The Supreme Court of South Carolina

In the Matter of Kenneth L. Mitchum, Respondent.

ORDER

By opinion of this same date, we have suspended respondent from the practice of law in this state for nine months. The Office of Disciplinary Counsel has requested the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Hal M. Strange, Esquire, is hereby 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. Strange shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Strange 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 Hal M. Strange, 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 Hal M. Strange, 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. Strange's office.

Mr. Strange's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

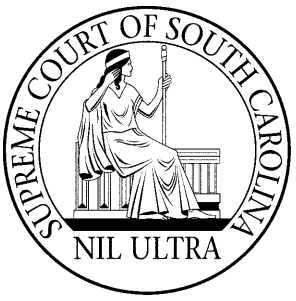
IT IS SO ORDERED.

s/ Costa M. Pleicones J.

FOR THE COURT

Columbia, South Carolina

June 30, 2008



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
June 30, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

American Credit of Sumter, Inc., Appellant,

v.

Nationwide Mutual Insurance Company, Respondent.

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 26509
Heard February 21, 2008 – Filed June 30, 2008

REVERSED

Thomas E. Player, Jr., of Player & McMillan, of Sumter, for appellant.

William Bailey Woods, of Woods Law Firm, of Lexington, for respondent.

JUSTICE MOORE: Appellant (American Credit) filed an action claiming respondent (Nationwide) acted in bad faith by failing to pay the money due under an insurance policy. Nationwide answered that any claim brought by American Credit would be subject to the Loss Payable

Clause of the policy and that this Clause denies coverage to American Credit. The magistrate court granted Nationwide's motion for a directed verdict and the circuit court affirmed. We now reverse.

FACTS

The insured was the owner of a 1998 Nissan Altima automobile which was financed by American Credit. The automobile was insured with Nationwide for comprehensive and collision coverages, with the insured being shown as the policyholder and with American Credit as the lienholder. The automobile was involved in a collision in Connecticut, which was caused by the driver of another automobile. Damages resulted in the amount of $1,801.67. Allstate, the liability insurance carrier of the at-fault motorist, paid to the insured a sum of money sufficient to pay the costs of repairs to the automobile. The insured failed to have the repairs made to the automobile and later defaulted on the loan by American Credit, causing the automobile to be repossessed in a damaged condition in the amount of $1,801.67.

American Credit filed a claim with Nationwide in the amount of $1,307.67[1] and contended it was entitled to payment via the Loss Payable Clause in the insurance policy.

> The pertinent portion of the Loss Payable Clause states that:
>
> Protection of the lienholder's financial interest will not be affected by any change in ownership of the vehicle insured, nor by any act or omission by any person entitled to coverage under this policy. However, protection under this clause does not apply in any case of conversion, embezzlement, secretion, or willful damaging or destruction, of the vehicle committed by or at the direction of an insured.

[1]$1,307.67 represents the cost of repair of the automobile less the $500 deductible as provided in the insurance policy.

After the close of the evidence in the trial, the magistrate granted Nationwide's motion for a directed verdict. The magistrate found the insured received payment from another insurance company for the damage to the automobile and, rather than utilizing these funds to repair the automobile, as required under her financing contract with American Credit, she converted these funds to her own use. The magistrate found that this amounted to a conversion of that portion of the automobile which was damaged. As a result of the conversion, the magistrate found the protection of the lienholder's financial interest did not apply under the clear language of the Loss Payable Clause.

American Credit appealed to the circuit court. The court ruled the magistrate properly granted Nationwide's motion for a directed verdict. The court found the insured essentially converted that portion of the automobile that was damaged and paid for by Allstate. As a result, any claim American Credit had under the Loss Payable Clause was barred by the provision stating that protection under that Clause does not apply in a case of conversion committed by or at the discretion of the insured. The court stated that when the insured retained the funds she received from Allstate, she was essentially altering the condition of the automobile and accepting payments to the exclusion of the owner or lienholder.

ISSUE

> Is the failure of the insured to utilize the liability insurance proceeds to repair the damaged automobile a conversion of the automobile within the meaning of the Loss Payable Clause of the policy?

DISCUSSION

A loss payable clause is a type of clause used in insurance contracts by which a lienholder or mortgagee protects its interests in the insured property. There are two types of loss payable clauses: (1) a loss payable or open mortgage clause, and (2) a standard clause. Nationwide Mut. Ins. Co. v. Hunt, 327 S.C. 89, 488 S.E.2d 339 (1997). A lienholder's ability to recover

on an insurance policy largely depends on the type of clause used in the insurance contract. *Id.* In general, a loss payable or open mortgage clause merely identifies the person or entity that may collect the insurance proceeds and an insured's misconduct bars recovery by the lienholder. *Id.* On the other hand, under a standard clause, the interests of the lienholder in the proceeds of the policy will not be invalidated by the misconduct of the insured. *Id.*

By asserting the insured's misconduct bars American Credit from recovering under the policy, the dissent would find that the Clause at issue is the narrower loss payable or open mortgage clause. However, the type of clause involved here is a standard clause that contains exceptions, such as the conversion exception, which can preclude recovery by the lienholder. Nationwide's Loss Payable Clause specifically states that "protection of the lienholder's financial interest will not be affected by . . . any act or omission by any person entitled to coverage under this policy" except "in any case of conversion" of the vehicle. In other words, Nationwide will not be obligated to make payment to American Credit as a result of the insured misappropriating the funds only if such act constitutes a conversion of the vehicle by or at the direction of the insured. Therefore, contrary to the dissent's view, a plain reading of the Clause extends protection to American Credit's interest in the automobile notwithstanding the insured's misconduct, save for the specified exclusion.[2]

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[2]Although the dissent would find the Loss Payable Clause at issue is the narrower loss payable, or open mortgage, clause, the issue the parties asked this Court to resolve was not whether American Credit could recover pursuant to the Loss Payable Clause, but rather whether the exclusions contained in the Loss Payable Clause barred American Credit's claim. Nationwide has never argued that the Clause was the narrower loss payable or open mortgage clause, nor did Nationwide assert that *any* misconduct on behalf of the insured barred American Credit's claim. In fact, in its brief to this Court, Nationwide admits that "the policy does provide additional protection to the . . . lienholder by indicating that the lienholder's right will not be affected by the acts of the insured." This statement clearly indicates that Nationwide acknowledged that the Clause provided broader protection to

The insurance policy does not define conversion so we must determine whether the failure of the insured to utilize insurance proceeds received from a separate insurer to repair the damaged automobile is a conversion of the automobile within the meaning of Nationwide's Loss Payable Clause.

Insurance policies are subject to the general rules of contract construction. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002). We must give policy language its plain, ordinary, and popular meaning. *Id.* An insurance policy is to be liberally construed in favor of the insured and strictly construed against the insurer. Kraft v. Hartford Ins. Companies, 279 S.C. 257, 305 S.E.2d 243 (1983). Further, exclusions in an insurance policy are always construed most strongly against the insurer. Century Indem. Co. v. Golden Hills Builders, Inc., *supra*.

