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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.

MOTION FOR WITHDRAWAL

Pursuant to Rule 264, SCACR, Andrew D. Gowdown and Mary Harriet Moore of Rosen Hagood, LLC, move to withdraw as counsel of record for Respondent Zapp Scooters, Inc. d/b/a/ Zapp Ride Share (hereinafter "Respondent Zapp") and Respondent Frank Scozzafava (hereinafter "Respondent Scozzafava"). The grounds for this motion are as follows.

Attorneys Gowdown and Moore were erroneously identified as counsel for Respondents Zapp and Scozzafava. On August 29, 2024, Karen Nissen, a paralegal at Rosen Hagood, LLC, notified the Court via email that the SC Appellate Case Management System incorrectly listed Attorneys Gowdown and Moore as attorneys for Respondent Zapp and Respondent Scozzafava in

the Party Information section. Ms. Nissen notified the Court that Attorneys Gowdown and Moore only represent Respondent Holland and not Respondents Zapp or Scozzafava.

On September 3, 2024, the Court responded to Ms. Nissen's email via letter stating, "According to our records and the filed order on appeal, you were listed as counsel for all of the defendants in the lower court case. Pursuant to Rule 264, SCACR, you remain counsel of record until relieved by the Court. If you wish to seek relief from this Court, you must file a motion."

The order on appeal, attached hereto as "Exhibit A," correctly identifies Attorneys Gowdown and Moore as attorneys for Respondent Holland only. Specifically, the Order states: "Present at the hearing were Andrew D. Gowdown, Esquire, and Mary Harriet Moore, Esquire, ***for Defendant Michael Holland*** and Brandon R. Gottschall, Esquire for Plaintiff The Cincinnati Specialty Underwriters Insurance Company." (emphasis added). The first footnote in the Order further explains: "The other defendants, Zapp Scooters, Inc. DBA Zapp Ride Share and Frank Scozzafava, have failed to timely answer or otherwise appear in this action, and default has been entered against them by Order dated August 5, 2020."[1] Additionally, all of the briefs, motions, and correspondence submitted to this Court by Attorneys Gowdown and Moore have been on behalf of Respondent Michael Holland only. In its submission to the Court, Appellant has also correctly identified Attorneys Gowdown and Moore as counsel for Respondent Michael Holland only. Thus, Attorneys Gowdown and Moore are incorrectly identified as counsel for Respondents Zapp and Scozzafava and, therefore, respectfully request to be withdrawn as counsel of record for those parties.

[1] Respondents Zapp and Scozzafava did not appear in that action, nor have they appeared in this appeal.

Although Attorneys Gowdown and Moore have never represented Respondents Zapp and Scozzafava, and are unaware of their current location, notice of this motion will be sent to Respondents Zapp and Scozzafava's last known address in accordance with Rule 264, SCACR.

The undersigned counsel affirms that, prior to filing this motion, she communicated by e-mail correspondence with opposing counsel concerning the matter contained herein and has received no objection.

September 6, 2024

s/ Mary Harriet Moore

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EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2019-CP-40-06380
	)	
The Cincinnati Specialty Underwriters Insurance Company,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
v.	)	
	)	
Zapp Scooters Inc. DBA Zapp Ride Share, Frank Scozzafava, and Michael Holland,	)	
	)	
Defendants.	)	
	)	

Presiding Judge:	The Honorable B. Alex Hyman
Plaintiff's Attorney:	Brandon R. Gottschall, Esquire
Defendant's Attorneys:	Andrew D. Gowdown, Esquire and Mary Harriet Moore, Esquire
Date of Hearing:	May 24, 2023

This matter came before the Court on May 24, 2023, on the parties' Cross Motions for Summary Judgment.[1] Present at the hearing were Andrew D. Gowdown, Esquire, and Mary Harriet Moore, Esquire, for Defendant Michael Holland and Brandon R. Gottschall, Esquire, for Plaintiff The Cincinnati Specialty Underwriters Insurance Company. After hearing from counsel and reviewing the parties' extensive briefs, including the accompanying exhibits in support of their respective positions, the Court hereby denies Plaintiff's Motion for Summary Judgment and grants Defendant Holland's Motion for Summary Judgment.

