IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000679

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SC Court of Appeals

Nationwide Mutual Fire Insurance Company.....Appellant,

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, Deborah Timms, ...Defendants,

Of whom,

Sharmin Christine Walls, Randi Harper, and Wendy Timms in her capacity as Personal Representative of The Estate of Christopher Adam Timms, ...Respondents.

RETURN TO PETITON FOR REHEARING

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RETURN TO PETITION FOR REHEARING

Appellant Nationwide Mutual Fire Insurance Company respectfully submits this Return to the Petition for Rehearing filed by Petitioners Sharmin Christine Walls, Randi Harper, and Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms:

SUMMARY

On June 5, 2019, this Court entered a unanimous opinion finding that flight-from-law-enforcement and felony exclusions in an automobile liability policy that reduce voluntary liability insurance to the state's mandatory minimum limits comport with South Carolina's public policy.

In doing so, this Court adopted a rule that has been reached by nearly every court in the country to address this question. South Carolina has long held that "[r]easonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted." *Pennsylvania Nat'l. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). Because the flight-from-law-enforcement and felony exclusions do not conflict with South Carolina public policy, this Court's Opinion was correct and should be left undisturbed.

I. This Court correctly held that an insurer may provide reasonable limitations on optional coverage, including limitations against voluntary conduct that is inherently more dangerous than what is attendant to the regular operation of a vehicle.

Petitioners ask this Court for rehearing, claiming the Opinion is inconsistent with the Supreme Court's decision in *Williams v. Government Employees Insurance Company (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014). However, this Court's Opinion addresses the *Williams* decision at great length and correctly reads the holding in *Williams*: "Accordingly, the majority [in *Williams*] held the step-down provision violated public policy because it conflicted with the plain language of section 38-77-142 and was injurious to the public welfare." (Opinion dated June 5, 2019 (Shearouse Adv. Sheet No. 23, p. 22)). Respectfully, this Court correctly read and applied the *Williams* decision. The exclusions at issue here do not conflict with the statutory language and are not injurious to the public welfare.

Petitioners contend this Court misreads *Williams* because – in Petitioners' view – the Supreme Court reached two, independent conclusions, finding that a provision in a policy may be struck down either if the provision is arbitrary or capricious or if it violates § 38-77-142. However, a close reading of *Williams* – a 3-2 decision – disproves Petitioners' contention.

After finding the family-member exclusion was unambiguous, the *Williams* Court spends several pages of its opinion discussing South Carolina Code § 38-77-142 and its meaning. *See Williams*, 409 S.C. at 598-603, 762 S.E.2d at 712-715. Importantly, at then end of its extensive discussion of § 38-77-142, the Supreme Court concludes its discussion with a conclusion paragraph beginning with the word "Therefore" and holding:

> Therefore, 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. Any other interpretation of section 38-77-142(C) would render the section useless, and the General assembly is presumed not to perform useless acts.

Williams, 409 S.C. at 604, 762 S.E.2d at 714 (emphasis added). Thus, the Supreme Court concluded that § 38-77-142 prohibits an arbitrary policy exclusion. In other words, a contractual step-down provision is only void under § 38-77-142 if it is arbitrary.

The Supreme Court then proceeds in the *Williams* opinion to evaluate whether the family-member step-down provision was, in fact, arbitrary. *Id.* at 604-607, 762 S.E.2d at 715-717. After evaluating the family-member exclusion, the Supreme Court held: "To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious and violative of public policy." *Id.* at 605-606, 762 S.E.2d at 716 (emphasis added). Thus, the Supreme Court held that § 38-77-142 prevents an insurer from arbitrarily reducing the limits of liability coverage, and then found that the family-member exclusion violated that public policy because it was arbitrary and capricious.

