

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

RECEIVED

OCT 12 2017

SC Court of Appeals

Case No. 2017-001348

NATIONWIDE INSURANCE COMPANY
OF AMERICA,

Respondent,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

Nationwide Insurance Company admits that despite the clear language of Section 38-77-340, a Section that allows a company to make a policy endorsement that excludes the *liability coverage* of a resident relative while using an insured vehicle, the company uses its excluded driver endorsement form to exclude not only such liability coverage, but "all coverages." (Respondent's Brief at 1) Thus, Nationwide confirmed this as an important public policy case. An order affirming summary judgment for Nationwide will eliminate the mandatory portable UM and UIM coverage of thousands of South Carolinians insured under Nationwide policies. (R. pp. 163-165). See *Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890, 892 (1973) ("The present policy provision which excludes resident relatives of the named insured from uninsured motorist coverage except when occupying the vehicle described in the policy is clearly a limitation upon the broad coverage required by the statute and is, therefore, void."); *Boyd v. State Farm Mut. Auto. Ins. Co.*, 195 S.E.2d 706, 707, 260 S.C. 316 (S.C., 1973) ("It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid.")

1. COURTS MUST LIBERALLY CONSTRUE THE AUTOMOBILE INSURANCE STATUTE AND STRICTLY CONSTRUE EXCEPTIONS AND EXCLUSIONS.

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. The purpose of Title 38 is to insure automobile risk. Nationwide's broad policy exclusion undermines our State policy by limiting portable UM and UIM coverages of resident relative family members who are not even using a Nationwide insured vehicle. Because these portable coverages are mandatory under South Carolina public policy, Nationwide's overbroad policy exclusions are void and of no effect. The description of State public policy that Nationwide recommends this Court adopt constitutes a massive change of existing State policy. It would strip South Carolina families of currently existing portable UM and UIM coverages. Therefore, Nationwide's arguments about, and its characterizations of, South Carolina public policy must be viewed with skepticism and carefully scrutinized.

Nationwide's recommendation to change South Carolina public policy derives from its overbroad interpretation of the exclusion allowed under Section 38-77-340 of Title 38. However, the breadth of Nationwide's interpretation of this Section is inconsistent with principles used to interpret remedial statutes. That is because the Supreme Court requires a strict construction of "the exclusions

recognized in the statutes." *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458 (S.C. App., 1984). See also *McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 310 S.C. 316, 319 (S.C., 1992) ("rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed.")

2. SOUTH CAROLINA FAVORS A PUBLIC POLICY OF REMEDIAL UM AND UIM COVERAGE OF STATUTORY INSUREDS.

The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. *Cobb v. Benjamin*, 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct. App.1997). "The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature." *Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 10, 367 S.C. 253 (S.C., 2005).

3. NATIONWIDE'S BRIEF INACCURATELY SETS FORTH SOUTH CAROLINA PUBLIC POLICY.

Nationwide's public policy argument for why UM and UIM coverages *must* be excluded by Section 38-77-340 (along with liability coverage) is set out in its brief at pages 8 through 10. Its articulation of public policy is unsupported by case law and conflicts with the

remedial purposes described above. The public policy argument made by the insurance company here is rambling and difficult to follow. However, the gist of Nationwide's argument is that when the liability coverage of an individual is excluded by policy endorsement all of the portable coverages (UM and UIM) in the same policy must also be excluded because an individual should not be permitted to obtain greater insurance coverage than what is provided to the community by the (excluded) liability insurance. At page 9, Nationwide provides an example that attempts to explain this alleged South Carolina public policy:

For example, a father might insure himself for liability coverage, but exclude the rest of his driving family from liability coverage to save 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.

(Respondent's Brief at 9).

The only authority cited in support of this description of South Carolina public policy was S.C. Code Ann. § 38-77-160.¹ Nationwide incorrectly asserts that this Code Section, "mandates that UIM

¹ Nationwide cited no case law supporting its description of South Carolina public policy.

coverage *can only be purchased up to the limits* of the insured liability coverage.” (Respondent’s Brief at 8) (emphasis added).

Nationwide’s claim about the mandate of Section 38-77-160 is incorrect. The 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.

S.C. Code Ann. § 38-77-160 (emphasis added). The mandate here defines *the minimum* portable coverages an insurance company must offer (“up to the liability limits”). It in no way limits the right of an automobile insurance company to offer more portable coverage than a policy’s liability limits. That South Carolina permits insurers to offer additional portable coverages beyond liability limits is made clear by the Motor Vehicle Financial Responsibility Act.

