No. _____

In The Supreme Court of the ~~United States~~ South Carolina

Willie Freeman, Michael Craft,
Kimberly Sanford and Antonio Craft,

Petitioners,

v.

United Auto Insurance Company,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

January 11, 2018

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CERTIFICATE OF COUNSEL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari
Of the Decision of South Carolina Court of Appeals

Appellate Case No.: 2015-000811

Willie Freeman, Michael Craft,
Kimberly Sanford and Antonio Craft, *Petitioners,*

v.

United Auto Insurance Company, *Respondent.*

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2017.

January 11, 2018

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QUESTION PRESENTED

Did the Court of Appeals err in holding that Respondent did not violate applicable statutory requirements related to the cancellation of the automobile insurance policies subject matter of this case?

RULE 29 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Petitioners hereby certifies that Petitioners are individuals, and not a corporation, nor a subsidiary of any other corporation, and publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of South Carolina Court of Appeals.

OPINION BELOW

The Order of South Carolina Court of Appeals is filed on December 14, 2017, and is reproduced herein as Appendix "A" to this Petition.

JURISDICTION

The South Carolina Court of Appeals decided this case on November 1, 2017, and denied Craft and Freeman's Petition for Rehearing by Order dated December 14, 2017. This Court has jurisdiction under Rule 242(a) of the South Carolina Rules of Civil Procedure.

STATUTORY PROVISIONS INVOLVED

SC Code § 56-10-280 (2013) provides in pertinent part, "... *a contract or 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 insurance must remain in effect for at least thirty days...* "

SC Code § 38-77-120 provides in pertinent part, "... *no cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew. This notice:*

> *"(2) must state the date not less than fifteen days after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective...* "

Ohio Rev. Code Ann § 3937.32 provides in pertinent part, "*No cancellation of an automobile insurance policy is effective, unless it is pursuant to written notice to the insured of cancellation. Such notice shall contain:*

> *(E) Where cancellation is for nonpayment of premium at least ten days' notice from the date of mailing of cancellation accompanied by the reason therefor shall be given;"*

S.C. Code Ann. § 38-77-10(1) provides in part, "*... In order to effect a complete reform of automobile insurance and insurance practices in South Carolina, the purposes of this chapter are to provide:*

> *(1) 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. §38-77-20 provides, "*This Chapter is to be liberally construed in order achieve its purpose.*"

STATEMENT OF THE CASE

The case below involves a motor vehicle accident and the ensuing personal injury action filed by Petitioners Michael Craft and William Freeman in order to recover damages caused by Antonio Craft and Kimberly Sanford.

On February 13, 2013, Antonio Craft, while operating the vehicle belonging to Kimberly Sanford, willfully and intentionally drove towards the sidewalk in front of 1506 Tribble St., towards the direction of Petitioners Michael Craft and William Freeman. Antonio Craft struck the Petitioners, and fled the scene. (R. 21). He was later apprehended and charged with driving in a reckless manner and two counts of attempted murder. Both Antonio Craft and Kimberly Sanford were served with initial pleadings on September 21, 2013 and April 29, 2013, respectively. Neither filed responsive pleadings. Thereupon, an Order of Default was entered,

and Petitioners were awarded $64,128.52 and $24,295.50 in damages, respectively. (R. 21). Kimberly Sanford's insurance company, Respondent United Automobile Insurance Company (UAIC), filed a complaint seeking declaratory judgment that Sanford's automobile was not insured on the date of the accident, and as such it is not responsible to the Petitioners. (R. 10.6).

Respondent UAIC asserts that Sanford obtained an automobile insurance on January 3, 2013, when she paid her first month's premium. (R.11.5). The policy covered the automobile that was involved in the accident, a 1997 Ford Crown Victoria, with bodily injury coverage of $25,000/$50,000. (R. 11.5; R. 87. 10-13). On January 9, 2013, less than a week after Sanford paid her first month's premium, Respondent UAIC sent her a bill for the second month's premium. (R.87.20-22). On January 22, 2014, Respondent UAIC sent Sanford a notice of cancellation. (R.87.24-25). Sanford failed to pay the premium before the due date of February 3, 2013. (R. 11.7). As a result of which, Respondent cancelled the Policy as of February 3, 2013 at 12:01 a.m. (R.11.7). On February 13, 2013, the above-mentioned vehicular accident occurred. (R. 88.5-6). On February 14, 2013, Sanford paid the second month's premium, which Respondent UAIC accepted. (R.88.6-9).

