

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2011-CP-10-4867

Permanent General Assurance Company Respondent,

v.

Karen D. Givens, Individually and as Personal

Representative of the Estate of E. Cierra

Givens, and Kayla Givens.....Appellants.

FINAL BRIEF OF APPELLANTS

RECEIVED

JUN 26 2013

SC Court of Appeals

Donald J. Budman
Solomon, Budman & Stricker, LLP
P.O. Box 30280
Charleston, South Carolina 29407
(843)-763-1118
ATTORNEYS FOR APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT FINDING THAT APPELLANT'S AUTOMOBILE LIABILITY INSURANCE POLICY ISSUED BY RESPONDENT WAS NOT IN EFFECT ON THE DATE THAT ENRIQUA CIERRA GIVENS WAS KILLED IN A SINGLE VEHICLE COLLISION?

STATEMENT OF THE CASE

After Appellants made a claim for liability insurance benefits, Respondent filed a summons and complaint on July 11, 2011 against Appellants seeking a declaration that Appellant Karen Givens' liability insurance policy was not in effect at the time of Enriqueta Cierra Givens' death in an auto collision on March 19, 2011 (R. pp. 1-13). On August 4, 2011 Respondent filed and served an amended complaint upon Appellants (R. pp. 15-17). Appellants filed an answer and counterclaim on August 18, 2011 setting forth defenses in support of coverage (R. pp. 18-23). Respondent filed an answer to counterclaim on August 25, 2011 (R. pp. 24-27). Respondent filed a motion for summary judgment on February 6, 2012 (R. pp. 28-29). Appellants also filed a motion for summary judgment on February 22, 2012 (R. pp. 30-31), and filed an amended motion for summary judgment on March 9, 2012 (R. pp. 32-34). A summary judgment motion hearing was held before the Honorable Michael G. Nettles on May 29, 2012. On June 19, 2012, Judge Nettles filed an Order granting Respondent's motion for summary judgment (R. pp. 2-7). Appellants served a Rule 59-e motion for reconsideration on June 29, 2012

(R. pp. 35-37). Judge Nettles held a hearing on Appellants' motion for reconsideration. On December 31, 2012, Judge Nettles filed an order denying Appellants' Rule 59-e motion. That order was mailed to Appellants on December 31, 2012 (R. pp. 8-9). Appellants filed and served a notice of appeal on January 29, 2013 (R. pp. 191-192). Permanent General named Kayla Givens as a Defendant in this declaratory judgment action, because she was the driver of the vehicle in which Enriqua Cierra Givens was killed. The actual contract of automobile liability insurance is between Karen Givens and Permanent General. For that reason, both Karen Givens-the insured, and Kayla Givens-the driver, are referred to as "Appellants" in this case.

FACTS

On March 19, 2011, Enriqua Cierra ("C.C.") Givens, the daughter of Karen Givens, was killed while she was a passenger in a single car accident in Charleston County. Compounding the tragedy surrounding the death of 17 year-old "C.C." was the fact that the subject automobile, a 2003 Buick Century owned by Karen Givens, was driven by C.C.'s 19 year-old sister, Kayla Givens. Both C.C. and Kayla were Karen Givens daughters. Kayla survived the collision. The 2003 Buick Century is alleged to be insured by Respondent, Permanent General.

Permanent General filed this Declaratory Judgment action to determine whether it is obligated to provide liability insurance coverage to the Estate of Enriqua Cierra Givens in the amount of \$25,000.00, its policy limits on the subject vehicle involved in this accident, and the property damage insurance coverage that was also carried on the totaled vehicle. The accident occurred on March 19, 2011. Permanent General claims that the insurance policy on the 2003 Buick Century, involved in this accident, was cancelled on

March 16, 2011, allegedly for non-payment of premium. The Appellants deny that the policy on the 2003 Buick Century could be cancelled on that date. They also claim that Permanent General had no right to cancel the policy covering the Buick Century prior to the accident, and that Respondent extended liability insurance coverage on the Buick at least until March 24, 2011.

Permanent General Insurance Policy # SC7623245 contained a provision mandating coverage for a “Newly Acquired Vehicle,” which applied to the 2003 Buick Century (R. pp. 185-186).

A 2006 amendment to South Carolina Code Ann. § 56-10-280 (A)(4) (Supp. 2011) requires insurers to provide a 30 day period of coverage, as the “minimum duration” for liability coverage on an automobile.