PROCEDURAL HISTORY AND FINDINGS OF FACT

On October 12, 2018, Defendant Holland was injured while operating a moped, sometimes referred to as a scooter, he rented from Defendant Zapp Scooters Inc. DBA Zapp Ride Share. Prior

[1] The other defendants, Zapp Scooters Inc. DBA Zapp Ride Share and Frank Scozzafava, have failed to timely answer or otherwise appear in this action, and default has been entered against them by Order dated August 5, 2020.

to closing in 2019, Defendant Zapp operated an electric moped rental business in downtown Columbia, South Carolina. On January 15, 2019, Defendant Holland filed suit in the Richland County Court of Common Pleas against Zapp Scooters, Inc. and Frank Scozzafava, Civil Action No. 2019-CP-40-00288 ("Underlying Complaint"). The Underlying Complaint alleged that Holland was injured when the vehicle he rented from Zapp malfunctioned, throwing him over the handlebars as he was riding it down Main Street in Columbia. Defendant Scozzafava was the sole shareholder and Chief Executive Officer of Defendant Zapp at the time the Underlying Complaint was filed.

Defendants Zapp and Scozzafava were served with the Underlying Complaint on March 26, 2019. Defendants failed to timely answer or otherwise defend. By Entry of Default dated May 22, 2019, Defendants Zapp and Scozzafava were adjudged to be in default in the Underlying Action. Defendants Zapp and Scozzafava moved for the Entry of Default to be set aside on September 18, 2019.

Plaintiff filed the within action on November 13, 2019, seeking a declaratory judgment that a commercial insurance policy, Policy No. CSU0087939 ("Policy"), issued to Defendant Zapp with effective dates of August 9, 2018, to August 9, 2019, does not provide liability coverage for Holland's injuries solely because of the Policy's "auto" exclusion.

By Order dated December 30, 2019, the Court denied the Motion to Set Aside Entry of Default. Then on October 2, 2020, Plaintiff amended its declaratory judgment action in this case, alleging that Defendants Zapp and Scozzafava failed to comply with the notice provisions of the Policy, which Plaintiff claims substantially prejudiced it.

On April 21, 2021, Holland filed a Motion for Judgment by Default in the underlying action, and with notice to Defendants Zapp and Scozzafava as well as their counsel appointed by

Plaintiff to represent them, a damages hearing was held on May 11, 2021, in which counsel for those defendants participated. By order dated June 15, 2021, the Court granted the default judgment against Defendants Zapp and Scozzafava. The Court enrolled the judgment on July 28, 2021, in Holland's favor for the amount of $641,232.40. Defendants Zapp and Scozzafava filed neither a Motion to Set Aside the Default Judgment nor an appeal.

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). 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).

A declaratory judgment action to determine coverage under a liability policy is an action at law. *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 140, 511 S.E.2d 692, 694 (Ct. App. 1999). 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. *Est. of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). "[T]he construction and interpretation of an insurance policy should be determined as a matter of law by the court." *Allstate Ins. Co. v. Best*, 728 F. Supp. 1263, 1266 (D.S.C. 1990) (citing *Hann v. Carolina Casualty Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969)). The relevant facts as to the interpretation of the Policy at issue in this case are not in dispute.

CONCLUSIONS OF LAW

Viewing the evidence in the light most favorable to Plaintiff, the Court now addresses whether Plaintiff's Policy provides liability coverage for Defendant Holland's injuries and

damages arising out of the October 12, 2018, incident. Plaintiff argues that the Policy does not provide coverage for Defendant Holland's damages because the "auto" exclusion applies and because Defendants Zapp and Scozzafava failed to comply with the Policy's notice provisions resulting in substantial prejudice to Plaintiff. For the reasons that follow, the Court concludes that, under the facts and circumstances of this case, Defendant Holland is entitled to summary judgment as a matter of law because (1) the "auto" exclusion is ambiguous and, therefore, coverage must be construed against Plaintiff and in favor of Defendant Holland and (2) Plaintiff was not substantially prejudiced by a failure to notify. The Court will address each of its holdings in turn.

I. The Policy's "auto" exclusion is ambiguous, rendering it unenforceable.

The Policy in question 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." 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."