As this Court held in the June 5, 2019 Opinion, the felony and flight-from-law-enforcement exclusions are far from arbitrary. Rather, these exclusions support important public policy by discouraging volitional, illegal conduct and preventing a criminal actor from shifting the cost of his criminal conduct to others. As such, this Court's holding comports with the strong majority

view of similar exclusions.[1] "Indeed, this public-policy principle is so compelling that in many jurisdictions, insurers may actually violate public policy if they fail to include criminal-acts or

[1] Numerous courts across the country have found that felony or flight-from-law-enforcement exclusions in automobile and other types of insurance policies do not violate public policy. *Alfa Specialty Ins. Co. v. Jennings*, 906 So. 2d 195 (Ala. Civ. App. 2005) (holding felony exclusion in automobile liability policy did not violate public policy where insured was fleeing law enforcement); *Hix v. Hertz Corp.*, 307 Ga. App. 369, 705 S.E.2d 219 (Ct. App. 2010) (same); *Southern Farm Bureau Cas. Ins. Co. v. Easter*, 374 Ark. 238, 287 S.W.3d 537 (2008) (holding that eluding-lawful-arrest exclusion did not violate public policy as stated in state's compulsory insurance statute or no-fault statute); *Hix v. Hertz Corp.*, 307 Ga. App. 369, 705 S.E.2d 219 (Ct. App. 2010) (same); *Bailey v. Lincoln General Ins. Co.*, 255 P.3d 1039, 1048 n.2 (Colo. 2011) ("Of course, many jurisdictions, although not recognizing a public-policy requirement for insurers to include intentional or criminal-act exclusions, hold that public policy is not violated where insurers include in liability or excess insurance policies criminal-acts or other similar exclusions . . . .") (auto policy); *Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335, 341-42, 329 S.E.2d 136, 142 (1985) (holding that application of flight-from-law-enforcement exclusion in automobile liability policy to amounts exceeding state's minimum limits did not violate public policy); *Bohner v. Ace American Ins. Co.*, 359 Ill. App. 3d 621, 834 N.E.2d 635 (App. 2 Dist. 2005) (holding that criminal act exclusion in auto gap policy was enforceable and did not violate public policy); *Slayko v. Security Mut. Ins. Co.*, 98 N.Y.2d 289, 774 N.E.2d 208 (2002) (holding that a criminal activity exclusion in a homeowners policy does not violate public policy); *American Family Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 445-46, 648 N.W.2d 769, 779-80 (2002) ("As a general rule, the majority of courts that have addressed the issue hold that a provision in a homeowner's policy which excludes coverage for claims arising from criminal acts . . . does not violate public policy."); *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997) (holding that criminal acts exclusion in homeowners policy did not violate public policy); *ANPAC v. Clendenen*, 793 S.E.2d 899, 908 (W. Va. 2016) ("Indeed, the majority of jurisdictions to consider the question raised . . . apply intentional acts exclusions similar to the exclusions in [the] policies to preclude coverage to an insured based on the intentional or criminal acts of a co-insured") (homeowners policy); *Pompa v. American Family Mut. Ins. Co.*, 520 F.3d 1139 (10th Cir. 2008) (applying Colorado law and holding that a criminal acts exclusion in a homeowners policy does not violate public policy); *American Family Mut. Ins. Group v. Kostaneski*, 688 N.W.2d 410, 415 (S.D. 2004) ("It is contra bonos mores to allow a man to insure against the consequences of his own . . . criminal conduct.") (homeowners policy); *Auto Club Group Ins. Co. v. Daniel*, 254 Mich. App. 1, 5, 658 N.W.2d 193, 196 (Ct. App. 2002) ("[A]s a matter of public policy, an insurance policy that excludes coverage for a person's criminal acts serves to *deter* crime, while a policy that provides benefits to those who commit crimes would *encourage* it.") (homeowners policy); *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 698 A.2d 9 (1997) (holding that criminal acts exclusions are "valid and do not violate public policy.") (medical malpractice policy); *New Mexico Physicians Mut. Liability Co. v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993) (holding that a criminal acts exclusion in a physician's professional liability policy did not violate public policy); *Rivera v. Nevada Medical Liability Ins. Co.*, 107 Nev. 450, 455, 814 P.2d 71, 74 (1991) (same); *Barker v. California-Western States Life Ins. Co.*, 252 Cal. App. 2d 768, 776, 61 Cal. Rptr. 595 (1967), *cert. denied*, 390 U.S.

