency who had an agency agreement with Penn National that authorized it to "receive and accept proposals for insurance including binding authority, covering such … risks as [Penn National] may … authorize to be insured." *Id.* at 248-49.

After the automobile accident between Noisette and Ismail, Penn National contended that its policy did not provide coverage in the amount of $100,000 because "Owens failed to notify Penn National of the accident." *Id.* at 251. Owens notified Bulwinkle of the accident on February 15, 1982, the day after the accident; however, at no time did Owens forward any suit papers to Penn National. *Id.* Penn National claimed it did not receive notice of the lawsuit until January 11, 1983, which came from Noisette's attorney the day before the trial began. *Id.* The court of appeals held that Penn National had received notice "[b]ecause Bulwinkle was still Penn National's agent on the date Owens notified Bulwinkle of the accident, [and, therefore,] Owens' notice to Bulwinkle constituted notice to Penn National." *Id.*

Just as in *Noisette*, Appellant received notice of Holland's claim through its agent, Livingston Insurance Agency. Livingston is one of Appellant's independent agents authorized to represent Appellant in South Carolina. Livingston's website states, "We Represent Primarily A++, A+, and A Rated Companies" – listing Appellant as one of those companies. (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., Ex. 20). In fact, the Policy issued to Respondents Scozzafava and Zapp's by Appellant, and at issue in this case, specifically states "Your contact for matters pertaining to this policy: Livingston Insurance Agency, Inc." (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., Ex. 2). By listing Livingston as the contact, Appellant

represented that Livingston had broad authority related to the policy and its insureds, and the general public has the right to presume such authority exists. *See Noisette*, 299 S.C. at 250, 384 S.E.2d at 314 ("Those dealing with [an] agent without notice of restrictions upon his authority have a right to presume that his authority is co-extensive with its apparent scope, and as broad as his title indicates."). Thus, while Appellant attempts to downplay this relationship, it is a clear representation by Appellant of Livingston's apparent authority.

Moreover, on the homepage of Appellant's website, www.cinfin.com, you can "Find an Agency to Get a Quote" by typing in a zip code or city and state for a list of Cincinnati agents in a particular area. If you type in the Columbia, South Carolina, area code, 29201, Livingston Insurance Agency is listed as one of Cincinnati's agents. (Def't.'s Resp. Plt'f.'s Reply Mem. Supp. Mem. Supp. Mot. Summ. J., Ex. 4). Additionally, since the time Livingston and Defendants Zapp and Scozzafava began working together in 2016, Cincinnati has been listed as one of Livingston's carriers on Livingston's website. (Def't.'s Resp. Plt'f.'s Reply Mem. Supp. Mem. Supp. Mot. Summ. J., Ex. 7). In fact, Livingston has promoted its relationship with Cincinnati Insurance since 2013 by publicly stating, "**We are proud to represent them**." (Def't.'s Resp. Plt'f.'s Reply Mem. Supp. Mem. Supp. Mot. Summ. J., Ex. 8). Additionally, as far back as 2016 and 2018, an insured could even pay their Cincinnati premium through the Livingston website. (Def't.'s Resp. Plt'f.'s Reply Mem. Supp. Mem. Supp. Mot. Summ. J., Ex. 9).

In this case, Livingston received notice of Respondent Holland's claim on May 14, 2019, when it received and signed for a subpoena *duces tecum* from Respondent Holland's counsel via certified mail. (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., Ex. 22). Importantly, on the date it received this subpoena, Livingston was still acting as an agent for Appellant.

Appellant further argues that, because Respondent Zapp failed to appear or answer the complaints in this matter, it "is held to have conclusively admitted the factual allegations against it, including that it did not provide timeline notice and that [Appellant] was prejudiced. (App.s' Initial Brief at 27). Appellant essentially contends that these so called "admissions" are binding on Respondent Holland. However, in South Carolina, admissions by one party are not binding on co-parties. *See, e.g.*, *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, 248 F. Supp. 3d 733, 750 (D.S.C 2017) ("A judicial admission is a 'representation that is 'conclusive in the case" such as 'formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.'") (citing *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014); Section 18:5 *Judicial Admissions of Party-Opponent*, TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS (5th ed. Sept. 2022) ("A judicial admission made by one party is not binding upon coparties unless they consent to it or there is privity between them.") (citing Am. Jur.2d, Evidence § 689).

