THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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 REPLY BRIEF

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INTRODUCTION

The trial court's grant of summary judgment for Respondent rests on the erroneous finding that S.C. Code Ann. § 38-77-340 bars uninsured motorist coverage ("UM") as a matter of law. Entitled "Agreement to exclude [a] designated natural person from coverage," § 38-77-340 provides in relevant part:

> 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 . . . is binding upon every insured to whom the policy applies.

S.C. Code Ann. § 38-77-340

It is not disputed that the parties signed a written agreement, by way of amendatory endorsement, on a form which was approved by the director, which provides 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 ["Chevy"] . . . while [the "Chevy"] is being driven or operated by [Kevin].
>
> In all other respects this policy remains unchanged.

(R. __).

Even though Kevin was not at fault, Respondent argued, and the trial court agreed, that § 38-77-340 should be interpreted and applied to bar Pickens's UM. The effect of the trial court's ruling was to treat the agreement as if it "provides that [Respondent] 'shall not be liable for damages, losses, or claims' *arising out of the accident*;" rather than what it actually says. *Compare* (Order p. 7) with (R. __) (supra) (excluded driver agreement, applying to damages "**arising out of the operation or use of the automobile**" operated by Kevin) (italics and bold for distinction).

Interpreting and applying § 38-77-340 beyond the scope of liability coverage, to also exclude UM coverage, was error. The trial court's interpretation of § 38-77-340 is inconsistent

with the plain meaning and intent of the statute, and this erroneous interpretation should have been apparent from the fact that the trial court was forced to re-write the terms of the policy.

In response, Respondent contends that § 38-77-340 should not be limited to liability coverage but should extend to all coverages, including UM. Respondent also asserts that to the extent Pickens argues the policy itself does not exclude UM coverage; this argument is not preserved. *See* (Resp. Br. p. 8)

ARGUMENT IN REPLY

The rationale supporting Respondent's argument is two-fold. *See generally* (Resp. Br. §§ I(A), (B) and (C)). First, Respondent contends that § 38-77-340 applies to the "entire insurance policy," not just liability coverage, thus making it "as if the [entire] policy is turned off while the excluded driver [i.e., Kevin] operates a vehicle[1]." *See* (Resp. Br. p. 2) and (Resp. Br. p. 20 at n. 5). Second, and based on this interpretation, Respondent concludes that once an excluded driver addendum is signed, all insureds, including Pickens, become "subject to the **statute's** directive that [the entire policy] 'shall not apply.'" (Resp. Br. p. 20) (bold added); *see also* (Resp. Br. p. 19).

However, Respondent (like the trial court) misapprehends this reasoning is precisely backward. Section 38-77-340 provides that when a valid excluded driver agreement is signed, it is "the **agreement"** which becomes binding, not the **statute** as Respondent assumes. *See* S.C. Code Ann. § 38-77-340 (directing, **"[t]he agreement**, when signed by the named insured, **is binding upon** every insured to whom the policy.") (emphasis added).

[1] Respondent waivers throughout its brief as to whether the purported exclusion of § 38-77-340 applies when Kevin is operating "any" vehicle, or whether its limited to when he is driving the covered vehicle—i.e., the Chevy. This matters because, like the agreement, § 38-77-340 speaks to the covered vehicle, and also because the thrust of the analysis here focuses on the distinction between liability coverage which generally follows a vehicle and UM coverage which generally follows a person. *See e.g., Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973); *and* (App. Br. pp. 4-8).

This flawed premise serves to highlight: (I) Respondent's argument regarding issue preservation is wrong; and (II) Respondent's argument that the statute should be interpreted to apply to the entire policy is not sound.

I. Respondent's argument regarding issue preservation is wrong.

Respondent suggests that the issue of whether policy language itself "excludes UM coverage while a vehicle is operated by Kevin" is not preserved because it was never objected to. Frist, this is a red herring and disingenuous to the issue before the trial court. Although it was not disputed that the addendum met all the ministerial requirements of § 38-77-340 (i.e., it was on an approved form, it was signed, etc.), Respondent nonetheless sought summary judgment based on the statute, rather than the Policy alone. If Respondent's implication were correct, then the trial court would have had no need to alter the Policy to conform to its interpretation of § 38-77-340. This is a point that Pickens discussed in her brief to highlight that in the most basic sense, the trial court interpreted § 38-77-340 to trump the terms of written amendatory agreement of the Policy. *See* (App. Br. pp. 2 & 4-7) (explaining Respondent's motion for summary judgment was premised on the idea that § 38-77-340 excluded coverage as a matter of law, notwithstanding the agreement itself); *and* (App. Br. p. 7, n. 3) (indicating the trial court's reasoning demonstrates it "address[es] the broader question of whether § 38-77-340 *could* bar a UM claim rather than whether it bars *this* UM claim."); *accord* S.C. Code Ann. § 38-77-340 (providing "[**t]he agreement**, when signed . . . is binding.") (emphasis added).

