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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

The Cincinnati Specialty Underwriters Insurance Company……. Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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I. The Policy's Definition of Motor Vehicle Unambiguously Includes "Moped."

Respondent's Brief argues that this Court should overlook the South Carolina Supreme Court's judicial definition of "motor vehicle" along with the plain, ordinary, and popular definition of the term from dictionaries, statutes, and legal treatises. Respondent's argument relies on a misunderstanding and misapplication of South Carolina law.

a. Respondent and the Circuit Court Order Fail to Apply the Rules of Contract Interpretation.

i. The rules of contract interpretation govern interpretation of Cincinnati's Policy.

This case involves questions of contract interpretation. "An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183, 763 S.E.2d 598, 602 (Ct. App. 2014). Under black letter law in South Carolina, undefined words in insurance policies must be given their "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). Moreover, "[a]n ambiguity exists only when the language is *reasonably* capable of being understood in more than one way." *Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 711 (2014) (emphasis added). "The court cannot torture the meaning of policy language to extend coverage not intended by the parties." *Precision Walls*, 410 S.C. at 183–84, 763 S.E.2d at 602. "It is well-settled that an insurance policy term is not ambiguous merely because the policy does not provide a definition for the term." *Morris v. Auto-Owners Ins. Co.*, No. 3:16-CV-00880-JMC, 2016 WL 7473430, at *4 (D.S.C. Dec. 29, 2016). "Moreover, a term in an insurance policy is not ambiguous, and the rule construing ambiguities in favor of the insured does not apply, when the

term has been judicially defined." *Id.* (collecting cases indicating that terms are not ambiguous and are not construed against an insurer where a term has been judicially defined).

Moreover, it is well established that in interpreting undefined terms in an insurance policy, courts in South Carolina regularly turn to a dictionary to find a term's plain, ordinary, and popular meaning. *See*, *e.g.*, *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 5, 747 S.E.2d 426, 428 (2013) (citing *American Heritage Dictionary* to identify the "plain, ordinary, and popular meaning" of undefined policy term in policy); *Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 443, 737 S.E.2d 631, 637 (Ct. App. 2012) (citing *Black's Law Dictionary* for definition of undefined policy term); *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 383, 588 S.E.2d 643, 646 (Ct. App. 2003) (citing *Black's Law Dictionary* and *The American Heritage Dictionary of the English Language* for undefined insurance policy term and citing another case for its holding that "dictionaries can be helpful tools for the purpose of defining terms" (internal citation omitted)); *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)). Courts can examine the common usage of a word using "descriptive dictionaries," such as *Websters*; the "proper" use of words by consulting "prescriptive dictionaries," such as *The American Heritage Dictionary*; and case law interpretations such as *Black's Law Dictionary*. *See*, *e.g.*, *Heilker v. Zoning Bd. of Appeals for City of Beaufort,* 346 S.C. 401, 410, 552 S.E.2d 42, 47 (Ct. App. 2001) (noting that "a descriptive dictionary sets forth definitions showing what a word may mean generally" while legal dictionaries rely on case law and their editorial boards); *Armstrong v. Comm'r*, 139 T.C. 468, 508 (2012), aff'd, 745 F.3d 890 (8th Cir. 2014) (discussing descriptive and prescriptive dictionaries at fn. 11).

While other sources—such as statutes and legal treatises—are occasionally cited in the context of interpreting insurance policy terms, such citations tend to occur in tandem with, and subsequent to, the courts' consideration of dictionary definitions. *See, e.g.*, *S.C. Farm Bureau Mut. Ins. Co.,* 356 S.C. at 383, 588 S.E.2d at 646 (citing multiple dictionary definitions before also considering statutory sections). The reason for this is apparent: dictionaries provide common and proper words usages. Statutes, on the other hand, are far more likely to use a term in a specialized manner (i.e. as a "term of art"). *See, e.g.*, TERM OF ART, *Black's Law Dictionary* (12th ed. 2024) (defining "term of art" as "[a] word or phrase having a specific, precise meaning in a given specialty, *apart from its general meaning in ordinary contexts*") (emphasis added).

Notably, the circuit court and the Respondent concede this. Specifically, the circuit court rejected the "*common, everyday*" definitions from dictionaries in favor of what it found to be a "*special*" recognition from the legislature. (R. p. ____; September 29, 2023 Order at p. 7) (emphasis added). The Respondent agrees. *See* Respondent's Brief at 13 ("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.'"). By abandoning the "ordinary, plain, and popular" meaning—and the South Carolina Supreme Court's judicial definition of "motor vehicle"—in favor of a "specialized" (and, as discussed below, unsupported) definition, the circuit court erred.