Respondent UAIC moved for Summary Judgment on December 4, 2015, (R. 17) which Judge Sprouse granted on March 6, 2015. (R. p. 2). Judge Sprouse found that Respondent properly cancelled the subject insurance on February 3, 2013, and, thus, did not cover the subject automobile on the date of the accident. (R. 6). Petitioners timely served their Notice of Appeal on April 17, 2015. (R. p. 110). The Court of Appeals affirmed the judgment of the circuit court. (*United Auto Insurance Company v. Willie Freeman, Michael Craft, Kimberly L. Sanford and Antonio Craft,* Op. No. 2017-UP-412 (S.C. Ct. App. filed November 1, 2017). Petitioners filed

their Petition for Rehearing on November 14, 2017, which the Court of Appeals denied on December 14, 2017 Order. Petitioner seeks a writ of certiorari to review that decision.

ARGUMENTS

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT DID NOT VIOLATE APPLICABLE STATUTORY REQUIREMENTS RELATED TO THE CANCELLATION OF THE AUTOMOBILE INSURANCE POLICY.

A. Respondent's letter of cancellation, dated January 22, 2013, operated as an anticipatory breach, which did not effectively cancel the policy.

Petitioner submits that an automobile insurance policy is a contract. A contract law is the law of enforceable promise. Typically, a promise is breached when a promissor (in this case, Kimberly Sanford) fails to perform when and as a promised. Until the time has come for her to perform, and until all conditions precedent to her performance are satisfied, she cannot breach the contract by failing to perform as promised.

Since the language of the policy does not specify a fixed time for the payment of the premium, then the obligation shall be deemed to be fulfilled at such time as may have probably been contemplated, bearing in mind the nature of the obligation. An installment contract, such as the subject policy found herein, is an agreement that provides for the periodic payment of an equal fraction of the while, on a regular basis. Sanford was paying month to month, for a period of six (6) months. (R.87). In this case, since Sanford paid her first installment on January 3, and in the absence of a fixed term for payment of premium on the insurance policy, then Sanford would have been expected to pay each installment on the third (3^{rd}) of each month. Thus, the due date for her second month's premium would have been the third (3^{rd}) of February.

S.C. Code Ann. §56-10-280 A(4) provides that a contract or policy of insurance remains in effect within sixty days, and may be cancelled within the first sixty days only under specified

circumstances, one of which is the non-payment of the premium, **when due**. [1] Petitioners contend that Sanford's failure to pay her premium on February 3, 2013, set in motion the application of the provisions of S. C Code Ann. §56-10-280 A(4) in relation to §38-77-120.

Petitioners contend that since Sanford's breach commenced on February 3, 2013, the notice of cancellation sent by Respondent on January 22, 2013 was in anticipation of a breach, that at that time has not been perpetrated.

South Carolina courts have not yet ruled on the issue of whether a cancellation notice for nonpayment may be properly sent to an insured prior to a missed payment. S.C. Code Ann. §38-77-120 concerns with the requirements for notice of cancellation. The section provides:

Sec. 39-77-120. Requirements for notice of cancellation or refusal to renew policy:

(a) No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of cancellation or refusal to renew. This notice:

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[1] S.C. Code Ann. §56-10-280 (2013) states:

(A) Contracts or policies of insurance issued to meet the financial responsibility requirements prescribed in this chapter must be issued for not less than six months. A contract or policy of insurance remains in effect at least sixty days notwithstanding a power of attorney which may purport to give the attorney-in-fact the right to effect cancellation on behalf of the insured. However, a contract or policy may be canceled within the first sixty days only under one or more of the following circumstances:

(1) a check or bank draft tendered by the insured for payment to an agent, an insurance company, or a premium finance company is returned unpaid for insufficient funds or other reason by the insured's financial institution. If the check or draft is an initial payment made by an applicant for insurance or a payment made by an insured to renew a policy, the cancellation is effective as of the policy inception or renewal date;

(2) the insured produces satisfactory proof from the Department of Motor Vehicles that he has sold or otherwise disposed of the insured vehicle or surrendered its tags and registration;

(3) the insured has secured another policy that meets the financial responsibility requirements prescribed in this chapter;

(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 insurance must remain in effect for at least thirty days.

