The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who remain administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be

removed from the roll of attorneys in this State. Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
April 9, 2001

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The Supreme Court of South Carolina

In the Matter of L.
Michael Allsep, Respondent.

ORDER

The records of the office of the Clerk of the Supreme Court show that on November 15, 1984, L. Michael Allsep, Jr. was admitted and enrolled as a member of the Bar of this State.

By way of letter addressed to the Supreme Court of South Carolina, Mr. Allsep has submitted his resignation from the South Carolina Bar. We accept Mr. Allsep's resignation, effective March 20, 2001, as directed by this Court in In the Matter of Allsep, Op. No. 25235 (S.C. Sup. Ct. filed January 16, 2001).

Mr. Allsep shall, within fifteen days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State. In addition, his name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 9, 2001

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 9, 2001

ADVANCE SHEET NO. 13

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Florence County, Respondent,

v.

Albert Moore, Florence County Treasurer, and Dean C. Fowler, Jr., Florence County Treasurer-Elect, Defendants,

of whom Albert Moore is Appellant,
and
Dean C. Fowler, Jr. is Respondent.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25277
Heard February 21, 2001 - Filed April 9, 2001

REVERSED

Steve Wukela, Jr., of Florence, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of

Columbia, for respondent Fowler.

Florence County Attorney Dale R. Samuels, of Florence, for respondent Florence County.

JUSTICE PLEICONES: This case comes before the Court on appeal from the circuit court. The court below held that the candidate elected county treasurer in a general election for the term to commence on July 1, 2001, was entitled to assume office before that date, immediately upon taking the oath of office, notwithstanding that the office was filled by a gubernatorial appointee whose term had not expired. We reverse.

FACTS/ PROCEDURAL HISTORY

The governor appointed appellant Albert Moore ("Moore") to serve as Treasurer of Florence County on March 10, 1999, pursuant to authority granted in S.C. Code Ann. § 1-3-220(2) (Supp. 2000). The position became vacant after the elected treasurer was unable to fulfill his term. Initially, the governor appointed Thomas Shearin to the office. When Shearin resigned, the governor appointed Moore. The governor commissioned Moore to serve "until his successor is elected and qualified as provided by law."

Moore thereafter filed for election to the position for the term commencing July 1, 2001, and ending June 30, 2005. Respondent Dean Fowler ("Fowler") likewise filed to run for the position. He listed the term of office sought as beginning 2001 and ending 2005. In the general election held November 7, 2000, Fowler was elected treasurer.

Shortly after his election, Fowler took the oath of office, posted the required bond, and received a commission from the governor.[1] Soon

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[1]This appears to have been a *pro forma* act, not intended to conflict with the governor's previous appointment of Moore.

thereafter, Fowler sought to assume the office. Moore resisted Fowler's attempts, asserting that he was the lawfully appointed treasurer and would remain so until the expiration of the unexpired term to which he had been appointed, i.e., the term ending June 30, 2001. Fowler, on the other hand, claimed that he was the rightful treasurer since he had been elected and had qualified for the office.

Two actions were subsequently initiated. Moore initiated suit on November 28, 2000, seeking to establish his entitlement to continue in the position of treasurer through June 30, 2001. Florence County brought suit against Moore and Fowler in November 2000, seeking a declaratory judgment as to who would serve as treasurer through June 30, 2001. The cases were consolidated.

The trial court determined that Fowler should serve as the lawful treasurer during the period November 17, 2000,[2] through June 30, 2001, and ordered Moore to immediately surrender the office. Moore moved the trial court for supersedeas; the trial court denied the motion.

Moore appealed, and petitioned this Court for supersedeas. He also moved to expedite his appeal. On December 14, 2000, we granted Moore's petition for supersedeas and his motion to expedite.

ISSUE

> Does one appointed by the governor to fill a vacancy in the county treasurer's position serve for the remainder of his predecessor's term or only until a successor is elected in a general election, takes the oath of office, and receives a bond and commission?

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[2]November 17 is the date on which Fowler took the oath of office. Further, the parties agreed that the issue below was entitlement to the office for the period from November 17, 2000, to June 30, 2001.

ANALYSIS

Several provisions of the South Carolina Code of Laws bear on this question. Those sections are as follows:[3]

Section 1-3-220(2) provides that the governor is to fill a vacancy in an elective county office by appointment, and that the person so appointed shall hold office until the next general election and until his successor shall qualify. S.C. Code Ann. § 1-3-220(2) (Supp. 2000).

S.C. Code Ann. § 12-45-20 (2000) provides:

> The county treasurer shall hold office for four years and until his successor is appointed or elected and qualified. His term of office shall commence on the first day of July following his appointment or election. **When any treasurer for any reason fails to complete his term of office, his successor shall be appointed initially for the unexpired portion of the term for which his predecessor was appointed.** (Emphasis added).

S.C. Code Ann. § 4-11-10 (Supp. 2000) provides that the term of office for county treasurers commences on July 1, following their election.[4] This section does not apply to those appointed by the governor, nor to elections held for an unexpired term of office.

Our goal in construing statutes is to harmonize conflicting statutes

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[3]The trial court's decision relied heavily upon S.C. Code Ann. § 4-11-20 (Supp. 2000). For reasons discussed below, we conclude that such reliance was in error, and that § 4-11-20 is of no assistance in deciding this dispute.

[4]This provision reflects the General Assembly's intent that treasurers' and auditors' terms coincide with the state's fiscal year. The result we reach in this case gives effect to that intent.

whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000). The primary function in interpreting a statute is to ascertain the intent of the legislature. Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993).

Applying these rules to the instant dispute compels reversal of the trial court's decision. Florence County did not conduct an election to fill the unexpired term to which Moore had been appointed. Fowler and Moore ran for the term of office beginning on July 1, 2001. The voters of Florence County responded by electing Fowler to that term. Accordingly, we hold that Fowler was not entitled to assume the office of treasurer prior to July 1, 2001, the date the term to which he was elected commences.

We construe § 1-3-220 (2) as providing for holdover situations in which no person authorized by law to do so has qualified for office on the day the term is to commence. In order to qualify[5] for an office, one must first be entitled to do so. It stands to reason that one cannot qualify for a term of office to which he was not elected.

In order to prevent a vacancy in the office, the legislature provided, in § 1-3-220 (2), that appointees remain in office until a successor has qualified. This interpretation is consistent with the public policy of this state

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[5]Nothing in this opinion is to be construed to conflict with our decision in Ex parte Smith, 8 S.C. 495 (1877). There, in interpreting the meaning of "qualified" as applied to the governor-elect, we found it "difficult to conceive of any other appropriate signification of the word 'qualified' than that he shall take the oath of office." Id. at 520. That decision further implied that had a bond been statutorily required, the posting of bond would be an additional prerequisite to "qualification." The decision we announce today merely recognizes that one cannot qualify without first being legally entitled, by virtue of election or appointment, to the office and term for which he seeks to qualify.

disfavoring vacancies in office. This Court gave effect to that policy in Becknell v. Waters, 156 S.C. 77, 152 S.E. 816 (1930), wherein we affirmed the trial court's well-reasoned order which recognized that, in order to prevent a hiatus in the administration of government, the policy of the law is that all administrative officers should hold over until their successors are appointed or elected and qualified. See also Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952) (public officials hold over *de facto* until their successors are appointed or elected and qualified).

The Texas Supreme Court addressed a factually analogous dispute in Ex parte Sanders, 215 S.W.2d 325 (Tex. 1948), and reached a similar conclusion. The question before the court in Sanders involved entitlement to a popularly elected district judgeship. The candidate elected to the seat died during his term and the governor appointed Davis to fill the vacancy. Davis ran for the judgship, but was defeated in the November election by Sanders. The term for which Sanders and Davis ran commenced on January 1 following the November election, as mandated by the state constitution. On November 9, Sanders subscribed to the oath of office and on that date entered the courtroom where Davis was holding court. Sanders assumed the bench and announced to all present his position as judge. Davis demanded that Sanders vacate the bench. When Sanders refused, Davis held him in contempt and had the sheriff take Sanders into custody.