We have stated that conversion is a wrongful act and have defined conversion as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel. *Id.*

The insured's failure to utilize the insurance proceeds received from the other driver's insurer to repair the damaged automobile is not a conversion. The insured owned the automobile at the time she retained the funds that should have been used to repair the damaged automobile. The insured had not defaulted on the installment contract and the car had not been repossessed; therefore, she was still the owner. What is envisioned by the exception to Nationwide's Loss Payable Clause is the conversion of the

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a lienholder. In any event, because Nationwide did not argue that this Clause was the narrower loss payable or open mortgage clause, this issue is not preserved. *See* Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (to preserve issue for appellate review, issue must have been raised to and ruled upon by the trial court).

insured property, that is, the automobile.[3] No such conversion has occurred here. At all relevant times, the insured has not directed or allowed the ownership of the automobile to be assumed by another to the exclusion of the insured's rights. *See* SSI Med. Servs., Inc. v. Cox, *supra* (conversion is unauthorized assumption in exercise of right of ownership over goods belonging to another to the exclusion of the owner's rights). *See also* Foremost Ins. Co. v. Allstate Ins. Co., 486 N.W.2d 600 (Mich. 1992) (person cannot convert his own property; intentional burning of mobile home did not amount to conversion within meaning of loss payable clause); Gibraltar Fin. Corp. v. Lumbermens Mut. Cas. Co., 513 N.E.2d 681 (Mass. 1987) (burning of an insured automobile by mortgagor did not constitute conversion because, at the time of the arson, no one other than the owner/mortgagor had an immediate right to possess the automobile; therefore, the mortgagee's recovery under the policy was not precluded); Nationwide Mut. Ins. Co. v. Dempsey, 495 S.E.2d 914 (N.C. App.), *review denied*, 502 S.E.2d 847 (N.C. 1998) (automobile policy's loss payable clause which invalidated lienholder's interest only upon insured's conversion of vehicle did not apply when vehicle was destroyed by fire allegedly set by insured since vehicle was not changed from one purpose to another).

Because the exclusion in the insurance policy is to be construed strongly against the insurer and Nationwide failed to define conversion to include the aforementioned facts, the lower courts erred by finding a conversion had occurred when the insured retained the insurance proceeds and failed to repair the automobile. *See* Century Indem. Co. v. Golden Hills Builders, Inc., *supra* (exclusions in an insurance policy are always construed most strongly against the insurer). *See also* Chrysler Credit Corp. v. Dairyland Ins. Co., 491 So.2d 402 (La. Ct. App.), *writ denied*, 484 So.2d 1178 (La. 1986) (while not determining whether the actions constituted conversion, court held where a policy fails to define the term "loss" it is unclear whether the application by the insured to his personal use of the funds

[3]The exception states: "protection under this clause does not apply in any case of conversion . . . of the vehicle committed by or at the direction of the insured." (Emphasis added).

received in settlement from the tortfeasor's insurer is a "loss caused by conversion," thus relieving the insurer of its obligation to pay the claim of the loss payee; the court found, because of the ambiguity, the policy must be construed against the insurer). Accordingly, the decision of the circuit court is

REVERSED.

TOAL, C.J., WALLER and BEATTY, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm. In my opinion, under the facts of this case, the loss-payable clause does not provide American Credit with a right to recover from Nationwide the amount retained by the defaulting insured after she received payment from a third-party's liability carrier.[4]

It has been held that an insured's misconduct bars recovery by the lienholder under a loss-payable clause. Nationwide Mut. Ins. Co. v. Hunt, 327 S.C. 89, 93, 488 S.C. 339, 341 (1997). Furthermore, the loss-payable clause merely identifies the person who may collect the proceeds, and the lienholder stands in the insured's shoes and is usually subject to the same defenses. Id.

In Nationwide's policy with its insured in this case, the loss-payable clause specifically states, "This clause applies to the Comprehensive and Collision coverages provided by this policy." Because, under the facts of this case, Nationwide's coverage was never triggered, the loss-payable clause is simply not involved. Again, the lienholder merely stands in the shoes of the insured. Hunt, *supra*. If Nationwide is not obligated to tender payment to its insured, the loss-payable clause does not inure to the benefit of American Credit. This loss-payable clause applies only in the event of a valid first-party claim under the policy between the insured and Nationwide. American Credit could only receive the benefit of the loss-payable clause should Nationwide have tendered payment to its insured without protecting American Credit's rights as a lienholder, or had otherwise participated in some way to the derogation of American Credit's rights.

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[4] While I do not believe the interpretation of the loss-payable clause controls this case, I disagree with the majority's statement that the clause be strictly construed against Nationwide in favor of American Credit. Nationwide's failure to define the term "conversion" in the insured's policy does not necessarily require us to apply that term narrowly to these facts. The loss-payable clause in this case is not an exclusion of coverage for the insured but exists for the benefit of a lienholder who is not a party to the insurance contract.

In this case, because there was never a first-party claim, I am at a loss to discern why Nationwide is now liable for its insured's misapplication of proceeds received from the at-fault party's carrier. Nationwide's obligation does not extend to insuring American Credit against losses over which Nationwide had no control.[5] American Credit must look solely to the insured who failed to submit to American Credit insurance proceeds from Allstate when she defaulted on the loan.[6]

In my opinion, the loss-payable clause found in the insurance contract between Nationwide and its insured did not protect American Credit's interest where that interest was damaged by the acts of a third-party or by the insured. I would affirm.

[5] Indeed, there is no indication that Nationwide was ever made aware of the event which occasioned damage to the vehicle.

[6] Insured was under no obligation to American Credit to repair her vehicle with the money paid by Allstate so long as she made payments on the loan from American Credit.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Eston Groome, Respondent.

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 26510
Heard April 15, 2008 – Filed June 30, 2008

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia, and Solicitor Robert Mills Ariail, of Greenville, for Appellant.

J. Falkner Wilkes of Greenville, and James H. Price, III, of Price, Ashmore & Beasley, of Greenville, for Respondent.

JUSTICE PLEICONES: The State appeals a pre-trial circuit court order suppressing drugs found after respondent was stopped at a drivers' license checkpoint. We affirm.

FACTS

In response to civilian "crime stoppers" tips of speeding and drug activity, a "Directed Patrol Unit" set up a drivers' license checkpoint one evening in Greenville. A "Directed Patrol Unit" is a specialized crime suppression group; a K-9 team with a drug dog was assigned to the road-block. The dog and his handler walked up and down the line of cars as they were stopped at the checkpoint.

Respondent was stopped and surrendered his drivers license. As the officer walked back to check respondent's tag, he radioed in and learned respondent's license was suspended. Respondent was asked to pull his car into a nearby parking lot, then exit it, and meet the officer at the rear of the vehicle.

The K-9 officer and dog left the line and approached respondent's car. The dog alerted, the car was searched, and marijuana seeds were found on the floorboards. Respondent was placed in the back of a patrol car before being transported to the law enforcement center. After respondent exited the police vehicle at the center, the officer found a baggie containing two other bags, each having white powder in it. The baggies were found to contain 13.02 grams of cocaine. Respondent was "Mirandized" at the station, and admitted smoking marijuana but denied the cocaine was his.

Respondent moved to suppress the drugs alleging the roadblock was violative of the Fourth Amendment. The trial judge agreed, and the State's appeal follows.

SCOPE OF REVIEW

A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000).

ISSUES

1) Whether the circuit court erred in finding the primary purpose of the checkpoint was for general crime control and therefore it was violative of the Fourth Amendment under City of Indianapolis v. Edmond, 531 U.S. 32 (2000)?