Respondent is simply wrong to contend that Pickens waived or failed to preserve the argument that a proper interpretation of § 38-77-340 cannot ignore or trump the addendum agreement of the Policy. The cornerstone of Pickens's argument is that § 38-77-340 cannot, in and of itself, exclude coverage for damages which do not arise from the excludes driver's operation of

the vehicle—which not coincidentally is the very distinction the trial court ultimately wrote out of the Policy. After articulating this to the trial court at the hearing, Pickens's counsel stated: "Therefore, **I don't think we can just rely on pure statutory construction, and we have to look to the policy**, which [] doesn't make an insurance company liable for someone they could have set premiums on"–i.e., Kevin as compared to an uninsured driver. (Trans. p. 12; lns 2-5) (emphasis added).

Interpretation of the agreement is not really the point—its terms are plain. What is significant is the trial court's interpretation of the statute served to trump the agreement, and Pickens raised the notion that it would be error to interpret § 38-77-340 in this way. *See* (Trans. p. 12; ln; 15-18) ("So I think that we both win on the statutory construction and the fact that the form was done [in]correctly, but if we're going to lose on that and **look to the actual policy** . . . [it] just doesn't allow for the exclusion of [UM] coverage.") (emphasis added). Further, as evidenced by the trial court's ruling which altered the Policy language, the court rejected this argument, and therefore the rules of issue preservation required nothing further. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (providing preservation rules are simply to give the trial court "an opportunity" to resolve the issue); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating issue preservation rules are "meant to enable the lower court to rule properly after it has considered all relevant facts, laws, and arguments") (quoting *I'On, L.L.C. v. Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 648 817 S.E.2d 273, 277 n.3, (2018) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial.") (*quoting Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted)).

II. Respondent's argument that Section 38-77-340 should be interpreted to apply to the "entire policy" fails.

Section 38-77-340 provides:

> Notwithstanding the definition of "insured" [the parties] must, 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 [] person designated by name. The agreement, when signed . . . is binding upon every insured to whom the policy applies.

Respondent argues the phrase "such a policy of liability insurance" should be interpreted to constitute the entire policy rather than any component coverage. (Resp. Br. p.12). However, this argument must fail for two very simple reasons.

First, had the Legislature intended this meaning it would have used the term "automobile insurance" which is plainly defined in Title 38 to include all types of coverages. *See* S.C. Code Ann. § 38-77-30(1) ("'Automobile insurance' means automobile bodily injury and property damage liability insurance, including medical payments **and uninsured motorist coverage**, and [others]") (emphasis added). Because the Legislature used a different term it must have meant something different. *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").[2]

Second, Respondent's thesis that "policy of liability insurance" means the whole policy is fatally flawed because the Legislature has already made clear that the term "policy," has a very specific and limited meaning within the context of Title 38, and only provides a singular

[2] It is also worth noting that despite the statutory scheme providing for a variety of different types of coverages, § 38-77-340 makes use of "coverage" in the singular form.

coverage—that being liability coverage. *See* S.C. Code Ann. § 38-77-30(10.5) (defining "policy" to mean "a policy or contract for bodily injury or property damage **liability insurance** . . . **covering liability** arising from the ownership, maintenance, or use" of a vehicle.) Thus, even if the phrase "such a policy of liability insurance," in § 38-77-340 were replaced by "the policy" as Respondent suggests, it would still only contemplate coverage for "**liability** arising from the ownership, maintenance, or use" of the covered vehicle, and thus would not extend to UM coverage.[3]

For these reasons Respondent's arguments fail, and although the response could end here, Pickens continues for the sake of completeness, to address the remaining points Respondent offers in an attempt to support its contention that "policy of liability insurance" should be interpreted to mean the whole policy.

