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Nov 16 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2019-001596

Nationwide Mutual Fire Insurance Company.....Respondent,

v.

Sharmin Christine Walls, Randi Harper, Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, Deborah Timms.....Defendants,

Of Whom

Sharmin Christine Walls and Randi Harper are the.....Petitioners.

BRIEF OF *AMICUS CURIAE* THE SOUTH CAROLINA ASSOCIATION FOR JUSTICE

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INTRODUCTION

The Court of Appeals' decision in this case – as well as the arguments of Respondent Nationwide Mutual Fire Insurance Company ("Nationwide") in support of that decision – are contrary to the public policy of this State as evidenced by the Legislature's enactment of S.C. CODE ANN. § 38-77-142 (1976, as amended). As such, *amicus curiae* the South Carolina Association for Justice ("SCAJ") respectfully submits that this Court should reverse the decision of the Court of Appeals and reaffirm the application of this Court's holding in *Williams v. Government Emps. Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014) as applicable to insurance policy provisions that seek to reduce coverage limits for liability arising out of any form of negligent conduct in the operation or use of a motor vehicle.

ARGUMENT

I. Nationwide is Incorrect About the Purpose and Effect of Section 38-77-142.

At the core of the present appeal is the effect of S.C. CODE ANN. § 38-77-142 (1976, as amended) upon automobile insurance policies in South Carolina.

A. Section 38-77-142 is intended to prevent insurers from improperly reducing mandatory coverage and is not an "omnibus statute" as Nationwide contends.

Nationwide argues the statute has a limited scope, premised on its contention that it is an "omnibus statute" that simply defines who is an insured under an insurance policy. (Nationwide's Brief, pp. 18-19). This premise is faulty.

South Carolina automobile insurance statutes have long included an omnibus provision defining insureds. S.C. CODE ANN. § 38-77-30(7) (1976, as amended); *see Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 542, 753 S.E.2d 437, 441 (Ct. App. 2013). The Legislature did not need to enact Section 38-77-142 to define insureds under automobile insurance policies in this State; therefore, it clearly intended to achieve something else by doing so. *See*

Traynum v. Scavens, 416 S.C. 197, 208, 786 S.E.2d 115, 121 (2016) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act."), *quoting Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008).

A review of the language of Section 38-77-142 also demonstrates it is intended to do more than simply define insureds. As is clear from its language, the purpose of the statute is to prevent insurers from writing coverage with stated liability limits but then reducing those limits when their insureds are liable for negligence in the operation or use of insured vehicles.[1] This Court recognized its effect in *Williams v. Government Emps. Ins. Co.*, 409 S.C. 586, 603-04, 762 S.E.2d 705, 714-15 (2014):

> [T]he General Assembly specifically included language in section 38-77-142(C) prohibiting provisions in the policy that limit or reduce coverage[.] …
>
> Therefore, once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage. Any other interpretation of section 38-77-142(C) would render the section useless, and the General Assembly is presumed not to perform useless acts.

Id.

B. Nationwide's mandatory versus optional coverage analysis does not properly recognize how that distinction is applied under South Carolina law; rather, once an insured accepts the offer to purchase otherwise optional excess liability coverage, that coverage becomes subject to the public policy of this State.

Nationwide relies upon the mandatory/compulsory coverage versus optional/voluntary coverage distinction in support of its argument that its exclusions can be validly applied to any coverage in excess of minimum statutory limits. South Carolina courts have traditionally applied

[1] For example, the stripped-down wording of Section 38-77-142(A) demonstrates a clear effort to regulate the terms of coverage afforded by insurance policies and not just to define who is an "insured": "No [policy of automobile insurance, as defined by Section 38-77-30(10.5)] may be issued … unless the policy contains a provision insuring [insureds, as defined by Section 38-77-30(7)] against liability … within the coverage of the policy … as a result of negligence in the operation or use of the vehicle . . . ." S.C. CODE ANN. § 38-77-142(A) (1976, as amended).

