

IN 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

Appellate Case No. 2017-001348

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Nationwide Insurance Company of America.....Respondent

Kristina Knight, individually and as Personal Representative of the Estate of Daniel P. Knight
.....Appellant

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

1. Was the trial court correct when it found that the Excluded Driver endorsement naming Daniel Knight, which was requested and signed by Kristi Call Knight, barred her claim for underinsured motorist (“UIM”) benefits on behalf of the Estate of Daniel Knight?

STATEMENT OF THE CASE

This insurance coverage dispute is the product of an automobile accident that occurred on February 2, 2016. Appellant’s decedent Daniel P. Knight was driving his motorcycle when he was involved in a collision with a vehicle operated by Randy Minley. Mr. Knight subsequently died as a result of injuries he sustained in the accident.

While the motorcycle that Mr. Knight was driving at the time of the accident was insured by another insurance company,¹ Nationwide Insurance Company of America (hereinafter “Nationwide”) provided automobile insurance coverage to Kristi Call² for a different vehicle – a 1996 Ford Ranger – that was not involved in the accident. (R. p. 76). Daniel Knight was excluded from coverage at Mrs. Knight’s written request (hereinafter “excluded driver endorsement”). (R. p. 74). At the time she applied for the policy, Mrs. Knight signed the excluded driver endorsement, which is entitled “Voiding Auto Insurance While Named Person Is Operating Car.” (R. p. 74). The endorsement states, “With this endorsement, *all* coverages in your policy are not in effect while Danny Knight is operating

¹ Appellant represents that Daniel Knight was paid liability insurance benefits by Minley’s liability insurer and underinsured motorist benefits by his motorcycle’s insurer.

² Kristi and Daniel were not married at the time she purchased the Nationwide policy, which was issued with “Kristi Call” as the named insured. When she executed the endorsement, she signed it as “Kristi Call.” By the time of the accident, she and Mr. Knight were married and she is referred to as “Mrs. Knight” in the remainder of this brief.

any motor vehicle.” (Id.) (emphasis added). When she applied for the policy and signed the excluded driver endorsement, Mrs. Knight represented that Mr. Knight had “obtained insurance or other security to operate motor vehicles.”³ (Id.)

There is no dispute that Mrs. Knight executed the excluded driver endorsement and that she represented to Nationwide that Mr. Knight had obtained other insurance. (R. p. 74; p. 13, ¶11). Nor is there any dispute that Mr. Knight actually had other insurance coverage at the time of the execution of the endorsement. (R. p. 8, ¶ 9; p. 13, ¶ 5). Mrs. Knight signed the excluded driver endorsement, thus Mr. Knight was listed as an excluded driver on the policy at the time of the February 2, 2016 accident. Therefore, there are no disputed issues of material fact in this case, and the trial court properly decided the cross-motions for summary judgment in favor of Nationwide.

Nationwide filed a motion for summary judgment on March 9, 2017. The Appellant filed a cross-motion for summary judgment on April 13, 2017. The trial court held a hearing on the matter on May 22, 2017. The Order granting Nationwide’s motion and denying Knight’s cross-motion was signed and filed on May 26, 2017. The Appellant filed her notice of appeal on June 12, 2017.

ARGUMENT

By enacting S.C. Code Ann. § 38-77-340, the General Assembly permitted the use of excluded driver forms in automobile insurance policies issued in the State of South Carolina. Nationwide’s excluded driver endorsement states in plain and unambiguous terms that “all coverages” in the policy are not in effect while “Danny Knight is operating

³ Although it is not necessary for Nationwide to confirm the veracity of this representation, United Financial Cas. Co. v. Bostic, 782 F. Supp. 2d 179 (D.S.C. 2011), the appellant has conceded that this was a true statement.

any motor vehicle.” (R. p. 74). The policy defines “motor vehicle” to include land motor vehicles “designed primarily to be driven on public roads.” (R. p. 99). Mr. Knight’s motorcycle was a land motor vehicle “designed primarily to be driven on public roads.” Therefore, the exclusion applies and the Nationwide policy does not extend *any* coverage – including UIM coverage – for injuries Mr. Knight sustained while operating a motor vehicle.

