THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

STATEMENT OF ISSUES (CERTIFIED QUESTION)

I. 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?

ARGUMENT

Plaintiff Anthony Denson, as personal representative of the estate of Garland Denson ("Plaintiff" or "Denson") submits this brief in reply to Defendant National Casualty Company ("Defendant" or "National Casualty")'s brief. National Casualty's brief misses the point: the requirement that the insurer notify the Department of Revenue exists to protect people who are injured by bars'[1] unlawful service of alcohol. S.C. Code Ann. § 61-2-145(C). The requirement is part of a larger mechanism that exists to prevent bars from operating without having a million dollars in liquor liability coverage, i.e., without there being a large fund of money available to compensate those injured people. S.C. Code Ann. § 61-2-145. When insurers meet the requirement, a bar that stops carrying such coverage is either forced to stop operating or obtains the coverage. S.C. Code Ann. § 61-2-145(A)&(C). When that requirement is not fulfilled, the mechanism breaks down, which can result in a person in the protected class being unable to obtain the compensation that S.C. Code Ann. § 61-2-145 requires to be available. That is an injury, caused by the insurer's failure to do what the law requires, to a person in the protected class. See id.

I. National Casualty makes a straw man contractual privity argument. Denson is not suing to enforce someone else's contract of insurance.

National Casualty states repeatedly in its brief that Denson is not a party to National Casualty's insurance policy. This is a straw man argument. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented"). Unlike in Major v. National Indemnity

[1] In this brief, "bar" is used to refer to an 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.[,]" as contemplated by S.C. Code Ann. § 61-2-145(A).

Company, 367 S.C. 517, 299 S.E.2d 849 (1976), Denson is not suing National Casualty to enforce someone else's contract of insurance.

The certified question in this case involves whether a person inured by the failure to meet a statutory notice requirement can sue the entity required by statute to give the notice. Just as there needs to be no contractual privity between a negligent automobile driver and the person his negligence injures to sustain tort liability, so there is no need for it here.

II. As the parties injured by the failure to give the notice, people in Denson's shoes have standing.

National Casualty argues that a person in Denson's position has no standing to sue the insurer that failed to provide the notice S.C. Code Ann. § 61-2-145(C) requires. This does not make sense.

To have standing, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'" Sea Pines Assn. for Prot. of Wildlife, Inc. v. S.C. Dept. of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 559-561, 112 S. Ct. 2130, 2136 (1992)).

To be sure, Denson has suffered an injury in fact, as would anyone in a similar position. Denson's decedent is dead as a result of the bar's continued operation, though that operation was unlawful in the absence of a million dollars in liquor liability insurance. S.C. Code Ann. § 61-2-145. Further, now that Denson's decedent is dead, the million dollars in insurance coverage that S.C. Code Ann. § 61-2-145 requires to exist for his beneficiaries is not there. These are injuries in fact. See Sea Pines, 345 S.C. at 601.

There is causal connection between the injury and National Casualty's failure to comply with the notice requirement. The notice requirement is a part – a crucial part – of a process that exists to prevent a bar from operating unless it has a million dollars in liquor liability coverage. S.C. Code Ann. § 61-2-145. When an insurer meets the requirement, the Department or Revenue takes action, forcing a bar that stops carrying the coverage either to stop operating or to obtain the coverage. S.C. Code Ann. § 61-2-145(A)&(C). In either such event, an injury sustained here would not have occurred. Either the bar would have stopped operating, in which case the patron would never have been overserved and Denson's decedent would never have been killed or hurt, or the bar would have obtained the required insurance, in which case the decedent would still be dead but there would be a million dollars in insurance coverage.

An old proverb illustrates a causal chain. "For want of a nail, the shoe was lost. For want of a shoe, the horse was lost. For want of a horse, the rider was lost. For want of a rider, the battle was lost." As illustrated above, far fewer events are in the direct causal chain concerning this certified question than are in the direct causal chain of the proverb.

A verdict for the damages – the injury – suffered by someone in Denson's position would be "redress[] by a favorable decision." Sea Pines, 345 S.C. at 601 (internal quotation marks omitted). It would allow the injured person to recover his losses and gain what compensation he can.

