

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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CERTIFIED QUESTION
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Appellate Case No. 2021-001389
—————

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

v.

National Casualty Company,.....Defendant.
—————

NATIONAL CASUALTY COMPANY'S BRIEF

Robert M. Kennedy, Jr.
S.C. Bar No. 102288
GlenLake Four
4141 ParkLake Avenue, Suite 530
Raleigh, North Carolina, 27612
919-789-5300
robert.kennedy@phelps.com

Attorney for Defendant, National Casualty
Company

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STATEMENT OF THE CASE

Plaintiff, Anthony Denson, as personal Representative of the Estate of Garland Denson (“Plaintiff”), filed the present lawsuit in the United States District Court for the District of South Carolina. As set forth in Plaintiff’s Amended Complaint, Garland Denson (“Mr. Denson”) was killed in a June 24, 2020 auto accident involving a vehicle driven by Steve Jones (“Jones”).¹ Plaintiff alleges that on the night of the accident, Jones was an intoxicated patron of a bar and restaurant operated by Watershed Enterprises, LLC DBA Royal Lanes (“Royal Lanes”) and licensed to conduct business in South Carolina.² In his Amended Complaint, Plaintiff alleges that Royal Lanes overserved Mr. Denson and owed Mr. Denson a statutory duty to not serve alcoholic beverages to an intoxicated person, and that in doing so, Royal Lanes was negligent, grossly negligent, and reckless in several ways, creating liability on behalf of Royal Lanes for Mr. Denson’s death.³

Despite an admitted lack of privity in contract, Plaintiff sued respondent, National Casualty Company (“National Casualty”), a general liability insurer, *directly* seeking coverage for the liability claim Plaintiff has asserted against Royal Lanes, National Casualty’s purported insured.⁴ National Casualty issued policy no. KKO0000024233500 (the “Policy”) to Royal Lanes for the policy period March 26, 2020 through June 26, 2020.⁵ The Policy does not provide liquor liability coverage.⁶ Perhaps recognizing that he otherwise does not have a right under South Carolina law to sue National Casualty, Plaintiff attempts to reframe his direct action claim as a negligence claim

¹ Pl.’s Am. Compl., 2-3.

² *Id.* at 2.

³ *Id.* at 3-5.

⁴ *Id.* at 1 and 7.

⁵ *Id.* at 7.

⁶ *Id.* at 7.

based on National Casualty's alleged failure to comply with South Carolina Code section 61-2-145 relative to liquor liability coverage under the Policy.⁷ Section 61-2-145 provides 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 61.⁸

The statute requires that certain insureds licensed or permitted to sell alcohol procure insurance and submit documentation of such insurance to the South Carolina Department of

⁷ National Casualty disagrees with Plaintiff's version of the facts, but the merits of the claim are not presently before the Court.

⁸ Pl.'s Am. Compl. at 5-6; S.C. CODE § 61-2-145 (2021).

Revenue.⁹ Section 61-2-145 also requires insurers of qualifying sellers to notify the South Carolina Department of Revenue upon lapse or termination of the required coverage.¹⁰

Plaintiff claims that “[Mr. Denson] was within the class of persons intended to be protected by” section 61-2-145, and because of National Casualty’s alleged noncompliance with section 61-2-145(C), no coverage is available under the Policy for Mr. Denson’s claim.¹¹ In Plaintiff’s view, this gives him a ripe claim for coverage under National Casualty’s Policy, despite no present right otherwise existing under South Carolina law, and makes National Casualty responsible for the damages arising from Mr. Denson’s death, despite the lack of privity in contract and there being no liquor liability coverage paid for or written under the Policy.¹²

On January 29, 2021, National Casualty filed a Motion to Dismiss Plaintiff’s claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).¹³ In support of its Motion, National Casualty established that under South Carolina law: (1) Plaintiff cannot maintain a negligence cause of action against National Casualty as it did not owe Plaintiff a duty to ensure that its insured procure specific coverage; (2) because section 61-2-145 does not provide a legally protected interest in favor of a third party to a business’s insurance contract and because no causal connection can be established between Plaintiff’s alleged injury (that is, lack of coverage under the Policy) and National Casualty’s alleged noncompliance with section 61-2-145, Plaintiff lacks standing to bring an action arising out of section 61-2-145; and (3) Plaintiff, as a third-party claimant, lacks standing under black-letter South Carolina law to maintain any action against National Casualty unless and until he obtains a judgment against Royal Lanes.¹⁴ The district court

⁹ S.C. CODE § 61-2-145(A), (B) (2021).

¹⁰ S.C. CODE § 61-2-145(C) (2021).

¹¹ Pl.’s Am. Compl., 7-8.

¹² *Id.*

¹³ *See* Def.’s Mtn. to Dismiss.

¹⁴ *See id.*

requested that this Honorable Court assist in resolving National Casualty's Motion to Dismiss by answering the certified question addressed herein.

