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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Case No. 14-CP-26-6382

Appellate Case No. 2015-001827

Erie Insurance Exchange,.....Respondent

v.

Government Employees Insurance Company, Mark Allison Scoggin, and Angela Bennett Hill, Defendants,

Of which Government Employees Insurance Company is.....Appellant

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

By Complaint filed September 26, 2014, Erie Insurance Exchange ("Erie") instituted this declaratory judgment action seeking a declaration that an automobile liability policy issued by Government Employees Insurance Company ("GEICO") to Mark Allison Scoggin ("Scoggin") provides excess liability insurance coverage for Scoggin's September 5, 2012 automobile accident with Angela Bennett Hill ("Hill"). (*See* R. pp. 37 (¶¶ 5, 12); R. pp. 40-43 (¶¶ 19, 21); R. p. 4.) On October 31, 2014, GEICO timely answered, denying, in pertinent part, the existence of coverage under Scoggins's policy for the accident at issue. (*See* R. pp. 81-86.)

On March 17, 2015, the matter came for a non-jury trial before the Honorable Paul M. Burch, Circuit Court Judge. GEICO and Erie agreed to a stipulated set of facts and exhibits which were submitted to the trial court. (*See* R. pp. 114-192.) The parties additionally submitted memoranda of law. (*See* R. pp. 218-224; R. pp. 193-217.)

By Order filed May 7, 2015, the circuit court ruled in favor of Erie, declaring that GEICO's policy issued to Scoggin afforded excess liability coverage for the accident at issue. (*See* R. pp. 5-16.) GEICO subsequently filed a Motion to Alter or Amend Judgment or Order pursuant to Rule 59, SCRCP. (*See* R. pp. 258-260.) On June 18, 2015, the trial court denied GEICO's motion without a hearing, but styled the order as denying the "Plaintiff's" motion to alter or amend. (*See* R. p. 4.) By Order filed July 6, 2015, but not served by mail until July 25, 2015, the circuit court then issued an Amended Order denying GEICO's motion to amend or alter judgment. (*See* R. p. 1.) GEICO noticed this appeal on August 24, 2015. (*See* R. p. 18.)

STATEMENT OF FACTS

On September 5, 2012, Scoggin and Hill ("Hill") were involved in a motor vehicle accident in Horry County which resulted in alleged personal injuries to Hill. (R. pp. 114-115 (¶ 5).) At the time of the accident, Scoggin was operating a 2002 Ford Taurus owned by his mother, Mildred Scoggin ("Ms. Scoggin"), with whom he resided. (R. p. 115 (¶ 6).) Scoggin was using his mother's car at the time of the accident because his mother's dog was riding with him and there was a dog seat set up in her vehicle. (R. p. 87, lines 15-25.) It was his regular practice to take his mother's dog whenever he went on short trips, and he used his mother's car because it was equipped for the dog. (R. p. 87, lines 15-25.)

Hill filed suit against Scoggin in the Horry County Court of Common Pleas captioned Angela Bennett Hill v. Mark Allison Scoggin, No. 13-CP-26-2592. (R. pp. 114-115 (¶ 5).) Ms. Scoggin's Ford Taurus was insured under a policy issued by GEICO (Policy No. 0929-32-50-09) carrying liability limits of $50,000.00/$1000,000.00. (R. p. 115 (¶ 6); R. p 120.) GEICO tendered the $50,000.00 policy limit under Ms. Scoggin's policy to Hill in exchange for a covenant not to execute in favor of Scoggins. (R. p. 115 (¶ 10); R. p. 117 (¶ 16); R. p. 6.)

At the time of the accident, Scoggin owned a 2005 Chevrolet Colorado which was insured under a different policy issued by GEICO (Policy No. 4085-57-17-45) (the "Policy") carrying liability limits of $25,000.00/$50,000.00. (R. p. 115 (¶ 7); R. p. 129.) As to bodily injury liability coverage, the Policy's insuring clause provides, in pertinent part:

> **LOSSES WE WILL PAY FOR *YOU* UNDER SECTION I**
>
> Under Section I, we will pay damages which an *insured* becomes legally obligated to pay because of:
>
> 1. *bodily injury*, sustained by a person; and
> 2. damage to or destruction of property;
>
> arising out of the ownership, maintenance or use of the *owned auto* or a *non-owned auto*.