2) Whether the circuit court erred in holding that even if the primary purpose was a license checkpoint and there was no Edmond flaw, the roadblock none-the-less violated the Fourth Amendment under Brown v. Texas, 443 U.S. 47 (1979)?

ANALYSIS

The controlling decision in this matter is City of Indianapolis v. Edmond, 531 U.S. 32 (2000). In Edmond, the Court held that a police checkpoint whose primary purpose is general crime control- in Edmond narcotics interdiction- is unreasonable under the Fourth Amendment.

Here, the circuit court judge acknowledged there was conflicting evidence on the true purpose of the checkpoint, but was persuaded the primary purpose was general crime suppression rather then merely a drivers' license checkpoint. He pointed to the following facts to support his conclusion:

1) the checkpoint was conducted by the Directed Patrol Unit, which is assigned specifically to deal with crime suppression issues;

2) a K-9 patrol unit with a nationally certified drug dog team was participating; and,

3) the State presented no evidence as to the plan, procedures, or duration of the roadblock, nor was any evidence of a protocol introduced and as the Supreme Court noted in Edmond, without such information "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they include a license or sobriety check."

The circuit court went on to find that even if the primary purpose were a license checkpoint and thus the roadblock passed constitutional muster under Edmond, the roadblock would still violate the Fourth Amendment under Brown v. Texas, 443 U.S. 47 (1979). Brown established a three part balancing test for determining the constitutionality of a traffic checkpoint:

1) the gravity of the public interest served by the seizure;

2) the degree to which the seizure serves the public interest; and,

3) the severity of the interference with individual liberty.

The trial judge held the first and third factors easily weighed in the State's favor, but found that the State presented no evidence on the second factor.

The State first argues the trial judge erred in finding the primary purpose here was suppression of drug activity. It does not argue that there is no evidence to support the ruling, but instead contends the judge placed "undue emphasis" on certain facts. Under this Court's limited scope of

review, the finding that the primary purpose of the roadblock was general crime suppression is supported by the evidence, and the conclusion that it violated the Fourth Amendment under Edmond must be affirmed. State v. Brockman, *supra*.

The State next argues the trial judge abused his discretion finding the State failed to meet the second Brown factor, the "effectiveness" requirement. The State argues that it need not introduce evidence about the specific effectiveness of this roadblock because, by its very nature, every license check roadblock determines whether the driver is legally licensed. The State's position that license check roadblocks are *ipso facto* constitutional, thereby eliminating the requirement of effectiveness from the Brown formula relies upon Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990). While Sitz does criticize "searching examination of effectiveness" by trial courts, it retains the requirement that the State produce empirical data to support the effectiveness of its roadblock. Sitz at 454 ("unlike [Delaware v. Proust, 440 U.S. 648 (1979), this case [does not involve] a complete absence of empirical data . . . ."). The record supports the trial court's finding that the State failed to produce any evidence satisfying the second prong of the Brown test.

CONCLUSION

There is evidence in the record supporting the trial judge's finding that the primary purpose of this roadblock was general crime suppression and therefore his conclusion that the roadblock violated Edmond must be affirmed. State v. Brockman, *supra*. Even if we were to disagree with this finding, the record supports the trial judge's secondary holding that the State's failure to produce any evidence on the second prong of the Brown v. Texas test renders the checkpoint unconstitutional. Id. Accordingly, the order suppressing the evidence is

AFFIRMED.

MOORE, WALLER and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. I would reverse the trial court's order suppressing the evidence and hold that this checkpoint did not violate the Fourth Amendment.

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the United States Supreme Court held that the Fourth Amendment prohibits law enforcement from setting up a traffic checkpoint where the "programmatic" primary purpose is general crime control. The relevant jurisprudence instructs that the test to determine the primary purpose of a checkpoint is an objective test, and that the examining court should "consider all the available evidence in order to determine the relevant primary purpose." *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (citing *Edmond*, 531 U.S. at 45-47).

In my view, there is no evidence in the record to support the trial court's finding that the primary purpose of this checkpoint was general crime control. The record shows that in accordance with the sheriff's department's guidelines, law enforcement officers placed signs on each road approaching the checkpoint alerting drivers to the checkpoint. Law enforcement officers stopped every vehicle, detained the drivers for no more than two minutes, and only after ascertaining probable cause would they ask the driver to pull off the road into a parking lot for further questioning. Additionally, an officer testified that the purpose of the checkpoint was to verify that every driver had a valid license and registration. Considering all the evidence in the record, I do not believe that the primary purpose of this checkpoint was general crime prevention, nor do I believe that this checkpoint allowed officers to exercise standardless and unconstrained discretion. *See Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (invalidating discretionary "spot checking" in which the officer stopped random motorists on public highways solely for the purpose of checking the drivers' license and registration).

Further, in my opinion, the majority errs in suggesting that *Brown v. Texas*, 443 U.S. 47 (1979) requires the State to provide empirical data regarding the effectiveness of checkpoints or that *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) retained this requirement. In ruling on the constitutionality of a suspicionless checkpoint in which police stopped every

vehicle, the *Sitz* court noted that the case did not involve "a complete absence of empirical data." *Id.* at 454 However, the Supreme Court went on to hold that the second prong of the *Brown* test "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger" and that "for purposes of Fourth Amendment analysis . . . [this decision] remains with the governmental officials." *Sitz*, 496 U.S. at 454.

In my view, the balance of the public interest and the severity of the interference with individual liberty clearly weighs in favor of this checkpoint. As noted by the trial court, the intrusion on individual liberty was minimal and the State has a high interest in preventing unlicensed or uninsured drivers from operating vehicles. In my opinion, this checkpoint provides an effective method of curtailing this problem in that every vehicle was stopped and every driver was required to produce their license, registration, and proof of insurance. Moreover, the fact remains that decisions regarding the techniques and methods of combating roadway dangers remains with law enforcement. *See Id.* Perhaps most significant, however, is that this checkpoint modeled the types of checkpoints that have been upheld as constitutional under the Fourth Amendment. *See Sitz*, 496 U.S. at 455 (holding that a suspicionless seizure where law enforcement briefly stopped all motorists crossing the checkpoint did not violate the Fourth Amendment); *Prouse*, 440 U.S. at 663 (distinguishing between the unconstitutional seizure of drivers without reasonable suspicion and the "[q]uestioning of all oncoming traffic at roadblock-type stops"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (holding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment"). Indeed, while *Edmond* held that the Fourth Amendment prohibits a suspicionless stop whose "programmatic" primary purpose is general crime control, the "holding [] [did] nothing to alter the constitutional status of the sobriety and border checkpoints that [the United States Supreme Court] approved in *Sitz* and *Martinez-Fuerte*, or of the type of traffic checkpoint that we suggested would be lawful in *Prouse*." *Edmond* at 47.

For these reasons, I would hold that the primary purpose of this checkpoint was not general crime prevention and that the checkpoint did not violate Appellant's Fourth Amendment rights.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

SCANA Corporation and
Subsidiaries, Respondent,

v.

South Carolina Department of
Revenue, Appellant.

Appeal from Richland County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26511
Heard May 28, 2008 – Filed June 30, 2008

REVERSED

Milton G. Kimpson, Joe S. Dusenbury, Jr., and Harry A Hancock, of Columbia, for appellant.