Additional coverage permitted. Any policy which grants the coverage required for a motor vehicle liability policy *may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy* and the excess or additional coverage shall not be subject to the provisions of this chapter.

S.C. Code Ann. 56-9-20(d). See also *Universal Underwriters Ins. Co. v. Metropolitan Property and Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858 (S.C. App., 1989) (“The Act permits coverage beyond the mandated minimum limit.”) Thus, contrary to Nationwide’s claim, there is obviously no South Carolina public policy that prohibits an insurer from providing additional remedial portable coverage than the policy’s liability coverage limits. Thus, Nationwide’s claim that S.C. Code Ann. § 38-77-160 must prohibit UM and UIM coverage in excess of liability limits allowed because of the State public policy is simply an incorrect statement. To illustrate why Nationwide is wrong about this, we offer several examples.

4. UNLIKE LIABILITY INSURANCE COVERAGE, SOUTH CAROLINA MANDATES PORTABLE UM AND UIM COVERAGE BEYOND THE INSURED VEHICLE.

The first example of South Carolina public policy mandating more portable UM and UIM coverage than is required for liability coverage relates to the scope of our remedial, portable UM and UIM coverages. These remedial coverages extend beyond the mere use of the insured vehicle while the liability coverage follows the vehicle. In *Hogan v. Home Ins. Co.*, the South Carolina Supreme Court stated: “*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*, and cannot be so limited by the policy provisions." *Hogan v. Home Ins. Co.*, 260 S.C. 157, 161, 194 S.E.2d 890, 892 (1973) (emphasis added).

5. SOUTH CAROLINA REQUIRES MANDATORY STACKING OF PORTABLE UM AND UIM COVERAGE BUT STACKING OF LIABILITY INSURANCE IS NOT REQUIRED.

Another example of how the State requires greater portable UM and UIM coverages than the mandated the liability coverage obligation is illustrated by the concept of stacking. The remedial, portable coverages are treated differently than liability coverage under our public policy because they spring from different Sections of Title 38. "[S]tacking of uninsured and underinsured coverages, which are both statutorily required coverages, is governed specifically by statute. Construing specific statutory language, we have held an insured is entitled to stack underinsured or uninsured coverage in an amount no greater than the amount of coverage on the vehicle involved in the accident." *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 405 S.E.2d 396 (1991) (citation omitted). On the other hand, stacking of liability coverage is *not* permitted.

In this case, we look to § 38-77-140 which mandates liability insurance in this State. This section requires coverage under a policy issued to the owner of a motor

vehicle for liability arising out of the ownership, maintenance, or use of that motor vehicle. Liability coverage, therefore, while statutorily required, is limited to the particular vehicle for which it is purchased. The extent of liability coverage is thus statutorily defined by the amount of coverage on the insured vehicle and does not encompass coverage applicable to other vehicles.

Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 496 S.E.2d 631, 633

(1997). The stacking jurisprudence shows that the portable UM or UIM coverages *must be* stacked to multiple levels in South Carolina.

However, stacking of the liability coverage limits, even for for multi-

vehicle policies, is not required. Therefore, public policy *mandates*

additional portable UM or UIM coverage in excess of the liability

coverage. These two examples are well-established South Carolina

public policies. Nationwide's Brief argues that Section 38-77-340 had

to include "all coverages" because otherwise (under its view of public policy) the portable UM and UIM coverage might exceed the policy

liability coverage limit. As shown above, Nationwide's interpretation of

current South Carolina public policy is incorrect. Nationwide seeks a

judicially significant change to South Carolina public policy, curtailing

existing mandatory UM and UIM coverages required by Title 38.

**6. NATIONWIDE'S PUBLIC POLICY ARGUMENT IS ILLOGICAL
CONSIDERING THE DIFFERENCES BETWEEN LIABILITY
COVERAGE AND THE REMEDIAL PORTABLE COVERAGES.**

Nationwide's public policy theory—that an individual should not be permitted to obtain greater insurance for his family (via the

portable UM and UIM coverages) than what the liability policy on a particular policy of insurance on a vehicle provides to the general public—is also illogical. These two types of coverages are mutually exclusive. This is because the remedial, portable UM and UIM coverages arise only when an individual is injured by negligence of a third party. When UM and UIM coverage applies, the liability insurance coverage on the insured vehicle is irrelevant. Thus, the public is never exposed any additional threat by construing Section 38-77-340 as it was narrowly written and intended, an allowed exclusion that is limited to the *liability coverage* for a particular individual driving the insured vehicle.

