

**The State of South Carolina  
In The Supreme Court**

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APPEAL FROM GREENVILLE COUNTY

**RECEIVED**

Court of Common Pleas

FEB 14 2020

William H. Seals, Jr., Circuit Court Judge

S.C. SUPREME COURT

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Case No. 2020-000026

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NATIONWIDE INSURANCE COMPANY  
OF AMERICA,

Respondent,

v.

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

Appellants.

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**APPELLANTS' REPLY TO RESPONDENT'S  
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Attorney for Appellants

## I. ANALYSIS

- 1. The Court should grant certiorari because this case raises a novel issue and because the Court of Appeals decision conflicts with several Supreme Court decisions.**

Respondent concedes in the *Return*, this case raises a novel question of law involving South Carolina public policy with regard to an insurance policy exclusion of underinsured motorist coverage (UIM).

Respondent asserts without elaboration that, “there are no conflicting decisions from this Court.” (Respondent’s Return at 3). We disagree. In the process of upholding an exclusion of the coverage, the Court of Appeals held UIM coverage was non-mandatory, and therefore, subject to reasonable policy limitations. That holding was foundational to the Court of Appeals’ reasoning to allow the exclusion. As set forth in our *Petition*, the Court of Appeals’ holding that UIM is non-mandatory coverage is contradicted by several Supreme Court decisions stating that UIM coverage is mandatory.

- 2. This case arises under the automobile insurance law not the Motor Vehicle Financial Responsibility Act.**

Respondent’s argument cites frequently to the Motor Vehicle Financial Responsibility Act (MVFRA). This case does not arise under the MVFRA. Rather, it involves interpretation of Section 38-77-340, a provision of the automobile insurance law. *See* S.C. Code Ann. §§ 38-77-10, *et seq.*; *Sweetser v. South Carolina Dep’t of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (S.C. 2010) (noting distinction between the two statutes at the outset of the Court’s analysis). A key aspect of Respondent’s argument involves the attempted incorporation of

the MVFRA definition of “policy of liability insurance<sup>1</sup>” into its analysis. Respondent conflates definitions from the MVFRA into the analysis of an unambiguous Section of the automobile insurance law which has its own definitions. “Where there is no ambiguity, words must not be added to or taken from the statute.” *McCollum v. Snipes*, 213 S.C. 254, 49 S.E.2d 12, 16 (S.C. 1948). Applying a definition from the wrong statute creates confusion where none existed. The automobile insurance law, at least with respect to Section 38-77-340, is clear and unambiguous. “It is a generally accepted proposition that if a statute is clear and unambiguous there is no room for construction, and courts must give the terms of the statute their literal meaning. *Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 171 S.E.2d 355, 253 S.C. 407 (S.C. 1969).

**3. Section 38-77-340 directly references the insured vehicle. Therefore, the exclusion allowed by this Section can only be for liability coverage because liability coverage is the only bodily injury coverage that follows the vehicle.**

Respondent quotes S.C. Code Ann. § 38-77-340 at page 4-5 of the *Return*.

The relevant language of that Section is quoted 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). Respondent's *Return*, in summarizing the quote above, misstates what Section 38-77-340 says as follows:

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<sup>1</sup> See S.C. Code Ann. § 56-9-20(5).

“coverage under the policy ‘shall not apply’ when an excluded driver *operates a vehicle.*” (Respondent’s *Return* at page 5) (emphasis added).

The change to the statute made by Respondent’s purported summary was subtle. Respondent changes the word “the,” that was in front of the word “vehicle,” to the word “a”. That one little word change makes a very big difference to the meaning of Section 38-77-340. By changing “the” to an “a”, Respondent is able to argue its overbroad excluded driver form, which seeks to deprive Respondent’s insureds of *all* personal and portable<sup>2</sup> coverages, like the uninsured (UM) and underinsured (UIM) motorist coverages which would otherwise apply to the excluded person (statutory insured) when he is not driving the insured vehicle, is an allowed exclusion under Section 38-77-340.

The problem with Respondent’s argument is that the statute does not say, “a vehicle.” It says, “*the* vehicle.” Without altering the words, Respondent cannot avoid the principle of *Hogan v. Home Ins. Co.*, 260 S.C. 157, 161, 194 S.E.2d 890, 892 (1973). *Hogan* stands for the principle that liability coverage follows the vehicle. Personal and portable coverages, like UM and UIM motorist coverage, follow the person. Here, the South Carolina Legislature clearly and unambiguously limited the exclusion to liability insurance coverage on “the vehicle” when it is being operated by the excluded driver. Respondent has no

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<sup>2</sup> “[P]ortability refers to a person’s ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident.” *Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 181, 178, 700 S.E.2d 283 (2010).

valid argument to rebut this. It must change the statute and hopes you do not notice its subterfuge.

The intent to limit the Section 38-77-340 exclusion to liability coverage is demonstrated by the Legislature's use of the word "liability" to modify the defined word, "policy". Section 38-77-340 states: "a policy of *liability* insurance shall not apply while **the** motor vehicle is being operated." S.C. Code Ann. § 38-77-340 (emphasis added). The Legislature intended the word "liability" to modify something. And that something it meant it to modify was the defined term, "policy."<sup>3</sup> *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("In construing a statute, it must be read so that, "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .") This intent is hammered home because Section 38-77-340 expressly limited the allowed exclusion to "the vehicle" when it is being operated by an excluded driver.