On these facts, the court concluded that Sanders "had neither legal right nor color of legal right to the judgeship on November 9." Id. at 326. The court continued

> [Sanders] was never in any sense a candidate for the unexpired term [to which Davis was appointed], either in the primary or in the general election, but ran for the full term to begin on January 1, 1949, and to end on December 31, 1952. As such candidate, he knew, as the electors were presumed to know, that under the provisions of [the state constitution], the term of office he was seeking did not and could not begin until January 1, 1949. That is what he asked for and that is what he got and all he got.

Id. Without expressing an opinion on when Sanders would have been entitled to assume the office had he been elected to fill the unexpired term, the court found it significant

> that our Constitution provides . . . 'In all elections to fill vacancies of office in this state, it shall be for the unexpired term only.' If one elected to an unexpired term cannot by reason thereof claim any part of the succeeding full term, it would seem to follow that one elected to a full term cannot on basis of that election alone claim any part of the preceding unexpired term. Clearly they are two distinctly different things.

Id. (internal citation omitted).[6]

Addressing Sanders' argument that Davis' contempt order was void because Davis' appointive tenure to the office expired on November 2, the day of the election, the court cited the state constitutional provision directing that "[a]ll officers within this State . . . continue to perform the duties of their offices until their successors shall be duly qualified." The court reasoned that Davis became an "officer within the State" upon appointment, and continued in that capacity until his successor "shall be duly qualified." Sanders, the court opined, "[could] not qualify before January 1, 1949, because he ha[d] no mandate by election or otherwise to do so." Id.

So too, in this case, Fowler cannot qualify before July 1, 2001, as he has "no mandate by election or otherwise to do so."

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[6]It is noteworthy that Fowler, when filing to run for treasurer, listed the term sought as beginning in 2001, indicating that he sought election to the four year term commencing on July 1, 2001. Moore listed the term sought as beginning July 1, 2001. These dates are consistent with the term of office prescribed in § 4-11-10. Moreover, the question before the electors of Florence County in the general election was who would serve as treasurer for the term beginning July 1, 2001.

Here, the trial court, relying heavily upon S.C. Code Ann. § 4-11-20 (Supp. 2000), made a *post hoc* determination that the general election wherein Fowler prevailed was actually two elections, one for the four year term of office commencing July 1, 2001, and a separate election to fulfill the unexpired term from November 2000 through June 30, 2001. All parties agree that Florence County did not hold an election for the unexpired term Moore was appointed to fill. This is the procedure contemplated by § 4-11-20 (Supp. 2000), which provides that a gubernatorial appointee selected to fill a vacancy in an elective position serves until an election is held to fill the unexpired term, and that the appointee serves until a successor shall qualify. Since no election to fill an unexpired term was held here, reliance upon § 4-11-20 was misplaced.

Further, the trial court's decision ignores § 12-45-20, and renders § 4-11-10 a nullity inasmuch as the latter section dictates that terms of county treasurers are to "commence the first day of July next following their election."

Construing these statutes in a common-sense manner so as to provide for the orderly transfer of office, we hold that Moore will serve as treasurer until Fowler qualifies on or after July 1, 2001.

CONCLUSION

For the foregoing reasons, the order of the circuit court is

REVERSED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Ernest George, Personal Representative of the Estate of Kate George and Marvelyn Ernette George, Petitioner,

v.

Empire Fire and Marine Insurance Company, W. Gene Whetsell, Personal Representative of the Estate of Angela Farmer, and John Shields Autos, Inc., Defendants,

of whom W. Gene Whetsell, Personal Representative of the Estate of Angela Farmer, and John Shields Autos, Inc. are Petitioners,

and Empire Fire and Marine Insurance Company is Respondent,

v.

Ken Rickel and Williams
and Stazzone Insurance
Agency,

Third-Party Defendants.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Charles W. Whetstone, Jr., Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25278
Heard February 8, 2001 - Filed April 9, 2001

REVERSED

Gedney M. Howe, III, and Alvin Hammer, both of Charleston, for petitioner Ernest George.

Gaines W. Smith, of Legare, Hare & Smith, of Charleston, for petitioner John Shields Autos, Inc.

Robert J. Wyndham, of Howe & Wyndham, of Charleston, for petitioner W. Gene Whetsell.

James E. Reeves, of Barnwell, Whaley, Patterson & Helms, and Thomas J. Wills, of Wills & Massalon, both of Charleston, for respondent Empire Fire &

Marine Insurance Company.

Matthew Story, of Clawson & Staubes, of Charleston, for third-party defendants.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in George v. Empire Fire and Marine Ins. Co., 336 S.C. 206, 519 S.E.2d 107 (Ct. App. 1999). We reverse.

FACTS

Petitioner John Shields Autos, Inc. (Shields Auto), a used car dealership, loaned its customer, Angela Farmer, a car to use while hers was being repaired at the dealership. While driving the loaner vehicle on August 1, 1994, Angela had a head-on collision with another vehicle. Marvelyn George was driving the other car, in which her daughter, Kate, was a passenger. Angela, Marvelyn, and Kate were all killed as a result of the accident.

As personal representative for the estates of his wife and daughter, petitioner Ernest George brought this declaratory judgment action against Respondent Empire Fire and Marine Insurance Company (Empire), Angela's estate,[1] and Shields Auto. George sought declaration that Shields Auto's insurance policy with Empire covered Angela in the amount of $1 million or, alternatively, that the policy be reformed to provide $1 million in coverage.[2]

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[1]Petitioner W. Gene Whetsell, as personal representative of Angela's estate, is the named party. Throughout this opinion, we simply refer to Angela.

[2]Shields Auto in turn brought a cross-claim against Empire, as well as a third-party complaint against Ken Rickel, the insurance agent who procured the policy, and the Williams and Stazzone Insurance Agency. In the event that Empire denied $1 million coverage, Shields Auto alleged that Empire, Rickel, and the agency were negligent. As relief, Shields Auto also sought declaration that the policy provided $1 million coverage for this accident, or alternatively,

George and Empire filed cross motions for summary judgment, and the trial court granted summary judgment in favor of George. The trial court found that the policy provided $1 million coverage for Angela. In the alternative, the trial court decided that if the liability policy was limited to $15,000, then reformation based on mutual mistake was granted to provide $1 million in coverage.[3]

Empire appealed, and initially, the Court of Appeals affirmed on the basis of reformation. After granting rehearing, the panel then reversed summary judgment. The Court of Appeals held as a matter of law that the policy covered Angela only up to the statutory limits. Regarding the reformation issue, the Court of Appeals decided that there was an issue of fact on whether the policy was intended to cover customers in the amount of $1 million and remanded for further factual development. Petitioners appealed to this Court, and certiorari was granted on the reformation issue only.

ISSUE

> Did the Court of Appeals err in finding that an issue of fact existed regarding the issue of reformation based on mutual mistake?

DISCUSSION

The Court of Appeals made two holdings pertinent to our analysis of the issue that is before us. First, the Court of Appeals held that, insofar as the insurance policies with Empire contained an invalid endorsement which excluded coverage for certain customers, "a court would reform such policies for the mandatory minimum coverage of 15/30/5, not the policy limits."

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that the policy be reformed to provide $1 million in coverage.

[3]This was Judge Whetstone's decision. Subsequently, Judge Dennis granted summary judgment, on the basis of reformation, to Shields Auto and Angela against Empire.

George, 336 S.C. at 220-21, 519 S.E.2d at 114. Second, the Court of Appeals stated that there is an issue of fact on "whether Empire, through its agent Rickel, intended that the insurance policies afford Shields's customers coverage in the amount of $1,000,000." Id. at 223, 519 S.E.2d at 116. While we agree with the Court of Appeals as to the effect of invalidating the endorsement, we disagree that there is a genuine issue of material fact on whether the parties intended customer coverage.

1. Reformation Due to Invalid Endorsement

The Empire policies contain an endorsement which excludes liability coverage for customers such as Angela. Although the parties agree that the exclusion is invalid under South Carolina law, they disagree as to the effect of removing the illegal exclusion from the policy. We agree with Empire, and the Court of Appeals, that the legal effect of invalidating the exclusion does not provide $1 million coverage for Angela. A full understanding of this issue necessitates a review of both the Empire policies and Shields Auto's previous liability policies with Nationwide Mutual Insurance Company (Nationwide).