In summary, the canons of contract interpretation govern this matter. In applying these canons, courts should primarily rely on judicial definitions (where available) and dictionary definitions. This is because under South Carolina law, contract terms are to be given their plain, ordinary, and popular meanings. Dictionaries provide the *common* and *proper* usage of a term for courts. Similarly, judicial interpretations provide a definition of a term that is typically reached

after judicial research of sources such as dictionaries. Other sources—such as statutes and legal treatises—may help guide these considerations on occasion so long as they help a court arrive at the plain, ordinary, and popular meaning of a term.

Fortunately, when it comes to the term "motor vehicle," the terms in the Cincinnati Policy, judicial definitions, dictionary definitions, statutory definitions, and legal treatises—among other things—align.

ii. The Policy itself demonstrates that Mr. Holland's motor scooter is a "motor vehicle."

Under the Policy, an "Auto" is defined to include "[a] land motor vehicle, trailer or semitrailer designed for travel on public roads…." (*See* R.p. ____; Policy at p. 30). Respondent does not dispute that the moped is a vehicle. (*See* Respondent's Initial Brief at p. 7). Moreover, Respondent has never disputed that the vehicle used by Mr. Holland at the time of the accident was powered by an electric motor. (*See* Appellant's Initial Brief; *see also* R.p. ____; Holland's Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment). Further, while Respondent prefers to refer to the vehicle as a "moped," it is important to note that the vehicle used by Mr. Holland was exclusively operated by an electric motor and could not be powered by pedals. (R.p. ____; Exhibit B to Cincinnati's Complaint; R.p. ____, Exhibit C to Cincinnati's Complaint at pp. 9-10, 19-22). Moreover, Respondent does not dispute that the electric scooter was to be operated on land. (*See* Appellant's Initial Brief; R.p. ____, Holland's Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. *See also* R.p. ____, Exhibit C to Cincinnati's Complaint at p. 4). Lastly, it is undisputed that the electric scooter was designed for travel on public roads. *See id.*

iii. South Carolina has judicially defined the term "motor vehicle" such that it encompasses Mr. Holland's motor scooter.

Faced with this definition of "auto" in the Policy that, on its face, encompasses the motor scooter being operated by Mr. Holland, Respondent suggests that the term "motor vehicle" as contained within the definition of "auto" contains a hidden, latent ambiguity. However, this flies in the face of long-established South Carolina law, among other things.

As an initial matter, the term "motor vehicle" has been judicially defined for more than six decades. *See Gunn v. Burnette*, 236 S.C. 496, 499, 115 S.E.2d 171, 172 (1960) ("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."). Since then, both the South Carolina Supreme Court and the South Carolina Court of Appeals have revisited and confirmed this interpretation. *White v. S.C. Dep't of Parks, Recreation & Tourism*, 271 S.C. 91, 94, 245 S.E.2d 125, 127 (1978) (noting that the generic meaning of "motor vehicle" was examined in *Gunn,* as quoted above); *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 45–46, 885 S.E.2d 433, 439 (Ct. App. 2023), reh'g denied (Apr. 26, 2023).

Respondent urges this Court to distinguish *Gunn* because it "dealt with a wrecker and not a moped." *See* Respondent's Brief at 13. But Respondent's argument fails. *Gunn* provided a generic definition that has been used by the South Carolina Supreme Court and this Court repeatedly over the last six decades and for various kinds of vehicles. For example, in *White*, the South Carolina Supreme Court cited *Gunn*'s definition to determine whether a tram was a "motor vehicle." *White*, 271 S.C. at 94, 245 S.E.2d at 127. Noting that *Gunn* provided the "generic meaning of the term 'motor vehicle'" as a "self-propelled vehicle designed to carry passengers,"

the Court in *White* found that the tram was a "motor vehicle" even though it did not operate on highways. *Id.* Similarly, in *Jack's*, this Court cited *Gunn* and its definition of "motor vehicle" to determine whether ATVs and UTVs were "motor vehicles." *Jack's*, 439 S.C. at 45-46, 885 S.E.2d at 439. Respondent's argument that *Gunn* is limited to consideration of wreckers fails.

