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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

2025-UP-074 (S.C. Ct. App. filed Feb. 24, 2025)

Appellate Case No. 2025-000943
Trial Court Case No. 2020-CP-12-00207

Alexis Jones, ... Respondent,

v.

Progressive Northern Insurance Company . . . . . Petitioner.

RESPONSE TO BRIEF OF AMICI CURIAE THE AMERICAN PROPERTY AND CASUALTY INSURANCE ASSOCIATION

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INTRODUCTION

Pursuant to Rule 213, SCACR, and this Court's order of January 29, 2026, Respondent Alexis Jones files the following Response to the Brief of Amici Curiae filed on behalf of The American Property and Casualty Insurance Association ("Amici").

At the outset, the Court should not consider the arguments the Amici present since those arguments track largely the arguments Progressive made to this Court. In their motion accompanying the conditionally filed brief, Amici did not explain adequately why a brief of amicus curiae was desirable, other than the general statement that the brief "will assist the Court by providing a broader perspective addressing the implications of a ruling in Respondent's favor on the auto insurance industry in South Carolina." (Motion, p. 2). In their brief Amici argue the same position in their first issue as Progressive argued, and Amici then argue everything but automobile insurance in the second,[1] keeping clear of auto coverage because of the unique rules governing regulation of automobile insurance, as explained in Part II, below.

As Judge Richard A. Posner explained:

> The tendency of many judges of this court, including myself, has been to grant motions for leave to file amicus curiae briefs without careful consideration of "the reasons why a brief of an amicus curiae is desirable," although the rule makes this a required part of the motion. After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion.
>
> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They

[1] The "parade of horribles" the Amici present in their second argument is specious at best since, unlike automobile insurance, the coverages in every case Amici present are not as heavily regulated as automobile coverage in South Carolina. See Part II, below.

> are an abuse. *The term "amicus curiae" means friend of the court, not friend of a party*. We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. But there are, or at least there should be, limits. An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1007) (citations omitted) (emphasis added). *See also Kinkel v. Cingular Wireless, LLC*, Op. No. 100925 (Ill. Sup. Ct. filed Jan. 11, 2006) at *1, 2006 WL 8458036 ("Briefs which essentially restate arguments advanced by the litigants are of no benefit to the court or the adversarial process. To the contrary, they are a burden on the court's time and on the resources of the litigants who must review and respond to them. In some cases, they may represent an improper attempt to inject interest group politics into the appeals process. Other times, parties may enlist supposed '*amicus curiae*' as a means of circumventing page limitations in their own briefs.").

Respondent understands that the Court granted the Amici's motion two days after the motion and brief were filed conditionally (January 27, 2026 filed; January 29, 2026 motion granted). This is likely because of the close proximity in time to the scheduled oral arguments on February 10, 2026, and to give Respondent an opportunity to respond. However, the Court should not be persuaded by a brief of *amicus curiae* that does not provide meaningful assistance to this Court in ruling on the actual issues before the Court.

COUNTER-STATEMENT OF THE ISSUES PRESENTED BY THE AMICI

I. Does this Court's settled precedent provide a "sound basis" for enforcing the terms of the contract with Progressive under South Carolina statutory law?

II. Is the Court of Appeals' decision consistent with this Court's settled precedent and South Carolina statutory law such that any impact on other forms of voluntary coverage will not be adverse, and furthermore such a policy consideration is for the General Assembly, not this Court?

ARGUMENTS

I. This Court's Settled Precedent Provides a "Sound Basis" for the Trial Court's Ruling, Affirmed by the Court of Appeals, Enforcing the Terms of the Contract with Progressive under South Carolina Statutory Law

Amici describes Medpay coverage as voluntary, claims insurers are "free to contract for exclusions or limitations on coverage," and adds "Courts have 'no authority' to rewrite insurance policies based on 'public policy.'" (Brief of Amici, p. 2). What Amici conspicuously omits is that in South Carolina an automobile policy's terms (even one addressing Medpay/PIP) must comply with the governing statutory provisions or the term is void. *See, e.g., Cothran v. State Farm. Mut. Auto. Ins. Co.*, 427 S.C. 545, 831 S.E.2d 919 (2019). The Court should not be persuaded by Amici's argument.

Like Progressive, the Amici mischaracterize Ms. Jones' claim under the Medpay policy as one for "phantom damages," yet in a footnote Amici concede she must repay Medicaid from her recovery for these so-called "free services." (Brief of Amici, p. 3 and n. 1). Furthermore, like Progressive, Amici ignore that Ms. Jones did, in fact, incur the medical expenses for the treatment she received at the time she received it; she simply had Medicaid coverage (a collateral source) that ultimately paid the bill.

