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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

Donald B. Hocker, Circuit Court Judge
Case No. 2024-CP-41-00087

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.

REPLY BRIEF OF APPELLANT

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Two independent grounds require reversal, and each yields the same relief. The first is statutory. South Carolina Code Ann. § 38-77-142(A) (2015) requires every automobile liability policy issued or delivered in this State to insure against liability for death. The Wrongful Death Act imposes that liability. Progressive's policy meets it with the same $25,000 limit that applies to the decedent's own bodily injury, so that once the single limit is exhausted, no additional amount is payable for the liability for death. Subsection (C) of the statute provides that reduction is void, and *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014) holds that what controls in its place is the face amount the insurer wrote and priced.

The second ground for reversal is the holding the circuit court actually made. The court held that Appellant's damages are consequential to her son's bodily injury and therefore share his limit. That holding fails under the very test the decisions it relied upon supply. In those decisions, damages were consequential because they flowed from a bodily injury that the same limit was simultaneously compensating. The beneficiary's damages, however, do not flow from any such injury. South Carolina compensates the decedent's injury on the survival track and measures the beneficiary's loss by what the death cost her, and our Supreme Court has held that the two are not the same injury and that the elements of damage recoverable are entirely different.

Either ground produces the same figure: $50,000, the "each accident" amount Progressive itself wrote and priced. That is all Appellant seeks. (Stip. ¶¶ 2, 14.) Reversal on either ground is sufficient. The first does not require the Court to decide whether the beneficiary's damages are direct or consequential in the sense the consortium decisions use those words, because subsection (A) of § 38-77-142 names death regardless; it asks only that liability for death be recognized as an object of coverage the statute separately requires. The second does not depend on § 38-77-142 at all.

Progressive's Brief does not engage the first ground. It does not mention subsection (C). It does not use the word "void." It does not cite *Williams v. Government Employees Insurance Co. (GEICO)* or *Nationwide Mutual Fire Insurance Co. v. Walls*, 433 S.C. 206, 858 S.E.2d 150 (2021), the two decisions in which the Supreme Court applied subsection (C). Progressive's analysis of subsection (A) occupies a single sentence. The remainder of the Brief rests on decisions that either predate the enactment of § 38-77-142 or that never construe it. The decisions are offered under a Statement of the Issue asking whether the circuit court erred in adhering to longstanding South Carolina Supreme Court precedent.

Appellant does not ask this Court to rewrite Progressive's policy. She asks it to apply the statute the policy was written to satisfy, and to correct a holding that treats as a byproduct of someone else's injury a claim the General Assembly created.

I. SECTION 38-77-142 REQUIRES COVERAGE AGAINST LIABILITY FOR DEATH, AND SUBSECTION (C) VOIDS A PROVISION THAT WITHHOLDS IT

Section 38-77-142(A) provides that no policy of bodily injury liability insurance may be issued or delivered in this State unless the policy contains a provision insuring the named insured and permissive users "against liability for death *or* injury sustained or loss or damage incurred within the coverage of the policy." S.C. Code Ann. § 38-77-142(A) (emphasis added). The terms are disjunctive. Death is named as an object of mandatory coverage alongside injury, not as a consequence of it. The chapter's own definition points the same way: "bodily injury" includes "death resulting therefrom." S.C. Code Ann. § 38-77-30(3) (2015). So does Progressive's policy, which defines the term as "bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease."

Subsection (C) supplies the consequence of a policy provision that pulls back what subsection (A) requires:

> Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void.

S.C. Code Ann. § 38-77-142(C). Progressive's policy provides that the "each person" limit "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." The General Assembly named liability for death as an object of required coverage. Progressive's policy names wrongful death as a claim "derived from" someone else's bodily injury and caps it accordingly. Whether the statute permits that is the question subsection (C) governs, and it is the question this appeal presents.

A. The question is whether Progressive may satisfy subsection (A) out of the limit payable for the decedent's own injury

Progressive's answer, at page 7 of its Respondent's Brief, is that its definition of bodily injury matches the statute's and that it has "already paid" for the decedent's "injuries and death resulting therefrom." The policy names wrongful death expressly, and Progressive has tendered its per-person limit. (Stip. ¶ 13.) But subsection (C) does not ask whether the insurer has afforded some coverage. It asks whether a policy provision reduces the coverage the section requires. Progressive's clause does. Subsection (A) separately names liability for death and liability for injury sustained. Progressive's "each person" clause applies a single $25,000 to both, so that once the limit applicable to the decedent's bodily injury is exhausted, no additional amount remains available for the liability for death.