The question before the Court is one of policy construction and interpretation. A contract is "ambiguous" when it is capable of more than one meaning or when its meaning is unclear. *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015). Whether language is ambiguous is a question of law for the court, and any ambiguous terms are to be construed liberally in favor 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). "In South Carolina, clauses of inclusion should be broadly construed in favor of coverage, and when there are doubts about the existence or extent of coverage, the language of the policy is to be 'understood in its most inclusive sense.'" *Cook v. State Farm Auto Ins. Co.*, 376 S.C. 426, 430, 656 S.E.2d 784, 786 (Ct. App. 2008) (quoting *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 337-38, 157 S.E.2d 633, 635 (1976)). On the other hand, exclusionary terms in a policy are narrowly construed to the benefit of the insured. *Canal*, 414 S.C. at 267, 777 S.E.2d 418 at 425 (Few, J., concurring); *see also McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770 (1993).

A. A moped is not a "land motor vehicle."

As an initial matter, the Court concludes, and Plaintiff concedes, that the vehicle in question was a "moped." Turning to the exclusion language, the Policy fails to define the term "land motor vehicle" as referenced in section 2.a. of the "auto" definition. As such, the Court looks to South Carolina statutory law to interpret whether the vehicle at issue, in this case a moped, is a "motor vehicle." *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 Defendant Holland's injuries in October 2018, South Carolina statutory law specifically excluded a "moped" from the definition of "motor vehicle." In every section of Title 56 in which the term "motor vehicle" was defined, save one which is discussed below, the law makes clear that a moped is not a motor vehicle. *See, e.g.*, S.C. CODE ANN. § 56-3-20(2) (Law. Co-op. 2017) ("Motor Vehicle Registration and Licensing") (defining motor vehicle 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.") (emphasis added); S.C. CODE ANN. § 56-5-130 (Law. Co-op. 2017) ("Uniform Act Regulating Traffic on Highways") (defining "motor vehicle" as "Every vehicle which is self-propelled, ***except mopeds***…") (emphasis added); S.C. CODE ANN. § 56-9-20(4) (Law. Co-op. 2017) ("Motor Vehicle Financial Responsibility Act") (specifically excepting mopeds from the definition of "motor vehicle"); S.C. CODE ANN. § 56-19-10(16) (Law. Co-op. 2017) ("Protection of Titles to and Interests in Motor Vehicles") (defining "motor vehicle" as "every vehicle which is self- propelled, ***except moped***....") (emphasis added).

Of the five different times that "motor vehicle" is defined in Title 56, there is only one section that does not except mopeds, which is S.C. CODE ANN. § 56-1-10(7) (Law Co-op. 2017). Plaintiff urges the Court that this section is the controlling definition of "motor vehicle." While the Court acknowledges that this definition does not exclude "mopeds" like the other statutory definitions, the introductory language to § 56-1-10(7) reads, "For purposes of this title, ***unless otherwise indicated***, the following words, phrases, and terms are defined as follows: . . . ." (emphasis added). By defining "motor vehicle" to exclude mopeds in four, subsequent statutory sections, the Court finds the definition in § 56-1-10(7) is not controlling. Statutes must be read *in pari materia*. *See Amisub of S.C., Inc. v. S.C. Dep't of Health and 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.").

Plaintiff further 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. 2023), *reh'g denied* (Apr. 26, 2023), is instructive in this case. The Court disagrees. In *Jack's Custom Cycles,* the South Carolina Court of Appeals addressed whether an ATV and a UTV met the definition of "motor vehicle" for purposes of a tax exemption. The

case centered on statutory interpretation. Whether an ATV or UTV is a motor vehicle is of little significance to the analysis before this Court, especially considering that a moped was specifically exempted from the definition of "motor vehicle" in October 2018. An ATV is simply not the same as a moped in that an ATV is explicitly recognized as a "motor vehicle" under South Carolina statutory law. In fact, the definition of ATV under Title 56 specifically defines it as "a ***motor vehicle*** measuring fifty inches or less in width, designed to travel on three or more wheels and designed primarily for off-road recreational use . . . ." S.C. CODE ANN. § 56-1-10(20) (Law Co-op. 2017) (emphasis added). A moped did not gain recognition as a motor vehicle until the enactment of the new moped law, 2017 S.C. Act No. 89 (H.3247), on November 19, 2018, approximately a month after Defendant Holland's injury. [2]

Plaintiff also argues that, under the *Jack's Custom Cycles* case, the Court must look to dictionary definitions as guidance on the meaning of "motor vehicle." However, 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. Therefore, the Court finds that a moped cannot be a "land motor vehicle" under the Policy.