Amici's argument is analogous to challenging payment when medical bills for a work-related injury are covered under the Workers' Compensation Act – because the employer pays the bills those benefits would qualify under Amici's concept of "phantom damages." Amici's argument need not be carried very far to assert an insured, who purchases the "voluntary" coverage, may not recover MedPay or PIP if the injury is covered by Workers' Compensation benefit, but this Court has held otherwise. *See Cothran v. State Farm Mut. Auto. Ins. Co.*

(holding invalid under Section 38-77-144 a "coordination clause" which permitted insurer to reduce PIP payments for workers' compensation recovery). Taken to its extreme, Amici's argument (which parrots largely Progressive's arguments) becomes a full-throated assault on the collateral source rule in general, something this Court and the General Assembly have repeatedly rejected. That is, if an at-fault driver has sufficient coverage to pay the innocent injured party's medical bills, an insurer providing PIP or Medpay would contend that an insured who recovers from a third party does not "incur" the expense, and the insurer would therefore require the insured to seek that recovery before applying for no-fault PIP or Medpay coverage, thus undercutting the "no-fault" aspect of the voluntary coverage as the General Assembly adopted. *See* S.C. Code Ann. § 38-77-144 (2015) ("If an insurer sells *no-fault* insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to setoff.") (emphasis added).

Accepting the Amici's position (which mirrors Progressive's arguments) would result in a windfall for the insurance company, who sells the no-fault coverage with full knowledge of other potential sources of recovery, takes the insured's premiums, and then refuses to pay as agreed. *Cf. Lomax v. Nationwide Mut. Ins. Co.*, 964 F.2d 1343, 1347 n. 5 (3rd Cir. 1992) (discussing UM coverage, the Third Circuit stated, "[a]lthough application of the collateral source rule may result in a windfall to the insured, public policy favors this result because the insured is the innocent party. A double recovery by the insured usually may be prevented by the operation of the insurer's exercise of its subrogation rights. *See California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 Hastings L.J. 667, 686–87 (1986)."). By statute there are no subrogation rights for PIP or Medpay.

Amici mischaracterizes the recovery as a "windfall" to Ms. Jones. (Brief of Amici, p. 3). As between an innocent injured person who purchased the voluntary coverage (or is a beneficiary of the coverage) governed by statute and an insurer who elected to sell the non-mandatory coverage, public policy favors any "windfall" be to the person who expected the benefit of the bargain (including those deemed "insured" under the policy, like Ms. Jones).

Next, Amici cite summarily to numerous cases from other jurisdictions in support of their argument. Each of these cases is distinct from this case in very meaningful ways.[2]

A. *Woodrich v. Farmers Ins. Co.*, 405 F.Supp.2d 1276, 1279 (N.D. Okla. 2004) (US District Court applied Oklahoma law to an automobile policy but with no mention of any similar anti-alienation provision in Oklahoma as is found in Section 38-77-144).

B. *Metz v. U.S. Life Ins. Co. In N.Y.C.*, 662 F.3d 600, 602 (2d Cir. 2011) (case involved a "catastrophic care insurance policy" and Court applied New York law).

C. *Barker v. Wash. Nat. Ins. Co.*, 2013 WL 1767620 (D.S.C. Apr. 24, 2013) (case involved an individual "limited benefits health coverage" policy and is discussed in the principle briefs before this Court).

D. *State Farm Mut. Auto. Ins. Co. v. Bowers*, 500 S.E.2d 212, 214 (Va. 1998) (court applied Virginia law to an automobile policy, but did not address whether Virginia law contained an anti-alienation provision similar to Section 38-77-144; Virginia law does contain a provision adopted in 1997 defining "incurred" for purposes of medical payments in liability insurance policies, which the Court found persuasive; see *Id.* at n. 4).

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[2] This portion of the Brief of Amici was apparently plucked nearly verbatim from *Evans v. Liberty Nat. Life Ins. Co.*

E. *Evans v. Liberty Nat. Life Ins. Co.*, No. 13-CV-0390-CVE-PCJ, 2015 WL 1650192 (N.D. Okla. April 14, 2015) (case involved a cancer care policy; Court pointed out "Moreover, one Oklahoma statute clearly intends to prevent an insured from gaining a windfall by forcing an insurer pay more than what the insured paid. Okla. Stat. tit. 36, § 3651 (defining the 'actual charge' or 'actual fee' for services as 'the amount actually paid by or on behalf of the insured and accepted by a provider for services provided'"; no such similar statute exists in South Carolina)).

These cases therefore do not provide any meaningful assistance for this Court.

