THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Civil Action No. 2015-CP-40-07254
Appellate Case No. 2016-001710

Andrew P. Neumayer.....Respondent,

v.

Philadelphia Indemnity Insurance Company, Primary Colors Child Care Center, Jocelyn Knox DeMartelare, and Asia N. Partman..... Defendants,

Of Whom Philadelphia Indemnity Insurance Company is .....Appellant.

APPELLANT'S FINAL REPLY BRIEF

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April 7, 2017

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I. RESPONDENT'S RESPONSES TO PHILADELPHIA'S ARGUMENT THAT THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT ONLY $25,000.00 IN COVERAGE IS AVAILABLE FOR THE UNDERLYING ACTION ARE NOT PERSUASIVE.

In Section I of his brief, Respondent attempts to explain how the arguments set forth in Section I of Philadelphia's initial brief are incorrect. As set forth herein, his attempts are unavailing.

A. Respondent asserts, but does not actually show, that compliance with the Notice Clauses was not a condition precedent to coverage under the Policy.

Section I.A. of Respondent's brief is entitled "Compliance with the Notice Provision Is Not a 'Condition Precedent' to Coverage." Resp. Br. at 7. Notably, however, nothing in this six-page section—which comprises approximately one-third of the argument portion of Respondent's brief—actually establishes the proposition used as the section's title. Instead of establishing that proposition, Respondent spills a great deal of ink in an effort to distinguish the cases cited in Section I.A. of Philadelphia's initial brief. In doing so, he overstates the very narrow reason for Philadelphia's citation of those cases, which is that they lend support to the assertion that notice clauses in insurance policies are generally considered conditions precedent to coverage. Respondent cites no authority to the contrary and, revealingly, he does not engage with the text of the Notice Clauses at all. See, e.g., Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.").

To reiterate, the title of Section IV of the Policy's Business Auto Coverage Form is "BUSINESS AUTO CONDITIONS." (R. p. 63). The first sentence of Section IV.A.2.

states: "*We have no duty to provide coverage* under this policy *unless* there has been *full compliance with the following duties*[.]" (emphasis added). (R. p. 63). This language unambiguously states that the occurrence of one thing—Philadelphia's duty to provide coverage—is not triggered unless another thing—full compliance with certain duties—occurs first. In other words, the duty to provide coverage is conditioned upon prior compliance with other duties. Those duties, which are that the insured must (a) give Philadelphia prompt notice of an "accident" or "loss" and (b) immediately send Philadelphia copies of any documents concerning a claim or "suit," are by definition conditions precedent, and Section I.A. of Respondent's brief fails to demonstrate otherwise. See also, e.g., Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 149-50, 328 S.E.2d 132, 132 (Ct. App. 1985) (affirming a trial court order holding that a policy provision requiring the insured to "immediately forward [to the insurer] any summons, process, etc., received by him or his representative" was a condition precedent).

B. Respondent suggests, but does not actually show, that coverage was triggered under the Policy.

Section I.B. of Respondent's brief is entitled "PIC's Argument that Coverage was Not Triggered At All is Wrong." Resp. Br. at 14. This title suggests a forthcoming argument demonstrating that coverage was triggered under the Policy, but such an argument never comes. Rather, Respondent merely protests that Philadelphia "summarily" contends it suffered prejudice[1] and misstates the holding of Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993).

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[1] Philadelphia is somewhat surprised Respondent has chosen to make this an issue in light of the parties' agreement that, for summary judgment purposes, substantial prejudice would be presumed so that the courts could adjudicate the determinative issue of whether the Notice Clauses are valid and enforceable under S.C. Code Ann. § 38-77-142.

Respondent points out that Philadelphia has not proffered a defense to the claims asserted in the Underlying Action or challenged the propriety of the Judgment, to which Philadelphia responds: "Of course not!" The entire basis for Philadelphia's coverage position is that it was deprived of its right—the protection of which the Supreme Court has described as the "obvious function" of insurance policy notice provisions[2]—to conduct an investigation into and seek discovery regarding the merits of Respondent's claims and the amount of his damages (if any). How else could Philadelphia have obtained the evidence Respondent now complains is absent from the record? In any event, as set forth in footnote 4 of its initial brief, Philadelphia has suffered substantial prejudice as a matter of law and was not required to proffer a defense to Respondent's claims or contest the amount of damages awarded. See also, e.g., Merit Ins. Co. v. Koza, 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980) ("[P]rejudice is clearly established by the fact that a default judgment was entered against the insured."); Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC, 2:13-cv-03035-DCN, 2016 WL 3189213, at *12 (D.S.C. June 8, 2016) ("[I]t is clear from Koza that the entry of a default judgment establishes substantial prejudice[.]").