STANDARD OF REVIEW

When a certified question raises a novel question of law, this Court is free to answer 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.” *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 11, 800 S.E.2d 479, 480 (2017) citing *Drury Dev. Corp. v Foundation Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

ARGUMENT

The certified question presented requires this Honorable Court to address two separate issues: (1) whether a third party to a business's insurance contract has standing to bring a negligence claim against the business's insurer for an alleged violation of South Carolina Code section 61-2-145's reporting requirement and (2) whether section 61-2-145 provides an actionable basis for a third party's negligence claim against a business's insurer. The answer to both must be no, as to hold otherwise would sanction what is, at bottom, a request for an end-run around existing South Carolina law.

A third party to a business's insurance contract lacks standing to bring a negligence claim against the business's insurer for an alleged violation of South Carolina Code section 61-2-145. Under the unambiguous wording of section 61-2-145 and South Carolina case law, an insured, not its insurer, bears responsibility for maintaining the insurance required by the statute. As such, a third party cannot meet the injury-in-fact element of standing. Further, a third party cannot establish the traceability element of standing as there is no causal connection between the alleged injury (the business's lack of insurance) and the conduct complained of (the insurer's failure to comply with section 61-2-145's reporting requirement).

In addition, a third party cannot establish the duty and proximate cause elements of a negligence claim against a business's insurer for its alleged violation of section 61-2-145. The statute does not create rights in favor of a third-party claimant; therefore, an insurer owes no duty to third parties under section 61-2-145. In addition, a third party cannot prove the proximate cause elements of (1) causation in fact and (2) legal cause because an insurer's failure to report a lapse in coverage does not, in fact, lead to the lack of coverage and it is not foreseeable that a lack in insurance coverage would "have been a natural and probable consequence of" an insurer's failure to report a lapse in coverage.

Further, allowing a third party to maintain a negligence action against a business’s insurer for alleged noncompliance with section 61-2-145 would contradict both South Carolina’s public policy against direct-action claims against insurers and the plain language of the law as considered and passed by the South Carolina legislature.

1. A Third Party To A Business’s Insurance Contract Does Not Have Standing To Bring A Negligence Claim Against The Business’s Insurer Under South Carolina Code Section 61-2-145.

Standing to sue is a fundamental prerequisite to instituting an action.¹⁵ South Carolina courts apply federal law to determine whether a party satisfies the standing requirement.¹⁶ Article III of the United States Constitution “limits the jurisdiction of federal courts to deciding only actual ‘cases’ and ‘controversies,’” where “[o]ne benchmark that sets apart those ‘cases’ and ‘controversies’ that are of the justiciable sort is the doctrine of standing, which has been held to be an ‘essential and unchanging part of the case-or-controversy requirement.’”¹⁷ The standing requirement “ensures that a party possesses ‘the requisite stake in the outcome of a case ‘at the outset of the litigation.’”¹⁸ The “irreducible constitutional minimum of standing”¹⁹ consists of three elements: “(1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the

¹⁵ See *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 299 (S.C. 1985).

¹⁶ See e.g. *Joseph v. S.C. Dept. of Labor, Licensing and Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769-70 (S.C. 2016); *Sea Pines Ass’n for Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (S.C. 2001) (South Carolina Supreme Court applied federal standing test enunciated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992)).

¹⁷ *Smith v. Catamaran Health Sols., LLC*, 205 F. Supp. 3d 699, 705 (D.S.C. 2016) (quoting *Lujan*, 504 U.S. at 559–60).

¹⁸ *Meyer v. McMaster*, 394 F. Supp. 3d 550, 558 (D.S.C. 2019) (quoting *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)).

¹⁹ *Green v. Beazer Homes Corp.*, No. 3:07-1098-CMC, 2007 WL 2688612, at *2–3 (D.S.C. Sept. 10, 2007) (quoting *Lujan*, 504 U.S. at 560–61 (internal citations omitted)).

conduct complained of,’ and (3) a ‘likel[i]hood]’ that the injury ‘will be redressed by a favorable decision.’”²⁰ Establishing these elements requires the following:

First, an injury in fact is established when a plaintiff shows that “he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”²¹ Second, “[t]raceability is established if it is ‘likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court.’”²² Lastly, to satisfy redressability, a plaintiff must show that it is likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.²³

A third party to a business’s insurance contract cannot establish the injury-in-fact and traceability elements and, therefore, lacks standing to maintain a negligence action against the business’s insurer for violating section 61-2-145’s reporting requirement.

To satisfy the injury-in-fact element of standing, Plaintiff must show that National Casualty’s alleged violation of section 61-2-145 affected Plaintiff’s legally protected interest. As held by this Court on several occasions, whether section 61-2-145 affords Plaintiff a legally protected interest such that he may bring a private cause of action against National Casualty is a matter of legislative intent:

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.²⁴

²⁰ *Meyer*, 394 F. Supp. 3d at 558 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan*, 504 U.S. at 560–61)).

²¹ *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) (quoting *Lujan*, 504 U.S. at 560)).