From 1988 to 1992, Nationwide covered Shields Auto. For the first three policies (1988-89, 1989-90, 1990-91), Shields Auto had liability insurance in the amount of $1 million. The 1991-92 policy had a liability limit of $500,000. Significantly, in all the Nationwide policies, liability was not limited in any way for Shields Auto's customers.[4]

Empire began insuring Shields Auto in December 1992. For 1992-93, Shields Auto had a garage liability policy in the amount of $1 million. In

[4]Item Five of the policies, entitled "LIABILITY COVERAGE FOR YOUR CUSTOMERS," stated the following, in relevant part: "Liability coverage for your customers is limited unless indicated below by an 'X' [in the appropriate box]." The box was checked on all four Nationwide policies. Thus, the endorsement at issue in this case was not activated on the Nationwide policies.

this policy, however, liability for customers was limited.[5] This limitation excluded customers as "insureds," with two exceptions. First, if the customer had no liability insurance of her own, then the policy would provide liability coverage up to the statutory minimum limits.[6] Second, if the customer had liability insurance for less than the statutory minimum limits, the policy would provide liability coverage for the difference between the customer's coverage and the statutory minimum limits. The effect of the endorsement was to completely exclude liability coverage under the Empire policy for customers who had their own personal liability insurance in an amount equal to or greater than the statutory limits.

Shields Auto renewed its insurance with Empire for 1993-94. For this year, however, Empire provided Shields Auto with two policies – a primary and an excess policy. The primary policy covered "Garage Operations - 'Auto' Only" in the amount of $15,000/30,000/5,000, and "Garage Operations - Other than 'Auto' Only" in the amount of $1 million. The excess policy covered named insureds up to $1 million. As in the previous year, the 1993-94 policy contained an endorsement which limited liability coverage for certain customers and completely excluded coverage for other customers.[7]

The accident occurred on August 1, 1994, and Angela's personal auto liability policy provided coverage at the statutory limits. Because the endorsement did not provide coverage for Shields Auto customers if they had their own insurance coverage for at least the statutory limits, the Empire policy

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[5]The Empire policy contained the same standard language as the Nationwide policies. See footnote 4, supra. In the Empire policy, however, the box in Item Five was not checked, thereby activating the endorsement which limited liability for customers.

[6]The statutory minimum limits at the time the accident took place were $15,000/30,000/5,000. See S.C. Code Ann. § 38-77-140 (1989).

[7]That is, the box in Item Five again was not checked. See footnotes 4 and 5, supra.

on its face excluded Angela from any coverage. However, since this endorsement excludes a class of permissive users, it violates South Carolina law. See Potomac Ins. Co. v. Allstate Ins. Co., 254 S.C. 107, 173 S.E.2d 653 (1970) ("insured" as defined by South Carolina statute includes permissive user; thus, endorsement which attempted to exclude customer who had accident while using loaned vehicle was held invalid). Indeed, throughout this lawsuit, Empire has conceded that the exclusion is invalid under the rule of Potomac.

Petitioners argue that when Shields Auto renewed its coverage with Empire for the 1993-94 term, all parties intended to provide Shields Auto with the same coverage as the 1992-93 policy. Petitioners further argue that although the 1992-93 policy contained the endorsement which excludes customers such as Angela, the legal effect of invalidating the endorsement is that Angela would be covered for the amount of the 1992-93 policy, i.e., $1 million.

Although we agree with petitioners that the evidence clearly shows the parties intended the same coverage in 1993-94 as in 1992-93, "legal reformation" of the policy only affords coverage for Angela in the amount of the statutory minimum limits. As the Court of Appeals correctly found, when endorsements such as these are invalidated, reformation of the policies is "for the mandatory minimum coverage of 15/30/5, not the policy limits." George, 336 S.C. at 220-21, 519 S.E.2d at 114; see also Potomac, 254 S.C. at 111, 173 S.E.2d at 655 ("Under the facts of this case, White, by virtue of the statutory law, was fully covered by Potomac's policy up to the statutory limits, despite the exclusionary endorsement inserted in Potomac's policy.") (emphasis added); Pennsylvania Nat. Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 553-54, 320 S.E.2d 458, 462-63 (Ct. App. 1984) (where the court found permissive user was insured despite exclusion in policy, the court held that user was "insured against loss from the liability imposed by law").

The reasoning of Potomac mandates this result. In Potomac, the Court found that an endorsement which excluded liability coverage for a customer, who was a permissive user driving a loaned vehicle, violated the provisions of the South Carolina Financial Responsibility Act. The Potomac Court noted that two sections of the statute are considered as though written into

the liability policy. Potomac, 254 S.C. at 111, 173 S.E.2d at 655 (citing Pacific Ins. Co. of New York v. Fireman's Fund Ins. Co., 247 S.C. 282, 147 S.E.2d 273 (1966)). The first defines a permissive user as an insured. See S.C. Code Ann. § 38-77-30(7) (Supp. 2000).[8] The second requires minimum statutory liability limits in every automobile insurance policy. See S.C. Code Ann. § 38-77-140 (1989).[9]

Following the rationale of Potomac, when a liability policy contains an exclusion which conflicts with § 38-77-30(7), then the policy must be reformed as a matter of law to comply with § 38-77-140. Accordingly, the Empire policy, without the illegal endorsement, provides Shields Auto with coverage for Angela up to the statutory minimum limits of 15/30/5.

Therefore, contrary to what the trial court decided, the legal reformation of the Empire policy does not provide $1 million coverage.

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[8]This section defines "Insured" as "the named insured . . . and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies . . . ."

[9]This section states, in pertinent part:

> No automobile insurance policy may be issued or delivered in this State to the owner of a motor vehicle or may be issued or delivered by an insurer licensed in this State . . ., unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada, subject to limits . . . as follows: [15/30/5]. Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements.

(Emphasis added).

2. Reformation Due to Mutual Mistake on Customer Coverage

The question remains, however, whether the invalid endorsement should ever have been activated on the Empire policy at all. In other words, did the parties intend to limit liability for customers to the statutory minimum limits? The Court of Appeals held that a genuine issue of material fact exists on this question and therefore summary judgment was premature. Specifically, the Court of Appeals stated that although it "is undisputed that Shields intended to purchase $1,000,000 in customer coverage from Empire, ... it is less than clear that Rickel, as Empire's agent, intended to issue $1,000,000 in customer coverage." George, 336 S.C. at 221, 519 S.E.2d at 115. We disagree and find that, as a matter of law, the evidence establishes that there was a mutual mistake as to customer coverage. Thus, we affirm summary judgment and hold that the trial court properly reformed the policy to provide coverage for Angela in the amount of $1 million. See Rule 220(c), SCACR (appellate court may affirm any judgment upon any grounds appearing in the record on appeal); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (same).

A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. E.g., Crosby v. Protective Life Ins. Co., 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987). A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Id. Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence. Id.

In addition to the above-discussed insurance policies themselves, we review the relevant deposition testimony to resolve whether there is a material issue of fact regarding mutual mistake. At John Shields's deposition, he testified about the initial procurement of insurance from Empire, through agent Rickel. Shields made clear that he intended customers such as Angela to be fully covered by the liability policy:

Q. . . . Have you ever discussed with any agent or sales person who was selling you insurance for John Shields Autos, Inc., a garage liability policy, the coverage that would exist for a customer to whom you loaned a car?

A. Yes.

Q. Who was the first agent you discussed that subject with?

A. Rickel.

. . .

Q. How about the person who sold you the Nationwide policy?

A. Same thing.

. . .

Q. You discussed that subject with them?

A. That's the main subject when you're buying an insurance policy. You want to know, "Is everybody covered?"

Q. "Everybody" being who?

A. Anybody that drove one of my cars.

Shields also testified that after the accident, he was assured by Empire's agents that Angela would be covered for $1 million:

Q. Did anyone tell you that the young lady driving the car that caused the accident had a million dollars worth of insurance?

A. They told me that my car was covered with a million dollars

worth of insurance, regardless of who drove it.

Q. Who said that to you?

A. Well, first of all, Esther Levine told me and then Tom Rickel called me from New York and said, "Don't worry about it John. I sold you the policy. You're covered. You don't have a thing to worry about." That's what he said. That's when I told him that I was worried about it.

Q. . . . Did [Rickel] ever say, "Don't worry. That young lady has a million dollars worth of insurance. You don't need to worry"?