That is the same kind of reduction subsection (C) invalidated as described in *Williams* and *Walls*, and in neither case did the insurer exclude anything. GEICO's policy covered the accident; its family step-down clause reduced the amount payable from the stated $100,000 to the then-statutory minimum of $15,000. *Williams*, 409 S.C. at 592, 762 S.E.2d at 708. Nationwide's policy covered the passengers; its provisions reduced the amount payable from the stated $300,000 per occurrence to $50,000. *Walls*, 433 S.C. at 214, 858 S.E.2d at 154. Each insurer said, in substance, that it covered the liability but would pay less than the policy's stated amount, and in each case subsection (C) made the provision that retracted the stated coverage void. Progressive says it covers liability for death but will pay nothing beyond the amount already payable for the decedent's injury. Subsection (C) draws no distinction among those forms of retraction. It reaches any provision that "purports or seeks to limit or reduce" the coverage the section requires.

Our Supreme Court has given weight before to separately identified statutory objects of coverage. In *Nance v. State Board of Education*, 277 S.C. 64, 282 S.E.2d 848 (1981), subsection (1)(a) of the school bus statute provided recovery for the death of a bus occupant and subsection (1)(b) for the "personal injuries" of others, and the Court held that subsection (1)(b) afforded the parents a cause of action "exclusive of" subsection (1)(a), rejecting the objection that this produced a double recovery. *Id.* at 66, 282 S.E.2d at 850. *Toney* later held that a 1977 amendment narrowing subsection (1)(b) to "bodily injuries" changed that result, a point addressed in Part II.C of this Brief, below. What *Nance* illustrates is the Court's willingness to give separate effect to separately worded objects of statutory coverage. Section 38-77-142(A) names liability for death and liability for injury sustained in a single provision, and it contains no carve-out directing that the coverage required for the one be satisfied out of the amount payable for the other.

B. *Williams* and *Walls* supply the governing rule, and Progressive cites neither

Progressive quotes subsection (A) at page 7 of its Brief, with its own emphasis added, and does not analyze the statute except in the single sentence discussed below and in one further sentence invoking the absurd-result canon, which Part III of this Brief addresses.

That is the omission the Supreme Court identified as error in *Williams*, where the circuit court "failed to give any consideration to subsection (C)." *Id.* at 601, 762 S.E.2d at 713. The Court held that "it is the face amount of the coverage that is relevant under section 38-77-142, not the statutory minimum limits of liability coverage set forth in section 38-77-140, which are not even mentioned in the statute." *Id.* at 603, 762 S.E.2d at 714. And "once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage." *Id.* at 604, 762 S.E.2d at 715. Any other interpretation of subsection (C), the Court added, "would render the section useless, and the General Assembly is presumed not to perform useless acts." *Id.*

Walls applied *Williams* and rejected the argument that § 38-77-142 is "a mere omnibus provision" identifying who must be covered. Subsections (A) and (B), the Court held, "specify who must be covered in liability insurance policies, including named insureds and permissive users, as well as what injuries must be covered," and "once the insurer places the required provisions in the policy with the agreed-upon limits of coverage, any attempt by the insurer to reduce the coverage afforded by the provisions is void pursuant to subsection (C)." *Walls* at 212-13, 858 S.E.2d at 153-54. Subsection (C), the Court further held, "makes no distinction between mandatory minimum limits and excess coverage," and the Court found "it significant that the General Assembly has not amended section 38-77-142 since this Court decided *Williams* in 2014." *Walls* at 215, 858 S.E.2d at 154.

Those holdings also answer the argument implicit in Progressive's page 7 argument. Section 38-77-140(A)(1) fixes the minimum limit "because of bodily injury to one person," § 38-77-30(3) provides that bodily injury "includes death resulting therefrom," and one person died; on that reading, Progressive has paid the per-person amount the General Assembly itself contemplated for one person's injury and death. This reading measures subsection (A) by a statute subsection (A) does not mention. *Williams* held that the minimum limits of § 38-77-140 "are not even mentioned in" § 38-77-142 and are not the measure of the coverage it protects. 409 S.C. at 603, 762 S.E.2d at 714. Subsection (A) names liability for death as its own object of coverage, without reference to the per-person structure of § 38-77-140, and § 38-77-30(3) places death within the coverage the chapter requires rather than outside it. Neither provision says that the coverage required for the death may be satisfied out of the amount paid for the injury that preceded it, and *Walls* holds that subsection (C) "makes no distinction between mandatory minimum limits and excess coverage." 433 S.C. at 215, 858 S.E.2d at 154.

