South Carolina Law Review

Volume 23
Issue 4 *Survey of South Carolina Law*

Article 8

1971

Insurance

Richard J. Paul

INSURANCE

I. OMNIBUS CLAUSE—PERMISSIVE-USE

Three cases were decided in the past survey period by the South Carolina Supreme Court dealing with the question of omnibus coverage where the teenaged son or daughter of an insured had permitted a friend to drive a car belonging to the insured. The broader question decided by these cases was whether consent could "flow through" the person with permission to a third party.

In *State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.*,[1] Ricky James, the son of the insured, had asked a friend, David Lasater, to pick up a pair of slacks for him at a downtown department store. David drove the car, provided for Ricky by his father, to make the trip and was involved in automobile collision. Mr. Wallace James' insurer, State Farm, brought an action against Allstate, Lasater's insurer, seeking a declaratory judgment that David Lasater was not an additional insured under the omnibus coverage of the automobile liability policy issued to Mr. James. The trial judge sitting without a jury, found that he was not, since Mr. James had specifically forbidden Ricky to let anyone outside the family drive the car. On one occasion, Mr. James had learned that Ricky had allowed friends to drive the car and had admonished him to allow no one else to do so.

Allstate, on appeal, contended that "the named insured's prohibition against the car being operated by a third person [was] not controlling, nor even germane."[2] It urged the court to recognize a distinction between the verbs "use" and "operate" as follows:

> A person is said to "operate" a car when he manipulates its controls by driving it. One "uses" a car, by contrast, when he employs it for a particular purpose. At the time of the accident the Chevrolet was being "used" for a purpose consented to by the named insured, Mr. James. Specifically, David was running an everyday errand for Ricky—just the sort of thing for which the car had been provided. . . . David's "use" was with the consent of the named insured, whose express prohibition against "operation" by a third person was irrelevant.[3]

1. 179 S.E.2d 203 (S.C. 1971).
2. *Id.* at 204.
3. *Id.*

The court noted that a number of cases from other jurisdictions had accepted the distinction urged by the appellant.[4] Finding the vehicle to have been employed at the time of the accident for a permitted purpose or use, those cases had extended omnibus coverage to the third person despite the named insured's express prohibition against his operation. The court did not find those cases persuasive, because of the decisive difference in the terminology of the omnibus coverage afforded from that provided by statute in South Carolina. The language of the omnibus coverage in those cases was found to be virtually identical to that contained in *Hanover Insurance Co. v. Miesemer*.[5] The policy in that case covered "any . . . person using [the insured] automobile, provided the actual use thereof is with the permission of the named insured. . . ."[6] The court reasoned that, under such language, it was the "actual use" which must have been permitted. A permitted "actual use" and, therefore, coverage could be found even with an express prohibition against "operation" by the third person involved.[7]

The South Carolina Supreme Court concluded:

> Our Section 46-750.31,[8] by contrast, conceded by appellant to bound the scope of respondent's omnibus coverage, extends it to "any person who uses [the insured vehicle] with the consent, expressed or implied, of the named insured. . . ."[9] Under this language it is the *person* using the vehicle, and claiming omnibus coverage, who must have the consent of the named insured. Consent must run to the "person who uses," as well as to the use he makes. To hold otherwise would, we think, do violence to the language of the statute.[10]

Another contention of Allstate was that Ricky James' dominion over the insured car "was so unrestricted that for purposes of coverage under the omnibus clause he should be considered an owner of the car."[11] Appellant also urged that since he had made several payments

4. *See* Annot., 4 A.L.R.3d 10 (1965).

5. 42 Misc.2d 881, 249 N.Y.S.2d 87 (Sup. Ct. 1964).

6. *Id.* at 883, 249 N.Y.S.2d at 89.

7. 179 S.E.2d at 204-5 (S.C. 1971). "The somewhat different verbiage of the omnibus clause involved in *State Farm Mutual Auto Ins. Co. v. Allstate Ins. Co.*, 175 S.E.2d 478 (W. Va. 1970), conveys the same idea; it is the 'actual use' which must be permitted." 179 S.E.2d at 205, n.1.

8. S.C. CODE ANN. § 46-750.31 (Supp. 1970).

9. *Id.*

10. 179 S.E.2d at 205 (S.C. 1971) (court's emphasis).

11. *Id.*

on the car following its purchase, Ricky had gained an equitable interest in its ownership. The court dismissed this contention as well, stating that the omnibus coverage depended upon the consent, not of the owner but of the named insured, Mr. James.[12]

In *Dearybury v. New Hampshire Insurance Company*,[13] a case decided the same day, there were only immaterial differences in the fact situation. Gloria Dearybury, against the expressed prohibition of her father, had allowed a friend to drive the car furnished for her use. While the friend was driving, an accident occurred in which she was seriously injured. The lower court found that the friend was an insured under the omnibus clause of Mr. Dearybury's automobile liability insurance policy issued by New Hampshire Insurance Company. Relying upon the annotated cases referred to in *State Farm*,[14] it held that it was immaterial whether Gloria's father had forbidden her to allow another to drive the car, saying, "It is the permission to use and not the permission to operate which is controlling."[15]

The supreme court, in reversing, stated that such conclusion was opposed to its opinion in *State Farm*, unless it was justified by policy language affording broader omnibus coverage then required by South Carolina statute. In this instance, the court found that the policy definition of an insured adhered strictly to the statute and did not broaden the definition in any way.[16] Instead, as the court noted, its purpose was to provide a shield against the liberal construction of omnibus coverage which holds that permission to use an automobile for one purpose implies permission to use it for all purposes.[17]

The third case dealing with similar facts, *Southern Farm Bureau Casulaty Insurance Co. v. Hartford Accident & Indemnity Co.*,[18] again ruled against omnibus coverage for a friend of the insured's permittee.