Moreover, Mr. Holland's motor scooter undoubtedly meets South Carolina's judicial definition of "motor vehicle." It is undisputed that the motor scooter was a self-propelled vehicle used to carry people and things. To the extent Respondent prefers to describe the vehicle as a "moped," the Court should be aware that the electric scooter used by Mr. Holland was entirely motorized—it could not be powered by pedaling. (*See* R.pp. ____; Exhibit C to Cincinnati's Complaint at pp. 39-40). The fact that the motor scooter meets the judicial definition should end the analysis. "It is well-settled that an insurance policy term is not ambiguous merely because the policy does not provide a definition for the term." *Morris v. Auto-Owners Ins. Co.*, No. 3:16-CV-00880-JMC, 2016 WL 7473430, at *4 (D.S.C. Dec. 29, 2016). "Moreover, a term in an insurance policy is not ambiguous, and the rule construing ambiguities in favor of the insured does not apply, when the term has been judicially defined." *Id.*

In summary, because South Carolina has judicially defined the term "motor vehicle," which definition encompasses the motor scooter used by Mr. Holland, the Policy is unambiguous, the circuit court's order should be reversed, and judgment should be entered in Cincinnati's favor.

iv. Dictionaries, legal treatises, South Carolina statutes, and other sources define "motor vehicle" such that it encompasses Mr. Holland's motor scooter.

1. Dictionaries

Even absent South Carolina's judicial definition of "motor vehicle," other sources show that Cincinnati's policy is unambiguous. As an initial matter, every single dictionary consulted by

Appellant's counsel in this matter, including *Merriam Webster's Collegiate Dictionary*, *The American Heritage College Dictionary*, *Black's Law Dictionary*, and *Dictionary.com*, included definitions that encompass the motor scooter at issue here. *See* Appellant's Initial Brief, p. 19. These dictionaries run the gamut from descriptive (*Websters*) to prescriptive (*American Heritage*) to legal (*Black's*) to online dictionaries (*Dictionary.com*). *See id.* The South Carolina Supreme Court and this Court regularly rely on these sources, including for interpretation of terms in insurance policies. *See*, *e.g.*, *Gunn* at 499, 115 S.E.2d at 172 (1960) (citing *Webster's*); *Jack's* at 46, 885 S.E.2d at 439 (citing *Merriam Webster's Collegiate Dictionary* and *The American Heritage College Dictionary*); *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").

Dictionary definitions are particularly important with regard to interpretation of undefined terms because dictionaries are specifically designed to provide common and proper usage for words, as discussed above. The fact that each of these definitions would encompass Mr. Holland's motor scooter is telling, particularly given that these and similar definitions have been cited by South Carolina appellate courts. The circuit court Order's disregard of these undisputedly "common, everyday" definitions was error. (R.p. ____; September 29, 2023 Order at p. 7).

Respondent's reliance on *Myers v. Government Employees Ins. Co.*, 279 S.C. 70, 72-73, 302 S.E.2d 331, 333 (1983), to justify the circuit court's disregard for dictionary definitions and

other sources is in error. *See* Respondent's Initial Brief at pp. 7-8 and 13; September 29, 2023 Order at p. 5. In *Myers*, "[t]he sole question… was whether a Honda Express is a motorcycle as contemplated by the policy exclusion *and the applicable statutes*." *Myers*, 279 S.C. at 72, 302 S.E.2d at 333 (emphasis added). Specifically, the case involved whether South Carolina statute allowed an insurer to exclude a two-horsepower two-wheeled cycle as a "motorcycle." *See id.* at 72, 302 S.E.2d at 332. As the court notes, the applicable South Carolina Code provisions at the time permitted insurers to exclude coverage for "motorcycles," which was then a statutorily-defined term. *See id.* at 73, 302 S.E.2d at 332-33. Under the statutory scheme, insurers were required to provide personal injury protection for vehicles unless the vehicle was a motorcycle. *See id.* Thus, the key question in the *Myers* case was whether the insurer could, under South Carolina statutes, exclude coverage for the two-wheeled cycle involved in the collision. *See id.* at 72, 302 S.E.2d at 333. If the cycle was a "motorcycle" under the applicable South Carolina statute, exclusion of coverage was proper. If the two-wheeled cycle was *not* a motorcycle under the statute, the insurer could not exclude coverage. The *Myers* court was thus engaged in statutory interpretation, not contract interpretation. Review of the decision clearly review the court was not looking for the "plain, ordinary, and popular" definition of the word but rather the statutory meaning.

