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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000439

Circuit Court Case No. 2019-CP-40-03702

United Services Automobile Association.....Respondent,

v.

Belinda Pickens.....Appellant.

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

This matter arises from the trial court's denial of uninsured motorist coverage ("UM") to a named insured who was a passenger in her own vehicle when she suffered injuries in an accident caused by an uninsured driver. Based on a misinterpretation of Section 38-77-340 of the South Carolina Code, the trial court rewrote the terms of the subject insurance policy in order to deny UM coverage under a "named-driver exclusion" to liability coverage. Appeal was taken because neither the plain language of the insurance policy nor the law of South Carolina supports the exclusion of this UM claim.

ISSUE ON APPEAL

I. Did the trial court err by interpreting Section 38-77-340 of the South Carolina Code to exclude the appellant's claim for UM coverage as a matter of law, where such an interpretation is inconsistent with the terms of the insurance policy?

STATEMENT OF THE CASE

In 2008, Appellant Belinda Pickens purchased an automobile insurance policy ("the Policy") from Respondent United Services Automobile Association, ("USAA") covering five vehicles, including a 1997 Chevrolet (the "Chevy"). The Policy contained an addendum excluding her son Kevin Simms from certain coverage, providing in relevant part:

> . . . it is hereby agreed that with respect to such insurance as is afforded under this policy, including any obligation to defend, the Company 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 automobile is being driven or operated by the following named person:
>
> KEVIN S. PICKENS [1]
>
> In all other respects this policy remains unchanged.

(R. __). (Named Driver Endorsement).

[1] Although Kevin Simms is misidentified as Kevin Pickens, the parties intended this addendum to name Kevin Simms. (Stip. of Fact) (R. __).

In 2016, while a passenger in the Chevy, Pickens was severely injured in an accident caused by an unknown and uninsured at-fault driver. Although Kevin was driving the Chevy at the time, it is not disputed that he was not at fault and did not cause her injuries. Therefore, Pickens made a UM claim. USAA denied the claim and on July 9, 2019, commenced this declaratory judgment action. On January 20, 2020, USAA moved for summary judgment arguing, that notwithstanding the language of the Policy, § 38-77-340 excluded Pickens's UM claim as matter of law. (USAA Memo in Sup. of MSJ) (R. __). USAA argued that the exclusion contemplated by § 38-77-340 should not be limited to *liability* coverage—i.e., indemnity for those damages caused by Kevin—but should also extend to all coverages, including UM coverage. (P. Mot. for Summ. Jgt. p. 5) (R. __) (Complaint, pp. 3-4, ¶¶ 16, 17 and 21) (R. __) (italics added for distinction).

THE TRIAL COURT'S INTERPRETATION OF SECTION 38-77-340

Section 38-77-340 is entitled "Agreement to exclude [a] designated natural person from coverage," and provides:

> 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.[2]

(emphasis added).

[2] The parties agree that subject form was approved by the director and additionally there is no dispute that subsections (1) and/or (2) were contained within the form. (Stip. of Fact) (R. __).

In concluding that § 38-77-340 applies to UM coverage the trial court focused its analysis on the phrase "such a policy of liability insurance." (R. __). Although this phrase is not defined in the statute, the term "policy" is defined, and only includes "liability insurance" for bodily injury and property damage. S.C. Code Ann. §38-77-30 (10.5). The trial court apparently reasoned that by adding the words "of liability insurance" the legislature was not expressing an intent to limit § 38-77-340 to liability coverage, but instead intended to expand the exclusion to all types of coverage—including UM. (Order p. 5-7) (R. __). The trial court concluded "policy of liability insurance" should be synonymous with the definition of "motor vehicle liability policy" as used in S.C. Code Ann. § 56-9-20(5). The trial court justified this interpretation as consistent with the policy goal of Title 56 and necessary to "protect[], in limited situations, the right of the parties to make their own contract." (Order p. 7) (R. __).

The trial court's interpretation of § 38-77-340 is inconsistent with the plain language of the Policy—which only excludes *liability* coverage—by providing "[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 automobile** is being driven or operated by [Kevin]." (R. __) (bold added) So, in order to give effect to its interpretation of § 38-77-340, the trial court had to, and did, rewrite the Policy. It deleted the operative phrase "arising out operation or use of the automobile," and decided instead: "Therefore, the policy provides that USAA 'shall not be liable for damages, losses, or claims' *arising out of the accident*[.]" *See* (Order p. 7) (R. __) (italics added to distinguish language added by the trial court).

