IN THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2020-000026

Nationwide Insurance Company of America..........Respondent

v.

Kristina Knight, individually and as Personal Representative of the Estate of Daniel P. Knight
..........Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

Wesley B. Sawyer, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

STATEMENT OF ISSUE ON APPEAL

I. **Whether the Circuit Court and Court of Appeals correctly found that the excluded driver endorsement, which was requested and signed by Petitioner, barred Petitioner's claim for underinsured motorist coverage for an accident that occurred while the excluded driver was operating a vehicle.**

STATEMENT OF THE CASE

This insurance coverage matter involves application of a plainly-worded excluded driver agreement. Petitioner Kristina Knight purchased an automobile liability policy issued by Nationwide Insurance Company of America (Nationwide), which included uninsured and underinsured motorist (UIM) coverage. (R. pp. 76 & 81). When she applied for the policy, Petitioner was engaged to decedent Daniel Knight (Decedent). Petitioner chose to exclude Decedent from the policy and signed an excluded driver endorsement, which is entitled "Voiding Auto Insurance While Named Person Is Operating Car." (R. p. 74). The excluded driver endorsement states, "With this endorsement, *all* coverages in your policy are not in effect while Danny Knight is operating any motor vehicle." (R. p. 74) (emphasis added).

On February 2, 2016, Decedent was operating a motorcycle when he was struck and killed by an underinsured motor vehicle. (R. pp. 9 & 13). Decedent carried UIM insurance with the motorcycle and on another at-home policy issued by a different insurance carrier. Therefore, Petitioner collected liability coverage from the at-fault motorist and also collected UIM coverage from the policies insuring the motorcycle and Decedent's other at-home vehicle.

Despite the plainly-worded named driver exclusion stating that no coverage applied under the Nationwide policy while Decedent operated any vehicle, Petitioner sought to collect an additional layer of UIM coverage under her policy. This action followed.

On March 9, 2017, Nationwide filed a Motion for Summary Judgment. (R. p. 45-46). Petitioner filed a cross-motion for summary judgment on April 13, 2017. (R. p. 51). On May 16,

2017, after a hearing, the Honorable Judge William H. Seals, Jr. granted Nationwide's motion and denied Petitioner's motion. (R. pp. 1-5). Judge Seals held Nationwide's excluded driver endorsement satisfied all the requirements of South Carolina Code § 38-77-340. (R. p. 2). He also applied the plain language of the statute and held the exclusion applies to Decedent even if he would otherwise have been a statutory insured. (R. p. 3). Although Petitioner argued the exclusion can only apply to liability coverage, Judge Seals held that the phrase "policy of liability insurance" must be read in the context of South Carolina's insurance statutes. Underinsured motorist coverage cannot be sold as a standalone policy because it can only be offered up to the amount of liability insurance. (R. p. 3) (citing S.C. Code § 38-77-160). Therefore, UIM coverage only exists as a part of "the policy of liability insurance." (R. p. 3). Lastly, Judge Seals found that South Carolina public policy supports Nationwide's application of the excluded driver endorsement to UIM coverage. (R. p. 4) ("Allowing an excluded driver to collect UIM coverage when he is explicitly and purposefully excluded from coverage for his liability to others undercuts that legitimate public policy objective."). This appeal followed.

On October 2, 2019, the South Carolina Court of Appeals unanimously affirmed the Circuit Court's decision. The Court of Appeals held that UIM coverage is only purchased at the option of the named insured as additional coverage. By signing the excluded driver endorsement, the insured is statutorily permitted to exclude mandatory liability coverage. Therefore, the Court of Appeals found "that to interpret § 38-77-340 to allow for the intentional exclusion of a resident relative from liability coverage, but not UIM coverage offered as optional, 'additional coverage' in conjunction with the same policy, would impose a forced construction of the statute not intended by the General Assembly." (Appendix pp. 253-254).