The present case is easily distinguishable. Where *Myers* involved questions of statutory interpretation, in which the wording of the statute and legislative intent controls, the present case involves questions of contract interpretation, where the plain, ordinary, and popular definition controls. *See S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006). Moreover, the Cincinnati policy at issue is a Commercial General Liability ("CGL") policy. CGL policies as a general rule *do not* provide coverage for automobiles. *See*

Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004); *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999). Unlike the auto policy at issue in *Myers*, there is no statutory provision that requires CGL policies to cover (or not cover) mopeds or "motor vehicles." In other words, the *Myers* Court was required to consider statutory interpretation and intent. In contrast, the circuit court here was required to consider the plain, ordinary, and popular definition of the term at issue.

2. Statutes

While statutory definitions may not be a reliable source for the "plain, ordinary, and popular" definition of most terms and are not consulted nearly as frequently as dictionary definitions, they are consulted on occasion. *See, e.g.*, *S.C. Farm Bureau Mut. Ins. Co.,* 356 S.C. at 383, 588 S.E.2d at 646 (considering dictionary definitions followed by code sections). In the present case, however, South Carolina's general statutory definitions of "motor vehicle" are consistent with judicial and dictionary definitions.

For example, Section 56-1-10 provides the general definitions governing all of South Carolina's Motor Vehicle Code, Title 56. Unless otherwise indicated, these default definitions control. The definition for "motor vehicle" appears in subsection 56-1-10(7) and it provides that "'[m]otor 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." Mr. Holland's motor scooter plainly fits this definition, and as already addressed in Appellant's Initial Brief, neither the circuit court nor Mr. Holland's expert dispute this. (*See*, *e.g.*, Appellant's Initial Brief at pp. 8-9).

Respondent relies on ambiguous and equivocal language to escape this default definition. For example, Respondent argues that "[a]t the time of Respondent Holland's injury on October 12,

2018, *South Carolina statutory law specifically excluded mopeds from the definition of 'motor vehicle.*'" (Respondent's Brief at 8 (emphasis added)). As written, this sentence suggests that South Carolina statutory law generally excepts mopeds from the definition of motor vehicle. The opposite, in fact, is true: the general definition of "motor vehicle" in Title 56 by default *includes* mopeds and similar vehicles.

Nor does Respondent's sweeping and inaccurate statement acknowledge S.C. Code Ann. § 38-77-30(9), which defines "motor vehicle" to mean "every self-propelled vehicle which is designed for use upon a highway[1]," with certain specific exceptions, none of which include electric scooters or mopeds.

Respondent goes on to argue that "[I]n 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." Respondent's Brief at 8. This statement is highly misleading. Title 56, as already discussed, contains approximately 23 active chapters. It is Chapter 1 that contains the general definition of "motor vehicle" discussed above, a definition that all parties acknowledge encompasses Mr. Holland's motor scooter. This general definition *explicitly* governs all 23 chapters *unless* otherwise noted. Also of note, Chapter 1 of Title 56 is also the statute that governed general operation of mopeds at the time of Mr. Holland's accident. *See, e.g.*, S.C. Code Ann. § 56-1-1710 *et seq.* The fact that mopeds are governed under Title 56, which is South Carolina's *motor vehicle* code, is telling.

[1] "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).

Respondent, in an effort to escape the general and ordinary definition of motor vehicle in Title 56, relies on limited-purpose exceptions within four of Title 56's approximately 23 chapters. These four subsections are:

- S.C. CODE ANN. § 56-3-20 (Supp. 2017) (relating to Chapter 3, Motor Vehicle Registration and Licensing);

- S.C. CODE ANN. § 56-5-130 (Supp. 2017) (relating to Chapter 5, Uniform Act Regulating Traffic on Highways);

- S.C. CODE ANN. § 56-9-20(4) (Supp. 2017) (relating to Chapter 9, Motor Vehicle Financial Responsibility Act);

- S.C. CODE ANN. § 56-19-10(16) (Supp. 2017) (relating to Chapter 19, Protection of Titles to and Interest in Motor Vehicles);

But each of these definitions *explicitly* applies only within the confines of certain, specifically-identified chapters. *See*, *e.g.* S.C. CODE ANN. § 56-3-20 (Supp. 2017) (providing that definitions are "***for purposes of this chapter***" (emphasis added)); S.C. CODE ANN. § 56-5-110 (Supp. 2017) (providing that the following definitions, including § 56-5-130, provide definitions for "***purposes of this chapter***") (emphasis added); S.C. CODE ANN. § 56-9-20(4) (Supp. 2017) (providing that definitions apply only "***when used in this chapter***") (emphasis added); S.C. CODE ANN. § 56-19-10 (Supp. 2017) (providing that definitions are "***for the purposes of this chapter***" and Title 16, Chapter 21) (emphasis added).