Therefore, and relying largely on *Nationwide v. Knight,* the trial court concluded USAA was excused from paying Pickens's UM claim and granted summary judgment in favor of USAA. *Nationwide Ins. Co. of Am. v. Knight* 428 S.C. 451, 853 S.E.2d 538 (Ct. App. 2019). This appeal

followed, and on July 8, 2020, this Court issued an order accepting certification from the Court of Appeals pursuant to Rule 204(b), SCACR.

STANDARD OF REVIEW

"Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 365, 764 S.E.2d 920, 922 (2014); *citing CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *see also, Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 350, 803 S.E.2d 288, 304 (2017) (confirming the interpretation of a clear and unambiguous contract of insurance is a question of law). "The determination of coverage under an insurance policy" should be reversed if "based on an error of law or on a factual conclusion without evidentiary support." *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 59-60 (Ct. App. 2009) (*en banc*) (cert. denied May 6, 2011) (citations omitted).

ARGUMENT

A. Section 38-77-340 does not exclude the UM claim at issue here.

That the trial court was forced to rewrite the operative language of the Policy in order to *exclude* coverage is significant because South Carolina's statutory scheme, which is to be liberally construed, generally seeks inclusion of coverage and permits contracting for broader, but not narrower, coverages than the minimum requirements contemplated by statute. *See* S.C. Code Ann. § 38-77-10(1) (providing the legislature intended to ensure that "every risk which is insurable . . . is entitled to automobile insurance"); *see also e.g., Willis v. Fid. & Cas. Co.*, 253 S.C. 91, 95, 169 S.E.2d 282, 284 (1969) (confirming the statutory scheme provides for minimum requirements of an insurance policy and the parties are free to contract for additional coverage).

Moreover, that the language the trial court deleted—i.e., "arising out of the operation or use of the automobile"— concerns the operation of the covered car is also significant because operation of the covered car is typically the hallmark of what implicates liability coverage as opposed to UM coverage. This suggests the trial court viewed this UM case through the lens of liability coverage. However, the logic is not the same, and by making Kevin's operation of the Chevy the lynchpin of its analysis, the trial court's focus is misplaced and shows it ignored the clear "distinction between *liability* and *uninsured motorist* coverage." *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973) (italics supplied by the Court); *see Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (in a UM claim by a passenger, finding that the lower court "incorrectly focused on" whether the driver was an insured).

It is a fundamental premise of insurance that UM coverage is not liability coverage—these distinct coverages are mutually exclusive. "[UM] coverage applies when the **at-fault** motorist lacks liability insurance with minimum statutory limits." *Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 543, 370 S.E.2d 85, 88 (1988) (emphasis added). On the other hand, liability coverage applies to damages caused by the insured and provides indemnity "for damages arising out of the ownership, maintenance or use of the [covered vehicle]" owned by the insured. *Hogan*, at 162, 194 S.E.2d at 892 (providing that UM coverage does not provide coverage for the liability of the at fault driver); *citing Willis*, 253 S.C. at 95, 169 S.E.2d at 284 (internal quotations omitted); *see also Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 91, 644 S.E.2d 62, 63 (2007); *see also* (USAA Policy p. 13) (R. __) (stating that "liability coverage pays other motor vehicle drivers [] for the damages caused by you" while explaining "[UM] coverage compensates you . . . [for] damages from an owner or operator of an at-fault uninsured motor vehicle").

Here, this distinction means that damages arising out of the operation of the Chevy—i.e., damages caused by Kevin—would implicate *liability* coverage, whereas damages arising out of an uninsured driver's operation of an uninsured car—like those Pickens suffered—implicate UM coverage. Simply, neither the exclusion in the Policy nor § 38-77-340 speak to UM coverage because both turn on Kevin's operation of the covered car—i.e., the Chevy—rather than on the third-party uninsured car. *See* (USSA Policy Addnm.) (R. __) *and* S.C. Code Ann. §38-77-340.