The terms of the insurance Binder written by Permanent General state that coverage was extended on the 2003 Buick Century to March 24, 2011 (R. p. 164), a date beyond the date of the accident, which was March 19, 2011.

On February 13, 2011, Karen Givens purchased a policy of automobile insurance from Permanent General for her 1999 Ford Taurus automobile, Policy # SC7623245 (R. pp. 142-161). The policy period was stated on the policy to be from 2-13-11 to 8-13-11. A premium deposit, as requested by Permanent General, was paid by Karen Givens (R. p. 152). The balance of the premium was to be paid over the course of the next 6 months, with the next payment due on March 13, 2011 (R. p. 151). There was no insurance agent involved, as Permanent General sells insurance on the internet.

Dated February 21, 2011, Permanent General mailed Karen Givens a bill for her monthly premium for the Ford Taurus (R. p. 162). As stated on that bill, payment of \$90.96 was due before 3-12-2011.

On February 21, 2011, Karen Givens purchased a 2003 Buick Century from Crazy J's Auto Sales. It was decided to add the 2003 Buick to Karen Givens' existing insurance policy with Permanent General; that being the same policy that insured the Ford Taurus (R. p. 189). The addition of the Buick to the existing insurance policy was effectuated, first by an Insurance Binder (R. p. 164), then through Endorsement Policy Declarations (R. p. 168). In order to insure the Buick Century on the existing policy that insured the Ford Taurus, the 2003 Buick Century, had to be titled in the name of "Karen Givens."

Permanent General faxed Karen Givens an Insurance Binder for the Buick while she was at Crazy J's Auto Sales on February 21, 2011. The Binder extended coverage to the Buick Century under her policy with Permanent General "Effective 2/21/2011, 1:48 PM; Expiration 3/24/2011, 12:01 AM" (R. p. 164). This is written on the face of the Binder. No additional premium was requested by Permanent General for adding the Buick onto the existing policy at the time the Binder was issued. Karen Givens was told that she would be billed later (R. p. 168).

Dated February 25, 2011, Permanent General mailed Karen Givens a Notice of Cancellation (R. pp. 170-174). The Notice of Cancellation made no mention of the insurance Binder for the Buick that was issued just 4 days earlier on the same policy. It did say, "We have not received your payment, therefore we must inform you that your policy will be cancelled due to non-payment of premium." The amount claimed to be

due was \$90.96. The due date was once again changed for a third time to March 16, 2011. \$90.96 was the amount of premium owed for the Ford Taurus, as per the original financing documents (R. p. 151). The new Binder stated coverage for the Buick Century would be in effect until March 24, 2011 (R. p. 164). Karen Givens received no invoices for insurance premiums due on the Buick Century prior to the collision of March 19, 2011. The February 25, 2011 Notice of Cancellation was issued before the payment on the Ford was past due (R. p. 170). The Notice of Cancellation was also issued before the Insurance Binder on the 2003 Buick was issued.

By letter dated March 10, 2011, Karen Givens received the Endorsement Policy Declarations from Permanent General (R. pp. 168-169). It shows that both the Ford and Buick were then insured on the Permanent General policy. The Endorsement shows the Net Premium Due and, at the bottom it states, "This is not a bill. You will receive a separate invoice in the near future" (R. p. 169). There is not any mention in this Endorsement Policy Declaration of the Notice of Cancellation dated February 25, 2011.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard of review as the trial court under Rule 56, SCRPC, Nationwide Mut. Ins. Co. v. Smith, 376 S.C. 60, 654 S.E.2d 837, 840 (Ct.App. 2007). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC, Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether any triable

issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). However, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 578, 588, 635 S.E.2d 649, 654 (Ct.App. 2006). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004).

ARGUMENTS

1. BECAUSE THE APPELLANTS' BUICK CENTURY VEHICLE WAS A "NEWLY ACQUIRED VEHICLE" UNDER THE TERMS OF APPELLANT'S LIABILITY INSURANCE POLICY WITH RESPONDENT, APPELLANT WAS ENTITLED TO LIABILITY INSURANCE COVERAGE FOR AT LEAST 30 DAYS FROM THE DATE OF ACQUISITION OF THE VEHICLE.