Just as Owens obtained the insurance policy in *Noisette* through the Bulwinkle Agency, Respondents Zapp and Scozzafava acquired Appellant's Policy through Livingston. As a result, Livingston was cloaked with the apparent authority to receive notice of claims involving insurance policies sold on behalf of Appellant. Thus, Livingston clearly had notice of the lawsuit on May 14, 2019, and because notice to Livingston constitutes notice to Appellant, Appellant also had notice of Respondent's lawsuit on May 14, 2019, which was seven days before the Entry of Default on May 22, 2019.

B. Appellant received actual notice of Respondent Holland's lawsuit.

Even if the circuit court erred in finding that Appellant received notice through Livingston, which is expressly denied, the circuit court correctly found that Appellant received actual notice

just seven days after the entry of default was entered. The Entry of Default occurred on May 22, 2019. The evidence clearly shows that on May 28, 2019, a Livingston employee named Jackie Lorick, feeling that she had a duty to alert Appellant that Respondent Zapp was being sued, sent an email to Cassandra Wilhelm, a Small Business Underwriter for Appellant, alerting Ms. Wilhelm to the lawsuit and the fact that Livingston had received a subpoena. (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., Ex. 19, Ex. 23). The following day, May 29, 2019, Ms. Wilhelm responded via email thanking Ms. Lorick for the "heads up," and providing contact information if the claimant, in this case Respondent Holland, needed to file a claim. *Id.* Thus, on May 29, 2019, just seven days after the Entry of Default, Appellant had actual notice of Respondent Holland's lawsuit, giving it an immediate opportunity to move to set aside the default. Instead, it chose to do nothing.

Furthermore, the law does not require that notice of a lawsuit be given in strict conformity with the Policy provisions, especially to the detriment of an innocent third party. *See Factory Mut. Liability Ins. Co. of America v. Kennedy,* 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971) ("The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured. If such prejudice does not result to the rights of the insurer, no sound reason appears to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled. The requirement that noncompliance must result in prejudice to the rights of the insurer preserves the basic function of the notice conditions and at the same time prohibits a technical application thereof from defeating the public purpose of affording protection to the innocent victim of a motor vehicle accident.").

At bottom, Appellant received notice of Respondent Holland's lawsuit through its agent, Livingston Insurance Agency, on May 14, 2019, and again through its employee, Cassandra Wilhelm, on May 29, 2019, giving Appellant two separate opportunities to investigate and act. "Had [Appellant] acted immediately . . ., it could have taken the necessary steps to protect its interests and negate any prejudice it now claims. [Appellant] cannot now allege prejudice for a situation it created by its own doing." (Order, p. 10).

C. Appellant was not substantially prejudiced.

The purpose of the notice provision is to allow time for the investigation of facts and to assist the insurer in preparing a defense. *Washington v. Nat'l Service Fire Ins. Co.,* 252 S.C. 635, 168 S.E.2d 90 (S.C. 1969). However, the burden of proof is "upon the insurer to show not only that the insured has failed to perform the terms and conditions invoked upon him by the policy contract but in addition that it was substantially prejudiced thereby." *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67 145 S.E.2d 673, 677 (S.C. 1965); *Founders Ins. Co.*, 761 Fed. Appx. at 182 (4th Cir. 2019). In fact, "'[t]he driving force behind the notice-prejudice rule is that there is 'no sound reason . . . to permit mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled.'" *Neumayer*, 427 S.C. at 272, 831 S.E.2d at 411 (quoting *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971)). "Rather than provide a 'technical escape-hatch for the insurer to deny coverage, the notice-prejudice rule balances both interests without a wholesale prohibition of these clauses." *Id.*

Moreover, South Carolina courts have held that substantial prejudice arises as a matter of law only when notice is received after the entry of default judgment, distinguishing between the entry of default and default judgment. *Founders Ins. Co.*, 761 Fed. Appx. at 183 (4th Cir. 2019) ("South Carolina appellate courts have never held the entry of default alone clearly establishes

prejudice[.]"). The circuit court correctly relied on several cases to hold that Appellant was not substantially prejudiced. *See, e.g. Berenyi, Inc. v. Landmark American Insurance Co.*, No. 2:09-CV-01556-PMD, 2010 WL 233861 at *7 (D.S.C. 2010) (holding failure to show substantial prejudice where Landmark had sufficient time to investigate and defend the underlying action and "no default judgment ha[d] been entered."); *Vermont Mutual Insurance Company v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 422 (1994) (holding there was "absolutely no evidence" that notification "only four months after the accident" created substantial prejudice to Vermont); *W. Heritage Ins. v. Guiliani*, 38 Fed. Appx. 974, 979 (4th Cir. 2002) (holding that 17-month delay in receiving notice did not substantially prejudice Western Heritage).