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Although not controlling, the Supreme Court considers the following reasons when determining whether to grant certiorari:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. In this case, no judge in the Court of Appeals dissented, there are no conflicting decisions from this Court,[1] no constitutional issues are involved, and no federal question is involved. Therefore, the only prong of the Rule 242(b) considerations that could be implicated is whether the case presents a novel question of law. Because the Court of Appeals applied well-established rules of contract and statutory construction, this case does not present any novel issues of law.

ARGUMENT

The General Assembly expressly authorized the use of excluded driver endorsements in South Carolina Code § 38-77-340. By the plain language of the statute, the exclusion applies even if the excluded driver would otherwise qualify as a statutory, omnibus insured. Moreover, the

[1] Contrary to Petitioner's argument that this reason is implicated, the South Carolina Court of Appeals held that South Carolina Code Section 38-77-340 allows the exclusion of all policy coverages while the excluded driver is operating a vehicle. No prior decision of this Court has held otherwise.

plain language of the statute says the exclusion applies to the policy, not specific coverage in the policy.

While the Motor Vehicle Financial Responsibility Act (MVFRA) generally protects the public, the excluded driver statute "protects, in limited situations, the right of the parties to make their own contract." *Lincoln General Ins. Co. v. Progressive Northern Ins. Co.*, 406 S.C. 534, 547, 753 S.E.2d 437, 444 (Ct. App. 2013) (citation omitted). Where parties are free to make their own contract, South Carolina's traditional rules of contract interpretation apply, and a contract must be applied according to its plain terms. *Charles v. Canal Ins. Co.*, 238 S.C. 600, 617, 121 S.E.2d 200, 209 (1961) ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.") (citation omitted). The excluded driver endorsement that Petitioner chose to sign states in plain and unambiguous terms that "*all* coverages in your policy are not in effect while Danny Knight is operating *any* motor vehicle." (R. p. 74). Because Decedent was operating a motor vehicle at the time of the accident, the coverages in the Nationwide policy were not in effect.

I. The General Assembly Chose to Protect Parties' Freedom of Contract Rights by Enacting the Excluded Driver Statute.

Despite the mandatory nature of certain provisions in the MVFRA, the General Assembly enacted the excluded driver statute to give insureds the freedom to choose to exclude certain individuals from their policies. South Carolina Code § 38-77-340 authorizes the excluded driver endorsement if certain directives are followed:

> 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. The agreement,

> when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code Ann. § 38-77-340. Thus, an excluded driver form is valid and enforceable such that coverage under the policy "shall not apply" when an excluded driver operates a vehicle as long as: (1) the form has been approved by the Department of Insurance; (2) the endorsement names the excluded driver; and (3) the named insured declares either that the excluded driver has turned in his license to the DMV or that the excluded driver has an appropriate policy of liability insurance. Once these elements are satisfied – as is the case here – coverage under the policy will not apply when the excluded driver is operating any motor vehicle.

Of course, a licensed excluded driver should have another "appropriate policy of liability insurance" while driving, such that another carrier assumes the risk of that driver's operating a vehicle. S.C. Code § 38-77-340. However, the named insured – Petitioner – and the insurer – Nationwide – have contractually agreed that this policy will not apply when the excluded driver operates a vehicle.

Petitioner argues that Decedent was a statutory insured and, therefore, could not be excluded from UIM coverage. However, the excluded driver statute begins by stating, "Notwithstanding the definition of 'insured' in Section 38-77-30 . . . ." S.C. Code § 38-77-340. Therefore, the General Assembly clearly intended for the excluded driver endorsement to exclude someone who would otherwise qualify as a statutory insured.

"The thrust of [the omnibus statute] is to protect the public, while the thrust of the [excluded driver statute] is to protect, in limited situations, the right of the parties to make their own contract."

South Carolina Ins. Co. v. Barlow, 301 S.C. 502, 508, 392 S.E.2d 795, 798 (Ct. App. 1990). Petitioner elected to exclude the Decedent and signed the excluded driver endorsement. Petitioner expressly agreed that all coverages in the policy would not apply when Decedent was operating any vehicle.

"Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) (citation omitted). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* (citation omitted). By enacting the excluded driver statute, the General Assembly protected Petitioner's right to contract for the exclusion and to sign the agreement. Petitioner chose to sign the plainly-worded excluded driver endorsement. Therefore, the exclusion must be applied according to its plain, ordinary, and popular meaning, and the Court of Appeals correctly held that no coverage applied at the time of the accident because Decedent was operating a vehicle.

II. A "Policy" Encompasses All "Coverages" in an Insurance Policy.

Petitioner places great emphasis on the language in the excluded driver statute that "coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by" the excluded driver. Petitioner mistakenly construes the phrase "policy of liability insurance" as referring solely to liability coverage. However, "policy" is different from "coverage." A policy of insurance is the insurance contract, which routinely consists of a number of different coverages, including liability coverage, uninsured motorist coverage, UIM coverage, medical payments coverage, comprehensive and collision coverage, and other coverages. Together, all of these coverages make up the policy.

The General Assembly clearly understood that a "policy" is the entire contract of insurance, which consists of multiple coverages. The Court of Appeals below identified numerous statutory examples, but the most poignant example is in the definition of "motor vehicle liability policy" in South Carolina Code § 56-9-20(5):

> (5) An owner's or operator's policy of liability insurance that fulfills all the requirements of Sections 38-77-140 through 38-77-230, certified as provided [in Title 56] and issued, except as otherwise provided by Section 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured, and subject to the following special conditions.

S.C. Code Ann. § 56-9-20(5) (emphasis added). Notably, this definition uses the exact same phrase as the excluded driver statute – "policy of liability insurance." The statute goes on to make clear that a "policy of liability insurance" includes all the requirements of Sections 38-77-140 though 38-77-230. Importantly, South Carolina's UIM statute, Section 38-77-160, falls within this range. Thus, the General Assembly understood and intended for a "policy" to be one that encompasses various "coverages," including UIM coverage as provided for in Section 38-77-160.

The wording of the UIM statute further shows the General Assembly's understanding of the distinction between the terms "coverage" and "policy." When requiring insurers to offer UIM coverage, the General Assembly uses the word "coverage," knowing that UIM will be offered as part of a policy of liability insurance: "Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured . . . ." S.C. Code § 38-77-160 (emphasis added). Therefore, when the excluded driver statute states that the "policy of liability insurance shall not apply when" the excluded driver

operates a vehicle, the General Assembly intended for the entire policy – i.e., all coverages in the policy – to be excluded.[2]

III. The Circuit Court Correctly Held Application of the Excluded Driver Endorsement to All Coverages in the Policy Promotes South Carolina Public Policy.

The principal goal of the MVFRA is for owners of vehicles garaged and operated in South Carolina to purchase insurance coverage to protect the motoring public in at least the minimum amounts required by South Carolina law. This legislative goal is carried out by Chapter 10 of Title 56, which requires "[e]very owner of a motor vehicle required to be registered in this State [to] maintain" insurance providing for at least "the minimum coverages specified in Sections 38-77-140 through 38-77-230 . . . ." S.C. Code §§ 56-10-10 & 56-10-20. A secondary goal of the statutory scheme is for insureds to have protection through UIM coverage for the risk of injury caused by another motorist. The fact that this goal is secondary is made apparent by two aspects of the insurance statutes. First, a named insured can choose to reject UIM coverage. Thus, it could not be part of the General Assembly's principal goal in the MVFRA. Second, an insured can only purchase UIM coverage "up to the limits of the insured's liability coverage." S.C. Code § 38-77-160. Thus, the amount for which an insured can protect herself or members of her household is limited to the amount for which she is willing to insure for the risk that she or a member of her household may injure a member of the public while operating a vehicle. Both of these facts reveal the General Assembly's emphasis on the purchasing of liability coverage over first-party coverage.