None of these definitions apply outside of the specified chapters. Much less do any of these limited-purpose exceptions purport to apply to Cincinnati's commercial general liability policy.

Respondent incorrectly states that aside from the above four chapters, "[t]he remaining 18 chapters have nothing to do with mopeds." (*See* Respondent's Brief at 10). This is manifestly inaccurate. Chapters 1 governs general operation of mopeds. Chapter 7 governs issuance of traffic tickets. Chapter 17 governs criminal penalties for certain acts. Chapter 21 governs traffic at state

institutions. Chapter 23 governs driver training schools. Chapter 25 governs "Nonresident Traffic Violator Compacts." Chapter 29 governs motor vehicle chop shops. Each of these—and others—operate under the default definition of "motor vehicles" under Chapter 1 of Title 56. Each of these Chapters relates or potentially relates to mopeds and other motor scooters.

Respondent also argues that that a law change effective in November 2018 shows an ambiguity as to the Policy's definition of "motor vehicle." Specifically, 2017 S.C. Act No. 89 (H.3247) became effective in November 2018 and affected the treatment of mopeds for certain purposes. *See* Respondent's Initial Brief at p. 10. One of the changes was to add a separate definition of "moped" in S.C. Code Ann. § 56-1-10. *See* S.C. Code Ann. § 56-1-10(26) ("a cycle, defined as a motor vehicle, with or without pedals, to 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.") Respondent argues that by adding § 56-1-10(26), the legislature was indicating that prior to November 2018, mopeds were not "motor vehicles." *See* Respondent's Initial Brief at pp. 10-11. But this argument is without merit.

First, Respondent's argument fails because the definition of "motor vehicle" that already existed in Title 56 already encompassed "motor vehicle." The circuit court Order does not dispute this, and Respondent's own expert, Gerald Finkel, admits this. *See*, *e.g.*, September 23 Order at p. 6; Appellant's Initial Brief at p. 9. There is no indication in the statute or from any authority cited by Respondent to the contrary. Moreover, when the legislature added a separate definition of "moped," it did not change the general definition of "motor vehicle."

Second, the South Carolina Supreme Court's judicial definition of "motor vehicle" has existed since 1960. It was revisited and confirmed by this Court in the *Jack's* decision in 2023. The 2018 addition of a separate definition for "moped" within Title 56—particularly one that is

consistent with the definition of "motor vehicle" that already existed in Title 56 and in South Carolina case law—does not obfuscate the judicial definition of "motor vehicle" or create an ambiguity in Cincinnati's clear policy language.

3. Legal Treatises

In addition to dictionaries and statutes, legal treatises show that Respondent's suggested interpretation fails. For example, 60 C.J.S. Motor Vehicles defines "motor vehicle" to "ordinarily mean[]":

> … 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.

60 J.S. Motor Vehicles § 1, 118-119 (2012). This is the very legal treatise cited by this Court in *Jack's*. 439 S.C. at 45–46, 885 S.E.2d at 439.

4. Actual Usage

Finally, the officer responding to Mr. Holland's accident treated the moped as a "motor vehicle" governed by motor vehicle traffic laws. (R.p. ____; February 13, 2023 Affidavit of Lance Corporal Robert J. Paturzo). He investigated the accident as one involving a motor vehicle used by Mr. Holland. *Id.* This is evidence of the plain, ordinary, and popular meaning of the term "motor vehicle."

v. Even if the Policy were ambiguous, the intent of the parties controls and demonstrates that the motor scooter was a "motor vehicle" under the Policy.