Appellant has not meet its burden in proving that it was substantially prejudiced by Respondent Zapp's failure to notify Appellant of Respondent Holland's lawsuit. Appellant contends that it was prejudiced by the entry of default and that it did not have the opportunity to take any action other than to attempt to set aside the default. (Appellant's Initial Br., p. 29). Specifically, Appellant relies on *Portrait Homes – S.C., LLC v. Pennsylvania Nat'l Mut. Cas. Ins. Co*., 2023 WL 8610277 (Ct. App. May 2, 2023). That case, however, supports Respondent Holland's position.

In *Portrait Homes*, Penn National argued that the trial court "improperly failed to conclude Castillo violated the notice and cooperation conditions contained in the policies as a matter of law [and] because Castillo's violations of those conditions led to entry of default and default judgment, the trial court erred in failing to find it suffered substantial prejudice as a result." *Id.* at *16.

However, the Court of Appeals held:

> Here, Castillo did not notify Penn National of the lawsuit. However, in addition to showing Castillo did not provide it with notice, Penn National must also show prejudice because this case involves an innocent third party. Penn National clearly received notice of the suit despite Castillo's failure to notify it. The trial court did

> not err in finding Penn National was not substantially prejudiced by Castillo's failure to notify it of the lawsuit. Because Penn National knew of the lawsuit well before Castillo, it was not prejudiced by Castillo's failure to forward the paperwork or contact it. Penn National had the opportunity to respond to the suit; it even filed a motion for an extension to file an answer. It did not make any attempt to investigate. Penn National had defended Castillo in similar suits in the past. ***Based on its own knowledge of the suit, Penn National had opportunities, of which it did not take advantage, to at least attempt to protect itself.*** Accordingly, the trial court did not err in finding Penn National was not substantially prejudiced due to lack of notice by Castillo.

Id. at *19 (emphasis added). The Court further noted that "South Carolina appellate courts have never held that entry of default alone clearly establishes prejudice[.]" *Id.* at *18.

In this case, had Appellant timely investigated the suit upon receipt of notice by its employee, Ms. Wilhelm, it could have taken immediate action to set aside the entry of default that was entered just seven days before as opposed to waiting until September 18, 2019, nearly four months later, to make that motion. Appellant would likely have been in a much stronger position to set aside the entry of default had it acted promptly. Thus, like in *Portrait Homes*, the circuit court correctly ruled that Appellant could not sit on its hands and then claim prejudice when it made no effort to timely act. Any alleged prejudice to Appellant was self-inflicted.

Additionally, the circuit court correctly held that Appellant and its defense counsel had ample time, resources, and opportunity to adequately investigate and defend that claim before an Order of Default Judgment in June 2021, which was over two years after Appellant first learned of the lawsuit. Specifically, Appellant: (1) received all of Respondent Holland's then-available medical records and bills, including the collision report an all correspondence previously sent to Respondents Zapp and Scozzafava; (2) received a demand package from Respondent Holland's counsel which included a demand letter, medical records and bills, photos, a summary of medical expenses, the collision report, and correspondence previously sent to Respondents Zapp and Scozzafava; (3) issued subpoenas to all of Respondent Holland's medical physicians; (4) was

provided with Respondent Holland's life care plan; (5) attended the deposition of Dr. Eric Black, Respondent Holland's shoulder surgeon, and cross-examined the witness; and (6) attended the damages hearing and cross-examined Respondent Holland. (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., Ex. 24). Generally, when an entry of default has been entered, the defaulting party cannot conduct discovery. *See Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). However, in this case, Appellant had access to nearly all the discovery it would have been able to obtain had there been no entry of default.

Additionally, Appellant was given the opportunity to settle Respondent Holland's case in good faith prior to default judgment. As mentioned above, Respondent Holland made a settlement demand on Respondent Zapp in October 2019, at the request of Respondent Zapp's defense counsel. (Def't.'s Mem. Supp. Mot. Summ. J. & Opp. Plt'f.'s Mot. Summ. J., p. 20). At the time, Respondent Holland's medical expenses were nearly $100,000, and he was left with permanent fixation hardware in his shoulder, permanent impairment, and permanent disfiguration and scaring. (*Id*.) A demand of $425,000 was made. (*Id*.) In response, Appellant offered $25,000. Respondent Holland made a counter demand of $400,000 in response, only to be told by Respondent Zapp's counsel that he had been given only $25,000 in authority from Appellant. (*Id*.) Settlement negotiations ended at that point and Appellant made no further attempts to resolve the case prior to judgment being entered against Respondents Zapp and Scozzafava in July 2021. (*Id*.)