Progressive raises one preservation objection, and it is directed at the punitive damages argument in Part II.D of Appellant's Initial Brief. Respondent's Brief at 13 n. 2. Appellant does not press that argument. Progressive makes no preservation objection to the § 38-77-142 argument, and none would lie. Appellant's memorandum in opposition to summary judgment invoked § 38-77-142(A) against *Toney* as the statute that "specifically mandates that liability policies contain a provision insuring against 'liability for death'"; cited *Williams* for the rule that an insurer may limit its liability and impose conditions only where they are not "in contravention of public policy or some statutory inhibition"; argued that a policy definition excluding the elements of wrongful death damages from bodily injury "is not enforceable"; and asked the court to rule that Progressive must pay "the 'each accident' limit of coverage available under the policy, that is, an additional 'per person' limit representing Plaintiff's claim under the Wrongful Death Statute." (Pl.'s Mem. in Opp'n to Summ. J. 1, 6, 8.) The circuit court ruled on that coverage question. An objection "must be sufficiently specific to inform the trial court of the point being urged," *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), and this one was. Subsection (C) and *Walls* supply further support for the point the memorandum urged; they do not change it.

C. Progressive's answer aims at an argument Appellant did not make, and its authorities do not construe the statute

At page 8 of its Brief, Progressive writes that "Appellant points to no statutory prohibition of this provision." However, Appellant quoted the operative language of the prohibition, cited *Williams* for the rule that a policy provision reducing coverage below the policy's stated amount is void, and cited *S.C. Farm Bureau Mutual Insurance Co. v. Mumford*, 299 S.C. 14, 17, 382 S.E.2d 11, 13 (Ct. App. 1989), for the rule that where a provision in an automobile policy conflicts with statutory requirements, the statute controls. Initial Brief of Appellant at 6-7.

Progressive's remaining answer is a single sentence: "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." Respondent's Brief at 8. Appellant does not contend that § 38-77-142 broadens a definition. She contends that subsection (A) independently requires coverage against liability for death, that the Wrongful Death Act imposes that liability, and that subsection (C) voids a policy provision that withholds it. Section 38-77-30(3) is consistent with that reading rather than an obstacle to it, because it places death within the defined term rather than outside it.

Mumford holds that § 38-77-140 requires an automobile insurance policy to insure against "loss from liability imposed by law," that the statute "draws no distinction between intentional acts and negligent acts of the insured," and that "if liability for damages is 'imposed by law,' coverage must be provided." *Id.* at 17-18, 382 S.E.2d at 13. The liability imposed by the law triggers the requirement. The Wrongful Death Act imposes it. S.C. Code Ann. § 15-51-10 (2005).

Section 38-77-142 was enacted in 1997 and became effective March 1, 1999. *See Williams*, 409 S.C. at 602, 762 S.E.2d at 714 (noting the enactment and effective dates). Measured against that date, Progressive's authorities fall into two groups. The first predates the statute: *Sossamon* was decided in 1964, *Sheffield* in 1965, *Toney* and *Kinard* in 1985, *Ramsey* in 1988, and *Cummings* in 1993. *Russo* belongs with them, having been decided one week after the statute took effect, on an accident that occurred in August 1994. *Russo*, 334 S.C. at 457, 513 S.E.2d at 127.

The second group postdates the statute but does not mention it: *Stewart* was decided in 2000 and *Kizer* in 2004, and § 38-77-142 appears in neither. Not one of the decisions Progressive relies upon construes the statute.

Williams explains what follows from that. The Court there declined to treat earlier decisions as controlling because they "involve accidents that occurred prior to the effective date of section 38-77-142, and the decisions do not address the statute's application." 409 S.C. at 602, 762 S.E.2d at 714. Because the General Assembly is presumed to know the law, the Court observed, the enactment of § 38-77-142 "could be perceived as a response to these earlier decisions." *Id.*

Progressive's Statement of the Issue asks whether the circuit court erred "in adhering to longstanding South Carolina Supreme Court precedent." No decision of this State's courts has construed § 38-77-142 to permit an insurer to satisfy the coverage subsection (A) requires for liability for wrongful death out of the amount payable for the decedent's own injury. Two further provisions of the chapter bear on the reading Progressive urges. The chapter "is to be liberally construed in order to achieve its purposes," S.C. Code Ann. § 38-77-20 (2015), and among those purposes is preventing "the evasion of coverage provided for by" the chapter, S.C. Code Ann. § 38-77-10 (2015).