---

12. *Id.*
13. 179 S.E.2d 206 (S.C. 1971).
14. *See* n. 4, *supra.*
15. 179 S.E.2d at 207.
16. The policy clause in this case provided:
Persons insured: the following are insureds under Part I:
. . . any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission. . . . *Id.*
17. *Id.* The supreme court rejected such construction as unsound in *Rakestraw v. Allstate Ins. Co.*, 238 S.C. 217, 227, 119 S.E.2d 746, 750 (1961).
18. 179 S.E.2d 454 (S.C. 1971).

The testimony had shown that the insured had instructed his son not to allow any other person to drive any of the cars entrusted to him and had failed to show any implied or expressed consent for the friend to drive the car when it was involved in the accident. The court ruled that the burden of proof was upon the party taking the position that there was coverage under the omnibus clause to show that expressed or implied permission actually existed and the burden had not been met. The court stated:

> The permission which puts the omnibus or extended coverage clause of the policy of insurance into operation may be either expressed or implied, but whether the permission be expressly granted or impliedly conferred, *it must originate in the language or the conduct of the named insured or some one having authority to bind [him] in that respect. . . .*[19]

The court, following the rule adopted in *Dearybury* and *State Farm*, found that because of the lack of expressed or implied consent, the automobile liability policy of the insured did not cover his son's friend.

In all of the foregoing cases, Associate Justice Lewis dissented on the grounds that it was immaterial whether or not the insured had forbidden his permittee to allow another to drive. Justice Lewis reasoned that if the third person was driving the automobile with the permission of the permittee and the use to which the automobile was being put was within the scope of the original permission, the third person should be afforded coverage under the omnibus clause.[20]

Associate Justice Bussey concurred in the conclusion reached in the three cases that the respective drivers were not using such vehicles with the "consent, express or implied, of the named insured[s]."[21] However, he raised the interesting question of whether the drivers of the vehicles were guests in such vehicles, within the contemplation of Section 46-750.31,[22] and afforded coverage by virtue of that statute. He would have remanded each of the cases for the consideration and adjudication of such questions.[23]

---

19. 179 S.E.2d at 456, *quoting from* Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 223, 119 S.E.2d 746, 748 (1961) (court's emphasis).

20. Dearybury v. New Hampshire Ins. Co., 179 S.E.2d 206, 208-9 (S.C. 1971).

21. 179 S.E.2d at 207.

22. S.C. CODE ANN. § 46-750.31 (Supp. 1970). The term "insured," as defined in this section, includes the following: "and a guest in such motor vehicle to which the policy applies. . . ."

23. Dearybury v. New Hampshire Ins. Co., 179 S.E.2d 206, 207-8 (S.C. 1971).

One other case during the survey period, *Boston Old Colony Insurance Co. v. C.B. Prentiss & Co.*,[24] dealt with omnibus clause coverage, but it involved the question of employer-employee permission. Cornelius J. Baker, the teen-aged nephew of the president of C.B. Prentiss & Company, was provided a panel truck to use in connection with his employment. He was allowed to drive the truck back and forth to work and to keep it at his home at night and on weekends. One evening he had the truck out for his personal use and struck a pedestrian. The company's insurer, Boston Old Colony, denied coverage and brought an action for declaratory judgment. The lower court found implied permission on the part of the insured, and the insurer appealed the decision.

The appellant contended that there was no implied consent in the absence of Baker having actually had a reasonable belief that consent to his use was intended. Baker had testified that he had known at the time of the accident that he did not have permission. Appellant argued that what was in Baker's mind, as reflected by his testimony, was conclusive of the issue.[25] In support of its contention, it strongly relied on certain language in *Crenshaw v. Harleysville Mutual Casualty Co.*[26] which stated:

> Generally, in the case of employer and employee, there must be some conduct on the part of the employer sufficient *to raise in the mind of the employee* a reasonable belief that consent was intended.[27]

The supreme court, in dismissing the appellant's argument, stated that the issue of whether or not there was implied consent could not rest solely upon the testimony of the employee as to what was in his mind at the time, regardless of any other testimony. The court stated the test to be, instead, "whether or not under all the circumstances disclosed by the evidence the employee reasonably had the right to assume consent or permission."[28] It quoted further from the decision in *Crenshaw*:

> Consent to the use by an employee of his employer's automobile, outside the scope of his employment, will be implied only if

24. 180 S.E.2d 653 (S.C. 1971).
25. *Id.* at 656.
26. 246 S.C. 549, 144 S.E.2d 810 (1965).
27. *Id.* at 554, 144 S.E.2d at 812-13 (emphasis added).
28. 180 S.E.2d at 656.

> there has been "a course of conduct or a practice with the knowledge and acquiescence of the owner, such as would indicate to a reasonable mind that the employee had the right to assume permission under the particular circumstances."[29]

The supreme court noted that there was evidence that Prentiss had known and acquiesced in the use of the truck by Baker to take his grandmother, the mother-in-law of Prentiss, to work at night. There was also testimony susceptible of the inference that Prentiss knew of Baker's use of the truck on several occasions for his purely personal pleasure. The court further noted that Prentiss had completed and forwarded a form to the South Carolina Highway Department certifying that Baker had been insured at the time of the accident in order for Baker to retain his driver's license. The court reasoned that such evidence gave rise to the inference that "Baker did, in fact, have permission to drive the truck at the time of the accident."[30]

II. CONTRIBUTION BETWEEN INSURANCE COMPANIES

The case of *Nationwide Insurance Co. v. Hartford Accident & Indemnity Co.*[31] involved an action brought by Nationwide to recover from Hartford, a pro rata share of the $8,000 it had paid to one J.R. Mixson as a result of accidental injuries. Mixson had been injured while a passenger in a trailer insured by Hartford under an automobile liability insurance policy issued to C. W. Priester and covering the operation of the trailer and anyone using it with Priester's consent. With the permission of Priester, the trailer was being pulled by Ellis Hunt, who had his automobile insured with Nationwide. Mixson brought an action against both men and their respective insurance companies undertook to defend the suit. At trial Priester was granted a nonsuit and counsel for Hartford left the courtroom and did not further participate. Prior to the rendering of a verdict, Nationwide settled the claim for $8,000.

