

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM THE RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000439

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Jun 04 2020

SC Court of Appeals

United Services Automobile Association, Respondent and moving party,

v.

Belinda Pickens, Appellant,

**APPELLANT’S RETURN TO UNITED SERVICES AUTOMOBILE ASSOCIATION’S MOTION  
FOR CERTIFICATION BY THE SUPREME COURT**

Pursuant to Rule 240(e), SCACR, the Appellant (Pickens), in return to Respondent’s Motion for Certification, and without conceding Respondent’s factual and legal representations, herein consents to certification, but objects to consolidation of this matter with *Nationwide Insurance Company of America v. Knight* (App. Case No.: 2020-000026).

**BACKGROUND**

For the purposes of this motion only it is agreed that Pickens was severely injured in an accident caused by an uninsured third-party driver, and that USAA denied Pickens was entitled to the uninsured motorist coverage (“UM”) she purchased because at the time of the accident her son—an excluded driver—was operating her car. This is despite the fact that Pickens’ injuries were caused by the uninsured third-party driver and not her son.

## ARGUMENT

USAA argues for certification by, among other things, alleging this case presents similar or “overlapping legal arguments about the meaning of [S.C. Code Ann. §38-77-340]” with *Knight*, and therefore “requests that the Court hears these cases together.” (Motion p. 5). While unclear, to the extent USAA seeks consolidation pursuant to Rule 214, SCACR, Pickens objects to consolidation.

Unless arising from the same lower court order—which is not the case here—consolidation is limited to where the appeals present the same question. *See* Rule 214, SCACR. Here, although this case may be similar to *Knight* in that each concerns the effect of an excluded driver provision, the similarities end there. The issues and policy considerations presented in *Knight*—a stacking case brought seeking payment of benefits to the excluded driver—differ substantially from this case—which was brought by the named insured and does not concern stacking or payment of benefits to the excluded driver. Thus, while Pickens agrees certification is warranted,<sup>1</sup> consolidation is not.

*A. This case is not the same as Knight because this is not a stacking case, and although the Court of Appeals erred in Knight, that holding is not determinative of this one.*

USAA asserts that “In *Knight* the Court of Appeals held that a policy with an excluded driver endorsement did not provide any UIM [] when the excluded driver was operating a vehicle.” [Mot. for Cert. p. 4]. However, this is an overly broad and misleading characterization. The *Knight*

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<sup>1</sup> While Pickens agrees this matter presents issues of significant legal and public significance, she does not agree or concede with the reasoning and arguments offered by USAA. However, Pickens need not make her opposing arguments here, which she reserves for when briefing the merits of this matter. *See* Rule 240(e) (providing a return to a motion is only necessary to the extent a party opposes the relief requested).

Court's actual holding was that public policy is not offended by a policy limitation preventing the **excluded driver from stacking** UIM. See *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 460, 835 S.E.2d 538, 543 (Ct. App. 2019) (Concluding “we find the Excluded Driver endorsement validly excluded [claimant] from the UIM coverage [he] now seeks to **stack**.”) (bold added). Although the *Knight* Court opined—albeit incorrectly—that there is no meaningful distinction between liability insurance and UIM insurance where the excluded party seeks to stack coverage, it remains that the question of stacking is altogether different than whether a policy provides UIM or UM in the first place. Compare e.g., *Carter v. Std. Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515 (2013) (in a stacking case the court declined to employ the rationale and holdings from cases that “do not involve stacking . . . [because these cases do] not involve [stacking]”); with *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 519, 548 S.E.2d 880, 884 (Ct. App. 2001) (in a non-stacking case the court refused to apply the arguments and precedent established in stacking cases because it was not analogous).

The *Knight* Court never addresses whether its conclusion extends beyond the situation of the excluded driver seeking coverage, much less whether the reasoning applies outside the context of stacking UIM. See *Knight*, 428 S.C. 451, 460, 835 S.E.2d 538, 543 (*supra*). Thus, the holding in *Knight*—incorrect as it is—does not compel the outcome of this case.

*B. The arguments here are not the same as those presented in Knight, and Pickens should not be bound or limited to the arguments presented in Knight.*

Although Pickens intends to argue—similar to *Knight*—that any excluded driver provision purporting to limit UM is void to the extent the damages are not caused by the excluded driver, Pickens has additional arguments that the language of the specific excluded driver provision and

the USAA insurance policy do not foreclose UM in this case. These issues are unique and distinct from those raised in *Knight*, and therefore demonstrate consolidation is improper.