A. Respondent's reliance on *Thao* is misplaced.

Respondent's reliance on the U.S. District Court's non-precedential decision in *Thao v. Nationwide,* is misplaced, and out of context. *See* (Resp. Br. § I(A), p. 10) (*quoting Thao v. Nationwide Affinity Ins. Co. of Am.*, 2018 U.S. Dist. LEXIS 98866, *1 (D.S.C. June 13, 2018) for the alleged proposition that the statute provides "the policy will not be in effect while a vehicle is operated by [a person] excluded from coverage."). Unlike the present case, *Thao,* involved claims

[3] At section I.(B)(ii) of its brief Respondent calls upon an alleged "common-parlance" to contend that its entire policy interpretation of the phrase "policy of liability insurance" is "consistent with the common use of the phrase in the insurance industry." (Resp. Br. p. 15). First this reasoning has been rejected. *See generally, Forner v. Butler,* 319 S.C. 275, 277-78, 460 S.E.2d 425, 427 (Ct. App. 1995) (rejecting that notion that the typical meaning of "relative" as ordinarily used in the insurance industry was the same as "the common-parlance"). Second, this is refuted by Respondent's own brief wherein it consistently changes the terms used. *Compare* (Resp. Br. p. 7) ("the policy of liability insurance"); (Resp. Br. p. 7) ("the policy of automobile liability insurance"); (Resp. Br. p. 2) ("the insurance policy"); (Resp. Br. p. 15) ("the contract"); (Resp.Br. p. 10) ("the insurance contract"). Third, and most compelling, common parlance is ultimately irrelevant to the issue of statutory construction where the Legislature has assigned a specific meaning to a word. *See e.g., State v. Landis,* 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) (the Legislature's intent should be ascertained primarily from the words of the statute).

for bodily and property damage liability coverage stemming from an accident caused by the excluded driver. *Id.* at *3. *Thao* involved precisely those coverages contemplated by the statutory definition of "policy" (i.e., those Pickens contends § 38-77-340 is limited to). *See* S.C. Code Ann. § 38-77-30(10.5) (*supra,* defining policy to contemplate liability coverage only). Despite Respondent's implication otherwise, the district court did not interpret the entire policy to be "turned off" but instead simply applied the exclusion, as written in the excluded driver agreement, to exclude liability coverage where the exclude driver was at fault. *See Thao,* at *10 (holding: "the Court finds that, under [§ 38-77-340], the policy excludes all **coverage for damages arising from** [the at-fault excluded driver's] operation of the vehicle") (bold added).[4] Therefore, because *Thao* was limited to coverages contemplated by the statutory definition of "policy," this persuasive authority is of no help to Respondent's position. If anything, it bolsters Pickens's argument.

B. Respondent's contention that other sections of Title 56 support its interpretation of § 38-77-340 is not compelling and overlooks the use of the phrase "policy of liability insurance" in other sections of Title 38.

Respondent points to the appearance of the phrase "policy of liability insurance" in § 56-1-110, and § 56-9-20(5). *See* (Br. § I(B)). However, because these statues do not concern the same subject matter as each other, or § 38-77-340, Respondent is wrong to imply there is an imperative they be interpreted synonymously. *Contra, Progressive Direct Ins. Co. v. Reeves*, 427 S.C. 291, 291, 831 S.E.2d 422, 424 n.2 (2019) ("statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result") (emphasis added); Black's Dic. 7ed., p. 794 (West 1999) (translating *in pari materia* [Latin] as "in

[4] Also unlike this case, the excluded driver addendum in *Thao* stated simply: "all coverages in your policy are not in effect while [the excluded driver] is operating" the car. *Thao*, at *2. As compared to this case in which the addendum provides: "[Respondent] shall not be liable for damages . . . arising out of the operation or use of the automobile described in the policy" while its being driven by Kevin. (R. __).

the same matter," and being defined as "on the same subject; relating to the same matter"). Specifically, § 56-1-110, appears in a chapter of the Code concerning the requirements for obtaining a driver's license, and imposes vicarious liability on a parent or guardian for the negligence of their minor child to the extent the child is not insured. Meanwhile § 56-9-20(5) sets the definition of "Motor vehicle liability policy" within the context of the Motor Vehicle Financial Responsibility Act (the "MVFRA") which Pickens's has previously articulated concerns a different subject matter than Title 38, and § 38-77-340. *See* (App. Br. pp. 13-16).