In its complaint, Nationwide alleged that the Hartford policy, as well as its own, contained a pro rata clause and that the companies were jointly liable to Hunt for the payment of the whole amount. Nationwide alleged further that by making settlement payment, it became

29. 246 S.C. at 554, 144 S.E.2d at 813, *quoting from* U.S. Fidelity & Guaranty Co. v. Brann, 297 Ky. 381, 384, 180 S.W.2d 102, 104 (1944).

30. 180 S.E.2d at 656.

31. 178 S.E.2d 660 (S.C. 1971).

subrogated to the rights of Hunt against Hartford and became entitled to recover from Hartford its pro rata share of the amount paid in settlement of the claim.[32] Hartford demurred to the complaint, declaring no cause of action existed because the plaintiff had made payment as a volunteer and thus was not entitled to contribution.[33]

Upon the sustaining of the demurrer, Nationwide appealed. The supreme court noted that the effect of sustaining the demurrer was to hold, as a matter of law, that the only reasonable inference to be drawn from the allegations of the complaint was that Nationwide had paid as a volunteer and was not entitled to subrogation. The court, however, thought a question of fact had been raised for the determination of the trial court. In reversing, the court stated:

> Nationwide not only had its own interest to protect, but had a legal obligation to defend the suit and to pay a judgment when and if procured; and also had a legal and moral duty to use care in negotiating a settlement so as to protect Hunt from exposure to the possibility of having to pay some amount above the policy coverage.[34] Taking the allegations of the complaint as true, Hartford had a similar obligation to Hunt.[35]

III. UNINSURED MOTORIST COVERAGE

A. Public Carrier

Weeks v. Friday[36] was an action brought by Ora Bell Weeks, for injuries received when the taxicab she was driving collided with an uninsured motorist. The insurer, Canal Insurance Company, moved that service be quashed, arguing that its policy did not contain uninsured motorist coverage, nor was it required to do so. The circuit court quashed the service and Weeks appealed.

The supreme court stated that Section 46-750.33 of the South Carolina Code[37] forbids the issuance or deliveryof any policy of personal injury or property damage automobile liability insurance, unless it contains uninsured motorist coverage. The court noted further that

32. *Id.* at 661-62.
33. *Id.* at 661.
34. *See* Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933).
35. 178 S.E.2d at 662.
36. 179 S.E.2d 909 (S.C. 1971).
37. S.C. CODE ANN. § 46-750.33 (Supp. 1970).

although this section was a part of the Motor Vehicle Safety Responsibility Act, presently codified as Chapter 8 of Title 46, it had rejected the view that the section's application was restricted to policies required to be certified under that act.[38] Therefore, the court ruled that the fact that the policy issued by Canal was not certified to the Highway Department, as proof of financial responsibility under the act, did not immunize it from the uninsured motorist requirement.[39]

Canal relied on two other sections of Chapter 8 in arguing that it was immune from the requirement. The first, Section 46-702(7)(i) stated:

> *Other required policies unaffected.* [Chapter 8] shall not be held to apply to or affect policies of automobile insurance against liability insuring public carriers or policies which may be required by any other law of this state, any law or ordinance of any municipality or any [federal law], and those policies, if they contain an agreement or are endorsed to conform with the requirements of this chapter, may be certified as proof of financial responsibility under [Chapter 8].[40]

Canal contended that, since its policy insured a common carrier and was required by municipal ordinance and by virtue of the above statute, Chapter 8 with its uninsured motorist provisions did not apply to the policy.[41]

The court reviewed the legislative history of the quoted statute and noted that twenty-seven years before its passage in original form, the legislature had subjected the public carrier industry to *mandatory* insurance requirements.[42] Public carriers were required to hold insurance policies containing provisions prescribed by the Highway Commission (now the Public Service Commission), which differed significantly from the corresponding provisions which a policy had to contain in order to be certified under the Safety Responsibility Act. The court concluded:

38. 179 S.E.2d at 910. *See* Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964); *cf.* Pacific Ins. Co. v. Fireman's Fund Ins. Co., 247 S.C. 282, 147 S.E.2d 273 (1966).

39. 179 S.E.2d at 910.

40. *Id.* at 910-11, *quoting from* S.C. CODE ANN. § 46-702(7)(i) (Supp. 1970).

41. 179 S.E.2d at 911.

42. Section 5 of Act No. 170 of 1925, *presently codified as* S.C. CODE ANN. § 58-1481 (1962).

> No reason has been suggested, and none occurs to us, for denying uninsured motorist coverage to insureds under liability policies issued on taxicabs. We are persuaded that the legislature did not intend this inharmonious result and that Section 23(a) of the Act, the parent of Section 46-702(7)(i), was intended merely to forestall the contention that certification of a policy under the Act would obviate the need for compliance with the more vigorous policy requirements of other applicable laws and regulations . . . . We are convinced that this construction, which we adopt, conforms to the intention of the legislature.[43]

Canal also invoked Section 46-704[44] as a bar to the application of Chapter 8 to the taxicab policy it had issued. The relevant part of that section reads:

> [Chapter 8] shall not apply with respect to any [government-owned vehicle], nor, except for certain named sections, shall it apply, with respect to any motor vehicle which is subject to other laws of this State which require their owners to carry insurance or to place security, in a manner which would make those owners carry insurance, or place security in addition to the amounts required by this chapter.[45]

The court denied the availability of the proffered section's application to Canal, because it failed to show that its policy insured a motor vehicle "subject to other laws of this State which require [its owner] to carry insurance."[46] The court noted that the section only sought to forbid the application of Chapter 8 in such a way as to impose on mandatory insureds a second, cumulative requirement as to policy limits. Thus, as the court inferred, the chapter's application to those mandatorily insured under other laws was contemplated, so long as the sole proscribed result was avoided.[47]

---

43. 179 S.E.2d at 911.

44. S.C. CODE ANN. § 46-704 (1962).

45. 179 S.E.2d at 911, *quoting from* S.C. CODE ANN. § 46-704 (1962).

46. 179 S.E.2d at 911.