John C. von Lehe, Jr. and Andrea St. Amand, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for respondent.

JUSTICE MOORE: This appeal involves a carry-forward of the economic impact zone investment tax credit (hereinafter "EIZ credit"). This is a tax credit allowed for qualified manufacturing and

productive equipment property placed in service during the tax year as provided in S.C. Code Ann. § 12-14-60 (Supp. 2007).[1] The trial court found the carry-forward could be claimed by the taxpayer in the 1997 tax year. We reverse.

FACTS

Section 12-14-60 allowing the EIZ credit was first enacted in 1995. In 1997, the legislature added subsection (D) which allows the taxpayer to carry forward unused credit for ten years from the close of the tax year in which the credit was earned. This amendment was enacted by 1997 S.C. Act No. 151, § 8, which specifies that the carry-forward provision is "effective for tax years beginning after 1996." The specific issue here is whether the carry-forward provision applies only to credits earned after 1996, or whether the carry-forward provision may be applied against the taxpayer's liability in tax years beginning after 1996.

The facts here are uncontested. Respondent (SCANA) is a yearly calendar taxpayer. In 1996, it placed property in service that generated an EIZ credit of $29,575,619. After applying the tax credit against its tax liability for 1996, SCANA had $15,323,257 of unused credit remaining. In 1997, SCANA sought to carry forward this amount of credit pursuant to § 12-16-60(D). Appellant (Department) denied the credit because it was not generated in a tax year after 1996.

The Administrative Law Court (ALC) agreed with Department's interpretation of § 12-14-60(D) and found the carry-forward credit was

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[1]This section provides in pertinent part:

> (A)(1) There is allowed an economic impact zone investment tax credit against the tax imposed pursuant to Chapter 6 of this title for any taxable year in which the taxpayer places in service economic impact zone qualified manufacturing and productive equipment property.

properly denied because it was earned in 1996, and therefore does not qualify as being earned in a tax year "beginning after 1996" as required.[2] On appeal, the circuit court reversed and held that the carry-forward may be used in tax years after 1996, and therefore SCANA was allowed to claim it to offset its tax liability in 1997.

ISSUE

In what year may the carry-forward provision be applied?

DISCUSSION

As enacted in 1997, subsection (D) provided:

> Unused credit allowed pursuant to this section may be carried forward for ten years from the close of the tax year in which the credit was earned.

As noted above, the legislature provided that this provision "is effective for tax years beginning after 1996."

The circuit court found that under the "effective" language in the enacting legislation, SCANA may take the carry-forward credit for credit earned in 1996 because: 1) the statute would not be effective until 1998 otherwise since the credit would have to be earned in 1997; 2) use of the past tense "was earned" indicates earned before the effective date of the carry-forward provision; and 3) a 2005 amendment to subsection (D), by distinction, indicates that the legislature's intent in enacting the original provision was to allow the carry-forward credit to be taken in 1997.

Department argues, to the contrary, that a plain reading of the statute indicates the carry-forward credit applies only to credit actually earned after 1996. It points to the following: the statute refers to credit

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[2]The other issue raised was the effective date of the original § 12-14-60 allowing the EIZ credit. This issue is not on appeal.

that "was earned" implying earned after the effective date; the statute is effective in 1997 because the carry-forward credit may be earned in 1997; the 2005 amendment clarifies what the legislature meant in the original enactment.

We find neither side of the argument persuasive and conclude the effective date language of the carry-forward provision is ambiguous.[3] Further, an analysis of the 2005 amendment is not helpful. This amendment re-designated subsection (D) as (D)(1), and added subsection (D)(2) which allows an extension under certain circumstances of the ten-year period for carry-forward credit.[4] This amendment was enacted as part of 2005 S.C. Act No. 113 which provides:

> [T]he provisions of Section 12-14-60(D)(2) of the 1976 Code, as amended by this act, apply for credits earned in taxable years beginning after 1996.

(emphasis added). The circuit court found that by specifying "credits earned," the legislature signaled its intent that the original subsection (D) was different, therefore the original carry-forward did not require that the credits be earned after 1996. Department argues, on the other hand, that the amendment clarifies the legislature's intent that the credits be earned after 1996.

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[3] At oral argument before this Court, counsel for SCANA emphasized the "was earned" language in subsection (D) as support for finding the carry-forward's applicability in 1997. We note, however, that a carry-forward by definition applies to credits earned in the past and we glean no significance from the use of the past tense in this context.

[4] This section provides:

> (2) In the case of credit unused within the initial ten-year period, a taxpayer may continue to carry forward unused credits for use in any subsequent tax years if the taxpayer:
>
> [setting forth conditions that must be met]

Again, we find neither argument persuasive. A legislative amendment may indicate a change from the original or may indicate a clarification of the original. *Compare* Stuckey v. State Budget and Control Bd., 339 S.C. 397, 529 S.E.2d 706 (2000) (subsequent statutory amendment may be interpreted as clarifying original legislative intent) *and* Key Corp. Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (it will be presumed in adopting an amendment to a statute that the legislature intended some change in existing law). In the absence of other indicia of legislative intent, the amendment is not dispositive.

Because we find the effective date of subsection (D) ambiguous, we resort to statutory rules of construction to resolve the issue. In cases involving a tax deduction, any ambiguity is resolved against the taxpayer.[5] M. Lowenstein & Sons, Inc. v. South Carolina Tax Comm'n, 277 S.C. 561, 290 S.E.2d 812 (1982); Davis Mech. Contractors, Inc. v. Wasson, 268 S.C. 26, 231 S.E.2d 300 (1977); C.W. Matthews Contracting Co. v. South Carolina Tax Comm'n, 267 S.C. 548, 230 S.E.2d 223 (1976); Southern Soya Corp. v. Wasson, 252 S.C. 484, 167 S.E.2d 311 (1969). Here, the allowance of a tax credit is analogous to a tax deduction since both are a matter of legislative grace.[6] Accordingly, we resolve the ambiguity here against the

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[5]This is contrary to the general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government. South Carolina Nat'l Bank v. South Carolina Tax Comm'n, 297 S.C. 279, 376 S.E.2d 512 (1989) (taxpayer should receive the benefit in cases of doubt); Cooper River Bridge, Inc. v. South Carolina Tax Comm'n, 182 S.C. 72, 188 S.E. 508 (1936); Columbia Ry. Gas & Elec. Co. v. Carter, 127 S.C. 473, 121 S.E. 377 (1924); State v. Charron, 351 S.C. 319, 569 S.E.2d 388 (Ct. App. 2002) (*quoting* Cooper River, *supra*).

[6]We note the rule of construction in other jurisdictions is that because a tax credit is a matter of grace, it is strictly construed against

taxpayer and find Department properly disallowed the carry-forward credit for EIZ credit earned in 1996.

REVERSED.

BEATTY, J., and Acting Justice James W. Johnson, Jr., concur. TOAL, C.J., dissenting in a separate opinion in which PLEICONES, J., concurs.

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the taxpayer. *See* Texasgulf, Inc. v. C.I.R., 172 F.3d 209 (2d Cir. 1999); Team Specialty Prods., Inc. v. New Mexico Taxation and Rev. Dep't, 107 P.3d 4 (N.M. 2004); MacFarlane v. Utah State Tax Comm'n, 143 P.3d 1116 (Utah 2006); Midland Fin. Corp. v. Wisconsin Dep't of Rev., 341 N.W.2d 397 (Wis. 1983).