intentional-acts exclusions in their policies." *Bailey*, 225 P.3d at 1048. "To be sure, public policy generally bars coverage for an insured's intentional wrongdoing or criminal misconduct." *St. Paul Fire and Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 162 (E.D. Va. 1993), *aff'd* 48 3.d 778 (4th Cir. 1995). Therefore, the exclusions – rather than being arbitrary or capricious – actually support important public policy goals by preventing a criminal actor from shifting the cost of damages he causes to others.

II. This Court correctly found that the flight-from-law-enforcement and felony exclusions do not simultaneously reduce or limit coverage appearing on the face of the policy to a certain class of insureds.

The Supreme Court in *Williams* was concerned with an identity-based policy exclusion. The family-member exclusion in that case determined how much liability coverage was available for an accident based solely on the happenstance identity of the victim. The Supreme Court found that such an exclusion was arbitrary and capricious. The exclusion violated public policy because it singled out family members "who are no less innocent victims in accidents solely because they are injured by the negligence of a family member." *Id.* at 606-607, 762 S.E.2d at 716.

As this Court aptly recognized in its June 5, 2019 Opinion, the flight-from-law-enforcement and felony exclusions at issue here are quite different from the family member exclusion at issue in *Williams*. The family-member exclusion focuses on the identity of the victim

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922, 88 S. Ct. 855 (1968) (concluding felony exclusion clause in a life insurance policy is not contrary to public policy); *James v. Louisiana Laborers Health & Welfare Fund*, 29 F.3d 1029 (5th Cir. 1994) (upholding provision in health insurance plan excluding coverage for expenses incurred in the course or commission of a felony); *Sisters of the Third Order of St. Francis v. Swedish American Group Health Benefit Trust*, 901 F.2d 1369, 1370 (7th Cir. 1990) (holding that because drunk driving is illegal activity under Illinois law, insured was not able to recover from a health plan for the injuries he sustained in a drunk driving accident); *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1, 12 n.12 (1st Cir. 2004) ("We note that numerous state courts have also held that enforcement of similar insurance policy provisions excluding coverage for criminally caused loss or liability does not violate the public policy of those states.") (boating policy).

of a tort – a factor that the Supreme Court in *Williams* deemed arbitrary. In stark contrast, the felony and flight-from-law-enforcement exclusions in this case focus on the volitional and criminal conduct of the insured.

The Supreme Court in *Wiliams* reasoned that, in the context of identity-based exclusions such as the family member exclusion, the policy provides reduced coverage for injuries to certain victims the moment the policy is issued. Although the face limit of liability coverage on the declarations page says one amount, the policy actually only provides a fraction of that amount if the victim is a family member, regardless of the conduct that gave rise to the injury. On the other hand, conduct-based exclusions such as the flight-from-law-enforcement and felony exclusions are not automatic. The insured driver enjoys the full limits of liability coverage stated on the declarations page from the moment the policy is issued until the moment when the insured driver begins to flee from law enforcement or use the vehicle in the commission of a felonious act. The step-down provision only applies while the insured driver participates in conduct which is wholly volitional and significantly increases the risk beyond normal driving conditions. As this Court cogently stated in its Opinion:

> The policy's coverage remains intact, so long as the injury is not the result of foreseeably dangerous conduct that the insured can reasonably avoid. To that end, we note sections 38-77-142(A) and (B) only require insurers to insure against liability that arises "as a result of *negligence* in the operation or use of the motor vehicle." (emphasis added). If we were to read *Williams* as Respondents suggest, any policy provision that excludes voluntary coverage for intentional acts would also violate section 38-77-142. Such an interpretation would essentially eliminate an insurer's ability to limit exposure against avoidable hazards and is not supported by the plain language of the statute.

