IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000679

Nationwide Mutual Fire Insurance Company..... Appellant.

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, Deborah Timms, ... Respondents.

INITIAL BRIEF OF APPELLANT

J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Appellant

September 12, 2016

Other Counsel of Record:

Milford O. Howard, III, Esquire
Howard Law Firm, P.A.
Post Office Box 9754
Greenville, SC 29604
Attorney for Christopher Timms

Michael F. Mullinax, III, Esquire
P.O. Box 2665
509 North McDuffie Street
Anderson, SC 29622
Attorney for Sharmin Walls

J. Kirkman Moorhead, Esquire
Krause, Moorhead & Draisen, P.A.
207 East Calhoun Street
Anderson, SC 29621
Attorney for Randi Harper

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. **The Circuit Court erred by failing to enforce exclusions in an automobile liability policy that prevent an insured from being indemnified beyond the minimum limits for injuries caused by his decision to flee law enforcement or commit a felony.**

II. **If the Circuit Court correctly read the Supreme Court's opinion in *Williams v. GEICO* to preclude exclusions in auto policies that reduce coverage to the minimum limits when an insured is committing a felony or fleeing from law enforcement, then the decision in *Williams* should be overturned.**

STATEMENT OF THE CASE

This appeal arises out of a tragic accident that resulted from Korey Mayfield's decision to flee from law enforcement. Mayfield was driving a Chevrolet Lumina insured by Nationwide and owned by Respondent Sharmin Walls. Walls, Christopher Timms, and Randy Harper were passengers in the vehicle when State Trooper Travis Wilson observed Mayfield crossing the yellow line and speeding. Trooper Wilson activated his blue lights. Instead of pulling over, Mayfield led Trooper Wilson on a high-speed chase. Mayfield ultimately lost control of the vehicle and ran off the road in a single-car accident that caused Timms' death and severe injuries to Walls and Harper.

The Nationwide policy insuring the Chevy Lumina provided liability limits of $100,000 per person and $300,000 per accident. However, the policy included two exclusions relevant to this appeal: (1) a flight from law enforcement exclusion; and (2) a felony exclusion. The exclusions applied "with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law . . . ." (Stip. of Facts ¶ 14). In addition, although Walls had the option to purchase underinsured motorist coverage, she chose not to. (Trial Trans. p. 27, lines 21-22). Therefore, the recoveries for her and the other passengers in the Lumina are limited to the applicable liability coverage.

After the accident, Nationwide tendered the minimum limits required by the South Carolina Financial Responsibility Act, $50,000, to the Respondents here. Nationwide then filed this declaratory action seeking a declaration applying the felony and flight from law enforcement exclusions.[1] The case came before the Honorable J. Cordell Maddox, Jr. for bench trial on September 12, 2013.

At trial, Respondents raised for the first time their contention that Mayfield was a non-permissive user, attempting to trigger the policy's uninsured motorist coverage. Nationwide objected to this contention based on Respondents' failure to plead a claim for uninsured motorist coverage. (Trial Trans. Sept. 12, 2013, p. 26, lines 7-12). On August 18, 2014, the Circuit Court entered an Order in favor of Respondents and against Nationwide. (Aug. 18, 2014, Order). The August 18 Order found that Mayfield was a non-permissive user of the vehicle and, therefore, Respondents were entitled to uninsured motorist coverage. (Aug. 18, 2014 Order, p. 6).

On August 26, 2014, Nationwide served a Motion to Alter or Amend the August 18 Order. (Mot. to Alter or Amend) (Mem. in Support of Plt.'s Mot. to Alter or Amend). In particular, Nationwide argued that the Respondents had failed to raise the issue of Mayfield's non-permissive use in their pleadings, and that Respondents were precluded from seeking uninsured motorist coverage because they had recovered liability payments equal to the mandatory minimum limits from two different insurers.[2] (Mem. in Support of Plt.'s Mot. to Alter or Amend, p. 2). Nationwide

---

[1] Initially, Korey Mayfield contended that Sharmin Walls was actually driving the car at the time of the accident. However, Mayfield pled guilty to reckless homicide as a result of the accident, and the Circuit Court entered summary judgment on August 29, 2011 finding that Mayfield was the driver of Walls' vehicle at the time of the accident. That ruling has not been appealed.

[2] In addition to recovering $50,000 from Nationwide as the uncontested portion of Nationwide's liability coverage, Respondents also recovered from State Auto who insured Mayfield for an at-home vehicle. (Nov. 26, 2012 Order Approving Settlement on Behalf of Sharmin Christine Walls); (May 24, 2011 Order Approving Wrongful Death Settlement). At trial, Respondents

also argued that the Order misapplied South Carolina law, failed to make the key factual determinations of whether Mayfield was fleeing from law enforcement at the time of the accident and committing a felony, and made factual determinations that were not supported by the record. (Mem. in Support of Plt.'s Mot. to Alter or Amend, pp. 4-8, 19-20).

The Circuit Court held a hearing on Nationwide's Motion to Alter or Amend on March 6, 2015. At the hearing, Respondents withdrew their contention that the uninsured motorist coverage applied. (Transcript, March 6, 2015, p. 12, lines 10-23). Furthermore, the Circuit Court found that Mayfield was fleeing from law enforcement at the time of the accident. (Transcript, March 6, 2015, p. 8, lines 12-17). Subsequently, on February 26, 2016, the Circuit Court entered an Order finding Mayfield was fleeing from law enforcement at the time of the accident and that his conduct constituted a felony. (February 26, 2016 Order, p. 5). Nonetheless, the Circuit Court refused to apply the plain language of the exclusion. Instead, the Circuit Court read the Supreme Court's recent decision in *Williams v. Government Employees Insurance Company*, 409 S.C. 586, 762 S.E.2d 705 (2014), to hold that ***any*** exclusion in an automobile liability policy issued in South Carolina that reduces the applicable limits of coverage to the minimum amount required by the financial responsibility laws is void and violates public policy pursuant to South Carolina Code Annotated Section 38-77-142(c). (Feb. 26, 2016 Order, p. 6 and pp. 8-9).

The Circuit Court also held Nationwide's exclusion unenforceable because the policy provision was not set out in bold or otherwise brought to the insured's attention in some way other than being plainly written in the policy. (Feb. 26, 2016 Order, pp. 7 & 9). This appeal followed.

---

failed to present the Safe Auto policy, and failed to present evidence that the policy did not provide liability coverage to Mayfield for the accident.