Additionally, while the Cincinnati Policy is not ambiguous, even if it were, the circuit court failed to consider the intent of the parties. *See, e.g., Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976); *BP Oil Co. v. Federated Mut. Ins. Co.*, 329 S.C. 631,

640, 496 S.E.2d 35, 40 (Ct. App. 1998) ("In construing a contract, the primary concern of the court is to ascertain and give effect to the intent of the parties."). "The primary purpose of all rules of contract construction is to determine the intent of the parties." *Goldston v. State Farm Mut. Auto. Ins. Co*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004) (citation omitted). The rule of construing ambiguities against the drafter, i.e., *contra proferentem*, is a rule of last resort that can only be applied after applying the rule that typewritten terms prevail over printed terms and, if necessary, considering the extrinsic evidence to determine the intent of the parties. *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 818 (5th Cir. 1997) ("Only if the plain terms remain ambiguous after applying ordinary principles of contract interpretation are we compelled to apply the rule of *contra proferentem* and construe the terms strictly in favor of the insured.")

Here, the parties are Cincinnati, on the one hand, and Zapp Scooters, the actual policyholder, on the other. Zapp Scooters purchased a Commercial General Liability Policy. General Liability Policies traditionally exclude coverage for motor vehicles. *See Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004); *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999). Moreover, Zapp Scooters purchased a CGL policy that included not just a standard auto exclusion but instead one that included an "Absolute Auto Exclusion." *See* Policy at p. 49. Under this exclusion, the policy made clear that the exclusion included vehicles leased to other individuals—precisely the situation at issue in this case. *Id.* The intent of the parties to exclude the motor scooter used by Mr. Holland is thus apparent from the intent of the parties.

Moreover, Zapp Scooters, by failing to answer Cincinnati's declaratory judgment complaint, is in default and has thereby admitted Cincinnati's allegations, including that the Policy

provides no coverage. (R. p. ____; Cincinnati Complaint at ¶ 19). There is thus not even a jury question on this issue.

b. Respondent Fails to Distinguish *Jack's Custom Cycles*.

As referenced in Appellant's Initial Brief, the Court recent addressed whether an ATV / UTV was a "motor vehicle" 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). In Respondent's brief, Respondent fails to understand Appellant's reliance on *Jack's Custom Cycles.* In *Jack's Custom Cycles*, the Court provided a framework and outlined their process in determining whether an ATV / UTV was a "motor vehicle"—looking to (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. Respondent attempts to diminish this framework by pointing out the differences from the case at hand—it was an administrative law decision; it dealt with a tax code; it did not deal with a moped. (Respondent's Initial Brief, pp.11-13). However, these arguments do not hold weight as the framework the Court followed is applicable and probative in this case. Moreover, the *Jack's* decision was analyzed under similar rules of construction. Tax exemption statutes are strictly construed against the taxpayer. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing *Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). 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). Therefore, as referenced in Appellant's initial brief, a moped is a "motor vehicle" under South Carolina case law, including under the *Jack's Custom Cycles* framework.

Notably, Respondent has failed to provide any South Carolina case law that a moped is not a "motor vehicle." Moreover, Respondent's citations to cases from other jurisdictions are unavailing. *See* Respondent's Initial Brief at p. 15.

First, the cases cited by Respondent that provide that a moped is not a "motor vehicle" conflict with South Carolina Supreme Court and appellate precedent. Under South Carolina law, a moped is considered a "motor vehicle." In *Gunn v. Burnette*, the Supreme Court noted:

> "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."

Gunn, 236 S.C. at 499, 115 S.E.2d at 172. A moped would clearly fit into this definition of motor vehicle. Next, in *White v. S.C. Dep't of Parks, Recreation & Tourism*, the Supreme Court again noted that the generic meaning of "motor vehicle" was examined in *Gunn*, relying on the same definition. *See White*, 271 S.C. at 94, 245 S.E.2d at 127. Moreover, in *Jack's Custom Cycles, Inc.*, the Court of Appeals relied on the same Supreme Court definition from *Gunn*. *See Jack's Custom Cycles, Inc.*, 439 S.C. at 45–46, 885 S.E.2d at 439. Therefore, there are three South Carolina cases that rely on the same definition of "motor vehicle," and a moped fits into this definition. As such, there is no split in authority in South Carolina.

Second, there is not an actual split in authority as the cases cited by Respondent are easily distinguishable to the case at hand. Respondent first cites to *Larimer v. American Family Mutual Ins. Co.*, 926 N.W.2d 472 (S.D. 2019), a case from South Dakota. The court in *Larimer* addresses auto policies, not CGL policies. *See id.* at 474. In reviewing these policies, the court found an ambiguity of the term "land motor vehicle" based on their comparison of definitions from two different policies, which is entirely different from the scenario here. *See id.* at 476.