Amici also cite summarily to two treatises (apparently plucked from *Evans*, *supra*), but neither provides useful assistance to this issue. First, Amici cite to Steven Plitt, *et al.*, *Couch on Insurance* § 158:10 (3d Ed. 2014) ("*Couch*") for the parenthetical proposition that:

> The medical payments provision most commonly requires that the insured have "incurred" or "actually incurred" medical expenses. The clause contemplates a liability thrust upon the insured by act or operation of law.... [E]xpenses are incurred within medical payments coverage only when one has become obligated to pay for them.

(Brief of Amici p. 4). But this is only half of the cited Section. The remainder of the Section states:

> Additionally, the requirement that bills be "incurred" or "actually incurred" does not mean that the insured must have paid his or her bills in full. Thus, *an insurer was liable in the full amount* that the insured became liable for hospital and doctor bills notwithstanding that insured, because the insurer at first denied the claim, had settled with his or her hospital and doctor for less than the full amount of the bills.

Id. (emphasis added). This is consistent with current South Carolina law.

Finally, the section of *Couch* cites to a West Virginia case in which the Court held an

insured "incurred" medical expenses for physical therapy received to treat injuries sustained in automobile wreck, within the meaning of an automobile insurance policy provision stating that insurer would pay "reasonable medical expenses incurred for necessary medical and funeral services because of bodily injury," at the time she received treatment, regardless of whether expenses were paid by Medicaid. *Auto Club Property Casualty Insurance Co. v. Moser*, 874 S.E.2d 295 (W. Va. 2022). The *Moser* case surveyed numerous courts that held an insured "incurred" medical expenses at the point the services were provided regardless of whether the services were ultimately paid by an HMO or Medicaid and at a reduced value. *Auto Club Property Caualty Ins. Co. v. Moser*, 874 S.E.2d at 303-304.

Amici next cite to William J. Schermer & Irvin E. Schermer, *Automobile Liability Insurance* § 56:2 (4th Ed. 2014) ("*Schermer*") for the parenthetical proposition that:

> In an action for benefits under the policy, the amounts which the health provider have [sic] accepted in full payment are deemed "incurred," but not that portion that was "written off" by the health care providers and not paid by the insured.

(Brief of Amici p. 4). The provision in *Schermer* focuses primarily on the *timing* of billing for the medical services. This section of the article begins with:

> A majority of jurisdictions has held that where a policy requires medical expenses to be "incurred" within a specified period of time, it is not sufficient, standing alone, that the need arose during the qualifying period. The expense is not "incurred" since *the obligation to pay arises only when the services are actually performed or the insured has become legally bound contractually to pay for the projected services*. Thus, even if the services of a surgeon are engaged within the period, the expense may not be considered incurred until the surgery is actually performed. The retention of the surgeon constitutes a contingent promise to pay for his services. The expense is not incurred until the contingency—the surgeon's performance of the services—occurs.

Id. (emphasis added). The quoted language from the Amici's brief references a case from

Virginia and a "*cf.*" cite to a Minnesota case, but neither case mentions whether the Commonwealth of Virginia nor the State of Minnesota have the same anti-alienation language found in South Carolina's PIP/Medpay statute.[3] The Court should not be persuaded by this article.

Amici also contend that "it is common practice" for healthcare providers to provide varying amounts for services provided under a CPT code, or so-called "sticker prices," that are allegedly arbitrary but are rarely paid. (Brief of Amici, pp. 4-5). Once again, there is no basis in this Record for these statements. Furthermore, the General Assembly, with full knowledge of this Court's opinions in *Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003) and *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004), as well as the anti-alienation provision in the PIP/Medpay statute, has taken no action to amend the statute in over two decades.

At bottom, the Court should not be persuaded by the Amici's assertions which are grounded in authorities that are meaningfully distinct from the matter before the Court.

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[3] Interestingly, the *Schermer* article also states:

> * * * It has been held that a serviceman receiving medical treatment at a government facility without charge has not incurred a medical expense, *but more perceptive decisions have pointed out that the treatment is part of the compensation for his services and is not rendered gratis*. It has also been held that the premium paid for no-fault coverage by a serviceman contemplates reimbursement of the medical expenses incurred by the government. In any event, if no governmental facility is available, a soldier required to pay for medical services is considered to have incurred medical expense, even though he is entitled to be reimbursed by the government. The fact that one is initially or nominally liable for the service makes it incurred, even though actual payment is made through a hospitalization plan or by a workers' compensation carrier.

Schermer, 56:2 (citations omitted) (emphasis added).

II. The Court of Appeals' Decision Is Consistent with this Court's Settled Precedent and South Carolina Statutory Law Such That Any Impact on Other Forms of Voluntary Coverage Will Not Be Adverse, and Furthermore, That Policy Consideration Is for the General Assembly, Not this Court

Amici make the specious claim that "[t]here are a variety of other voluntary 'incurred expense' or 'reimbursement' first-party coverages that will be adversely affected by the Court of Appeals' decision." (Brief of Amici p. 5). This Court should not be persuaded by this argument.