CHIEF JUSTICE TOAL: I respectfully dissent and would affirm the circuit court's decision. The only proposition which is needed to resolve the instant case is this: in the 1997 tax year, S.C. Code Ann. § 12-14-60 (D) allowed unused economic impact zone investment credit to be carried forward beyond the close of the tax year in which the credit was earned.

The majority correctly notes that SCANA earned an economic impact zone investment credit in 1996, of which it was not able to take full advantage in the tax year 1996. When SCANA prepared its tax information for the tax year 1997, the statutory law in effect provided that unused EIZ credit could be carried forward "ten years from the close of the tax year in which the credit was earned." S.C. Code Ann. § 12-14-60 (D) (Supp. 2007). That SCANA was justified in claiming the unused portion of its previously earned credit seems to me to follow rather directly from a straight-forward application of the statute. Thus, although I agree that the majority accurately summarizes the law of ambiguities as it pertains to tax law, I can discern no reasonable ambiguity here.

I would find that the Department of Revenue's proposed alternate interpretation of how this tax credit operated in tax years 1996, 1997, and 1998 is an unreasonable interpretation grafted into a statute and effective date provision in which no ambiguity exists. For the foregoing reasons, I respectfully dissent.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto Owners Insurance Company, Huckaby and Associates and Wright Auto Sales, Respondents,

v.

Lance Rollison, Appellant.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 26512
Heard February 7, 2008 – Filed June 30, 2008

REVERSED

James B. Richardson, Jr., of Columbia and Mark Reagan Calhoun, of Calhoun Law Firm, of Lexington, for Appellant.

Henry H. Taylor, of Taylor Law Firm, of West Columbia, John T. Lay, Jr. and A. Johnston Cox, both of Ellis, Lawhorne & Sims, of Columbia, for Respondents.

JUSTICE BEATTY: In this declaratory judgment action, Lance Rollison, who was injured as a passenger in a vehicle insured by Auto Owners Insurance Company (Auto Owners), appeals the circuit court's order finding he was not entitled to uninsured motorist coverage because he was not a "guest" in the insured vehicle. This Court granted the Court of Appeals' motion for the appeal to be certified directly to this Court. We reverse the decision of the circuit court.

FACTUAL/PROCEDURAL HISTORY

On the night of January 6, 2001, fifteen-year-old David Reed was involved in a single-vehicle accident while driving a Plymouth Laser owned by his grandfather, James L. Wright d/b/a Wright's Auto Sales. Rollison, Reed's fifteen-year-old friend and passenger in the vehicle, was injured in the accident. The vehicle involved in the accident was insured by Auto Owners under a Commercial General Liability Policy that included a Garage Liability Coverage Form and a Dealers' Blanket Coverage Form.

Rollison brought suit against Reed, Wright, and Wright's Auto Sales to recover for injuries sustained in the accident. Auto Owners filed a declaratory judgment action seeking a determination that neither policy provided coverage. In its Complaint, Auto Owners alleged that Wright's policies did not provide coverage because, at the time of the accident, Reed: (1) was not a permissive user of the vehicle or a resident of Wright's home; and (2) was not using the vehicle for purposes associated with Wright's Auto Sales. Additionally, Auto Owners contended the policies did not provide underinsured or uninsured motorist coverage to Rollison because he was not a permissive user or guest in the vehicle at the time of the accident. In response, Rollison filed a counterclaim seeking liability coverage, or in the alternative, uninsured motorist coverage under the Garage Liability policy.

The circuit court judge conducted a nonjury trial. The trial and deposition testimony established that at the time of the accident Reed did not have permission to drive Wright's vehicle nor was he a resident

relative of Wright. Wright testified that at the time of the accident Reed lived alone in a camper located on the premises of the auto sales business. Although Reed had unlimited access to the business office where the vehicle keys were stored, Wright claimed he did not give Reed permission to drive any of the vehicles off the sales lot. In terms of the vehicle involved in the accident, Wright testified he intended to give Reed the vehicle for his birthday when he received an unrestricted driver's license. Wright, however, never gave Reed permission to drive the vehicle on a public road. In fact, Wright stated he told the police officers at the scene of the accident that the vehicle had been taken without his permission. Wright further testified he was unaware that Reed had previously driven vehicles off the lot before the time of the accident. Had he known, Wright stated he would have "tried [his] best to stop" it.

Reed confirmed his grandfather's testimony. Reed testified his grandfather did not know before the date of the accident that he had driven vehicles off the sales lot. According to Reed, he had driven two of the vehicles off the sales lot on at least ten occasions. However, he always drove the vehicles at night so that his grandfather did not witness what he was doing. Reed acknowledged that his grandfather never gave him permission to drive the vehicle that was involved in the accident.

In contrast, Rollison testified he witnessed Reed drive five to ten different vehicles on at least thirty occasions. He further testified that Reed's grandfather was often present when Reed drove off and returned to the sales lot. Rollison assumed Reed had permission to drive the vehicle that was involved in the accident because Reed told him that his grandfather had given him the vehicle. Additionally, Rollison testified that Reed had the keys to the vehicle and had never been reprimanded by his grandfather for driving off the sales lot.

Two teenage friends of Rollison corroborated his testimony. Michael J. Kinney testified that on at least five occasions he had been a passenger in a vehicle that Reed drove off the sales lot in the presence of his grandfather. Kinney believed Reed had permission to drive the

vehicles because he had the keys and had never been reprimanded by his grandfather for driving. However, he admitted there were times when Reed avoided returning the vehicle at night when his grandfather was still present at the sales lot. Kinney testified that Reed would "circle around" until his grandfather left the dealership for the evening. Because of this behavior, Kinney conceded he was under the impression that Reed did not have permission to drive the vehicle at night.

H. Patrick Hodge, III, gave a similar account to that of Kinney. Hodge testified that Reed "always had keys to the [Plymouth] Laser" and that the vehicle was a gift from Reed's grandfather. Hodge claimed he had seen Reed drive "numerous" vehicles. On several occasions, Hodge witnessed Reed drive these vehicles off the sales lot in the presence of his grandfather. Like Kinney, Hodge also observed that when returning a vehicle at night Reed often would circle the auto sales lot and enter it only after his grandfather was no longer at the business. Kinney interpreted Reed's behavior to mean that he had permission to drive but just not at night.

Based on this evidence and the terms of the insurance policies, the circuit court ruled the Commercial General Liability Policy did not provide coverage for the accident as a matter of law because the policy contained an exclusion for bodily injury arising out of the use of the automobile. Additionally, the court found the Garage Liability policy did not provide coverage because Reed did not have Wright's express or implied permission to drive the vehicle on the night of the accident. Therefore, the court held Reed did not qualify as an "insured" pursuant to section 38-77-30(7)[1] of the South Carolina Code or the terms of the policy.

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[1] Section 38-77-30(7) provides:

> "Insured" means 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

Because Reed was not a permissive user of Wright's vehicle at the time of the accident, the court found the vehicle would be deemed uninsured pursuant to this Court's holding in Unisun Insurance Company v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). The court, however, concluded that Rollison was not entitled to uninsured motorist benefits under the Garage Liability policy because he was not a permissive guest in the vehicle at the time of the accident. In reaching this decision, the court reasoned that Rollison could not be a "guest" within the meaning of section 38-77-30(7) of the South Carolina Code without the named insured's permission.