(R. p. 148; R. p. 117 (¶ 13).) An "*Owned auto*" is defined as:

> (a) a vehicle described in this policy for which a premium charge is shown for these coverages;
> (b) a *trailer* owned by *you*;
> (c) a *private passenger*, *farm* or *utility auto*, ownership of which *you* acquire during the policy period or for which *you* enter into a lease during the policy period for a term of six months or more, if:
> (i) it replaces an *owned auto* as defined in (a), above; or
> (ii) we insure all *private passenger*, *farm* and *utility autos* owned or leased by *you* on the date of the acquisition, and *you* ask us to add it to the policy no more than 30 days later;
> (d) a *temporary substitute auto*.

(R. p. 147; R. p. 116 (¶ 12).) A "*Temporary substitute auto*" is "an automobile or *trailer*, not owned by *you*, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the *owned auto* or *trailer* when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." (R. p. 147; R. p. 116 (¶ 12).)

The Policy defines a "*Non-owned auto*" as:

> a *private passenger*, *farm*, or *utility auto* or *trailer* not owned by or furnished for the regular use of either *you* or *your relatives*, other than a *temporary substitute auto*. *You* or *your relatives* must be using the *non-owned auto* or *trailer* within the scope of permission given by its owner. A *non-owned auto* rented or leased for more than 30 days will be considered as furnished for regular use.

(R. p. 161; R. p. 116 (¶ 12).) "*Relative*" is defined under the Policy as "a person who continuously lives in *your* household, and is related to *you* by blood, marriage, or adoption (including a ward or foster child)." (R. p. 161; R. p. 116 (¶ 12).)

GEICO denied coverage and a defense under the Policy on the grounds that at the time of the accident, Scoggin was not operating an "owned or non-owned vehicle" as defined under the Policy. (R. p. 143; R. pp. 115-116 (¶ 11).) GEICO has, however, provided Scoggin with a defense to Hill's claims under his mother's policy covering the Ford Taurus involved in the accident. (R. p. 115 (¶ 10).)

The vehicle Hill was operating was insured under a North Carolina insurance policy (Policy No. Q05 1107128) issued by Erie which carried underinsured motorist limits of $100,000.00/$300,000.00. (R. p. 115 (¶ 8); R. pp. 138-141.) Erie instituted this declaratory judgment action seeking additional, excess liability coverage under the Policy for Scoggin so as to obtain an additional $25,000.00 offset against its UIM liability to Hill. (*See* R. p. 117 (¶ 15); R. pp. 36-45.)

ARGUMENT

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589, 592 (2011). While a trial court's findings of fact should not be disturbed unless there is no reasonable evidence to support them, "an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 748 S.E.2d 781, 795 (2013). "Where the action presents a question of law," as does a declaratory action presented on stipulated facts, an appellate court's "review is plenary and without deference to the trial court." Crossman, *supra*, 717 S.E.2d at 592.

I. UNDER THE PLAIN, UNAMBIGUOUS TERMS OF THE POLICY, THE VEHICLE SCOGGINS WAS OPERATING AT THE TIME OF THE ACCIDENT WAS NEITHER AN "OWNED AUTO" NOR A "NON-OWNED AUTO," AND IS THUS NOT COVERED UNDER THE POLICY.

The party seeking coverage bears the burden of proof. Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746, 749 (1961). Insurance policies are subject to "the general rules of contract construction." Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 565 S.E.2d 114, 116 (Ct. App. 2002). Courts "must enforce, not write, contracts of insurance." Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814, 816 (1983); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791, 797 (2008). "Parties to a contract have the right to construct their own contract without interference

from courts to rewrite or torture the meaning of the policy to extend coverage." Schulmeyer v. State Farm Fire & Cas., 353 S.C. 491, 579 S.E.2d 132, 134 (2003) (*citing* Gambrell, *supra*). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Beaufort County Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 709 S.E.2d 85, 90 (Ct. App. 2011). Policy language is to be given its "plain, ordinary, and popular meaning," and if the contract "is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." B.L.G. Enterprises, Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327, 330 (1999); *see also* Schulmeyer, *supra*, 579 S.E.2d at 134 ("[i]f the contract's language is clear and unambiguous, the language alone determines the contract's force and effect").

