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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Donald B. Hocker, Judicial Circuit Court Judge
Case No. 2024CP4100087

Appellate Case No. 2026-000356

Truetta Cyrus, Individually and as
Duly Appointed Personal Representative and
Administrator of the Estate of Timothy S. Cyrus……………………………………….Appellant,

v.

Progressive Northern Insurance Company……………………………….………...Respondent.

INITIAL BRIEF OF RESPONDENT

A. Johnston Cox
Gallivan, White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202-7368
(803) 779-1728
jcox@gwblawfirm.com

Attorney for Respondent

John S. Nichols (SC Bar #4210)
Allison P. Sullivan (SC Bar #73754)
Bluestein Thompson Sullivan
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
john@bluesteinattorneys.com
allison@bluesteinattorneys.com

Carlise E. Kennedy, Esq. (SC Bar # 104175)
Kennedy Law Firm

125 E. Church Street
Leesville, SC 29070
(803) 532-4100
carlislekennedy@kennedylawsc.com

Attorneys for Appellant

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STATEMENT OF THE ISSUE ON APPEAL

Did the Circuit Court err in adhering to longstanding South Carolina Supreme Court precedent in holding that any person, including a statutory beneficiary of a deceased's estate, must either be directly physically injured in an accident with an insured driver or satisfy the *Kinard v. Augusta Sash* factors to recover a "per person" bodily injury liability limit under Progressive's automobile liability policy?

STATEMENT OF THE CASE

This is a declaratory judgment action to determine the amount of liability coverage available under an automobile policy following the death of Timothy S. Cyrus. On June 6, 2021, Mr. Cyrus was killed when the moped he was operating on U.S. Highway 1 was struck by a vehicle driven by Amanda Sandin, a permissive user of a vehicle insured by Progressive Northern Insurance Company ("Progressive") under a policy issued to Dinorah Gonzalez. The policy provides bodily injury liability limits of $25,000 "each person" and $50,000 "each accident." Truetta Cyrus, the decedent's mother and the sole statutory beneficiary of his estate, sued Ms. Sandin both individually and as the duly appointed personal representative and administrator of Timothy's estate. Progressive tendered its $25,000 "each person" limit to resolve the bodily injury liability claims arising from the decedent's death.

Appellant filed her complaint for declaratory judgment on June 5, 2024, and an amended complaint on June 19, 2024, contending that she is entitled to a separate "per person" bodily injury liability limit because of her status as a statutory beneficiary of Timothy's estate under South Carolina Code Section 15-51-10 ("Wrongful Death Act"), even though she was not physically injured in the accident and did not witness the accident. The parties submitted the coverage question to the Circuit Court on a written stipulation of facts and the operative policy language.

Progressive moved for summary judgment on October 18, 2024. Following a hearing on November l0, 2025, the Circuit Court granted Progressive's motion by Order filed January 20, 2026. The Circuit Court correctly found that Appellant could not recover bodily injury liability coverage from Progressive's policy because the damages recoverable under the Wrongful Death Act do not constitute "bodily injury" under Progressive's policy and South Carolina Supreme Court precedent. Appellant timely filed this appeal.

STATEMENT OF THE FACTS

The undisputed facts in this case are as follows: Progressive Northern Insurance Company ("Progressive") issued Auto Policy No. 942176143 ("Policy") to Dinorah Gonzalez ("Gonzalez"), which listed a 2012 Dodge Grand Caravan as an insured vehicle. The Policy provided bodily injury liability limits of $25,000 per person and $50,000 per accident and property damage liability limits of $25,000 per accident. (*see* Ex. 1, Policy).

On June 6, 2021, Timothy S. Cyrus ("Decedent") was operating a moped on U.S. Highway 1 when he was killed in a motor vehicle accident involving Amanda Sandin ("Sandin"), who was operating the 2012 Dodge Grand Caravan with Gonzalez's permission. The Policy was in force on the date of the accident. (Stipulated Facts).

Plaintiff Truetta Cyrus ("Cyrus") is the mother of Decedent. She is the only statutory beneficiary of the Decedent's estate. She was not a witness to the Decedent's accident with Sandin, was not physically present at the time of the Decedent's accident with Sandin, and was not physically injured in the accident with Sandin. Cyrus did not own any property involved in the Decedent's accident with Sandin. Cyrus' damages derive solely from the death of her son as a statutory beneficiary of his estate under South Carolina Code Section 15-51-10. As such, her damages are limited to potential pecuniary losses, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of society recoverable under the Wrongful Death Act. (Stipulated Facts).