**4. Respondent's public policy argument is inconsistent with long-standing South Carolina public policy.**

In Section III of its *Return*, Respondent advances the insurance company's view of South Carolina public policy. This section is short on authority and is confusing. We will rebut what the insurance company argues is South Carolina public policy below. Before doing so, however, it is necessary to set forth clearly the public policy regarding personal and portable UM or UIM coverages of South

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<sup>3</sup> See 38-77-30(10.5) (defining "policy").

Carolina as described by *Howard, Hogan, Sloan, Floyd, and Burgess* (cited below):

Our supreme court has previously explained, "uninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to the insured." *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (citing *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973)). The court further clarified in *Hogan* that "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." *Hogan*, 260 S.C. at 162, 194 S.E.2d at 892. Similarly, the statutory purpose of UIM coverage is to provide coverage in the event damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured. S.C. Code Ann. § 38-77-160. Thus, our UIM statute is also remedial in nature and enacted for the benefit of injured persons. It should be construed liberally to effect the purpose intended by the legislature. See *Sloan v. Greenville County*, 356 S.C. 531, 564, 590 S.E.2d 338, 356 (Ct. App.2003) (reasoning that the provisions of a code should be construed liberally if the code is remedial in nature).

Understanding that UIM coverage is a variation of UM coverage, we believe that *Hogan* indicates the legislative intent behind our UIM statute and is applicable here. In other words, under insurance, like un insurance, is personal and portable. "In jurisdictions where the coverage follows the person any person who enjoys the status of an insured under a motor vehicle policy of insurance which includes uninsured/underinsured coverage enjoys coverage protection simply by reason of having been injured by an uninsured/underinsured motorist." 9 Couch on Ins.3d § 123:3.

*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).

"The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the

purpose intended by the Legislature.” *Floyd v. Nationwide Mut. Ins. Co.*, 626 S.E.2d 6, 10, 367 S.C. 253 (S.C., 2005).

Despite the well-established South Carolina public policy described by the paragraph above, Respondent argues for a different South Carolina public policy. It claims our State’s automobile insurance public policy stands for the following principle:

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.

(Respondent’s *Return* at Page 8) In other words, Respondent suggests South Carolina public policy stands for the principle that, “an individual is not allowed to protect himself from injury in an amount greater than that which he protects the public.” (Respondent’s *Return* at Page 9) (quoting Circuit Court Order). Respondent derives this public policy from the automobile insurance law’s requirement<sup>4</sup> that an insurer must *offer* insureds (at minimum) UM and UIM coverages up to the liability policy limits.<sup>5</sup>

The insurance company’s description of South Carolina public policy is inaccurate. South Carolina often *requires more* personal and portable UM and UIM coverages than liability coverage. For example, UM and UIM coverages are

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<sup>4</sup> *Return* at Page 8, quoting S.C. Code Ann. § 38-77-160.

<sup>5</sup> The MVFRA directly contradicts Respondent’s public policy argument. It expressly allows insurers to write more coverage than the minimums. See S.C. Code Ann. 56-9-20(d) (“a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy.”) See also *Universal Underwriters Ins. Co. v. Metropolitan Property and Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858 (Ct. App. 1989).

not limited to an insured's use of the insured vehicle. Liability insurance is limited to injuries caused by the vehicle. *See Hogan v. Home Ins. Co.*, 260 S.C. 157, 161, 194 S.E.2d 890, 892 (1973) (“requiring UM and UIM “at all times and without regard to the activity”). This is because liability coverage and UM and UIM coverages are for completely different risks. UM and UIM coverages only apply when a *third party* is negligent. On the other hand, liability coverage applies only when the vehicle insured by the policy is the cause a wreck. The type of risk and type of coverage for liability and UM/UIM are mutually exclusive.

South Carolina public policy also requires that UM and UIM coverages exceed liability coverage in stacking cases involving injury to Class I insureds. However, stacking of liability coverage is prohibited. *Compare S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 405 S.E.2d 396 (1991) (requiring stacking); *with Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631, 633 (1997) (prohibiting stacking of liability insurance coverage). Because it contradicts our statutes and Supreme Court case authority, Respondent's description of South Carolina public policy must be rejected.

## II. Conclusion

For the above reasons and for the reasons set forth in our *Petition*, Appellants respectfully request that the Court grant *Appellants' Petition for Certiorari*.

February 13, 2020



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**Proof of Service**

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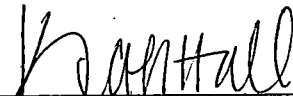
I certify that I have served Appellants' Reply to Respondent's Return to Petition for Writ of Certiorari on Nationwide Insurance Company of America by depositing a copy of it in the United States Mail, postage prepaid, on February 13, 2020, addressed to its attorney of record, Wesley Brian Sawyer, Post Office Box 6648, Columbia, SC 29260

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