47. *Id.* The court felt that this view of § 46-704 was reinforced by a comparison of its provisions with those of the Virginia code section [VA CODE ANN. § 46.1-392 (Repl. 1967)], from which it was fashioned. The Virginia section treats state-owned vehicles and mandatorily insured public carrier vehicles alike, exempting both from most of that state's financial responsibility act. The South Carolina section, by contrast, distinguishes the two classes, following Virginia's exemption only as to government-owned vehicles. This distinction, the court pointed out, indicated an intention to depart from that state's financial responsibility act. *Id.* at 912. *See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

The court dismissed Canal's last contention that orders of the Insurance Commission indicated that companies issuing policies required by other state laws were to be treated differently from policies under the Safety Responsibility Act. It stated that the orders failed to show that the administrative practice resulted from the sections interpreted in this case.[48]

B. Effect of Settlement and Release

Wallace v. Nationwide Mutual Insurance Co.[49] was an action brought by an administratrix for her intestate's wrongful death against his insurer under its uninsured motorist coverage. The intestate had been injured in an automobile collision and there had been a question as to whether the other party was covered by liability insurance. Wallace entered into an agreement with Nationwide whereby he agreed that, in the event the other insurer avoided responsibility, he would accept the sum of $1,500 "for his bodily injuries and property damage sustained in the collision."[50] Thereafter, Wallace died as a result of his original injuries and a judgment was secured against the owner and operator of the adverse automobile in the sum of $40,000. After it was determined that the other insurer could not be held liable, Nationwide argued that it was required to pay only the amount in keeping with the agreement made with the intestate and the lower court ruled in its favor.

On appeal, the supreme court read the circuit order as limiting recovery on the theory that the result was required by the decision in *Price v. Richmond & Danville Railroad*.[51] That case was in tort for the wrongful death of the victim who, prior to his death, had settled with the wrongdoer for his injury. Recovery was denied upon the ground that the statute[52] limited the administratrix to recovery only in cases in which the injured party could have recovered if he had survived. "Since the release would have barred recovery by the victim in his lifetime, the Court held that the action for wrongful death did not lie."[53]

48. 179 S.E.2d at 912.
49. 182 S.E.2d 84 (S.C. 1971).
50. *Id.* at 85-6.
51. 33 S.C. 556, 12 S.E. 413 (1890). This case was followed in *Rish v. Seaboard Air Line Ry.*, 106 S.C. 143, 90 S.E. 704 (1916).
52. S.C. CODE ANN. § 10-1951 (1962).
53. 182 S.E.2d at 85.

The court noted, however, that in this case the plaintiff had already recovered judgment against the wrongdoer for the death of her husband. The tort-feaser, who had made no settlement with the injured party, could not have defended the action on the rationale of the *Price* case. The court could not perceive how the insurance company, against which no rights need have been, nor were, asserted under the wrongful death statute, could defend on that rationale.[54]

The court stated that the plaintiff was entitled to recovery to the full extent of the defendant's contractual obligation to pay unless the defendant, by contract with the intestate, had been absolved of liability in excess of $1,500. It noted further that the written promise of the intestate, upon which the defendant relied upon as a release, was no more than a conditional agreement to settle his claim for "property damage and bodily injury."[55] The court concluded:

> [T]he words of the instrument make plain the agreement relied upon simply does not modify the carrier's obligation with respect to this claim, founded upon a judgment for damages for wrongful death, as to which the intestate contracted only by the insuring agreement.[56]

In *Lawson v. Porter*,[57] the plaintiff's insurer, National Grange Mutual Insurance Company, had been served with the summons and complaint because it was anticipated that the defendant's insurer would deny liability coverage. National Grange sought to have the service set aside on the ground that the plaintiff had executed a "Release and Trust Agreement," by which it was released from any liability under the uninsured motorist provision of its policy. The circuit court denied the motion and National Grange appealed.

The supreme court observed that the service was required by statute, in that Section 46-750.33 of the Code provides:

> No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision. The insurance carrier shall have the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability,

54. *Id.*
55. *Id.*
56. *Id.*
57. 180 S.E.2d 643 (S.C. 1971).

> and shall have twenty days after service of process on it in which to make such appearance. . . .[58]

The court stated that recovery under the uninsured endorsement was subject to the condition that the insured establish legal liability on the part of the uninsured motorist. An action *ex delicto* must be brought in which the only issues are that of liability and the amount of damage. After judgment against the uninsured motorist has been secured, a direct action *ex contractu* could be brought to recover from the insurance company on its endorsement. In the latter action, policy defenses could be properly raised by the insurance company.[59]

The court held that the trial judge was correct in holding that the release and subrogation rights of National Grange, plaintiff's insurer, were irrelevant to a determination of the liability of the defendant. National Grange could not plead any policy defenses and any rights under the "Release and Trust Agreement" until the plaintiff had obtained a judgment against the defendant and had brought an action *ex contractu* against National Grange.[60]

Senn v. J.S. Weeks & Co.[61] dealt with the question of whether the settlement by a plaintiff of his insurance carrier's liability under its uninsured motorist endorsement affected the liability of a joint tortfeasor. Senn had secured a judgment against an uninsured motorist for injuries and property damage resulting from a collision caused by the motorist's negligence. Senn's liability insurance carrier paid to him the sum of $5,000 under the uninsured motorist provisions of his policy, taking from him a Trust Agreement for the payment. Thereafter, Senn brought an action against the Weeks company, alleging that a truck owned by the defendant had been parked by its agent in a "no parking" zone at the intersection, so as to obscure the stop sign from the view of the driver whose car collided with Senn's. The action resulted in a judgment in favor of the plaintiff and the defendant appealed.

After discussing questions of negligence and evidence, the supreme

58. S.C. CODE ANN. § 46-750.33 (Supp. 1970).

59. 180 S.E.2d at 644. *See* Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965); Sheffield v. American Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965); Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964); Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964); Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

60. 180 S.E.2d at 644.