The plain, unambiguous language of the Policy's insuring clause provides that liability coverage applies only to "damages which an *insured* becomes legally obligated to pay because of...*bodily injury*, sustained by a person...arising out of the ownership, maintenance, or use of the *owned auto* or a *non-owned auto*." (*Emphasis added.*) Under the Policy an "owned auto" is one that is: "described in this policy for which a premium charge is shown for these coverages"; "a trailer owned by you"; "a private passenger...auto, ownership of which you acquire during the policy period or for which you enter into a lease during the policy period for a term of six months or more"; or "a temporary substitute auto." Here, Scoggin's mother's Ford Taurus which he was operating at the time of the accident was not an "owned auto" under the Policy. First, it was not described in the Policy for which a premium charge was shown, but was, instead, listed and insured under another liability policy: the one issued to his mother as the

owner of the vehicle. (*Compare* R. pp. 129-130 *with* R. pp. 120-121).) The only vehicle listed on the Policy for which a premium was shown was Scoggin's Chevrolet Colorado truck. Second, the Ford Taurus was not a trailer owned by Scoggin. Third, the vehicle was not acquired or leased by Scoggin during the policy period; rather, it was owned by Scoggin's mother. Finally, the Ford Taurus was not a "temporary substitute auto" as Scoggin was driving his mother's car simply because it was equipped with a seat for his mother's dog, not because Scoggin's Chevrolet Colorado truck – the vehicle insured under the Policy – was disabled and withdrawn from normal use.

A "non-owned auto" is "a *private passenger*, *farm*, or *utility auto* or *trailer* not owned by or furnished for the regular use of either *you* or *your relatives*, other than a *temporary substitute auto*." Contrary to the trial court's conclusion, Scoggin's mother's vehicle was not a "non-owned auto" under the express terms of the Policy. First, it is undisputed that the vehicle was owned by Scoggin's mother with whom Scoggin resided at the time of the accident. Second, Scoggin's testimony was that he used the Ford Taurus whenever he went on short trips because it had a dog seat in the front seat; therefore, the vehicle was available for his regular use. Either of these two grounds, independently, establishes that the Ford Taurus was not a "non-owned auto" under the terms of the Policy.

In Danforth v. Gov't Employees Ins. Co., 638 S.E.2d 852 (Ga. App. 2006), the Georgia Court of Appeals confronted a factually similar case involving identical policy provisions. In that case GEICO's insured was involved in an accident while driving a vehicle titled in his mother's name. GEICO declined to provide coverage for the accident under a separate policy issued on another, at-home vehicle on the grounds that the vehicle

involved in the accident did not meet the definition of an "owned auto" or "non-owned auto" under the at-home policy. The court agreed, and held that the vehicle was not a "non-owned auto" since the vehicle was owned by a relative (i.e., the insured's mother) with whom the insured resided at the time of the accident. *Id.*, 638 S.E.2d at 859.

In another very similar case, GEICO Gen'l Ins. Co. v. Hanzlik, 32 Kan. App. 2d 951, 954, 92 P.3d 1121 (Kan. App. 2004), the Kansas Court of Appeals had an opportunity to consider a similar "non-owned auto" provision in a GEICO policy. In that case a GEICO insured was involved in an accident while operating his wife's vehicle which was insured under a policy with State Farm. The court held that since the vehicle was "owned by 'either *you* or a *relative*'," i.e., the insured's wife, it "by policy definition cannot be a 'nonowned auto'" as to the insured. *Id.* Additionally, the court rejected the insured's argument that the "nonowned auto" policy provision was ambiguous, holding, instead, that the policy plainly and unambiguously afforded the insured "liability coverage only while he was operating, maintaining, or using an 'owned auto' or a 'non-owned auto,' but not while he was operating his wife's vehicle which was insured under a different policy." *Id.*, at 958. As that court noted, the rationale for "nonowned auto" policy provisions such as the one at issue is well-established: "'the evident intention of the limitation with respect to other automobiles is to prevent a situation in which the members of one family or household may have two or more automobiles actually or potentially used interchangeably but with only one particular automobile insured.'" *Id.* (*quoting* Boyd v U.S. Fidelity & Guaranty Co., 256 So. 2d 1 (Fla. 1971)). It held that construing GEICO's "policy precisely as written comports with common sense and sound public policy." *Id.*, at 959.