D. Once the offending provision is void, the policy's face amount controls

What follows is fixed by the policy Progressive wrote. Subsection (C) voids the offending provision, and *Williams* holds that what then controls is "the face amount of the coverage," not the statutory minimum. 409 S.C. at 603, 762 S.E.2d at 714. Progressive's declarations page states a face amount of $25,000 each person and $50,000 each accident. (Stip. ¶ 2.) The "each person" clause is void only to the extent it folds the liability for death into the limit payable for the decedent's own injury; as the Initial Brief put it, policy terms that conflict with the statute are void to the extent of the conflict. Initial Brief of Appellant at 6-7. With that much of the clause inoperative, the coverage subsection (A) requires for each liability is available, the policy contains no limit specific to the liability for death other than the stated "each accident" amount, and that amount is therefore the face amount *Williams* directs the Court to enforce. Stated in the policy's own terms, the liability for death draws its own "each person" amount, subject to the "each accident" ceiling, which is the relief the stipulation describes. Appellant seeks $50,000, the limit for the "each accident" coverage. (Stip. ¶ 14.)

Progressive does not contend that the "each accident" clause independently defeats the claim. Its footnote 1 states the consequence of Appellant prevailing in Appellant's own terms: "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." Respondent's Brief at 9 n.1. Progressive itself thus recognizes the practical consequence of Appellant's reading, and the consequence it describes is bounded. The "each accident" limit is the amount Progressive itself set and priced.

None of this rewrites Progressive's policy. The authority Progressive offers for that proposition, *Sphere Drake Insurance Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993), construed a commercial liability policy that no statute constrained, and the Court said as much: It saw no basis to disturb the plain language because, in "the commercial setting of this insurance contract," the insured "could have contracted for additional coverage and paid an additional insurance premium." *Id.* at 474, 438 S.E.2d at 277-78.

Compulsory automobile liability insurance is different because the General Assembly has constrained that contractual freedom through mandatory coverage requirements. *Mumford* drew exactly that line, between "voluntary insurance and compulsory insurance," and held that where the Legislature has made coverage compulsory, "there is no room for the courts to impose a different judgment." 299 S.C. at 19-20, 382 S.E.2d at 13-14. Where a policy provision conflicts with what the chapter requires, "the Act prevails over the terms of the insurance contract," *id.* at 17, 382 S.E.2d at 13, and subsection (C) supplies the consequence. Giving effect to it is enforcement, not revision.

II. INDEPENDENTLY, THE CIRCUIT COURT ERRED IN TREATING THE BENEFICIARY'S DAMAGES AS CONSEQUENTIAL TO THE DECEDENT'S BODILY INJURY

The circuit court held that Appellant cannot recover under a separate "each person" limit because the damages she may recover as a statutory beneficiary are consequential "personal injuries" rather than "bodily injuries." That question was squarely presented and squarely decided, and the answer the circuit court gave was wrong. It furnishes a second ground for reversal, and one that does not depend on § 38-77-142 at all.

A. By the test the decisions themselves supply, the beneficiary's damages are direct rather than consequential

The consortium decisions upon which Progressive and the circuit court rely do not turn on whether a claim is separate. *Stewart v. State Farm* says so: "the crux of coverage is not the separateness of a loss of consortium claim," and "the key is the consequential or direct nature of the damages sought." *Stewart v. State Farm Mutual Automobile Insurance Co.*, 341 S.C. 143, 157, 533 S.E.2d 597, 604 (Ct. App. 2000). Appellant accepts that test. Applied here, it decides this appeal in her favor.

In those decisions, damages were consequential because they flowed from a bodily injury that the same "each person" limit was simultaneously compensating. That is what happened in *Sheffield* and in *Stewart*: a living claimant's subsisting bodily injury anchored the limit, and a second claimant's losses followed from it. The wife's damages, the *Stewart* court explained, fell under the same "per person" limit as the bodily injuries of her husband, "from which Wife's injuries resulted." *Id.* at 155, 533 S.E.2d at 603.