Progressive tendered the full per person bodily injury liability limit of $25,000 to Cyrus individually and as the personal representative of the decedent's estate. Cyrus has brought this action asking the Court to declare that she is individually entitled to a separate per person liability limit of $25,000 because she is a statutory beneficiary of Decedent's estate.

Progressive's policy states, in relevant part, as follows:

> **GENERAL DEFINITIONS**
>
> The following definitions apply throughout the policy. Defined terms are printed in bold-face type and have the same meaning whether in the singular, plural, or any other form.
>
> ***
>
> 4. "**Bodily injury**" means bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease.
>
> ***
>
> **PART I—LIABILITY TO OTHERS**
> **INSURING AGREEMENT**
>
> If **you** pay the premium for this coverage, **we** will pay damages for **bodily injury** and **property damage** for which an **insured person** becomes legally responsible because of an accident.
>
> ***
> **LIMITS OF LIABILITY**
> ***
>
> If **your declarations page** shows a split limit:
>
> 1. the amount shown for "each person" is the most **we** will pay for all damages due to **bodily injury** to one person resulting from any one accident;
>
> 2. subject to the "each person" limit, the amount shown for "each accident" is the most **we** will pay for all damages due to **bodily injury** sustained by two or more persons in any one accident; and

> 3. the amount shown for "property damage" is the most **we** will pay for the total of all **property damage** resulting from any one accident.
>
> The "each person" limit of liability applies to the total of all claims made for **bodily injury** to a person and all claims of others derived from such **bodily injury**, including, but not limited to, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

Further, Appellant stipulated to the Circuit Court that she cannot satisfy the elements of "a bystander claim in this case pursuant to *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) and its progeny. "Plaintiff was not in proximity to the wreck and did not contemporaneously perceive the wreck." (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 4).

ARGUMENT

I. Progressive's definition of "bodily injury" complies with South Carolina statutory law.

Neither Progressive's policy, S.C. Code Ann. § 38-77-140, § 38-77-30(3), § 38-77-142, nor the Wrongful Death Act require Progressive to afford a separate per person liability limit to Appellant's claim for damages.

South Carolina Code Section 38-77-140 states,

> (A) An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows:
>
> (1) twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person;
>
> (2) fifty thousand dollars because of bodily injury to two or more persons in any one accident;

South Carolina Code Section 38-77-142 states,

> (A) No policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State . . . unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability for death or injury sustained or loss or damage incurred *within the coverage of the policy* or contract as a result of negligence in the operation or use of the vehicle by the named insured or by any such person.

S.C. Code Ann. § 38-77-142 (emphasis added).

South Carolina Code Section 38-77-30(3) provides the statutory definition of the term bodily injury, stating that "'Bodily injury' includes death resulting therefrom." S.C. Code Ann. § 38-77-30(3). Progressive's definition of "bodily injury" comports with the statutory requirements and South Carolina common law. Progressive's policy defines "bodily injury" as "bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease." While using different words, the meaning of the definitions are identical: bodily injury to a person and death resulting therefrom. That is exactly the damage for which Progressive has already paid – Decedent's injuries and death resulting therefrom. Appellant was not physically injured in the accident, she did not die in the accident, and she did not witness the accident – the only avenues to individual recovery of bodily injury liability coverage resulting from an automobile accident in South Carolina. *See State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 351, 368 S.E.2d 477, 478 (Ct. App. 1988), *aff'd*, 297 S.C. 71, 374 S.E.2d 896 (1988).

Progressive's policy further states, in pertinent part:

> The "each person" limit of liability applies to the total of all claims made for **bodily injury** to a person and all claims of others derived from such **bodily injury**, including, but not limited to, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

Appellant points to no statutory prohibition of this provision, and in fact, as discussed below, it fully comports with South Carolina law. There is no legal basis to support an argument that Section 38-77-142 somehow broadens the statutory definition of "bodily injury" found in Section 38-77-30(3) to include the type of "personal injuries" recoverable by statutory beneficiaries under the Wrongful Death Act. "Bodily injury including death resulting therefrom" means what is says. While Decedent unfortunately sustained bodily injury and died as result of the accident, Appellant did not. Under South Carolina law, the damages she has incurred as a statutory beneficiary are classified as "personal injuries," not "bodily injuries" recoverable only under the Wrongful Death Act.

