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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION

Appellate Case No. 2021-001389

Anthony Denson, as personal representative of the estate of Garland Denson,……...…...Plaintiff,

v.

National Casualty Company.....Defendant.

PLAINTIFF'S BRIEF

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STATEMENT OF THE CASE

Plaintiff, Anthony Denson, as personal representative of the estate of Garland Denson (hereinafter "Denson"), brought suit against the Defendant, National Casualty Company (hereinafter "National Casualty"), which suit is pending in the federal District Court for the District of South Carolina, Charleston Division. The Honorable David C. Norton, the federal district judge presiding in that suit, certified a question to this Court. On January 12, 2022, this Court issued an order that it will answer that question, which is as follows:

> May a person entitled to bring a dram-shop action against a business maintain a negligence action against the business's insurer where the insurer failed to notify the South Carolina Department of Revenue of the business's lapse in or termination of liquor liability coverage in violation of S.C. Code Ann. § 61-2-145(C) and the business did not have liquor liability coverage at the time of the underlying accident?

STANDARD OF REVIEW

> In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.

Drury Dev. Corp. v. Foundation Ins. Co., 390 S.C. 97, 668 S.E.2d 798, 800 (2008).

ARGUMENT

In S.C. Code Ann. § 61-2-145(C), the General Assembly created a notice requirement for insurers that is designed to protect people who are in Denson's position, a requirement designed to ensure that each establishment "licensed or permitted to sell alcoholic beverages for on-premises consumption, in which the person [i.e., establishment] so licensed or permitted remains open to sell alcoholic beverages for on-premises consumption after five o'clock p.m.[1][,]"

[1] These establishments are hereinafter referred to as "bars." Plaintiff recognizes that sorts of businesses other than bars (e.g., restaurants) fall within the meaning of "person" under the statute, but the typical bar almost always does.

has at least one million dollars in liquor liability insurance coverage or has its license to sell such beverages revoked or suspended by the South Carolina Department of Revenue. S.C. Code Ann. § 61-2-145(A).

National Casualty would have this Court determine that an insurer's failure to comply with S.C. Code Ann. § 61-2-145(C)'s mandate is consequence-free for the insurer.

Denson disagrees. To hold that the insurer may be liable for its failure to those harmed by its failure is consistent with this state's law, this state's policy, and both logic and fairness.

Answering the certified question with a *yes* is consistent with existing South Carolina law and existing South Carolina public policy. It would further the aims of the law. It would be just and right.

I. The statute creates a duty by insurers to notify the South Carolina Department of Revenue of a bar's lapse or termination of liquor liability insurance coverage.

In 2017, the South Carolina General Assembly enacted the statute at issue, which reads as follows:

> (A) In addition to all other requirements, a person licensed or permitted to sell alcoholic beverages for on-premises consumption, which remains open after five o'clock p.m. to sell alcoholic beverages for on-premises consumption, is *required to maintain a liquor liability insurance policy or a general liability insurance policy with a liquor liability endorsement for a total coverage of at least one million dollars* during the period of the biennial permit or license. *Failure to maintain this coverage constitutes grounds for suspension or revocation of the permit or license.*
>
> (B) The department shall add this requirement to all applications and renewals for biennial permits or licenses to sell alcoholic beverages for on-premises consumption, in which the permittees and licensees remain open and sell alcoholic beverages for on-premises consumption after five o'clock p.m. Each applicant or person renewing its license or permit, to whom this requirement applies, shall provide the department with documentation of a liquor liability insurance policy or a general liability insurance policy with a liquor liability endorsement in the required amounts.

> (C) *Each insurer writing liquor liability insurance* policies or general liability insurance policies with a liquor liability endorsement to a person licensed or permitted to sell alcoholic beverages for on-premises consumption, in which the person so licensed or permitted remains open to sell alcoholic beverages for on-premises consumption after five o'clock p.m., *must notify the department in a manner prescribed by department regulation of the lapse or termination of the liquor liability insurance policy or the general liability insurance policy with a liquor liability endorsement.*
>
> (D) For the purposes of this section, the term "alcoholic beverages" means beer, wine, alcoholic liquors, and alcoholic liquor by the drink as defined in Chapter 4, Title 61, and Chapter 6, Title 61.