A wrongful death claim is not built that way. The decedent's bodily injury is compensated on its own track. "Unlike actual damages in a wrongful death action, actual damages in a survival action are awarded for the benefit of the decedent's estate rather than for the family." *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). *Bennett* drew the line more than a century ago: in the survival action the representative "may recover all damages which his intestate sustained by reason of the injury," while in the wrongful death action "no damages resulting to the deceased are recoverable, but only such as her death caused to" the statutory beneficiaries. *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 30, 81 S.E. 189, 190 (1914). The two are, "[i]n contemplation of law, . . . practically the same as if plaintiff had administered upon the estates of two different persons who were killed at the same time and in the same manner." *Id.*

Our Supreme Court reaffirmed the distinction recently. Affirming *Jolly v. Fisher Controls* on certiorari, it held that a personal injury verdict and a wrongful death settlement are "obviously not 'the same injury or the same wrongful death,'" citing *Bennett* for the point that a survival action is distinct from a wrongful death claim in part because "the elements of damage recoverable are entirely different." *Jolly v. Fisher Controls International, LLC*, 443 S.C. 511, 535, 905 S.E.2d 380, 393 (2024). And because the General Assembly created this cause of action, the General Assembly fixed its measure. "Where a cause of action is created by statute, the statute determines what damages may be recovered." *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 536, 393 S.E.2d 162, 163 (1989); S.C. Code Ann. § 15-51-10.

The beneficiary's damages are therefore not the consequence of an injury the policy compensates elsewhere. They are direct compensation for a distinct loss, measured by what the death took from her. Progressive accepted the premise below. Addressing *Jolly* in its reply memorandum, it wrote: "Progressive agrees with the Supreme Court; a decedent's injury (survival) claim is completely different from a statutory beneficiary's wrongful death damage claim. As stated by the South Carolina Supreme Court, 'the elements of damage recoverable are entirely different.' *Bennett, supra*. That is because the decedent incurs bodily injury damages, and the statutory beneficiary incurs personal injury damages." (Progressive's Reply to Pl.'s Mem. in Opp'n to Summ. J. 5.) Progressive thus agreed with the premise that matters here: the beneficiary's damages are not compensation for the injury the decedent sustained. That premise is difficult to reconcile with treating those damages as consequential to that injury for purposes of the "each person" limit. Progressive's explanation is a label, personal injury rather than bodily injury, and the label's only sources are *Toney*, which construed a different statute, and a concurring opinion. Parts C through E below take up each.

B. The derivative label describes a condition for the claim, not the measure of the beneficiary's damages

Progressive's remaining argument, and the circuit court's, is that a wrongful death claim is wholly derivative and its damages are therefore consequential. The label is drawn from one sentence in *Jolly v. General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021), *aff'd sub nom. Jolly v. Fisher Controls International, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024). Read in place, the sentence states the premise of an argument the Court went on to *reject*, and the Court then explained what the premise does and does not mean: "We disagree with the logic of this argument, but we will explain its premise: 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." *Id.* at 667, 869 S.E.2d at 851-52.

What the label describes is a condition on whether the claim exists. The authority cited for it says so: a claim under the Wrongful Death Act "lies in the decedent's estate only when the decedent possessed the right of recovery at his death," and "if the decedent had no claim at his death, the estate has no claim." *Estate of Stokes v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 347, 349, 699 S.E.2d 143, 145, 146 (2010). *Stokes* was a statute of limitations case. It says nothing about what a beneficiary may recover.

The *Jolly* court addressed the point directly. Rejecting the contention that a wrongful death claim allows a decedent's heirs to pursue the decedent's personal injury claims after his death, it held: "We do not interpret this proposition as defining the nature of a wrongful death claim or the damages recoverable under such a claim. Rather, it is simply the expression of a prerequisite for the right of the decedent's heirs to recover their own damages in a wrongful death action." *Id.* at 670, 869 S.E.2d at 853.

Progressive's supporting points do not change the analysis. That a wrongful death recovery is reduced by the decedent's comparative fault, *see Weaver v. Lentz*, 348 S.C. 672, 684-85, 561 S.E.2d 360, 366-67 (Ct. App. 2002), and that comparative fault bears on the extent of the tortfeasor's liability, not on the character of the beneficiary's damages. That a wrongful death claim arises only upon death, *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 104, 498 S.E.2d 395, 402 (Ct. App. 1998), is why *Hawkins* applied one negligence doctrine to the wrongful death claim and another to the survival claim arising from the same death. *Id.* Each proposition describes two claims analyzed separately. The circuit court's "derivative" conclusion rests on *Hopkins v. Fidelity Insurance Co.*, 240 S.C. 230, 233, 125 S.E.2d 468, 469 (1962), an action for fraud and deceit that announces no coverage holding and does not use the word derivative. Progressive neither defends that reasoning nor cites the case.