Prior to the passage of the Wrongful Death Act, South Carolina did not recognize any legal claim for damages possessed by relatives due to the death of a person. *See Sellers v. Lewis & Holmes Motor Freight Corp.*, 215 S.C. 256, 54 S.E.2d 806 (1949). The Wrongful Death Act permits statutory beneficiaries to recover personal injuries not previously recognized by South Carolina law resulting from another person's death. The Act did not create an avenue through which the parent of a deceased child can recover for bodily injuries that a parent of a child rendered a quadriplegic cannot. Such an interpretation of Sections 38-77-30(3) and 38-77-142(A) would lead to an impermissible, absurd result and rewriting of Progressive's policy. *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 670 S.E.2d 371 (2008) (In construing a statute, Supreme Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.); *see also Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) (Parties to contract of insurance have right to make their own contract, and it is not function of courts to rewrite or torture meaning of policy to extend coverage.).

II. The Circuit Court Correctly Found that Progressive's Policy Complies with South Carolina Common Law, and Appellant Has Not Suffered Bodily Injury Recognized by South Carolina Law.

Under South Carolina law and Progressive's policy, a person must receive "bodily injury" to recover under their own "per person" bodily injury liability limit. However, the damages Appellant is claiming as a statutory beneficiary of Decedent's estate are not considered "bodily injury" under South Carolina law. Rather, the law is clear that damages recoverable under the Wrongful Death Act are classified as "personal injuries," not "bodily injuries." Therefore, Appellant is not entitled to her own, separate "per person" bodily injury liability limit. Her damages do not constitute "bodily injury" under South Carolina law.

Appellant's stipulation to the Circuit Court that she cannot meet the *Kinard* factors should end the analysis in this case. Despite her concession, Appellant still argues that because her son died in an accident that she did not witness, she, individually, is entitled to a "per person" limit of bodily injury liability coverage, even though a parent of a child who becomes a quadriplegic as a result of an accident cannot.[1] *See Kinard v. Augusta Sash & Door Co.,* 286 S.C. 579, 336 S.E.2d 465 (1985). The issue presented has been rejected by our appellate courts in several previous cases.

In *Kinard*, a mother and child were both involved and physically injured in an automobile accident. The mother argued that she should not only be able to recover for the physical injuries she sustained and the emotional distress related thereto, but also the emotional distress caused by witnessing her daughter becoming severely injured in the accident. The *Kinard* Court adopted for the first time a cause of action for negligent infliction of emotional distress upon proof of the following elements:

[1] In this case, there happens to be only one statutory beneficiary. If appellant prevails in this action, all statutory beneficiaries of an estate would be entitled to a separate "per person" bodily liability limit up to the "per accident" bodily injury liability limit.

> (a) the negligence of the defendant *must cause death or serious physical injury to another*;
> (b) the plaintiff bystander must be in close proximity to the accident;
> (c) the plaintiff and the victim must be closely related;
> (d) the plaintiff must contemporaneously perceive the accident; and
> (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Kinard, at 465 (emphasis added).

Neither *Kinard* nor its progeny make a distinction between recovery by parents of injured children as opposed to parents of deceased children. *Kinard* applies both to accidents resulting in death and accidents resulting in serious bodily injury. In *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 154, 533 S.E.2d 597, 602 (Ct. App. 2000), the wife of a husband who was injured in an automobile accident claimed she was entitled to a separate "per person" bodily injury liability limit for her alleged damages arising out of the accident. She alleged that she

> suffered the loss of the society, companionship, services of her husband along with personal injuries such as emotional distress, physical injury and illness, financial loss, among other losses and has separate and distinct losses apart from those of her husband also believed to be in excess of $25,000.00.

Id. at 599. She was not involved in the accident and did not witness the accident. The wife alleged that she "suffered emotional and physical illness as a result of stress from her husband's accident and from caring for his injuries." *Id*.