S.C. Code Ann. § 61-2-145.

This statute contains express consequences for the bar, should the bar cancel or let lapse its liquor liability coverage – suspension or revocation of its liquor license. S.C. Code Ann. § 61-2-145(A). The statutory scheme does not spell out what the consequences are for the insurer, who has the responsibility to notify the Department of Revenue and set in motion the suspension or revocation, should the insurer fail to meet that responsibility.

The purpose of S.C. Code Ann. § 61-2-145 is self-evident: to provide that a fund of at least a million dollars exists to compensate those who are injured as a result of a bar's unlawful service of alcoholic beverages. The purpose of the insurer's notice requirement of S.C. Code Ann. § 61-2-145(C) is similarly evident: to alert the Department of Revenue to the failure to maintain the required insurance, so that the department then prevents the bar from selling more alcohol, at least until the million-dollar fund is back in existence. S.C. Code Ann. § 61-2-145(A)&(C).

When insurers comply with S.C. Code Ann. § 61-2-145(C) and provide the department with the required notice, the likelihood of insufficient funds being available to compensate a

person injured as a result of a bar's unlawful alcohol service is greatly lessened, since bars without the required insurance will be shut down by the department after the insurer's notice is received. If insurers do not comply with S.C. Code Ann. § 61-2-145(C) and give the notice, the statutory scheme cannot function as intended. S.C. Code Ann. § 61-2-145.

II. To protect tortiously injured people, South Carolina courts impose consequences on insurers when they fail to comply with statutory requirements.

That this state's courts impose consequences on insurers when they fail to comply with statutory requirements is nothing new. It is this state's policy. In U.S. Fidelity & Guaranty Co. v. Security Fire & Indemnity Co., this Court decided the effect of an insurer's failure to comply with S.C. Code § 46-702(7)(h) (1965 Supp. to 1962 Code of Laws), part of the South Carolina Motor Vehicle Safety Responsibility Act which required an insurance carrier providing SR-22 coverage to notify the State Highway Department of the cancellation or termination of that coverage, providing that the coverage shall not be cancelled until at least 10 days following the notice. 248 S.C. 307, 310, 311-12, 149 S.E.2d 647, 648, 649 (1966). This Court affirmed the ruling below that "the policy of Security afforded coverage for its insured Hemingway at the time of the collision, because of the failure of Security to give the statutory ten days' written notice of termination to the State Highway Department[.]" Id. at 312, 316. The Court set out its reasons for so holding:

> The Act contemplates continuous coverage of such insured and devolves the duty of enforcing the requirement upon the State Highway Department. This duty could not be accomplished unless the Department has the advance notice required to place into operation the administrative procedures necessary to accomplish such purpose.
>
> . . .
>
> Statutory provisions requiring notice for cancellation or termination of compulsory motor vehicle insurance are mandatory, must be

> strictly followed to effect a cancellation or termination of the policy, and must be construed so as to effect the statutory purpose of providing protection to the general public.
>
> . . .
>
> The clear intent of the statute was to require notice, in the event of the end of coverage under a certified policy either by cancellation or termination, in order that the Department would be able to protect the public by preventing the operation of a motor vehicle by the insured without proof of continued financial responsibility. The danger to the public from the absence of liability coverage is no greater when it results from one cause than from the other. The statutory purpose was to protect from both.
>
> While the statute does not expressly state that the coverage of a certified policy will continue in force if the insurer fails to comply with the notice requirement, such is the clear intent and result of the language used. Since it is provided that the insurance so certified shall not be cancelled or terminated "until" the notice is given to the Department, it is obvious that the coverage of the policy does not end until after the notice requirements are met. Any other construction would render useless the requirement that notice be given.

U.S. Fidelity, 248 S.C. at 313-15.

Of note is that the Court, so that the Highway Department would be able to effect the statutory scheme and protect the public from uninsured drivers, fashioned a remedy to provide meaningful consequences for an insurer that failed to follow the law and provide the notice requirement. Id. Also noteworthy is that those consequences furthered the aim of the statute – making sure that SR-22 drivers were only driving if they had adequate insurance coverage – by providing that coverage. Id.