²² *Id.* (quoting *Doe v. Va. Dep’t of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000)).

²³ *Id.* (quoting *Deal*, 911 F.3d at 189 (quoting *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018)) (internal quotation marks omitted).

²⁴ *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (S.C. 2007) (internal citations omitted); see *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170, 785 S.E.2d 595, 600

There is no evidence here of such legislative intent that a private cause of action arises under section 61-2-145.

Looking to the language of the statute, South Carolina Code section 61-2-145 creates obligations for both those “licensed or permitted to sell alcoholic beverages for on-premises consumption, which remains open after five o’clock p.m.,” and the insurers of such sellers.²⁵ As to these sellers, section 61-2-145 requires that they maintain at least \$1 million in liquor liability insurance coverage during their permit or license period and provide documentation of the requisite insurance to the South Carolina Department of Revenue.²⁶ As to the insurers providing liquor liability coverage to such sellers, section 61-2-145 requires that such insurers notify the South Carolina Department of Revenue upon “lapse or termination” of their insured’s liquor liability coverage.²⁷

Section 61-2-145 explicitly creates a potential statutory consequence for insureds who fail to maintain the requisite liquor liability coverage, as “[f]ailure to maintain this coverage constitutes grounds for suspension or revocation of the [seller’s] permit or license.”²⁸ The statute, however, is conspicuously silent as to any potential statutory ramifications for an insurer who fails to comply as outlined therein.²⁹ Further, section 61-2-145 does not state nor suggest that an insurer’s notification obligation runs in favor of third parties.³⁰

(S.C. 2016) (“it is not the province of this Court to legislate or imply remedies not specified by the legislature”) *see e.g. 16 Jade St., LLC v. R. Design Const. Co., LLC*, 405 S.C. 384, 387-88, 747 S.E.2d 770, 772 (S.C. 2013) (based on plain statutory wording, the South Carolina Supreme Court held that the Residential Home Builders Act, which requires companies engaged in home-building to comply with certain licensing requirements and assume professional liabilities, did not create a private cause of action for third parties).

²⁵ S.C. CODE § 61-2-145 (2021).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Indeed, Section 61-2-145's legislative history does not support or even mention the possibility of an insurer bearing the consequences of an insured's failure to procure the insurance required under the statute.³¹ For these reasons, the statute's plain and unambiguous language does not provide a basis for a third party who is entitled to bring a dram-shop action against a business to maintain a negligence action against the business's insurer who failed to comply with section 61-2-145's reporting requirement. Accepting Plaintiff's position to the contrary would change the law as written and passed by the South Carolina legislature and directly contradict South Carolina case law.

South Carolina law and public policy considerations establish that where a person or entity is statutorily required to insure certain risks, the obligation to ensure that such coverage is procured falls to the party required to procure it, not to an insurer.³² In fact, in *DHW Purchasing Group, LLC v. Hub International Midwest Ltd.*, the United States District Court for the District of South Carolina, applying South Carolina law, analyzed whether such is the case with regard to section 61-2-145. In *DHW*, an insured argued that an assault and battery exclusion that precluded coverage for certain underlying lawsuits violates section 61-2-145 by making the statutorily required coverage unavailable.³³ Rejecting this argument, the court made clear that the statute is "directed to the coverage a licensee must obtain, not to terms an insurer must offer".³⁴ The court's ruling in

³¹ S.C. House Journal, 2017 Reg. Sess. 5/4/17, S. 116; S.C. House Journal, 2017 Reg. Sess. 5/9/17, S. 116; S.C. Legislative Update, 2017 Reg. Sess. 3/28/17; S.C. House Journal, 2017 Reg. Sess. 5/10/17, S. 116; S.C. Legislative Update, 2017 Reg. Sess. 5/9/17; and S.C. Legislative Update, 2017 Reg. Sess. 5/16/17 (the legislative updates show that the South Carolina legislature never imposed consequences on an insurer for a business's failure to procure the insurance required under section 61-2-145).

³² See *DHW Purchasing Grp., LLC v. Hub Int'l Midwest Ltd.*, No. 3:19-cv-1243-CMC, 2019 WL 5700457, at *1 (D.S.C. Nov. 4, 2019); *Northfield Ins. Co. v. Evian HPR*, No. 9:01-883-23, 2002 WL 32332186 (D.S.C. Aug. 28, 2002), *aff'd sub nom.*, *Northfield Ins. Co. v. Evian Horizontal Prop. Regime*, 68 Fed.Appx. 487 (4th Cir. 2003).

³³ *DHW Purchasing Grp.*, 2019 WL 5700457, at *8.

³⁴ *Id.* (emphasis in original).

DHW supports the application of section 61-2-145 as written—to hold the licensee, not its insurer, responsible for meeting the coverage requirements enumerated in the statute.