Rollison only appeals the portion of the circuit court's order regarding his status as a "guest" for purposes of uninsured motorist coverage.

DISCUSSION

Rollison argues the circuit court erred in finding that he was precluded from receiving uninsured motorist coverage from the Garage Liability policy issued by Auto Owners to Wright's Auto Sales. He contends he was a "guest" in the vehicle to which the policy applied. Specifically, he asserts that a passenger is not required to use the vehicle or have the named insured's permission in order to qualify as a "guest" under the terms of section 38-77-30(7). For reasons that will be more fully discussed, we agree that Rollison was a guest at the time of the accident.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An insurance policy is a contract between the insured and the insurance

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> 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) (2002).

company, and the terms of the policy are to be construed according to contract law. Estate of Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997). This case primarily involves the interpretation of statutes, which are questions of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Thus, because this action involves the interpretation of a contract and statutes, it is an action at law. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). In an action at law tried without a jury, "our scope of review extends merely to the correction of errors of law." Id. Therefore, this Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

As recognized by the circuit court judge in his order, this Court's case of Unisun provides guidance for a determination of whether a passenger in a vehicle may recover uninsured motorist benefits under the vehicle owner's policy. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). In Unisun, January O'Neale was given a BMW by her father with instructions not to let anyone else drive the vehicle. One night, O'Neale and her friend Jennifer Hurst drove to a party at Christopher Schmidt's house. During the course of the party, Schmidt drove off in the BMW with Hurst as a passenger. Schmidt was involved in a single-vehicle accident which resulted in Hurst being injured. As stipulated by the parties, Schmidt's use of the vehicle was not consensual, but Hurst's use was at all times consensual. Id. at 364-65, 529 S.E.2d at 281. State Farm, the insurance carrier for the BMW, successfully denied liability coverage as a result of Schmidt's non-permissive use of the vehicle. Hurst sought uninsured motorist coverage, claiming the denial of liability coverage by State Farm rendered the BMW an uninsured motor vehicle. Because she was a permissive occupant, guest, or user of the BMW at the time of the accident, Hurst asserted she was covered under State Farm's uninsured motorist policy and the uninsured motor vehicle insurance statutes. Id. at 365, 529 S.E.2d at 281. The circuit court agreed with Hurst, holding

that she could make an uninsured motorist claim against the State Farm policy which insured the BMW. Id.

On appeal, the Court of Appeals reversed on the ground that "Hurst was not an insured, because '[w]hen Schmidt drove off in the BMW without permission, the BMW was no longer a motor vehicle *to which the policy applied*.'" Id. at 365, 529 S.E.2d at 281 (quoting Unisun Ins. Co. v. Schmidt, 331 S.C. 437, 442, 503 S.E.2d 211, 214 (Ct. App. 1998)).

Hurst petitioned for and was granted certiorari by this Court. We reversed the Court of Appeals' decision. In doing so, we analyzed the following questions: (1) was Hurst an "insured" within the meaning of section 38-77-30(7) of the South Carolina Code; and (2) was the BMW an uninsured motor vehicle?

This Court answered the first question in the affirmative based on several grounds. As our primary basis, we noted that "Respondent's concession that Hurst was a 'guest and/or permissive occupant and/or permissive user' of the vehicle places Hurst squarely within the statutory definition of 'insured.'" Unisun, 339 S.C. at 366, 529 S.E.2d at 282. However, even without the Respondent's concession, this Court found that Hurst fell within the definition of "insured" under the uninsured motorist statute and the insurance policy given the BMW was a vehicle "to which the policy applied," and Hurst's "use" of the vehicle was at all times consensual. Id.

In terms of the second question, we found the BMW was "an uninsured motor vehicle based on the plain language of the statute and public policy." Id. at 367, 529 S.E.2d at 282. Because State Farm successfully denied liability coverage, the Court concluded that the BMW fell within section 38-77-30(14) of the South Carolina Code, the uninsured motorist law.[2] Additionally, we found this decision was

[2] Section 38-77-30(14) defines "uninsured motor vehicle" to mean a vehicle as to which:

consistent with the purpose of the uninsured motorist law, which is "'to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle.'" Id. at 368, 529 S.E.2d at 283 (quoting Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 100, 198, S.E.2d 522, 524 (1973)).

We believe our analysis in Unisun is instructive in the instant case in that it establishes: (1) what constitutes an uninsured motor vehicle when an insurer successfully denies liability coverage; and (2) that a passenger who rides with the consent of the named insured is a "guest." However, Unisun is not dispositive given the significant factual difference between the two cases. In Unisun, the insurance carrier conceded that Hurst was a guest or permissive user of the vehicle. Here, Auto Owners specifically asserts that Rollison was neither a permissive user nor guest in the vehicle at the time of the accident.

The factual scenario presented in this appeal requires this Court to extend the holding in Unisun and answer the question of whether Rollison qualified as a "guest" under section 38-77-30(7). In analyzing this issue, we are guided by the general rules of statutory construction.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be

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> (a) there is not bodily injury liability insurance and property damage liability insurance both at least in the amounts specified in Section 38-77-140, or
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> (b) there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder . . . .

S.C. Code Ann. § 38-77-30(14) (2002).

reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). "We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun, 339 S.C. at 368, 529 S.E.2d at 283.

The specific statute at issue, the uninsured motorist statute, is remedial in nature. Unisun, 339 S.C. at 366, 529 S.E.2d at 282. "A statute remedial in nature should be liberally construed in order to accomplish the object sought." Inabinet v. Royal Exchange Assur. of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932).

With these principles in mind, we turn to the language of section 38-77-30(7). Under this section, an "insured" is defined as: (1) the named insured while in the motor vehicle or otherwise; (2) the named insured's resident relatives, specifically his or her spouse, while in the motor vehicle or otherwise; (3) any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies; and (4) a guest in the motor vehicle to which the policy applies or the personal representative of any of the above-listed. S.C. Code Ann. § 38-77-30(7) (2002); see Davidson v. E. Fire & Cas. Ins. Co., 245 S.C. 472, 477, 141 S.E.2d 135, 138 (1965) (interpreting section 46-750.11(2) of the South Carolina Code, the precursor to section 38-77-30(7), and defining the following two classes of insureds: (1) the named insured, his spouse and his or her relatives resident in the same household, while in the vehicle or otherwise; and (2) any person using, with the consent of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies).

A review of the plain language of the statute reveals that "guest" is listed independently as a person who constitutes an "insured." As we interpret the statute, a person in the fourth category of "insured" need only have the status of a "guest" to qualify as an "insured." In comparison, for a person to constitute an "insured" under the third category, he or she must use the vehicle and have the express or implied consent of the named insured. See Davidson, 245 S.C. at 477-78, 141 S.E.2d at 138 (stating "[t]he members of the second [class] . . . the permissive user and the guest, are covered while using, or a guest in, the motor vehicle to which the policy applies, i.e., the motor vehicle designated in the policy") (emphasis added). Because the Legislature did not include the consent language when it listed "guest" in the statute, we do not believe it intended to require a "guest" to obtain the consent of the named insured in order to be eligible for uninsured motorist coverage.