In this case, the terms of USAA's named driver exclusion only suspend coverage for those claims or losses arising out of the ownership maintenance or use of the covered vehicle(s). *See* [Exhibit A, p. 1] and [Order pp. 1-2] (USAA "shall not be liable for damages, losses, or claims arising out of the operation or use of the **automobile described in the policy . . . while said vehicle** is being driven or operated by the [named excluded party]") (bold added).<sup>2</sup>

This is where the distinction between "liability" insurance and UM insurance becomes significant, and that distinction turns on who, and which car, caused the damages. Liability insurance exists for damages caused by the insured arising out of use of the covered vehicle, while UM exists for damages caused by a third-party's operation of an uninsured vehicle. The language of the policy—which tracks the law—demonstrates that liability insurance is contingent on the damages arising from ownership maintenance or use of a covered vehicle while UM is not. *See* [Exhibit A, p. 1] (*supra* italicized language); *see also* [Exhibit A p. 13] (providing UM coverage for the damages caused by a third-party "owner or operator of an uninsured vehicle" when the damages arise from the third-party's "ownership maintenance or use of the **uninsured motor vehicle.**") (bold original). This plain language makes clear that UM coverage is provided not for damages arising from the operation of the vehicle identified in the policy (i.e., Pickens' vehicle

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<sup>2</sup> In *Knight* the excluded driver provision provided "all coverages . . . are not in effect while" the excluded person "is operating **any** vehicle." [*Knight* Appx p. 84] (bold added). Notwithstanding that this provision plainly violates §38-77-340 which only permits the suspension of coverage when the excluded driver is operating the covered vehicle—not "any" vehicle—this demonstrates why the distinction between liability insurance and additional insurance (like UM/UIM) is more significant here than in *Knight*, and confirms further how the issues here diverge from *Knight*.

that son was driving), but for damages caused by and arising from a third-party's "ownership, maintenance, or use" of a different vehicle altogether—to wit an "uninsured vehicle." See [Exhibit A, p. 13] (*supra*). Simply put, "liability" coverage arises from damages caused by the operation of Pickens' vehicles while UM coverage does not. Thus, because the terms of the excluded driver provision here only suspend coverage for claims arising out the operation or use of Pickens' vehicle, it can only apply to liability coverage not UM coverage.

The distinction between liability coverage and additional coverage such as UM is consistent with well-settled insurance law<sup>3</sup> and the general purpose of UM insurance. UM is personal and portable, as compared to liability insurance which is not, and follows a particular vehicle. See e.g., *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404, 496 S.E.2d 631, 632 (1998) (after distinguishing additional UM and UIM coverage from "liability coverage" confirming "[l]iability coverage . . . is limited to the particular vehicle for which it is purchased.")(emphasis supplied by Court); see also *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 703 S.E.2d 862 (2012) (reiterating that the "central purpose of [UIM] is to provide coverage when the injured party's damages exceed the" limits available and, having been "enacted for the benefit of injured persons" must be liberally protected). Therefore, considering that the excluded driver provision at issue here—as well as S.C. Code Ann. §38-77-340—turns on the car from which the damages arise, it is illogical to say the excluded driver provision equally applies

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<sup>3</sup> The law has consistently contemplated and necessitated a distinction between liability insurance and "additional" coverage such as UM/UIM. See *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404, 496 S.E.2d 631, 632 (1998) (finding that liability coverage cannot be stacked but addition coverage, like UIM and UM can be stacked). Although the *Knight* decision is contrary to this fundamental principle, even if this Court were to affirm *Knight*, the language of the USAA policy at issue here requires that distinction be made.

to UM/UIIM. *See* S.C. Code Ann. §38-77-340 (providing that the coverage that may suspended by the excluded driver provision is only that arising from “the motor vehicle” being operated by the excluded driver).


Therefore, because Pickens’ arguments are, at least in part, unique to the specific facts and policy language presented in this case, consolidation of with *Knight*, where these policy-specific issues are not presented, would be improper.

#### CONCLUSION

For the reasons stated above, this Court should grant the request for certification but should not consolidate this matter with *Knight*.

Respectfully submitted,

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Defendant/Appellant,

PROOF OF SERVICE

I, hereby certify that the enclosed was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on this day and properly posted for delivery to the following addresses:

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This 4 day of June, 2020.

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**SC Court of Appeals**

**Re: *United Services Automobile Association v. Belinda Pickens***  
***Appellate Case No.: 2020-000439***

Dear Mrs. Kitchings,

Enclosed please find the original and six (6) copy of the Appellant's Return to United Services Automobile Association's Motion for Certification by the Supreme Court in the above referenced matter. By copy of this letter, I am serving all counsel of record with the same. If you have any questions, please do not hesitate to contact us.

With best regards, I remain

Very truly yours,

THURMOND KIRCHNER & TIMBES, P.A.



Caroline E. Boyce  
Paralegal to Thomas J. Rode

/ceb  
Enc. As stated  
Cc: All Counsel via email only

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**SC Court of Appeals**

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