An extension of coverage, until at least March 24, 2011, is appropriate under the terms of the subject liability insurance policy. Looking at Section 1-L of the Policy (R. p. 185), initially written for the Ford Taurus, coverage on the Buick was in effect on the date of Appellant's decedent's death because Permanent General insured the Buick, a newly acquired vehicle, and had agreed in writing, in the form of the insurance Binder

(R. pp. 164-165), and in its subsequent notices, to a further extension of coverage to March 24, 2011 (R. p. 168). This provision of the liability insurance policy is termed to be a “newly acquired vehicle” provision designed to extend coverage for a minimum duration of 30 days when an additional car is added to an auto policy. The policy language in this case includes a provision for a “newly acquired vehicle.” The policy states:

L. “Your covered auto” means

2. A “car, pickup, or van” as of the date “you” become the owner or lessee provided that:

a. “You” acquire the “car, pickup or van” during the policy period shown on the declarations page; and

b. “You” ask “us” to insure it within 30 days after “you” become the owner. Coverage is limited to the lesser of 30 days from the date of acquisition or the date the policy subsequently expires or is cancelled unless “we” agree in writing to a further extension of coverage; and

The policy period on the original policy of insurance is February 13, 2011 to August 13, 2011 (R. p. 187). Appellant, Karen Givens, purchased the newly acquired Buick Century vehicle during that policy period; that is, on February 21, 2011. On February 21, 2011, after discussing insurance for the Buick with a representative of Permanent General, Appellant submitted a “policy change request” to Respondent requesting the addition of the Buick Century to the policy (R. pp. 189-190). On February 21, 2012, Permanent General agreed with that request and issued an Insurance Binder for the Buick Century

(R. pp. 164-165). Appellant complied with the policy and asked that the Buick be insured within 30 days after she became the owner of the vehicle.

The policy then states that “Coverage is limited to the lesser of 30 days from the date of acquisition or the date the policy subsequently expires or is cancelled unless ‘we’ agree in writing to a further extension of coverage. ...” 30 days from the date of the February 21, 2011 acquisition would run through March 23, 2011. In fact, the Insurance Binder states that it is effective from 02/21/2011 to 03/24/2011 @ 12:01 a.m. (R. p. 164)

The policy then goes on to state, “or the date the policy *subsequently* expires.” This has to mean “subsequent to March 23, 2011. If the word “subsequently” had any different meaning, then the terms “lesser of” would have no meaning. So, in accordance with the policy issued by Respondent, coverage on the new vehicle was limited to the lesser of March 23, 2011 (30 days), or August 13, 2011 (expiration of policy), or the multiple cancellation date(s) stated in documents prepared by Permanent General.

As far as the Ford Taurus was concerned, Karen Givens was told by Permanent General that the policy insuring that vehicle would be cancelled on at least three different dates; (1) documents she received when she first financed the Taurus in February state insurance premium due “March 13, 2011 (R. p. 151),” (2) an invoice mailed to her from Permanent General on February 21, 2011 states payment due on “March 12, 2011 (R. p. 162),” and (3) the Notice of Cancellation dated February 25, 2011 from Permanent General states a cancellation date of “March 16, 2011 (R. p. 170).” Appellants claim that the Buick remained covered until at least March 23, 2011, as stated on the Insurance Binder (R. p. 164). Appellants were never told by Permanent General that if, or when,

insurance coverage on the Ford Taurus was cancelled, that the insurance coverage on the Buick Century would be cancelled at the same time.

However, if the court concludes that the policy covering the Buick, in fact, expired or was cancelled before March 23, 2011, there are three reasons why the facts of this case point to a different conclusion; the last two of which raise questions of fact. First, the policy did not “expire” before the tragic March 19, 2011 collision. No question of fact is created here.

If it is concluded that the policy was *cancelled* before the collision, the remainder of the policy provision must be read; which is, “unless ‘we’ agree in writing to a further extension of coverage, and” This second consideration creates questions of fact when viewed in the light most favorable to Appellants; that is that Permanent General did agree, in writing, to an extension of coverage by issuing the Insurance Binder which states on its face an expiration date of March 24, 2011 (R. pp. 164-165). Permanent General also issued and sent to Appellant the “Endorsement Policy Declarations” dated 03/10/2011 (R. p. 168), which states a policy period to 08/13/2011. It further states, that “insured will receive a separate invoice in the near future.” Both of these documents, the Insurance Binder and the Endorsement, were issued by Permanent General after it sent Appellant a Notice of Cancellation.