In *DHW*, the district court relied upon its previous ruling in *Northfield Insurance Co. v. Evian HPR*, where the court’s holding turned, in part, on a determination of who should bear the responsibility for failure to procure statutorily required insurance—an insured council of property co-owners (who are required by law to procure certain insurance) or the council’s insurer, whose policy issued to the council was subject to an exclusion precluding coverage for a claim brought against the council.³⁵ Like in *DHW*, the insured argued that a policy exclusion precluding coverage for the underlying claim should be void because the insurer “issued a policy which failed to comply with [the council’s statutory insurance procurement] obligations.”³⁶ The *Northfield* insured argued that “enforcement of the exclusion also violates public policy given the various statutory obstacles preventing enforcement of a tort judgment against a condominium regime without proper insurance.”³⁷ Unpersuaded, the district court recognized that the insured council’s argument would inequitably create a duty on behalf of an insurer to ensure that its insured meets its statutory obligations.³⁸ Recognizing that the pertinent statute begins with the charge—similar to section 61-2-145—that “the council of co-owners shall insure the property against risks....,” this Court held that the insured party “responsible for obtaining adequate insurance ought to bear [the] consequences” for its failure to do so.³⁹

As illustrated by the plain language of section 61-2-145 and the jurisprudence discussed above, section 61-2-145 does not create a legally actionable claim on behalf of third parties with regard to insurers’ notification obligations pursuant to that section. Without creation of such a right

³⁵ *Northfield Ins. Co.*, 2002 WL 32332186, at *3-4.

³⁶ *Id.*

³⁷ *Id.* at *3.

³⁸ *Id.*

³⁹ *Id.* at *4.

in favor of third parties, a person who is not a party to a business's insurance policy, such as Plaintiff in the underlying lawsuit, can present no injury arising out of section 61-2-145 sufficient to establish the injury-in-fact element of standing.

Further, a third party who may assert a dram-shop action against a business cannot meet the traceability element of standing required to bring a lawsuit against the business's insurer. Traceability requires a causal connection between an alleged injury and the conduct complained of.⁴⁰ The alleged injury addressed in the certified question at issue is the lack of coverage for an incident under a business's insurance policy.⁴¹ The conduct complained of is an insurer's failure to notify the South Carolina Department of Revenue upon the lapse or termination of the business's liquor liability coverage.⁴² Nothing in section 61-2-145 supports that an insurer's compliance or noncompliance with that section's notification obligation has any bearing on an *insured's* decision regarding whether to procure and maintain liquor liability coverage.⁴³ As established above, the onus for maintaining such coverage falls to the insured, and there is no support in the statutory language, legislative history, or in South Carolina jurisprudence for Plaintiff's argument that an insurer must bear the consequences for its insured's failure to do so.⁴⁴ Suspected empty pockets of the party alleged to have failed to maintain the coverage required by law does not allow a third party with no rights under an insurance policy to redirect the chain of causation to a party who has no duty to ensure that such coverage is maintained. Accordingly, a third party without privity of

⁴⁰ *Meyer*, 394 F. Supp. 3d at 558 ((quoting *Doe*, 713 F.3d at 755) (quoting *Friends of the Earth, Inc.*, 204 F.3d at 154)).

⁴¹ See Pl.'s Am. Compl., 8.

⁴² *Id.*

⁴³ S.C. CODE § 61-2-145 (2021).

⁴⁴ See *DHW Purchasing Grp.*, 2019 WL 5700457, at *1; *Northfield Ins. Co.*, 2002 WL 32332186; S.C. House Journal, 2017 Reg. Sess. 5/4/17, S. 116; S.C. House Journal, 2017 Reg. Sess. 5/9/17, S. 116; S.C. Legislative Update, 2017 Reg. Sess. 3/28/17; S.C. House Journal, 2017 Reg. Sess. 5/10/17, S. 116; S.C. Legislative Update, 2017 Reg. Sess. 5/9/17; and S.C. Legislative Update, 2017 Reg. Sess. 5/16/17.

contract to a business's insurance policy cannot meet the traceability element of standing required to bring an action against a business's insurer for breaching section 61-2-145.

2. South Carolina Code Section 61-2-145 Does Not Create A Basis For A Third Party's Negligence Claim Against A Business's Insurer.

Under South Carolina law, a plaintiff asserting a negligence claim must establish the following elements: “1) a duty of care owed by the defendant to the plaintiff, 2) a breach of that duty by negligent act or omission, and 3) damage proximately caused by the breach.”⁴⁵

Recognizing that “[a]n essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff,” “the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff.”⁴⁶ South Carolina courts recognize this duty as “the obligation to conform to a particular standard of conduct toward another.”⁴⁷ Without such a duty, “the defendant is entitled to judgment as a matter of law.”⁴⁸

An insurer's alleged noncompliance with section 61-2-145 for failing to notify the South Carolina Department of Revenue of the lapse or termination of an insured's liquor liability coverage does not create rights in favor of third-party claimants. Rather, as described above in section 1. of this brief (incorporated by reference in this section for the sake of brevity), section 61-2-145's mandate to procure coverage (“a person licensed or permitted to sell alcoholic beverages ... is required to maintain a liquor liability insurance policy....”) is the sole responsibility of the insured, and the insured alone.⁴⁹ Section 61-2-145's mandate to maintain liquor liability coverage falls squarely on the shoulders of a person licensed or permitted to sell alcoholic

⁴⁵ *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (S.C. 2003).

