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 BRIEF

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April 7, 2017

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II. DID THE CIRCUIT COURT ERR IN HOLDING THE NOTICE CLAUSES ARE VOID UNDER SOUTH CAROLINA LAW?

STATEMENT OF THE CASE

In September 2012, Appellant Philadelphia Indemnity Insurance Company ("Philadelphia") issued Commercial Lines Policy No. PHPK928536 (the "Policy") to Primary Colors Child Care Center, Inc. ("Primary Colors") effective from September 30, 2012 to September 30, 2013. (R. p. 37). The Policy provided multiple coverages including commercial property coverage, commercial general liability coverage, commercial auto coverage, professional liability coverage, and abuse liability coverage. (R. p. 39). This case concerns the Policy's Business Auto Coverage Form. (R. p. 56).

On or about November 8, 2013, Respondent Andrew P. Neumayer ("Neumayer") filed a lawsuit in the Richland County Court of Common Pleas captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839 (the "Underlying Action"). In the Underlying Action, Neumayer alleged that, on or about January 25, 2013, he was a pedestrian on Julius Felder Street in Lexington County, South Carolina when he was struck by a bus owned by Primary Colors and operated by Asia N. Partman ("Partman"), an employee of Primary Colors. Neumayer further alleged that Primary Colors and Partman were liable for injuries he suffered as a result of the accident.

Primary Colors and Partman failed to answer or otherwise respond to the Underlying Action and defaults were entered against them. A damages hearing was subsequently held on or about April 3, 2014, after which an Order for Damages Against Defendants was entered on or about April 7, 2014, awarding Neumayer damages against Primary Colors and Partman in the amount of $622,500.00 and entering a judgment in the same amount (the "Judgment"). (R. p. 20).

Over 18 months later, on October 21, 2015, Philadelphia received its first notice of the Underlying Action and the Judgment when counsel for Neumayer faxed certain documents regarding the Judgment to Philadelphia. (R. p. 112, ¶ 3). Philadelphia declined to pay the judgment in full on the grounds that it was not timely notified of the Underlying Action or the service thereof upon Primary Colors and Partman and, as such, was never provided the opportunity to investigate or defend against Neumayer's claims, all in violation of the applicable terms and conditions of the Policy, specifically, the notice clauses found at Section IV.A.2.a. and Section IV.A.2.b.(2) of the Policy's Business Auto Coverage Form (the "Notice Clauses"). (R. p. 63). Philadelphia determined that, because it suffered substantial prejudice as a result of the failure by Primary Colors and Partman to comply with the Notice Clauses, its indemnification obligation is only $25,000.00, which is the mandatory minimum limit established by S.C. Code Ann. § 38-77-140(A)(1).

On December 4, 2015, Neumayer filed this declaratory judgment action, seeking a judicial declaration that Philadelphia is obligated to pay the Judgment in full. (R. p. 13). Philadelphia timely answered the Complaint and asserted a counterclaim against Neumayer and a cross-claim against Primary Colors, Jocelyn Knox DeMartelare (an owner or officer of Primary Colors), and Partman seeking a judicial declaration that its indemnification obligation with respect to the Judgment is $25,000.00. (R. p. 25).

Neumayer and Philadelphia subsequently agreed that the determinative issue in this case—the validity and enforceability of the Notice Clauses—presented a legal question that could be resolved on summary judgment. Accordingly, in April 2016, the parties filed competing motions for summary judgment. (R. pp. 83 & 93). The motions were heard on May 18, 2016 by The Honorable L. Casey Manning. On June 7, 2016,

Judge Manning issued an Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment (the "Initial Order"). (R. p. 1). The Initial Order was entered on June 13, 2016. (R. p. 1). On June 23, 2016, Philadelphia filed a Motion to Alter or Amend requesting certain revisions to the Initial Order. (R. p. 105). In response to that motion, Judge Manning issued an Amended Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment on July 26, 2016 (the "Amended Order"). (R. p. 7). The Amended Order was entered on August 2, 2016. (R. p. 7). Philadelphia timely filed and served a Notice of Appeal of the Amended Order on August 17, 2016.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008). An appellate court "undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court." Menezes v. WL Ross & Co., LLC, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013).

