

The State of South Carolina In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2017-001348

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JUL 12 2017

SC Court of Appeals

NATIONWIDE INSURANCE COMPANY
OF AMERICA,

Respondent,

v.

KRISTINA KNIGHT, Individually and as
Personal Representative of
THE ESTATE OF DANIEL KNIGHT,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

Does Respondent's automobile insurance policy, which seeks to exclude all portable UIM and UM coverages to statutory insureds, violate South Carolina public policy?

STATEMENT OF THE CASE

On February 2, 2016, Danny Knight was killed by a negligent driver in an Anderson County motor vehicle collision.

On July 18, 2016, Respondent sued Appellants seeking a declaration that its policy was not required to provide any coverage to Danny Knight. (*Complaint* Page 4)

On September 29, 2016, Appellants filed an Answer and Counterclaim. Appellants asked the court to declare that Respondent's policy excluding UIM coverage to Danny Knight violated South Carolina public policy and that they were entitled to recovery of the insurance policy limits (\$25,000). (*Answer and Counterclaim* Pages 2, 5)

On October 7, 2016, Respondent filed a reply denying Appellants' counterclaim. (*Plaintiff's Reply to Defendant's Counterclaim*)

On March 9, 2017, Respondent filed a motion for summary judgment. (*Plaintiff's Motion for Summary Judgment*) On April 13, 2017, Appellants filed a motion for summary judgment. (*Motion for Summary Judgment*) On May 22, 2017, the trial court conducted a hearing on the parties' cross motions for summary judgment. On May 26, 2017, the trial court granted Respondent's motion for summary judgment and denied Appellants' motion for summary judgment. (*Order Granting Plaintiff's Motion for Summary Judgment* at 1)

On June 12, 2017, Appellants filed a notice of appeal. (*Notice of Appeal*).

FACTS

On February 2, 2016, Randy M. Mincey was driving a 2007 Saturn east on Monroe Street in Anderson. Meanwhile, a 1998 Honda motorcycle was traveling north on Market Street. Mincey, inattentive, failed to yield and drove the Saturn onto Market Street and into the path of the motorcycle. The vehicles collided and the motorcycle rider was ejected. His head hit the road surface. The impact caused a severe head injury and death. (*Answer and Counterclaim* at 2) The rider and owner of the motorcycle was Danny Knight, Kristi Knight's husband. (*Death Certificate, Marriage License, Memorial*). The liability carrier for the at-fault driver, and the UIM carriers for Danny's

motorcycle insurance and automobile insurance paid their respective policy limits. (Complaint at 2) Respondent stipulates that the damages exceed the coverage of the policy. (*Stipulation and Agreement*)

Before the fatal collision, Nationwide issued an automobile insurance policy, policy number 6139D 065876, on a 1996 Ford Ranger owned by Kristina Knight (hereinafter Kristina). Kristina opted to purchase UIM coverage and paid the extra premium for that coverage. That policy was in good standing on the date of her husband's death. The policy provided for underinsured motorist coverage to Kristina and all resident relatives (*i.e.*, statutory insureds) as required by the South Carolina automobile insurance statute. (*Answer and Counterclaim*) However, by endorsement, the policy sought to exclude all coverage, including the portable UIM and UM coverage, for Kristina's late husband Danny Knight. (*Complaint*) Nationwide denied the widow's UIM claim. (*Complaint* at 2-3)

ARGUMENTS

1. An automobile insurance policy provision that eliminates mandatory, minimum, portable UIM coverage of a statutory insured is void because it violates South Carolina public policy.

Nationwide v. Knight is an important public policy case because an order affirming summary judgment for Respondent will eliminate UM and UIM coverage for thousands of South Carolina families.

(Exhibit 7, Appellants' *Motion for Summary Judgment*) Respondent continues to use the excluded driver endorsement broadly on policies across the State. (Respondent's Answers to Interrogatories)

The statutory purpose of the automobile insurance statute is to provide that, "every automobile insurance risk which is insurable on the basis of the criteria established in this chapter is entitled to automobile insurance." S.C. Code Ann. § 38-77-10. The statute directs the trial courts to "liberally construe[]" the statutory language "in order to achieve its purposes." S.C. Code Ann. § 38-77-20.

This is a case about underinsured motorist insurance "portability." "[P]ortability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident." *Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 181, 178, 700 S.E.2d 283 (2010).

The South Carolina UIM statute states as follows:

Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers *shall also offer*, at the option of the insured, underinsured motorist coverage *up to the limits of the insured liability coverage* to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, *an insured or named insured* is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that

the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the *insured's or named insured's* vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

See S.C. Code Ann. § 38-77-160 (emphasis added). The Legislature required the policy include UIM coverage for the "named insured" as well as "insured."