A. Yes, because he said, "Your car is covered, regardless of who is driving it."

Q. He said that?

A. Yes.

Q. Those words?

A. Those words – when I bought the policy and then when I got worried about the wreck. That was my main concern.

(Emphasis added). Additionally, Shields testified that he asked Rickel to get the same coverage as Shields Auto had "before," i.e., with Nationwide. As discussed above, the Nationwide policies did not limit liability in any way for Shields Auto's customers.

At Rickel's deposition, he testified that when he first wrote the Empire policy for Shields Auto, he knew that Nationwide had previously insured Shields Auto:

Q. And did you do any investigation into the Nationwide coverage?

A. Yes, I would have. When I was doing the application, I asked John [Shields] what type of coverage he had.

(Emphasis added). Rickel stated that Shields "went with the million dollar limit" on the Empire policy in 1992, which was up from the $500,000 liability limit of the previous year's policy with Nationwide.

Regarding the renewal of coverage with Empire for the 1993-94 year, Rickel testified that Shields wanted the same liability limits and sent Rickel a blank application which Rickel subsequently filled out.[10] Rickel acknowledged that "the policy forms changed," i.e., coverage went from a single policy to two separate policies. Rickel stated that moving from the single policy format to two policies would not have changed the insurance coverage for Angela.

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. Id.

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a genuine issue for trial.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)) (emphasis in original). The party opposing summary judgment cannot simply rest on mere allegations or

[10]The renewal form listed liability limits as "CSL 1,000,000."

denials contained in the pleadings. Rule 56(e), SCRCP.

There is no issue of fact as to what Shields intended. Shields testified unequivocally that he intended customers such as Angela to be covered for $1 million. He stated this was the "main subject" he discussed with Rickel. Furthermore, Shields testified that Rickel told him, when he bought the policy and after the accident, that his "car is covered, regardless of who is driving it." As to Rickel's testimony, he stated that he wrote Shields up for $1 million coverage. Additionally, we find it clear that Rickel stated he "would have" investigated Shields Auto's previous coverage with Nationwide. Those Nationwide policies plainly covered customers for the full liability limits of the policies, not the statutorily mandated limits. Given this evidence, the only reasonable inference is that Rickel, or some other agent of Empire, erroneously limited liability for Shields Auto's customers.[11]

Empire had a burden to come forward with specific facts to create a genuine issue of material fact. See Rule 56(e), SCRCP. In our opinion, because Empire has failed to present specific facts showing a genuine issue for trial, Empire has not met its burden under Rule 56(e).[12] Put simply, Empire has not offered any material evidence to dispute the fact that a mutual mistake occurred since Shields requested from Rickel $1 million coverage for "anybody" who drove one of his cars, but nonetheless the policies limited customer

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[11]Empire points to Rickel's testimony that "a customer driving a car is still going to be afforded the state minimum limits of insurance under the standard ISO form or under the way the policy was written with the split limits." Empire contends this statement shows Rickel believed customers would not be covered for $1 million. We find that the only logical inference from Rickel's statement is that he was testifying as to what the policy on its face provided for customers. This comment in no way addresses the intent of Shields regarding customer coverage, or Rickel's understanding of that intent.

[12]Although Empire also moved for summary judgment, for purposes of our Rule 56 analysis, we treat Empire as the opposing party because summary judgment on this issue was granted for petitioners.

coverage. Cf. Commercial Union Assurance Co. v. Castile, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984) (where the court found that insured and agent agreed to provide insurance for 1977 Ford during their telephone conversation, even though agent could not recall the conversation, and thus reformed the policy erroneously written to cover 1972 Chevrolet); 13A John Appleman & Jean Appleman, Insurance Law and Practice § 7609 (1976) ("where the party applying for insurance states the facts to the agent and relies on him to write the policy, . . . and the agent so understands, but fails by mistake to so write the contract, the mistake is considered mutual.").

We note further that all relevant parties have been deposed; thus, it was not premature for the trial court to dispose of the case on summary judgment. Cf. Baughman 306 S.C. at 112, 410 S.E.2d at 543 (summary judgment should not be granted until "the opposing party has had a full and fair opportunity to complete discovery"). Clearly, Empire had a full and fair opportunity to develop the record on this issue, but failed to do so.

Accordingly, we find there is clear and convincing evidence of mutual mistake, requiring reformation of the policy. Crosby v. Protective Life Ins. Co., 293 S.C. at 206, 359 S.E.2d at 300 (a mistake is mutual where the clear and convincing evidence shows that both parties intended a certain thing and by mistake in the drafting did not obtain what was intended). We therefore affirm, in result, the trial courts' decisions to grant summary judgment to petitioners and reform the policy to provide $1 million coverage for Shields Auto's customers. See Rule 220(c), SCACR (appellate court may affirm any judgment upon any grounds appearing in the record on appeal).

The Court of Appeals' decision is

REVERSED.

TOAL, C.J., BURNETT and PLEICONES, JJ., concur. MOORE, J., concurring and dissenting in a separate opinion.

JUSTICE MOORE: I concur in Part 1 of the majority opinion regarding reformation based on an invalid endorsement. I disagree, however, with the holding in Part 2 affirming the grant of summary judgment on the issue of reformation based on mutual mistake. Accordingly, I dissent from that portion of the opinion.

In concluding there is no factual issue regarding a mutual mistake, the majority overlooks pertinent deposition testimony by Empire's agent, Ken Rickel, who wrote the original Empire policy. In context, Rickel testified as follows:

> Q: Okay. Now, when you first wrote this policy or first filled out this application with Mr. Shields, that was the first time you had met him?
>
> A: Yes, to the best of my recollection.
>
> Q: Had Empire written insurance to him previously?
>
> A: No.
>
> Q: Do you know who had written his insurance previously?
>
> A: Nationwide.
>
> Q: And did you do any investigation into the Nationwide coverage?
>
> A: Yes, I would have. When I was doing the application, I asked John what type of coverage he had.
>
> Q: What did he tell you?

A: He told me he had half a million dollars of coverage and we went over the inventory coverage on *(sic)* the garage liability. We went over his inventory coverage. I didn't feel he was carrying enough but he told me – he specifically said that that's what he wanted. He wanted the $100,000, I believe, for inventory coverage. That he felt he was definitely safe with that limit. And then we went over his property coverage also.

Q: Okay. Did you see his Nationwide policy?

A: I know that I saw his Nationwide policy on the property. I don't recall – I'm not sure if I saw the Nationwide policy on the liability.

Q: Okay. And this would have been in the context of the discussions prior to the filling out of the application?

A: This would have taken place while I was filling out the application.

Based on this testimony, I believe the Court of Appeals correctly concluded the record "does not show that Rickel was aware of the Nationwide policies and their contents." Absent evidence that Rickel knew the Nationwide policies covered customers for the full liability limits, there is no clear and convincing evidence of his intent in writing the initial Empire policy. *See* Truck South, Inc. v. Patel, 339 S.C. 40, 528 S.E.2d 424 (2000) (mistake must be common to both parties and, by reason of it, each has done what neither intended); Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981) (before equity will reform an instrument, it must be shown by clear and convincing evidence not simply that it was a mistake on the part of one of the parties but that it was a mutual mistake).

In my opinion, summary judgment was inappropriately granted. I would affirm the Court of Appeals' ruling remanding the case for trial on the issue of reformation based on mutual mistake.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ralph M. "Mike" McGee, as Personal Representative of the Estate of Donna L. McGee, Petitioner,

v.

Bruce Hospital System, Palmer M. Kirkpatrick, Jr., M.D., Alan Blaker, M.D., Reginald S. Bolick, M.D., and Joseph M. Pearson, M.D., both individually and Pee Dee Surgical Group, P.A., and Margaret E. Lee, M.D., individually and d/b/a Pee Dee Radiology Group, Defendants,

of whom,

Alan Blaker, M.D., is the Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 25279
Heard February 8, 2001 - Filed April 9, 2001

REVERSED AND REMANDED

David W. Goldman, Diane M. Rodriguez, Terrell T. Horne, and Kristi F. Curtis, of Bryan, Bahnmuller, Goldman & McElveen, L.L.P., of Sumter, for petitioner.

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia; and David A. Brown, of Aiken, for respondent.