61. 180 S.E.2d 336 (S.C. 1971).

court considered the appellant's contention that the settlement by the plaintiff with his insurance carrier should be construed either as a settlement and release of one joint tortfeasor, thereby releasing the defendant from liability, or as a covenant not to sue, entitling the defendant to credit on the judgment against it for the amount paid to plaintiff under the settlement. Since the requirement of uninsured motorist coverage is statutory, the court turned to the provisions of the statutes in determining the effect of the settlement.[62]

The court noted that when an insurance company pays a claim under the uninsured motorist provisions of its policy, it becomes subrogated to that extent to the rights of its insured. The extent of these subrogation rights is set forth in Section 46-750.36 as follows:

> An insurance carrier paying a claim under the uninsured motorist provision required by Section 46-750.33 shall be *subrogated to the rights of the insured* to whom such claim was paid *against any and every person causing such injury, death or damage to the extent that payment was made. . . .*[63]

Since the defendant's conduct, along with that of the uninsured motorist, had allegedly caused the plaintiff's damages, the plaintiff's carrier was subrogated not only to the plaintiff's rights against the uninsured motorist, but also to those against the defendant.[64]

In construing the uninsured motorist law, the supreme court has held that its purpose was not to provide coverage upon an uninsured vehicle to the public, but to afford additional protection to an insured motorist. The uninsured motorist provision is a contractual liability required by statute between the insured motorist and his carrier and inures solely to the benefit of the insured.[65]

The court denied the contention of the defendant that the instrument executed by the plaintiff in settlement of the liability of his insurer was a release of a joint tortfeasor. It pointed out that the uninsured motorist had not been a party to the agreement and had had no interest in the settlement. The only effect of the instrument was to settle the liability of the plaintiff's insurer and to recognize the insurer's statutory right of subrogation against any person who might have caused

62. *Id.* at 339.
63. S.C. CODE ANN. § 46-750.36 (Supp. 1970) (court's emphasis).
64. 180 S.E.2d at 339.
65. *Id. See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

the damage. The court declared also that, for the same reasons, the instrument could not have the effect of a covenant not to sue a tortfeasor. Only the right of the plaintiff to sue his insurer had been affected.[66]

C. *Unknown Motorist*

Wynn v. Doe[67] was an action brought by Gloria Wynn against "John Doe,"[68] an unknown motorist, to establish liability for injuries sustained by her when her motorcycle hit a slick, chemical substance on the highway, causing it to go out of control. Wynn contended that since there was actual and physical contact with the chemical substance dumped or spilled onto the public highway by an unidentified and unknown vehicle, the "physical contact" requirement of the statute was met.

The supreme court, in dismissing the contention, stated that the statute makes proof of physical contact a condition precedent in any case for the recovery of damages caused by an unknown driver and vehicle and that there were no exceptions to the rule.[69] There had been no actual physical contact between the unknown vehicle and the motorcycle operated by Wynn, and its absence was fatal to her cause of action. To adopt the proffered view, the court declared, would defeat the clear and unambiguous legislative intent expressed in the statute.[70]

IV. LIBEL ACTION AGAINST AN INSURER

Prentiss v. Nationwide Mutual Insurance Co.[71] was a libel action brought by an insured's wife against his insurer for charging that she was mentally retarded. Nationwide had cancelled the husband's insur-

66. 180 S.E.2d at 339.

67. 180 S.E.2d 95 (S.C. 1971).

68. S.C. CODE ANN. § 46-750.34 (Supp. 1970) provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action or recovery under the uninsured motorist provision, unless . . .
>
> (2) The injury or damage was caused by physical contact with the unknown vehicle.

A remedy for the enforcement of such liability is provided by the authorization of an action against the unknown motorist in the fictional name of "John Doe", with the right given to the insurance carrier to defend in such name. *Id.* § 46-750.35.

69. *See* Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968).

70. 180 S.E.2d at 96.

71. 181 S.E.2d 325 (S.C. 1971).

ance and advised him that, upon request in writing, he was entitled by law[72] to be informed of the specific facts which caused the termination of coverage. Upon such a request, Nationwide advised him that it had discovered that he had misrepresented certain facts in his application. The application had shown that he had had no accidents and his wife was not a driver of the automobile. Nationwide reported to him that their investigation had shown that he had been involved in an accident and that his wife did drive the car and "that she is mentally retarded."[73] The trial judge directed a verdict in favor of the defendant, holding that the letter was qualifiedly privileged and the plaintiff had failed to prove express malice or malice in fact to destroy such privilege.[74]

The supreme court, in affirming, stated:

> The respondent being under the statutory duty to give an explanation, in response to the request by the insured, as to its reason or reasons for cancelling his policy, compliance with such request was qualifiedly privileged.[75] The letter containing the alleged libelous statement was, pursuant to statute, a qualifiedly privileged communication, and such rebuts the inference of malice and, in order to overcome the defense of qualified privilege, the appellant had to prove express malice or malice in fact on the part of the respondent toward her.[76]

The court observed that the evidence revealed that Mrs. Prentiss was an epileptic and had been treated for the disease at the South Carolina Medical College Hospital and the South Carolina State Hospital. Also, Mrs. Prentiss had testified that she did not know any of Nationwide's employees who had connection with the writing of the letter or any reason for any of them to have animosity against her. The court thus concluded that there was no evidence in the record to support a finding of the existence of actual or express malice, or the abuse of the qualified privilege.[77]

---

72. *See* S.C. CODE ANN. § 46-750.54 (Supp. 1970).
73. 181 S.E.2d at 326.
74. *Id.*
75. S.C. CODE ANN. § 46-750.53 (Supp. 1970) provides:
[T]hat as between the company or its agent and the named insured or any other person who customarily operates an automobile insured under the policy the reasons specified for cancellation in the notice of cancellation shall constitute a privilege communication and in an action for libel arising therefrom the defendant shall be entitled to assert the defense of qualified privilege as defined and limited by the common law of this State.
76. 181 S.E.2d at 327.
77. *Id.* at 328.