Moreover, even if the *Larimer* case were otherwise indistinguishable, this Court should reject the logic used by the *Larimer* case because it is fatally flawed. Specifically, the *Larimer* court reasoned that because certain categories of vehicles with motors were specifically excepted by the policy's definition of "auto," and because the policy did not explain *why* those vehicles were excluded, the court could not determine whether "mopeds" should also be excluded. *Id.* But this is flawed reasoning. Definitions sections in insurance policies regularly define terms by identifying items that fit within the definition and excluding other items. Appellant's counsel is not aware of any insurance policy definitions that explain *why* some items are within the category and others outside of it. The role of a definition is to define the limits of a category, not to explain why the category is made.

Using the *Larimer* court's logic, it would be impossible to tell whether *any* vehicle qualifies as a "motor vehicle." The *Larimer* court reasoned that by "[a]pplying the minimal guidance provided by the definition of motor vehicle in the Endorsement, it would be equally reasonable to conclude that mopeds either may or may not be motor vehicles." *Id.* By taking this quote and substituting any other type of vehicle for "mopeds," one demonstrates the absurdity of this approach when taken to its logical conclusion: "Applying the minimal guidance provided by the definition of motor vehicle in the Endorsement, it would be equally reasonable to conclude that [sedans, or pick up trucks, or any other vehicle] either may or may not be motor vehicles." This reasoning is fallacious and is not supported by South Carolina law, which simply looks to the plain, ordinary, and popular meaning of a term.

Next, Respondent cites *Allstate Ins. Co. v. Pachecco*, 851 F.2d 257 (9th Cir. 1988), a Hawaii case that addresses a specific Allstate homeowner's policy. In *Pachecco*, the court looked "outside the policy to the statutory requirements for automobile insurance[,]" as provided in their statutory

scheme, H.R.S. Chapter 294 (Motor Vehicle Accident Reparation). *See id*. at 259. In this case, the court acknowledged that their ruling was specific to this specific Allstate policy and Hawaii law. *See id*. at 259-60. Moreover, the dissent notes, "[t]o the extent that courts in other jurisdictions may look to the majority opinion in construing the same Allstate policy, they should be reminded that the majority's finding of ambiguity in the term "motorized land vehicle" was impelled at least in part by its reading of the idiosyncrasies of Hawaii law." *Id.* at 261.

The Respondent next cites *Farmers Ins. Exchange v. Galvin*, 170 Cal.App.3d 1018, 216 Cal. Rptr. 844 (Cal. Ct. App. 1985), a California case that addresses a UIM policy. In *Galvin*, while the court found an ambiguity regarding whether mopeds are motor vehicles, that ambiguity arose in the context of mopeds that could be *pedaled*. *Id.* at 1021, 216 Cal. Rptr. at 845. *See also Armstrong v. Farmers Ins. Co.* of Idaho, 143 Idaho 135, 138, 139 P.3d 737, 740 (2006) (stating that the *Galvin* court relied on the fact that "mopeds were designed to be propelled by pedaling in addition to their motors"). Moreover, the *Galvin* court relied on the fact that "mopeds" were not motor vehicles under California's vehicle code. *See id.* at 1022, 216 Cal. Rptr. at 846.

Galvin is easily distinguished here. First, the motor scooter used by Mr. Holland was purely motor-driven and could not be pedaled. Thus, it clearly and unambiguously fits within the various definitions of "motor vehicle" because it is a self-propelled vehicle. Second, the California statute cited in *Farmers* is entirely inapplicable in South Carolina. South Carolina has judicially defined "motor vehicle" such that it encompasses Mr. Holland's motor scooter. Moreover, under South Carolina's rules of statutory construction, Mr. Holland's motor scooter meets the plain, ordinary, and popular definition of "motor vehicle."

In sum, the cases cited by Respondent are easily distinguished. They do not discuss commercial general liability policies, much less Cincinnati's policy and particularly its "Absolute"

auto exclusion. Moreover, the cases involve entirely different analyses under other states' law, and the analyses are not relevant here and, in some cases, are flawed. Perhaps most notably, in contrast to the present case, the cases cited by Respondent were not decided in the context of controlling state supreme court and appellate court precedent.

The present case involves a straightforward question: whether a moped is a "motor vehicle" under the plain, ordinary, and popular definition of the term. The relevant sources in South Carolina are unified. Under (1) South Carolina judicial definitions, (2) dictionary definitions; (3) South Carolina statutory law, and (4) legal treatises, among other things, "motor vehicle" includes the motor scooter used by Mr. Holland.

c. The Policy Does Not Contain Conflicting Internal Definitions.