JUSTICE MOORE: We granted a writ of certiorari to review the Court of Appeals' decision that affirmed the grant of a motion for a directed verdict. McGee v. Bruce Hosp. Sys., 336 S.C. 410, 520 S.E.2d 623 (Ct. App. 1999). We reverse.

FACTS

McGee admitted herself to the hospital for treatment of solitary rectal ulcer syndrome. She died after complications developed from the improper placement of a central venous catheter. The autopsy revealed that there was an extensive contusion of the pericardium and myocardium with lacerations

of the right atrium of the heart. The contusion was caused by Dr. Joseph M. Pearson's improper placement of the catheter into McGee. The autopsy further revealed there were two puncture sites involving the liver with perforation into a large hepatic vein caused by respondent. As a result, petitioner filed a wrongful death and survival suit against Dr. Pearson, respondent, and others.

At the first trial, the trial court dismissed petitioner's case against respondent on a directed verdict motion. The jury returned a verdict against Dr. Pearson.[1] This Court affirmed the verdict against Dr. Pearson, but reversed the trial court's grant of respondent's directed verdict motion and remanded for further proceedings. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996).

Before the trial of respondent, Dr. Pearson paid the verdict amount in full with interest. Petitioner executed a satisfaction of judgment against Dr. Pearson and the Pee Dee Surgical Group. Respondent then amended his answer and alleged petitioner's claim should be dismissed because the judgment was satisfied.

The trial court refused to dismiss petitioner's claim, and stated the previous award of punitive damages against Dr. Pearson should not bar a recovery of punitive damages against respondent. The court further noted that whether respondent acted recklessly, wilfully, or wantonly was not determined in the first trial. The court concluded that while petitioner could not recover actual damages against respondent, petitioner could attempt to recover punitive damages.

During respondent's trial, the trial court bifurcated the closing

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[1] The jury awarded McGee $500,000 in actual damages and $1,000,000 in punitive damages in the wrongful death action and $500,000 in actual damages and $2,000,000 in punitive damages in the survival cause of action.

arguments for liability and damages. The jury failed to reach a verdict on liability and the trial court granted a mistrial. Respondent then moved for a directed verdict and the trial court reversed its earlier opinion and granted the motion, stating that petitioner was entitled to only one satisfaction in a matter in which indivisible damages are alleged to be the result of the acts or omissions of one or more tortfeasors.

Petitioner appealed to the Court of Appeals, which affirmed the decision of the trial court. The Court of Appeals stated that, because petitioner conceded he had received all actual damages to which he was entitled and the issue of actual damages cannot be submitted to the jury, there was no legal liability upon which to predicate a verdict for punitive damages. The court further noted that this conclusion is in accord with the principle that there can be only one satisfaction for an injury or a wrong. McGee v. Bruce Hosp. Sys., 336 S.C. 410, 520 S.E.2d 623.

ISSUE

May petitioner seek punitive damages against respondent following the satisfaction of a judgment against Dr. Joseph M. Pearson?

DISCUSSION

When addressing a similar issue, the United States District Court for the District of South Carolina found that a plaintiff could not bring another action against a second defendant where a previous judgment in an earlier action against a first defendant had been satisfied. Garner v. Wyeth Lab., Inc., 585 F. Supp. 189 (D.S.C. 1984). The Garner Court further noted that a lawsuit seeking only punitive damages cannot proceed once the cause of action for actual damages has been extinguished. Id. at 195. The Court of Appeals relied on Garner to support its finding that petitioner could not seek punitive damages against respondent. However, the Garner Court inaccurately surmised the law of South Carolina.

The rule in South Carolina is that there must be an award of actual or nominal damages for a verdict of punitive damages to be supported. See Cook v. Atlantic Coast Line R.R. Co., 183 S.C. 279, 190 S.E. 923 (1937). This rule is premised on the fact that liability must be established before a plaintiff can seek punitive damages. See Sanchez v. Clayton, 877 P.2d 567 (N.M. 1994) (an award for punitive damages must be supported by an established cause of action).

We believe the New Mexico Supreme Court in Sanchez v. Clayton, supra, provides the proper analysis in this matter. In Sanchez, the court stated the following:

> Whether the prior judgment for compensatory damages may have been paid in full is not determinative in deciding that punitive damages may be awarded against Defendants. All the law requires is that "[t]he conduct giving rise to the punitive damages claim must be the same conduct for which actual or compensatory . . . damages were allowed."

Sanchez, 877 P.2d at 574 (citation omitted). The Sanchez Court noted that the "most reasonable interpretation of the supposed actual damages requirement is that it is really a defective formulation of an entirely different idea – that the plaintiff must establish a cause of action before punitive damages can be awarded." Id. at 573 (citation omitted). The Sanchez Court also specifically noted that "even after compensatory damages have been fully satisfied by the settlement of a judgment, a plaintiff seeking punitive damages against a joint tortfeasor may bring suit to recover those damages in a separate action after dismissal of that joint tortfeasor from the original suit has been reversed on appeal." Id.

As a result, we believe the Court of Appeals incorrectly stated that since the issue of actual damages could not be submitted to the jury, there was no legal liability upon which to predicate a verdict for punitive damages. To the contrary, under the reasoning of our law and Sanchez v. Clayton,

supra, the issue of respondent's liability can be submitted to the jury and if the jury determines respondent is liable, the jury can then decide whether punitive damages against respondent are warranted.

Petitioner should be placed in the position he would have been in had the trial court in the first action not erroneously granted a directed verdict for respondent. Had the first action proceeded properly, the jury could have awarded petitioner punitive damages against Dr. Pearson and respondent.

While "it is almost universally held that there can be only one satisfaction for an injury or wrong,"[2] allowing petitioner to seek punitive damages against respondent will not result in petitioner having a double recovery. Although Dr. Pearson has paid the punitive damages levied against him, those punitive damages do not reflect the amount of punitive damages for which a jury may find that respondent is responsible.[3] In this case, a jury has yet to have the opportunity to determine whether respondent's conduct was willful, wanton, or in reckless disregard of petitioner's rights. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996) (in order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights). Petitioner should not be denied the opportunity to have a jury determine

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[2] Truesdale v. South Carolina Highway Dep't, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), overruled in part on other grounds, McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). See also Garner v. Wyeth Lab, Inc., supra ("A plaintiff may have but one satisfaction for a wrong done.").

[3] See, e.g., Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. App. 1980) ("Punitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor since the purpose of punitive awards is to punish a particular offender rather than to compensate the victim for its injury." (citations omitted)); Sanchez v. Clayton, 877 P.2d at 572 (punitive damages against two or more defendants must be separately determined).

whether respondent is liable for punitive damages.

We remand this case to the trial court with instructions that petitioner be allowed to proceed with his action against respondent for the sole purpose of determining whether petitioner is entitled to punitive damages. To recover punitive damages, petitioner must first prove, on remand, that respondent, through his conduct, committed acts making him liable to petitioner for compensatory damages. The jury also has to determine whether respondent acted wilfully, wantonly, or in reckless disregard of McGee's rights in order to support an award of punitive damages. At the conclusion of the trial, if the jury has found respondent liable for actual and punitive damages, then the trial court will strike the award of actual damages given the fact that petitioner's actual damages have already been satisfied by Dr. Pearson. If punitive damages are found, the trial court will then determine any motion concerning punitive damages according to Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).[4]

REVERSED AND REMANDED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

[4] To the extent Brown v. Singleton, 337 S.C. 74, 522 S.E.2d 816 (Ct. App. 1999), is inconsistent with this opinion, it is overruled.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bert Braddock, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Dorchester County
Gerald C. Smoak, Trial Judge
James E. Lockemy, Sentencing Judge
Thomas L. Hughston, Jr., Post-Conviction Judge

Opinion No. 25280
Submitted March 22, 2001 - Filed April 9, 2001

REMANDED

Assistant Appellate Defender Tara S. Taggart of the S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, Assistant

Attorney General David A. Spencer, and Assistant Attorney General William Bryan Dukes, all of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine if the post-conviction relief (PCR) court erred by finding petitioner waived his right to an appeal by failing to appear for trial. We find petitioner is entitled to a belated appeal.