(Opinion dated June 5, 2019 (Shearouse Adv. Sheet No. 23, p. 23)).

Simply put, there is no basis to find that the flight-from-law-enforcement or felony exclusions are arbitrary or capricious or violate the public policy of the State

of South Carolina. In fact, Petitioners do not even argue in their Petition that the provisions are arbitrary or capricious.

By enforcing the step-down provisions, this Court adopted a rule that has been applied by nearly every jurisdiction to consider the applicability of these exclusions.[2] Unlike the family-member step-down in *Williams*, which focused on the identity of the victim and always precluded coverage for those victims regardless of the insured driver's conduct, the exclusions at issue here only apply when the insured driver elects to participate in highly dangerous or felonious conduct. The South Carolina General Assembly has already deemed such conduct violative of public policy by attaching criminal penalties to that conduct. Therefore, provisions in an insurance contract reducing coverage to the minimum limits when the insured driver choses to participate in such criminal conduct do not violate any public policy of this State. Instead, the exclusions support South Carolina's public policy. Therefore, this Court's unanimous Opinion is correct, and should be left undisturbed.[3]

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[2] The undersigned is unaware of any case finding that flight-from-law-enforcement or felony exclusions in this context are wholly unenforceable even for amounts above a state's stated minimum limits of liability coverage.

[3] At the end of their Petition for Rehearing, Petitioners argue that they "were essentially innocent victims of a 'car-jacking.'" (Pet. for Rehearing, p. 5). This argument focuses again on the identity of the victim, not the conduct of the insured driver. The argument suggests that there should be different treatment for the Petitioners than a person who was unrelated to the accident vehicle. However, liability insurance insures against the liability of the insured driver. It is paid on the insured driver's behalf to indemnify the driver for his legal liabilities to third parties. The exclusion here does not focus on the identity of the victim, it focuses solely on the conduct of the insured driver.

In contrast, a purchaser of an insurance policy has the statutorily-protected option to purchase uninsured and underinsured motorist coverage, which insures the named insured and certain others for their personal injuries regardless of whether the tortfeasor's conduct was felonious or merely negligent. Uninsured/underinsured motorist benefits are paid directly to the insured and not paid on behalf of the tortfeasor driver. Had the named insured in this case elected to purchase underinsured motorist coverage, then there would be no step down for that coverage. However, the named insured in this case chose to reject optional underinsured motorist coverage.

III. Neither Section 38-77-142 nor the Supreme Court's holding in *Williams* can be read to invalidate all exclusions in automobile insurance policies.

Petitioners ask this Court to read the *Williams* decision as making a sweeping holding that would place South Carolina alone in the county in its position. Even though the numerous jurisdictions that have addressed felony and flight-from-law-enforcement exclusions overwhelmingly hold that such exclusions are enforceable and, in some instances mandatory, Petitioners ask this Court to read the *Williams* decision and section 38-77-142 to invalidate all policy exclusions regardless of whether they involve coverage above the statutorily mandated minimums and regardless of the conduct the exclusion is designed to dissuade. Petitioners have cited no cases from anywhere in the country holding similar provisions invalid.

The South Carolina General Assembly adopted section 38-77-142 from Virginia's statute, as evidenced by a typographical error in South Carolina's statute that was copied from Virginia's statute. South Carolina's statute applies only to motor vehicles, but Virginia's statute applies to both vehicles and boats. However, the South Carolina statute includes typographical errors referencing vehicles "docked" in this State. *See* S.C. Code § 38-77-142(A) ("No policy . . . covering liability arising from the . . . use of a motor vehicle may be issued . . . upon a motor vehicle that is principally garaged, docked, or used in this State . . .. Each policy or contract of liability insurance . . . insuring private passenger automobiles principally garaged, docked, or used in this State . . .."). Obviously, motor vehicles are not "docked." Unlike South Carolina's statute, the Virginia statute applies to motor vehicles and watercraft. *See* Va. Code § 38.2-2204(A). This typographical error in the South Carolina statute makes it obvious that South Carolina adopted this omnibus statute from Virginia.