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

Plaintiff next argues that a moped also qualifies under the second definition of "auto," which reads:

[2] On November 19, 2018, the South Carolina legislature enacted a new law that comprehensively changed the use of mopeds in South Carolina. For the first time, the new law classified mopeds as motor vehicles, subjecting mopeds to much stricter laws and requirements such as:

- Requiring mopeds to be registered with the Department of Motor Vehicles;
- Requiring a valid moped or driver's license to drive a moped;
- Requiring drivers under 21 to wear a helmet;
- Requiring moped drivers to stay in the far-right lane; and
- Requiring moped drivers to comply with all the laws of the road.

> 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, at the time of Defendant Holland's injuries in October 2018, and even today under the new moped law, mopeds are not required to be insured. S.C. CODE ANN. § 56-2-3010(C) (Law Co-op. 2021) ("Mopeds are not required to be titled or insured in this State"). Plaintiff has not cited any section under the Financial Responsibility Act or elsewhere requiring a moped to be insured in South Carolina prior to the enactment of the new moped law.

Furthermore, it 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.

c. The Policy is ambiguous because it contains conflicting internal definitions and terms.

When read in conjunction with other provisions of the Policy, the "auto" exclusion conflicts with various internal definitions and terms, further rendering it ambiguous. For example, 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.

. . . . (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 an irreconcilable conflict in the Policy language and making it impossible to conclude that any motorized vehicle that travels on land is an "auto." *See Larimer v. American Family Mutual Ins. Co.*, 926 N.W.2d 472 (S.D. 2019) (holding that the exclusion for injuries sustained while occupying a "motor vehicle that is not insured under this policy" did not apply to mopeds because the policy was ambiguous as to whether a moped qualified as a "land motor vehicle.").

The Court finds 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) (where words of an insurance policy are capable of two reasonable interpretations, the construction which is most favorable to the insured will be adopted). Therefore, the Policy exclusion is unenforceable, and coverage applies for Defendant Holland's injuries and damages.

II. Plaintiff had notice of Defendant Holland's lawsuit and was not substantially prejudiced by a failure to notify.

Plaintiff argues that Defendants Zapp and Scozzafava failed to comply with the Policy's notice provisions by not alerting Plaintiff to Defendant Holland's lawsuit and, as a result, Plaintiff was substantially prejudiced by the entry of, and judgment by, default. The Court disagrees. "Although the failure of the insured to comply with a notice requirement may bar recovery by the

insured, where 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 before recovery is barred." *Founders Ins. Co. v. Richard Ruth's Bar & Grill, LLC*, 761 Fed. Appx. 178, 183 (4th Cir. 2019) (applying South Carolina law) (citing *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 11, 446 S.E.2d 417, 421 (1994)).

A. Plaintiff received actual notice of Defendant Holland's lawsuit.

The Court finds that Plaintiff had actual notice of the lawsuit just six days after the Entry of Default. The Entry of Default occurred on May 22, 2019. On May 28, 2019, a Livingston Insurance Agency ("Livingston") employee named Jackie Lorick, feeling that she had a duty to notify Plaintiff that Defendant Zapp was being sued, sent an email to Plaintiff's employee, Cassandra Willhelm, alerting Willhelm that Livingston had received the subpoena. The following day, May 29, 2019, Willhelm responded via email thanking Lorick for the "heads up," and providing contact information if the claimant, in this case Defendant Holland, needed to file a claim. It does not appear from the record that Plaintiff took any action in light of this knowledge and information. Had Plaintiff acted immediately upon receipt of the notice from Livingston, it could have taken the necessary steps to protect its interests and negate any prejudice it now claims. Plaintiff cannot now allege prejudice for a situation it created by its own doing.

B. Plaintiff received notice of Defendant Holland's lawsuit through its agent, Livingston Insurance Agency.

Even if the Court were to disregard Plaintiff's actual notice of Defendant Holland's lawsuit as evidenced by the above emails, the Court still finds that Plaintiff received notice of the suit through its agent, Livingston. 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. *See W. Heritage Ins. v. Guiliani*, 38 Fed. Appx. 974, 978 (4th Cir. 2002); *Noisette v. Ismail*, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989), *rev'd on other grounds*, 304 S.C. 56, 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).