FACTS

Petitioner was released on bond after his arrest for first degree criminal sexual conduct (CSC) of a minor and did not appear for trial. He was convicted at a trial in his absence. After being apprehended by law enforcement, he appeared for the opening of his sealed sentence of thirty years imprisonment, which was reduced at its opening to imprisonment for twenty-three years. Petitioner appealed the conviction and sentence, but the appeal was dismissed when petitioner failed to file an Initial Brief and Designation of Matter.

Thereafter, petitioner filed a PCR application, which was denied after a hearing. The PCR court dismissed his application, and stated the following: "The applicant escaped from custody and willfully remained at large for several months as a fugitive from justice. By such action he destroyed the right to appeal his conviction, directly or collaterally."

ISSUE

Whether the PCR court erred by finding petitioner had waived his right to appeal by failing to appear for trial?

DISCUSSION

While the PCR court did not cite any law for the proposition that escaping from custody destroys one's right to directly or collaterally attack his conviction and sentence, the following cases are applicable: Lamb v. State, 293 S.C. 174, 359 S.E.2d 282 (1987); Jordan v. State, 276 S.C. 168, 276 S.E.2d 781 (1981); Martin v. State, 276 S.C. 514, 280 S.E.2d 210 (1981). Lamb, Jordan, and Martin hold that this Court will not hear the appeal of a party who evades the process of the Court and refuses to submit to its jurisdiction by escaping.

These cases are distinguishable from the instant case. In all of these cases, the prisoner escaped custody after conviction and was not, at the time of appeal, in South Carolina custody. In this case, petitioner is in custody in South Carolina and has been since he was sentenced. While petitioner did not appear at his trial, this does not act to waive his right to appeal from his conviction. Cf. State v. Robinson, 287 S.C. 173, 337 S.E.2d 204 (1985) (where a defendant is tried *in abstentia*, an appeal may not be taken until the sealed sentence is opened and read to the defendant); State v. Washington, 285 S.C. 457, 330 S.E.2d 289 (1985) (same).

Both petitioner, acting pro se, and his counsel filed Notices of Appeal with this Court.[1] At the PCR hearing, petitioner testified he believed counsel was proceeding with the appeal. While petitioner admitted he did not pay counsel for pursuing the appeal, he testified counsel never requested any payment.

Counsel testified he told petitioner he would file an appeal; however, he stated he was never offered any money to proceed with the appeal. Counsel stated he informed petitioner's wife he could handle the appeal for a fee or that the Office of Appellate Defense could handle it for free. He testified he did not personally contact Appellate Defense because he felt

[1] The appeals were later combined into one appeal.

petitioner was not, in fact, indigent.

There is no evidence petitioner waived his right to a direct appeal. Counsel did not seek to withdraw as counsel; instead, he ceased handling the appeal without ensuring petitioner had retained other counsel or was being represented by Appellate Defense. See Rule 602(e)(4), SCACR. Since petitioner did not knowingly and intelligently waive his right to appeal, he is entitled to a belated appeal. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

We have reviewed petitioner's direct appeal issues and conclude they are without merit. Accordingly his conviction is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue 3: State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) (if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, case was properly submitted to the jury); State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) (in reviewing denial of a motion for directed verdict, the evidence must be viewed in light most favorable to the State); Issue 4: Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998) (caption of indictment need not precisely conform with wording on its face); Issue 5: State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997) (trial judge's denial of motion for continuance will not be disturbed absent clear abuse of discretion); Issue 6: State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675 (1999) (denial of a new trial motion will not be disturbed on review absent an abuse of discretion resulting in prejudice to the defendant).

Petitioner's allegation his absence at trial was due to a communication from counsel is an issue for PCR rather than direct appeal. Given the fact the PCR court incorrectly found it could not address petitioner's PCR application, this matter is remanded to the PCR court to make findings and to rule on this issue. If the PCR court determines petitioner's allegation has merit, then petitioner will be entitled to a new trial.

REMANDED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of John G. O'Day, Respondent.

O R D E R

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to an interim suspension.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Wilburn Brewer, Jr., Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Brewer shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Brewer may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office

accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Wilburn Brewer, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Wilburn Brewer, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Brewer's office.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 6, 2001

The Supreme Court of South Carolina

In the Matter of William C. Wooden, II, Respondent.

O R D E R

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Lynette Rogers Hedgepath, Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Ms. Hedgepath shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Hedgepath may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Lynette Rogers Hedgepath, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Lynette Rogers Hedgepath, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Hedgepath's office.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 9, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

John Peake,

Respondent.

Appeal From Greenwood County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 3327
Heard February 8, 2001 - Filed April 9, 2001

REVERSED AND REMANDED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, and Special Assistant Attorney General Alexander G. Shissias, all of Columbia, for appellant.

John Hawkins, of Lister & Hawkins, of Spartanburg, for respondent.

HOWARD, J.: John Peake was indicted by the Grand Jury of Greenwood County for violating the Pollution Control Act. S.C. Code Ann. § 48-1-10 to -350 (1987 & Supp. 2000). Following a pre-trial hearing, the circuit court dismissed the indictment, concluding the Department of Health and Environmental Control (DHEC) had entered into a binding agreement on behalf of the State to forego criminal prosecution of Peake in exchange for payment of a civil sanction. The State appeals, asserting, among other things, that DHEC did not have legal authority to bind the State to an agreement limiting criminal prosecution. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Peake developed a tract of land located in Greenwood County, South Carolina, building townhouses and patio homes. DHEC required Peake to install a wastewater treatment system costing $325,000. The development project failed, and DHEC alleged Peake abandoned the treatment facility in violation of code section 48-1-90(a), which prohibits the discharge of waste into the environment, except in compliance with a permit issued by DHEC. See S.C. Code Ann. § 48-1-90(a) (1987).

Peake and his attorney met with DHEC officials, including Water Pollution Control Agent Anastasia Hunter-Shaw. Hunter-Shaw negotiated on behalf of DHEC and demanded that Peake acknowledge wrongdoing, convey ownership of the wastewater treatment facility to the municipality in which it was located, and pay a fine of $100,000. Over the next few weeks, Peake negotiated with DHEC through his attorney.[1] Peake refused to acknowledge wrongdoing or pay a fine, but eventually agreed to convey ownership of the treatment facility to the municipality without remuneration to end the controversy. Hunter-Shaw agreed to this compromise on behalf of DHEC, and the deed conveying the facility was executed and delivered on September 30, 1997.

[1]This attorney no longer represents Peake.

Unbeknownst to Peake, Hunter-Shaw had referred the violations to the criminal investigative division of DHEC. The criminal division decided to refer the matter to the Attorney General for prosecution. DHEC attorney Alex Shissias was appointed by the Attorney General as a Special Assistant to seek an indictment and prosecute the case against Peake. On October 20, 1997, Peake was indicted by the Greenwood County Grand Jury for abandoning the wastewater treatment facility in violation of sections 48-1-90 (a) and 48-1-320 of the Pollution Control Act (Act). See S.C. Code Ann. § 48-1-90(a) (1987); S.C. Code Ann. § 48-1-320 (1987).

When the case was called for trial, Peake moved to dismiss the indictment, arguing that the State had agreed to accept the $325,000 treatment facility as an end to all threats of civil and criminal sanction. Although Peake acknowledged that his understanding of the agreement emanated from his discussions with his attorney and that criminal sanctions had never been directly discussed with DHEC, he nevertheless argued that the parties had agreed to transfer the treatment facility to end the entire matter, including the threat of criminal prosecution. Peake's former attorney corroborated this understanding, testifying that Hunter-Shaw had indicated that, if Peake complied, the "entire matter" would "all go away" and "[t]here would be nothing further [to] come from the matter if he would do that."

The State denied the agreement and countered that neither Hunter-Shaw nor DHEC had the legal authority to enter into an agreement foregoing prosecution of a criminal offense. Hunter-Shaw maintained that she had no criminal enforcement function in DHEC, that criminal sanctions had never been mentioned to Peake or his attorney, and that no such agreement had been reached.

At the conclusion of the hearing, the trial court dismissed the indictment. The court noted that Hunter-Shaw had reported Peake's actions to DHEC's criminal investigative division. The court then concluded that the decision to prosecute and refer Peake's case for criminal action to the Attorney General's office was within the exclusive jurisdiction and power of DHEC. The court further found that "[t]he State without, and but for, the action of the Department of Health and Environmental Control would not have sought any indictment

against Mr. Peake." The court ruled that Peake's actions were based upon "reasonable inferences" that criminal as well as civil liability was addressed by an agreement "in the nature of a covenant not to prosecute," given in exchange for Peake's conveyance of the wastewater treatment facility to a governmental subdivision of the State.