Applying the Virginia statute, the United States District Court for the Eastern District of Virginia held that an illegal acts exclusion is valid and enforceable. In *Standard Fire Ins. Co. v.*

Armstrong, 2013 WL 1933828 (E.D. Va. May 8, 2013), the District Court enforced an "illegal act" exclusion to the operation of a watercraft. In that case, the insured operated the boat while intoxicated, and the District Court held the illegal acts exclusion applied. *Id.* at *3. The District Court specifically reviewed section 38.2-2204 and held it could find nothing in the statute "forbidding an exclusion of coverage for dishonest and illegal actions where an intoxicated boater causes property damage." *Id.* Thus, whereas Petitioners fail to cite any case holding a similar statute prohibits a felony or flight-from-law-enforcement exclusion, at least one other court applying a nearly identically-worded statute has held that statute does not invalidate an illegal acts exclusion.

The Supreme Court's 3-2 decision in *Williams* addressed a very specific, identity-based exclusion, and found that exclusion violated section 38-77-142 because it arbitrarily and capriciously reduced the limits of available insurance coverage based on the identity of a victim. The case was narrowly decided, and it cannot be reasonably read as broadly as the Petitioners contend. If followed to its logical end, the Petitioners' argument would invalidate every exclusion in every automobile insurance policy in the State of South Carolina regardless of the exclusion's reasonableness. Instead, the *Williams* holding was limited to a particular exclusion, deemed to be arbitrary and capricious, and should be read as applying only to that particular exclusion. Petitioners' request for a broader reading is inconsistent with the plain reading of the statute, with the rationale of the *Williams* opinion, and with how other courts across the nation have interpreted similar statutes and exclusions. For all of these reasons, this Court should deny the Petition for Rehearing.

CONCLUSION

For the above-stated reasons, Petitioners' request for a rehearing should be denied, and this Court's well-reasoned June 5, 2019 Opinion should stand. This Court's written Opinion evidences a thorough analysis of the *Williams* decision, section 38-77-142, and the public policy of this State. In sum, the Opinion reaches the correct conclusion. The flight-from-law-enforcement and felony exclusions strike the correct balance of South Carolina's competing public policy interests by providing the mandatory minimum limits of liability coverage to protect the innocent public while not insuring insured drivers beyond those minimum limits for their volitional, criminal conduct. Because the exclusions promote public policy, the Opinion should be left undisturbed.

Respectfully submitted,

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CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Appellant, certify that the Final Brief of Appellant complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Appellate Court Rules.

July 15, 2019

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PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing on the following and their counsel of record as follows:

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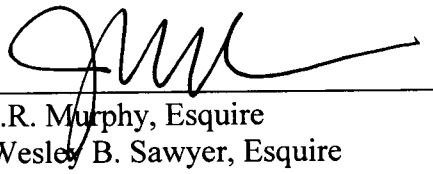
July 15, 2019



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July 15, 2019

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Re: Nationwide Mutual Fire Insurance Company vs. Sharmin Christine Wall, Randi Harper, Wendy Timms in her capacity as P.R. of the Estate of Christopher Adam Timms and Deborah Timms
Appellate Case No.: 2016-000679
Civil Action No.: 2009-CP-04-00907
Claim No.: 298413-GG
Date of Loss: 07/11/08
Our File No.: 1150-0410

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and four (4) copies of a Return to Petition For Rehearing in the above-referenced matter. I would appreciate your filing the original and returning the clocked copies and receipt for fee to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel. With warm personal regards, I am

Sincerely yours,

J. R. Murphy

JRM/sb

cc: Milford O. Howard, III, Esquire
Michael F. Mullinax, III, Esquire
J. Kirkman Moorhead, Esquire
Michael Glenn (via email)