⁴⁶ *Id.*

⁴⁷ *Id.*, 355 S.C. at 333, 585 S.E.2d at 277 (quoting *Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (S.C. 2000)).

⁴⁸ *Id.* at 277.

⁴⁹ S.C. CODE § 61-2-145 (2021); *see, e.g., DHW Purchasing Grp.*, 2019 WL 5700457, at *1; *Northfield Ins. Co.*, 2002 WL 32332186.

beverages, as courts applying South Carolina law have repeatedly determined that the insured party “responsible for obtaining adequate insurance ought to bear [the] consequences” for its failure to do so.⁵⁰ As such, there is no statutory or jurisprudential basis to find that the insurer is in any way responsible for any purported breach of that duty.⁵¹

In his brief, Plaintiff argues that an insurer’s failure to comply with section 61-2-145(C)’s notice requirement is negligence *per se*.⁵² In support of this position, Plaintiff cites *Fairchild v. S.C. Department of Transportation* and *Whitlaw v. Kroger*.⁵³ Neither case involves claims brought by a third party against an insurer nor do the decisions support Plaintiff’s conclusions. *Fairchild* addressed long-standing precedent that a driver’s violation of a traffic statute constitutes negligence *per se* and whether that violation amounted to recklessness, as a basis for awarding punitive damages to an injured party.⁵⁴ *Whitlaw* analyzed the certified question of whether South Carolina Code sections 61-9-40 and 61-9-410(1)—prohibiting the sale of alcohol to minors—provides a private cause of action against a seller of alcohol where an underage person consumed alcohol purchased by another underage person, and suffered injuries as a result of becoming intoxicated.⁵⁵

In his brief, Plaintiff states that *Whitlaw* supports the following conclusion: “[d]ram shop liability is itself is [*sic*] negligence *per se* action, founded on statutes that are in Title 61, just as is S.C. Code Ann. § 61-2-145...[and]... [t]his 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

⁵⁰ *Northfield Ins. Co.*, 2002 WL 32332186, at *4; *see also DHW Purchasing Grp., LLC*, 2019 WL 5700457.

⁵¹ In arguing as set forth above, National Casualty does not concede that section 61-2-145 factually applies to the Policy’s coverage or that it was breached (by Royal Lanes or National Casualty). The Court should take notice of the Policy’s inception date—March 26, 2020—and that several local and state closure orders affected business’ ability to operate and serve alcohol at the time.

⁵² Pl.’s Brief, p. 7-9

⁵³ *See Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (S.C. 2012); *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (S.C. 1991).

⁵⁴ *See Fairchild*, 727 S.E.2d at 409.

⁵⁵ *See Whitlaw*, 410 S.E.2d at 252.

alcohol.⁵⁶ In fact, *Whitlaw* does not support this conclusion. In *Whitlaw*, this Court found that sections “61-9-40 and 61-9-410 give rise to civil liability if the Plaintiff can establish negligence *per se*... [and] [a]fter establishing negligence *per se*, the Plaintiff must then prove that the violation of the statute was causally linked, both in fact and proximately, to the injury.”⁵⁷ This Court specifically held that, based on the record, the *Whitlaw* plaintiff could not satisfy the elements of negligence *per se* nor prove causation.⁵⁸ As such, *Whitlaw* does not provide a basis for this Court to accept Plaintiff’s broad assertion that every statute in Title 61 provides a negligence *per se* action. Even if section 61-2-145 can support a negligence *per se* claim, that claim would be proper only against the insured who under the statute is solely responsible for complying with the statute’s duty to maintain insurance. Further, to the extent section 61-2-145 provides a basis for negligence *per se*, a third party’s negligence claim fails because an insurer’s lack of reporting is not the proximate cause of a lapse in coverage.

An insurer’s alleged violation of section 61-2-145(C) cannot be the proximate cause of the alleged injury (lack of available insurance coverage). In *Bramlette v. Charter Medical-Columbia*, this Court provided the following causation analysis necessary under South Carolina law:

Proximate cause requires proof of (1) causation in fact and (2) legal cause.

Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s negligence. Legal cause is proved by establishing foreseeability. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. A plaintiff therefore proves legal cause by establishing the injury in

⁵⁶ Pl.’s Brief, p. 8.

⁵⁷ See *Whitlaw*, 410 S.E.2d at 253.

⁵⁸ See *id.*

question occurred as a natural and probable consequence of the defendant's negligence.⁵⁹

As discussed above, the statute and applicable case law establish that the insured bears the sole responsibility for failing to maintain the insurance required under the statute, which causes the lack of coverage. Whether an insurer complies with the statute's notification requirement of section 61-2-145(C) is irrelevant to the insured's decision and ability to retain the requisite insurance. In terms of proximate cause, therefore, an insurer's failure to report a lapse in coverage does not, in fact, lead to the lack of coverage. Likewise, it is not foreseeable that a lack in insurance coverage would "have been a natural and probable consequence of" an insurer's failure to report a lapse in coverage.