On appeal, the State contends the trial court erred in ruling that DHEC had the authority to bind the Attorney General to an agreement not to prosecute for a criminal offense. The State further claims the court erred in ruling that the State could be estopped from prosecuting Peake criminally. We conclude that DHEC could not legally bind the Attorney General to the agreement and that the State is not estopped from prosecuting Peake.

DISCUSSION

Our supreme court has ruled that a guilty plea rests upon contract principles and that the State can be required to fulfill the terms of its promise to forego further prosecution of the accused when such forbearance is a part of the benefit of the bargain. State v. Thrift, 312 S.C. 282, 292-93, 440 S.E.2d 341, 347 (1994) (citing Santobello v. New York, 404 U.S. 257 (1971)). The court noted that "a plea agreement analysis must be more stringent than a contract because the rights involved are fundamental and constitutionally based." Thrift, 312 S.C at 293, 440 S.E.2d at 347 (citing United States v. Ringling, 988 F.2d 504 (4th Cir. 1993)).

Other jurisdictions have applied these principles to an agreement not to prosecute, even where no guilty plea has been entered. See United States v. Carrillo, 709 F.2d 35, 36 (9th Cir. 1983) (finding that cooperation agreement is analogous to a plea bargain); United States v. Rodman, 519 F.2d 1058, 1059-60 (1st Cir. 1975) (affirming dismissal of indictment when SEC breached agreement to make no prosecution recommendation to United States Attorney in return for defendant's cooperation). However, enforcement of an agreement not to prosecute is subject to two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise. See United States v. Streebing, 987 F.2d 368, 372 (6th Cir. 1993); see also Ringling, 988 F.2d at 506-07 (finding that Assistant United States Attorney

could bind government and that the defendant relied on government's promise to allow him opportunity to cooperate in order to seek reduced sentence); Yarber v. State, 375 So. 2d 1212, 1227 (Ala. Crim. App. 1977) (stating that "law enforcement officers are utterly without power and authority to grant an accused immunity from arrest and prosecution for violating our criminal laws"), rev'd on other grounds, 375 So. 2d 1229 (Ala. 1978); Green v. State, 857 P.2d 1197, 1199 (Alaska Ct. App. 1993) ("We base our decision to deny defendant specific performance on the fact that the police lacked the authority to make a binding promise of immunity or not to prosecute."); People v. Thompson, 410 N.E.2d 600, 603 (Ill. App. Ct. 1980) ("[A]n auditor with the Illinois Department of Revenue is without authority to determine prosecution for criminal conduct."); State v. Crow, 367 S.W.2d 601, 605 (Mo. 1963) ("[T]he sheriff has no standing to grant or offer immunity as a bar to a prosecution."); State v. Cox, 253 S.E.2d 517, 521 (W. Va. 1979) (holding "that law enforcement officers do not have authority to promise immunity from prosecution in exchange for information, and such promises are generally unenforceable").

The trial court ruled that Hunter-Shaw was authorized under section 48-1-220 to promise not to criminally prosecute Peake in return for the conveyance of the wastewater treatment facility. Section 48-1-220 states that "[p]rosecutions for the violation of a final determination or order shall be instituted only by the Department or as otherwise provided for in this chapter." S.C. Code Ann. § 48-1-220 (1987) (emphasis added). Section 48-1-210 describes the Attorney General as DHEC's "legal advisor" and provides that the Attorney General "shall upon request of the Department institute injunction proceedings or any other court action to accomplish the purpose of this chapter." S.C. Code Ann. § 48-1-210 (1987) (emphasis added). This language is consistent with the circuit court's conclusion that the Legislature intended to place the decision to prosecute for criminal offenses under the Act in DHEC's hands exclusively.

Based upon these and other sections within the Act which place regulation exclusively in the hands of DHEC, Peake argues that DHEC makes the decision to prosecute, which is separate and distinct from the right to supervise the prosecution of cases, reserved to the Attorney General by the South Carolina

Constitution.[2] See S.C. Const. art. V, § 24 ("The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." (emphasis added)). The trial court agreed with this reasoning and concluded Hunter-Shaw had the authority to promise forbearance of criminal prosecution in exchange for civil sanctions.

We conclude this was error. Our supreme court addressed this issue in State v. Thrift and concluded that the power constitutionally granted to the Attorney General to supervise the prosecution of criminal cases includes the power to decide which cases to prosecute. 312 S.C. at 307, 440 S.E.2d at 355.

In Thrift, a defendant was indicted for violation of the pre-1991 Ethics Act, S.C. Code Ann. § 8-13-490 (1986) (repealed 1991). The "old" Ethics Act contained language requiring a referral from the Ethics Commission to the Attorney General before prosecution could be maintained. On appeal, the defendant argued the requirement of referral thereby placed the decision to prosecute in the hands of the Ethics Commission, not the Attorney General. Our supreme court disagreed, stating:

> [Article V, § 24] is dispositive that any requirement which places the authority to supervise the prosecution of a criminal case in the hands of the Ethics Commission is unconstitutional. As noted earlier in the plea agreement issue, the prosecution has wide latitude in selecting what cases to prosecute and what cases to plea bargain. This power arises from our State Constitution and cannot be impaired by legislation.

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[2]Peake also suggests that the dual role held by DHEC attorney Shissias renders this situation unique. However, there is no assertion that Shissias was appointed as a Deputy Attorney General prior to Peake's agreement with Hunter-Shaw, or that Shissias participated in any way in negotiating the agreement. Furthermore, Shissias was "deputized" as an Assistant Attorney General in order to seek the indictment and handle the prosecution of the case, all of which occurred after the agreement with Hunter-Shaw and the transfer of the wastewater treatment facility.

Thrift, 312 S.C. at 307, 440 S.E.2d at 355. Under Thrift, the decision to prosecute is constitutionally granted to the Attorney General and cannot be impaired by the Legislature.

It is axiomatic that legislation must be construed so as to be constitutional. A basic rule of statutory interpretation requires a construction which is constitutional. "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977).

The State argues that sections 48-1-220 and 48-1-210 were intended to give the exclusive control over civil enforcement of the Act to DHEC. Our supreme court resolved the controversy in Thrift by recognizing the civil nature of the Ethics Act complaint and adopted a narrow construction of that statute. 312 S.C. at 307, 440 S.E.2d at 355. Therefore, we agree with the State that these sections must be construed to apply only to civil enforcement of final determinations and orders issued pursuant to the Act. Thus, even if Hunter-Shaw intended to reach a binding agreement to forego prosecution of Peake in return for civil sanctions, she was without power to do so.

Furthermore, absent authority of Hunter-Shaw to enter into an agreement, the State cannot be estopped from prosecuting Peake. The State may be subject to estoppel where its officers or agents act within the proper scope of their authority. Goodwine v. Dorchester Dep't of Soc. Servs., 336 S.C. 413, 418-19, 519 S.E.2d 116,118-19 (Ct. App. 1999). However, estoppel "will not be applied to deprive the State of the due exercise of its police power or to thwart its application of public policy." Id. at 418, 519 S.E.2d at 118. A governmental body cannot be estopped "by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment." S.C. Coastal Council v. Vogel, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987); see McDaniel v. S.C. Dept. of Pub. Safety, 325 S.C. 405, 411, 481 S.E.2d 155, 158 (Ct. App. 1996) (probation officer's assurance could not bind the Department of Public Safety because he had no connection with the Department and no authority); Daniels v. City of Goose Creek, 314

S.C. 494, 499, 431 S.E.2d 256, 259 (Ct. App. 1993) ("The acts of government agents acting within the scope of their authority can give rise to estoppel against the government, but unauthorized conduct or statements do not."); see also Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 352, 126 S.E.2d 15, 18 (1962) ("The question is not one of intention, but of power; and, if the officer has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the state." (quoting Carolina Nat'l Bank v. State, 60 S.C. 465, 473, 38 S.E. 629, 632 (1901))).[3]

CONCLUSION

For the foregoing reasons, the decision of the trial court dismissing the indictment is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CONNOR and HUFF, JJ., concur.