The circuit court's determination that the Ford Taurus was a "non-owned auto" under the Policy rests upon fundamental interpretive errors and upon factual findings utterly lacking any support in the record. First, in concluding that the vehicle was a "non-owned auto" under the Policy, the circuit court's Order states, erroneously, that "[u]nder GEICO's policy, a car is NOT 'non-owned' if it is owned by a resident relative AND furnished for regular use." (R. p. 9 (*emphasis added*).)[1] The court goes on to state that "[t]he key to invoking a vehicle as being NOT 'non-owned' under the definitions is whether the resident relative's vehicle is available for the 'regular use' of a GEICO insured." (R. p. 12.) The policy, however, actually provides that a "non-owned auto" is "a *private passenger*, *farm*, or *utility auto* or *trailer* not owned by OR furnished for the regular use of either *you* or *your relatives*, other than a *temporary substitute auto*." (R. p. 161; R. p. 116 (¶ 12) (*emphasis added*).) The use of the word "or" indicates "a disjunctive particle that marks an alternative," and "imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both." Brewer v. Brewer, 242 S.C. 9, 129 S.E.2d 736, 738 (1963); *see also* Martin v. Bay, 400 S.C. 140, 732 S.E.2d 667, 675 (Ct. App. 2012). Under the Policy, therefore, a "non-owned auto" is one that is EITHER "not owned by...you or your relatives" OR "not...furnished for the regular use of either you or your relatives." It is stipulated and undisputed that Scoggin's mother, his relative, owned the Ford Taurus at issue. This is, in and of itself, sufficient to render the vehicle not a "non-owned auto" under the Policy. The mere fact that Scoggin's deposition testimony establishes that the vehicle was also available for his

[1]In its Order, the circuit court comments that in making its coverage determination, GEICO relied upon "carefully crafted definitions" (R. pp. 12, 15), as if that is somehow deserving of reproach. One would assume that it is desirable that all provisions in a policy be "carefully crafted" and further that insurers (and insureds) rely upon them.

regular use (i.e., whenever he took his mother's dog on short trips, which he "always" did) is both superfluous and ultimately not dispositive.

In reaching its conclusion to the contrary, the circuit court ignored the use of the disjunctive "or" and erroneously inserted the word "and," thus supplying a conjunctive which would require satisfaction of both conditions – not owned by a relative AND not furnished for regular use – before the vehicle would be deemed not a "non-owned auto." In so doing, the circuit court erroneously rewrote, rather than enforced, the policy language. *See* Gambrell, *supra*, 310 S.E.2d at 816 (courts "must enforce, not write, contracts of insurance").

Second, the circuit court also concluded that in tendering the liability limits to Hill under Ms. Scoggin's policy, "GEICO stipulated that the Mildred Scoggin vehicle was a non-owned vehicle as to Mark Scoggin" and that "it stipulated that the Mildred Scoggin car was not available for Mark Scoggin's regular use." (R. pp. 9-10.) There were no such stipulations made explicitly or implicitly, and these findings are completely without any evidentiary support in the record and should be rejected. *See* Rhodes, *supra*, 748 S.E.2d at 795 (appellate court should not disturb trial court's findings of fact unless there is no reasonable evidence to support them).

Third, not only are these factual "findings" without any support in the record, they are the result of a faulty and illogical reading of Ms. Scoggin's policy. The Ford Taurus driven by Scoggins in the accident was, in fact, owned by Ms. Scoggins and was, in fact, described under her policy for which a premium was shown; it was, therefore, an "OWNED AUTO" under the terms of Ms. Scoggin's policy. (*See* R. pp. 120-21 (Mildred Scoggin Declarations Page); *see also* R. p. 147 (definition of "owned auto").) Moreover,

Scoggin was not only Ms. Scoggin's resident relative at the time but was also a permissive user of the Ford Taurus. (*See* R. p. 115 (¶ 6); *see also* R. p. 149 (with regard to an "owned auto," "Persons Insured" includes relatives and permissive users).) Therefore, from the perspective of Ms. Scoggin's policy, the Ford Taurus was not, and in fact could not have been, a "non-owned auto," but was, instead, an "owned auto" for which coverage was due.