Respondent next asserts that, under Shores, "the at-fault insured's failure to forward the suit papers will not affect the injured third-party's ability to make a claim under the at-fault insured's liability policy." Resp. Br. at 14. But that was not the holding of Shores. Indeed, the Supreme Court had already held 22 years earlier that "in an action

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[2] "The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured." Factory Mut. Liab. Ins. Co. of Am. v. Kennedy, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971).

affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery . . . ." Factory Mut., 256 S.C. at 381, 182 S.E.2d at 729. That holding, however, was subject to the following caveat: " . . . unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights." Id. at 381, 182 S.E.2d at 729-30. The holding of Shores expanded the principle discussed in Factory Mutual to provide, pursuant to the public policy reflected by the passage of mandatory automobile insurance laws, that the minimum limits coverage required by S.C. Code Ann. § 38-77-140 may not be defeated or voided by the insured's breach of a notice provision *even if* the insurer was substantially prejudiced by the breach. Shores, 315 S.C. at 356, 433 S.E.2d at 917. The question presented in this case is whether Section 38-77-142 expanded Shores such that an automobile insurer is now responsible to pay the full amount, up to its policy limits, of any judgment against an insured notwithstanding the fact that the insurer's first notice of the lawsuit was its receipt of the order of judgment. Philadelphia asserts the answer is no.

C. *Markosky* is still good law with respect to the validity and applicability of notice clauses.

In Section I.C. of his brief, Respondent conducts a survey of a number of South Carolina appellate opinions with the goal of establishing that United Services Automobile Association v. Markosky, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000), is not controlling in this case. However, because (a) Markosky was the last reported opinion to address the effect of an insured's failure to comply with a notice clause in an automobile liability policy, resulting in substantial prejudice to the insurer, and (b) its central holding—that where an insured's failure to comply with a notice clause results in

substantial prejudice to the insurer, the policy provides no coverage in excess of the mandatory minimum coverage limit—has never been questioned or overruled, that holding remains good law and does indeed control the outcome of this case.

Respondent recognizes the central holding of Markosky but asserts that, because the underlying lawsuit in that case was filed in 1995 and concerned an accident that occurred in 1994, Markosky is no longer applicable in light of the changes to automobile insurance statutes that took effect in 1999. He points to footnote 2 of the Markosky opinion as support for this assertion. However, that footnote merely addressed an argument based on S.C. Code Ann. § 38-77-110, which was repealed effective March 1, 1999. Obviously, the court's discussion of that argument could not have prospective application because the statute at issue is no longer on the books. Nothing in footnote 2 or any other portion of the Markosky opinion indicates the court's analysis of the insured's failure to comply with the policy's notice clause—and the impact of that failure on coverage—was limited to the facts of the case.

Respondent then turns to a discussion of Cowan v. Allstate Insurance Co., 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002), which he refers to as "Cowan I," and Cowan v. Allstate Insurance Co., 357 S.C. 625, 594 S.E.2d 275 (2004), which he refers to as "Cowan II." Respondent notes that the Court of Appeals distinguished Markosky in Cowan I, but what is not clear from Respondent's brief is that it was *the injured parties*, Kevin Cowan and Jimmy Blanding, who invoked Markosky in Cowan I. In response to Allstate's argument that the holding of Shores had not survived the enactment of Section 38-77-142 (specifically subsection (B) of that statute), Cowan and Blanding pointed to Markosky to show that Shores remained applicable because the Court of Appeals applied

Shores in Markosky, which was decided in 2000, after Section 38-77-142 had taken effect. Cowan I, 351 S.C. at 630, 571 S.E.2d at 717. It was in this context that the Court of Appeals attempted to distinguish Markosky, finding that it could not be read to mean that Shores survived the enactment of Section 38-77-142 because the accident at issue occurred before the statute's effective date. Id. The Supreme Court would subsequently reverse the finding that Section 38-77-142 modified Shores. Cowan II, 357 S.C. at 629, 594 S.E.2d at 277 ("We hold that § 38-77-142(B) does not impact the holding in Shores v. Weaver[.]").

At issue in both Cowan I and Cowan II was a sentence in Section 38-77-142(B) which states:

> 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.

Allstate argued, and the Court of Appeals agreed, that this sentence impliedly allowed Allstate to avoid coverage in any amount—even the statutory minimum amount mandated by Shores—if it did not have actual notice of the lawsuit. However, the Supreme Court disagreed, finding that because the sentence identifies only two parties, the insurer and the insured, the Court of Appeals was wrong to find that it impacted the insurer's obligation, under Shores, to the injured party. Cowan II, 357 S.C. at 629, 594 S.E.2d at 277. Accordingly, Allstate was required to pay the injured party's judgment (the amount of which was less than the statutory minimum coverage limits).

