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The State of South Carolina
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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OCT 16 2019
SC Court of Appeals

Case No. 2017-001348

NATIONWIDE INSURANCE COMPANY OF AMERICA, Respondent,

v.

KRISTINA KNIGHT, Individually and as Personal Representative of THE ESTATE OF DANIEL KNIGHT, Appellants.

Appellants' Motion for Rehearing, and Suggestion for Rehearing *En Banc*

Edwin L. Turnage, Esquire
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, SC 29607
(864) 235-1331

Attorney for Appellants

Pursuant to Rules 219 and 221, SCACR, Appellants respectfully request a rehearing *en banc* related to the Court's October 2, 2019, Order. Rehearing *en banc* is needed to protect uniformity of precedent and because this is a case of exceptional importance affecting South Carolina public policy. Rehearing is required because the October 2, 2019, Order overlooked precedent and misapprehended Section 38-77-340.

This case arose when Respondent denied The Estate of Daniel Knight's[1] wrongful death, underinsured motorist coverage (UIM) claim arising from a motor vehicle collision. Respondent insured Kristina Knight's (Daniel Knight's spouse) vehicle, and provided UIM coverage on the automobile insurance policy. Respondent, by policy endorsement, excluded "all coverages in [Kristina Knight's] policy . . . while Daniel P. Knight is operating *any* motor vehicle." (ROA at 9) Respondent ostensibly based its exclusion on Section 38-77-340; however, that Section only allows an automobile insurance carrier to exclude coverage on a "policy of liability insurance." Appellants' believe that the exclusion under Section 38-77-340 permitted only exclusion of liability insurance coverage and did *not* allow insurance companies to exclude all other bodily injury coverages such as the required, remedial, personal and portable UIM coverage.

The Court's October 2, 2019, Order finds, "UIM coverage is not mandatory in South Carolina." (Order at 5). The Order holds that UIM is an optional, non-mandatory coverage subject to "reasonable limitations." (Order's footnote 3) Thus, the Order approves Respondent automobile insurance carrier's policy provision excluding all coverages, including the uninsured (UM) and UIM coverage as a reasonable limitation on "optional" coverage.

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[1] It is undisputed that Daniel Knight was a Class I insured.

By holding that UIM is non-required, optional coverage that automobile insurers may reasonably limit, this Order disregards clear, explicit, and contradictory Supreme Court and Court of Appeals precedent. For example, the Order directly contradicts *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 337 n.1, 342 S.E.2d 603 (S.C., 1986) (Ness, J.), providing that UIM is required coverage: "Required coverage is coverage required to be provided *or required to be offered.*" *Id.* (emphasis added)[2] As noted in the attached memorandum, rehearing *en banc* is required because the October 2, 2019, Order disrupts the uniformity of long-standing precedent based upon *Jackson* and its progeny including this court's decision *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283, 287 (S.C. App. 2010).

The Order also misapprehends the language of S.C. Code Ann. § 38-77-340 which allowed a limited exclusion for designated drivers, as to liability coverage only, while using a particular insured vehicle or vehicles. Section 38-77-340 nowhere permits insurers to also exclude required, personal and portable coverages, *i.e.*, required UM and UIM coverages.

Nationwide v. Knight involves a question of exceptional importance affecting public policy in our State. The Order erodes and overrules numerous cases protecting important remedial coverage mandated by our Legislature. It impacts thousands of South Carolina citizens. This exceptionally important case deserves a rehearing before the full court. For the reasons outlined in the accompanying memorandum in support, Appellants respectfully suggest rehearing *en banc* is needed to reconsider the October 2, 2019, Order. As stated above, rehearing *en banc* is needed to insure uniformity of

[2] Further authorities are cited in the attached memorandum of law.

precedent and further warranted to readdress the October 2, 2019, Order's misunderstanding of Section 38-77-340.

October 15, 2019

Edwin L. Turnage
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, SC 29607
(864) 235-1331

Attorney for Appellants

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MEMORANDUM IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC

Edwin L. Turnage, Esquire
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, SC 29607
(864) 235-1331

Attorney for Appellants

This proceeding, affecting South Carolina public policy, involves a question of exceptional importance. The October 2, 2019, Order approves Respondent's exclusion of "all coverages" whether a designated driver is using a vehicle insured under the policy or not. This Court must grant *Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc* to insure uniformity of precedent because the October 2, 2019, Order overlooks or directly contradicts and overrules important and long-standing South Carolina public policy cases requiring automobile insurers provide consumers certain minimal amounts of remedial, personal and portable, underinsured motorist (UIM) coverage. The court must also rehear this matter *en banc* to correct the October 2, 2019, Order's misapprehension or misinterpretation of the exclusion allowed by Section 38-77-340.