The South Carolina automobile insurance statute defines "insured" to include the insured person (or persons named in a policy) and "[w]hile resident of the same household, the spouse of any named insured and relatives of either." S.C. Code Ann. § 38-77-30 (definitions). It is undisputed that Danny was Kristina's spouse. The couple was married in Anderson on December 2, 2015, after the policy was issued and about two months before the fatal motor vehicle collision. Danny and Kristina were living in the same residence on the date of Danny's fatal collision. (Exhibits 3,4, 13, and 14 attached to Appellants *Motion for Summary Judgment*)

South Carolina has a strong, remedial public policy requiring insurance companies who write automobile insurance in this State provide portable UM or UIM coverages to insureds and their families:

Our supreme court has previously explained, "uninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to the insured." *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5,

12, 339 S.E.2d 501, 504 (citing *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973)). The court further clarified in *Hogan* that "unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household *at all times and without regard to the activity* in which they were engaged at the time. *Such coverage is nowhere limited in the statute to the use of the insured vehicle.*" *Hogan*, 260 S.C. at 162, 194 S.E.2d at 892. Similarly, the statutory purpose of UIM coverage is to provide coverage in the event damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured. S.C. Code Ann. § 38-77-160. Thus, *our UIM statute is also remedial in nature and enacted for the benefit of injured persons. It should be construed liberally to effect the purpose intended by the legislature. See Sloan v. Greenville County*, 356 S.C. 531, 564, 590 S.E.2d 338, 356 (Ct. App.2003) (reasoning that the provisions of a code should be construed liberally if the code is remedial in nature).

Understanding that UIM coverage is a variation of UM coverage, we believe that *Hogan* indicates the legislative intent behind our UIM statute and is applicable here. In other words, under insurance, like un insurance, *is personal and portable*. "In jurisdictions where the coverage follows the person any person who enjoys the status of an insured under a motor vehicle policy of insurance which includes uninsured/underinsured coverage enjoys coverage protection simply by reason of having been injured by an uninsured/underinsured motorist." 9 Couch on Ins.3d § 123:3.

Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 201-02, 603 S.E.2d 861 (S.C. App., 2004), *rev'd on other grounds*, 644 S.E.2d 40, 373 S.C. 37 (S.C., 2007).

Nationwide cannot by policy endorsement eliminate coverage of insureds that is mandated by statute. "[A]ny limiting language in an

insurance contract which has the effect of providing less protection than made obligatory by the statute is contrary to public policy and is of no force and effect." See *Ferguson v. State Farm Mut. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522 (1973); see also *Nationwide Mut. Ins. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985). Any policy provision in Respondent's policy that limits the Legislature's mandatory portable coverage must be declared void. "A policy of automobile insurance must provide at least the minimum amount of coverage outlined in the statute, and 'a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended.'" *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609 (2013) (quoting *Kay v. State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App.2002)); *Jackson v. State Farm Mutual Auto. Ins. Co.*, 288 S.C. 335, 342 S.E.2d 603 (1986); and *Giles v. Whitaker*, 297 S.C. 267, 376 S.E.2d 278 (1989). Therefore, the minimum limits UIM coverage on this policy cannot be excluded by Respondent. Nationwide's policy endorsement language that purports to exclude it for Danny Knight must be declared void.

2. Section 38-77-340, a provision that sets forth procedures allowing automobile insurance companies to exclude liability insurance coverage to a resident relative, does not authorize them to also exclude mandatory minimum, portable UM and UIM coverages those family members.

The South Carolina Legislature permits automobile insurance companies to make policy endorsement agreements with insureds to exclude *liability* insurance coverage for resident relatives. The procedures for entering such *liability* insurance coverage exclusions are set forth in Section 38-77-340.

Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such *a policy of liability insurance* shall not apply while the motor vehicle is being operated by a natural person designated by name.

S.C. Code Ann. § 38-77-340 (emphasis added). This Section only relates to *liability coverage*. However, Nationwide uses the endorsement over-broadly to exclude all coverages including mandatory, minimum, portable UM and UIM coverage.

When construing a statute, courts must determine the intent of the legislature. See *Horn v. Davis Elec. Constructors, Inc.*, 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its operation. See *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 229, 417 S.E.2d

592, 593 (1992). One principle of statutory construction is that a court must assume the legislature intended to accomplish something through an enacted statute and did not engage in futile action. See *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 288, 403 S.E.2d 662, 666 (Ct. App. 1991). A statute ought to be read so that, “no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law.” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

The Order acknowledged that Section 38-77-340 was applicable only to, “a policy of liability insurance.” However, the Court ruled that, “In this context . . . [it] must encompass all coverages provided to the policyholder because UIM coverage cannot be sold as a stand-alone policy.” (Order at 3) By lumping all coverages together, the Circuit Court overlooked the practical and public policy differences between liability coverage on the one hand, and UM and UIM coverage on the other. As shown below, the distinctions must be considered to properly analyze the statutory language. Otherwise, the language of the statute does not make sense.