The Supreme Court further held, in Cowan II, that Section 38-77-142(B) "provides that despite an insured's failure to comply with a cooperation clause requiring

him to forward pleadings, the insurer must honor all its obligations under the policy *if it has actual notice of those pleadings*." Id. (emphasis added). However, nothing in Cowan II (or Cowan I) addressed the situation that exists in this case, i.e. the situation where the insurer does *not* have actual notice of the pleadings and is substantially prejudiced as a result. The last case to address that issue was Markosky, and neither Cowan I nor Cowan II impacted the holding in that case that where an insured's failure to comply with a notice clause results in substantial prejudice to the insurer, the policy provides no coverage in excess of the mandatory minimum coverage limit.

Respondent last turns to Williams v. Government Employees Insurance Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014), which Philadelphia has already addressed in Section II.B. of its initial brief. In the interest of brevity, Philadelphia refers the court to that discussion in response to Respondent's arguments regarding Williams. Philadelphia emphasizes, however, that (a) Williams did not overrule Markosky, nor did Williams have anything at all to say about notice clauses, and (b) unlike in Williams, the date of the accident at issue in Markosky is irrelevant in this case because, as explained in Philadelphia's initial brief, nothing in Section 38-77-142 affected the validity of notice clauses.

To summarize and reiterate, Markosky was the last appellate opinion to address the effect of an insured's failure to comply with a notice clause in an automobile liability policy, resulting in substantial prejudice to the insurer. Accordingly, Markosky remains good law as to that issue. Though Respondent points out that Markosky's central holding "has never been cited with approval by the Supreme Court," Resp. Br. at 20, a Court of Appeals opinion does not require the Supreme Court's seal of approval to become

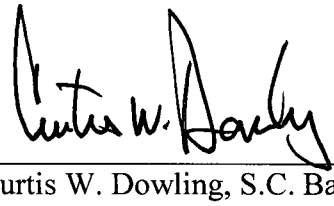
controlling law. Unless and until the Supreme Court overrules Markosky, it represents binding precedent and it controls the outcome of cases, like this one, where an insured's failure to comply with a notice clause in an automobile liability policy results in substantial prejudice to the insurer. In such cases, the policy provides no coverage in excess of the mandatory minimum coverage limit. Markosky, 340 S.C. at 230-31, 530 S.E.2d at 664.

II. RESPONDENT'S RESPONSES TO PHILADELPHIA'S ARGUMENT THAT THE CIRCUIT COURT ERRED IN HOLDING THE NOTICE CLAUSES ARE VOID UNDER SOUTH CAROLINA LAW ARE NOT PERSUASIVE.

Section II of Respondent's brief largely repeats unpersuasive arguments that have already been addressed *infra* or in Philadelphia's initial brief. However, Respondent makes the additional assertion that Philadelphia "overstates" the Circuit Court's holding, Resp. Br. at 22, and labels as "hyperbolic" Philadelphia's assertion that the Circuit Court nullified all notice clauses in automobile liability policies under Section 38-77-142. Resp. Br. at 23. In response, Philadelphia would simply ask, "How so?" If the Notice Clauses are void in this case, where the insurer's first notice of a lawsuit against its insured was over 18 months after judgment was entered, when will an insurer ever be able to rely on a notice clause, and to what effect? The truth is that, if the Circuit Court is correct, every notice clause in every automobile liability policy in South Carolina is effectively null and void, even if the Circuit Court refrained from making such a broad declaration in its orders.

CONCLUSION

What Respondent is essentially asking this Court to do is to hold that in 1997, without any fanfare and without anyone realizing it for nearly 20 years, the General Assembly dramatically expanded the holding of Shores such that every automobile insurer in this state is now responsible for the full amount of any judgment rendered against an insured, up to the applicable policy limits, even if the insurer's first notice of a pending lawsuit is its receipt of the order of judgment. Such a holding would almost certainly increase insurance premiums for every South Carolinian and would likely create a plethora of unintended consequences, such as a perverse incentive for injured parties to collude with at-fault insureds to conceal the pendency of litigation from the insurer until after judgment is entered. Nothing in Section 38-77-142 or the few cases applying it indicates the General Assembly intended to or did in fact make such a monumental change in the law. This court should leave it to the legislative branch to thoroughly consider and debate the ramifications of such a change and to make the change clearly and unambiguously should it decide to do so. Accordingly, the Circuit Court's orders should be reversed.



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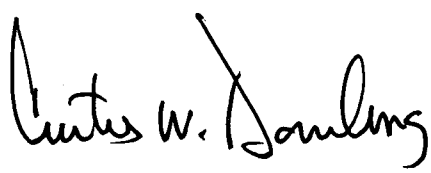
CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing **APPELLANT'S FINAL REPLY BRIEF** complies with Rule 211(b), SCACR.



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