IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Mar 25 2021

S.C. 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.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Respondent Nationwide Mutual Fire Insurance Company ("Nationwide"), by and through its undersigned counsel, hereby respectfully submits this Petition for Rehearing.

ARGUMENT

This appeal concerns the enforceability of two Nationwide policy provisions – a flight-from-law enforcement provision and a felony provision, each of which would limit liability coverage to State minimum limits when applicable. The Court's March 10, 2021 Opinion held that South Carolina Code § 38-77-142(C) renders both provisions void. For several reasons,

Nationwide respectfully asserts that the Court's decision warrants reconsideration. First, the Opinion demonstrates a fundamental misunderstanding of who the insured is with respect to liability coverage. The Opinion also overlooks several basic rules of statutory construction. Additionally, as recognized by Justice Kittredge and Justice James, the majority's Opinion amounts to legislating from the bench, which this Court has repeatedly admonished against.

I. The Court's Opinion demonstrates a fundamental misunderstanding of who the insured is with respect to liability coverage.

At the time of the auto accident, the insured driver, Korey Mayfield, was fleeing law enforcement in a vehicle owned by Sharmin Walls and insured by Nationwide. Walls and two other passengers in the vehicle were injured as a result of the accident. The question at issue in this declaratory judgment action is how much liability coverage the Nationwide policy provides to indemnify Korey Mayfield – the tortfeasor insured under the Nationwide policy – for his legal liability resulting from the accident. However, the Opinion states: "Nationwide's provisions reduce coverage...for **insureds when they are injured** while either fleeing from law enforcement or engaging in a felony." *Nationwide Mut. Fire Ins. Co. v. Walls*, --S.E.2d--, No. 2019-001596, 2021 WL 908511, at *4 (S.C. Mar. 10, 2021). This statement reveals a fundamental misunderstanding of who an insured is for liability coverage and to whom § 38-77-142 applies.

The Court's statement is drawn from the *Williams v. Government Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014) decision. In both the *Williams* case and this case, a named insured under the policy was also an injured passenger. However, the only insured for liability coverage was the driver. Liability coverage provides indemnity coverage to tortfeasors, not first party coverage to a victim who might otherwise qualify as a Class I insured. This Court

has long recognized that an insured victim has no direct right to liability insurance.[1] This is a fundamental difference between first party insurance, which is not at issue here, and liability coverage. Section 38-77-142 only applies to insureds for liability coverage – in this case, only Korey Mayfield. The fact that the named insured, Sharmin Walls, was a passenger in the vehicle does not entitle her to any protection under § 38-77-142. The injured parties, regardless of whether they are the named insured or a spouse or resident relative of the named insured, are not the insureds for liability coverage. The above statement in the Opinion demonstrates a fundamental misunderstanding of who is an insured for liability coverage and consequently, who is provided protection by § 38-77-142.

Approaching liability coverage questions with a view toward claimants rather than insureds improperly ignores the relationship between the insurer and insured, which is the focus of both the liability section of the policy and South Carolina Code § 38-77-142. *See Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 629, 594 S.E.2d 275, 277 (2004) (admonishing the Court of Appeals for focusing on third parties with respect to § 38-77-142 and not solely "the insured and the insurer").

---

[1] *See Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (recognizing difference between insured for liability coverage and third-party claimant and stating "South Carolina has never extended the concept of an 'insured' to include parties whose rights arise from the contract between the first party insured and the insurer"); *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003) ("Third-party-liability-insurance contracts are generally indemnity contracts whereby the insurer, or the first party, agrees to pay the insured, or the second party, the amount of any damages the insured may become legally liable to pay a third party…. Thus, the third party, or the incidental beneficiary, does not have a contractual relationship with the insurer…."); *Howard v. Allen*, 254 S.C. 455, 460, 176 S.E.2d 127, 129 (1970) ("Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured…..The provisions of the policy, insofar as they inure to the benefit of only the insured, are, prior to any breach by the insurer, of no value to anyone other than the insured.").

II. The Court's Opinion ignores and disregards basic rules of statutory construction to advance its own views of public policy.

Objectively, South Carolina Code § 38-77-142 is poorly drafted. The second sentence of Section (A) is a sentence fragment with no verb. *See* S.C. Code § 38-77-142(A). The first sentence of Section (B) repeats the first sentence of Section (A) without any material differences. *See* S.C. Code § 38-77-142(B). The statute also repeatedly refers to motor vehicles being "docked" in this State. *See* S.C. Code § 38-77-142(A); *Walls*, WL 908511, at *7 (Kittredge, J., dissenting) (recognizing that this "docked" language demonstrates that the statutory language was copied from a Virginia statute that applies to vehicles and watercraft). However, poor drafting does not give the Court license to ignore the rules of statutory construction to advance its own views of public policy.