Fourth, the trial court's summary conclusions that the Ford Taurus "retains the same status when considering the Excess Coverage under the Mark Scoggin policy because the terms and conditions of the two policies and been stipulated to be identical" and "for the purposes of Excess coverage under the Mark Scoggin policy, GEICO is bound by its determinations under the Mildred Scoggin policy" (R. pp. 9-10) are without authority or support, and ignore the insurer's obligations to analyze Hill's claims under each policy separately. As discussed above, since the Ford Taurus was indeed described and shown to have been charged a premium in Ms. Scoggin's policy, it was an "owned auto" under that policy. The same conclusion cannot be reached with regard to the Policy issued to Scoggins. Moreover, though the language of the body of the two policies was identical, the objects of the policies (both insured vehicles and named insureds) were different meriting a different coverage analysis under each.[2] GEICO was, therefore,

[2]The circuit court's Order states that "the terms and conditions of the two policies have been stipulated to be identical." (R. p. 9.) In fact, the only stipulation in this regard was that the body of the policy, attached to the Stipulations of Fact as Exhibits E and E-1, apply to both Ms. Scoggin's policy and Scoggin's policy. (*See* R. p. 116 (¶ 12).) The declarations pages for each policy, however, cover different interests and insureds; therefore, the terms and conditions of each policy are not, and cannot be, "identical." Williams v. Gov't Emps. Ins. Co., 409 S.C. 586, 762 S.E.2d 705, 711 (2014) (the insuring agreement comprises the application, dec page, and policy).

obligated to conduct a coverage analysis under each policy, and the fact that different conclusions were reached under each is neither surprising nor erroneous.[3]

For these reasons, GEICO's denial of excess liability coverage to Scoggin for the accident at issue was reasonable and correct under the plain, unambiguous terms of the Policy. The circuit court's conclusion that Scoggin's mother's Ford Taurus was a "non-owned auto" under the Policy was erroneous, and the Order should be reversed.

II. THE POLICY IS CLEAR AND UNAMBIGUOUS, AND IS NOT RENDERED AMBIGUOUS BY REFERENCE TO A DISCRETE, INAPPLICABLE SENTENCE OR CLAUSE.

An insurance contract "'is ambiguous only when it may fairly and reasonably be understood in more ways than one.'" Hansen, *supra*, 565 S.E.2d at 117 (*quoting* Universal Underwriters Ins. Co. v. Metro. Prop. & Life Ins. Co., 298 S.C. 404, 380 S.E.2d 858, 860 (Ct. App. 1989)). "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Beaufort County Sch. Dist., *supra*, 709 S.E.2d at 90 (*quoting* Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 225 S.E.2d 344, 348 (1976)). "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself,

[3]The circuit court declared, without authority, context or reference, that the "'regular use' doctrine serves no valid purpose where two vehicles in a household are covered by the same insurer and that insurer is regularly paid a premium for the coverage of both vehicles." First, here there were two separate policies on two separate vehicles. The fact that the same insurer issued both policies is mere happenstance, of no legal consequence, and irrelevant to whether the policy language covers or excludes any particular loss: the same result obtains even if two different insurers were involved. Second, the statement that insurer was paid "a premium [in the singular] for the coverage of both vehicles," inaccurately implies that the vehicles were insured under the same policy. Finally, given that the circuit court erred in concluding that whether a vehicle is a "non-owned auto" under the Policy is contingent upon the vehicle not being furnished for the insured's regular use, overlooking the fact that ownership by a relative is a sufficient precondition in and of itself, the declarations about the "regular use" doctrine are dicta.

but by reading the policy as a whole and considering the context and subject matter of the insurance contract." Schulmeyer, *supra*, 579 S.E.2d at 134.

In an effort to avoid its UIM obligations to Hill, Erie encouraged the circuit court to ignore the plain, unambiguous terms of the Policy as a whole, and find an ambiguity where none exists by focusing a limited portion of a discrete (and inapplicable) policy provision in isolation and out of context. Erie argued, and the circuit court accepted, that a few isolated words contained in the "Other Insurance" clause of the Policy conflict with the coverage agreement, particularly as it relates to coverage for the operation of a vehicle not owned by the insured. Specifically, the circuit court concluded that since the "Other Insurance" clause refers to "a vehicle *you* do not own," and not to a "*non-owned auto*" as contained in the insuring clause and policy definitions, the Policy is ambiguous. (R. pp. 10, 13-14.) The circuit court thereby concluded that coverage was in effect created by the "Other Insurance" clause of the Policy despite what the other terms of the Policy provide. (R. pp. 10, 13-14.)