The Legislature enacted Section 38-77-340 as a limited exception to the general rule requiring automobile insurance policies provide for liability insurance coverage of all statutory insureds that might use an insured vehicle. By its terms, Section 38-77-340 allows automobile insurers and policy-holders, by agreement, to limit liability insurance for designated family members with regard to specified automobiles. The purpose of this exception is to reduce risks (and the associated higher premiums) related to the liability insurance coverage for a resident relative with a bad driving record. Under the exclusion permitted by Section 38-77-340, the automobile insurance company and its policy-holder agree that a designated person will not to drive an insured vehicle, and that the designated person will purchase his own automobile insurance policy. There is nothing in Section 38-77-340 that suggests that an automobile insurance carrier may also exclude other required coverages including personal and portable UM and UIM coverages.

1. Underinsured motorist coverage is required, remedial, personal, and portable coverage.

Appellants believe that UIM coverage is required coverage and its exclusion is *not* allowed by Section 38-77-340. The October 2, 2019, Order rejected that argument stating, "However, as the circuit court aptly noted, 'UIM coverage is not mandatory in South Carolina.'" The Court cited to S.C. Code Ann. § 38-77-160 for this assertion, noting Section 38-77-160 only required automobile insurance companies to *offer* UIM coverage.[1] The October 2, 2019, Order then reasoned that because UIM is not mandatory, Respondent may subject it to a "reasonable limitation" (footnote 3). However, the Court's assertion that UIM is not required coverage is contradicted by numerous South Carolina Supreme Court opinions. In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 337 n.1, 342 S.E.2d 603 (S.C., 1986) (Ness, J.), the Supreme Court stated, "Required coverage is coverage required to be provided or required to be offered." In *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 405, 496 S.E.2d 631, 632 (S.C., 1997), the Supreme Court stated: "Statutorily required coverage is that which is required to be offered or provided." In *Brown v. Continental Ins. Co.*, 434 S.E.2d 270, 272, 315 S.C. 393, 396 (S.C., 1993), the Supreme Court stated, "In *Jackson*, we specifically noted that required coverage includes coverage that is required to be provided or required to be offered." In *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 753 S.E.2d 515, 519 (S.C., 2014), the Supreme Court quoted *Ruppe* as stated above. The Court of Appeals has also affirmed the required nature of UIM coverage. In *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283, 287 (S.C. App., 2010), this Court

[1] It is undisputed that Respondent offered Kristina Knight UIM coverage and that Kristina Knight accepted the offer. She paid additional premiums for the UIM coverage in her policy.

stated, "Statutorily required coverage is that which is required to be offered or provided." *Id.* (quoting *Ruppe*) Therefore, the Order's characterization that required UIM as non-mandatory and optional is an incorrect statement of long-standing South Carolina law and public policy.

In footnote 3, Page 6, the Order reasoned that, "so long as the mandatory minimum coverage limits are met, an insurer may provide reasonable limitations on optional coverage." However, the required, minimum amount of UIM coverage for Daniel Knight was not tendered. Rather, Respondent totally excluded all UIM (and UM) coverage for Daniel Knight. As such, Respondent's policy exclusions are void. "[A]ny limiting language in an insurance contract which has the effect of providing less protection than made obligatory by the statute is contrary to public policy and is of no force and effect." *See Ferguson v. State Farm Mut. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522 (1973). Because the October 2, 2019, Order deviates from established South Carolina precedent, this Court must rehear this case *en banc* and reconsider it.

2. The Statutory language demonstrates Section 38-77-340 was intended to allow a limited exclusion of liability insurance coverage only.

The relevant language of this S.C. Code Ann. § 38-77-340, with its operative language highlighted, is set forth below.

> Notwithstanding the definition of " insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage *under such a policy of liability insurance* shall not apply *while the motor vehicle is being operated* by a natural person designated by name.

S.C. Code Ann. § 38-77-340 (emphasis added). By enacting Section 38-77-340, the Legislative intended to permit automobile insurance carriers and policy-holders to agree on an exception to the general mandate that liability insurance must cover all statutory insureds, *i.e.,* resident relatives of the policy-holder who might drive an insured vehicle. That the allowed exclusion in Section 38-77-340 was intended narrowly for the liability insurance coverage only is shown by the Legislature's use of the terms "policy of liability insurance." "Policy" is a defined term under the automobile insurance statute (Title 38). "Policy" is defined broadly as the "contract" for "bodily injury." S.C. Code Ann. § 38-77-30(10.5). "Policy" therefore encompasses all bodily injury coverages in an insurance contract including liability, UM, and UIM. Thus, by modifying the defined term, "policy," with the undefined words "liability insurance," the Legislature demonstrated its intent to permit a narrow exclusion for liability insurance coverage only. Otherwise, the words following the defined term "policy" become surplusage. This is because "policy," as defined by the automobile insurance statute, already includes all bodily injury coverages in an insurance contract. In construing a statute, it must be read so that, "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). The October 2, 2019, Order violates this canon of statutory construction.