C. *Toney* enforced a legislative narrowing of a different statute

Progressive's centerpiece is one sentence from *Toney v. South Carolina Department of Education*, 284 S.C. 401, 327 S.E.2d 322 (1985): "the kinds of injuries recoverable under the

Wrongful Death Act are not included within the term 'bodily injuries.'" The sentence that follows it supplies the limit. "Therefore, the respondent may not maintain an action seeking such damages based on subsection (1)(b)." *Id.* at 405, 327 S.E.2d at 325. When Progressive says at page 15 of its Brief that Appellant "ignores the following discussion," the passage it block-quotes opens: "Nor can the respondent maintain an action under subsection (1)(b) to obtain the damages provided by the Wrongful Death Act." Progressive's evidence that *Toney* reached beyond a single subsection of the school bus statute is a sentence deciding a claim under that discreet code subsection.

Toney construed S.C. Code Ann. § 59-67-710 (1976, as amended), a no-fault benefits statute applicable to school bus accidents, and it gave two reasons drawn from that statute's text. The first was an amendment: § 1 of Act No. 215 "changed the kind of injuries recoverable under subsection (1)(b) from 'personal injuries' to 'bodily injuries,'" and "[i]t is clear that the term 'bodily injuries' is much narrower than the term 'personal injuries.'" *Id.* The second was an express carve-out: subsection (1)(b) provided coverage "[f]or any person, other than . . . a person who qualified for benefits under paragraph (a)," and the Court held that "[t]he coverages provided by subsection (1)(a) and (1)(b) are separate and distinct, and one person cannot recover under both." *Id.* at 404, 327 S.E.2d at 324.

Nance confirms what the amendment accomplished. Prior to the amendment, the beneficiaries' damages were recoverable, and *Toney* departed from *Nance* on one ground only: that *Nance* "did not consider the impact of Act No. 215 of 1977 which was not effective at the time of the death in that case." 284 S.C. at 405, 327 S.E.2d at 325. *Toney* is a decision enforcing a legislative narrowing. Progressive's Brief mentions neither *Nance* nor Act No. 215.

Toney also permitted recovery for the death. The administrator "was properly allowed to collect the no-fault benefits under subsection (1)(a)," the subsection "provid[ing] coverage for the death or bodily injury of a person lawfully occupying a public school bus." *Id.* at 404, 327 S.E.2d at 324. *Toney* is therefore a case in which death was covered under a provision naming death and not covered under a provision naming only "bodily injuries." Section 38-77-142(A) names death, and so does the chapter's definition. Here the General Assembly wrote death into the statute rather than out of it.

D. *Sossamon* and *Sheffield* turn on two statutory words, and neither involved a death

Progressive supplies the reasoning that connects *Toney* to loss of consortium. After quoting *Toney*, Progressive reasons that "just like consortium damages, damages recoverable under the Wrongful Death Act are consequential 'personal injuries,' not direct 'bodily injuries,'" and then writes that "[t]he *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." Respondent's Brief at 16. The verb "indicates" is Progressive's; an inference drawn from a citation is not a holding.

The decisions *Toney* cited establish one proposition about wording, and it is not the proposition Progressive needs. *Sossamon* construed § 21-840(1)(b) of the 1962 Code, an earlier version of the school bus statute *Toney* would later construe. Because that statute provided benefits for any one person who suffers "personal injuries," each claimant, including the husband whose claim was for loss of consortium, "is entitled to recover an amount not exceeding Five Thousand Dollars for such injury." *Sossamon*, 243 S.C. 552, 564, 135 S.E.2d 87, 93 (1964).

Sheffield, 245 S.C. 389, 140 S.E.2d 787 (1965), construed an uninsured motorist endorsement whose operative term was "bodily injury" and reached the opposite result: the husband, who "sustained no physical injury," recovered nothing once the per-person limit had been paid to his injured wife. *Id.* at 397, 140 S.E.2d at 791. *Sheffield* explained the difference in *Sossamon*'s own words: The position urged there "would be meritorious if our statute had used the words 'bodily injury' rather than the words 'personal injuries.'" *Id.* The outcomes were opposite, and they turned on which of two words the legislature had chosen.