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Accordingly, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005).

"Under South Carolina law the construction and interpretation of an insurance policy should be determined as a matter of law by the court." Allstate Ins. Co. v. Best, 728 F. Supp. 1263, 1266 (D.S.C. 1990) (citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969)). Insurance policy language must be given its "plain, ordinary, and popular meaning." B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). There is no need to employ rules of construction if the

contract language is clear and unambiguous. 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."). Rather, when presented with unambiguous contract language, the court's only job is to apply the contract as written. See, e.g., Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning . . . and give effect to it.") (citations and quotation marks omitted). The court must not rewrite or distort the plain meaning of unambiguous contractual language. See, e.g., Stewart, 341 S.C. at 151, 533 S.E.2d at 601 ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

"Determining the proper interpretation of a statute is a question of law[.]" Town of Summerville, 378 S.C. at 109, 662 S.E.2d at 41. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The goal of statutory construction is to . . . prevent an interpretation that would lead to a result that is plainly absurd." Id. at 91, 533 S.E.2d at 584. The courts are to reject interpretations that "would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Ray Bell Const. Co. v. Sch. Dist. of Greenville Cty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT ONLY $25,000.00 IN COVERAGE IS AVAILABLE FOR THE UNDERLYING ACTION.

A. Compliance with the Notice Clauses was a condition precedent to coverage under the Policy.

The Notice Clauses, found at Section IV.A.2.a. and Section IV.A.2.b.(2) of the Policy's Business Auto Coverage Form, (R. p. 63), provide as follows:

> **SECTION IV – BUSINESS AUTO CONDITIONS**
>
> * * *
>
> **2. Duties In The Event Of Accident, Claim, Suit Or Loss**
>
> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:
>
> **a.** In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss." . . .
>
> * * *
>
> **b.** Additionally, you and any other involved "insured" must:
>
> * * *
>
> **(2)** Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".

The language of these clauses clearly indicates that compliance therewith is a condition precedent to Philadelphia's obligations under the Policy. The title of Section IV is

"BUSINESS AUTO CONDITIONS."[1] 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). The duties are that the insured must (a) give Philadelphia prompt notice of the "accident" or "loss" and (b) immediately send Philadelphia copies of any documents concerning the claim or "suit." According to this clear and unambiguous language, **coverage under the Policy is not triggered at all unless and until the insured complies with these duties.**[2]

The South Carolina Supreme Court and numerous courts from other jurisdictions have found that compliance with policy provisions—such as the Notice Clauses—which require the insured to give notice of an accident and to forward suit papers is a condition precedent to coverage. See, e.g., Squires v. Nat'l Grange Mut. Ins. Co., 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965) ("It is well settled that, unless waived by the insurer, the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made conditions precedent to liability, will

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[1] Black's Law Dictionary lists two definitions for the term "condition." The first is "[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance." CONDITION, Black's Law Dictionary (10th ed. 2014). The second, which defines the term as it is used in the contractual context, is "[a] stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument." Id. The second definition is followed by a further explanation: "If a court construes a contractual term to be a condition, then its untruth or breach will entitle the party to whom it is made to be discharged from all liabilities under the contract." Id.

[2] The South Carolina Supreme Court has imposed an additional requirement that, in order for a liability insurer to avoid coverage for a third party claim due to an insured's failure to comply with a policy condition, the insurer must suffer substantial prejudice. See, e.g., Evans v. Am. Home Assur. Co., 252 S.C. 417, 420, 166 S.E.2d 811, 813 (1969) ("[I]t is settled law with us that a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy only when the breach has been material and has resulted in substantial prejudice to the insurer.").

bar recovery."); Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964) ("It is well settled that, unless waived by the insurer, the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made conditions precedent to liability, will bar recovery.").[3]

B. Due to the failure of Primary Colors and Partman to comply with the Notice Clauses, coverage was not triggered at all under the terms of the Policy.

"Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured." Howard v. Allen, 254 S.C. 455, 460, 176 S.E.2d 127, 129 (1970). "Before they come into play there must be an external event within the coverage of the policy **and the performance of all conditions precedent by the insured**[.]" Id. at 460-61, 176 S.E.2d at 129 (emphasis added). In this case, even though the Underlying Action asserted claims which would have fallen within the coverage of the Policy, **Primary Colors and Partman failed to comply with the Notice**

[3] See also UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 369 (1999) ("Insurance policies . . . frame timely notice provisions as conditions precedent to be satisfied by the insured before an insurer's contractual obligation arises."); Maryland Cas. Co. v. W.R. Grace & Co. - Conn., 1:88-cv-04337-JSM, 1994 WL 167962, at *5 (S.D.N.Y. Apr. 29, 1994) ("[T]imely notice of occurrence and suit are conditions precedent to the duty to defend."); Country Mut. Ins. Co. v. Livorsi Marine, Inc., 833 N.E.2d 871, 873 (Ill. Ct. App. 2004) ("When the contract includes a provision requiring the insured to notify the insurer of a suit against it, the notice provision is a condition precedent to the triggering of the insurer's contractual duties.") (citation and quotation marks omitted); Colonial Ins. Co. v. Barrett, 542 S.E.2d 869, 874 (W. Va. 2000) ("The satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder."); State Farm Mut. Auto. Ins. Co. v. Porter, 272 S.E.2d 196, 200 (Va. 1980) ("The giving of notice of the accident, the giving of notice of suit, and the forwarding of suit papers were conditions precedent to coverage under the policy[.]"); Kolibczynski v. Aetna Life & Cas. Co., 410 A.2d 485, 487 (Conn. 1979) ("The insured's duty to comply with the insurance policy in forwarding the complaint and all suit papers was a condition precedent to the [insurer's] duty to defend.").

Clauses—a condition precedent to coverage—and Philadelphia suffered substantial prejudice as a result.[4] **Accordingly, coverage under the Policy was never triggered.**

C. There is nevertheless $25,000.00 in coverage available under the Policy pursuant to South Carolina law, but no more.

Based solely on the terms of the Policy, no coverage is available for the Underlying Action whatsoever. However, pursuant to Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993), and its progeny, mandatory minimum coverage under a motor vehicle liability insurance policy may not be voided for an innocent third party due to an insured's breach of a policy condition. The current mandatory minimum coverage limit, pursuant to Section 38-77-140(A)(1), is $25,000.00. Accordingly, **South Carolina law imposes an obligation upon Philadelphia to provide coverage under the Policy in the amount of $25,000.00, but no more**. See, e.g., United Servs. Auto. Ass'n v. Markosky, 340 S.C. 223, 230-31, 530 S.E.2d 660, 664 (Ct. App. 2000) (holding that

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[4] For purposes of the current dispute, which turns on whether the Notice Clauses are valid and enforceable, Neumayer does not contest that Primary Colors and Partman failed to comply with the Notice Clauses or that Philadelphia suffered substantial prejudice as a result. Rather, his sole argument (at the present time) is that the Notice Clauses are void and unenforceable pursuant to S.C. Code Ann. § 38-77-142.

If Neumayer were to argue that Philadelphia has not suffered substantial prejudice, he would fail as a matter of law because the "obvious function" of insurance policy notice provisions "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). This case presents a textbook example of substantial prejudice in that Philadelphia was unquestionably denied any opportunity to investigate or defend against Neumayer's claims in the Underlying Action. See also St. Paul Mercury Ins. Co. v. Am. Bank Holdings, Inc., 819 F.3d 728, 736 (4th Cir. 2016) ("When a late notice precludes an insurer from exercising meaningful contractual rights provided to it by the policy—in this case, *all* the contractual rights—we agree with the district court that the insurer has suffered actual prejudice.") (italics in original); Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 174 (Tex. 1995) ("The failure to notify an insurer of a default judgment against its insured until after the judgment has become final and nonappealable prejudices the insurer as a matter of law.").

where an insured fails to comply with a notice clause and the failure results in substantial prejudice to the insurer, the policy provides no coverage in excess of the mandatory minimum coverage limit). The Circuit Court thus erred in finding that Philadelphia is obligated to provide coverage in excess of $25,000.00.