The trial court's conclusion that "there would have been no liability coverage had Kevin caused an accident" is correct but wholly irrelevant to the question of UM coverage. *See* (Order p. 6). (R. __). Similar faulty logic persists throughout the trial court's order. For instance, the trial court claimed there would be a "perverse incentive" to exclude all family members if "an owner can pay a reduced premium and yet still protect herself as a passenger." (Order p. 6) (R.__) Again, this overlooks the fundamental point that Pickens seeks UM coverage to protect her from an at-fault uninsured driver who was not Kevin. The law mandates UM coverage for a named insured—like Pickens—regardless of whether she is a passenger, driver, or a pedestrian. *See* S.C. Code Ann.§§ 38-77-150 and 38-77-30(7) (mandating UM coverage to the named insured "while in a motor vehicle or otherwise.") Thus, even at whatever reduced premium USAA charged, to be a valid policy it must have contemplated the risk that Pickens could be injured by an uninsured at-fault driver—precisely the risk that was realized. This coverage remains available to Pickens and the existence of the addendum to the Policy does not change this as it plainly states: "**In all other respects this policy remains unchanged.**" (R. __). (Named Driver Endorsement) (bold added for emphasis). Yet changing this coverage (after Pickens was injured) is precisely what USAA sought and precisely what the trial court permitted.

Because § 38-77-340 excludes Kevin from the definition of "an insured" while he is operating the Chevy, it stands to exclude only those coverages which depend on Kevin being an insured. The flaw in the trial court's reasoning boils down to the simple premise that unlike *liability* coverage, Pickens's UM claim does not depend on Kevin being an insured.

B. The purpose and intent of section 38-77-340 demonstrates the trial court erred in finding it bars Pickens's UM claim.

The issue here is whether § 38-77-340 bars Pickens's UM claim.[3] It does not. "The cardinal rule of statutory construction is [to] ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (quoting *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002)). In addition to the plain language of a statute, "[i]t is [also] proper to consider the title or caption of an act in aid of construction to show the intent of the legislature." *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 276-77, 772 S.E.2d 159, 161 (2015) (quoting *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972)) (internal quotation marks omitted); *see also Hock Rh, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 214-15, 813 S.E.2d 540, 543-44 (Ct. App. 2018).

Section 38-77-340 permits an "[a]greement to exclude [a] designated natural person from coverage" by providing in relevant part:

> Notwithstanding the definition of "insured" in Section 38-77-30, the [parties may] . . . 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.

[3] The trial court seems to address the broader question of whether § 38-77-340 *could* bar a UM claim rather than whether it bars *this* UM claim. It implies that because Kevin was not insured, he was not entitled to UM and therefore no one is entitled to UM. Notwithstanding that Pickens's does not agree with this premise, this case does not involve a UM claim by Kevin.

The trial court's analysis (like the *Knight* Court) began and ended with what it saw as an ambiguity created by the phrase "such a policy of liability insurance." (Order pp. 2-6) (R. ___). This myopic approach ignored the context of the statute as a whole and overlooked that the purpose of this provision is limited to *liability* coverage—i.e., the risk the excluded person will cause damage while operating the covered car. *See Contra TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (to give effect to the legislature's intent "the statute must be read as a whole").

Prior to its enactment, § 38-77-340 was codified in substantially the same form at § 56-11-250.[4] This Court has explained the legislature created this provision to alleviate "the problem often faced by the owner. . . [who] has a relatively safe driving record but is forced to pay higher premiums because [a family] member . . . with a bad driving record, is by definition also included." *Lovette v. United States Fid. & Guar. Co.*, 274 S.C. 597, 600-01, 266 S.E.2d 782, 783-84 (1980). The legislature created a "means by which a . . . person[] covered by the omnibus clause, may be excluded from the provisions of the omnibus clause." *South Carolina Ins. Co. v. Barlow*, 301 S.C.

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[4] Previously § 56-11-250 provided:

> Notwithstanding the definition of "insured" in *Article 7 of Chapter 9*, the insurer and any named insured, may by the terms of a written amendatory endorsement . . . 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 *and the person to be excluded*, . . ., shall be binding upon every insured to whom the policy applies. Provided, however, no such natural person shall be so excluded unless [*the Highway Department confirms]* (1) the driver's license has been turned into the State Highway Department 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.

(italics added to show variations from current version of S.C. Code Ann. § 38-77-340)

502, 507, 392 S.E.2d 795, 798 (Ct. App. 1990). Section 38-77-340 continues to function in this way, excluding the designated person from the definition of "insured." *See* S.C. Code Ann. § 38-77-340 (beginning with the operative clause; "Notwithstanding the definition of 'insured' in Section 38-77-30"); *accord* S.C. Code Ann.§ 56-11-250 (beginning with the same operative clause "Notwithstanding the definition of 'insured' in Article 7 of Chapter 9); *see also Lovette,* at 601, 266 S.E.2d at 784 (this was to apply to those "automatically covered" by the definition of insured).