this dichotomy to invalidate statutorily unauthorized exclusions (*i.e.*, exclusions that are contrary to public policy) as to the former type of coverage but to permit such exclusions as to the latter. This approach – like the cases cited by Nationwide in support of it (Nationwide's Brief, pp. 8-9) – predates the enactment of Section 38-77-142. *See Williams*, 409 S.C. at 602, 762 S.E.2d at 714 ("[S]everal decisions GEICO additionally references for the proposition that coverage for insureds may be reduced from the policy amount to the statutory minimums are not controlling here as they … involve accidents that occurred prior to the effective date of section 38-77-142, and the decisions do not address the statute's application.").

This Court has recognized in other contexts that the mandatory/voluntary distinction requires more than the superficial analysis of whether the coverage at issue must be included in every policy under S.C. CODE ANN. §§ 38-77-140 or -150 (1976, as amended).

In *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 753 S.E.2d 515 (2013), the Court addressed the validity of an exclusion to underinsured motorist (UIM) coverage. UIM coverage is not mandatory or compulsory in the sense that it must be included in all South Carolina automobile policies. The Court there, however, held that the public policy analysis applicable to mandatory coverages should also govern exclusions to UIM coverage because UIM coverage is required to be offered by insurers and to be provided when an insured opts to purchase it. As such, the Court made clear that the mandatory-versus-voluntary focus is not on what coverage *an insured* is required by law to carry when purchasing a policy but on what coverage *the insurer* must provide by statute when an insured requests it.

In light of Section 38-77-142, liability coverage in excess of the minimum limits set forth in S.C. CODE ANN. § 38-77-140 (1976, as amended), like UIM coverage, is of this latter type of coverage. In other words, while an insurer is not required to write coverage in excess of minimum

limits, Section 38-77-140(B) authorizes it to offer it; therefore, when an insured accepts the offer to purchase the excess liability coverage, that coverage becomes subject to the public policy of this State as set forth in the insurance code, including the limitations of Section 38-77-142.

In sum, the mandatory-versus-voluntary analysis urged by Nationwide does not govern the liability coverage at issue in this case. Instead, Section 38-77-142 establishes a public policy that voids a policy provision that reduces liability coverage for negligence.[2]

II. Nationwide is Wrong About the Application of Section 38-77-142 in this Case and Its Interpretation Threatens to Erode the Important Public Policy of this State Going Forward.

As always, there is more at stake than the narrow – albeit, to the Petitioners, personally important – outcome. Nationwide's position here threatens coverage for the innocent victims of an entire universe of statutorily regulated driving acts, all of which would potentially be excludable despite the prohibition of Section 38-77-142(c) if the Court of Appeals' opinion were affirmed. That Nationwide has selected this particular case to vindicate its exclusion is not accidental; it no doubt believes this case presents, in a vacuum, the kind of facts that make its otherwise illegal exclusion seem justified. But, an affirmation of the Court of Appeals' decision will inevitably invite incrementally more clever exclusionary efforts by insurers.

A. Nationwide's exclusion presages much more aggressive exclusions that will deny coverage for innocent victims.

It is not news that insurers, like Nationwide, remain vigilant for any economic efficiency, often at the expense of coverage – even, as in this case, where contracted and compelled. If they can thwart the otherwise clear public policy of this State that damages for bodily injury to innocent victims be covered, they will. Accordingly, a rejection of the Petitioners' arguments leaves

[2] *See infra* regarding the inclusion of recklessness, gross negligence, etc. within the scope of negligence.

vulnerable, to future exclusion, negotiated coverage for potentially all manner of statutorily prohibited driving infractions, which *are not nefarious and intentional*, ranging from driving under the influence to speeding to following too closely to disregarding traffic signals.