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). "[T]hose 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. 250, 384 S.E.2d 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 (internal citation omitted).

The Court finds that Plaintiff received notice through its agent, Livingston. The record contains ample evidence that Livingston had apparent authority at the time of Defendant Holland's injury to act and represent Plaintiff as an authorized, independent agent in South Carolina. In fact, the Policy specifically states: "Your contact for matters pertaining to this policy: Livingston Insurance Agency, Inc." As a result, Livingston was cloaked with the apparent authority to receive

notice of claims involving insurance policies sold on behalf of Plaintiff, meaning notice to Livingston constituted notice to Plaintiff.

With respect to the timeline of events, Livingston received notice of Defendant Holland's lawsuit on May 14, 2019, when it received and signed for a subpoena *duces tecum* from Defendant Holland's counsel via certified mail. Because notice to Livingston constitutes notice to Plaintiff, Plaintiff had notice that same day, May 14, 2019, which is seven days before the Entry of Default on May 22, 2019. To the extent Plaintiff claims it was prejudiced by Livingston's delay in passing along notice of the lawsuit to Plaintiff – between May 14, 2019, when Livingston received the subpoena *duces tecum*, and May 28, 2019, when Lorick sent the email to Willhelm notifying her of the case – that is a dispute between Plaintiff and Livingston, which should not work to the gain of Plaintiff and the detriment of Defendant Holland. At bottom, Plaintiff was notified of the lawsuit on May 28, 2019, and acknowledged that notice the next day, giving it an immediate opportunity to move to set aside the Entry of Default. Instead, Plaintiff chose to do nothing.

C. Plaintiff was not substantially prejudiced because it had the opportunity to investigate and defend the lawsuit.

Plaintiff had numerous opportunities to investigate and defend Defendant Holland's lawsuit, all of which cut against a finding of prejudice. The purpose of the notice provision is to allow time for the investigation of facts and to assist the insurer in preparing a defense. *See Washington v. Nat'l Service Fire Ins. Co.*, 252 S.C. 635, 168 S.E.2d 90 (S.C. 1969). Several South Carolina state and federal cases have addressed this issue. *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.); *Western 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).

The Court again finds that Plaintiff was not substantially prejudiced by the failure to notify. For two years, Plaintiff investigated and defended Defendant Holland's claim, including but not limited to: receiving medical records, medical bills, the collision report, and all correspondence sent to Defendants Zapp and Scozzafava; making a request for and receiving a demand package; attempting to negotiate a settlement; issuing subpoenas to Defendant Holland's medical providers; receiving Defendant Holland's Life Care Plan; deposing Defendant Holland's shoulder surgeon; and attending and participating in the default damages hearing, including cross-examining Defendant Holland.

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

As further support for the Court's conclusion that Plaintiff has not been substantially prejudiced, it points to the timing of Plaintiff's notice claim. Plaintiff filed its declaratory judgment action on November 13, 2019. In the original complaint, Plaintiff did not allege a failure to notify and substantial prejudice claim. It was not until October 2, 2020, eleven months after initially filing its declaratory judgment action, that Plaintiff asserted it was substantially prejudiced by Defendant Zapp's failure to notify. Failure to raise the claim for nearly a year after it was already in default is inconsistent, in the Court's view, with an allegation of substantial prejudice.

Accordingly, the Court finds that Plaintiff has not met its burden in showing that it was substantially prejudiced by the failure to notify. Defendant Holland's injuries and damages are covered by the Policy.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment is DENIED and Defendant Michael Holland's Motion for Summary Judgement is GRANTED.

AND IT IS SO ORDERED.

_____

The Honorable B. Alex Hyman

Richland Common Pleas

Case Caption:	Cincinnati Specialty Underwriters Insurance Company vs Zapp Scooters Inc , defendant, et al
Case Number:	2019CP4006380
Type:	Order/Summary Judgment

15th Circuit Resident Judge

s/ B. Alex Hyman

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

v.

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

PROOF OF SERVICE

I, the undersigned of the law office of Rosen Hagood, LLC, attorneys for Respondent Michael Holland, do hereby certify that I have caused to be served all parties to this appeal by copy of the Motion for Withdrawal, which copy has been emailed and/or mailed to the addresses below:

Parties Served:
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Zapp Scooters, Inc. d/b/a Zapp Ride Share
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September 6, 2024

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