This conclusion both misinterprets the effect of "other insurance" clauses generally, and ignores the full language of this "Other Insurance" clause specifically. First, "other (or excess) insurance" clauses such as the one at issue merely set the priority of coverages between and among applicable policies. *See* Bardsley v. Gov't Emps. Ins. Co., 405 S.C. 68, 747 S.E.2d 436, 441 (2013); Horace Mann Ins. Co. v. General Star Nat. Ins. Co., 514 F.3d 327, 330 (4th Cir. 2008) (where "multiple insurance policies may cover a given loss," other insurance clauses attempt to define responsibilities). They do not create coverage where none otherwise exists.

Second, in concluding that there is an ambiguity created by the Other Insurance clause, even assuming its applicability, the circuit court failed to consider the clause in its the entirety. The Other Insurance clause actually provides: "If the insured has other insurance against **a loss covered by Section I** of this policy, we will not owe more than our pro rata share of the total coverage available. **Any insurance we provide** for losses arising out of the ownership, maintenance or use of a vehicle you do not own shall be excess over any other valid and collectible insurance." (*Emphasis added.*) The applicability of the "Other Insurance" clause is not a source of coverage, but is clearly dependent upon the existence of coverage elsewhere provided under the Policy. By its express (and complete) terms, the clause is contingent and merely attempts to order multiple coverages: it does not in itself create coverage. Moreover, the Other Insurance clause must be read in light of the entire policy, including the insuring clause (discussed *supra*), and not in isolation.

Because the accident at issue is not covered under the Policy, the "Other Insurance" clause does not apply. The circuit court erred in concluding that a discrete phrase in the inapplicable "Other Insurance" clause rendered the policy ambiguous.

III. THE ISSUANCE OF A DECLARATIONS PAGE LISTING THE POLICY LIMITS DOES NOT PRECLUDE DISCLAIMER OF COVERAGE UNDER OTHER, UNAMBIGUOUS PROVISIONS OF THE POLICY.

Erie contended, and the circuit court agreed, that because GEICO issued a declarations page setting forth the applicable coverage limits under the Policy, it was thereafter precluded from denying of coverage under S.C. Code Ann. § 38-77-142 thus creating an ambiguity between the declarations page and the other policy provisions. (R. pp. 11-16.) The circuit court seems to have additionally held that the coverage denial at

issue was improper because it was based on the Policy's insuring clause and definitions contained in the Policy, and not upon an enumerated policy exclusion. (*See* R. pp. 10-11.) These conclusions are based on a far too broad of a reading of section 38-77-142 and Williams, *supra*, and ignore well-settled law that a policy is to be read and applied as a whole according to its plain, unambiguous terms.

As the Williams Court reaffirmed, "insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Id.*, 762 S.E.2d at 712. S.C. Code Ann. § 38-77-142 provides:

> (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 to the owner of the vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle** that is principally garaged, docked, or used 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. Each policy or contract of liability insurance, or endorsement to the policy or contract, insuring private passenger automobiles principally garaged, docked, or used in this State, that has as the named insured an individual or husband and wife who are residents of the same household and that includes, with respect to any liability insurance provided by the policy, contract, or endorsement for use of a nonowner automobile a provision requiring permission or consent of the owner of the automobile for the insurance to apply.
>
> (B) No policy or contract of bodily injury or property damage liability insurance **relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle** principally garaged or used in this State without an endorsement or 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 motor vehicle by the named insured or by any other person. If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.
>
> Where the insurer has elected to provide a defense to its insured under such circumstances and files responsive pleadings in the name of its insured, the insured is not subject to sanctions for failure to comply with discovery pursuant to the South Carolina Rules of Civil Procedure unless it can be shown that the suit papers actually reached the insured, and that the insurer has failed after exercising due diligence to locate its insured, and as long as the insurer provides such information in response to discovery as it can without the assistance of the insured.
>
> (C) 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.

(*Emphasis added.*) By its terms, the applicability of section 38-77-142 is contingent upon the applicability of the liability policy at issue to the loss. If a policy at issue is inapplicable to a particular loss, then section 38-77-142 is equally inapplicable.