Importantly, the exclusion from the definition of an insured only applies "while the motor vehicle is being operated by [the excluded] person." S.C. Code Ann. § 38-77-340. That its application depends on the operation of the covered car is significant because damages arising from the operation of the covered car cannot trigger UM coverage; instead this would only implicate *liability* coverage. *See* (discussion *supra*); *see also Hogan,* at 162, 194 S.E.2d at 892 (making clear, prior to the enactment of § 38-77-340, that UM coverage could not be limited based on the use of the insured vehicle); *see also Burgess v. Nationwide Mut. Ins. Co.,* 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007) (confirming after the enactment of § 38-77-340 that unlike liability coverage, UM coverage cannot be limited "to the use of the insured vehicle"). Certainly, the legislature could have drafted the statute to exclude the designated person from coverage in all circumstance, however, in choosing not to, it specifically left open the ability for an excluded family member—like Kevin—to collect UM coverage as a passenger or pedestrian. *See* S.C. Code Ann. § 38-77-150 (requiring a policy to provide UM coverage to an insured); *and* S.C. Code Ann. § 38-77-30(7) (defining insured to as a resident relative "while in a motor vehicle or otherwise"). That the legislature did not intend § 38-77-340 to foreclose the excluded driver's ability to seek UM as a passenger suggests it did not intend this statue to exclude a named-insured's ability to collect UM as a passenger either.

The public policy the legislature addressed with § 38-77-340—i.e., the financial burden imposed by the increased risks associated with an excluded driver's "operation" of the car—is quintessentially the ambit of liability coverage, not UM coverage. *See Lovette,* at 601, 266 S.E.2d at 784 (the exclude an "accident-prone" family members was to obtain lower premiums); *see also* S.C. Code § 56-10-210 (defining an "operator" as a person who is in actual physical control of a vehicle). The legislature's focus on the risks posed by the excluded driver is bolstered by the provision that "no natural person may be excluded [under this section] unless" the excluded person has surrendered his license or separately obtained insurance. S.C. Code Ann. § 38-77-340; *see Lovette,* at 600, 266 S.E.2d at 784 (explaining the legislature intended to provide "safeguards [] to prevent persons so excluded from driving without insurance").

By excluding the named person from the definition of "insured" it stands that § 38-77-340 would only exclude those coverages that depend on the excluded person being an "insured." Unlike liability coverage, UM coverage simply does not fit this bill. Rather, UM coverage is a first party benefit that arises from contract, independent of any tort liability, and is available to a named insured "without regard to the activity in which they were engaged at the time." *Erwood*, 373 S.C. at 91, 644 S.E.2d at 63; *see also Wright v. Smallwood*, 308 S.C. 471, 476, 419 S.E.2d 219, 221 (1992) (the obligation to pay UM benefits arises from contract not tort). Being personal and portable, Courts have consistently rejected limitations on UM coverage that turn on the use of the covered car. *See e.g., Erwood*, 373 S.C. at 91, 644 S.E.2d at 63 (finding that an insurer could not condition a passenger's UM benefits on whether the driver of the vehicle—in that case her husband—was insured).

To permit a limitation that makes a passenger's UM coverage dependent on the whether the driver of the covered car is an "insured" under the same policy is inconsistent with this Court's

ruling in *Schmidt*. There, the Court of Appeals ruled a passenger was not entitled to UM coverage because the driver was not a permissive user and therefore did not meet the definition of an insured. *Schmidt*, 339 S.C. at 368, 529 S.E.2d at 283. However, this Court reversed because the Court of Appeals "incorrectly focused on [the driver's] operation of the vehicle," and although the driver did not meet the definition of insured this could not bar the passenger from UM coverage. *Id.*; *accord Lovette*, at 601, 266 S.E.2d at 784 (concluding that the predecessor version of § 38-77-340 was only intended to apply to people "other than the named insured"). This Court's reasoning in *Schmidt* serves to reiterate that UM is personal and the availability of such coverage to claimants like Pickens, must be evaluated from her perspective rather than be dependent on whether another person, like Kevin, is also an insured.