The Court of Appeals, following long standing legal precedent, held that neither the wife's alleged loss of consortium damages nor her alleged emotional distress constituted claims for bodily injury covered under State Farm's automobile liability policy or South Carolina law. As to the wife's claim for emotional distress, the Court of Appeals stated,

> Recovery for this type of direct, as opposed to consequential, claim for emotional and physical upset is limited to bystander recovery. The *Kinard* Court distinguished recovery under this type of direct claim from recovery of consequential damages resulting from bodily injuries to others by emphasizing the plaintiff in *Kinard* "may not recover for the emotional upset arising from her voluntary vigil at her daughter's

> bedside following the accident" as part of her direct claim of injury. . . . The damages sustained by Wife in this case are consequential damages. They do not constitute direct bodily injury from the accident. Thus, Wife's damages are covered under the same "per person" limit as the bodily injuries of her husband, from which Wife's injuries resulted.

Id. at 603 (internal citations omitted).

The Court of Appeals also addressed the wife's claim for the consequential damages asserted under her loss of consortium claim. Similar to appellant's argument in this case, the Wife claimed entitlement to a separate per person bodily injury liability limit because her "consortium claim is a separate and distinct cause of action." *Id*. at 604. The Court of Appeals agreed that "loss of consortium is an independent action, not derivative. . . and distinct cause of action from one maintained by the injured spouse." *Id*. The Wife made the same argument Appellant is making in this case – that she was entitled to a separate "per person" bodily injury liability limit because

> the Wife's loss of consortium and bodily injury damage is a 'liability imposed by law' on the tortfeasor which creates an obligation to pay damages. They further reason § 38–77–140 requires separate "per person" coverage for this loss because Wife's consortium claim is a separate and distinct cause of action.

Id.

Rejecting this (and Appellant's current) contention, the Court of Appeals correctly noted,

> The crux of coverage is not the separateness of a loss of consortium claim. Instead, the key is the consequential or direct nature of the damages sought. Where the claim is for consequential damages resulting from the bodily injuries suffered by the other spouse, rather than direct emotional or physical injury inflicted by the tortfeasor, the damage claim is covered by the single "per person" limit applicable to the claim for bodily injury giving rise to the consequential damages. Wife's damages were consequential and are covered under the same "per person" limit as the bodily injuries of Husband.

Id. at 604-605.

It has long been the law in South Carolina that "consequential damages, such as loss of consortium, medical and hospital expenses, etc., are generally held not to constitute 'bodily injuries' within the meaning of automobile liability policies limiting liability to a stated amount for 'bodily injuries' to one person...." *Id*. at 602 (citing *Sheffield v. American Indem. Co.*, 245 S.C. 389, 395, 140 S.E.2d 787, 790-91 (1965)); *see also Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 513 S.E.2d 127 (Ct. App. 1999) (spouse could not recover UIM benefits for loss of consortium under a per person UIM BI limit separate from insured's recovery for bodily injuries).

In *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 351, 368 S.E.2d 477, 478 (Ct. App. 1988), *aff'd*, 297 S.C. 71, 374 S.E.2d 896 (1988), Candus Ramsey, individually and as the Administrix of her daughter's estate, filed a declaratory judgment action seeking a declaration that the emotional injuries she suffered from witnessing her daughter's death met the definition of a "bodily injury" under State Farm's automobile liability policy and South Carolina law. Although State Farm had tendered one per person bodily injury liability limit to settle the child's survival claim and the wrongful death claims of the statutory beneficiaries, Ramsey asserted that she was entitled to recover a separate "per person" bodily injury liability limit, because she witnessed the death of her daughter, thus meeting the *Kinard* elements. She was not herself involved or physically injured in the accident that caused her child's death.

The Court of Appeals correctly found that the issue was controlled by the Supreme Court's adoption of a bystander liability claim in *Kinard*, noting it was a "new cause of action in tort for emotional distress to certain bystanders." *Id.* The Court of Appeals held that for emotional distress to be considered "bodily injury," the "burden is on respondent to prove derivative damages under the elements of *Kinard*." *Id*. The Supreme Court affirmed the Court of Appeals, stating, "The Court of Appeals, relying in part on *Spaugh v. Atlantic Coast Line R. Co.* and *Kinard v. Augusta Sash & Door*, held that negligent infliction of emotional distress is a bodily injury for which damages may be recovered under a standard insurance policy. We agree with the reasoning of the Court of

Appeals and, accordingly, affirm." *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 297 S.C. 71, 72, 374 S.E.2d 896, 896 (1988).