SUMMARY OF THE ARGUMENT

The Nationwide policy excludes liability coverage for amounts in excess of the state's minimum required limits of coverage while an insured is committing a felony or fleeing from law enforcement. There is no dispute in this case that Timms was fleeing from law enforcement and that he pled guilty to a felony as a result of the accident. However, relying on the Supreme Court's holding in *Williams*, the Circuit Court held, in effect, that ***any*** provision in an automobile liability policy that reduces coverage to the mandatory minimum limits violates public policy and is therefore unenforceable. Nationwide respectfully contends that the Circuit Court misread the *Williams* case, which held that an ***arbitrary and capricious*** family member exclusion violated public policy. In contrast, the exclusions here – flight from law enforcement and commission of a felony exclusions – merely limit coverage for conduct that the State of South Carolina has already deemed criminal. Rather than arbitrarily or capriciously excluding coverage, these provisions support the State's public policy by preventing an insured from being indemnified in amounts over and above the State's mandatory minimum limits when the insured is committing a crime. Therefore, the exclusions should be enforced as written.

Alternatively, if the Circuit Court read the *Williams* case correctly, then the opinion in *Williams* should be overturned. In reaching its conclusion, the Supreme Court in *Williams* relied upon the phrase "within the coverage," and interpreted that phrase to mean "within the limits" on the face of the policy's declarations page. However, the General Assembly's use of the phrase "within the coverage" in other insurance statutes clearly reveals that "coverage" means the terms and conditions of the policy, not the policy limits. When the General Assembly intends to use the word "limits," it does so. Likewise, a review of the South Carolina Supreme Court's use of the

phrase "within the coverage" in numerous insurance cases reveals that "coverage" does not mean "limits."

The Circuit Court also created a new rule that has never been recognized in South Carolina by holding the exclusion should have been set out in bold or otherwise made apparent in the insurance policy. This is not the law. South Carolina has long held to the traditional rule that an insured is expected to read the insurance policy, and courts will enforce plainly worded exclusions. Because the exclusions in this case are plain and unambiguous, they must be enforced as written.

STATEMENT OF FACTS

The facts of the case were largely stipulated at trial. Walls owned a Chevrolet Lumina insured by Nationwide. (Feb. 26, 2016 Order, p. 2). The policy provided liability limits of $100,000 per person, $300,000 per accident. (Stip. of Fact, ¶ 14). However, the policy contained an exclusion that applied to any coverage in excess of the State's mandatory minimum limits if bodily injury occurred while an insured – either the named insured, a resident relative, or a permissive user – was fleeing from law enforcement or committing a felony:

> B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:
> 6. **Bodily injury** or **property damage** caused by:
> a) **You**;
> b) a **relative**; or
> c) anyone else while operating **your auto**:
> (1) while committing a felony; or
> (2) while fleeing a law enforcement officer.

(Stip. of Facts ¶ 14).

On July 11, 2008, Walls, Mayfield, Harper, and Timms had been drinking at Walls' residence when they left as a group. (Walls Statement, pp. 4-6). Walls had been drinking wine all morning, so she got in the car and allowed Mayfield to drive her Chevy Lumina without protest.

(Walls Statement, p. 5-6). The group made a number of stops before Trooper Travis Wilson observed the vehicle on South Carolina Highway 81 in Anderson crossing the yellow line and going approximately 12 miles an hour over the speed limit. (Walls Statement, p. 8); (Stip. of Fact, ¶¶ 1-2). Trooper Wilson decided to pull the vehicle over and activated his blue lights. (Stip. of Fact, ¶ 3). Then, the Lumina – operated by Mayfield – went from the far left lane (81 is a four-lane road) to the far right turning lane, disregarded a stop signal, and continued down 81 South. (Stip. of Fact, ¶ 4). While driving down 81 South, Trooper Wilson's vehicle reached speeds of 109 miles per hour in an effort to keep up with the Lumina. (Stip. of Fact, ¶ 5).

Mayfield turned left off 81 South onto Fred Dean Road. (Stip. of Fact, ¶ 6). In order to keep up, Trooper Wilson's vehicle reached speeds exceeding 95 miles per hour. (Stip. of Fact, ¶ 6). Mayfield then turned right onto Flat Rock Road and then left onto Leatherdale Road, disregarding multiple stop signs. (Stip. of Fact, ¶ 7). At that time, Trooper Wilson received instructions to terminate the pursuit, which he did. (Stip. of Fact, ¶ 8). However, by the time Trooper Wilson deactivated his siren and blue lights, the Lumina was out of sight. (Stip. of Fact, ¶ 9).

Knowing that Leatherdale Road was a curvy road, Trooper Wilson proceeded down Leatherdale to ensure that the Lumina made it through several upcoming curves. (Stip. of Fact, ¶ 10). Approximately a mile down the road, Mayfield lost control of the Lumina and ran off the road in a single-vehicle accident. (Stip. of Fact, ¶ 11). Trooper Wilson came upon the scene within a minute-and-a-half of terminating the chase. (Stip. of Fact, ¶ 12). The Greenville County Accident Reconstruction Team investigated and determined that Mayfield was travelling a minimum of 72 miles per hour when he lost control. (Stip. of Fact, ¶ 13) (Pl.'s Ex. 5, Traffic Collision Investigation Report, p. 13). The speed limit on that portion of Leatherdale

Road was 35 miles per hour. (Stip. of Fact, ¶ 13). Timms died as a result of the accident, and Mayfield, Walls, and Harper each sustained serious injuries.

Mayfield was charged with and ultimately pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), to reckless homicide – a felony. (Stip. of Fact, ¶ 15). Furthermore, the Circuit Court made a factual determination that Mayfield was fleeing a law enforcement officer at the time of the accident. (Feb. 26, 2016 Order, p. 4). The Circuit Court based its factual determination on damage to the vehicle, the speed of the vehicle at the time of the accident, the dash cam video, witness statements, and the timeline. (Feb. 26, 2016 Order, pp. 4-5). Even though Trooper Wilson had terminated the chase, the Circuit Court found that Mayfield's unlawful course of conduct and manner of driving continued up until the time of the crash.

Relying on the flight-from-law-enforcement and felony exclusions in the policy, Nationwide agreed to tender its $50,000 of undisputed liability coverage, which the Respondents accepted. (May 25, 2010 Settlement Agreement between Timms Estate and Nationwide); (July 20, 2011 Settlement Agreement between Harper and Nationwide); (December 3, 2012 Settlement Agreement between Walls and Nationwide). Furthermore, Mayfield had liability coverage under a policy of insurance issued by State Auto. State Auto also tendered its liability limits of $50,000. (Nov. 26, 2012 Order Approving Settlement on Behalf of Sharmin Christine Walls); (May 24, 2011 Order Approving Wrongful Death Settlement). Then, Nationwide filed this declaratory judgment action seeking application of the felony and flight from law enforcement exclusions. (Complaint).