Obviously, the South Carolina Legislature understood the public policy distinctions between these types of coverages and the narrowly

written statute section it enacted reflects it. The italicized phrase ("*a policy of liability insurance*") shows that Legislature meant to limit the exclusion permitted to liability coverage only. If the Legislature meant to grant insurance companies the authorization to exclude all coverages, the statute would simply say, "a policy of insurance shall not apply." Instead, Legislature included the limiting word "liability" after the words "policy of." An illustration how the word "liability" adds nothing to Nationwide's alleged interpretation of this Section follows:

policy of ~~liability~~ insurance shall not apply

The only logical reason the Legislature had for including the word "liability" after the words, "policy of" was to make clear that the excluded driver endorsement allowed is limited to just "liability coverage." Otherwise, the additional word, "liability" after the words "policy of" serves no purpose. It is a nonsensical surplusage. Superfluous.

The Legislative intent to limit the allowed exclusion to just the liability insurance coverage is also indicated because the sentence also references *operation* of the insured vehicle. "[C]overage under such a policy of liability insurance shall not apply *while the motor vehicle is being operated . . .*" S.C. Code Ann. § 38-77-340 (emphasis added)

Under South Carolina public policy, liability insurance coverage follows the vehicle. UIM (and UM) coverage, on the other hand, follow the person.

UIM coverage follows the person; in others it follows the vehicle. We believe that South Carolina falls in the category where UIM coverage follows the person, as is the case with uninsured motorist ("UM") coverage.

Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 201-02, 603 S.E.2d 861 (S.C. App., 2004), *rev'd on other grounds*, 644 S.E.2d 40, 373 S.C. 37 (S.C., 2007). Liability insurance coverage is the only kind of automobile insurance coverage in a policy that is implicated by the careless *operation* of a motor vehicle (using the word the Legislature included in Section 38-77-340). Thus, by limiting the "coverage" exclusion allowed to persons operating the insured vehicle, the Legislature confirmed its intent to limit the allowed exclusion to just liability insurance coverage.

The purpose of allowing insurance companies to exclude liability coverage to some drivers makes sense as a public policy. It allows an insured and an insurance company to exclude a high risk resident relative from the liability insurance coverage related to his operation of an insured vehicle. Thus, the named insured and company can set an affordable premium on the car insurance.

The purpose of this section is to "alleviate the problem often faced by the owner of a family policy, who . . . has a

relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage.”

Lincoln General v. Progressive, 406 S.C. 534, 753 S.E.2d 437, 441

(S.C. Ct. App. 2013) (citation omitted). The primary benefit associated with excluding a driver on an automobile insurance policy relates to the liability insurance coverage risk implicated by operation of an insured vehicle by a high risk driver. On the other hand, there is little associated insurance risk of providing that same high risk driver portable UIM and UM coverage. UIM and UM coverages are only implicated when the negligence of a third party causes a collision. Therefore, no public policy purpose of reduced premiums is served by expanding Section 38-77-340 to allow exclusion of portable UM and UIM coverages.

For all of the above reasons, Nationwide’s endorsement that attempts to exclude portable UM and UIM coverages to resident relatives of their insureds is not authorized by Section 38-77-340 and violates South Carolina public policy.

CONCLUSION

For the reasons stated, this Court must reverse the judgment of the Circuit Court and remand the case with instructions to enter judgment in favor of Appellants.



July 11, 2017

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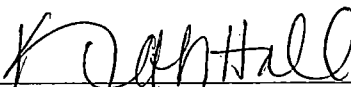
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SC Court of Appeals

Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and the Designation of Matter to be Included in the Record on Appeal on Nationwide Insurance Company of America by depositing a copy of them in the United State Mail, postage prepaid on July 12, 2017, addressed to its attorney of record, Adam J. Neil, Esq., Murphy and Grantland, P.A., P.O. Box 6648, Columbia, SC 29260.



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July **12**, 2017

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Nationwide Ins. Co. of Am. vs. Kristina Knight and The Estate of Daniel P. Knight*
Civil Action #: 2017-001348
Our File #: 201649115

Dear Ms. Kitchings:

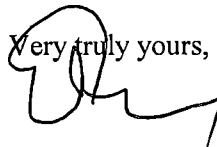
I am enclosing the following for filing:

1. Initial Brief of Appellants;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

I have included an extra copy of each, which I would appreciate you clocking in and returning to the courier from our office. By copy of this letter, I am hereby serving the same on opposing counsel.

Should you have any questions concerning this letter, please do not hesitate to contact me.

Very truly yours,



EDWIN L. TURNAGE
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Enclosures

cc: Adam J. Neil, Esquire (w/enclosures)

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