Respondent also argues that Cincinnati's Policy contains internally inconsistent definitions, citing to the *Larimer* case in support. As already discussed above, *Larimer* is easily distinguished. *See* discussion *supra* at pp. 22-23. Further, the *Larimer* court's discussion of "internal inconsistencies" is logically unsound. *Id.* In Cincinnati's Policy, the 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." Therefore, there is no internal inconsistency.

II. Cincinnati did not receive proper notice of Respondent Holland's lawsuit.

a. Livingston Insurance Agency is not Cincinnati's agent.

As cited by Respondent, "[u]nder 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. Guiliana*, 38 Fed. Appx. 974, 978 (4th Cir. 2002).

Therefore, the insured's agent must be in an agency relationship with the insurer. This is not met in this case—Cincinnati specifically and directly disputes that Livingston is its agent.

Respondent misunderstands Appellant's argument based on *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). In *Noisette*, the Court of Appeals found that notice to an *insurer's* agent constituted notice to the insurer. *See id.* at 248, 384 S.E.2d at 313. In other words, the Court of Appeals' decision was premised on the fact that the insurer had an agency relationship with the agent, which was evidenced by a written agreement. *See id.* Therefore, there was an agency relationship *and* apparent authority to bind the company. Appellant's argument here does not hinge on whether there was apparent authority—it is based on the lack of any agency relationship between Cincinnati and Livingston in the first place. There is nothing in the record related to any agency agreement, any deposition testimony, any affidavit, or any other competent evidence of an agency relation.

b. A Subpoena is Not Notice of a Lawsuit.

It is undisputed that Livingston sent only a subpoena to Cincinnati—and not the Holland Complaint. *See* Order at p. 10. A subpoena is not notice of a claim, nor does it provide any operative Complaint to an insurance carrier. *See Emps.' Fire Ins. Co. v. ProMedica Health Sys., Inc.*, 524 Fed. Appx. 241, 246-47 (6th Cir. 2013) (finding that the subpoenas did not meet the elements of a "claim," did not seek any remedy, and did not redress the alleged wrong).

III. Cincinnati was substantially prejudiced.

c. Cincinnati never had the opportunity to defend.

As an initial matter, as referenced above, Cincinnati did not receive proper notice of the lawsuit in May 2019. Cincinnati was first informed of the Underlying Complaint by Respondent's counsel on August 16, 2019. *See* Aff. of Sheri Bugher ¶ 8. However, even had Cincinnati received

proper notice in May 2019, such notice would still have been *after* the entry of default had already occurred—and which entry of default the circuit court refused to set aside.

South Carolina recognizes that prejudice can arise through the entry of default. *See 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). After default was entered, Cincinnati was never able to investigate promptly, negotiate a settlement, or provide a defense *without the handicap of a default position*. Moreover, the default was never set aside, ultimately resulting in a default judgment. Therefore, Cincinnati was directly and substantially prejudiced.

d. Cincinnati's actions are consistent with a showing of substantial prejudice.

Respondent argues, without any supporting case law, that Appellant's actions are somehow inconsistent with a showing of substantial prejudice when it waited to amend its declaratory judgment Complaint. However, the timing of Cincinnati's amended complaint was appropriate: Cincinnati filed the motion after default had been entered but before entry of default judgment. Moreover, the motion to amend was granted and the amended complaint accepted. Appellant is not aware of any grounds to suggest that the timing of Cincinnati's complaint has any bearing on its prejudice argument, and Respondent fails to provide any case law to suggest otherwise. Cincinnati's timing was appropriate, the motion to amend was granted, and the amended complaint is the operative complaint in this matter.

IV. On Cross-Motions for Summary Judgment, This Court May Order the Trial Court to Enter Judgment for Cincinnati in Accordance with This Order.

South Carolina law is clear that if the Court of Appeals reverses the Court's grant of Respondent Holland's Motion for Summary Judgment, the Court of Appeals may further instruct the trial court to enter judgment in favor of the appellant. *See Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 166, 705 S.E.2d 432, 436 (2011) (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"). Therefore, while Cincinnati has not appealed the denial of its Motion for Summary Judgment, an order reversing the trial court may further include instructions that judgment be entered in Cincinnati's favor.

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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