Another example of this jurisprudential policy at work is the case of National Service Fire Ins. Co. v. Jordan, in which the Court similarly determined what would otherwise be cancelled SR-22 coverage to remain in effect, since Canal Insurance Company did not provide the required notice to the Highway Department. 258 S.C. 56, 58-61, 187 S.E.2d 230, 231-33 (1972). In so

doing, the Court relied on the rationale of U.S. Fidelity that, when insurers are required to notify a government body of the end of insurance coverage, that requirement's meaning "must be construed so as to effect the statutory purpose of providing protection to the general public." Id. (quoting U.S. Fidelity, 248 S.C. at 314-15).

As it has ever since, this Court followed this logic in State Farm Mut. Auto. Ins v. Wannamaker, holding that an insurer's failure to make a meaningful offer of underinsured motorist coverage, as required by statute, created "underinsured coverage by operation of law." 291 S.C. 518, 522, 354 S.E.2d 555, 557 (1987). As in U.S. Fidelity and Jordan, in the absence of express statutory language stating the consequences of an insurer's failure to comply with a statute's obligations, the Court determined those consequences to be those which logically best supported the aim of the legislature in creating the statute. Wannamaker, 291 S.C. at 520-22.

It is the policy of this state that, when a statue governing an insurer's conduct does not contain express language stating the consequences of the insurer's failure to comply, the consequences are those which logically best support the object of the statute. See Wannamaker, 291 S.C. at 520-22; Jordan, 258 S.C. at 58-61; U.S. Fidelity, 248 S.C. at 313-15.

III. An insurer's failure to provide the notice required by S.C. Code Ann. § 61-2-145(C) is negligence *per se* under South Carolina's existing jurisprudence.

Longstanding principles of negligence *per se* support a *yes* answer to the certified question. It is well settled that "violation of a statute constitutes negligence *per se*[.]" Fairchild v. S.C. Dept. of Transp., 398 S.C. 90, 97, 727 S.E.2d 407, 411 (2012). This Court has set forth the negligence *per se* analysis as follows:

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

> If the plaintiff makes this showing, he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence per se.
>
> The statute can establish a duty to plaintiff. A breach of the duty can be found with a showing of violation of the statute.

Whitlaw v. Kroger Co., 306 S.C. 51, 53-54, 410 S.E.2d 251, 252-53 (1991) (internal quotation marks and citation omitted; quoting and citing Rayfield v. S.C. Dept. of Corr, 297 S.C. 95, 103, 104, 374 S.E.2d 910, 914 (Ct. App. 1988).

Dram shop liability is itself is negligence *per se* action, founded on statutes that are in Title 61, just as is S.C. Code Ann. § 61-2-145. See Whitlaw, 306 S.C. at 54-55 (holding that cause of action arises from duties under S.C. Code Ann. §§ 61-9-40 and 61-9-410). This supports a *yes* answer to the certified question, as the statutes of Title 61 exist to prevent harm that flows from unlawful sale and consumption of alcohol. See Whitlaw, 306 S.C. at 54-55.

Examining the object and operation of S.C. Code Ann. § 61-2-145 reveals that a negligence claim for an insurer's failure to give the required notice under subsection (C) falls squarely within the ambit of negligence *per se* and the purpose behind the doctrine. The words of S.C. Code Ann. § 61-2-145 reveal that its purpose is to ensure at least a million dollars are available to compensate a person injured because of a bar's unlawful sale or service of alcoholic beverages. The insurer's notice requirement of the statute's subsection (C) is to alert the Department of Revenue to the failure to maintain the required insurance, so that the department may then suspend or revoke the bar's liquor license, preventing the bar from selling more alcohol, at least until a million-dollar insurance policy is back in effect. S.C. Code Ann. § 61-2-145(A)&(C). Both the statute as a whole and the notice requirement exist

to protect those injured by a bar's unlawful alcohol service. Id. That is "the essential purpose of the statute" and such an injured person is "a member of the class of persons the statute is intended to protect." Whitlaw, 306 S.C. at 53. When the statute is not followed, the loss to the injured person is manifest – impairment of his ability to be compensated for his tortiously caused injuries. Put another way, the injured person's loss from an insurer's failure to notify under the statute could well be a million dollars. See S.C. Code Ann. § 61-2-145(A)&(C). Compliance with the statute protects against that loss being suffered by a member of that class. Id. Had National Casualty complied with the statute, the bar that served the alcohol giving rise to Denson's dram shop cause of action would probably not have done so, but, if the bar had been operating to sell the alcohol, that would probably have been because it had obtained the required insurance. Id.