[2] Petitioner also takes issue with the Court of Appeals' holding that UIM coverage is voluntary "additional coverage." However, it is well-established that a named insured has the option of selecting or rejecting UIM coverage. Thus, it is optional additional coverage. It is undisputed that Nationwide offered UIM coverage and Petitioner selected UIM coverage. However, Petitioner also selected to sign the excluded driver endorsement and to agree that all coverages would not be in effect while Decedent operated a vehicle. In doing so, she selected for the policy <u>not</u> to provide UIM coverage while Decedent operated a vehicle. Moreover, Decedent <u>was</u> entitled to UIM coverage when the policy was in effect – i.e. when Decedent was not operating any motor vehicle.

Petitioner's contention that an insured could exclude a statutory insured for liability coverage – and thereby void any protection to the motoring public while the excluded driver operates a vehicle – but still enjoy UIM protection while that statutory insured operates a vehicle would completely thwart the primary goal of the MVFRA. A parent of high-risk, teenage drivers could choose to exclude all of her children from liability coverage – and thus avoid the significant increase in insurance premium – and yet still expect her children to be protected for UIM coverage from the risk of injury caused by another driver. The parent would avoid paying insurance for the risk that high-risk household drivers would injure someone else, but still expect to get first-party coverage – such as comprehensive and collision, UM, UIM, or medical payments. Such a rule would create perverse incentives that directly conflict with the purpose of the MVFRA.

As the Circuit Court succinctly stated, "an individual is not allowed to protect himself from injury in an amount greater than that which he protects the public. Allowing an excluded driver to collect UIM coverage when he is explicitly and purposefully excluded from coverage for his liability to others undercuts that legitimate public policy objective." (R. p. 4). This rule is plainly established by the UIM statute, which limits the amount of UIM coverage an insurer can offer to the amount of liability coverage in the policy. Likewise, the use of the word "policy" in the excluded driver endorsement shows the General Assembly intended that all coverages in the policy "shall not apply" while an excluded driver operates a vehicle. Thus, the Circuit Court and Court of Appeals correctly applied the named driver exclusion according to its plain terms.

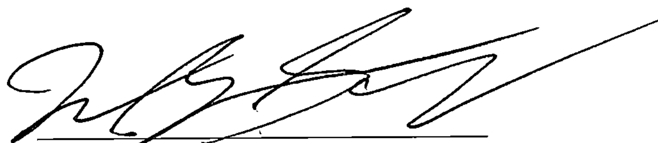
CONCLUSION

The Circuit Court and Court of Appeals properly applied the excluded driver statute and excluded driver endorsement according to their plain terms. Petitioner purposely elected to exclude all coverage while Decedent operated any vehicle. The excluded driver endorsement

comports with the excluded driver statute, complies with all of the requirements of the statute, and enforcement of the endorsement promotes South Carolina public policy. The case does not raise any novel question of law. Thus, the excluded driver endorsement applies, and coverage under the policy was not in effect at the time of the accident. Therefore, the Petition should be denied.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
PO Box 6648
Columbia, South Carolina 29260
(804) 782-4100
wsawyer@murphygrantland.com
Attorneys for Respondent

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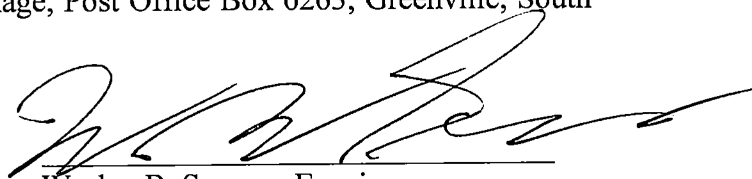
PROOF OF SERVICE

I certify that I have served the Return to Petition for Certiorari of Respondent on Petitioner, by depositing a copy of it in the United States Mail, postage prepaid, on February 5, 2020, addressed to his attorney of record, Edwin L. Turnage, Post Office Box 6263, Greenville, South Carolina 29606.



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