I. The Excluded Driver Endorsement complies with every requirement of South Carolina Code § 38-77-340.

South Carolina’s excluded driver statute allows for the exclusion of a specific person from the coverage afforded by the policy if certain directives are followed:

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. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver’s license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code Ann. § 38-77-340. In sum, an excluded driver form is valid and enforceable when the form has been approved by the South Carolina Department of Insurance, the endorsement names the excluded driver, and the named insured declares either that the named excluded driver has turned in his license to the DMV or the named excluded driver has an appropriate policy of liability insurance. Once these elements are satisfied – as is

the case here – “coverage under the policy shall not apply” when the excluded driver is operating any motor vehicle.

A. The South Carolina Department of Insurance approved Nationwide’s Excluded Driver Form endorsement.

The first element required for application of § 38-77-340 is that the form must be approved by the South Carolina Department of Insurance. The South Carolina Department of Insurance approved Nationwide’s use of the excluded driver endorsement (Form V-3109-A) on January 28, 2010, with an effective date of January 22, 2010. (R. pp. 123-128).⁴ Thus, Nationwide’s endorsement satisfies the first requirement of § 38-77-340.

B. The Excluded Driver Endorsement names Mr. Knight as the excluded driver, and Mrs. Knight represented on the form that Mr. Knight had an appropriate policy of liability insurance.

The excluded driver endorsement also satisfies the second and third requirements of the statute. The second requirement under § 38-77-340 is that the excluded driver endorsement name the person to be excluded. “Danny Knight” is clearly named as the “excluded person.” (R. p. 74). Lastly, § 38-77-340 requires the named insured – Mrs. Knight – to represent on the form that the excluded driver had turned in his license to the State Highway Department or obtained other appropriate insurance. Here, Mrs. Knight marked the space indicating that Mr. Knight had obtained insurance or other security to operate motor vehicles. (R. p. 74). Therefore, Nationwide’s excluded driver endorsement satisfies each of the elements of § 38-77-340.

⁴ The System for Electronic Rate and Form Filing (SERFF) is managed by the National Association of Insurance Commissioners as a method for facilitating the submission, review and approval of product filings between regulations – such as the South Carolina Department of Insurance – and insurance companies.

II. Despite Appellant's arguments to the contrary, the Excluded Driver Endorsement applies to all coverage under the policy, including Underinsured Motorist Coverage.

Knight erroneously argues that the Nationwide policy does not and cannot exclude UIM coverage because § 38-77-340 only applies to liability coverage. However, neither the statute nor the endorsement supports Mrs. Knight's position. The unambiguous endorsement applies to every coverage afforded by the policy: "With this endorsement, *all* coverages in your policy are not in effect while Danny Knight is operating *any* motor vehicle." (emphasis added). Because the endorsement clearly applies to the entire policy, the only question is whether the exclusion is authorized by the statute. Section 38-77-340 states that "a policy of liability insurance" will not be in effect when a vehicle is being driven by the excluded driver. Upon a cursory review one might conclude, as Appellant suggests, that only liability coverage can be the subject of an excluded driver endorsement. But a closer reading reveals that the statute does not refer to liability coverage; it refers to a "policy of liability insurance." As the trial court found, a "policy of liability insurance" must incorporate every single type of coverage that is part of the policy "because UIM coverage cannot be sold as a stand-alone policy." (R. p. 3). *See also* S.C. Code Ann. §38-77-160.⁵

The General Assembly established a structure for automobile insurance whereby a particular "coverage" is only a subpart of the whole policy of insurance to which the

⁵ Section 38-77-160 requires that "Such [automobile insurance] carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage...." Thus, UIM coverage cannot be sold separate from liability coverage because there would be no way to determine the maximum limit of allowable coverage.

specific coverage is attached. UIM coverage is one type of coverage that is attached to a broader insurance policy. The legislature chose to refer to the whole policy as a “liability policy.” This is made clear by § 56-9-20(5) which defines “Motor Vehicle Liability Policy” to include a policy with any of the coverages described in S.C. Code Ann. §§38-77-140 – 38-77-230. A variety of types of coverage are established in those code sections and UIM coverage is dealt with in § 38-77-160, which means that UIM coverage is plainly within the scope of a “Motor Vehicle Liability Policy.” Thus, the legislature has demonstrated that “liability policy” refers to the complete automobile insurance policy regardless of which type of coverage is implicated in a particular claim.