In support of their contention that the entire insurance industry will be impacted, Amici cite to cases dealing with cancer care policies, disability policies, or homeowners' insurance policies regarding debris removal, living expenses, fire damage, replacement costs, or other damages related to homeowners' coverage. (Brief of Amici, pp. 6-7). *See Snyder v. Auto-Owners Inc. Co.*, 634 F.Supp.3d 252 (D.S.C. 2022) (*Snyder II*) (case involved a homeowners' policy covering a fire that destroyed residence under construction); *Snyder v. Auto-Owners Ins. Co.*, 618 F.Supp. 292 (D.S.C 2022) (*Snyder I*) (a related case to *Snyder II*, above, and involves coverage under the same homeowners' policy); *Am. Res. Ins. Co. v. Palmer*, No. C.A. No. 4:08-03314-RBH, 2010 WL 3282579 (D.S.C. Aug. 19, 2010) (case involved a commercial hazard insurance policy covering a market that was destroyed by arson); *Bethel v. Berkshire Hathaway Homestate Ins. Co.* 822 F.Appx. 835 (10th Cir. 2020) (case involved residential property insurance coverage; Court applied Colorado law to construe the phrase "actual cash value" under the policy); *Turner v. Fed. Ins. Co.*, C.A. No. CV-20-851-MWF (AGRx), 2021 WL 4894272 (C.D. Cal. Aug. 18, 2021) (case involves a "masterpiece" homeowners policy); *Green v. Allstate Ins. Co.*, 3:11-CV-00210-TMB, 2015 WL 10939709 (D. Alaska March 26, 2015) (case involved homeowners coverage); *Am. Nat'l Prop. & Cas. Co. v. Felix*, 399 F.Supp.3d 324 (W.D. Pa.

2019) (case involved a fire claim under a homeowners insurance policy); *Christopherson v. Am. Strategic Ins. Corp.*, 483 F.Supp.3d 631 (E.D. Wis. 2020) (claim under homeowners policy for trees that fell on house). Without explaining why, Amici make the bold claim that "[t]he issue presented in this case is no different from other types of voluntary 'expense incurred' or 'reimbursement' coverages," but that claim is, of course, not so.

Like Progressive, Amici fails to address how automobile insurance in South Carolina is different from homeowners' coverage, cancer care coverage, or the disability insurance policy involved in *Barker*. For instance, there is no statutory provision governing homeowners' insurance, cancer care insurance, or general disability insurance such as that found in S.C. Code Ann. § 38-77-144 (2015) ("If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, *the coverage* shall not be assigned or subrogated and *is not subject to a setoff.*") (emphasis added). *See, also, Cothran v. State Farm Mut. Auto. Ins. Co.*, 427 S.C. 831 S.E.2d 919 (2019) (holding invalid under Section 38-77-144 a "coordination clause" which permitted insurer to reduce PIP payments for workers' compensation recovery).

Furthermore, automobile insurance in South Carolina is more heavily regulated than other forms of insurance listed in the Amici's brief. *See South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 349 S.C. 366, 371, 563 S.E.2d 648, 651 (2002) ("Automobile insurance is a highly regulated area of the law. It is well-settled that an insurer has the right to impose only those conditions that do not conflict with a statutory mandate.").

Finally, any effort to modify the plain language of Section 38-77-144 must come from the General Assembly, not this Court, which cannot implement its own public policy in this area.

Spring Valley Interests, LLC v. Best for Last, LLC, Op. No. 28309 (S.C. Sup. Ct. filed January 7, 2026) (Howard Adv. Sh. No. 1 at 8) (citing *ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 580, 884 S.E.2d 506, 509 (2023) ("Determinations of public policy are chiefly within the province of the legislature, whose authority on these matters we must respect." (citation modified)); *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 376, 858 S.E.2d 633, 635 (2021) (observing "the General Assembly establishes the public policy ... and enacts statutes to let the public and the courts know what that policy is"); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989) ("It is the responsibility of this Court to construe statutes; we have no power to legislate.").

The Court should not be persuaded by the Amici's second argument, which crafts a false "parade of horribles" narrative based upon authorities that are meaningfully distinct. The argument also advocates that the Court act based upon arguments that should be made to the General Assembly, not this Court.

CONCLUSION

For the reasons stated the Court should disregard the arguments set forth in the Amici's brief. The first argument basically mirrors Progressive's argument, which is not appropriate for an *amicus curiae*. The second argument is grounded in authorities that are meaningfully distinct from this case or that involve public policy decisions for the legislature to address.

Respectfully submitted,

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