Notably, courts from other jurisdictions interpreting similar statutory language have reached the same conclusion. See, e.g., Beard v. Nunes, 603 S.E.2d 735, 737 (Ga. Ct. App. 2004) (applying Ga. Code Ann. § 33-7-11(b)(1)(B) and stating "[t]he second category [of 'insureds'] consists of 'any person who uses, with the expressed or implied consent of the named insured, the motor vehicle to which the policy applies; a guest in such motor vehicle to which the policy applies'"); Nationwide Mut. Ins. Co. v. Silverman, 423 S.E.2d 68, 71 (N.C. 1992) (applying N.C. Gen. Stat. § 20-279.21(b)(3) and stating "[t]he second class of insured persons is referred to as 'Class II' insureds and includes any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle;" finding injured party was a "Class II" insured given she was "merely a guest in one of the covered vehicles").

Additionally, we believe our interpretation not only effectuates the intention of the Legislature but is also consistent with the general definition of a guest:

> Generally speaking, a guest is one who takes a ride in a car driven by another person, merely for his or her own

> pleasure or on his or her own business, and without making any return or conferring any benefit on the operator thereof. A guest is a person who is carried in an automobile gratuitously, that is, one who gives no compensation for the carriage.

60A C.J.S. Motor Vehicles § 805 (2002 & Supp. 2008); see Owens v. Gresham, 258 S.C. 46, 50, 186 S.E.2d 816, 818 (1972) ("'A person riding in a motor vehicle is a guest if his transportation confers a benefit only upon himself and no benefit upon the owner or operator except such as is incident to hospitality, social relations, companionship, or the like as a mere gratuity.'" (quoting 8 Am. Jur. 2d Automobiles and Highway Traffic, § 475)).

Based on the foregoing, one who is a "guest" at the invitation of the driver has, by implication, the consent of the named insured. Presumptively then, a guest has the consent of the named insured unless he or she has knowledge to the contrary. Logically, because the named insured would rarely be present in a situation as in the facts of this case, a passenger can only rely on the driver's representations regarding his status as a permissive user. Thus, a determination of whether a passenger qualifies as a "guest" under the statute must be viewed from the passenger's perspective.[3]

We believe that to define "guest" otherwise would lead to an absurd result which would require a passenger to specifically inquire whether the driver either owned the vehicle or had permission from the named insured to drive the vehicle. Clearly, such an interpretation would be contrary to the intention of the Legislature as well as the remedial purpose and inclusive nature of the uninsured motorist statute.

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[3] Illustrative of this point is our comment in Unisun that Hurst, even without the concession of the parties that she was a "guest," would have fallen "within the definition of 'insured' under both the statute and the policy." Unisun, 339 S.C. at 366, 529 S.E.2d at 282. Thus, an invited passenger of a non-permissive driver may, but not necessarily, qualify as a "guest" for the purposes of uninsured motorist coverage.

See Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973) ("The public policy declared by our uninsured motorist statute imposes an obligation on insurers to provide protection to their insureds against loss caused by wrongful conduct of an uninsured motorist."). However, we emphasize that whether one is a mere passenger or a "guest" for purposes of determining an "insured" is largely dependent upon the facts and circumstances of each case, particularly the relationships among the involved parties. See Owens, 258 S.C. at 51, 186 S.E.2d at 818 ("Whether one is a passenger or a guest depends largely upon the facts and circumstances of each particular case.").

Turning to the facts of the instant case, we hold the circuit court erred in finding that Rollison was not entitled to uninsured motorist coverage. Applying Unisun, it is clear the vehicle involved in the accident was an uninsured vehicle given Auto Owners successfully denied liability coverage. The question then becomes whether Rollison was an "insured" at the time of the accident pursuant to section 38-77-30(7). As previously discussed, the only possible category that Rollison could come within is category four, a "guest." Based on the specific facts of this case, we conclude that Rollison was a "guest."[4]

On the day of the accident, Reed drove to Rollison's home during daylight hours and invited him to drive to another friend's home. Based on Reed's invitation, Rollison by implication had the consent of Wright, the named insured. Furthermore, there is no evidence that Rollison had reason to know that Reed was not a permissive user of

[4] Recently, our United States District Court reached a different conclusion when it considered Unisun and analyzed a question similar to the instant case. Progressive Specialty Ins. Co. v. Murray, 472 F.Supp.2d 732 (D.S.C. 2007). The holding in that case is neither controlling nor dispositive. The District Court specifically noted that the question of whether someone qualifies as a "'guest' under the statute is a difficult question because the South Carolina courts have never expressly defined that term." Id. at 738.

Wright's vehicle. On multiple occasions Rollison witnessed Reed drive off Wright's sales lot. Rollison also believed that Reed had permission to drive the vehicle because he had possession of the keys to the vehicle, a supposed gift from Wright, and had never been reprimanded by Wright for driving off the sales lot. Because Rollison was a "guest" and, thus, an "insured" for the purposes of uninsured motorist coverage, we reverse the decision of the circuit court.[5]

REVERSED.[6]

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[5] Auto Owners asserts that to allow Rollison to recover uninsured motorist benefits is contrary to the language of the policy at issue. We find this issue to be without merit given the statute is controlling if the terms of the policy excluding coverage are in conflict with the requirements of the statute. See Hogan v. Home Ins. Co., 260 S.C. 157, 160, 194 S.E.2d 890, 891 (1973) ("If the provision excluding coverage is in conflict with the requirements of the statute, of course, the statute controls the rights of the parties.").

[6] With all due respect, in our view to concur in the conclusion reached by the dissent would require an assumption of a holding in Unisun that is not evident in the opinion itself. Moreover, it would require the abandonment of a long-held position in our jurisprudence that the uninsured motorist statute is remedial in nature and should be liberally construed. See Unisun, 339 S.C. at 366, 529 S.E.2d at 282 (recognizing the uninsured motorist statute is remedial in nature); Inabinet, 165 S.C. at 36, 162 S.E. at 600 ("A statute remedial in nature should be liberally construed in order to accomplish the object sought.").

Although the dissent's analysis may be "consistent" with our decision in Unisun, it is clearly not the same. The dissent posits "passengers who were not 'invited' by one of these persons-the named insured, her resident relatives, permissive users-are not guests and are therefore not insureds." That is not the holding in Unisun. In Unisun, unlike here, the guest status of the plaintiff was uncontested and the Court was not required to define "guest." Instead, the Court focused its

TOAL, C.J., MOORE AND WALLER, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

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analysis on permissive/consensual use of the vehicle by the injured party versus non-permissive use of the driver.

In our view, the Unisun Court could have ended its analysis when it was determined that Hurst, the injured party, was a guest. As previously discussed, section 38-77-30(7) does not in any way condition the status of guest. The statute clearly includes "a guest in the motor vehicle to which the policy applies" as an insured.

The Unisun Court clearly wanted to specifically deal with the Court of Appeals' pronouncement that a non-permissive driver negates uninsured coverage for otherwise permissive/consensual passengers.

JUSTICE PLEICONES: I respectfully dissent and would affirm the circuit court's order finding Rollison was not a guest within the coverage of the Auto Owners' policy.

I agree with the majority that our decision in this case rests on our interpretation of "insured" found in S.C. Code Ann. § 38-77-30 (7)(2002)[7]:

> "Insured" means 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.