"It is elementary that statutes in derogation of common law rights are strictly construed..." *Crowder v. Carroll*, 251 S.C. 192, 199, 161 S.E.2d 235, 238 (1968); *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 201, 810 S.E.2d 848, 850 (2018) ("[S]tatutes in derogation of the common law are to be strictly construed."); *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011) (same).[2] "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting *Crosby*

[2] *See, e.g., Southern Ry. Co. v. S.C. State Highway Dep't*, 237 S.C. 75, 81, 115 S.E.2d 685, 688 (1960) ("[S]tatutes, being in derogation of the common law must be strictly construed."); *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013) ("[S]tatutes in derogation of the common law are to be strictly construed." (citation omitted)); *Powell v. Greenwood Cty.*, 189 S.C. 463, 1 S.E.2d 624, 625 (1939) ("These sections are in derogation of the common law and therefore will have to be strictly construed."); *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 383, 537 S.E.2d 543, 548 (2000) ("Statutes which are in derogation of common law must be strictly construed."); Doe v. Brown, 331 S.C. 491, 496, 489 S.E.2d 917, 920 (1997) (same); *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 308, 831 S.E.2d 429, 430 (2019) (same).

v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). "[A] statute is not to be construed in derogation of common law rights if another interpretation is reasonable." *Olson v. Fac. House of Carolina, Inc.*, 344 S.C. 194, 207, 544 S.E.2d 38, 45 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003); *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007) (same).

According to this Court's Opinion, by enacting South Carolina Code § 38-77-142(C), the General Assembly intended to prohibit any automobile insurance step-down provisions from being valid. *Walls*, 2021 WL 908511 at *4. This is a fundamental departure from the rules of insurance law in all other states and a monumental restriction on the parties' common law freedom of contract rights as previously understood in this State.[3] Changes to common law rights "must be expressly sanctioned by the legislature and not merely inferentially deduced." *Major v. National Indem. Co.*, 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976). If the General Assembly intended such a fundamental break with insurance rules nationwide and the common law in this State, it must have clearly drafted the language of the statute to do so. *See Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 273, 831 S.E.2d 406, 412 (2019) ("Had the General Assembly intended to categorically prohibit the enforcement of notice clauses in all policies, it would have done so. We therefore refuse to read Section 38-77-142(C) to abolish notice and cooperation clauses in insurance contracts."). With respect to South Carolina Code § 38-77-

[3] *Huff v. Watkins*, 18 S.C. 510, 513 (1883) (recognizing "common law right" of parties to contract); *South Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 657, 667 S.E.2d 7, 14 (Ct. App. 2008) (recognizing the "fundamental right of freedom to contract"); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."); *see also B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (recognizing insurers' "right to limit their liability and to impose conditions on their obligations"); *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975) (stating that "parties are generally permitted to contract as they desire....").

142(C), this is not the case. Of the eight (8) appellate judges that have interpreted the statute in the context of this case, only three (3) have interpreted the statute to invalidate all step-down provisions. The other (5) appellate judges do not read the statute to do so. *See Walls*, 2021 WL 908511 at *5 (Kittredge, J., dissenting and James, J., concurring); *Nationwide Mut. Fire Ins. Co. v. Walls*, 427 S.C. 348, 831 S.E.2d 131 (Ct. App. 2019) (Opinion by Lockemy with Thomas and Geathers concurring).

As demonstrated by this Court's dissent and the Court of Appeals decision, there are at least two ways to read South Carolina Code § 38-77-142(C).[4] Since the statute is in derogation of common law freedom of contract rights, it has to be strictly construed, adopting the interpretation that is least restrictive of common law rights. The Court's Opinion flouts this "elementary" rule of statutory construction, instead adopting the interpretation of the statute that is most restrictive of the common law freedom of contract rights. *See Crowder*, 251 S.C. at 199, 161 S.E.2d at 238.

The Court's interpretation of the statute also ignores other basic rules of statutory construction. As this Court has repeatedly stated, "[t]he ***cardinal rule*** of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (emphasis added); *Rowe v. Hyatt*, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation."); *Gilstrap v. South Carolina Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992); *State v. Robinson*, 310 S.C. 535, 538, 426 S.E.2d 317, 318 (1992).