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Lee v. University of South Carolina*, 407 S.C. 512, 517, 757 S.E.2d

394, 397 (2014) (citation omitted). "Because the construction of a clear and unambiguous contract is a matter of law for the court, [appellate courts] review the trial court's findings of law *de novo*." *Id.* (citing *Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 520, 252 S.E.2d 889, 891 (1979)); *see also Gary v. Askew*, 789 S.E.2d 94, 99 (S.C. Ct. App. June 1, 2016).

ARGUMENT

Nationwide's flight from law enforcement and felony exclusions prevent an insured from receiving excess liability coverage for his commission of a crime. Many states completely preclude coverage for criminal acts. At a minimum, an exclusion that prevents or limits an individual from receiving indemnification for his felonious acts supports, rather than conflicts with, public policy. Therefore, the exclusions should be enforced as written. To the extent that South Carolina has recognized a countervailing interest of protecting the public from injuries caused by the tortious act of a driver, that interest has been stated to be up to the minimum amount of coverage required by statute, not more. The *Williams* case does not change this outcome, especially for exclusions that promote rather than harm public policy.

Respectfully, if the Supreme Court in *Williams* read § 38-77-142 to preclude ***any*** exclusion in a policy that reduces the limits of coverage to the mandatory minimum amount based upon the insured's conduct, then the *Williams* decision misreads the phrase "within the coverage" in that statute. If the Court finds that the decision in *Williams* applies only to arbitrary and capricious exclusions that otherwise violate public policy, then the Court need not address this question.

I. The Circuit Court erred by failing to enforce exclusions in an automobile liability policy that prevent an insured from being indemnified beyond the minimum limits for injuries caused by his decision to flee law enforcement or commit a felony.

Nationwide's policy excludes illegal conduct. Logically, an exclusion that discourages illegal conduct promotes public policy. However, because South Carolina's General Assembly has determined that the State also has a public policy of protecting injured members of the public,

South Carolina law requires minimum limits of coverage even when an insured's conduct violates the law. *See e.g.*, S.C. Code Ann. § 38-77-140 (providing minimum limits of required liability coverage). The Court of Appeals in *United Services Auto. Ass'n v. Markosky*, 340 S.C. 223, 530 S.E.2d 660, (Ct. App. 2000), recognized that § 38-77-140 defines the extent of the state's public policy as to mandatory liability coverage:

> That public policy, however, has been effected by the enactment of the minimal limits coverage statute found in S.C.Code Ann. § 38-77-140. As recognized in *Shores*, "the legislature has determined that for all vehicles registered in South Carolina, at least minimal coverage is necessary to protect the public." To the extent the legislature determines this public policy is not being effected, it has the option of raising the minimum limits. We will not construe the plain language of the statute to extend the public policy beyond that which was plainly intended.

340 S.C. at 230, 530 S.E.2d at 664. Therefore, exclusions that reduce coverage to the State's mandatory minimum limits are enforceable to the extent that they otherwise comply with South Carolina's public policy. Nationwide's exclusions for criminal conduct do just that.

In *Williams*, the Supreme Court read South Carolina Code § 38-77-142 to hold that "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." 409 S.C. at 604, 762 S.E.2d at 715. The Circuit Court interpreted this holding to mean that ***any*** step down provision violates South Carolina public policy. The Circuit Court read *Williams* too broadly. The Supreme Court in *Williams* merely held that ***arbitrary and capricious*** step down provisions are unenforceable. Because the flight from law enforcement and felony exclusions are far from

arbitrary or capricious, these step down provisions comport with South Carolina public policy and are enforceable.

A. The Nationwide policy plainly and unambiguously excludes liability coverage for amounts exceeding the State's mandatory minimum limits when an insured driver is fleeing from law enforcement or committing a felony.

Nationwide's flight from law enforcement and felony exclusions plainly and unambiguously define what conduct is subject to the exclusions, and to whom the exclusions apply:

> B. This coverage does not apply, with regard to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law as of the date of the loss, to:
> 6. **Bodily injury** or **property damage** caused by:
> a) **You**;
> b) a **relative**; or
> c) anyone else while operating **your auto**:
> (1) while committing a felony; or
> (2) while fleeing a law enforcement officer.

(Stip. of Facts ¶ 14).

Despite the plain wording and the plain application of the exclusion to Mayfield, the Circuit Court held "the only rational reading of the [sic] this provision of the policy would make it applicable only to the 'insured purchaser' being guilty of such conduct." (Feb. 26, 2016 Order, pp. 7-8). Respectfully, the Circuit Court's reading completely ignores parts b) and c) of the exclusion stating that it also applies to a "relative" or "anyone else" while driving the vehicle. There is no ambiguity here.

"A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Bardsley v. Government Employees Ins. Co.*, 405 S.C. 68, 75, 747 S.E.2d 436, 439-40 (2013) (citation omitted). "Accordingly, when a court makes a finding of ambiguity, ***it must set forth either how a provision is capable of more than one meaning or is obscure in meaning***. A simple finding of ambiguity, absent any reasoning, is insufficient." *Id.*

The Circuit Court's Order fails to set forth an alternative reasonable reading of the exclusion that would provide coverage under the facts of this claim. The exclusion is plain. The Circuit Court entered summary judgment, finding that Mayfield was operating the insured automobile. Therefore, he is "anyone else . . . operating your auto" and the exclusion applies if he was fleeing law enforcement or committing a felony. In its February 26, 2016 Order, the Circuit Court found that Mayfield was doing both. He was fleeing law enforcement and committing a felony when the accident occurred. (Feb. 26, 2016 Order p. 5). Therefore, the exclusion applies by its plain terms. Respondents failed to present any logical alternative reading of the exclusion that would provide coverage in this case. Therefore, the exclusion is unambiguous.

The Circuit Court also found the exclusion unconscionable, but did not expressly state why. It appears that one justification by the Circuit Court was that "it was nowhere made clear in the policy, that the coverage she purchased and paid for would be reduced in the event of certain circumstances." (Feb. 26, 2016 Order, p. 7). The Circuit Court further held: "the testimony in evidence shows Such [sic] clause was not set out in bold print or otherwise made apparent to Walls in the insurance policy." (Feb. 26, 2016 Order, p. 9).