[3]The State also argues on appeal that the factual findings of the trial court are not supported by the record. However, in view of our conclusion that Hunter-Shaw and DHEC did not have authority to enter into a valid agreement barring prosecution of Peake, we need not consider this issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allstate Insurance Company,

Respondent,

v.

Estate of Thomas Adam Hancock, Estate of Johnny Blyther, Estate of James Brooks, Sr., James Brooks, Jr., and the Estate of Harold Connell Hancock, Willie K. Brooks, Companion Property and Casualty Insurance Company,

Defendants,

Of whom Estate of Thomas Adam Hancock and Estate of Johnny Blyther are

Appellants.

Appeal From Sumter County
M. Duane Shuler, Circuit Court Judge

Opinion No. 3328
Heard March 7, 2001 - Filed April 9, 2001

REVERSED & REMANDED

Christopher G. Isgett, of Lee, Eadon, Isgett & Popwell, of Columbia; and Jacob H. Jennings, of Jennings &

Jennings, of Bishopville, for appellants.

G. Murrell Smith, Jr., of Lee, Erter, Wilson, Holler & Smith, of Sumter, for respondent.

HEARN, C.J.: Allstate Insurance Company (Allstate) brought this declaratory judgment action to determine the amount of underinsurance (UIM) coverage available under H. Connell Hancock's automobile insurance policy. The trial court found that no coverage was available because Allstate provided Hancock with a meaningful offer of UIM coverage which was rejected. We reverse.

FACTS/PROCEDURAL HISTORY[1]

Hancock (Husband) purchased an automobile insurance policy from Allstate on July 30, 1996 with an effective date of January 31, 1997. Husband is listed as the applicant and named insured on the policy. Patricia Hancock (Wife), Husband's resident spouse, elected uninsured (UM) coverage limits and signed a waiver of UIM coverage on the policy. There is no evidence in the record that Husband saw Allstate's form offering UIM coverage. On April 5, 1997, Husband was involved in an automobile accident killing him, his resident son, and another passenger.

Following the accident, Allstate brought this action to determine the amount of coverage available to the various parties. The trial court found no UIM coverage because (1) Allstate's form was a valid offer of UIM coverage, (2) as Husband's resident spouse, Wife had the authority to sign a waiver of UIM coverage, and (3) the policy issued to Husband by Allstate prevented the stacking of liability insurance. The decedents' estates

[1] The facts are by stipulation of the parties.

(Appellants) appeal the trial court's determination of a valid rejection of UIM coverage.

STANDARD OF REVIEW

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. J.K. Constr., Inc. v. Western Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

ANALYSIS

Appellants argue the trial court erred in concluding the resident spouse of an automobile insurance policy's named insured had the authority to reject UIM coverage on behalf of the named insured. We agree.

Automobile insurance carriers are required to offer UIM and excess UM coverage up to the limits of a policy's liability coverage. S.C. Code Ann. § 38-77-160 (Supp. 2000). For all new applicants, this offer must be made using a form approved by the Insurance Commissioner and containing the following information:

> (1) a brief and concise explanation of the coverage,
> (2) a list of available limits and the range of premiums for the limits,
> (3) a space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires,
> (4) a space for the insured to sign the form which acknowledges that he has been offered the optional coverages,

> (5) the mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350 (Supp. 2000).

Section 38-77-350(B) further states:

> If this form is properly completed and executed by the **named insured** it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the policy for the insured's failure to purchase any optional coverage or higher limits.

(Emphasis added). If the insurer does not make a meaningful offer of UIM coverage, the policy will be reformed to include UIM coverage up to the limits of the policy's liability coverage. Norwood v. Allstate Ins. Co., 327 S.C. 503, 505, 489 S.E.2d 661, 662 (Ct. App. 1997).

Appellants' argument hinges on whether Wife's signature on the form constituted an effective rejection of an offer of UIM coverage. We find that it did not.

Section 38-77-350(B) requires the form be "properly completed and executed by the named insured." Here, Husband was the named insured and applicant. The trial court construed language in the policy defining "you" or "your" as the policy holder and that person's resident spouse to mean that Wife was a named insured. However, we find this policy language unavailing because, at the time Allstate made the offer of UIM coverage, no policy existed. The application is merely an offer; no contract arises until the offer is accepted and all conditions precedent are met. Rickborn v. Liberty

Life Ins. Co., 321 S.C. 291, 303, 468 S.E.2d 292, 299 (1996). Therefore, our decision is controlled by the applicable statutory language rather than the terms of the policy.

For automobile insurance policies, South Carolina law defines "insured" as:

> the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

S.C. Code Ann. § 38-77-30(7) (Supp. 2000). Under this definition, Wife was an insured. However, section 38-77-350(B) requires the rejection of UIM coverage be made by a "named insured."

The goal of statutory construction is to ascertain and give effect to the legislature's intent. Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 180, 447 S.E.2d 859, 861 (1994). We determine legislative intent primarily through the plain language of the statute. Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). "In construing statutes, the terms used therein must be taken in their ordinary and popular meaning. When such terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 28, 416 S.E.2d 641, 644 (1992) (citation omitted). Chapter 77 repeatedly distinguishes between the terms "insured" and "named insured."[2] Therefore,

[2] See, e.g., S.C. Code Ann §§ 38-77-30(7), (10), (10.5) (defining "insured," "nonpayment of premium," and "policy of automobile insurance" in

we believe the legislature would not have used the term "named insured" if it intended that any insured under the policy be able to waive UIM coverage. By the plain language of section 38-77-350(B), the form must be executed by the named insured to the exclusion of other mere insureds.[3]

Given the broad statutory definition of "insured," a construction allowing offers to and rejection by mere insureds would allow even permissive users to reject UIM coverage. See S.C. Code Ann. § 38-77-30(7); Wright v. Allstate Ins. Co., 746 F. Supp. 612 (D. S.C. 1990); Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). This court must reject an interpretation of a statute leading to an absurd result not possibly intended by the legislature. Hamm v. South Carolina Pub. Serv. Comm'n, 287 S.C. 180, 181, 336 S.E.2d 470, 471 (1985). Moreover, requiring the form be executed by the named insured who is the applicant is consistent with the language in section 38-77-350(A) requiring the form be used "for all

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terms of named insured), -120 (requiring notice be given to the named insured before cancellation or refusal to renew a policy), -123(A)(2)(h) (forbidding insurers from refusing to renew policy solely because named insured, a resident of the same household, or other customary operator has had two or fewer accidents), -123(B) (outlining when policy may be cancelled), -340 (allowing persons included under statutory definition of insured to be excluded from coverage if so provided by the terms of a written amendatory endorsement signed by the named insured and the person to be excluded).

[3] The case of Oncale v. Aetna Casualty & Surety Co., 417 So.2d 471 (La. Ct. App. 1982), cited by Allstate to support treating a spouse as a named insured, is distinguishable because Louisiana only requires that the rejection be made by "any insured named in the policy." La. Rev. Stat. Ann. 22:1406 (D)(1)(a) (Supp. 2000). We find the following cases more instructive: State Farm Mut. Auto. Ins. Co. v. Martin, 289 So.2d 606 (Ala. 1974) (holding that if right to reject belongs to named insured, rejection of coverage by spouse legally insufficient); Frank v. Illinois Farmers Ins. Co., 336 N.W.2d 307 (Minn. 1983) (finding mandatory offer of UIM coverage must be made to applicant, not applicant's spouse).

new applicants." Accordingly, we hold that the form offering UIM coverage on a new policy of automobile insurance must be completed by the named insured who is the applicant.[4]

Because the form was presented to and signed by a party unauthorized to reject UIM coverage, we find no offer was made as required by sections 38-77-160 and -350. Accordingly, we reverse and remand for reformation of the policy to include UIM coverage.

REVERSED AND REMANDED.

CURETON and HUFF, JJ., concur.

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[4] Although not argued in the appeal before us, we note that it may be possible for a spouse to reject UIM coverage if he or she does so as an agent authorized to act on the applicant's behalf. In such a case, the existence and scope of an agency relationship are questions of fact. Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Ct. App. 1999). "The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies. However, no presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife." Bankers Trust of South Carolina v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) (citations omitted).