Legislative intent to limit the allowed exclusion to liability insurance coverage only is further shown because Section 38-77-340 limits it to, "while the insured vehicle is being operated.[2]" This language can also only refer liability insurance coverage. Liability insurance coverage is the only bodily injury insurance coverage that follows the

[2] It is undisputed that Daniel Knight was *not* operating his wife's insured vehicle at the time of his death.

insured vehicle. *See Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973) (UM "coverage is nowhere limited in the statute to the use of the insured vehicle."); *Burgess v. Nationwide Mut. Ins. Co.*, 361 S.C. 196, 201-02, 603 S.E.2d 861 (S.C. App., 2004), *rev'd on other grounds*, 644 S.E.2d 40, 373 S.C. 37 (S.C., 2007). In *Hogan v. Home Ins. Co.*, the South Carolina Supreme Court stated: "Unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited in the statute to the use of the insured vehicle, and cannot be so limited by the policy provisions." *Hogan v. Home Ins. Co.*, 260 S.C. 157, 161, 194 S.E.2d 890, 892 (1973) (emphasis added). The October 2, 2019, Order never addressed the provision that limited the allowed exclusion to operation of an insured vehicle. Yet there is simply no other logical explanation for why Section 38-77-340 included the further limiting language, "while the motor vehicle is being operated by a natural person designated by name," except for legislative intent to limit the allowed exclusion to only liability insurance coverage.

3. The Court must strictly construe the exclusion against the automobile insurance industry.

The automobile insurance statute directs the trial courts to "liberally construe[]" the statutory language "in order to achieve its purposes." S.C. Code Ann. § 38-77-20. The purpose of Title 38 is to insure automobile risk. As argued above, the automobile insurance company's over-broad policy exclusion here, if upheld, undermines our State policy by limiting required, portable UM and UIM coverages of resident relative family members who are not even using the insured vehicle. The Supreme Court requires a strict construction of "the exclusions recognized in the statutes." *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458 (S.C. App., 1984*); see also McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 310 S.C. 316, 319 (S.C., 1992) ("rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed."). The October 2, 2019, Order fails to comply with the Supreme Court's guidance for interpreting remedial statutes broadly and narrowly construing exceptions in a remedial statute.

CONCLUSION

For the reasons stated above, the Court must rehear this case, and a rehearing *en banc* is warranted because of the exceptional importance and impact of the October 2, 2019, Order on the public policy of South Carolina.

October 15, 2019

Edwin L. Turnage
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, SC 29607
(864) 235-1331

Attorney for Appellants

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PROOF OF SERVICE

I certify that I have served Appellants' Motion for Rehearing, and Suggestion for Rehearing En Banc and Appellants' Memorandum in Support of Motion for Rehearing, and Suggestion for Rehearing En Banc on Nationwide Insurance Company of America by UPS - Overnight on October 15, 2019 addressed to its attorney of record, Mr. Wesley Brian Sawyer, Esquire, 4406B Forest Drive, Columbia, SC 29206

Edwin L. Turnage, Esquire
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, SC 29607
(864) 235-1331
Attorney for Appellants

October 15, 2019

LAW OFFICES
HARRIS AND GRAVES, P.A.
"Our mission is to provide exceptional personal and professional service to our clients"

MITCHELL J. WILLIAMS
STEVEN D. HAYMOND
ROBERT F. McMAHAN, JR.
MICHAEL S. SWINDELL
EDWIN L. TURNAGE
S. HAMPTON EADON, III*

*Also Licensed in North Carolina

812 LAURENS ROAD
P.O. BOX 6263
GREENVILLE, SOUTH CAROLINA 29606
864-235-1331
864-235-1741 (FAX)

OFFICES

COLUMBIA
GREENVILLE
CONWAY
FLORENCE
ROCK HILL
SPARTANBURG

OF COUNSEL
E. WESLEY GRAVES, III

RETIRED
SHIPP D. HARRIS

October 15, 2019

VIA UPS - OVERNIGHT

The Honorable Jenny Abbott Kitchings
Clerk of Court for SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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OCT 16 2019
SC Court of Appeals

RE: *Nationwide Insurance Company vs. Kristina Knight*
Civil Action #: 2017-001348
Our File #: 201649115

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Appellants' Motion for Rehearing, and Suggestion for Rehearing *En Banc*, together with Appellants' Memorandum in Support of Motion for Rehearing, and Suggestion for Rehearing *En Banc* and Proof of Service with regard to the above matter. A check in the amount of $50.00 is enclosed for the filing fees.

I have included an extra copy, which I would appreciate your filing and returning to me in the envelope provided for your convenience.

Thank you for your time and assistance in this matter.

Very truly yours,

EDWIN L. TURNAGE
elt@harrisgraves.com

Enclosures

cc: Mr. Wesley Brian Sawyer, Esquire
Murphy and Grantland, P.A.
4406B Forest Drive
Columbia, SC 29206

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HARRIS & GRAVES
864-235-1331
HARRIS & GRAVES
812 LAURENS ROAD
GREENVILLE SC 29607

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THE HONORABLE JENNY A. KITCHINGS
1220 SENATE STREET
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