The third consideration, which also raises questions of fact, is the fact that Permanent General never sent a bill to Appellant or invoiced Karen Givens for payment of a premium for liability insurance coverage on the Buick Century before Enriquia Cierra Givens was killed. The February 21, 2011 Insurance Binder required no payment and the March 10, 2011 Endorsement Policy Declarations, states that Appellant will receive a

separate invoice “in the near future.” These documents, both generated by Permanent General, create an agreement for a further extension of coverage. The conclusion to be drawn from this is that even though Permanent General agreed to provide liability insurance coverage on the Buick Century, it cancelled that insurance coverage for non-payment of premium, even though it never sent the insured any invoices for payment. A reasonable mind could conclude that if the insurance company was to send a “separate invoice in the near future,” on the newly acquired vehicle, that it would not be effected by the Notice of Cancellation that had been sent several weeks before.

It could also be concluded by a fact finder that Permanent General used this close set of dates between the alleged cancellation of coverage on the Ford Taurus and Enriquia Cierra Given’s death in the Buick Century as a way to create a justification to avoid payment of the policy limits on this claim.

If Permanent General is allowed to prevail in this case, it will have successfully cancelled coverage on the Buick Century’s automobile liability insurance policy less than 30 days after coverage on the vehicle was issued, which is in violation of Financial Responsibility Act, as shown below, and before the insured was ever billed for payment of a premium on that vehicle.

The final language in the analysis of the “Newly Acquired Vehicle” provision of the policy is language which comes after the word, “and.” Following is a paraphrased version of the language that follows:

- c. The are no other insurance policies; and
- d. The vehicle was not leased; and
- e. Permanent General insures all vehicles owned by Karen Givens; and

- f. No additional premium was required by Permanent General;
- g. The Buick was not used in the course of any business; and
- h. The Buick did not replace any vehicle on the Declarations Page;
- i. The Buick had additional coverages for collision and comprehensive because of the lien interests of Seller.

None of these provisions have any bearing upon the analysis in this case.

Looking at the evidence in the light most favorable to Appellants, there are the questions of fact as to whether coverage existed for this Newly Acquired Vehicle under the terms and condition of the Permanent General. The numerous dates provided to Karen Givens as to when the coverage for the two vehicles would terminate significantly confuse the issue. These discrepancies create questions of fact that cannot support summary judgment for the Respondent. The summary judgment granted to Respondent should be reversed. Upon reversal, this court should either grant summary judgment to Appellant for the limits of liability insurance coverage, \$25,000.00, or it can remand the case to the circuit court for a trial on the coverage issues.

2. BECAUSE THE SOUTH CAROLINA FINANCIAL RESPONSIBILITY ACT WAS AMENDED IN 2006 TO PROVIDE THAT AN AUTOMOBILE INSURANCE POLICY CANNOT BE CANCELLED UNLESS 30 DAYS HAS TRANSPIRED FROM THE DATE THE VEHICLE BECOMES INSURED, APPELLANTS WERE ENTITLED TO LIABILITY INSURANCE COVERAGE FOR AT LEAST 30 DAYS FROM THE DATE OF ACQUISITION OF THE VEHICLE.

An extension of liability insurance coverage to the Buick Century vehicle is appropriate under the Financial Responsibility Act S.C. Code Ann. § 56-10-10, et seq. (Supp. 2011). By amendment to S.C. Code Ann. § 56-10-280 in 2006, a provision was added stating that when the insured fails to pay a premium when due under a premium service agreement, the policy insuring the vehicle cannot be cancelled unless 30 days have elapsed. The last sentence of amendment to S.C. Code Ann. Sec. 56-10-280 (A)(4) (Supp. 2011) makes the intention of the legislature clear, stating, "[T]he contract or policy of insurance must remain in effect for at least 30 days." The legislature used the unambiguous terms, "minimum duration," in the amendment. Permanent General cannot avoid liability coverage on this policy simply because the 2003 Buick Century may have been added by endorsement to the policy on February 22, 2011, as opposed to being written on a new and separate insurance policy on that date. Had a new policy been issued for the Buick Century on February 22, 2011, mandatory coverage under the statute would have to exist through March 23, 2012. In order to effectuate the clear intention of the amendment to the Financial Responsibility Act, the Buick Century must be afforded coverage for at least 30 days; whether insured by an endorsement on an existing policy, or whether it is insured on a new policy.