II. THE CIRCUIT COURT ERRED IN HOLDING THE NOTICE CLAUSES ARE VOID UNDER SOUTH CAROLINA LAW.

In rejecting the analysis set forth in Section I, *infra*, the Circuit Court held the Notice Clauses are void and unenforceable pursuant to Section 38-77-142 and Williams v. Government Employees Insurance Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014). However, nothing in Section 38-77-142 or Williams affected the validity of notice clauses in motor vehicle liability insurance policies.

A. The Notice Clauses are not invalid under Section 38-77-142.

Section 38-77-142 contains three subsections. Subsections (A) and (B), though their wording varies slightly, require more or less the same thing, i.e. that insurance policies issued or delivered in South Carolina or covering motor vehicles primarily used in South Carolina must insure the named insured and permissive users against liability "within the coverage of the policy." Subsection (C) provides that "[a]ny endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by [subsections (A) and (B)] is void." The Circuit Court found that Philadelphia is attempting to use the Notice Clauses to improperly "reduce" the $1 million in coverage available under the Policy to the mandatory minimum limit of $25,000.00 in violation of Section 38-77-142(C). The Circuit Court, therefore, invalidated the Notice Clauses as contrary to South Carolina statutory law.

The Amended Order fails to take into consideration that **coverage under the Policy was never triggered in the first place** because Primary Colors and Partman did not comply with the Notice Clauses, which are conditions precedent to coverage. Accordingly, there is no liability "within the coverage of the policy" under Sections 38-77-142(A) and (B) which could potentially be limited or reduced by a provision prohibited by Section 38-77-142(C). **Section 38-77-142 is inapplicable under these circumstances**, and the only coverage available under the Policy is minimum limits coverage pursuant to Shores.

In one of the two reported cases applying Section 38-77-142, the South Carolina Supreme Court characterized Shores as requiring a motor vehicle liability insurer "to pay a judgment **up to the minimum limits** where its insured failed to notify the company of the suit and/or motion for judgment[.]" Cowan v. Allstate Ins. Co., 357 S.C. 625, 628, 594 S.E.2d 275, 276 (2004) (emphasis added). The court concluded that Section 38-77-142(B) does not impact the holding of Shores in that it does not eliminate the duty of an insurer to provide minimum limits coverage even where its insured has failed to comply with the policy's notice provisions. Id. at 629, 594 S.E.2d at 277. In the Amended Order, however, the Circuit Court effectively held that Section 38-77-142 *does* impact the holding of Shores, not by limiting it, but by *expanding* it to require coverage not only up to the mandatory minimum limits, but to the full limits of the policy. The Supreme Court in Cowan did not so much as hint at this conclusion, which **effectively transforms motor vehicle liability insurers into sureties**. See, e.g., Hodges, 341 S.C. at 91, 533 S.E.2d at 584 ("The goal of statutory construction is to . . . prevent an interpretation that would lead to a result that is plainly absurd.").

The Circuit Court's invalidation of the Notice Clauses also renders a portion of Section 38-77-142(B) superfluous. The last sentence of the first paragraph of that section provides:

> 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.

S.C. Code Ann. § 38-77-142(B) (emphasis added). This entire sentence is unnecessary if, as the Circuit Court held, the effect of Section 38-77-142 is that notice clauses in motor vehicle liability insurance policies are invalid and, therefore, an insurer may never, under any circumstances, rely on "the mere failure of the insured to turn the motion or complaint over to the insurer" as a defense to coverage. That this sentence is rendered surplusage by the Circuit Court's interpretation of Section 38-77-142 further indicates the interpretation is wrong. See, e.g., Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning."). See also McDonnell v. U.S., 136 S. Ct. 2355, 2369 (2016) (noting it is presumed that "statutory language is not superfluous") (citation and quotation marks omitted); Fontenot v. Taser Int'l, Inc., 736 F.3d 318, 327 (4th Cir. 2013) ("It is presumed that the legislature intended each portion [of a statute] to be given full effect and did not intend any provision to be mere surplusage.") (citation and quotation marks omitted).

The Circuit Court, therefore, erred in holding the Notice Clauses are invalid under Section 38-77-142.

