The State of South Carolina
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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MAY 22 2020
S.C. SUPREME COURT

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, Petitioners.

PETITIONERS' BRIEF

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

Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

Does Nationwide's automobile insurance policy, which seeks to exclude all portable UIM and UM coverages to a statutory insured, violate South Carolina public policy?

STATEMENT OF THE CASE

On July 18, 2016, Respondent sued Petitioners seeking a declaration that its policy was not required to provide any coverage to Daniel Knight. (ROA at 10)

On September 29, 2016, Petitioners filed an answer and counterclaim. Petitioners asked the court to declare that Respondent's policy excluding UIM coverage to Danny Knight violated South Carolina public policy and that they were entitled to recovery of the insurance policy UIM limits ($25,000). (ROA at 13-16)

On October 7, 2016, Respondent filed a reply denying Petitioners' counterclaim. (ROA at 17)

On March 9, 2017, Respondent filed a motion for summary judgment. (ROA at 45) On April 13, 2017, Petitioners filed a motion for summary judgment. (ROA at 51) On May 22, 2017, the trial court conducted a hearing on the parties' cross motions for summary judgment. On May 26, 2017, the trial court granted Respondent's motion for summary judgment and denied Petitioners' motion for summary judgment. (ROA at 1)

On June 12, 2017, Petitioners filed a notice of appeal. (ROA at 6).

On October 2, 2019, the Court of Appeals denied the appeal and issued an order that found, "UIM coverage is not mandatory in South Carolina." (Order at

5). The Order held that UIM is an optional, non-mandatory coverage subject to "reasonable limitations." (Order's footnote 3)

On January 8, 2020, Petitioners filed a petition for writ of certiorari. On February 5, 2020, Respondent filed a *Return* to the petition. On February 14, 2020, Petitioners filed a *Reply*. On April 24, 2020, this Court granted Petitioners' petition for writ of certiorari.

FACTS

On February 2, 2016, Randy M. Mincey was driving a 2007 Saturn east on Monroe Street in Anderson. Meanwhile, a 1998 Honda motorcycle was traveling north on Market Street. Mincey, inattentive, failed to yield and drove the Saturn onto Market Street and into the path of the motorcycle. The vehicles collided and the motorcycle rider was ejected. His head hit the road surface. The impact caused a severe head injury and death. (R. p. 13) The rider and owner of the motorcycle was Danny Knight, Kristi Knight's husband. (R. pp. 154-155, 167). The liability carrier for the at-fault driver, and the UIM carriers for Danny's motorcycle insurance and automobile insurance paid their respective policy limits. (R. p. 8) Respondent stipulates that the damages exceed the coverage of the policy. (R. pp. 156-157)

Before the fatal collision, Nationwide issued an automobile insurance policy, policy number 6139D 065876, on a 1996 Ford Ranger owned by Kristina Knight (hereinafter Kristina). Kristina opted to purchase UIM coverage and paid the extra premium for that coverage. That policy was in good standing on the date of her husband's death. The policy provided for underinsured motorist coverage to Kristina and all resident relatives (*i.e.*, statutory insureds) as required

by the South Carolina automobile insurance statute. (R. pp. 12, 81) However, by endorsement, the policy sought to exclude all coverage, including the portable UIM and UM coverage, for Kristina's late husband Danny Knight. (R. pp. 8, 74) Nationwide denied the widow's UIM claim. (R. pp. 8-9, 15-16)

ARGUMENTS

1. An automobile insurance policy provision that eliminates mandatory, minimum, portable UIM coverage of a statutory insured is void because it violates South Carolina public policy.

Nationwide v. Knight is an important public policy case because an order affirming summary judgment for Respondent will eliminate UM and UIM coverage for thousands of South Carolina families. (R. pp. 163-165) Respondent continues to use the excluded driver endorsement broadly on policies across the State. (R. pp. 176-178)

The Court of Appeals October 2, 2019, Order approved Respondent's automobile insurance policy provision that excluded all coverages, including the portable and remedial UM and UIM coverage as a reasonable limitation on optional coverage. The Court of Appeals Order misapprehended or misinterpreted Section 38-77-340 of the South Carolina Code of Laws which allows exclusion of *only* automobile liability insurance coverage.

The relevant language of 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).

The Legislature enacted Section 38-77-340 as a limited exception to the general rule that all South Carolina automobile insurance policies must provide liability insurance coverage to all statutory insureds that might use an insured vehicle. Section 38-77-340 allows automobile insurers and policy-holders, by agreement, to exclude liability insurance coverage on a specific automobile when the designated resident family member (statutory insured) uses the vehicle. The purpose of this exception is to reduce risks (and the associated higher premiums) related to the otherwise required liability insurance coverage when a resident relative with a bad driving record could use an insured vehicle. Under the exclusion permitted by Section 38-77-340, the automobile insurance company and its policy-holder agree that a designated person will not 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 bodily injury coverages such as personal and portable UM and UIM coverages that do not increase the risk to the automobile insurance company of covering a bad driver. The UM and UIM coverages only apply when a third party is at fault. However, the Court of Appeals upheld the insurance company's use of the statutory exclusion to exclude the personal and portable UIM coverage because, in the Court of Appeals view, the UIM coverage was non-mandatory, and therefore, subject to reasonable policy limitations.