Permanent General cannot hide behind the language of its policy to avoid payment of the limits of the liability coverage for Appellants damage in this case. Any provision of an automobile policy which conflicts with the requirements of the statute regulating such policies is invalid. McDonald v. State Farm Mutual, 287 S.C. 40, 336 S.E.2d 492, 494, 495 (1984); Hogan v. Home Ins. Co., 260 S.C. 157, 194 S.E.2d 890 (1973) (if a provision in an insurance policy excluding coverage is in conflict with the

requirements of a statute, the statute controls); Belk v. Nationwide Mut. Ins. Co., 271 S.C. 24, 244 S.E.2d 744 (1978) (an insurance policy issued pursuant to a statute may give more coverage than the statute requires, but not less. Statutes must effectuate the legislative intent.)

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000). In this case, the intent is clear- provide coverage for at least 30 days on vehicles financed with a premium service agreement- as is the case, here. In the entire statutory scheme of insuring vehicles against liability in South Carolina, this 30 day provision represents the shortest period of time that a vehicle must remain insured before being subject to cancellation. By adding the Buick Century vehicle to the existing policy by an endorsement, Permanent General cannot obfuscate the 30 day provision. The statutory provisions must over-ride the contractual provisions. Under Permanent General's view of this statute, a vehicle could be insured for only one day, if added on to a 29 day old policy which was to be cancelled the next day for non-payment. That cannot be the intent of the amendment. To effectuate the meaning of the "minimum duration," there must be coverage on the Buick for at least 30 days. That requirement would provide Appellant with liability insurance benefits resulting from the collision which caused her daughter's death, and would make other underinsured motorist benefits (UIM) available to her. Applying at least 30 days coverage to the Buick would be an application of the statute's plain language to the insurance policy, in favor of coverage. This court should not allow Permanent General to add a newly acquired vehicle to a liability insurance policy which is about to be cancelled pursuant to a previously issued notice of cancellation, where the

result is to effectively insure the new vehicle for less than 30 days. This result, as is the case here, is contrary to the intention of our legislature, in light of the amendment to the Financial Responsibility Act.

The summary judgment granted to Respondent should be reversed. Upon reversal, this court should grant summary judgment to Appellants for the limits of liability insurance coverage, \$25,000.00. Alternatively, the court can remand the case to the circuit court for a trial on the controverted facts surrounding the liability insurance coverage issues.

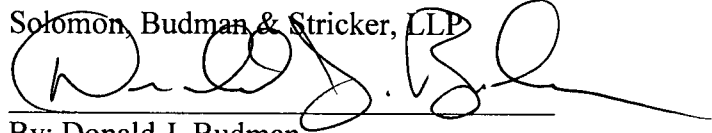
CONCLUSION

For the reasons stated, Respondent's Summary judgment should be reversed. A reversal of Respondent's summary judgment should result in Appellants being entitled to summary judgment against the Respondent. This court should require Respondent to provide Appellant with the limit of liability insurance benefits in the amount of \$25,000.00, requiring Respondent to pay Appellant liability insurance benefits in the amount of \$25,000.00, in accordance with the terms and conditions of the subject policy of automobile insurance. Any ancillary benefits, such as property damage benefits, should be paid by Permanent General, as well, to Karen Givens as the owner of the vehicle, specifically including property damage benefits for the totaled automobile. Alternatively, a remand of this case to the circuit court for a trial of contested facts should be granted to Appellants.

Respectfully Submitted,

June 24, 2013

Solomon, Budman & Stricker, LLP

A handwritten signature in black ink, appearing to read 'Donald J. Budman', is written over a horizontal line.

By: Donald J. Budman

P.O. Box 30280

Charleston, South Carolina 29407

(843)-763-1118

ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Permanent General Assurance Company Respondent,

v.

Karen D. Givens, Individually and as Personal
Representative of the Estate of E. Cierra
Givens, and Kayla Givens.....Appellants.

CERTIFICATE

I, Donald J. Budman, attorney for Appellants, certify that this
Final Brief complies with Rule 211(b) of the South Carolina Appellate
Court Rules.

June 25, 2013


Donald J. Budman
SOLOMON, BUDMAN & STRICKER, LLP
P.O. Box 30280
Charleston, SC 29417
843-763-1118
Attorneys for Appellants

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PROOF OF SERVICE

I certify that I have served a copy of the Appellants' Final Brief on Permanent General Assurance Company by depositing a copy of it in the United States Mail, postage prepaid, on June 25, 2013, addressed to its counsel of record, as follows:

Adam J. Neil, Esq.
P.O. Box 6648
Columbia, SC 29260

June 25, 2013


Donald J. Budman
SOLOMON, BUDMAN & STRICKER, LLP
P.O. Box 30280
Charleston, SC 29417
843-763-1118
Attorneys for Appellant

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