B. The Notice Clauses are not invalid under *Williams v. GEICO.*

Williams, upon which the Circuit Court relied, is the only other reported case applying Section 38-77-142, and it is likewise inapplicable here.[5]

In Williams, the South Carolina Supreme Court applied Section 38-77-142 to invalidate a so-called "family step-down" provision in a motor vehicle liability insurance policy. The declarations page indicated the policy provided up to $100,000.00 in bodily injury liability coverage, but the family step-down provision purported to reduce the amount of available coverage to the mandatory minimum limit—$15,000.00 at the time—for claims of bodily injury to the insured or a relative of the insured living in his or her household. In other words, the policy initially gave the insured a limit of $100,000.00 for bodily injury claims but subsequently reduced the limit to $15,000.00 under certain circumstances. The court found this contravened the requirement in subsections (A) and (B) of Section 38-77-142 that motor vehicle liability insurance policies must insure the named insured and permissive users against liability "within the coverage of the policy" and invalidated the family step-down provision pursuant to Section 38-77-142(C), holding that "once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage." Williams, 409 S.C. at 604, 762 S.E.2d at 715.

The holding and analysis of Williams have no application to this case because, unlike in Williams, **coverage for the Underlying Action was never initially triggered** due to the failure of Primary Colors and Partman to comply with the Notice Clauses. That failure, and the resultant substantial prejudice suffered by Philadelphia, meant **there was**

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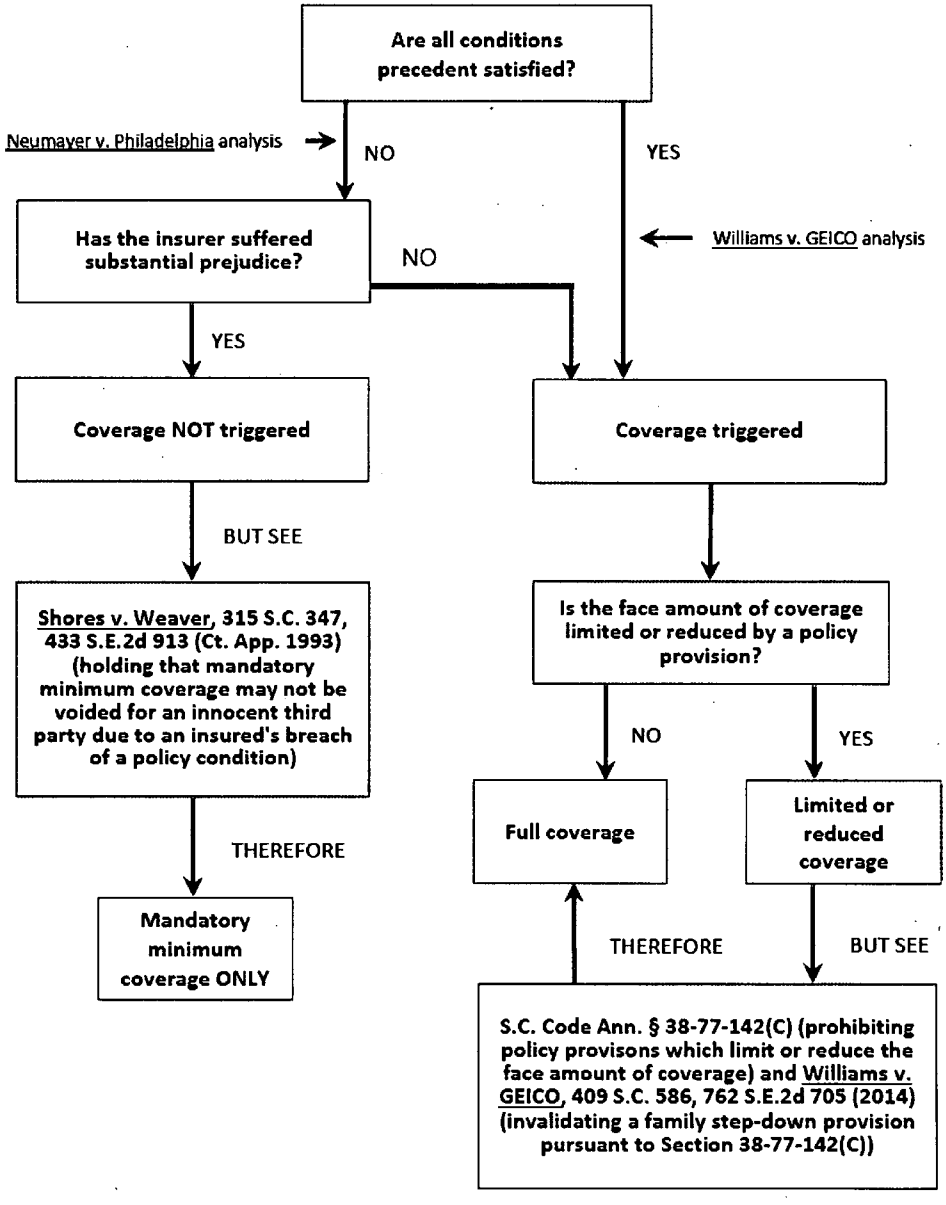
[5] Philadelphia reserves the right to dispute the applicability of Williams in other contexts and with respect to other insurance provisions.