V. INSURER'S OBLIGATION—ATTACHABLE DEBT?

In *Howard v. Allen*,[78] the plaintiff was injured when she was struck by the propellor of an aircraft, while upon the ground, at Greenville Municipal Airport. The defendant, alleged to be the operator of the aircraft, was a resident of Ohio. The plaintiff, having been unable to obtain personal service of process upon the defendant in South Carolina, caused to be issued a summons, complaint and warrant of attachment, directing the Sheriff of Spartanburg County to attach and seize "the applicable limits of liability and the duty to defend contained in Policy No. NM6-625, issued by American Motorists Insurance Company. . . ."[79] The process was served upon an agent of the insurance company. On motion of the defendant, the lower court quashed service and vacated the warrant of attachment.[80]

In urging that the attachment was proper, the plaintiff appellant relied solely upon the decision of the Court of Appeals of New York in *Seider v. Roth*,[81] there being no South Carolina decision in point. The supreme court observed that there are some important distinctions between the language of the New York attachment statutes and those of South Carolina and stated that, aside therefrom, they were not convinced of the soundness of the majority opinion in *Seider*. It noted further that no state had followed the New York court in this respect and that the decision in *Seider* had been criticised by legal writers on both constitutional and practical grounds.[82] In addition, several courts in other jurisdictions had reached results or conclusions contrary to *Seider*.[83]

---

78. 254 S.C. 455, 176 S.E.2d 127 (1970).

79. *Id.* at 457, 176 S.E.2d at 128.

80. *Id.* at 458, 176 S.E.2d at 128.

81. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). This decision was subsequently followed in *Simpson v. Loehmann*, 21 N.Y.2d 305, 287 N.Y.S.2d 663, 234 N.E.2d 669 (1967) and *Victor v. Lyon Associates, Inc.*, 21 N.Y.2d 695, 287 N.Y.S.2d 424, 234 N.E.2d 459 (1967).

82. *See Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108 (1968); *Quasi In Rem Jurisdiction Based on Insurer's Obligation*, 19 STAN. L. REV. 654 (1967); Reese, *The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild*, 35 INS. COUNSEL J. 118 (1968); *Attachment of "Obligations"—A New Chapter in Long Arm Jurisdiction*, 16 BUFFALO L. REV. 769 (1967); *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COL. L. REV. 550 (1967).

83. 254 S.C. at 459, 176 S.E.2d at 129. *See* De Rentiis v. Lewis, 258 A.2d 464 (R.I. 1969); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P.2d 390 (1967); Jardine v. Donelly, 413 Pa. 474, 198 A.2d 513 (1964).

The court noted that previous decisions[84] had quoted with approval from *Drake on Attachment*[85] as follows:

> A fundamental principle is that an attaching creditor can acquire no greater right in attached property than defendant had at the time of attachment. If, therefore, the property is in such a situation that the defendant has lost his power over it, or has not yet acquired some interest in, or power over, it as to permit him to dispose of it adversely to others, it cannot be attached as his debt.[86]

The court, in holding that the contractual obligations of an insurer were not a debt subject to attachment under the law of this state, declared:

> Both the obligation to indemnify and the obligation to defend are inchoate, conditional, contingent obligations to the insured. Before they come into play there must be an external event within the coverage of the policy and the performance of all conditions precedent by the insured, including his cooperation. There is no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained. Even then, if the insurer's obligations to defend and indemnify are fully performed, there is nothing of economic value to which the insured may make claim, receive or assign.[87]

VI. MISCELLANEOUS

A. Accidental Death

In *Gulledge v. Atlantic Coast Life Insurance Co.*,[88] the insurance company sought to avoid making payment under its accidental death insurance policy issued to Linda Faye Gulledge. The decedent had died after being shot and run over with an automobile by the jealous wife of a man with whom she had become romantically involved. The insurer alleged that it should not be required to pay, because the death had not been an accident and had resulted, in part, from her engaging in activities in violation of statutory law.[89]

84. *See* Charles R. Allen, Inc. v. Island Co-Op Services Ass'n, Ltd., 234 S.C. 537, 109 S.E.2d 446 (1959) and H.J. Baker & Bros. v. Doe, 88 S.C. 69, 70 S.E. 431, 433 (1911).

85. DRAKE ON ATTACHMENT § 243 (1885).

86. 254 S.C. at 461-2, 176 S.E.2d at 130.

87. *Id.* at 460-1, 176 S.E.2d at 129.

88. 179 S.E.2d 605 (S.C. 1971).

89. A provision in the policy read as follows:

> Moreover, this policy shall not cover and no indemnity shall be paid

The supreme court stated that injuries were to be regarded as accidental unless it could be said that they were a natural or probable result of the insured's action, reasonably foreseeable by the insured or by a reasonably prudent person in the same position.[90] While the conduct of the insured was improper, the court concluded, it was not such that injury and death should have been foreseen. The court held that the death was accidental within the meaning of the policy and dismissed the insurer's contention that it had resulted from violation of statutory law. It noted that the only violation alleged was that the defendant had been guilty of adultery, but the evidence failed to support such a finding.[91]

In *Sellers v. Public Savings Life Insurance Co.*,[92] the insured had been left at the site where his truck had skidded into a ditch and was found the next morning, face down in the water in the ditch. Friends who had tried to help dislodge the truck testified that the insured had been all right when they left and no evidence of foul play was found. The insurer refused to pay double indemnity for accidental death, arguing that it could not be proved that the death had been an accident.

On appeal, the supreme court declared that cause of death, like any other fact, could be established by circumstantial evidence.[93] It noted that although it had not had the occasion to consider the sufficiency of circumstantial evidence offered to prove that a particular death was an accidental drowning, several other courts had.[94] The court

---

hereunder for accident or sickness resulting wholly or partly from any of the following causes or conditions:

. . .

F. Any violation of statutory laws or Municipal ordinance.

Id. at 606-7.

90. The court, quoting from *Hope v. New York Life Ins. Co.* 186 S.C. 85, 195 S.E. 110 (1938), stated the rule to be:

> The view preferred and adopted in this state is that one insured, even if he be the aggressor in an encounter in which he is injured or killed, does not forfeit his insurance if he could not reasonably anticipate that he would receive bodily injury or be killed; and that ordinarily makes a question for the jury. However, if only one reasonable inference can be drawn from the testimony, then it becomes a question of law to be passed upon by the Court.