For these reasons, under South Carolina law, section 61-2-145 does not create a basis for a third party's negligence claim against a business's insurer for the insurer's alleged violation of the section 61-2-145's reporting requirement.

3. South Carolina Public Policy Favors A Finding That A Third Party To A Business's Insurance Contract May Not Maintain A Negligence Action Against The Business's Insurer.

Allowing a third-party claimant to recover directly against an insurer for violating the reporting requirements of 61-2-145 would circumvent black-letter South Carolina law. In acknowledgement of the lack of contractual privity between an insurer and third-party claimant, South Carolina courts and courts applying South Carolina law have consistently recognized that third-party claimants have no rights under an insured's policy unless and until the third-party claimant obtains a judgment against the insured.⁶⁰ Accordingly, a third-party claimant has "no

⁵⁹ 302 S.C. 68, 72, 393 S.E.2d 914, 916 (S.C. 1990) (internal citations omitted).

⁶⁰ See *Nationwide Mut. Fire Ins. Co. v. Jeter*, No. 3:12-cv-01759-MBS, 2012 WL 5289670, at *2 (D.S.C. Oct. 23, 2012) ("[T]hird-party claimants do not have standing to assert claims arising out of an insurer's breach of contract with its insured"); *Ross Dev. Corp v. Fireman's Fund Ins. Co.*, 809 F. Supp. 2d 449, 455-56 (D.S.C. 2011) ("South Carolina case law demonstrates that a judgment creditor of an insured can pursue a direct action against an insurer"); *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 520, 229 S.E.2d 849, 850 (S.C. 1976) ("At common law, no right to maintain suit directly against the insurer existed absent privity of contract between the claimant and the insured"); *Pharr v. Canal Ins. Co.*, 233 S.C. 266, 275-

right, either statutory or under common law, to maintain an independent action for damages solely against the insurer.”⁶¹ Rather, the appropriate (and only) avenue for relief for third-party claimants is to bring an action against the first-party beneficiary, who may then pursue an action against the insurer if a judgment is obtained.⁶² Contrary to Plaintiff’s argument that an insurer’s violation of section 61-2-145 would amount to a “wrong without a remedy,” this longstanding avenue for relief provides third-party claimants the appropriate remedy under existing South Carolina law. Plaintiff, here, simply seeks a short cut that does not exist under South Carolina law.

Permitting third parties to directly pursue claims against insurers for failing to comply with statutory notice requirements would provide an end-around by which third parties could bypass South Carolina’s historical prohibition of asserting direct-action claims against insurers. Consequently, any claimant who suspected an insurer of violating a statute could inundate the South Carolina courts with direct-action lawsuits, which the state’s courts and legislature have historically prohibited.

This Court has consistently held that statutes in derogation of common law are to be strictly construed.⁶³ Under common law, South Carolina is not a direct-action state; therefore, if the legislature intended section 61-2-145 to permit a third party to file suit directly against an insurer, it should and would have done so explicitly. Allowing a third party to maintain a negligence action

76, 104 S.E.2d 394, 399 (S.C. 1958) (holding claimants who had reduced auto liability claim to judgment against insured could maintain action against defendant’s insurer as third-party beneficiaries); *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (S.C. Ct. App. 2003) (“Under the common law, ‘no privity [of contract exists] between an injured person and the tortfeasor’s liability insurer, and the injured person has no right of action at law against the insurer.’”) (quoting 44 AM. JUR. 2d Ins. § 1445 (1982)).

⁶¹ *Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 14, 320 S.E.2d 495, 496 (S.C. Ct. App. 1984) (citing *Major*, 229 S.E.2d at 850).

⁶² See *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 137, 526 S.E.2d 218, 221 (S.C. 2000).

⁶³ See *Nuckolls v. Great Atlantic & Pacific Tea Co.*, 192 S.C. 156, 161, 5 S.E.2d 862, 864 (S.C. 1939) (“[T]he rules of the common law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language.”); *Major*, 229 S.E.2d at 850 (“Legislation in derogation of common law must be strictly construed under settled principles enunciated by this Court.”)

against a business's insurer for violation of section 61-2-145 would require this Court to change the clear wording of the statute as considered and passed by the South Carolina legislature, which attempts this Court already has rejected.

In *Major v. National Indemnity Co.*, this Court considered whether a statute permitted a direct action against an insurer, based on the statute requiring the procurement of liability insurance before transporting commercial goods in-state.⁶⁴ The Court held that no such direct action was allowed, because the sole and manifest purpose of the legislation was to ensure financial responsibility of motor vehicle carriers, and “[b]ecause direct actions against the insurer contravenes common law, such a right must be expressly sanctioned by the legislature and not merely inferentially deduced.”⁶⁵ Similar to the purpose of the statute at issue in *Major*, section 61-2-145 promotes financial responsibility of businesses that serve alcohol. As such, this Court's decision in *Major* supports that a third party cannot assert a direct negligence action against a business's insurer for failure to comply with the reporting requirements of section 61-2-145.