An example of this in operation was the liability created by Randy Mincey's driving when he caused Danny Knight's death. The liability coverage on Mincey's policy was unrelated to Kristi Knight's automobile insurance policy. The only liability coverage implicated was the liability coverage *of the negligent third party*, Randy Mincey. That liability coverage was exhausted here before the UIM claim was made against Kristi Knight's Nationwide's policy.

**7. THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACT
DEFINITIONS (TITLE 56) ARE INAPPLICABLE TO
INTERPRETING TITLE 38 STATUTES.**

Section 38-77-340 uses the terms "policy of liability insurance."
Nationwide attempts to define this statutory language by reference to

the definitions found in Title 56, the Motor Vehicle Financial Responsibility Act (MVFRA). The MVFRA established the implied consent law, and rules the DMV uses for issuing drivers' licenses and vehicle license plates including minimum insurance requirements. See *Unisun Ins. Co. v. First Southern Ins. Co.*, 319 S.C. 419, 462 S.E.2d 260, 262 (S.C., 1995) ("Article One of Title 56 primarily concerns procedures relating to the licensing of motor vehicle drivers. It does not govern coverage under automobile insurance policies.") The relevant definitions applicable to interpreting this Title 38 statute are found in Title 38 at S.C. Code Ann. § 38-77-30.

The reason Nationwide takes us to the implied consent statute definitions is because the definitions the Legislature included for interpreting Title 38 support a narrower construction of Section 38-77-340. Title 38 definitions define the term, "policy," very broadly. See S.C. Code Ann. § 38-77-30(10.5). "Policy" under Title 38 includes all forms and types of automobile insurance coverage. The subsequent and modifying terms after the word policy ("of liability insurance"), are not defined under Title 38. However, the location of the words "of liability insurance" after a defined term "policy," clearly indicate that the modifying words are intended to narrow the scope of the exclusion allowed by Section 38-77-340. We addressed construction of the language thoroughly in our Brief. Nationwide does not rebut our

statutory construction analysis except by diverting the Court to the wrong set of definitions.

**8. NATIONWIDE'S EFFORT TO SHOEHORN THIS CASE INTO
LINCOLN GENERAL FAILS.**

From the beginning of this case we have conceded Nationwide's policy properly excluded the *liability* coverage. The *Answer* stated, "Defendants admit the policy excluded liability coverage for Kristina's husband Daniel Knight." (R. pp. 12, 14) In the memorandum filed with the trial court, we agreed that, "The Legislature does permit an insurance company and a named insured to exclude liability insurance by endorsement. The limitation allowed was limited to only liability insurance." (R. p. 55) And at page 7 of *Appellants' Brief* we agreed that, "The South Carolina Legislature permits automobile insurance companies to make policy endorsement agreements with insureds to exclude liability insurance coverage for resident relatives." (Appellants' Brief at 7) Nevertheless, Nationwide misconstrues our argument as follows: "Mrs. Knight essentially claims the endorsement cannot apply to coverage required by statute." (Respondent's Brief)

In order to bolster its position, Nationwide needs to pit us against *Lincoln General Ins. Co.* However, we have always agreed with the holding of *Lincoln General*. It stands for the proposition that Section 38-77-340 was enacted to permit exclusion of liability

coverage of individuals otherwise covered as statutory insureds while driving an insured vehicle.

An "insured" is statutorily defined to include the named insured and resident relative. S.C. Code Ann. § 38-77-30(7) (2002). As a result, resident relatives of the named insured are generally covered as an "insured" under the named insured's policy regardless of whether the named insured gave them permission to operate the covered vehicle.

Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co., 406 S.C. 534, 753 S.E.2d 437, 440 (S.C. App., 2013). "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." *Id.*

The facts of the *Lincoln General* case are as follows. Jennifer Strickland bought an automobile insurance policy on a vehicle from Progressive Northern Insurance Company. She also entered an agreement to exclude the *liability* coverage of her husband Avery Strickland while driving the vehicle. Unlike this case, Jennifer allowed Avery to drive the insured vehicle and he negligently caused a collision with a Lincoln General insured. Progressive, citing the exclusion of liability coverage allowed by Section 38-77-340, denied the *liability*

coverage on the vehicle. Lincoln General paid compensation pursuant to the uninsured motorist coverage provisions. It then brought a declaratory judgment action challenging Progressive's denial of *liability* coverage. Lincoln General argued the *liability* coverage of Avery was required by the MVFRA despite the proper exclusion of liability under Section 38-77-340. Ultimately, Progressive's policy exclusion of the *liability* coverage for Avery was upheld as an authorized exclusion under Section 38-77-340. We agree with the *Lincoln General* holding.

In its brief, Nationwide carelessly argued that the *Lincoln General* held the exclusion allowed by Section 38-77-340, "applies to all coverage under the policy, even when that coverage is mandated by statute." (Respondent's Brief) That is wrong. *Lincoln General* holds as follows:

The MVFRA does not permit recovery of minimum limits *liability coverage* on a motor vehicle *liability insurance policy* when a person named in a policy provision pursuant to section 38-77-340 is operating the motor vehicle and the requirements of the statute are satisfied because the policy "shall not apply" under those circumstances.

Id., 753 S.E.2d at 440 (emphasis added).

Kristi Knight and The Estate of Danny Knight have never argued that the exclusion of Danny from Kristi Knight's *liability coverage* on Kristi Knight's vehicle violated State public policy. We agree that such exclusions are authorized by Section 38-77-340. The issue here, on

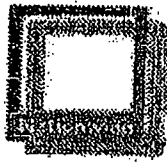
the other hand, is whether the exclusion of a "policy of liability insurance" (quoting the statute) may be extended by Nationwide to exclude the mandatory, portable UIM coverage of Danny. That issue was neither raised nor addressed in *Lincoln General*. However, the court's policy discussion about why the exclusion was enacted (to lower premiums)² and the carefully limited language of the court's holding, suggests no.

9. THE APPROVAL OF NATIONWIDE'S EXCLUDED DRIVER ENDORSEMENT FORM BY THE SCDOI WAS NOT AN ENDORSEMENT OF ITS VALIDITY.

Nationwide's brief states that the South Carolina Department of Insurance (SCDOI) approved the use of its form to exclude all coverages. However, the approval of Nationwide's form through the SCDOI bureaucratic process does not constitute an endorsement of Nationwide's interpretation of Section 38-77-340.

The title of the form used by Nationwide, shown in the image below, is misleading.

² 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." *Id.*, 753 S.E.2d at 441.



Endorsement 3109A

***Voiding Auto Insurance While Named
Person Is Operating Car***
(South Carolina)

The form's title tracks the language of the statute while the fine print in the body of the form states an exclusion denies all coverages. It is not surprising that such a form might be approved by non-lawyer employees of a busy State agency. Indeed, the SCDOI acknowledged that Nationwide's form was never reviewed by a SCDOI attorney. (R. p. 37). The form was one of thousands submitted by insurance companies. (R. p. 24). The SCDOI takes no position on issues of public policy raised by this case. (R. p. 24). Moreover, the agency's legal department is currently reviewing and vetting Nationwide's Endorsement 3109A to determine its validity in view of issues we raised by serving Appellants' deposition notice. (R. pp. 26-27)

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.

October 2, 2017



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellants and Reply
Brief of Appellants comply with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Brief of Appellants and Reply Brief of Appellants on Nationwide Insurance Company of America by depositing a copy of it in the United State Mail, postage prepaid on October 10, 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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October 10, 2017

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OCT 12 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court for 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 documents:

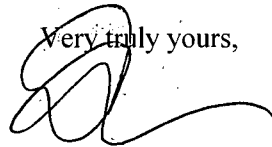
1. Original, unbound and (15) copies of the Brief of Appellants (16 total);
2. Original, unbound and (15) copies of the Reply Brief of Appellants (16 total);
3. Original and (1) copy of the Proof of Service;
4. Original and (1) copy of the Certificate of Counsel; and
5. Original, unbound and (15) copies of the Record on Appeal (16 total).

I would appreciate you filing these documents in this case. Please return one clocked copy of all documents to me in the envelope provided for your convenience.

By copy of this letter, I am hereby serving opposing counsel.

Thank you for your time and assistance in this matter.

Very truly yours,



EDWIN L. TURNAGE
elt@harrisgraves.com

Enclosures

Cc: Adam J. Neil, Attorney for Respondent