Here, the motor vehicle driven by Scoggin at the time of the accident was indeed insured through a policy (i.e., the policy issued to Ms. Scoggin on her Ford Taurus) which comported with section 38-77-142, and no attempt was made to arbitrarily reduce the coverage afforded thereunder: the full limit of that policy was tendered to and accepted by Hill. There is no requirement – under 38-77-142, Williams, or any other authority – that the Policy issued on Scoggin's vehicle which was not involved in the accident apply to his mother's vehicle which was insured under a different policy.

Rather, the lesson of 38-77-142 and Williams is that where a policy covers a particular loss, the limits for that particular loss may not be arbitrarily and capriciously reduced below the face amount of the policy. Applying the plain, unambiguous language of the Policy to determine that there is no coverage under the Policy does not, and cannot, run afoul of section 38-77-142, including subsection (C). To hold otherwise, as the circuit court seems to have done, would lead to the absurd result that any automobile insurance policy which comes with a declarations page setting forth the face value of the policy must cover the entire universe of potential losses without exception and without regard to the remaining terms and conditions of the policy.

Equally erroneous is the circuit court's conclusion that the denial of coverage violates section 38-77-142 and Williams because the Policy's declarations page "contained no warning of the reduced or eliminated coverage." (R. p. 11.) The concern addressed by the Williams court was a policy limits step-down provision contained within the body of the policy which reduced liability coverage from the face amount of the policy to the statutory minimum limits for a class of claimants (relatives of the insured) without such reduced limits being reflected on the declarations page. *See* 762 S.E.2d at 715-17. Williams did not hold, nor is there any other authority requiring, that terms and exclusions found elsewhere in a policy be recited in the declarations page as well. To suggest the contrary is to ignore well-established South Carolina law that an insurance contract is composed of different parts and must be read as a whole. *See id.*, 762 S.E.2d at 711 (application, declarations, and policy constitute the insuring agreement); Beaufort County Sch. Dist., *supra*, 709 S.E.2d at 90 (policy must be read as a whole). And the mere fact that an insured may have to resort to reviewing the body of

the policy, rather than simply resort to the declarations page, to ascertain the applicability of coverage does not create an ambiguity. Williams, *supra*, 762 S.E.2d at 710-11 (where coverage intent is clear from reading policy as a whole, there is no ambiguity).

Taking the Order at face value, additionally concerning is the circuit court's suggestion that coverage denials may be based on enumerated "exclusions" only, rendering completely impotent and meaningless the definitions, insuring clauses, and other provisions of a policy should not be considered in making coverage determinations. (*See* R. pp. 10-11 (stating that denial of coverage under the Policy was erroneous because there is "no applicable exclusion supporting the denial").) In so holding, the circuit court's Order once again disregards well-established law that a policy must be read as a whole, and that an insurer's obligations are "defined by the terms of the policy and cannot be enlarged by judicial construction." South Carolina Ins. Co. v. White, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). It cannot be gainsaid that coverage can be determined by reference to all parts of the policy, including insuring clauses, definitions, etc., and are not limited simply to enumerated exclusions. *See, e.g.,* South Carolina Farm Bureau Mut. Ins. v. Wilson, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001) (finding no coverage based on language of insuring clause, and holding that failure of policy to include a specific exclusion does not alter coverage limitation); State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 135-36 (Ct. App. 2000) (finding no coverage for loss based on policy's definition of an "occurrence").

IV. THE DEFINITIONS OF "OWNED AUTO" AND "NON-OWNED AUTO" SET FORTH IN THE POLICY DO NOT VIOLATE PUBLIC POLICY.

The circuit court concluded that because GEICO's determination that the Ford Taurus was, under the Policy, neither an "owned auto" nor a "nonowned auto" rested, in part, on the familial relationship between Scoggin and his mother, the owner of the vehicle, the coverage denial violated public policy under Williams, *supra*. (R. p. 15.) Such a conclusion is error and requires reversal.

At issue in Williams was the applicability of a step-down provision reducing liability coverage from the face amount of the policy to the statutory minimum limits where the injured party and the insured are family members. 762 S.E.2d at 715-17. It was this reduction of policy limits due to the familial relationship between the innocent injured party and the insured that the Court held was arbitrary and capricious, and in violation of public policy. *Id.* The policy at issue in that case was, indeed and indisputably, applicable to the loss: the sole question was what limits – those set forth on the declarations page or the stepped-down limits – applied to cover the injured family members' losses. The Court in no way addressed facts even remotely similar to the one at issue, and did not hold that it was impermissible to consider the relationship between a vehicle owner and its operator in determining whether a loss is covered. In this regard the holding of Williams is simply inapplicable to the instant case.