[4] Nationwide does not believe there is any way to read the statute to prohibit the exclusions at issue in this case.

Despite this repeated directive, the Court's Opinion resorts to a forced construction of the statute to expand its operation.

As shown by its plain language, South Carolina Code § 38-77-142 is an omnibus statute. Sections (A) and (B) of the statute state that the policy must insure "the named insured and [permissive users] of the motor vehicle...against liability for death or injury...as a result of negligence in the operation or use of the vehicle by the named insured or by any [such/other] person." S.C. Code § 38-77-142 (A) and (B). Section (C) of the statute states that any provision in the policy "which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void." S.C. Code § 38-77-142(C). "[T]he coverage afforded by the provisions required by this section" is coverage for the named insured and permissive users. The statute – like any omnibus statute – says who must be insured, not what conduct must be insured. The Nationwide policy provisions at issue do not reduce coverage based on who the purported insured is but rather the conduct of the insured, which is not dealt with in the language of the statute.[5]

In addition to being incompatible with the text of the statute, the Court's interpretation of § 38-77-142 is inconsistent with the legislative history of the adoption of that statute. First, it seems evident that the statute was adopted in response to Chief Judge Sanders' comments in

[5] Less than two (2) years ago, the Court held that this very statute – South Carolina Code § 38-77-142(C) – did not void an insurance policy provision that reduced coverage to the State minimum limits based on the conduct of the insured. *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 273, 831 S.E.2d 406, 412 (2019) (enforcing notice step-down provision). Likewise, the Nationwide provisions at issue are routinely found in insurance policies and reduce coverage to the State minimum limits based on the conduct of the insured. The plain language of South Carolina Code § 38-77-142(C) makes no distinction between notice step-down provisions and other conduct-based step-down provisions. South Carolina Code § 38-77-142(C) applies to "[a]ny endorsement, provision or rider...which purports or seeks to limit or reduce coverage...." S.C. Code § 38-77-142(C). Therefore, it is a forced construction of South Carolina Code § 38-77-142(C) to find that it voids some conduct-based step-down provisions but not all.

Universal Underwriters Ins. Co. v. Metropolitan P&C Co., 298 S.C. 404, 308 S.E.2d 858 (Ct. App. 1989). The *Universal* opinion upheld a policy provision limiting liability coverage to the statutory minimum limits for a customer/permissive user of an auto dealership vehicle, despite providing $500,000 of coverage to the dealership and its employees. *Id.* at 410, 380 S.E.2d at 862. Counsel for the claimant "conceded that there is no statutory prohibition against limiting the coverage for classes of insureds" – i.e. who is insured – but argued that it was "unconscionable to allow an auto dealership to bargain for less coverage for its customers than for itself and its officers." *Id.* at 410–11, 380 S.E.2d at 862. In response to this argument, Judge Sanders stated:

> [T]o reach this result, we would have to "carve out a special exception for automobile dealers." We have no authority to do so. *See Smith v. Wallace*, 295 S.C. 448, 452, 369 S.E.2d 657, 659 (Ct.App.1988) ("This Court has no legislative powers.").

Id. at 411, 380 S.E.2d at 862. Shortly thereafter, the General Assembly enacted § 38-77-142, which – by its plain terms – is a "statutory prohibition against limiting the coverage for classes of insureds." *See id.* at 410, 380 S.E.2d at 862.

Moreover, under the majority's interpretation of South Carolina Code § 38-77-142, its adoption resulted in sweeping changes to South Carolina automobile insurance law. However, unlike the numerous auto insurance statutes with which it was adopted, South Carolina Code § 38-77-142 received no discussion or explanation in the legislative history materials. This lack of discussion seems inconsistent with the argument that the statute was intended to make such sweeping changes. Stated differently, it cannot be extrapolated from the absence of any discussion that the legislature intended such a sweeping reform of automobile insurance law,

overruling more than 50 years of case decisions allowing reasonable policy exclusions to restrict "voluntary coverage" in excess of the statutorily required minimum limits.[6]

Another ignored rule of statutory construction is that "[i]n construing a statute, it is proper to consider legislation dealing with the same subject matter." *Fidelity & Cas. Ins. Co. of New York v. Nationwide Ins. Co.*, 278 S.C. 332, 335, 295 S.E.2d 783, 785 (1982); *see also Great Games, Inc. v. South Carolina Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes which are part of the same legislative scheme should be read together."); *Doe v. Brown*, 331 S.C. 491, 496, 489 S.E.2d 917, 920 (1997) (same).

