THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-UP-412

William Freeman, Michael Craft,
Kimberly Sanford & Antonio Craft, Appellants,

v.

United Auto Insurance Company, Respondent.

PETITION FOR REHEARING

Pursuant to the provision of Rule 221 (a), Appellants (hereinafter Petitioners), with the exception of Kimberly Stanford and Antonio Craft, who, since they have not been represented or participated in litigation in this case and, therefore, the appeal as to them is dismissed. Petitioners through their undersigned counsel, respectfully petition this Court for a rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

One of the self-declared purposes of Title 38, Chapter 77 (Automobile Insurance) of the South Carolina Code is to provide "that every automobile insurance risk which is insurable . . . is entitled to automobile insurance." S.C. Code Ann. § 38-77-10(1). The chapter is to be liberally construed in order to achieve that purpose. S.C. Code Ann. § 38-77-20. The South Carolina legislature undoubtedly intended for the public to be free from the dangers of uninsured motorists. Therefore, based on the plain language of the relevant statutes, the legislature's intent,

and public policy considerations, this Court should hold that Respondent could not have issued a cancellation notice until Kimberly Sanford's payment became delinquent, and thus provided insurance coverage on her vehicle on February 13, 2013.

The Court's decision relies on the plain language of the statutes, but fails to use the plain meaning of the policy for which they are applying the statutes. Furthermore, the Court interpreting the policy fails to read from the left to the right. As a result, the holding contradicts the very language that is relied upon in the affirmation of the lower court.

I. WHETHER RESPONDENT PROPERLY CANCELLED THE POLICY ON FEBRUARY 3, 2013 UNDER § 56-10-280.

Section 56-10-280 refers specifically to the cancellation of a new insurance policy within sixty days of issuance. In pertinent part, the section provides:

> (A) [A] contract of policy may be canceled within the first sixty days only under one or more of the following circumstances:
> . . .
>
> (4) the insured fails to pay **when due** the premium for the policy, an installment of the premium, or an installment payment under a premium service contract. The contract or policy of issuance must remain in effect for at least thirty days.

S.C. Code Ann. § 56-10-280 (emphasis added).

Utilizing the left to right manner in which the English language is read, the policy may be canceled within the first sixty days only if under the following conditions:

a. The insured **fails to pay when due**. That phrase cannot be more clear. Black's Law Dictionary describes delinquent as "simply due and unpaid at the time fixed by contract.
b. An installment contract is an agreement that provides for the periodic payment of an equal fraction of the whole, on a regular basis. The installment period in this case was once a month for a period of six months. In this installment contract, the first date of payment, or installment was paid on January 3, 2013 and, therefore, each installment would be paid on the 3rd of each month.

c. Upon failure to pay the installment payment of a premium service contract, **"The contract or policy of issuance *must* remain in effect for at least thirty days."**

The Court relied on the notion that "the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation". *Catawba Indian Tribe of S.*, 372 S.C. at 525, 642 S.E.2d at 754. That may be the holding in the case cited. However, the finding in this matter is representative of the Court forcing construction of the verbiage used by the drafters of the statute, in defiance of the mandate to allow the legislative intent to pervade the insurance legislation.

According to Robert Gibbs, the spokesman for Respondents, said the ***critical*** factor was that she did not pay for the entire policy. "She was paying month to month." The plain meaning of this statement was that the Respondents expected her payment to be made on a monthly basis. Thus, the due day date would be the 3rd of the month throughout the duration of the contract. Therefore, pursuant to the plain and ordinary meaning of failing to pay when due, the next installment payment would have been due on February 3rd when the first installment payment was exhausted. Failure to pay the installment on the 3rd of February would have ***required*** the policy to remain in effect for at least thirty days. There is absolutely no qualification to the way in which statute was drafted. Not seeing the statute in this vein forces a result expanding the statute's operation.

II. WHETHER S.C. CODE § 38-77-120 PERMITS AN INSURANCE COMPANY TO ISSUE A NOTICE OF CANCELLATION FOR NONPAYMENT OF PREMIUM BEFORE A PAYMENT BECOMES DELINQUENT.

South Carolina has yet to address whether anticipatory breach is an acceptable move by a carrier. However, since ordinary and plain meaning are the driving force behind statutory interpretation of insurance, it is necessary to look at the language. According to § 56-10-280, an

insurer can only cancel a new policy within sixty days if the insured fails to pay, **when due**, the premium for the policy. It is undisputed that the coverage that Kimberly Sanford received, for which she had paid the initial installment, took her through February 3rd. That would have been the due date of the next installment. **From that date,** the fifteen days to cancellation would begin. Thus, February 18, 2013, would have been the last day of coverage.

Victoria Automobile Insurance Company attempted to incorporate the anticipatory breach by likewise issuing a cancellation letter in anticipation of the insured's failure to emargued that the Cancellation Notice had complied with § 3937.32(E) because the cancellation date identified in the Notice was at least ten days subsequent to the date of the Notice. In rejecting the argument, the court held that the statute was ambiguous, and looked at other statutes to determine the legislative intent. Vietzen, 9 N.E.3d at 504. The court considered Ohio Rev. Code Ann. § 3937.31, which sets forth the reasons for which an insurance policy may be canceled by the insurer, including the nonpayment of premium. Id. at 505. The Ohio statute defines nonpayment of premium as **"[the] failure of the named insured to discharge when due** any of the named insured's obligations in connection with the payment of premiums on a policy." Ohio Rev. Code Ann. § 3937.31(A)(3). The court reasoned that because anticipatory breach is not a reason for cancellation enumerated in the statute, the insurance company could not cancel the policy based on its belief that Ms. Henry would not pay her premium when it was due. See Vietzen, 9 N.E.3d at 505.

The key to the coverage in Ohio and in South Carolina is seemingly the fact that the carrier cannot begin the cancellation countdown until such time as the insured has failed to make a timely payment. Ohio's reasoning was that an anticipatory breach was not addressed by statute and, therefore, resulted inherent ambiguity. Ambiguity should be addressed in favor of the

carriers. Ohio found on the side of finding coverage. South Carolina should follow suit, especially given the significant damages assessed to Plaintiffs' case. Insurance coverage is ultimately favored when the issue of coverage is weighed.

Conclusion

The Court in this case has withdrawn from the plain meaning approach to legislative intent. The vagueness in this statute is overwhelming. There are two different explanations of how it can be interpreted that coverage was in effect through February 18, 2013. That is a direct result of the Respondents being able to introduce imprecision into insurance forum. This case of first impression needs to be addressed at this point to prevent further cases wherein people in this state due fall under the gambit of being insure. \

November 14, 2017

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FORM 7
PROOF OF SERVICE
PETITION FOR REHEARING

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PROOF OF SERVICE

I certify that I have served a copy of Appellants' Petition for Rehearing and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and Mr. George V. Hanna, IV, Esquire at P.O. Box 12009, Columbia, SC 29211, by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2017.

November 14, 2017

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FORM 8
LETTER TO APPELLATE CLERK OF COURT

November 14, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: Willie Freeman, Michael Craft, et. al v. United Auto Insurance Company
Appellate Case No.: 2017-UP-412

Dear Ms. Kitchings:

Please find enclosed the following materials which I am filing for the above-mentioned case:

1. Petition for Rehearing; and
2. Proof of Service for same.

Sincerely,

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cc: George V. Hanna, Esquire