For these reasons, South Carolina law and public policy disfavor allowing third parties to maintain negligence actions against a business's insurer such that there should be no such right recognized here.

4. The Additional Law Cited In Plaintiff's Brief Is Not Germane To The Certified Question At Issue.

In his brief, Plaintiff cites South Carolina case law in asserting an entirely separate argument attempting to persuade this Court that a third party to a business's insurance policy may assert a negligence claim against an insurer that violates section 61-2-145(C). The cases that Plaintiff relies upon, however, do not (1) address section 61-2-145; (2) recognize in any way

⁶⁴ *Major*, 229 S.E.2d at 850.

⁶⁵ *Id.*

whether and to what extent injured third parties may bring actions against a business's insurer; and (3) consider general liability insurance concepts and issues.

Plaintiff argues that a third party to a business's insurance policy may assert a negligence claim against an insurer that violates section 61-2-145(C)'s notice requirement because South Carolina courts impose consequences on insurers that violate statutory requirements.⁶⁶ In support of this argument, Plaintiff directs this Court to three South Carolina Supreme Court decisions: *U.S. Fidelity & Guaranty Co. v. Security Fire & Indemnity Co.*, *National Service Fire Insurance Co. v. Jordan*, and *State Farm Mutual Automobile Insurance Co. v. Wannamaker*.⁶⁷ *U.S. Fidelity and Jordan* analyzed, in relevant part, the statutory requirements placed on insurers to cancel or terminate compulsory auto insurance coverage.⁶⁸ *Wannamaker* addressed the statutory burden on auto insurers to effectively transmit an offer to purchase underinsured motorists coverage to its insured.⁶⁹ *U.S. Fidelity* and *Jordan* were declaratory judgment actions brought by insurers to determine the extent of coverage under other insurers' policies.⁷⁰ The *Wannamaker* action was brought by an insured against its insurer.⁷¹ None involved a complete stranger to the contract, as Plaintiff is here. As such, these cases are not instructive in deciding whether a third party may maintain a negligence claim against a business's insurer.

Plaintiff therefore resorts to other states' decisions in an attempt to buttress his position.⁷² As an initial matter, Plaintiff's reliance on foreign case law is misplaced because this Court is

⁶⁶ Pl.'s Brief, pp. 5-7.

⁶⁷ See *U.S. Fidelity & Guaranty Co. v. Security Fire & Indem. Co.*, 248 S.C. 307, 149 S.E.2d 647 (S.C. 1966); *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (S.C. 1987); *Nat'l Srv. Fire Ins. Co. v. Jordan*, 258 S.C. 56, 187 S.E.2d 230 (S.C. 1972).

⁶⁸ See *U.S. Fidelity*, 149 S.E.2d at 649-50; *Jordan*, 187 S.E.2d at 231.

⁶⁹ See *Wannamaker*, 354 S.E.2d at 556.

⁷⁰ See *U.S. Fidelity*, 149 S.E.2d at 649; *Jordan*, 187 S.E.2d at 231.

⁷¹ See *Wannamaker*, 354 S.E.2d at 556.

⁷² Pl.'s Brief, pp. 10-13.

tasked with answering the certified question *under South Carolina law*. In addition, the out-of-state decisions cited in Plaintiff's brief are not germane to the certified question at issue.

The out-of-state case law discussed in Plaintiff's brief includes *Lang v. Kurtz* (Wisconsin law); *Midstate Hauling Co. v. Reliable Ins. Co.* (Florida law); *Allstate Ins. Co. v. McCrae* (North Carolina law); and *Lyngarkos v. Commonwealth of Pennsylvania, Department of Transportation* (Pennsylvania law).⁷³ Plaintiff leans on these four out-of-state decisions to argue that, under South Carolina law, an injured third party should have standing to bring an action against a general liability insurer, an insurer owes a duty to third parties redressable by law under section 61-2-145, and that any contrary holding is in the disinterest of public policy.⁷⁴

Not only do these out-of-state decisions not control the outcome here, but only a single one of the cases cited by Plaintiff (*Lang*) actually involves a third-party action against an insurer. Instead, *Midstate* "involve[d] an argument between two insurance companies as to which should be required to provide coverage for a truck owner"; *McCrae* was a declaratory judgment action brought by an insurer against its insured, among others, seeking to void an auto policy (which was reversed by the North Carolina Supreme Court, as it ultimately granted the insurer's motion for summary judgment); and *Lyngarkos* was an action brought by an auto accident's injured passenger against the dealership that sold the subject car to the car's driver.⁷⁵ Accordingly, outside of being of no precedential value, *Midstate*, *McCrae*, and *Lyngarkos* simply do not stand for the proposition that, under South Carolina law or the law of the states where these cases arose, third parties can bring direct actions against insurers as not one of those cases involved or recognized such an action.