(1) must be approved as to form by the director or his designee before use;

(2) must state the date not less than fifteen days after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;

(3) must state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by subsection (B) of Section 38-77-390. However, those notification requirements must not apply when the policy is being canceled or not renewed for the reason set forth in Section 38-77-123(B).

(4) must inform the insured of his right to request in writing within the fifteen days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement to inform the insured of such right.

"IMPORTANT NOTICE

Within fifteen days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the director does not have the authority to overturn this action.";

(5) must inform the insured of the possible availability of other insurance which may be obtained through his agent, through another insurer, or through the Associated Auto Insurers Plan. It must also state that the Department of Insurance has available an automobile insurance buyer's guide regarding automobile insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

Nothing in this subsection prohibits any insurer or agent from including in the notice of cancellation or refusal to renew, any additional disclosure statements required by state or federal laws, or any additional information relating to the availability of other

insurance. The insurer must disclose in writing whether the insured is ceded to the facility."

S.C. Code Ann §38-77-120 (a).

Respondent essentially argued that §38-77-120 affords insurers an anticipatory breach clause. While South Carolina courts have not ruled on this issue, other jurisdictions have. In *Vietzen v. Victoria Auto. Ins. Co.*, the Court of Appeals of Ohio reversed the judgment of the trial court granting summary judgment in favor of the insurance company. Vietzen v. Victoria Auto. Ins. Co., 9 N.E.3d 500, 506. In that case, Vietzen was injured in an automobile accident involving a vehicle owned by Paulette Henry and allegedly insured by Victoria Automobile Insurance Company (the insurance company), on September 6, 2009. Id at 501. The insurance company had mailed Ms. Henry a billing statement on August 25, 2009 indicating a payment due on September 5, 2009, and attached to it a "Cancellation Notice" that stated: "If the Minimum Due is not received by or on the Payment Due date, your policy cancels on the date and time shown above for non-payment of premium." Id. at 503. Ms. Henry failed to make the payment by September 5. Id. The issue to be decided by the Ohio courts was, "whether the cancellation notice sent to Ms. Henry by [by the insurance company] complied with the requirements of R.C. 3937.32." In pertinent part, the statute provides:

"No cancellation of an automobile insurance policy is effective, unless it is pursuant to written notice to the insured of cancellation. Such notice shall contain:

(E) Where cancellation is for nonpayment of premium at least ten days' notice from the date of mailing of cancellation accompanied by the reason therefor shall be given;"

Ohio Rev. Code Ann § 3937.32 (E).

In the said case, the insurance company argued 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. §3937.1, 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] 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. §3937.1(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 which it was due. See *Vietzen,* 9 N.E.3d at 505.

The court in that case, pointed to public policy interest as evidence that an insurance company must wait until payment is delinquent to issue a cancellation notice. See *Id.* The Court referenced a case [2] in which the Ohio Supreme Court noted that the public policy of Ohio is to ensure that motorists maintain coverage, and held that requiring notification of cancellation and other requirements within the statutory scheme are intended to protect insureds from lapses in coverage, and the public from uninsured motorists. See *Id.*

The Court of Appeals of Ohio reasoned that Ohio Rev. Code Ann. § 3937.32(E) was intended to "include a grace period of ten days during which an insured may cure her failure to pay her premium by its due date before the insurance company may cancel her automobile insurance policy." See *Id.* The court further reasoned that "an insurance company must wait until the insured has actually failed to pay her premium when due before mailing notice of cancellation of the policy which will take effect no fewer than ten days after the date of mailing

[2] See Wolfe v. Wolfe, 725 N.E.2d 261 (Ohio 2000).

of the notice." *Id.* Therefore, because the Ohio legislature intended a ten- day grace period, and public policy was to ensure that motorists maintain coverage, the court held that the notice of cancellation mailed August 24, 2009 was "ineffective to give Ms. Henry the requisite notice of cancellation pursuant to R.C. 3937.32." See *Id.* at 506.