Second, in arguing against the application of Nationwide’s endorsement, Mrs. Knight contends that it does not apply because Mr. Knight was a statutory insured, i.e. her resident relative. Mrs. Knight essentially claims the endorsement cannot apply to coverage required by statute.⁶ However, this Court already addressed the application of an excluded driver endorsement to mandatory coverage in *Lincoln General Ins. Co. v. Progressive Northern Ins. Co.*, 406 S.C. 534, 753 S.E.2d 437 (Ct. App. 2013), and held the exclusion applies to all coverage under the policy, even when that coverage is mandated by statute.

⁶ Of course, UIM coverage is not mandatory despite Appellant’s efforts to convert “personal and portable” coverage into statutorily mandated coverage. Appellant erroneously cites to this Court’s decision in *Burgess v. Nationwide Mut. Ins. Co.*, 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004), *rev’d*, 373 S.C. 37, 644 S.E.2d 40 (2007). While the *Burgess* opinion notes that uninsured coverage is mandatory and favorably compares treatment of uninsured coverage to that of UIM coverage for some purposes, the opinion does not override §38-77-160, which makes UIM coverage optional at the request of the insured.

The named insured in *Lincoln General* – like Mrs. Knight here – identified her husband as an excluded driver under the policy and executed an excluded driver endorsement. *Id.* at 537, 753 S.E.2d at 438-39. Later, the husband was driving an insured vehicle when he caused an accident. *Id.* Progressive relied on the endorsement and denied liability coverage to the husband. The plaintiff⁷ claimed Progressive’s excluded driver endorsement could not operate as a bar against collection of the statutorily required minimum limits of liability coverage. *Id.* at 538, 753 S.E.2d at 439. The trial court agreed, and granted Lincoln General’s motion for summary judgment. *Id.*

This Court reversed and rejected the argument that an excluded driver endorsement could not exclude statutorily required coverage: “Here, Progressive is not required to provide minimum limits. The named driver endorsement statute says that, ‘[n]otwithstanding the definition of ‘insured’ in Section 38-77-30, ... *a policy of liability insurance shall not apply*’ when the named driver is operating the vehicle.” *Id.* at 541, 753 S.E.2d at 441 (emphasis in original). Therefore, “an insurer’s obligation to provide minimum limits for ‘insureds’ *is inapplicable* when the person named in the endorsement is driving and the statute’s remaining requirements are satisfied.” *Id.* (emphasis added).

Just like Progressive’s exclusion, Nationwide’s excluded driver endorsement follows the language of the statute. “[A]ll coverages in your policy are not in effect while Danny Knight is operating any motor vehicle.” (R. p. 74). Because Knight was operating a motor vehicle at the time of the accident, the policy was not in effect when the accident

⁷ In that case the plaintiff, Lincoln General, was the uninsured motorist coverage provider of the people injured in the accident. Lincoln General sued Progressive claiming subrogation rights and asserted that the excluded driver endorsement was invalid under the facts at issue in that case.

occurred. Knight's estate cannot collect UIM benefits from a policy that was not in effect at the time of the accident. Therefore, Nationwide was entitled to summary judgment in its favor and the trial court's order should be affirmed.

III. Allowing Mr. Knight's estate to collect UIM coverage from a policy in which he is excluded from liability coverage violates the public policy of South Carolina.

Contrary to Appellant's argument, the public policy of South Carolina does not favor the disregard of Nationwide's unambiguous endorsement in this context. In fact, if the Court allows the Knight Estate to collect UIM coverage from Nationwide, the Court would permit an inequity that South Carolina insurance law does not support.

South Carolina adopted the Motor Vehicle Financial Responsibility Act for the purpose of mandating financial protection to injured third-parties. As the Supreme Court stated in *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 380, 182 S.E.2d 727, 729 (1971), liability insurance not only affords protection to the insured motorists,

it serves the public purpose of affording protection to innocent victims of motor vehicle accidents. In recognition of this important public purpose, the legislatures of some states have enacted compulsory liability insurance laws. Others, including our General Assembly, have sought protection for highway victims, short of compulsory insurance, by the enactment of financial responsibility and uninsured motorist statutes.

Id. at 380, 182 S.E.2d at 729. The General Assembly also made it clear in §38-77-160 that South Carolina's drivers should not be allowed to protect themselves with UIM coverage in an amount greater than the liability coverage purchased to protect the general public. This statute mandates that UIM coverage can only be purchased "up to the limits of the insured liability coverage...." If Knight's Estate is allowed to collect UIM coverage from

a policy where he is not afforded liability coverage, this important public policy is thwarted because Knight is protected from accidental injuries he may sustain but he has not protected the public to the same extent – or even at all.