B. The exclusion at issue in this case excludes negligent conduct and not simply intentional conduct.

To make this danger clearer, Nationwide has not attempted to exclude intentional conduct in the present policy. Indeed, the relevant exclusion makes no appeal to intentionality. (*See* App. at 221-22.) The policy does not require intentional conduct for either the exclusion for bodily injury caused "while committing a felony" or, as applicable in this case, for bodily injury caused "while fleeing a law enforcement officer." *See id.* And, to the point, "[t]he required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994). In other words, the General Assembly may criminalize behavior (including felonies) without regard to intent or knowledge. S*ee State v. Cribb*, 10 S.C. 518, 523, 426 S.E.2d 306, 309 (1992) (regarding felony DUIs).

And, so by its very breadth, the present exclusion already attempts to invade the province of Section 38-77-142, which admittedly only mandates coverage "*as a result of negligence* in the operation or use of the vehicle by the named insured or by any such person ... or any other person." *See* S.C. CODE ANN. § 38-77-142(a)&(b) (emphasis added). If the Court were to validate Nationwide's present exclusion, which would have the effect of avoiding coverage for negligent conduct, more direct attempts to abrogate compulsory coverage for unintentional conduct will most certainly follow.

C. Recklessness is a form of negligence.

Mayfield's *Alford* plea to "reckless homicide" demonstrates as much. (App. at 114.) The recklessness required for "reckless homicide" is a brand, albeit aggravated, of negligence. *See State v. Phillips*, 226 S.C. 297, 300, 84 S.E.2d 855, 856 (1954) ("The elements of manslaughter and reckless homicide are the same with the exception of the *degree of negligence* required and the punishment."). To convict an individual of reckless homicide, the State must prove that the individual was driving a vehicle "in reckless disregard of the safety of others." *See* S.C. CODE ANN. § 56-5-2910 (1976, as amended). "Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts." *State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997). "It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof." *Id*. Critically, the phrase "reckless disregard of the safety of others," in Section 56-5-2910, is literally defined as "criminal negligence," elsewhere under the South Carolina Code. *See* S.C. CODE ANN. § 16-3-60 (1976, as amended).

This understanding of "recklessness" is also consistent with how South Carolina treats the concept throughout its tort jurisprudence. The South Carolina Supreme Court has "observed that recklessness, willfulness, and wantonness 'are extensions of the law of negligence' and that the term 'negligence necessarily embodies all of these 'kindred concepts.'" *Berberich v. Jack*, 392 S.C. 278, 289, 709 S.E.2d 607, 613 (2011).[3] In fact, under "our comparative negligence system, all forms of conduct amounting to *negligence in any form*, including, but not limited to, ordinary

[3] *Amicus* acknowledges that the import of the terms negligence and recklessness are not interchangeable in civil and criminal contexts. *See State v. Rowell*, 326 S.C. 313, 317, 487 S.E.2d 185, 187 (1997). Rather, it references the concepts in *Berberich* to emphasize that there exists, in fact, a continuity of view on the concept of recklessness across this State's jurisprudence, even as that continuity is not technically controlling.

negligence, gross negligence, and *reckless*, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage." *Id*. at 615 (emphasis added).

So, with respect to the subject insurance policy, it is already true that Nationwide has crafted an exclusion that, at first blush, may appear narrowly drawn to avoid coverage for intentional acts but, in practice, it does much more. And, as discussed, one can imagine a tide of future attempted exclusions that will further erode the kind of coverage that South Carolina has purposefully mandated in the interest of the innocent motoring public.

Insofar as Section 38-77-142 is a clear expression of this State that insurers must provide bodily injury coverage and that such compulsory coverage cannot be "stepped-down" once committed, the specific exclusion at issue in this case operates in direct contravention to that policy and portends of more efforts to exclude coverage for negligence-based liability.

Inasmuch as the exclusion at issue violates the public policy of this State and reduces the protection afforded to innocent victims of motor vehicle negligence as intended by our insurance laws, the Court should reverse the holding of the Court of Appeals and rule that the exclusion is void.

CONCLUSION

For the foregoing reasons and the arguments of Petitioners, SCAJ respectfully submits that this Court should reverse the decision of the South Carolina Court of Appeals.

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November 16, 2020
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