Moreover, unlike in Williams, where the step-down provision was deemed "arbitrary, capricious and injurious," *id.*, 762 S.E.2d at 717, the rationale for "nonowned auto" policy provisions such as the one at issue is well-established and rational: "'the evident intention of the limitation with respect to other automobiles is to prevent a situation in which the members of one family or household may have two or more automobiles actually or potentially used interchangeably but with only one particular

automobile insured.'" Hanzlik, *supra*, 32 Kan. App. 2d at 958. GEICO's "policy precisely as written comports with common sense and sound public policy." *Id.*, at 959.

V. THE TRIAL COURT ERRED IN AWARDING ERIE ATTORNEYS' FEES WITHOUT STATUTORY OR CONTRACTUAL AUTHORITY.

Without citation to any legal authority or reference to any contractual provision, the circuit court granted Erie's request for an award of attorney's fees and costs, with the amount to be determined. (*See* R. p. 16.)

In South Carolina, "attorney's fees are not recoverable unless authorized by contract or statute." Seabrook Island Prop'y v. Berger, 365 S.C. 234, 616 S.E.2d 431, 434 (2005); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296, 297 (1989). Neither Erie nor the circuit court cited to any statutory authority or contractual provision, as there is none applicable, allowing for the recovery of attorney's fees by Erie in this case.

Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978), is inapplicable as attorney's fees thereunder are awardable only to "an insured" who prevails in a declaratory judgment action. *See* State Auto Prop'y and Cas. Ins. Co v. Raynolds, 357 S.C. 219, 592 S.E.2d 633, 637 (2004) ("when a defendant insured prevails...the insured is entitled to recover attorney's fees"). Erie is not an insured and is, therefore, not entitled to an award of fees under Hegler.

For these reasons, the circuit court's order granting Erie's request for an award of attorney's fees is in error and should be reversed.

CONCLUSION

For the foregoing reasons, the circuit court's order granting Erie Insurance Exchange declaratory relief and attorney's fees should be reversed in its entirety.

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April 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Case No. 14-CP-26-6382

Appellate Case No. 2015-001827

Erie Insurance Exchange,.....Respondent

v.

Government Employees Insurance Company, Mark Allison Scroggin, and Angela Bennett Hill, Defendants,

Of which Government Employees Insurance Company is.....Appellant

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CERTIFICATE OF COUNSEL

The undersigned, as attorney for Appellant, hereby certify that the *Brief of Appellant* and *Reply Brief of Appellant* comply with Rule 211(b) of the South Carolina Appellate Court Rules.

Robert T. King
Edward A. Love

April 18, 2016

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Of which Government Employees Insurance Company is.....Appellant

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PROOF OF SERVICE

I, the undersigned, as an attorney for Appellant, do hereby certify that I have served the *Brief of Appellant*, *Reply Brief of Appellant*, and *Record on Appeal* this this April 21, 2016, by depositing the same in a U.S. Postal Box in envelopes, sufficient postage prepaid, properly addressed to the following:

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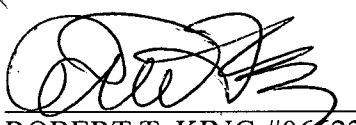

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April 21, 2016

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RE: Erie Insurance Exchange v. Government Employees Insurance Company, Mark Allison Scoggin and Angela Bennett Hill
Appellate Case No.: 2015-001827
Our File No.: 41.01747

Dear Ms. Kitchings:

Please find enclosed the following documents in regards to the above matter:

1. Fourteen bound copies and one unbound copy of the Record on Appeal;

2. Fourteen bound copies and one unbound copy of the Appellant's Brief; and

3. Fourteen bound copies and one unbound copy of the Appellant's Reply Brief.

By copy of this letter to all counsel of record, we are herewith serving them with the Appellant's Record on Appeal, Appellant's Final Brief and Appellant's Final Reply Brief.

Should you have any questions, please do not hesitate to contact us.

Sincerely,

Robert T. King
RKing@kingandlove.com

RTK/wl
Enclosures
cc: J. Dwight Hudson, Esquire (Via U.S. Mail)
One copy of each document
Ian D. Maguire, Esquire (Via U.S. Mail)
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