179 S.E.2d at 606.

91. *Id.* at 606-7.

92. 178 S.E.2d 241 (1970).

93. *See* Glenn v. Dunean Mills, 242 S.C. 535, 131 S.E.2d 696 (1963).

94. *See* Annot., 12 A.L.R.2d 1312 (1950).

quoted from *Sturm v. Employer's Liability Assurance Corporation*[95] in concluding:

> Where a man, a few minutes after being seen apparently in good health, is found under water, dead, and nothing more is known of the cause of death, the immediate conclusion arrived at is that he was drowned. As the result of common sense and common experience, that opinion is formed by the normal processes of almost instant reason, and it may be said that legally such circumstantial evidence makes out a prima facie case of accidental drowning.[96]

B. Fraudulent Misrepresentations

Government Employees Insurance Co. v. Chavis[97] was an action brought by the company, seeking to have an automobile liability insurance policy issued to one Bobby Chavis declared void *ab initio*, because of fraudulent misrepresentations made on his policy application. He had asserted that he had a "clean" driving record, but later investigation had shown violations, accidents, and a suspension. The action was contested by members of a family who were injured in an accident causd by Chavis. As respondents, they contended that the insurer should not have relied on the answers given by Chavis and that an independent investigation should have been conducted. Having failed to do so, the company had waived any right to have the policy cancelled. They also contended that the insurer was estopped from denying liability in the accident because of its investigation of the accident and negotiations with the respondents.

The supreme court declared that since the undisputed evidence showed that the policy had been procured under an application containing fraudulent misrepresentations, the policy never afforded any coverage to Chavis unless the insurer had waived its right to or had become estopped to assert a denial of coverage.[98] The court dismissed the contention of waiver, however, stating that the insurance company had the right to rely upon the answers in the application[99] and "was under no duty to investigate the truthfulness of the answers given in the applica-

95. 212 Ill. App. 354 (1918).
96. 178 S.E.2d at 243.
97. 254 S.C. 507, 176 S.E.2d 131 (1970).
98. *Id.* at 513, 176 S.E.2d at 134.
99. *Id.* at 517, 176 S.E.2d at 136, *citing* Southern Farm Bureau Cas. Ins. Co. v. Ausborn, 249 S.C. 627, 155 S.E.2d 902 (1967).

tion of Chavis, and by its failure to make inquiry as to the truthfulness of such was neither a waiver nor an estoppel."[100]

As to the question of estoppel because of the insurer's investigation of the accident, the court noted that it had generally been held that an insurance company does not waive any defense it may have under a policy unless it has knowledge of the defense when it investigates a loss under the policy. The court concluded:

> [I]t is essential that the acts relied on as indicative of waiver or estoppel shall have been done by the insurer with knowledge of the facts giving it a right to treat the policy as unenforceable. . . . The burden of proof was upon the respondents to show that the appellant had knowledge of the grounds upon which it could avoid liability at the time it committed the acts and made the statements asserted to constitute a waiver or estoppel. This, the respondents have failed to do.[101]

C. *Questions of Coverage*

In *Weeks v. Pilot Life Insurance Co.*,[102] the decedent-insured had left the employ of the company through which he had secured group life insurance. After his return a month later, Weeks was told that his insurance would be re-instated. An office manager of the company, upon the advice of an agent of the insurance company, made out a written statement waiving the usual waiting period for a new employee and had Weeks fill out an application. He forwarded these documents and Weeks' premium for the month of December to the insurance company on December 22. These were not received by Pilot Life until after the death of Weeks the next day. Pilot Life denied coverage because it failed to receive the application until after Weeks' death.

The supreme court, in remanding the case to the trial court for the consideration of the question of estoppel, stated that the company employing Weeks and its office manager were both agents of the insurer as a matter of law, by virtue of a South Carolina statute.[103] Further, the case of *Greer v. Equitable Life Assurance Society of the*

100. 254 S.C. at 519, 176 S.E.2d at 137. *See* State Farm Mut. Auto Ins. Co. v. West, 149 F. Supp. 289 (1957); State Farm Mut. Auto Ins. Co. v. Wall, 87 N.J. Super. 543, 210 A.2d 109 (1965) and 92 N.J. Super. 92, 222 A.2d 282 (1966); Washington Realty Co. v. American Mut. Fire Ins. Co., 252 S.C. 618, 167 S.E.2d 617 (1969).

101. 254 S.C. at 524, 176 S.E.2d at 139.

102. 180 S.E.2d 875 (S.C. 1971).

103. S.C. CODE ANN. § 37-233 (1962).

United States,[104] without mention or reliance upon the above-mentioned statute, had held an employee to be an agent of the insurer under circumstances indistinguishable from those in the present case.[105] The court reasoned that the question of coverage would never have arisen, but for the acts or omissions of the agents of the insurer. If they had acted more promptly, the controversy would have been prevented. The neglect of either of its agents, the court concluded, was chargeable to the prinicipal, Pilot Life, not to Weeks, the employee.[106]

Jordan v. Maryland Casualty Co.[107] was an action brought by a fireman, claiming entitlement to disability and medical benefits under a group life insurance policy issued to his employer. Jordan had been accidentally shot while on duty, but while watching television in the firestation's recreation room. The insuring agreement extended coverage to a regularly employed, full-time fireman, only "while actually on duty at fires, while answering alarms of fires, or while directly returning from fires."[108] The supreme court held that since none of the stated conditions accompanied the infliction of the injury, coverage had to be denied.