Well-settled negligence *per se* principles, the answer to the certified question is *yes*.

IV. There can be no wrong without a remedy.

Under principles of both law and equity, there can be no wrong without a remedy. Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004); accord Messervy v. Messervy, 82 S.C. 559, 64 S.E. 753, 754 (1909) "[t]he boast of the law is that there can be no wrong without a remedy"). As Denson's counsel put it to the District Court, the choice is "do something or do nothing." National Casualty espouses the position that the thing to do about an insurer's failure to do what S.C. Code Ann. § 61-2-145(C) requires it to do is *nothing*, since the statute sets out no penalty to the insurer for disregarding its obligations. As discussed above, though, an insurer's failure to give the notice can work a wrong upon someone in Denson's position. Our law will not countenance the remediless wrong envisioned by National Casualty.

Principles of law foundational to our justice system support a *yes* answer to the certified question.

V. The principles of South Carolina law that support a *yes* answer have been recognized in other states, leading to *yes* answers to similar questions.

In Lang v. Kurtz, in an action brought against both an at-fault driver and an insurer, the Court of Appeals of Wisconsin faced the question of what consequences flow from an insurer's failure to notify the Wisconsin Department of Transportation that the at-fault driver's SR-22 coverage had lapsed. 301 N.W.2d 262, 100 Wis.2d 40 (Wis. App. 1980). Employing reasoning that follows the same logic as South Carolina's insurance statute cases and negligence *per se* analysis, the Lang court noted as follows:

> Lang claims that because he is *a third-party beneficiary intended to be protected by the Financial Responsibility Act* (Chapter 344, Stats.), Mutual should be estopped by its failure to comply with sec. 344.34 from claiming Kurtz's policy lapsed. Lang further argues that *had Mutual properly notified the Department of Transportation, Kurtz's operating privilege probably would have been revoked and Kurtz would not have been driving on April 23, 1978, or Kurtz would have obtained other coverage*. Mutual argues that the nonpayment of the January 7, 1978, premium caused the policy to lapse without an affirmative act of cancellation or termination by Mutual. Thus, Mutual argues, the notice requirement of sec. 344.34 was not triggered. *We agree with Lang that Mutual's position directly contravenes the purpose of the financial responsibility law and the specific language of sec. 344.34.*
>
> *The purpose of the financial responsibility law is to provide a method of compensating a third party for damages that might result from future accidents involving an operator whose license has been previously revoked or suspended*. Proof of financial responsibility is required as a condition for reissuing a license previously revoked or suspended. One way of providing the necessary proof of financial responsibility is through a written certification by an insurer indicating that the operator is insured. It is in this context that the notice of cancellation of insurance provision should be interpreted.
>
> Section 344.34, Stats., provides that insurance certified under sec. 344.31 "shall not be canceled or terminated until at least 10 days

> after a notice of cancellation or termination of the insurance so certified has been filed in the office of the secretary ...." *Compliance with this notice requirement is essential to the effective operation of the financial responsibility law. Filing of the cancellation notice alerts the secretary of the Department of Transportation to the fact that an operator who was required to file proof of financial responsibility is no longer covered by insurance, so that the operator's license can be suspended or revoked until proof is again furnished*.

Lang, 301 N.W.2d at 264-65.

Pennsylvania has answered a question under a statute about insurance that employs similar reasoning and logic to the Lang court and to South Carolina jurisprudence about insurance statutes and negligence *per se*, finding a private right of action against the Pennsylvania Department of Transportation. Lyngarkos v. Commonwealth Dept. of Transp., 426 A.2d 1195, 57 Pa. Commwlth. 121 (Pa. Commw. Ct. 1981). The facts and reasoning of Lyngarkos are as stated by that court:

> Lyngarkos alleges that he is a citizen and resident of Pennsylvania; that Mackay is a new and used car sales corporation with its principal place of business in North East, Pennsylvania; that William George is a citizen and resident of New York; that on or about December 17, 1977, Mackay sold a 1971 Jeep to George and issued a Pennsylvania temporary registration card and plate for the Jeep; that Mackay issued the temporary registration plate as an agent for the Pennsylvania Department of Transportation; that at the time Mackay issued the temporary registration plate to George, George did not possess No-fault insurance coverage; [1] that on December 29, 1977 Lyngarkos was a passenger in the Jeep, being driven by Thomas Gratto in New York with the permission of George and that Gratto caused the car to leave the road resulting in an accident in which Lyngarkos suffered serious injuries; that as a result of the accident, Lyngarkos has incurred medical expenses in excess of $12,000.00 and has suffered a loss of earnings and an impairment of his earning capacity; and that, at the time of the accident, Lyngarkos did not operate or own a motor vehicle and did not live in a household in which an insured individual resided and therefore did not qualify for coverage under the No-fault law of Pennsylvania or New York.

In the count directed to Mackay, Lyngarkos avers that Mackay knew or should have known that proof of No-fault insurance was required before issuing a temporary registration card and plate to George for the Jeep; that Mackay owed a duty to Lyngarkos and others similarly situated to insure that George had proper No-fault insurance coverage prior to issuing the temporary registration; that Mackay was negligent in issuing a temporary registration to George, thereby allowing George to operate the Jeep on public highways, without proof of No-fault insurance coverage; and that as a result of Mackay's negligence, Lyngarkos is unable to collect No-fault benefits for the injuries sustained in the accident. In other counts of the complaint Lyngarkos alleges that since Mackay acted as agent for the Department of Transportation for the distribution of temporary registration plates, the Department is liable[.]

. . .

We agree with the court below that an automobile dealer who issues a temporary registration card and plate to a purchaser without first securing proof of No-fault insurance is answerable in trespass to one injured by the dealer's neglect. . . . [R]egulations impose upon the issuing automobile dealer the duty to inspect all documents necessary for the proper registration of a motor vehicle. There is thus created a statutory duty on the part of the dealer to ascertain that the applicant for temporary registration cards and plates has the required No-fault insurance. This duty is meant to protect all motorists by insuring that they will have recourse to the comprehensive, expeditious and equitable No-fault insurance coverage required of all motorists. Mackay owed Lyngarkos a duty to make certain that George possessed the insurance prior to issuing George a temporary registration card and plate. Restatement, Second, Torts, § 286. The other allegations in Lyngarkos' complaint that Mackay breached this duty, as a result of which Lyngarkos suffered an injury in the form of an inability to collect No-fault insurance benefits make out a valid cause of action.

. . .

The object of a tort action is to obtain compensation for the plaintiff's injuries. Lyngarkos alleges that his injury in this action is his inability to recover compensation under the No-fault Act. From the fact that it was Mackay's issuance of the temporary registration card and plate to George that allowed the Jeep to be operated on public roads, it follows that, if Lyngarkos prevails in this action, he should be allowed the full measure of benefits which he would have received if George had obtained No-fault insurance coverage.

Lyngarkos., 426 A.2d 1197-1200 (some internal citations omitted). The logic is consistent with South Carolina jurisprudence, and the result is consistent with a *yes* answer to the certified question.

VI. A *yes* answer is better for South Carolinians than even the best *no* answer.

Not only is a *yes* answer consistent with existing state law, it is the best answer for the people of South Carolina. This court is the highest authority on South Carolina law, and it could decide that the answer is *no*, on the grounds that the lack of notice to the Department of Revenue leaves the policy in effect. But *yes* is a better answer. A *yes* answer puts the responsibility for noncompliance with the statute squarely where it belongs: borne by the party obliged to comply, the insurer. S.C. Code Ann. § 61-2-145(C). A *yes* answer further provides a powerful incentive to insurers to comply with the notice requirement, and compliance with the notice requirement is essential to the functioning of the statutory scheme under S.C. Code Ann. § 61-2-145.

CONCLUSION

The answer that produces the just outcome, the answer that is consistent with the existing law and policy of this state and that best serves its people – the right answer – is *yes.* The Court should issue a decision that a person entitled to bring a dram-shop action against a business may maintain a negligence action against the business's insurer where the insurer failed to notify the South Carolina Department of Revenue of the business's lapse in or termination of liquor liability coverage in violation of S.C. Code Ann. § 61-2-145(C) and the business did not have liquor liability coverage at the time of the underlying accident.

Respectfully submitted,

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