Obviously, *Ramsey* was decided well after the enactment of the Wrongful Death Act. If damages recoverable under the Wrongful Death Act are considered "bodily injuries" recoverable under the automobile liability coverage, there would have been no need for Ramsey to assert a bystander claim to recover from an additional "per person" bodily injury liability limit. The creation, through adoption of the Wrongful Death Act, of a vehicle through which statutory beneficiaries can receive consequential damages, including punitive damages, arising from the death of another person in no way changes this analysis. *See Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989) ("punitive damages are not assessed to compensate the plaintiff for physical harm suffered. Their purpose is to punish the wrongdoer and to deter him and others from engaging in similar misconduct."); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000); *Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (Ct. App. 1999) ("Actual damages compensate for loss or injury sustained while punitive damages punish the wrongdoer in order to deter such conduct.")[2]

Just like a consortium claim, a statutory beneficiary's claim under the Wrongful Death Act is a separate and distinct cause of action from the deceased's survival claim. Similarly, the damages recoverable under the Wrongful Death Act are consequential, not direct damages and do not constitute "bodily injury" under Progressive's policy or South Carolina law, like that of a

[2] Further, it is well settled in South Carolina that an issue must be raised and ruled upon before a trial judge to be preserved for appeal, and that an issue may not be raised for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellant cannot now raise, for the first time, the argument that wrongful death damages are direct merely because the Wrongful Death Act permits an award of punitive damages. Such an allowance would be contrary to long standing South Carolina law and should not be entertained by this Court.

consortium claim. *See Toney v. S.C. Dep't of Educ.*, 284 S.C. 401, 405, 327 S.E.2d 322, 325 (1985) ("the kinds of injuries recoverable under the Wrongful Death Act are not included within the term 'bodily injuries.'").

South Carolina's Wrongful Death Act provides:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

S.C. Code Ann. § 15-51-10.

Section 15–51–20 provides a wrongful death action may be brought for the benefit of the statutory beneficiaries, in this case, Decedent's mother. "Although a wrongful death claim is for the benefit of the decedent's family, South Carolina treats this claim as derivative of the decedent's own personal claim during his lifetime." *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 667, 869 S.E.2d 819, 851–52 (Ct. App. 2021), *aff'd sub nom.*, *Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024) (referencing *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) (holding that a wrongful death claim "lies in the decedent's estate only when the decedent possessed the right of recovery at his death").

"Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship." *Clark v. S.C. Dep't of Pub. Safety*, 353 S.C. 291, 310, 578 S.E.2d 16, 25 (Ct. App. 2002), *aff'd*, 362 S.C. 377, 608 S.E.2d 573 (2005). Although a wrongful death claim is for the benefit of the decedent's family, our Supreme Court has stated "[T]he kinds of injuries recoverable under the Wrongful Death Act are not included within the term 'bodily injuries.'" *Toney v. S.C. Dep't of Educ.*, 284 S.C. 401, 405, 327 S.E.2d 322, 325 (1985); *see also State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 353, 368 S.E.2d 477, 479 (Ct. App. 1988), *aff'd*, 297 S.C. 71, 374 S.E.2d 896 (1988) (Cureton, J., concurring and citing *Toney*) ("Injuries recoverable under the Wrongful Death Act such as pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship are not 'bodily injuries' but are 'personal injuries.'").

Our appellate courts have clearly distinguished the terms "bodily injury" and "personal injury." The term "bodily injuries" is much narrower than the term "personal injuries." *Ramsey*, 368 S.E.2d at 479 (Cureton, J., concurring) (citing *Toney*, 327 S.E.2d at 325; *Cummings v. Horace Mann Ins. Co.*, 996 F.2d 720 (4th Cir. 1993) (wrongful death damages not recoverable under underinsured motorist coverage because they are personal injuries, not bodily injuries)).

Plaintiff's attempt to limit the Supreme Court's holding in *Toney* to the facts of that particular case is meritless. Appellant contends that the *Toney* Court's analysis was limited to the no-fault school bus statutes discussed in the opinion. This argument ignores the following discussion by the *Toney* Court:

> Nor can the respondent maintain an action under subsection (1)(b) to obtain the damages provided by the Wrongful Death Act, S.C. Code Ann. §§ 15–51–10 to –60. Under the Act, a decedent's personal representative may maintain a suit to recover the statutory beneficiaries' *personal injuries* caused by the decedent's death. These injuries include pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972).