National Casualty contends that Denson cannot establish proximate causation, but, as illustrated above, the causal chain is there, flowing directly from the insurer's failure to give the required notice. Ordinarily, proximate cause is a question of fact for the finder of fact. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 691 S.E.2d 170 (Ct. App. 2010); Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); Steele v. Rogers, 306 S.C. 546, 413 S.E.2d

329 (Ct. App. 1992); Jamison v. The Pantry, Inc., 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990). If this Court answers the question before it – the abstract question of whether the cause of action at issue exists – with a *yes*, Denson and National Casualty will be on track to litigate the issue of proximate causation, with National Casualty free to defend on a theory that the chain of causation was broken by some other event. The certified question before this Court is not whether National Casualty is liable to Denson; rather, it is whether South Carolina recognizes a cause of action for damages flowing from the violation of the notice requirement of S.C. Code Ann. § 61-2-145(C). As discussed in Denson's brief, established principles of South Carolina law are consistent with such a cause of action.

III. National Casualty cites cases that do not speak to the issue at hand.

National Casualty cites several cases in its brief, but those cases do not speak to the issue before the Court or even to analogous situations. Major, as discussed above, deals with a suit by a third party directly against an insurer to enforce an insurance policy. 367 S.C. at 517. Most of the cases National Casualty cites deal with situations in which there was a requirement for an insured party (or a potential one) to do something.

These are not like the situation this certified question addresses. Here, the statute squarely places the onus to take action – to give the notice – on the insurance company. Indeed, it is far more important for these purposes that an entity in National Casualty's shoes *is the party required to notify the Department of Revenue* than it is that it happens to be an insurance company. S.C. Code Ann. § 61-2-145(C).

Also, several of the cases National Casualty cites are trial-level and unpublished opinions. Not only are these cases no precedent, it is a violation of the Appellate Court Rules to cite unpublished opinions in a brief. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326

S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997). "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR.

These federal district court cases are not precedent in South Carolina state courts and have no binding effect upon this court. Blyth v. Marcus, 335 S.C. 363, 368 n. 3, 517 S.E.2d 433 (1999) (South Carolina federal district court decision "[o]f course . . . is not binding on this Court"). Moreover, they do not point to the answer to the certified question. If there were already federal cases that answered the question, the district court would doubtless have seen no need to certify it to this Court.

IV. The statute may be new, but the situation is one of classic negligence *per se*.

The statutory changes that bring this certified question to the fore are early in their life as part of the law. S.C. Code Ann. § 61-2-145. As discussed in Denson's brief, however, the situation the certified question presents is of the classic sort addressed by long-established negligence *per se* jurisprudence. The statute here, S.C. Code Ann. § 61-2-145, does not "merely make[] a provision to secure the safety or welfare of the public as an entity[.]" Doe v. Marion, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). It is aimed squarely at protecting a class of people – Denson's class – those injured as a result of a bar overserving a patron. S.C. Code Ann. § 61-2-145. That is who the required insurance coverage is designed to pay. S.C. Code Ann. § 61-2-145. If it is not to protect this class of people, who does it protect? If it protects the general public, how so? National Casualty offers no answers to these questions.

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

V. National Casualty's position does not serve the aims of the law.

National Casualty advocates a position that is not just, that makes a dead letter of the notice requirement of S.C. Code Ann. § 61-2-145(C), immunizing those who fail to heed its requirements

from any consequence for their unlawful behavior. "There is no tenet more fundamental in our law than liability follows the tortious wrongdoer." Fitzer v. Greater Greenville S.C. Young Men's Christian Assoc., 277 S.C. 1, 3, 282 S.E.2d 230, 231 (1981). The party required to give notice under S.C. Code Ann. § 61-2-145(C) is a tortious wrongdoer when its negligence causally injures someone, as discussed above. "If no cause of action is available to the [injured person], the negligent [insurance company] is effectively immune from liability." Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 137 (2014).

Such immunity cannot be the law. Not only would it be inconsistent with this state's existing jurisprudence, it would create an immunized scofflaw class – liquor liability insurers – and take a statute aimed at protecting a vulnerable, innocent group – those injured by patrons overserved at bars – and render it meaningless.

CONCLUSION

National Casualty offers no good reason, by way of jurisprudence or common sense, for why someone who suffers injury flowing from a failure to notify under S.C. Code Ann. § 61-2-145(C) cannot sue the party who was required to give that notice but negligently failed to do so. 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.

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Respectfully submitted,

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