no liability "within the coverage of the policy" to begin with, and no "face amount of coverage" to be effectively retracted in violation of Section 38-77-142(C). Williams, which had nothing at all to say about the validity of notice clauses, is thus inapposite as depicted in the flow chart below.



The Circuit Court, therefore, erred in holding the Notice Clauses are invalid under Williams.

CONCLUSION

If the Circuit Court is correct, then in 1997, the General Assembly profoundly altered the law of automobile insurance in South Carolina by abolishing notice clauses in motor vehicle liability insurance policies effective March 1, 1999, when Section 38-77-142 went into effect. Since that date, insureds under motor vehicle liability insurance policies have been under no obligation to notify their carriers of lawsuits or to forward copies of pleadings. Rather, they have been able to ignore lawsuits against them (thereby avoiding the inconvenience of participating in litigation), go into default, and leave their carriers—who have effectively been transformed from insurers into sureties—on the hook for any judgments entered.

But the Circuit Court is not correct. Nearly two decades have passed since the effective date of Section 38-77-142, and Philadelphia is unaware of any court—until the Circuit Court in this case—that has found notice clauses in motor vehicle liability insurance policies are now illegal in South Carolina. There is a simple explanation for that fact: **Section 38-77-142 did not actually abolish notice clauses in South Carolina motor vehicle liability insurance policies**. Rather, it remains the law of this state, pursuant to Markosky,[6] that where an insured under a motor vehicle liability insurance

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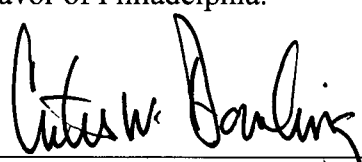
[6] The Circuit Court found that Markosky—the last reported opinion to address the effect of an insured's failure to comply with a notice clause in a motor vehicle liability insurance policy—is not controlling in this case because it involved an accident that occurred prior to the effective date of Section 38-77-142. In Williams, the Supreme Court correctly noted that Markosky did not control the outcome of that case because the accident at issue in Markosky occurred before family step-down provisions became illegal under Section 38-77-142. Notably, Williams did not overrule Markosky, nor did it have anything at all to say about notice clauses. Unlike in Williams, the date of the accident at issue in Markosky is irrelevant in this case because, as set forth herein, nothing in Section 38-77-142 affected the validity of notice clauses. Markosky is, therefore, still good law with respect to the validity and applicability of notice clauses.

policy fails to comply with a notice clause and the failure results in substantial prejudice to the insurer, the policy provides coverage only up to the mandatory minimum limit. 340 S.C. at 230-31, 530 S.E.2d at 664. The Circuit Court erred in holding otherwise and, accordingly, Philadelphia respectfully requests that this Court vacate the Amended Order and direct the entry of summary judgment in favor of Philadelphia.



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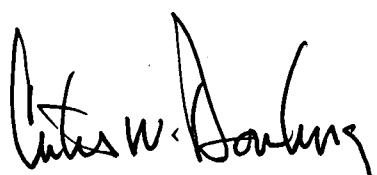
CERTIFICATE OF COUNSEL

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



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