Regardless, the appearance of the phrase "policy of liability insurance" in § 56-1-110 does not support Respondent's notion that it should be interpreted to include UM coverage. This section provides in relevant part:

> Any negligence or wilful misconduct of a minor when driving . . . must be imputed to the [parent or guardian who] is jointly and severally liable with such minor . . . except that if such minor *is protected by a policy of liability insurance* in the form and in the amounts as required under Chapter 9 of this title and Sections 38-77-140 through 38-77-310, then such parent or guardian . . . is not subject to the liability otherwise imposed under this section.

In the simplest sense, UM coverage would not be triggered by the minor's negligence. Moreover, since UM is a first party benefit (unlike liability coverage) it is illogical to suggest that the obligation to pay UM could be imputed to the parent. Plainly, UM coverage does not fall within the logical ambit of this statute, and therefore it offers no support for Respondent's theory. *See generally, Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (courts will reject a statutory interpretation that is illogical or would lead to absurd results).

Further, Respondent's reliance on the definition of "Motor vehicle liability policy" is similarly uncompelling. Section 56-9-20(5) defines Motor vehicle liability policy as:

> An owner's or an operator's policy of liability insurance that fulfills all the requirements of Sections 38-77-140 through 38-77-230, certified as provided in Section 56-9-550 or 56-9-560 as proof of financial responsibility and issued, except

> as otherwise provided in Section 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured, and subject to the following special conditions.

S.C. Code Ann. § 56-9-20(5).

Contrary to Respondent's contention that "policy of liability insurance" means the entire policy, this definition demonstrates just the opposite—i.e., "Motor vehicle liability policy" means the entire policy (as Respondent uses the term) while "policy of liability insurance," is merely a component part of the entire policy. Thus "policy of liability insurance" must have a more limited meaning. Moreover, it bears mention that the Policy at issue here—or any insurance policy containing an named driver exclusion—arguably cannot not meet this definition because it does not provide coverage to "any other person, as [an] insured, using the vehicle." *Id.; compare* S.C. Code Ann. § 38-77-30(1) (defining automobile insurance" for the purposes of Title 38, and not including this "any other person" provision); *accord Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 607, 762 S.E.2d 705, 716 at n.8 (2014) ("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.") (italics supplied by court); (App. Br. pp. 14-15).

Finally, it is significant that Respondent fails to point out the Legislature's use of the phrase "policy of liability insurance" in Title 38. Here, in addition to § 38-77-340, the phrase appears only once, that being in § 38-77-142 which (not coincidentally) by its titled "policies or contracts of bodily injury or property damage **liability insurance** covering liability; required provisions." This section deals exclusively with liability coverage, and to this as a "**policy** or contract **of liability insurance**." S.C. Code Ann. § 38-77-142.[5]

[5] Section 38-77-142 provides in relevant part:

Conversely, in the sections dealing with UM coverage the Legislature employs the entirely different phrase; "automobile insurance policy." *See* S.C. Code Ann. § 38-77-150(A) ("No *automobile insurance policy* or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision."). The use of the term "automobile insurance" is significant because this term has a much broader statutory definition. *See* S.C. Code Ann. § 38-77-30(1) (defining "Automobile insurance" as providing, in addition to liability coverage, "medical payments and uninsured motorist coverage, and automobile physical damage insurance such as automobile comprehensive physical damage, collision, fire, theft, combined additional coverage, and similar automobile physical damage insurance and economic loss benefits").

Thus, comparison of these sections of Title 38 serves to bolster Pickens's argument that had the Legislature intended § 38-77-340 to include UM coverage it would have used the phrase "automobile insurance policy" rather than "policy of liability insurance." Instead, use of the phrase "policy of liability insurance" demonstrates the Legislature's intent that § 38-77-340 be limited to liability coverage.[6]

> (A) No **policy or contract of** bodily injury or property damage **liability insurance** covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued . . . unless the policy contains a provision insuring . . . against liability. . . as a result of negligence in the operation or use of the vehicle . . . Each **policy or contract of liability insurance**, or endorsement to the policy or contract . . .

(emphasis added).

[6] Although "automobile insurance" has a broad and expansive meaning under the statute, it is worth noting the term "policy of automobile insurance" is defined to be synonymous with the much narrower term "policy" which only contemplates "liability insurance . . . covering liability arising from" use of the covered auto. S.C. Code Ann. § 38-77-30(10.5). Thus, it stands that, at least as used in this chapter, that addition of the words "policy of" have a limiting effect. This

C. Respondent's argument that its interpretation of § 38-77-340 comports with the intended purpose of South Carolina's statutory scheme is not compelling.