In fact, the Supreme Court has already opined that allowing the excluded driver endorsement 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.” *Lovette v. U.S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980) (internal quotation marks omitted) (discussing predecessor statute). Allowing a policyholder to insure her family members for UIM coverage when she is unwilling to insure the public against her family’s potential for poor driving is certainly not what the Supreme Court or the legislature envisioned. Following the position endorsed by Knight would lead to absurd results when compared to the aforementioned statutory policies.

For example, a father might insure himself for liability coverage, but exclude the rest of his driving family from liability coverage to save the premium expense. However, under Appellant’s position, all of his excluded family members would still have coverage for themselves via uninsured or underinsured motorist coverage. Thus, they have effectively insured themselves with more coverage than they provide for the general public. This position is not justifiable in light of the State’s public policy which allows for the protection of self only to the extent you also protect the community. In fact, Appellant’s position actually harms the public interest by incentivizing the exclusion of drivers to create lower premiums, while still affording them first-party insurance benefits.

To the extent that Appellant's "personal and portable" argument is based on the expressions of public policy about that topic, the argument is a distortion of the policy in light of the overall purpose of the MVFRA statutory scheme. Appellant's argument is also contrary to the language of S.C. Code Ann. § 38-77-340 and the explicit finding of this Court concerning the policy behind that statute. First, the personal and portable nature of UIM coverage applies only to those who are actually insured by the policy. Appellant argues that Mr. Knight is an insured because he was Mrs. Knight's resident spouse. But for the excluded driver endorsement this would be a true statement. However, Appellant's argument fails because the endorsement modifies the statutory definition of "insured." S.C. Code Ann. § 38-77-340 ("Notwithstanding the definition of "insured" in Section 38-77-30...."). This Court recognized that the legislature allows a policyholder and an insurance company to modify the definition of "insured" in this context by agreement.

Thus, "the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes" specifies that an insurer's obligation to provide minimum limits for "insureds" is inapplicable when the person named in the endorsement is driving and the statute's remaining requirements are satisfied. Because the policy is not in effect when the named driver is operating the vehicle and such an endorsement is part of our state's public policy, the MVFRA's mandate that "[t]he liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by the motor vehicle liability policy occurs" does not apply.

Lincoln General, 406 S.C. at 541, 753 S.E.2d at 441.⁸ Again, when a policyholder can

⁸ Nationwide respectfully contends that this Court's opinion in *Burgess* is not persuasive authority because it was reversed by the Supreme Court. However, to the extent that the logic in that decision remains influential, this Court found that the personal and portable coverage is only available to a "person who enjoys the status of an insured under a motor vehicle policy of insurance...." *Burgess*, 361 S.C. at 202, 603 S.E.2d at 865. Because Mrs.

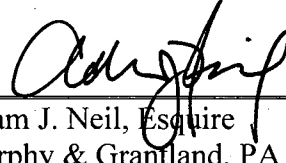
exclude a statutory insured for mandatory liability coverage, the same exclusion must be enforced as to optional UIM coverage.

CONCLUSION

The trial court properly granted Nationwide's Motion for Summary Judgment, and its decision should be affirmed. First, Nationwide's excluded driver endorsement meets all statutory requirements imposed by the legislature. Second, it is undisputed that Mrs. Knight signed the excluded driver endorsement and identified Mr. Knight as an individual to be excluded for *all* coverages provided by Nationwide's policy while he was operating any motor vehicle. Third, the broad statutory scheme indicates that the General Assembly never intended for the excluded driver endorsement to apply only to liability coverage. Finally, the State's public policy, which prohibits a driver from insuring himself for more than he insures against his liability to the public, supports the application of the excluded driver endorsement to UIM coverage, not just liability coverage. Therefore, considering the plain terms of Nationwide's endorsement and Mrs. Knight's decision to reject any coverage for Mr. Knight, "all coverages" in the Nationwide policy were "not in effect" at the time of the accident. Respectfully, this Court should affirm the trial court's decision declaring that Nationwide owes no UIM benefits to Mr. Knight's estate because of the February 2, 2016 accident.

Knight chose to modify the definition of "insured" in her policy to exclude Mr. Knight, he did not have insured status under the policy.

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CERTIFICATE OF COMPLIANCE

I, Adam J. Neil, Esquire, attorney for Respondent, certify that the Respondent's Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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