Toney, 284 S.C. at 405, 327 S.E.2d at325. Addressing Toney's ability to recover the damages sought under the Wrongful Death Act, the *Toney* Court stated,

> It is clear that the term "bodily injuries" is much narrower than the term "personal injuries." *Sheffield v. American Indemnity Company*, 245 S.C. 389, 140 S.E.2d 787 (1965); *Sossamon v. Nationwide Mutual Insurance Company*, 243 S.C. 552, 135 S.E.2d 87 (1964); 45 C.J.S. *Insurance* § 827.

Id.

The *Toney* Court clearly and succinctly declared, "In our opinion, the kinds of injuries recoverable under the Wrongful Death Act are not included within the term 'bodily injuries.'" *Id*. In doing so, the Supreme Court cited to the *Sheffield* case, *supra*, in which the Supreme Court had previously held that loss of consortium damages are "personal injuries" for which a spouse cannot recover under a separate "per person" bodily injury limits from the injured spouse. Therefore, just like consortium damages, damages recoverable under the Wrongful Death Act are consequential "personal injuries," not direct "bodily injuries."

The *Toney* Court's citation to *Sheffield* indicates that the Supreme Court views the nature of wrongful death damages as being equivalent to loss of consortium damages. Despite this, Appellant raises several arguments unsupported by South Carolina law in her attempt to persuade the Court that wrongful death damages are not consequential, but direct. However, she fails to point to any meaningful difference between the causes of action and damages recoverable that would result in a finding that consortium damages are consequential and wrongful death damages are direct.

III. Wrongful Death and Consortium Damages are Both Consequential Personal Injuries that do not Constitute Bodily Injury Under South Carolina Law.

Appellant first argues that wrongful death damages are different than loss of consortium damages because wrongful death damages are separate and distinct from survival damages. Appellant argues "wrongful death damages are not consequential to the decedent's bodily injury" because they "compensate a distinct injury measured by the beneficiary's own loss." (Appellant's Initial Brief, p. 9); *see also Jolly*, 435 S.C. at 670, 869 S.E.2d at 853 (quoting *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) (The two are "different claims for different injuries.") (Appellant's Initial Brief, p. 10).

This argument fails. Consortium damages have always been considered a separate and distinct injury from the injured spouse's injury claim, measured by the spouse's own loss, albeit prior to 1969 it extended only to husband's loss of consortium claim. *See Berry v. Myrick*, 260 S.C. 68, 194 S.E.2d 240 (1973); *Preer v. Mims*, 323 S.C. 516, 520-21, 476 S.E.2d 472, 474 (1996); *Lee v. Bunch*, 373 S.C. 654, 662, 647 S.E.2d 197, 201 (2007) ("claims for personal injuries and for loss of consortium are separate and distinct"); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000). In *Pratt v. Amisub of SC, Inc.*, 445 S.C. 199, 211, 912 S.E.2d 268, 274-75 (Ct. App. 2025), the Court of Appeals reiterated that a consortium claim is an independent claim, accrues when the spouse sustains injuries, and belongs exclusively to the non-injured spouse.

Appellant also argues that wrongful death damages are direct (as opposed to consequential) because the General Assembly created a cause of action for the benefit of statutory beneficiaries. Therefore, Appellant argues, "Because the decedent's bodily injury lives on the survival track, the beneficiary's wrongful-death damages cannot be the "consequence" of a bodily injury that is, by statute, compensated elsewhere.(Appellant's Initial Brief, p. 10).

However, Appellant's argument ignores the fact that in 1969, the General Assembly enacted South Carolina Code Section 15-75-20, creating a new consortium cause of action in favor of a female spouse where none previously existed. *See Berry v. Myrick*, 260 S.C. 68, 194 S.E.2d 240 (1973). Therefore, Appellant's argument that wrongful death damages are different from consortium damages because the General Assembly created a new cause of action for the benefit of statutory beneficiaries fails. By statute, a spouse's consortium damages are compensated elsewhere from the injured spouse's bodily injury claim. S.C. Code Ann. § 15-75-20. The creation of a cause of action, by itself, has no bearing on whether damages are direct, consequential or considered "bodily injury."