S.C. Code Ann. § 38-77-120(a)(2) is nearly identical to Ohio Rev. Code Ann. § 3937.32(E). Both require that notice be given in advance of the cancellation of an insurance policy. In addition, the South Carolina legislature seems to have considered many of the public policy reasons that were considered by the Ohio legislature. 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 on February 3.

B. There was no proper cancellation of the policy based on §38-77-120.

S.C. Code Ann. §38-77-120 provides that before an insurer may cancel a policy, a prescribed form of notice must be given by the insurer to the insured, at least fifteen (15) days in advance of the effective date of cancellation. Furthermore, the notice must specify the statutorily authorized grounds for which the insurer is cancelling the policy. S.C. Code Ann. §38-77-120 (a)(3).

Respondent sent its notice of cancellation on January 22, 2013. It thereafter canceled the policy on February 3, 2013. Under S.C. Code Ann. §38-77-120, the notice must " *state the date* ***not less than fifteen days*** *after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective.*" In this case, only twelve (12) days have elapsed between the mailing of the notice of cancellation (January 22, 2013), and the date that the policy was cancelled (February 3, 2013).

The clear intent of the statute was to require notice. While the statute does not expressly state that the coverage will continue in force if the insurer fails to comply with the notice requirement, such is the clear intent and result of the language used. Since it is provided that "*no cancellation ... is effective* ***unless*** *the insurer delivers or mails to the named insured ... a written notice of cancellation...which among others, state the date not less than fifteen days after the date of the mailing of delivering on which the cancellation becomes effective.* " It is obvious that the coverage of the policy does not end until after the notice requirements are met. Any other construction would render useless the requirement that notice be given.

The plain meaning of §38-77-120 and §56-10-280 espouse a public policy doctrine that demonstrates a clear legislative intent to avoid having uninsured motorists on South Carolina. See e.g. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980) (the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent wherever possible). According to S.C. §38-77-10, one of the stated purposes of the Automobile Insurance statutes is that every automobile insurance risks that is insurable under the statute be insured and that evasion of coverage be penalized. Furthermore, S.C. §38-77-20, states that automobile insurance coverage should be liberally construed to achieve its purposes.

Accordingly, the public policy purposes for a state's automobile insurance policies are clear—to protect the public from the burden of compensating for injuries as a result of uninsured drivers. *Vietzen, Id.* 19. Based on this public policy assumption, it is reasonable to read into the statute that an insurance company must wait until the insured has actually failed to pay her premium when due before mailing notice of cancellation which will take effect no fewer than fifteen days after the date of the mailing of the notice.

As such, Petitioners submit that there was no proper cancellation of the policy in accordance with the relevant policy and statutory provisions. Respondent is therefore liable under the policy.

CONCLUSION

Petitioners respectfully request that the Petition for a Writ of Certiorari be granted or, in the alternative, that the Court review and summarily reverse the erroneous decision of the South Carolina Court of Appeals affirming the trial court's judgment. The significant damages in this case are those for which public policy mandates coverage. By allowing carriers to rewrite legislation, it is clear that the public will not have seen the last of these scenarios.

Respectfully submitted,

January 11, 2018

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PROOF OF SERVICE

I certify that I have served a copy of Petitioners' Petition for a Writ of Certiorari, and its accompanying Appendix, upon The Honorable Daniel Shearouse, Clerk of Court South Carolina Supreme Court, PO Box 11330, Columbia SC 29211, and George V. Hanna IV, Esquire and Trevor P. Eddy, Esquire at 1508 Washington St., PO Box 12009, Columbia , SC 29211 by depositing a copies in the United States Mail, postage prepaid, on January 11, 2018.

January 11, 2018

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