Respectfully, the Stipulation of Facts submitted to the Circuit Court states that the policy contained the exclusion. (Stip. of Facts, ¶ 14). Moreover, neither Walls nor any other individual involved in the insurance transaction testified at trial. There was no evidence presented at trial showing that Walls was not aware of the exclusion or that the exclusion was not clearly presented in the policy. Therefore, this factual finding was not supported by the evidence presented at trial. Moreover, the ruling that the exclusion is unconscionable because it was not sufficiently brought to Walls' attention is based upon a mistake of law.

South Carolina's appellate courts have never held that a policy exclusion was unenforceable because it was not brought to an insured's attention. Rather, "[i]nsurance policies are subject to the general rules of contract construction." *South Carolina Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 104 (Ct. App. 2006) (citation omitted). "Although exclusions in a policy are construed against the insurer, 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 a statutory prohibition." *Id.* (citations omitted). "[I]n cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183, 763 S.E.2d 598, 602 (Ct. App. 2014) (citation omitted). "The court cannot torture the meaning of policy language to extend coverage not intended by the parties." *Id.* (quoting *Dawsey*, 371 S.C. at 638 S.E.2d at 105 (other citations omitted)).

South Carolina's appellate courts have never placed the burden of bringing exclusions that are plainly stated in the insurance policy to the insured's attention. Rather, the plain language of the policy is designed to do just that. Requiring that one exclusion have special print formatting to grab the insured's attention would – by definition – render another exclusion less noticeable. Moreover, if every exclusion used the same font, then none would stand out against each other. Rather than creating this impossible burden for insurers, South Carolina – like other jurisdictions – adopts the reasonable rule that an insured has the burden and expectation of reading her insurance policy and knowing its contents. *See Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 327, 233 S.E.2d 111, 114 (1977) ("One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning."). Therefore, because the

exclusion is plain and unambiguous, she would have known about the exclusion if she simply fulfilled her duty of reading the policy.

B. By wording the exclusion as a step-down provision, Nationwide provided more clarity to the insured about how the exclusion applies under South Carolina law.

On the most basic level, the Circuit Court held Nationwide's flight from law enforcement and felony exclusions violate South Carolina law because they are step-down provisions. (Feb. 26, 2016 Order, p. 6). If anything, the fact that the exclusion is worded as a step-down should confirm that the exclusion is valid and enforceable under South Carolina law. South Carolina Code § 38-77-140 mandates minimum limits of coverage even when an insured is committing illegal or intentional acts. *See* S.C. Code Ann. § 38-77-140; *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 17, 382 S.E.2d 11, 12-13 (Ct. App. 1989) (holding that the Act mandates minimum limits coverage and "draws no distinction between intentional acts and negligent acts . . . ."). Therefore, Nationwide could not exclude bodily injuries for felonies or flight form law enforcement if the exclusion had the impact of reducing coverage below the minimum limits. The exclusion acknowledges this rule by plainly informing the insured that it applies "with regards to any amounts above the minimum limits required by the South Carolina Financial Responsibility Law . . . ." (Stip. of Facts, ¶ 14). The exclusion applies, but only for amounts in excess of the mandatory minimum limits.

By wording this exclusion as a step-down provision, Nationwide accurately conveys the legal effect of the exclusion to the insured. In fact, a provision merely stating that felony or flight-from-law-enforcement is "excluded" would likely lead an insured to the incorrect conclusion that the policy provides no coverage for that conduct. Instead, the Nationwide policy language accurately describes how the exclusion works.

C. The flight from law enforcement and felony exclusions comport with public policy as stated by the Supreme Court in *Williams*.

The felony and flight-from-law-enforcement exclusions plainly and unambiguously exclude conduct that the State of South Carolina has already recognized as being against public policy. The General Assembly has answered the question of whether it is proper to discourage individuals from fleeing from law enforcement or committing felonies. The General Assembly itself has attempted to discourage this conduct by making them crimes. *See* S.C. Code Ann. 56-5-2910 ("A person who is convicted of, pleads guilty to, or pleads nolo contendere to reckless homicide is guilty of a felony . . . ."); S.C. Code Ann. § 56-5-750 ("[I]t is unlawful for a motor vehicle driver . . . to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light."). Nationwide's policy exclusions promote the public policy of these criminal statutes by providing that an insured will not be indemnified for this illegal conduct above the mandatory minimum limits.

Generally, South Carolina has consistently decided that voluntary coverage – i.e., coverage in amounts above the minimum limits – is subject to the general rules of contract construction. Insurance contracts are construed according to traditional contract principles. *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* (citation omitted). "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." *Id.* (citing *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 310 S.E.2d 814 (1983)). This general rule is the default rule for insurance policies providing optional coverage. Therefore, an insurer may include plainly worded exclusions in voluntary coverage so long as those exclusions do not violate public policy. *See e.g., id.* at 19, 382 S.E.2d at 13 ("The principle

that one should not be permitted to insure against his own intentional wrongdoing applies to voluntary insurance, not compulsory insurance."); *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 594 S.E.2d 275 (2004) (reaffirming the holding in *Shores v. Weaver*, 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002), that an insured's failure to cooperate cannot relieve the insurer's obligations to pay a judgment up to the mandatory minimum limits); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984) (holding that a business use exclusion "is void to the extent of minimum coverage . . . ."); *Universal Underwriters Ins. Co. v. Metropolitan Prop. and Life Ins. Co.*, 298 S.C. 404, 380 S.E.2d 858 (Ct. App. 1989) (approving provision that limited liability coverage to mandatory minimum coverage when vehicle is being operated by a statutory permissive insured); *Potomac Ins. Co. v. Allstate Ins. Co.*, 254 S.C. 107, 173 S.E.2d 653 (1973) (holding that a policy exclusion limiting coverage for certain permissive users was invalid up to the statutory limits); S.C. Code Ann. § 56-9-20(d) ("excess or additional coverage shall not be subject to the provisions of this chapter" and "the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this article.").

The Court of Appeals in *Universal Underwriters* put the issue succinctly: "It is clear that, while additional coverage is permitted by the Act, only the minimum limit is mandatory. Therefore, the Act provides no basis to hold that the provision of the policy limiting coverage to the statutory minimum is contrary to public policy." *Id.* at 410, 380 S.E.2d at 862.