The Court of Appeal'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 (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 (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 (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 (2014), the Supreme Court quoted *Ruppe*, "Statutorily required coverage is that which is required to be offered or provided." The October 2, 2019, Order also contradicted a 2010 Court of Appeals opinion. *See Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283, 287 (Ct. App. 2010) ("Statutorily required coverage is that which is required to be offered or provided.") (quoting *Ruppe*) Therefore, the Order's characterization that required UIM coverage is non-mandatory and optional is an incorrect statement of long-standing South Carolina law and public policy.

2. Section 38-77-340, a provision that sets forth procedures allowing automobile insurance companies to exclude liability insurance coverage to a resident relative, does not authorize them to also exclude mandatory minimum, portable UM and UIM coverages those family members.

In enacting Section 38-77-340, the Legislature 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. The allowed exclusion in Section 38-77-340 was intended narrowly for the liability insurance coverage *only* as 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. 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 Court of Appeals October 2, 2019, Order, disregarded the defined Title 38 term for "policy" and violated 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 its scope to times, "while the insured vehicle is being operated." This language means Section 38-77-340's exclusion can also *only* refer to liability insurance coverage. In *Hogan v. Home Ins. Co.*, this Court distinguished between liability coverage, which follows the vehicle, and UM coverage, which follows the person. It 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, Court of Appeals Order never addressed Petitioners' argument that the exclusion relates to use of an insured vehicle, an indication and confirmation of a clear legislative intent to limit the allowed exclusion to *only* liability insurance coverage.

3. This case arises under the automobile insurance law not the Motor Vehicle Financial Responsibility Act.

The Court of Appeals Order improperly relied upon definitions found in the wrong statute, 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 (2010) (noting distinction between the two statutes at the outset of the Court's analysis). A key element of Respondent's argument to the Court of Appeals and Circuit Court involved the attempted incorporation of the MVFRA definition of "policy of liability insurance" into its analysis. Respondent conflated definitions from the MVFRA into the analysis of an unambiguous Section of the automobile insurance law which had its own set of 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 (1948). Applying a definition from the wrong statute created confusion where none existed. The automobile insurance law, at least with respect to Section 38-77-340,

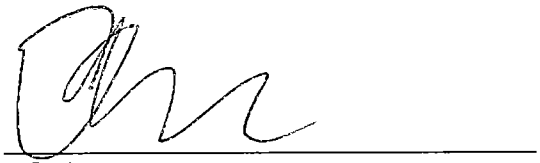
is clear and unambiguous. "It is a generally accepted proposition that if a statute is clear and unambiguous there is no room for construction, and courts must give the terms of the statute their literal meaning. *Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 171 S.E.2d 355, 253 S.C. 407 (S.C. 1969).

4. The automobile insurance law must be liberally construed in favor of coverage and any exceptions ought to be narrowly interpreted.

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. The Court of Appeals Order allows automobile insurance companies to overbroadly apply the allowed liability coverage exclusion provision (Section 38-77-340) to exclude all other bodily injury coverages of a designated person. Thus, the Order undermines the Legislature's remedial public policy requiring mandatory UM and UIM insurance coverage of statutory insureds in all automobile insurance policies. If this Court does not reverse the October 2, 2019, Court of Appeals Order, our remedial State policy in this regard will be significantly eroded. The wrongness of permitting an insurance company to undermine a remedial policy like this is obvious. This Court requires 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 (Ct. App. 1984); *see also McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770, 310 S.C. 316, 319 (1992) ("rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed."). Therefore, the October 2, 2019, Order fails to comply with the Supreme Court's guidance to narrowly construe exceptions in remedial statutes.

The Court of Appeals October 2, 2019, Order disregarded clear statutory language and contradicted numerous Supreme Court opinions. Its ruling reduces required UIM and UM coverage for South Carolina families. For this and the above reasons, it is urgent that the Court reverse the October 2, 2019, Order, and remand the case to the Circuit Court with instructions to enter judgment in favor of Petitioners.

May 15, 2020



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HARRIS & GRAVES, P.A.
812 Laurens Road
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Proof of Service

I certify that I have served Petitioners' Brief on Nationwide Insurance Company of America by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2020, addressed to its attorney of record, Wesley Brian Sawyer, Post Office Box 6648, Columbia, SC 29260

May 20, 2020

Karie L. Hall
Paralegal for
Edwin L. Turnage
HARRIS & GRAVES, P.A.
812 Laurens Road
Greenville, South Carolina 29607
(864) 235-1331
Attorney for Petitioners