1. The phrase "such a policy of liability insurance" as used in section 38-77-340 is not synonymous with "motor vehicle liability policy" as used in Title 56.

The trial court's ruling, like *Knight*, rests on its conclusion that the phrase "such a policy of liability insurance" as used in § 38-77-340 is synonymous with the definition of "motor vehicle liability policy" as used in S.C. Code Ann. § 56-9-20(5). However, this phrase does not create any ambiguity as to whether § 38-77-340 was not intended to apply to UM coverage, it was not. The meaning of this phrase is plainly ascertainable from the context and purpose of § 38-77-340. Thus, the trial court erred in seeking out and adopting an alternate meaning. *See Elwell*, 403 S.C. at 612, 743 S.E.2d at 806 (where the intent of the legislature is clear "the rules of statutory construction are not needed, and the court has no right to impose another meaning") (internal quotations omitted).

Although the phrase "policy of liability insurance" is not defined in Chapter 77, the term "policy" is defined, and the definition is limited to *liability* coverage. *See* S.C. Code Ann. § 38-77-30(10.5) ("policy means a policy or contract for bodily injury or property damage **liability**

insurance . . . covering **liability arising from the ownership, maintenance, or use** of any motor vehicle.")(emphasis added); *see also Hogan,* at 162, 194 S.E.2d at 892 (liability coverage is for damages "arising out of the ownership, maintenance or use of the [covered] motor vehicle"). Thus, the question becomes what, if any, effect the legislature intended by adding the words "of liability insurance" after the defined term "policy." To accept the trial court's interpretation, this Court must accept that by adding this **limiting** language the legislature intended to **broaden** the meaning of "policy" beyond liability coverage. This defies logic. Had this been intended, why would the legislature choose words that suggest the opposite?

Interestingly, the trial court, like the *Knight* court, cited to various other terms defined throughout the South Carolina Code. Many of these terms—including "automobile insurance" as defined in § 38-77-370 (1) and "motor vehicle liability policy" as defined in § 56-9-20(5)—offer broader and more expansive definitions that are more consistent with the trial court's interpretation. However, the legislature's choice not to employ these broader terms demonstrates it did not intend the broader meaning advanced by the trial court. *See Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554-55, 320 S.E.2d 458, 463 (Ct. App. 1984) (recognizing "[a] well-established rule of statutory construction is *expressio unius est exclusio alterius*, which means that the enumeration of particular things excludes the idea of something else") (*citing Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447 (1933)) (internal quotations omitted).

Certainly, the legislature is aware that courts have long recognized "the distinction between *liability* and *uninsured motorist* coverage." *Hogan,* at 162, 194 S.E.2d at 892 (emphasis supplied by the Court); *see also Sims v. Amisub of S.C., Inc.*, 414 S.C. 109, 117, 777 S.E.2d 379, 383 (2015) (stating the "[l]egislature is presumed to be aware of this Court's interpretation of its statutes" and finding the failure to amend a statute is "evidence [it] agrees with this Court's

interpretation") (*citing Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)). Had the legislature intended § 38-77-340 to apply as the trial court found it seems improbable and illogical that it would have used the words "liability insurance" if it meant to exclude more than liability coverage.

This Court has suggested that the use of the word "such" in the context of the auto-insurance statues generally has "the connotation of aforementioned, i.e., those [previously] described." *Willis*, 253 S.C. at 95, 169 S.E.2d at 284. Therefore, because "policy" is previously mentioned in the same statutory Chapter as § 38-77-340 it seems most plausible the phrase "**such a policy** of liability insurance" is referring to the aforementioned "policy" defined in § 38-77-30. Moreover because the definition of "policy" includes either a "policy for bodily injury liability insurance;" or a "policy for property damage liability insurance;" or both, it seems most likely that this phrase was meant to clarify that the legislature was speaking of *both* these component parts of the "policy" defined in § 38-77-30.

Finally, in adopting the definition of "motor vehicle liability policy" from § 56-9-20(5)(d) the trial court ignored that this definition expressly excludes UM coverage in excess of the minimum limits. *See* S.C. Code Ann. § 56-9-20(5)(d) (providing that in "the excess or additional coverage **shall not be subject to the provisions of this chapter**" and if the policy provides additional coverage "the term 'motor vehicle liability policy' **shall apply only to that part of the coverage which is required** by this article.") (emphasis added). Thus, even if the trial court's incorporation of this definition into § 38-77-340 were proper—which it is not—it is internally inconsistent with the trial court's conclusion because it did not award Pickens UM benefits in the amounts exceeding the minimum limits of $25,000.00. *Contra Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 547, 753 S.E.2d 437, 444 (Ct. App. 2013) (indicating in a

case concerning liability coverage that § 38-77-340 should apply equally to minimum and excess limits).[5]

2. The trial court's reliance on Title 56 is misplaced and fails to consider the public policy considerations of UM coverage.