In *Williams*, the Supreme Court recognized an exception to this general rule by striking down a family member step-down provision that reduced coverage to the minimum limits when the injured party was a relative of the insured. The Supreme Court relied upon two principles to reach its conclusion. First, the Supreme Court read South Carolina's Omnibus statute to hold that the policy could not reduce coverage for statutory insureds – which include the named insured and

permissive users – below the limits listed on the declarations page. *Williams*, 409 S.C. at 604, 762 S.E.2d at 715. Second, the Supreme Court held that § 38-77-142 precluded a provision that arbitrarily or capriciously reduces coverage: "Therefore, 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.* (emphasis added). After reviewing approaches taken by other jurisdictions, the Supreme Court held that the reduction of "coverage based solely on a familial relationship is arbitrary, capricious and injurious to the public good." *Id.* at 607, 762 S.E.2d at 717. Therefore, the Supreme Court struck down the family member provision as violating South Carolina's public policy. *Id.* However, this limited exception does not render ***all*** step-down provisions contrary to public policy. Rather, the Supreme Court in *Williams* limited its holding to a family member step-down provision that the Supreme Court deemed arbitrary and capricious.

The Circuit Court below failed to recognize the two-step analysis applied by the Supreme Court in *Williams*. The Supreme Court held the family member exclusion violated public policy because of § 38-77-142 ***and*** the conclusion that the exclusion was arbitrary and capricious. The Circuit Court ignored the second prong of the analysis. There is no finding in this case that the flight from law enforcement and felony exclusions are arbitrary and capricious. In fact, they are quite the opposite. These exclusions foster public policy by preventing an individual who chooses to break the law from being indemnified for the consequences of his criminal conduct.

"An exclusion in an automobile policy as to loss while the automobile used is engaged in unlawful flight from the police is not against public policy." 8A Couch on Ins. § 121:92; *see also* 41 A.L.R.6th 527 ("Efforts to exclude coverage for such behavior are often bolstered by judicial and legislative policies against allowing individuals to insure themselves against the consequences

of their own intentional misconduct."). Unlike the family member provision at issue in *Willliams*, an exclusion that merely excludes illegal conduct can no more be arbitrary and capricious than the criminal statutes that make this same conduct illegal. Because the General Assembly has already deemed Mayfield's conduct reprehensible by making it criminal, Nationwide's exclusion for the same reprehensible conduct is not at all arbitrary.

The Supreme Court spends a significant portion of its analysis in *Williams* discussing the public policy of the family member step-down provision and whether it is arbitrary and capricious. *Id.* at 604-607, 762 S.E.2d at 715-716. The Supreme Court also discusses the reasoning from a number of courts that have struck down similar family member limitations. In contrast, courts from across the country routinely uphold and enforce felony and flight from law enforcement exclusions. *See Alfa Specialty Ins. Co. v. Jennings*, 906 So. 2d 195 (Ala. Civ. App. 2005) (holding that a criminal acts exclusion in an automobile liability policy did not violate public policy); *Southern Farm Bureau Cas. Ins. Co. v. Easter*, 374 Ark. 238, 287 S.W.3d 537 (2008) (holding that eluding-lawful-arrest exclusion did not violate public policy as stated in state's compulsory insurance statute or no-fault statute); *Hix v. Hertz Corp.*, 307 Ga. App. 369, 705 S.E.2d 219 (Ct. App. 2010) (same); *Bohner v. Ace American Ins. Co.*, 359 Ill. App. 3d 621, 834 N.E.2d 635, (App. 2 Dist. 2005) (holding that criminal act exclusion was enforceable and did not violate public policy).

Public policy is always harmed when a policy gives insureds license to engage in criminal conduct. *Bailey v. Lincoln General Ins. Co.*, 255 P.3d 1039, 1048 (Colo. 2011). In fact, public policy strongly ***favors*** criminal acts exclusions: "Indeed, this public-policy principle is so compelling that, in many jurisdictions, insurers may actually violate public policy if they fail to include criminal-acts or intentional-acts exclusions in their policies." *Id.* at 1048.

A key aspect of the Supreme Court's holding in *Williams* was the arbitrariness of holding that an injured person's recovery could be limited solely because that injured person was related to the tortfeasor. Family members are part of the group specifically defined as "insureds" under the statutory scheme. *See* § 38-77-30(7). "To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious and violative of public policy." *Williams*, at 608, 762 S.E.2d at 717. In other words, the limitation applied based upon the identity of the victim, not the nature of the insured's – Mayfield's – conduct.

The flight-from-law-enforcement exclusion operates in a very different manner from the family-member step-down provision. Specifically, coverage is not dependent upon the identity of the ***victim***. Instead, coverage is dependent upon the ***conduct of the insured***. The exclusion is designed to discourage certain undesirable behavior by limiting the protections afforded by the policy when the insured undertakes that conduct. Certainly, a flight-from-law-enforcement exclusion comports with and parallels the legislature's stated public policy against fleeing from law enforcement because the legislature has criminalized such conduct. Therefore, rather than violating public policy, the flight-from-law-enforcement exclusion actually ***supports*** public policy.

In the *Bailey* case, the Supreme Court of Colorado considered the flight from law enforcement exclusion and concluded that the exclusion did not violate public policy. The Supreme Court began by recognizing three competing public policy interests: (1) protecting tort victims; (2) protecting the freedom of contract rights of insurers and insureds; and (3) allowing insurers to shift risk based on their insureds' conduct, especially when that conduct significantly increases the risk of the insurers' liability and may be encouraged by indemnification. 255 P.3d

at 1046-47. South Carolina recognizes these same principles. *See Williams*, 409 S.C. at 598, 762 S.E.2d at 712 (recognizing (1) the purpose of the MVFRA of protecting tort victims and (2) the parties' freedom of contract rights); *Columbia Real Estate & Trust Co. v. Royal Exch. Assurance*, 132 S.C. 427, 128 S.E. 865, 867-68 (1925) (recognizing that one purpose of the state value policy statute is to reduce the moral hazard created by over insuring property).

The Colorado Supreme Court recognized the purpose of the flight from law enforcement exclusion: "Most felonious criminal misconduct, like intentional misconduct, significantly alters the calculus of risk between the insurer and the insured, subjecting the insurer to increased and significantly greater risk of liability." *Bailey*, 255 P.3d at 1047. "If a single insured is allowed, through an intentional act, to consciously control risks covered by the policy, the central concept of insurance is violated." *Bohner*, 359 Ill. App. 3d at 626, 834 N.E.2d at 64 (citation omitted). "[M]ost insureds can keep themselves from engaging in felonious criminal conduct in the same way that '[m]ost individuals can protect themselves from causing intentional harm." *Bailey,* 255 P.3d at 1047. Because the exclusions have a clear, intelligible, and logical basis, they are neither arbitrary nor capricious.