Kidd v. Nationwide Mutual Insurance Co.[109] was an action brought to recover, under the comprehensive clause of the insured's policy, the value of an eight track stereo system and forty-five tapes which had been stolen from the insured's automobile. The question presented to the supreme court was whether the stolen property had been equipment of the automobile within the meaning of the policy provision which insured against loss or damage to the "automobile and its equipment."[110]

The court noted that tape stereo systems had been available for a number of years as optional equipment on new cars or for installation in others. It observed that, although the stolen stereo had not been bolted under the dashboard, it had been placed therein with the intention of devoting it to use as an automobile stereo, had been connected

104. 180 S.C. 162, 185 S.E. 68 (1936).
105. 180 S.E.2d at 877. *See also* Coker v. Aetna Life Ins. Co., 188 S.C. 472, 199 S.E. 694 (1938).
106. 180 S.E.2d at 878.
107. 181 S.E.2d 476 (S.C. 1971).
108. *Id.*
109. 179 S.E.2d 201 (S.C. 1971).
110. *Id.*

to the electrical system, and had been used exclusively for that purpose for a considerable period before the theft. The court concluded, in accord with the rule requiring that doubts as to construction be resolved in favor of the insured, that the stereo system was equipment within the coverage of the policy. It held to the contrary, however, as to the tapes. Noting that the tapes could be played in an automobile, a home or elsewhere, the court held that, although they had been of the contents of the automobile at the time of the theft, their connection with it was too tenuous to make them equipment within the policy's definition.[111]

In *Beattie Bonded Warehouse Co. v. General Accident Fire & Life Corporation, Ltd.*,[112] the insured's warehouse had collapsed and it sought to recover under its insurance policy which protected against loss by windstorm. The district court found that the building had been settling or listing perceptively for a considerable period of time before the time of the collapse and that there had been no winds of violence or tumultous force on the day of collapse.

The court concluded, as a matter of law, that the collapse of the warehouse had not been caused by a windstorm within the coverage of defendant's policy. It quoted *Phenix Insurance Co. v. Charleston Bridge Co.*[113] to the effect that, in order for the insured to recover, it would have had to show that the windstorm "was the predominating and efficient cause, the cause which produces the disaster without any new intervening cause, which of itself would have been sufficient to produce the result."[114]

D. Conspiracy to Defraud Policyholders

In *State v. Lagerquist*[115] eleven officers and employees of the Kennesaw Life and Accident Insurance Company had been found guilty of criminal conspiracy to unlawfully obtain insurance dividend funds.[116] Francis Marion Life Insurance Company had been acquired by Kennesaw through merger and stock exchange in 1961 and in 1965, officials

111. *Id.* at 202.
112. 315 F. Supp. 996 (D.S.C. 1970).
113. 65 F. 628, 632 (4th Cir. 1895).
114. 315 F. Supp. at 1001. *See also* Granger v. Aetna Ins. Co., 344 F.2d 942, 943 (1965).
115. 180 S.E.2d 882 (S.C. 1971).
116. *See* S.C. CODE ANN. §§ 16-366, 37-251, 37-253 (1962).

of Kennesaw decided upon a plan to attempt to persuade its policyholders to convert accumulated savings carried over from Francis Marion into additional life insurance prepaid for a fixed number of years. A sales meeting was held in Greenville, South Carolina in October, 1965, at which, the state charged, the defendants conspired to defraud the Francis Marion policyholders of their accumulated savings.

On appeal the defendants stressed "the open and honest" nature of the regular sales meeting at which the alleged conspiracy occurred and contended that no conspiracy could conceivably have taken place at such a meeting. The supreme court dismissed this contention, and in affirming, noted that it was clearly inferable from the evidence that the salesmen had been instructed to conceal the fact that the policyholders' own accumulated savings would be used for purchase of new policies. In addition, there was evidence that, in their actual contacts with the policyholders, the defendants had done just what had been planned at the meeting.[117]

E. Writ of Prohibition Against The Insurance Commissioner

Berry v. Lindsay[118] was a class action brought against John W. Lindsay, Chief Insurance Commissioner, seeking a Writ of Prohibition "restraining the issuance of additional rate increases for automobile liability insurance so long as the Insurance Industry as a whole is showing a profit."[119] Judge John A. Mason of the Richland County Court, in an order affirmed per curiam by the supreme court, sustained a demurrer to the petition, giving three reasons for the denial of the writ. First, the Writ of Prohibition would not lie to prohibit one from performing a particular function unless it were a judicial or quasi-judicial function. The court noted that although the South Carolina Supreme Court had not considered the question, numerous state and federal courts had consistently held that rate making is a legislative function.[120]

---

117. 180 S.E.2d at 886-87.

118. 182 S.E.2d 78 (S.C. 1971).

119. *Id.* at 79.

120. *Id.* at 82. *See* Oklahoma Operating Co. v. Love, 252 U.S. 331 (1919); Wilson & Company v. Oklahoma Gas & Elec. Co., 126 P.2d 1009, 1010, 1014 (1942); State v. Railroad Commissioners of Florida, 84 So. 444, 445, 446 (1920); Spring Valley Water Works v. Bartlett, 63 Calif. 245, 246 (1883). *See also* 16 C.J.S. *Constitutional Law* §§ 107, 198 (1956) and 73 C.J.S. *Public Utilities* § 16 (1951).

Secondly, the court stated that the alleged ground for the writ was abuse of discretion which is not a ground for its issuance. The court noted that *Ex Parte Jones*[121] and the cases cited therein clearly state that the writ will not lie under any circumstances to prevent an erroneous decision. Here, the court quoted from *Oklahoma Operating Co. v. Love*[122] where the United States Supreme Court stated: "The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority, but of correctness of the exercise of its judgment."[123]

The final reason stated by the court for the denial of the writ was that there were adequate and applicable statutory review provisions.[124] There had been no allegation that any petitioner had ever sought a review of any decision of the respondent as provided by the cited statutes or that the statutes failed to provide petitioners wth adequate relief.

RICHARD J. PAUL

121. 160 S.C. 63, 158 S.E. 134, 137 (1931). *See especially* Holladay v. Hodge, 84 S.C. 91, 65 S.E. 952 (1909).

122. 252 U.S. 331, 336 (1919).

123. 182 S.E.2d at 83.

124. *Id.* at 84. *See* S.C. CODE ANN. §§ 37-701, 37-70 to 37-74, 46-719 (1962).