In support of its analysis the trial court offered a discussion of the "public policy goal [of] the [Motor Vehicle Financial Responsibility Act]" (the "MVFRA") and suggested its interpretation was "the only way the public policy [] can be satisfied." (Order p. 6) (R. __).[6] This is wrong, and the trial court's focus on the policy considerations of Title 56 rather than Title 38 was error.

In *Williams*, this Court instructed that when interpreting other provisions in Article 2 of Chapter 77—of which § 38-77-340 is a part—"**section 56-9-20(5)(d) has no bearing on the application of *other* motor vehicle laws, such as section 38-77-142, or the related consideration of our state's public policy.**" *Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 607, 762 S.E.2d 705, 716 at n.8 (2014) (bold added for emphasis italics supplied by the Court). The public policy implications of the MVFRA only "reach to the provisions the MVFRA" and no further. *Id.* (*citing* S.C. Code Ann. § 56-9-20(5)(d)).

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[5] The legislative history also suggested that it was not intended for the definitions of Title 56 to be applied in the context of Title 38. When it enacted the State's "Insurance Law" at Title 38, the legislature initially proposed that the predecessor version of § 38-77-340 (i.e., § 56-11-250) remain part of Title 56 before ultimately deciding this should be made part of Title 38 instead. *Compare* 1987 Act No. 155 § 9 (initially drafting a proposed version of the statute to be included in Title 56); *with* 1988 Act. No. 641 § 2 (amending §56-11-250 for codification at its present location of §38-77-340); *see TNS*, 331 S.C. at 620, 503 S.E.2d at 476 ("statute[s] must be read as a whole, and sections . . .of the same general statutory law must be construed together"); *see also* S.C. Code Ann. § 56-9-20 (providing the definitions shall apply to the words and phrases "used in **this** chapter") (emphasis added); *accord Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 607, 762 S.E.2d 705, 716 (2014) (*infra*).

[6] The trial court purports to have gleaned this policy goal of the MVFRA from S.C. Code Ann. §§ 56-10-10 and 56-10-20; however, neither of these sections are part of the MVFRA but are instead part of Chapter 10 of Title 56 entitled "Motor Vehicle Registration and Financial Security."

Here, the trial court's misguided discussion of the MVFRA appears to stem from its misapprehension of the Court of Appeals' holding in *Lincoln General* that "the named driver endorsement statute [i.e., § 38-77-340] *is not inhibited by* the MVFRA's public policy because it constitutes separately approved public policy." *Lincoln Gen.*, 406 S.C. at 547, 753 S.E.2d at 444. (italics supplied by court) (*citing Barlow*, 301 S.C. at 507-08, 392 S.E.2d at 797). However, unlike the present case, both *Lincoln General* and *Barlow*, concerned the availability of *liability* coverage where the excluded driver was actually at fault for the accident and therefore these cases implicated the public policy considerations of the MVFRA. *Lincoln Gen.*, 406 S.C. at 539, 753 S.E.2d at 440 (*citing Parker*, 282 S.C. at 551, 320 S.E.2d at 461). Regardless, the trial court misses the bigger picture. *Lincoln General* makes clear that § 38-77-340 exists to serve a policy objective entirely independent of the MVRFA. By trying to force an interpretation of § 38-77-340 to serve the goal of the MVFRA the trial court missed this point entirely.