The Colorado Supreme Court also held that the flight from law enforcement exclusion supports public policy: "Finally, public policy is also concerned with insurers giving insureds license to engage in intentional misconduct, which may be 'more likely if . . .insured[s] believe [they] will not have to bear the financial costs of the intentional conduct." *Id.* at 1047-48. "The concern with giving insureds license to engage in intentional misconduct applies with equal force to most felonious criminal misconduct." *Id.* This public policy is so important, many jurisdictions hold that an insurer actually violates public policy if it fails to include a criminal-acts or intentional-acts exclusion. *Id.* at 1048 (citing several cases).

Nationwide's policy discourages insureds from committing illegal acts. The exclusions merely discourage conduct that South Carolina has already deemed criminal. Therefore, the exclusions support public policy. After finding that Mayfield was fleeing from law enforcement and committing a felony at the time of the accident, the Circuit Court should have enforced the exclusions according to their plain terms.

D. Walls and her passengers could have protected themselves by purchasing underinsured motorist coverage.

The Circuit Court made much of the fact that the exclusion should not be applied in such a way that it reduces coverage that Walls purchased. However, this is not a first-party claim. Unlike the exclusion at issue in *Williams*, the felony and flight from law enforcement exclusions do not treat Walls any differently than any other tort claimant. She is not receiving less recovery because she is the named insured, or merely because she was a passenger in the accident vehicle. Respondents would be entitled to the same amount of recovery from Nationwide if they had all been in a separate vehicle wholly disconnected with Mayfield. The exclusion focuses on the insured's (Mayfield's) conduct, not the identity of the victims.

Walls' recovery – if any – arises out of the tort liability of Mayfield as the driver of the vehicle.[3] Claimants such as Walls and the other Respondents have the ability to protect themselves from injuries when an at-fault driver does not have adequate liability insurance by purchasing optional underinsured motorist coverage. Walls rejected that optional coverage when she purchased the Nationwide policy. Therefore, the mere fact that the policy reduces the available liability coverage does not violate public policy because Walls could have protected herself from that result by simply purchasing UIM coverage. Her failure to do so does not justify refusing to

[3] Notably, Timms' estate and Harper also asserted claims against Walls for negligent entrustment.

apply plainly worded exclusions that do not violate public policy. Walls has already received all the liability coverage under the policy that her policy unambiguously provides.

Nationwide's felony and flight from law enforcement exclusions strongly support South Carolina public policy by preventing an insured driver from receiving excess indemnification for his criminal conduct. Mayfield chose to flee from law enforcement. Nationwide agreed to insure Mayfield – as a driver of the insured vehicle – for civil liability arising out of his negligent acts, but Nationwide did ***not*** agree to insure Mayfield for liability arising out of his intentional felonious conduct beyond the mandatory minimum. Although Nationwide could not completely exclude coverage for Mayfield's criminal conduct, it had the freedom to apply the exclusion to any limits in excess of the mandatory minimum. Because the exclusion comports with and supports South Carolina's public policy of prohibiting criminal conduct, the exclusion is valid and enforceable as written.

II. If the Circuit Court correctly read the Supreme Court's opinion in *Williams v. GEICO* to preclude exclusions in auto policies that reduce coverage to the minimum limits when an insured is committing a felony or fleeing from law enforcement, then the decision in *Williams* should be overturned.

The Supreme Court in *Williams* did ***not*** hold that § 38-77-142 prohibits exclusions that reasonably limit coverage when the insured driver is committing illegal acts. However, if this premise is wrong and the Circuit Court correctly read *Williams* as prohibiting ***all*** exclusions in an automobile liability policy that reduce coverage to the state's mandatory minimum limits, then Nationwide respectfully contends that the opinion in *Williams* misreads § 38-77-142, and Nationwide moves pursuant Rule 217, SCRAP to argue against precedent.

A. The purpose of the omnibus statute is to require coverage for permissive users, not to define the limits of coverage that must apply to all claims regardless of the insured's conduct.

The omnibus statute provides that automobile liability insurance policies must insure permissive users:

> 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 . . . 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 express 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 . . .

S.C. Code Ann. § 38-77-142(A). One phrase from the statute sits at the crux of the Supreme Court's holding in *Williams*: "within the coverage of the policy or contract." The *Williams* Court reasoned, "We think it is significant that section 38-77-142 provides insurers must provide liability coverage to insureds 'within the coverage of the policy' . . . ." *Williams*, 409 S.C. at 603, 762 S.E.2d at 714. The Supreme Court in *Williams* interpreted this phrase to mean "within the ***limits*** of the coverage of the policy or contract," i.e., the limits listed on the policy declarations page. *Id.* ("Thus, it is the face amount of the coverage that is relevant under section 38-77-142, not the statutory minimum of liability coverage set forth in 38-77-140, which are not even mentioned in the statute.").

Contrary to how the Supreme Court used the term, the "coverage" provided by the policy is not the same thing as the "limits" listed on the declarations page. "Coverage" consists of the policy in its entirety, including the provisions in the policy that grant coverage, and the exclusions in the policy that limit coverage. The omnibus statute is not designed to address what dollar limits the policy may or may not provide. The General Assembly already established those limits by enacting Section 38-77-140 and Section 56-10-10 and 20. Instead, the omnibus statute is designed

to define ***who*** must be insured. By requiring the policy to insure a permissive user against liability "within the coverage of the policy," the statute mandates that permissive users be given the same protections as the named insured. However, if liability does not fall "within the coverage," then the statute does not require insurance for the permissive user.

In essence, Section 38-77-142 changed the law on this issue to hold that permissive users must be treated the same as named insureds under the policy for purposes of liability coverage. As such, an exclusion or other provision cannot treat a permissive user differently from the named insured. *See Couch on Ins.* (3d) § 111:1 ("An automobile liability insurance policy will include an 'omnibus' clause that defines the individuals who qualify for coverage under the policy."). An exclusion that applies equally to both a named insured and a permissive user does not violate the omnibus statute. Rather, the exclusion is simply one that causes a loss not to be "within the coverage" of the policy. That is precisely the case here. The felony and flight from law enforcement exclusions treat all insureds, whether a named insured or a permissive driver, the same.

B. When the General Assembly intends for a statute to refer to the "limits" of "coverage," it makes that intention clear by using the word "limits" in the statute.