⁷³ See *Midstate Hauling Co. v. Reliable Ins. Co.*, 437 F.2d 616 (5th Cir. 1971) (applying Florida law); *Allstate Ins. Co. v. McCrae*, 91 N.C. App. 505, 372 S.E.2d 337 (N.C. Ct. App. 1988), *rev'd*, 325 N.C. 411, 384 S.E.2d 1 (N.C. 1989); *Lyngarkos v. Com., Dep't of Transp.*, 426 A.2d 1195 (Pa. Commnw. Ct. 1981); *Lang v. Kurtz*, 100 Wis. 2d 40, 301 N.W.2d 262 (Wis. Ct. App. 1980).

⁷⁴ See generally Pl.'s Brief, pp. 10-13.

⁷⁵ See *Midstate*, 437 F.2d at 617; *McCrae*, 372 S.E.2d at 337; *rev'd*, 384 S.E.2d 1 (N.C. 1989); *Lyngarkos*, 426 A.2d at 1197.

As to *Lang*, Plaintiff fails to mention that Wisconsin was, at the time *Lang* was decided, and currently remains to be, a direct-action state, where Wisconsin jurisprudence and statutory law have been long-ingrained to recognize negligence actions—as was the sole cause of action in *Lang*—brought directly against insurers by injured third parties.⁷⁶ That certainly is not the case in South Carolina, which has consistently refused to recognize any such right to direct action, and reliance on *Lang* is therefore inappropriate.

As mentioned, each of these four decisions relied upon by Plaintiff are entirely limited to the context of statutory requirements (such as vehicle responsibility laws) governing auto insurance. Plaintiff therefore asks this Court to transpose statutory auto insurance requirements and jurisprudence to the realm of general liability insurance—without acknowledging the fact that compulsory (and related) auto insurance statutory provisions serve entirely different public policy concerns than those affecting general liability coverage.⁷⁷ Moreover, as discussed above, courts applying South Carolina law have found that, where a statutory provision requires an insured to procure certain kinds of general liability insurance—including the type of insurance coverage under section 61-2-145⁷⁸— “the onus is on the [insured] to ensure that the [risk] is properly protected, and rightly so because the [insured] is in the best position to understand its needs as well as what other insurance protection it may already have in place.”⁷⁹ That is not so with auto

⁷⁶ See WIS. STAT. §§ 632.24, 803.04(2) (2021); see also *Est. of Otto v. Physicians Ins. Co. of Wisconsin*, 751 N.W.2d 805, 813 (Wis. 2008) (providing an overview of the application of Wisconsin’s direct action laws); *Verhein v. S. Bend Lathe, Inc.*, 598 F.2d 1061, 1062 (7th Cir. 1979) (applying Wisconsin law) (discussing Wisconsin’s direct action laws and principles firmly in place prior to *Lang*).

⁷⁷ Though Plaintiff makes references throughout his Brief to legislative intent and public policy concerns underlying auto insurance statutory provisions, no sources are cited to elaborate on the South Carolina Legislature’s intent with regard to section 61-2-145.

⁷⁸ See *DHW Purchasing Grp., LLC*, 2019 WL 5700457, at *1.

⁷⁹ *Northfield Ins. Co.*, 2002 WL 32332186 at *4; see also Def.’s Mem. Supp. Mtn to Dismiss, 8-10.

insurance, and any attempt to apply those cases to the statutory provisions addressing liquor liability coverage is an inappropriate and legally unjustified extension of the law.

CONCLUSION

A third party to an insurance contract lacks standing to maintain a negligence action against a business's insurer for its violation of section 61-2-145's reporting requirements. In addition, a third party cannot prove the essential elements of a negligence claim against an insurer for failing to comply with 61-2-145.

Allowing a third party to maintain a negligence action against a business's insurer for violating the statute would contradict South Carolina's public policy and common law prohibiting direct-action claims and would alter the plain language of the law as passed by the South Carolina legislature. Statutes in derogation of common law are to be strictly construed. If the South Carolina Legislature intended section 61-2-145 to permit a third party to file suit directly against an insurer, it should and would have done so explicitly. It did not.

The appropriate (and only) avenue for relief for third-party claimants is to bring an action against the first-party beneficiary, who may then pursue an action against the insurer if a judgment is obtained.⁸⁰ This longstanding avenue for relief provides third-party claimants, such as Plaintiff, the appropriate remedy under existing South Carolina law.

For these reasons, this Honorable Court should find that a person entitled to bring a dram-shop action against a business may **not** maintain a negligence action against the business's insurer where the insurer allegedly failed to notify the South Carolina Department of Revenue of the business's lapse in or termination of liquor liability coverage in violation of section 61-2-145(C). The certified question should be answered in the negative.

⁸⁰ See *Kleckley*, 526 S.E.2d at 221.