IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Anderson County
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate (Court of Appeals) 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, Randi Harper and Wendy Timms in her capacity as Personal Representative of the Estate of Christopher Adam Timms, are the Petitioners.

Appellate Case No.: 2019-001596

PETITIONERS' JOINT BRIEF IN RESPONSE TO RESPONDENT'S PETITION FOR REHEARING

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ARGUMENT

Nationwide has filed a Petition for Rehearing contending (1) That the Court misunderstands who is insured by liability coverage and (2) that the Court ignored the rules of statutory construction in order to “legislate from the bench”. The first argument is specious and neither argument raises issues that were overlooked or misapprehended by the Court. For these reasons, the Court should deny Nationwide’s Petition for Rehearing.

I. The Court’s Opinion exhibits a clear understanding of who is an insured with regard to liability insurance.

Nationwide contends that the Majority writing for the Supreme Court exhibit a fundamental misunderstanding of who is insured for liability coverage. In support of the same, Nationwide notes that the opinion states “Nationwide’s provisions reduce coverage.for insureds when they are injured while fleeing from law enforcement or engaging in a felony.”

While perhaps this lone sentence set forth by Nationwide as evidence of the same might be better clarified to reflect that Nationwide’s policy provisions reduce coverage for damages caused by an insured when fleeing from law enforcement or engaging in a felony, the opinion in its entirety overwhelmingly exhibits a clear understanding of liability insurance and its application in this context.

The Court begins noting that “Subsections (A) and (B) [of § 38-77-142] specify who must be covered in liability insurance policies, including named insureds and permissive users…” (Op. p. 61). The Court discussed *Neumayer* and the effects of “mere failure of an insured to turn the motion or complaint over to the insurer” (Op. p. 62). The Court discussed *Williams* and the requirement under § 38-77-142 that the policy provide coverage for “named insured and permissive users against liability for damage within the coverage of the policy. “(Op.

p. 63). These extended discussions reflect that, of course, the South Carolina Supreme Court does not operate under a fundamental misunderstanding of who is insured with respect to liability coverage, but to the contrary, clearly understands that automobile liability insurance provides coverage for damages caused by an insured as a result of an insured's negligent acts or omissions.

In addition, the Court has issued numerous opinions previously addressing liability insurance coverage and to whom it provides coverage, not the least of which are the cases cited by Nationwide in an attempt to make its point. Nationwide cites *Cowan v Allstate* , 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"). They cite *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 *Howard v. Allen* 254 S.C. 455, 460, 176 S.E.2d 127, 129 (1970*) (*The provision of the policy, insofar as the inure to the benefit of only the insured are …of no value to anyone other than the insured). While these opinions may be those of past iterations of the Supreme Court, they nonetheless reflect the Supreme Courts body of work and its continued understanding in this case.

The proposition that the Court, in this matter, somehow misapprehends the application of liability insurance to an insured is an argument that is specious, at best.

II. **The Court's Opinion properly applies the rules of statutory construction and does not attempt to "legislate from the bench"**.

The Court's Opinion here deals directly with §38-77-142 and whether the statute restricts the right of an insurer to utilize a stepdown provision to reduce the available coverage under the policy when the insured is fleeing law enforcement or is engaged in a felony.

Virtually the entire opinion of the Court in this matter is a discussion of statutory construction and the plain language of the statute. The Court's Opinion goes to great length analyzing the specific language of the statute, reasoning that the terms "within the coverage of the policy" referred to the coverage on the face of the instant policy and not the statutory minimum limits. To suggest that the Court has reviewed the statute without considering other interpretations is unreasonable. Clearly the Justices gave consideration to other opinions (see the Dissent both here and in *Williams*) and the majority saw fit to disagree as to whether there were other reasonable interpretations, as justices often do.

This Court held in Williams v. Geico 409 SC 603, 762 SE 2d 714 (citing SC Code Ann. §38-77-140 (2015) and reiterated in the March 10, 2021 decision in Nationwide Mutual Fire Insurance Co. v. Walls 2021 WL 908511 as follows:

> "On appeal this Court held that insurers have the right to "limit their liability and to impose conditions on their obligations provided they are not in contradiction of public policy or some statutory inhibition." . . . ."

In examining §38-77-142, the Court stated that the plain language of subsections A and B required a policy to provide coverage to the named insureds and permissive users "against liability for damage incurred *within the coverage of the policy*" (citations omitted). The Court evaluated this language and held that the face amount of coverage was relevant pursuant to §38-77-142 not the statutory minimum limits of liability. Williams 409 SC 603, 762 SE 2d at 714 (citing SC Code Ann. §38-77-140 (2015).

In conclusion, the Court stated the family step-down provision in GEICO's policy in *Williams* violated the prohibition established by §38-77-142 and therefore public policy based upon the plain language of the statute. (Citations omitted).

The Court's Opinion in Nationwide v. Walls further noted that the Supreme Court had previously rejected Nationwide's argument made in Williams vs. Geico that S.C. Code Ann. §56-9-20 (5)(d) (2018) allows limits on excess coverage so as to render §38-77-142(c) inapplicable .

The Court affirmed that the plain meaning of §38-77-142(c) makes no distinction between mandatory minimum limits and excess coverage. The Court held in Williams and reaffirmed in Nationwide v. Walls that the face amount of coverage is what is relevant under §38-77-142. The Court further made reference to the fact which Nationwide seems to continue to want to overlook, that since the enaction of the statute in 2002 and the Williams decision in 2014 no action has been by taken by the legislature.

The Court's Opinion further confirmed in footnote four, the dissent's suggestion in Nationwide v. Walls and in the Brief of Nationwide, that this decision is far from "judicial sleight of hand" but it is merely adhering to the plain language and meaning of the statute as it exists and was passed by, voted upon and is the law of the State of South Carolina, as passed by the General Assembly.

Nationwide further contends that the Court's Opinion ignores the "common law right of freedom to contract". However, to the contrary, the Court's opinion *specifically* founds its argument based upon the plain language of the statute, citing *Williams v. GEICO* and § 38-77-142. The Court acknowledges the right of insurers to "limited their liability and to

impose conditions on their obligations provided they are not in contravention of …some statutory inhibition." (Op. at p. 62 citing *Williams* at 598, 762 S.E.2d at 712 (in turn citing B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999); Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989); Cobb v. Benjamin, 325 S.C. 573, 580-81, 482 S.E.2d 589, 593 (Ct. App. 1997)).

Nationwide's argument ignores that the Court acknowledges that insurers have the right to limit their liability and impose conditions on their obligations. The Court does so. But, this is only provided that those limitations and conditions are not in contravention of statute or public policy. The Court carefully and thoroughly determined the plain language of the statute and has applied this limitation appropriately. The Court's Opinion here clearly appropriately contemplated all issues raised by Nationwide in their Petition for Rehearing. The Petition for Rehearing should be denied.

CONCLUSION

For the reasons stated above, the Petition for Rehearing should be denied and the ruling of this Court in Nationwide Mutual Fire Insurance Co. v Walls, March 10, 2021 WL 908511, should be affirmed on the basis that the step-down provisions contained in the Nationwide Policy violate S.C. Code §38-77-142 9 (c); and, are unenforceable pursuant to the Supreme Court's holding in Williams v. Government Employees Insurance Company, 409 S.C. 586, 762 S.E. 2nd 705 (2014).

Respectfully submitted,

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