Title 38, Chapter 77 and Title 56, Chapter 9 deal with the same subject matter – automobile insurance. These two chapters were both part of Title 56, Chapter 9 until a recodification. *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 17 n.2, 382 S.E.2d 11, 13 n.2 (Ct. App. 1989). Even more importantly, Chapter 77 specifically defines "automobile insurance" by reference to "motor vehicle liability polic[ies]" defined in South Carolina Code § 56-9-20. S.C. Code § 38-77-30(1). Based on this definition, this Court previously stated that the legislature "clearly intended" policies defined under South Carolina Code § 38-77-30 and policies defined under § 56-9-20 "to follow the same rules." *State Auto Prop. & Cas. Ins. Co. v. Gibbs*, 314 S.C. 345, 350, 444 S.E.2d 504, 506 (1994).

South Carolina Code 56-9-20(5) defines a "motor vehicle liability policy" as "[a]n owner's or operator's policy of liability insurance that **fulfills all the requirements of** Section 38-77-140 through 38-77-230," which would include Section 38-77-142. S.C. Code § 56-9-

---

[6] *See Penn Nat. Mut. In. Co. v. Parker*, 282 S.E. 546, 320 S.E.2d 458 (Ct.App. 1984); *Atomic Ins. Co. v. Allstate Ins. Co.*, 254 S.C. 107, 173 S.E.2d 653 (1970); *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989) (recognizing difference between compulsory insurance for which the legislature balances public interest and voluntary insurance above minimum limits for which it does not).

20(5). However, that section states insurers may grant excess coverage above the required limits, which is not subject to the provisions of the chapter. S.C. Code § 56–9–20(5)(d). Therefore, according to the General Assembly, a policy of liability insurance can fulfill the requirements of Section 38-77-142 and place limits on excess coverage. In an attempt to reconcile the Court's holding in this case with the General Assembly's language in South Carolina Code § 56-9-20, the Court's Opinion states that Section 56-9-20 "has no bearing on the application of *other* motor vehicle laws, such as section 38-77-142...." *Walls*, 2021 WL 908511 at *4. This statement is incompatible with this Court's prior statement in *Gibbs*, longstanding statutory construction rules, and, most importantly, the General Assembly's definition of "automobile insurance" in South Carolina Code § 38-77-30(1). These statutory provisions should be read together, not read in a vacuum to serve this Court's preferred public policy.

As this Court has noted, it is to "strictly apply rules of statutory construction" because "[d]etermining legislative intent...is a judicial function whereas legislative decisions-making is not." *Thomas v. Cooper River Park*, 322 S.C. 32, 36 n.1, 471 S.E.2d 170, 172 n.1 (1996). Therefore, it is the function of the judiciary to strictly apply rules of statutory construction, not to await the General Assembly's correction of the judiciary's interpretation where it has failed to do so. *See* Walls, 2021 WL 908511 at *4.[7]

[7] The majority's Opinion considers the General Assembly's failure to reform § 38-77-142 – in the less than seven (7) years since the *Williams* decision – as approval of its interpretation of the statute. *Walls*, 2021 WL 908511 at *4. As the United States Supreme Court has repeatedly admonished:

> The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.' *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826,

CONCLUSION

For the above-stated reasons, Nationwide submits that this Court misapprehended or overlooked matters of fact and statutory interpretation that compel a different outcome in this case. The Court's Opinion demonstrates a fundamental misunderstanding of who the insured is with respect to liability coverage and ignores several basic rules of statutory construction. Consequently, rehearing is warranted, and Nationwide respectfully requests that the Court withdraw its current opinion and affirm the Court of Appeals decision finding the exclusions enforceable for amounts above the statutory minimum liability limits.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

J.R. Murphy, Esquire
S.C. Bar # 7941
Wesley B. Sawyer, Esquire
S.C. Bar # 100229
Megan Walker, Esquire
S.C. Bar # 103069
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
jrmurphy@murphygrantland.com

> 830, 90 L.Ed. 1084 (1946)....Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.

Zuber v. Allen, 396 U.S. 168, 185 n.21, 90 S. Ct. 314, 324 n. 21 (1969); *see also Alexander v. Sandoval*, 532 U.S. 275, 292, 121 S. Ct. 1511, 1523 (2001) ("'It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.'" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1, 109 S.Ct. 2363 (1989)); *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("Congress's failure to speak up does not fairly imply that it has acquiesced in the Board's interpretation.").

wsawyer@murphygrantland.com
mwalker@murphygrantland.com
Attorneys for Respondent

Columbia, South Carolina
March 25, 2021