As I read the statute, "insured" means the named insured and resident relatives, persons using the car with the consent of the named insured, and their guests. While I agree that a guest need not obtain the consent of the named insured to be covered by the policy, in my view, whether a passenger is a "guest insured" is dependent on the status of the person "inviting" him. The statute unequivocally provides that all passengers of the named insured and her resident relatives are "guest insureds," as are passengers invited by permissive users. On the other hand, passengers who were not "invited" by one of these persons-the named insured, her resident relatives, permissive users- are not guests and are therefore not insureds. This analysis is consistent with our decision in Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). In Unisun, it was the status of the injured passenger as an "invitee" of both the named insured and the permissive user which made her a "guest" and thus an insured. Since Rollison was invited by a driver

[7]Unlike the majority, I am not persuaded that the interpretation of this term in § 38-77-30 (7) is impacted by the remedial nature of the uninsured motorist statute, S.C. Code Ann. § 38-77-150.

who did not have permission, I agree with the trial court that he is not a 'guest insured" under the statute and therefore not entitled to recover under the policy.

I do not agree that the status of a passenger should be determined from his perspective, and furthermore do not agree with the majority's holding that there is a presumption that a passenger invited by the driver has been invited with the named insured's consent.[8] If the Court determines to create this test and this presumption, then in my opinion the case must be remanded for a hearing on this specific factual inquiry.

I would affirm the circuit court order.

[8] One need only think of the implications where the driver of a stolen vehicle invites passengers to ride along, and they are subsequently involved in a serious accident.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael David Wood, Respondent.

Opinion No. 26513
Submitted June 3, 2008 – Filed June 30, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael David Wood, of Charleston, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent represented a client in a domestic matter. The client, who was living in the marital home, gave respondent an unopened package

addressed to the client's spouse that had been delivered to the marital home. Respondent, without the knowledge or consent of the addressee, opened the package and removed its contents. Immediately thereafter, respondent informed opposing counsel, who was present for an emergency hearing in the case, of his actions and allowed him to inspect the contents of the package. During the emergency hearing, respondent informed the court that he had opened the package and he presented the contents of the package to the court.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 4.4 (a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender) and Rule 8.4 (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct, to engage in conduct involving dishonesty or to engage in conduct prejudicial to the administration of justice). Respondent further admits his misconduct constitutes grounds for discipline under Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5)(it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth L. Mitchum, Respondent.

Opinion No. 26514
Submitted June 3, 2008 – Filed June 30, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia; for Office of Disciplinary Counsel

Kenneth L. Mitchum, of Georgetown, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension not to exceed two years pursuant to Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and suspend respondent from the practice of law in this state for nine months. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent admits the following with regard to his representation of a client:

1. Respondent filed suit on behalf of the client, but took no further action thereafter, resulting in the case being dismissed. Respondent failed to notify the client that the case had been dismissed and failed to restore the case within the time period set forth in Rule 40, SCRCP.

2. Respondent falsely represented to the client he had filed suit on her behalf in another matter. When he eventually filed the suit, he failed to effect service on the defendants despite representing to the client that he had done so.

3. In a matter before the State Board of Education, respondent failed to notify the client of the Board's decision to suspend her teaching certificate. The client did not learn of the suspension until after the period for appeal had expired. In this same matter, respondent recommended the client file suit against the Board and thereafter assured her he had filed such a suit on her behalf when in fact he never filed the suit.

4. Respondent assisted the client in receiving a loan and signed as guarantor of the loan. When the client refused to make further payments on the loan, respondent satisfied the loan.

5. Respondent failed to keep the client reasonably informed of the status of her cases and failed to promptly comply with the client's reasonable requests for information.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation, including the legal knowledge, skill, thoroughness and preparation

reasonably necessary for the representation, to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall consult with a client about the client's case, keep the client reasonably informed about the case and promptly respond to reasonable requests for information); Rule 1.8(e)(a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter and a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). Respondent also admits that he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, by violating the Rules of Professional Conduct.

Conclusion

We find a nine month suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

The Supreme Court of South Carolina

In the Matter of David Arthur Braghirol, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

account(s), operating account(s), and any other law office account(s) 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 accounts 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 Jonathan M. Harvey, 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 Jonathan M. Harvey, 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. Harvey's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina
June 24, 2008

The Supreme Court of South Carolina

Jose Missouri, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Counsel for petitioner filed a petition for a writ of certiorari, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), from an order denying and dismissing petitioner's application for post-conviction relief (PCR). By order dated October 30, 2007, the Court of Appeals denied the petition.

Thereafter, counsel for petitioner received two extensions of time to serve and file a petition for a writ of certiorari and appendix pursuant to Rule 226, SCACR, in this Court. Meanwhile, this Court held in Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008), that it will not entertain a petition for a writ of certiorari pursuant to Rule 226 in a PCR matter where there has been a "letter denial" by the Court of Appeals.

By order dated April 9, 2008, this matter was dismissed, pursuant

to Haggins, on the ground that the Court of Appeals denied the petition for a writ of certiorari by letter without issuing a formal order or opinion. The Court of Appeals sent the remittitur to the lower court on April 10, 2008.

Petitioner now asks the Court to reconsider its decision, recall the remittitur and reinstate the matter. Specifically, petitioner argues Haggins is inapplicable to his case because his petition was denied by way of an order. Petitioner argues further that the Court should recall the remittitur and grant reinstatement because the Court had already granted him two extensions of time, he had completed work on the petition at the time the order of dismissal was issued, his case involves substantial meritorious issues for appellate review, and the rule set forth in Haggins should not be applied to PCR appeals already before the Court. Finally, petitioner argues application of Haggins to his case would violate his rights to due process and equal protection.

Initially, we agree that this matter should not have been dismissed pursuant to Haggins since the Court of Appeals disposed of the petition for a writ of certiorari by way of an order instead of a letter denial. However, we hereby extend Haggins to petitions for a writ of certiorari filed

in this Court pursuant to Rule 226 following the Court of Appeals' issuance of an order denying a petition for a writ of certiorari filed pursuant to Johnson v. State, supra in a PCR matter. We find neither Haggins, nor our extension of Haggins herein, constitutes a violation of constitutional rights. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006); Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004); Rule 226(b), SCACR; 16C C.J.S. Constitutional Law § 1691 (2005). Finally, petitioner's argument that Haggins should not apply to his case because it was already pending before the Court at the time the decision in Haggins was issued, and because petitioner had already invested time and resources in preparing the petition, ignores the fact that this Court applied the new rule set forth in Haggins to Haggins himself, indicating our intent for the rule to be applied to all Rule 226 petitions in PCR appeals regardless of how far along in the process they may be. For that reason, we find it appropriate to apply our extension of the rule announced herein to petitioner's case and deny petitioner's motion to recall the remittitur and reinstate the petition for a writ of certiorari.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

June 26, 2008

The Supreme Court of South Carolina

In the Matter of Ivan N. Walters, Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR.[1] Respondent has filed a return in which he consents to being placed on interim suspension.

Pursuant to Rule 17(b), RLDE, respondent's license to practice law in this state is hereby suspended until further order of the Court.

IT IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

June 27, 2008

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[1] On June 18, 2008, respondent pled guilty in the United States District Court for the District of South Carolina to an information charging misprison of a felony in violation of 18 U.S.C. § 4.