If the General Assembly had intended to refer simply to the "limits" of coverage, it could have easily used that word. In fact, several examples show that when the General Assembly wants to state that a loss must be within the "coverage" ***and*** the "limits" of an insurance policy, it uses specific language to accomplish that task. Courts presume that the General Assembly acts intentionally when it uses a phrase in one statute and omits that phrase in another, related statute. *See Berkeley Cnty. Sch. Dist. v. South Carolina Dep't of Revenue*, 383 S.C. 334, 357 n.15, 679 S.E.2d 913, 925 (2009) (considering related statutes as relevant because they indicate the "General Assembly knows how to" include a provision when it so desires); *Doe v. Brown*, 331 S.C. 491,

496, 489 S.E.2d 917, 920 (1997) (considering related statutes and concluding that "[t]he clear and unambiguous language of . . . these statutes indicates that when the Legislature intended to exclude 'criminal parents' from the adoption process, it did so."); 82 C.J.S. *Statutes* § 478 (2014) ("[W]here a statute contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention has existed."). Therefore, because the General Assembly uses the word "limits" when referring to coverage limits, the use of the phrase "within the ***coverage***" does not mean "within the ***limits***."

In the statute addressing the South Carolina Property and Casualty Insurance Guaranty Association, the General Assembly defined the term "covered claim" to mean "an unpaid claim . . . which arises out of and ***is within the coverage and is subject to the applicable limits of an insurance policy*** to which this chapter applies . . . ." S.C. Code Ann. § 38-31-20(8) (emphasis added). The entire purpose of the Guaranty Association is to step in when an insurer becomes insolvent. *See Builders Transport, Inc. v. South Carolina Prop. and Cas. Ins. Guar. Ass'n*, 307 S.C. 398, 404, 415 S.E.2d 419, 423 (Ct. App. 1992). However, the Guaranty Association would not step in when an underlying loss would not have been covered by the insolvent insurer's policy in the first place. Therefore, the General Assembly deemed it appropriate to define "covered claim" to include only those claims that are "within the coverage" of the policy. Likewise, the Guarantee Association is not expected to provide coverage with limits that are higher than the underlying insolvent insurer's policy. Therefore, the statute also defines a "covered claim" to be one "subject to the applicable limits" of the underlying insurance policy. Thus, when the General Assembly uses the phrase "within the coverage," it means within the terms and conditions of the policy. If the General Assembly intended to mean "within the limits," it clearly knew how to communicate that meaning in plain and unambiguous terms. Therefore, when the General

Assembly uses the phrase "within the ***coverage***" in § 38-77-142, it did not mean "within the ***limits***."

The General Assembly uses the phrase "within the coverage" again in § 38-31-100. Once again, the context of the statute makes clear that "within the coverage" means within the terms and conditions of the policy, not the limits. "A person who has liquidated by settlement or judgment a claim against an insured under a policy issued by an insolvent insurer, and the claim is a covered claim and is also a claim ***within the coverage*** of any policy issued by a solvent insurer, must be required first to exhaust all ***coverage*** and ***limits*** provided under the policy issued by the solvent insurer before execution, levy, or any other proceedings are begun to enforce any judgment obtained against . . . the insured of the insolvent insurer." S.C. Code Ann. § 38-31-100(5). Furthermore, "[a]ny amount payable on a covered claim under this chapter, . . . must be reduced by the full ***limits*** of such other ***coverage*** as set forth on the declarations page of the policy issued by the insolvent insurer." *Id.*

The General Assembly uses the term "within the coverage" three times in the insurance context. Its use in §§ 38-31-20 and 38-31-100 make the conclusion abundantly clear: If the General Assembly meant "within the limits" when it said "within the coverage" in § 38-77-142, it would have used the word "limits." It did not. Therefore, § 38-77-142 does not preclude a step-down provision, especially in the context of a flight from law enforcement or a felony exclusion.

The General Assembly's use of the phrase "within the coverage" outside of the insurance context also does not subject itself to a reasonable interpretation that would allow "within the coverage" to mean "within the limits." Rather, the phrase means within the scope of the statutes, just as the phrase in this context means within the scope of the policy's terms. *See e.g.*, S.C. Code Ann. § 59-152-25 (D) (Defining "partnership" in the context of First Steps organizations to include

certain organizations "formed to further, within the coverage area, the purpose and goals of the First Steps initiative . . . .").

Just as the General Assembly's use of the word "within the coverage" connotes a specific intent, the General Assembly uses the term "limits" in Chapter 77 of Title 38 when it means limits. *See, e.g.*, S.C. Code Ann. § 38-77-140 (requiring minimum "limits" of coverage, and not using the word "coverage" at all); S.C. Code Ann. § 38-77-141 (requiring a notice that "Your uninsured . . . ***coverage*** has increased to the ***limits*** of your liability ***coverage*** . . . ."); S.C. Code Ann. § 38-77-150 (requiring policies to provide coverage "within limits which may be no less than the requirements of Section 38-77-140."); S.C. Code Ann. § 38-77-160 ("Automobile insurance carriers shall offer . . . uninsured motorist ***coverage*** up to the ***limits*** of the insured's liability coverage . . . ."); S.C. Code Ann. § 38-77-250 (requiring insurers of non-fleet private passenger policies to provide certain liability insurance information to claimants, including "the ***limits*** of ***coverage***"); S.C. Code Ann. § 38-77-350(B) (holding that a properly executed UM/UIM Offer Form precludes any claim against the insurer or agent "for the insured's failure to purchase optional ***coverage*** or higher ***limits***."); S.C. Code Ann. § 38-77-30(12) (defining "renewal" to include delivery of a policy "to provide the types and ***limits*** of ***coverage*** at least equal to those contained in" the prior policy).

Just as the Guaranty Fund statute's definition of "covered claim" is intended to provide that the scope of the Guaranty Fund's coverage must be the same as the coverage provided by the insolvent insurer's policy, the purpose of the omnibus statute is to require that named insureds and other statutory insureds – particularly, permissive users – receive the same treatment under the policy. The statute focuses on ***who*** must be insured, not what conduct must be insured. If the policy would otherwise exclude – or in this case, reduce – coverage for the named insured, then

the same provision may apply to the permissive user. Section 38-77-142 simply prohibits a provision that targets a permissive user merely due to his or her identity as a permissive user.