Neither decision involved a death, and neither held that damages recoverable under the Wrongful Death Act are consequential. Each presented the structure described in Part II.A, a living claimant's own bodily injury anchoring the limit, which is what *Kizer v. Kinard* described in saying that the courts "simply pointed out that the bodily injury claim and the loss of consortium claim share the limits of a per person liability limits policy." 361 S.C. 68, 72, 602 S.E.2d 783, 785 (Ct. App. 2004). The minimum-limits statute *Sheffield* quoted, moreover, itself stated limits "because of bodily injury to or death of one person in any one accident." 245 S.C. at 392, 140 S.E.2d at 788. *Sheffield* cannot be read as authority that death falls outside such coverage; no one had died.

E. The sentence on which the equation ultimately rests is a concurring opinion

In *State Farm Mutual Automobile Insurance Co. v. Ramsey*, the opinion of the Court held "that negligent infliction of emotional trauma is a bodily injury for which damages may be recovered under a standard policy of insurance." 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). That opinion contains no analysis of the Wrongful Death Act, no personal-versus-bodily distinction, and no citation to *Sheffield*, *Sossamon*, or *Toney*. The passage stating that "[i]njuries 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'" appears in a separate concurring opinion. *Id.* at 353, 368 S.E.2d at 479 (Cureton, J., concurring). Progressive discloses this at pages 14 and 15 of its Brief, and the pin cites the circuit court relied upon fall within the same concurrence. On certiorari the Supreme Court granted the writ, dispensed with further briefing, and stated that it agreed with the reasoning of the Court of Appeals, which is to say the majority opinion of that Court; the separate concurrence was not that opinion. 297 S.C. at 71-72, 374 S.E.2d at 896.

Progressive also observes, at page 12 of its Brief, that State Farm in *Ramsey* tendered one per-person limit to settle both the survival and wrongful death claims. It did, by a negotiated settlement in which the parties reserved only the mother's bystander claim; the allocation was never contested and never decided, and the only question presented was that separate claim. 295 S.C. at 352, 368 S.E.2d at 479 (Cureton, J., concurring); 297 S.C. at 72, 374 S.E.2d at 896. *Ramsey* also arose from an accident that preceded the enactment of § 38-77-142, and *Williams* instructs that decisions which do not address the statute do not control its application. 409 S.C. at 602, 762 S.E.2d at 714.

Progressive's reliance at page 15 of its Brief on *Cummings v. Horace Mann Insurance Co.*, 996 F.2d 720 (4th Cir. 1993), does not carry it further. Progressive describes *Cummings* as holding that wrongful death damages are personal injuries rather than bodily injuries. No one died in *Cummings*. The insured was "paralyzed from the waist down," his wife's claim was for loss of consortium, which the Fourth Circuit called "a consequential damages claim," and the Court rested on an unambiguous policy definition providing that bodily injury "includes all injury and damages to others resulting from this bodily injury, *i.e.* consequential damages." *Id.* at

721-22. The Fourth Circuit described *Sheffield* as "helpful" and as "a useful guidepost if the language is deemed unclear." *Id.* at 723. *Cummings* binds no court of this State, says nothing about the Wrongful Death Act, and adds nothing to *Sheffield.*

F. *Stewart* and *Russo* do not reach a liability imposed by law

In *Stewart*, the claimants relied on S.C. Code Ann. § 38-77-140 (2015)'s requirement of coverage for "loss from the liability imposed by law." The court's answer was that "[a] spouse's loss of consortium and bodily injury damage is not imposed by law," and, "[c]oncomitantly," that "§ 38-77-140 does not require separate 'per person' coverage for this loss." 341 S.C. at 158, 533 S.E.2d at 605. Progressive's broader reading of *Stewart* does not carry it further. The consequential-or-direct framing quoted in Part II.A sorted damages flowing from a living person's subsisting bodily injury. It supplies no answer where the legislature has itself created the liability and prescribed its measure, and *Stewart*'s own stated ground for declining to apply § 38-77-140 was that no liability had been imposed by law. Here the legislature has imposed one.

Liability under the Wrongful Death Act is imposed by law. It exists only because the General Assembly created it. Lord Campbell's Act, our Supreme Court said in *Bennett*, "was the creation of a new right of action, where none existed before." *Bennett*, 97 S.C. at 29, 81 S.E. at 189. Progressive's own authority says the same: At common law "there was no right of action for death caused by wrongful act; therefore plaintiff's right existed by reason of and within the provisions of the statute." *Sellers v. Lewis & Holmes Motor Freight Corp.*, 215 S.C. 256, 259, 54 S.E.2d 806, 807 (1949). And *Mumford* holds that where liability for damages is imposed by law, coverage must be provided. 299 S.C. at 17-18, 382 S.E.2d at 13. *Stewart*'s stated ground for declining to apply § 38-77-140 therefore has no application to a liability the legislature itself imposed.