Appellant was given more than enough time to investigate and defend Respondent Holland's claim. Appellant was granted extensions to respond, received numerous discovery documents and other information, issued various subpoenas, attended a deposition, participated in settlement negotiations, and fully participated in the damages hearing. The fact that Appellant did not obtain the result that it hoped for through these efforts does not amount to substantial prejudice.

D. Appellant's actions are inconsistent with a showing of substantial prejudice.

As further support that Appellant has not been substantially prejudiced, the circuit court noted the timing of Appellant's notice claim. (Order, p. 13). Appellant filed its declaratory judgment action on November 13, 2019. In the original complaint, Appellant did not allege a failure to notify and substantial prejudice claim. It was not until October 2, 2020, eleven months after initially filing the declaratory judgment action, that Appellant asserted it was substantially prejudiced by the failure of Respondents Zapp and Scozzafava's to notify.

Failure to raise the claim for nearly a year after it was already in default is inconsistent with an allegation of substantial prejudice. (Order, p. 13). Therefore, Appellant has not met its burden in showing that it was substantially prejudiced. The circuit court's Order granting Summary Judgment to Respondent Holland should be affirmed.

III. The Court's denial of Appellant's Motion for Summary Judgment is not immediately appealable.

Appellant argues that this Court should not only reverse the circuit court's ruling granting Respondent Holland's Motion for Summary Judgment, but also reverse the circuit court's decision and grant Appellant's Motion for Summary Judgment. Generally, orders granting summary judgment may be immediately appealable under either the "invoking the merits" or "substantial right" categories of section 14-3-330(1) and (2)(c). *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990). However, an order denying a motion for summary judgment is normally not immediately appealable. *See Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*, 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987). The Supreme Court of South Carolina has repeatedly held that the denial of summary judgment is not directly appealable. *See Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981); *Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981); *Neal v. Carolina Power and Light*, 274 S.C. 552, 265 S.E.2d 681 (1980); *United*

States Fidelity Guaranty Co. v. City of Spartanburg, 267 S.C. 210, 227 S.E.2d 188 (1976); *Medlin v. W.T. Grant, Inc.*, 262 S.C. 185, 203 S.E.2d 426 (1974); *Greenwich Savings Bank v. Jones*, 261 S.C. 515, 201 S.E.2d 244 (1973); *Geiger v. Carolina Pool Equipment Distributors, Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971); *see also Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986); *Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales*, 283 S.C. 53, 320 S.E.2d 501 (Ct. App. 1984). This Court has previously addressed this issue in *Fuller v. Blanchard* holding:

> This case concerned cross-motions for summary judgment regarding two of Dr. Blanchard's defenses; the circuit court simultaneously granted Mrs. Fuller's motion for summary judgment and denied Dr. Blanchard's motion. On appeal, the parties have blurred the distinction between the two motions. Because the *granting* of a motion for summary judgment is appealable while the *denial* of a motion for summary judgment is not, we are addressing Dr. Blanchard's arguments to the extent he appears to challenge the circuit court's grant of summary judgment to Mrs. Fuller as an error of law based on the facts of the case, although, as stated, there has been overlapping of these issues due to the procedural posture of the case. To the extent Dr. Blanchard appears to argue the court should have granted his motion for summary judgment, the denial of summary judgment is not properly before us and we do not address it. *See Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997) (reiterating that the denial of a motion for summary judgment is not appealable, even after final judgment); *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) (stating the denial of a motion for summary judgment is not appealable). Neither party makes this distinction in the briefs and Mrs. Fuller does not assert that Dr. Blanchard is only arguing about the denial of his own motion for summary judgment, so we have addressed the issues in manner outlined above.

358 S.C. 536, n. 21, 595 S.E.2d 831, n. 21 (Ct. App. 2004) (emphasis in original).

To the extent Appellant is attempting to appeal the circuit court's order denying its Motion for Summary Judgment, South Carolina law is clear that such an appeal is not immediately appealable and, therefore, Appellant's appeal as to the denial of its motion for summary judgment should be dismissed.

CONCLUSION

For the reasons and arguments presented above, the decision of the circuit court should be affirmed.

Respectfully submitted,

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