In this case, Nationwide's felony and flight from law enforcement exclusions treat all statutory insureds the same. Whether the driver/defendant is the named insured, a resident relative, or a permissive user, the exclusion applies to the full extent permitted by South Carolina law – that is, it reduces coverage to the minimum amount required by the Financial Responsibility Act. Because the exclusion applies equally to all statutory insureds, the reduction of limits is "within the coverage" of the contract, and the exclusion does not violate § 38-77-142 or any other portion of the applicable insurance statutes.

C. The Supreme Court's use of the phrase "within the coverage" in numerous cases shows that "within the coverage" does not mean "within the limits."

Respectfully, just as the General Assembly uses the phrase "within the coverage" to mean within the terms and conditions of a policy, the South Carolina Supreme Court has repeatedly used the phrase "within the coverage" and similar language as one that connotes whether a policy's terms provide coverage, not the limits of coverage. *See, e.g. Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009) ("The trial court determined that the homeowner's claim fell within the policy's coverage . . . ."); *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) ("If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend."); *USAA Prop. and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008) ("whether the allegations in a Complaint are sufficient to bring the claims within the coverage of an insurance policy . . . ."); *Firstland Village Associates v. Lawyer's Title Ins. Co.*, 277 S.C. 184, 187, 284 S.E.2d 582, 584 (1981) ("This theory, if adopted, would not bring the second amendment within policy coverage. The policy expressly excludes coverage for loss of

damage by reason of the original restrictions . . . ."); *Grantham v. U.S. Fidelity & Guar. Co.*, 245 S.C. 144, 146, 139 S.E.2d 744, 745 (1964) ("[T]he defendant denied liability upon the ground that bodily injury to the insured occurred while she was occupying an automobile 'furnished for the regular use' of her husband within the meaning of the foregoing exclusion and was therefore not within the coverage afforded by the policy."). This string cite is just a small sample of over fifty cases in which the Supreme Court uses "within the coverage" or another similar phrase regarding insurance. In all but one of those cases, the context shows that the Court treats the phrase "coverage" to mean the terms of the policy, not the limits. The sole exception that the undersigned could locate was a case from 1939 in which the Supreme Court stated: "We are not here confronted with a case where a settlement could be had within the coverage, and thus save the appellant harmless . . . ." *Cherry v. Shelby Mut. Plate Glass & Cas. Co.*, 191 S.C. 177, 4 S.E.2d 123, 126 (1939). The case is a lone outlier in a sea of examples where the Supreme Court uses the phrase "within the coverage" to mean within the terms and conditions of the policy, not the "within the limits."

The case of *Charles v. Canal Ins. Co.*, 238 S.C. 600, 121 S.E.2d 200 (1961), provides an apt example of the difference between "coverage" and "limits." The parties agreed "the loss was within the coverage." Moreover, the parties did not dispute the amount of the value of the damaged equipment. *Id.* at 602, 121 S.E.2d at 201. However, the entire dispute in the case involved the amount of the limit that applied to the loss. The insurer argued that "the coverage was limited, by a policy endorsement, to $2,000 less $250 deductible, on each of two pieces of equipment . . . ." *Id.* Therefore, as used in that case, "within the coverage" could not possibly mean "within the limits of coverage."

When the General Assembly used the phrase "within the coverage," it did not mean "within the limits." On its face, the omnibus statute does not reference minimum coverage. That matter is addressed in Section 38-77-140. Rather, the omnibus statute deals with who must be included as an insured and then addresses other insurance matters.[4] If the General Assembly intended such a drastic sea change in South Carolina's coverage law by prohibiting ***any*** exclusion that reduces the policy limits below the amount stated on the policy's declaration pages, then it would have made that intention much more clear. Also, the statute was enacted in 1997. It is difficult to believe that the provision would have gone unlitigated and unnoticed for nearly seventeen years if the General Assembly had really intended to preclude all exclusions that reduce coverage to the minimum limits.

In sum, regardless of who must be insured under the omnibus statute, the Nationwide policy's "coverage" contains an exclusion that applies when that person – whether the named insured or someone else – is committing a felony or fleeing from law enforcement. Because the exclusion does not treat one omnibus insured differently from another and it does not otherwise violate South Carolina's public policy, the exclusion is valid and enforceable for any limits in excess of the mandatory minimum.

CONCLUSION

For the above-stated reasons, the Circuit Court's holding should be reversed and the exclusions should be applied according to their plain terms. Nationwide's flight from law

[4] Subsection (A) states that any contract that provides coverage for use of a nonowner automobile must include a provision requiring permission or consent of the owner of the automobile for the insurance to apply. Subsection (B) states that an insurer who has actual notice of a motion for judgment or complaint having been served on an insured cannot raise the insured's failure to turn over the motion or complaint as a defense to coverage and provides protections for the insurer that steps in to defend from sanctions for an insured's failure to comply with discovery.

enforcement and felony exclusions plainly apply under the facts of the case. The Circuit Court found that Mayfield was both fleeing from law enforcement and committing a felony at the time of the accident. Because the exclusions merely limit the amount of coverage for conduct that South Carolina has already deemed criminal, the exclusions promote public policy and should be enforceable. The Supreme Court's holding in *Williams* applies only to arbitrary and capricious exclusions that violate South Carolina public policy. In contrast, Nationwide's flight from law enforcement and felony exclusions are reasonable, logical, and fair exclusions that support South Carolina public policy by dissuading illegal conduct. Section 38-77-142 does not prohibit this type of reasonable exclusion. Therefore, the Circuit Court should be reversed and judgment should be entered in favor of Nationwide.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Jrmurphy@murphygrantland.com
Wsawyer@murphygrantland.com
Attorneys for Appellant

Columbia, South Carolina
September 12, 2016

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000679

Nationwide Mutual Fire Insurance Company..... Appellant.

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, Deborah Timms, ... Respondents.

CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Respondent, certify that the Initial Brief of Appellant and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

September 12, 2016

J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Appellant

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000679

Nationwide Mutual Fire Insurance Company..... Appellant.

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, Deborah Timms, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the following and their counsel of record as follows:

Milford O. Howard, III, Esquire
Howard Law Firm, P.A.
Post Office Box 9754
Greenville, SC 29604
Attorney for Christopher Timms

Michael F. Mullinax, III, Esquire
P.O. Box 2665
509 North McDuffie Street
Anderson, SC 29622
Attorney for Sharmin Walls

J. Kirkman Moorhead, Esquire
Krause, Moorhead & Draisen, P.A.
207 East Calhoun Street
Anderson, SC 29621
Attorney for Randi Harper

September 12, 2016

J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire

Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Appellant