As this Court's commentary in *Williams* indicates, the public policy considerations of Title 38 are different than those of Title 56. In short, Chapter 77 of Title 38 protects insureds by, among other things, imposing certain "prohibitions and penalties" on discriminatory or unfair practices by insurance companies that would attempt to avoid the minimum criteria required by law. *See* S.C. Code Ann. § 38-77-10(3). Therefore, the provisions of Title 38—which includes § 38-77-40—must be liberally interpreted to advance this purpose and ensure that "every automobile insurance risk which is insurable . . . is entitled to automobile insurance." *Mathis v. State Farm Mut. Auto. Ins. Co.*, 315 S.C. 71, 75, 431 S.E.2d 619, 622 (Ct. App. 1993) (*citing* S.C. Code Ann. § 38-77-10(1))

Similarly, in focusing on Title 56, the trial court ignored that UM coverage "is remedial in nature, enacted for the benefit of the injured persons, and is to be liberally construed so that the

purpose intended may be accomplished." *Nationwide Mut. Ins. Co. v. Smith*, 376 S.C. 60, 69, 654 S.E.2d 837, 841 (Ct. App. 2007)). Thus, to the extent there is any ambiguity in § 38-77-340 it must be interpreted in favor of coverage because the "purpose of the uninsured motorist law is to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle." *Connelly v. Main St. Am. Grp.*, Op. No. 5755. Shearouse Adv. Sht. No. 31, p. 31 at 44 (Ct. App. Aug. 12, 2020); *quoting Schmidt*, 339 S.C. at 368, 529 S.E.2d at 283 and *Ferguson v. State Farm Mut. Auto. Ins. Co.*, 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973) (internal quotations omitted); *see also Jericho State Capital Corp. v. Chi. Title Ins. Co.*, Op. No. 5731, p. 39, Shearouse Adv. Sht. No. 23, at p. 47 (Ct. App. June 10, 2020) (coverage exclusions must be "construed most strongly against the [insurer]" and the insurer has the burden of proving its application) (petition for *cert.* pending) (*citing Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005).[7]

C. The trial court's ruling leads to an absurd result.

The trial court's interpretation and application of § 38-77-340 leads to absurd results. Consider this scenario: instead of being a passenger, Pickens was driving one of her other covered cars while Kevin was simultaneously driving the Chevy on the opposite side of town. If Pickens was involved in an accident but Kevin was not, the trial court's ruling would mandate there is no

[7] Even if the trial court's interpretation were correct—which it is not—there is no prohibition in the law against an insurance company providing *more* coverage than is required by statute. *See Willis*, 253 S.C. at 95, 169 S.E.2d at 284 (confirming the statutory scheme provides for minimum requirements of an insurance policy and the parties are free to contract for additional coverage). USAA never argued, and the trial court did not find, the Policy ambiguous and thus, even if § 38-77-340 were to be interpreted to permit the exclusion of a UM claim like the one here, this does not warrant re-writing the policy. *See e.g., Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) (it is not the function of courts to re-write insurance contracts).

coverage whatsoever for Pickens's accident—i.e., neither liability coverage for an injured third party if Pickens was at fault, nor UM (or UIM as the case may be) if the other party were at fault. To leave the availability of insurance coverage to pure happenstance eliminates an insured's ability to obtain coverage for "every automobile insurance risk" and prohibits an insurer from fully accounting for the risks it insures against. *Contra* S.C. Code Ann. § 38-77-10(1) (intending to ensure that "every risk which is insurable . . . is entitled to automobile insurance").

In this way, USAA avoids coverage which clearly falls within the Policy—as well as being mandated by law—for reasons entirely unrelated to the underlying risk. This makes UM coverage dependent on the use of a covered car, something this court has long forbidden. *See e.g., Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (1985) (rejecting an insurer's attempt to limit UM coverage because "such coverage is nowhere limited to the use of the insured vehicle, and cannot be so limited by the policy provisions"); *see also, Schmidt*, 339 S.C. at 368, 529 S.E.2d at 283 (finding a passenger's right to UM was not affected by the driver not meeting the definition of insured).

Moreover, to expand § 38-77-340 to exclude coverage without regard for whether there is a causal connection between the excluded risk, and the damage—i.e., to ignore that Kevin was not at fault—is to accept that an insurance company can avoid UM coverage for reasons that are completely arbitrary. Not only is this contrary to public policy, but avoidance of such arbitrary exclusions is precisely why South Carolina law mandates that an insurance company has the burden of proving the damages were caused by an exclude risk. *See e.g., Clayton*, 364 S.C. at 560, 614 S.E.2d at 614 (an "insurance company . . . bears the burden of establishing an exclusions applicability"). To accept the trial court's interpretation of § 38-77-340 would undo this

jurisprudence and completely relieve USAA of this burden which it cannot—and has not attempted to—carry in this UM case.

CONCLUSION

For these reasons this Court should reverse and find that § 38-77-340 does not bar Pickens's UM claim, nor defeat the plain language of the Policy.

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