Respondent contends its interpretation of § 38-77-340 serves the intended purpose of the statutory scheme because UM cannot be sold as standalone coverage. *See* (Br. § I (B)(iii)). However, this contention rests on a presumption Respondent makes from the "if however" provision of § 38-77-160[7] which this Court has held only applies in stacking cases. *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 400, 728 S.E.2d 477, 481 (2012) (finding the "If, however" sentence in § 38-77-160 applie[s] only to stacking cases" and therefore is not implicated in a non-stacking case); *citing Burgess v. Nationwide Mutual Insurance Company*, 373 S.C. 37, 41-42, 644 S.E.2d 40, 42-43 (2007). Because this is not stacking case Respondent's argument is of little import.

Regardless, even assuming UM coverage is not available as standalone coverage, independent of liability insurance, the point is of no consequence. Consider this logic in a similar context, where it could be said that an insured is not able to purchase a separate standalone covenant of good faith and fair dealing that is inherent in every insurance contract. This does not change the fact that this covenant gives rise to an entirely independent basis for tort recovery, unique and distinct from the insurance contract itself. *See generally, Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 501, 473 S.E.2d 52, 53 (1996) (confirming that although arising from the covenant of good faith and fair dealing inherent in contract this gives rise to claim for insurance bad faith sounding in tort). Thus, this point bears no fruit for Respondent.

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serving to further bolster Pickens's argument that "policy of liability insurance" as used in § 38-77-340 was intended to have limited application.

[7] This provision provides "If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident." S.C. Code Ann. § 38-77-160.

D. Respondent's argument that its interpretation serves the public policy of § 38-77-340 is wrong.

Much like its previous argument, Respondent's public policy arguments rest on the "if however" provision of § 38-77-160 which does not dictate the policy implications of a non-stacking case and is therefore not germane here. *See Rhoden*, 398 S.C. at 400, 728 S.E.2d at 481 (*supra*).

Finally, Respondent makes repeated refrain to the notion that Pickens allowed Kevin to drive knowing it would "void coverage." (Br. p. 21). This argument should likewise not be compelling. First, the only effect on coverage that Pickens could reasonably be charged with knowing would come letting Kevin driving the Chevy are those contained in the policy. To the extent the statute is only now, after the fact, interpreted to exclude coverage in a manner different than the policy, it cannot be claimed that Pickens could have reasonably known this.

Second, it cannot be overlooked that the excluded driver addendum here denotes that Kevin had obtained separate insurance that "enabled him to drive vehicles." (R. __). Public policy is not offended by allowing Pickens to presume that policy is in place—particularly in the context of UM coverage which cannot arise from his driving of the vehicle. Since the creation of the Insurance Database, Respondent was in a at least as good of, if not better, position to know whether Kevin's policy remained in force—even to the extent would matter its underwriting of UM risk—because it could have received notification from the DMV if Kevin's policy was cancelled. *See* S.C. Code Ann. § 56-10-610 (2002) *et. seq.* (the Motorist Insurance Database Program Act).

Similarly, past rulings of this Court have made clear that public policy does not require a family member to ensure another has purchased insurance coverage. *See Rhoden*, 398 S.C. at 400, 728 S.E.2d at 481 (where a parent was injured while a passenger in a car driven by a child that did not have UIM coverage, this Court affirmed the Court of Appeals finding that an insurer's attempt

to limit the portability of parent's UIM coverage from at-home policy violated public policy). Likewise, this Court has explained that public policy precludes an insurer from limiting the portability of UM coverage, even where insured knowing rode with an uninsured family member. *See Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 91, 644 S.E.2d 62, 63 at n. 2 (2007) (where a wife, was injured in an accident caused by her husband while a passenger on his uninsured motorcycle, this Court found that public policy required that wife be able to collect UM coverage from her at-home vehicle, this despite recognizing that this would permit an owner to collect benefits even though it did not purchase insurance coverage on the involved vehicle). Thus, public policy does not favor Respondent's position.[8]

CONCLUSION

For the reasons stated herein, together with those stated in Pickens's Appellant's Brief, this Court should reverse the trial court's grant of summary judgment and permit this matter to proceed to trial.

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[8] As final point, it bears mention that Respondent, like the trial court, suggests its interpretation of §38-77-340 is compelled by the general tenant of public policy that parties should be free to contract. (R. __). However, because the trial court's interpretation of § 38-77-340 required it to change the terms of the Policy this is a non sequitur.