Stewart also said, in passages Progressive does not quote, that the court "found coverage, but no available recovery under the policy," 341 S.C. at 155, 533 S.E.2d at 603, and that the inadequacy of the limit was "a repercussion of the choice made by the insured, not any contravention of South Carolina law or public policy." *Id.* at 159, 533 S.E.2d at 605. *Stewart* drew that line between coverage and recovery only after holding that the consortium liability was not imposed by law, under § 38-77-140 alone, without considering § 38-77-142, which names liability for death and voids provisions that reduce the coverage it requires. Nor does *Stewart*'s rejection of a Massachusetts decision treating a consortium claimant as a separate "person" under the policy's own terms, *id.* at 158-59, 533 S.E.2d at 605, bear on this appeal. Appellant does not ask the Court to construe the word "person." She asks it to apply a later statute *Stewart* never considered.

Stewart does not mention § 38-77-142. Its alternative holding, that the claimant had not satisfied the requirements of *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), addressed a claim of negligent infliction of emotional distress (bystander claim). 341 S.C. at 154-55, 533 S.E.2d at 602-03. Appellant asserts no such claim. She asserts the statutory claim the General Assembly provided to her.

Russo turned on statutory silence. The claimant there argued that S.C. Code Ann. § 38-77-160 (2015), which speaks of "damages" without using the term "bodily injury," authorized a separate per-person recovery for consortium. The court held that "[d]espite section 38-77-160's omission of the term 'bodily injury,' the repeated references to liability coverage and liability limits convince us the term 'damages' must be construed in accordance with the basic liability coverage statute, section 38-77-140, which focuses on bodily injury damages." 334 S.C. at 459, 513 S.E.2d at 129. The court filled a gap in a statute that did not speak by the court's reference to the statute that did. Section 38-77-142(A) is not silent. It names liability for death, and *Russo*'s method has nothing to operate upon.

III. PROGRESSIVE'S HYPOTHETICAL COMPARES A STATUTORY CLAIMANT TO A NON-CLAIMANT

Progressive argues at pages 8 and 9 of its Brief, and again in footnote 1, that "[t]he 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." The comparison assumes the two parents are similarly situated. They are not. The parent of the surviving child has no statutory cause of action for her own loss and may recover for her own emotional injury only by satisfying the elements the Supreme Court adopted in *Kinard*. *Cf. Doe v. Greenville County School Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) (South Carolina law does not provide a cause of action for loss of consortium of a child or for filial consortium). The parent of the deceased child, however, has a cause of action the General Assembly created, with a measure of damages the General Assembly prescribed. S.C. Code Ann. § 15-51-10. The difference is the legislature's, drawn in the Wrongful Death Act and carried into § 38-77-142(A) by the naming of death.

Progressive calls the result absurd, citing *Lancaster County Bar Association v. South Carolina Commission on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008). The construction rejected there produced a result the Court called absurd: In some judicial circuits it left the statutory formula nothing to operate on, and in others it rewrote the allocation the statute prescribed. 380 S.C. at 222, 670 S.E.2d at 372-73. A legislative line an insurer would have drawn differently is not of that kind.

CONCLUSION

Section 38-77-142(A) separately requires coverage against liability for death. The Wrongful Death Act imposes that liability. Progressive's "each person" clause satisfies the one out of the limit applicable to the other, so that once that limit is exhausted, nothing more is payable for the death. Subsection (C) makes such a provision void, *Williams* makes the policy's face amount the measure that replaces it, and the "each accident" amount Progressive wrote and priced supplies the ceiling.

Independently, the circuit court erred in treating the beneficiary's damages as consequential. By the test the consortium decisions themselves supply, those damages are direct: the decedent's injury is compensated on the survival track, the beneficiary's loss is measured by her own deprivation, and our Supreme Court has held that the elements of damage recoverable are entirely different. Progressive's authorities do not establish otherwise. *Toney* enforced a legislative narrowing of a different statute and permitted recovery for the death under the subsection naming death. *Sossamon* and *Sheffield* turn on the difference between two statutory terms and involved no death. The sentence on which the equation ultimately rests is a concurring opinion.

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For the reasons stated in Appellant's Initial Brief and in this Reply, the order granting summary judgment should be reversed and the matter remanded.

Respectfully submitted,

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