After admitting that a wrongful death claim is considered a derivative action in South Carolina, Appellant then contends that it is not derivative. Our courts have specifically held that a wrongful death claim is a derivative claim. *See Jolly v. Gen. Elec. Co.*, 435 S.C. at 667, 869 S.E.2d at 851("[a]lthough a wrongful death claim is for the benefit of the decedent's family, South Carolina treats this claim as derivative of the decedent's own personal claim during his lifetime."). In contrast, "under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative." *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 156, 533 S.E.2d 597, 604 (Ct. App. 2000). However, the same thing is true for both types of claims – no such claim exists without an injury or death to another person. A beneficiary has no cause of action or damage claim without the death of another person. *See Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 104, 498 S.E.2d 395, 402 (Ct. App. 1998) (a cause of action for wrongful death arises only upon the death of the injured person and does not exist prior to death.) Similarly, a spouse has no consortium claim without an injury to the other spouse. Neither would exist without the injury or death to another person, and are, by their very nature, consequential damages. *See Toney,* 284 S.C. at 405, 327 S.E.2d at 325.

The fact that the comparative negligence of the deceased person applies to limit the recovery of wrongful death damages further highlights the derivative nature of wrongful death damages. S.C. Code Ann. § 15-38-15. *See also Weaver v. Lentz*, 348 S.C. 672, 685, 561 S.E.2d 360, 367 (Ct. App. 2002) (wrongful death damages reduced by decedent's comparative fault); *Henson v. Int'l Paper Co.*, 358 S.C. 133, 594 S.E.2d 499 (Ct. App. 2004) (wrongful death damages reduced by decedent's comparative fault). This argument does not advance Appellant's cause.

Appellant also argues that wrongful death damages are different from consortium damages because wrongful death damages cannot be offset against the deceased's damages in a survival action. Appellant argues that survival and wrongful death damages are distinct damages for the benefit of distinct parties. *See Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 535, 905 S.E.2d 380, 393 (2024). However, the same is true for consortium damages. The injured spouse's bodily injury claim is separate and independent of the other spouse's consortium claim and belongs exclusively to the non-injured spouse. *See Pratt*, 445 S.C. at 211, 912 S.E.2d at 274-75; *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007). Further, damages paid to an injured spouse cannot be offset against the other spouse's damages for loss of consortium. *See Pratt,* 445 S.C. 199, 912 S.E.2d 268 (Ct. App. 2025); *Kizer v. Kinard*, 361 S.C. 68, 602 S.E.2d 783 (Ct. App. 2004) (insurance carrier not entitled to offset damages paid to injured spouse from wife's consortium claim). Further, the fact that comparative negligence of the decedent applies to limit a wrongful death beneficiary's damages, undercuts Appellant's argument that "the decedent's bodily injury "is compensated on its own separate track, not as the trunk from which the beneficiary's damages branch." (Appellant's Initial brief, p. 10).

When Appellant's bald assertions regarding wrongful death claims and damages are juxtaposed against the law regarding consortium claims and damages, it becomes clear that no argument she raises should result in a finding that wrongful death damages should be considered "bodily injuries" as opposed to "personal injuries" under South Carolina law.

CONCLUSION

As demonstrated above, the Circuit Court correctly granted Progressive's Motion For Summary Judgment. Appellant cannot recover a separate "per person" bodily injury liability limit from Progressive's automobile liability policy as a matter of law. She must have incurred bodily injury as recognized by South Carolina law to individually recover under an automobile's bodily injury liability coverage. She was not physically injured in the accident and did not witness the accident in which a close relative was seriously injured or killed. Therefore, the legal damages that she can recover, only because of her status as a statutory beneficiary under the Wrongful Death Act, are consequential, "personal injuries," not "bodily injuries." Therefore, Respondent respectfully requests this Court affirm the Circuit Court's Order granting Progressive's Motion For Summary Judgment.

Respectfully Submitted,

s/ A. Johnston Cox

A. Johnston Cox (SC Bar No. 9081)
GALLIVAN WHITE BOYD, PA
P.O. Box 7368
Columbia, South Carolina 29202
(803) 779-1833
jcox@gwblawfirm.com

Attorney for Respondent Progressive Northern Insurance Company

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