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Insurance

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INSURANCE

I. SUBROGATION

In *Murphy v. Murphy*[1] the beneficiary of a life insurance policy that had been assigned as additional collateral for a debt secured by a mortgage brought an action against the insured's heirs at law. The beneficiary alleged that she was entitled to be subrogated to the rights of the mortgagee because the indebtedness had been satisfied from the insurance proceeds. Pursuant to the mortgage agreement, the mortgagor was required to assign the policy in question to the mortgagee but was not required to name him as beneficiary. This assignment gave the mortgagee the right to hold the policy "as collateral security for any and all liabilities."[2] The right to designate the beneficiary, however, was reserved to the mortgagor.

The South Carolina Supreme Court, in reviewing the lower court's holding for the beneficiary, determined that subrogation has been allowed in cases where the parties intended real estate to be the primary security, but has been denied where insurance served as the primary security.[3] Following that practice, the court examined the mortgage agreement and found that it recited only that the mortgagee "may" require the mortgagor to carry life insurance. The court considered such elective language a clear indication that the real estate and not the insurance was the primary security. The court reasoned that had the parties intended otherwise, they could have easily so specified in the contract. In the absence of a mandatory provision, however, the beneficiary was entitled to subrogation rights.[4]

II. FRAUD

The insured in *Hutto v. Southern Farm Bureau Life Insurance Co.*[5] brought an action for fraud and deceit in the inception of her contract with Southern Farm and received a jury verdict of $2,500.00. Southern Farm appealed, contending that the trial court had erred in denying its motion for a directed verdict. It

1. 259 S.C. 147, 190 S.E.2d 735 (1972).
2. *Id.* at 151, 190 S.E.2d at 736.
3. *See* Annot., 91 A.L.R.2d 496, 504 (1963); *Ex parte* Boddie, 200 S.C. 379, 21 S.E.2d 4 (1942).
4. 259 S.C. at 153, 190 S.E.2d at 737.
5. 259 S.C. 170, 191 S.E.2d 7 (1972).

maintained that the only reasonable inference from the evidence was that the plaintiff had failed to establish justifiable reliance upon the oral statements made by the defendant's agent. Southern Farm also argued that the plaintiff's failure to read the policy, which had been in her possession for eight months, constituted gross negligence barring any reliance upon the alleged misrepresentation as a matter of law.[6]

The supreme court found that, during the four month delay between the date the plaintiff paid her first premium and the date the policy was delivered to her, the cause of action in fraud had arisen and substantial damages had occurred. Therefore, the court decided that damages accruing prior to the date of delivery were not precluded by the plaintiff's negligence because during that period she had not had an opportunity to read the policy.[7]

III. MULTIPLE POLICIES

In *Emmanuel Baptist Church v. Southern Mutual Church Insurance Co.*,[8] the plaintiff had constructed an addition to its building. Because its insurer, Southern Mutual, refused to increase coverage, the church obtained additional coverage from another company. The new insurance was secured only by an oral binder when the church burned down, and the plaintiff sought recovery under its Southern Mutual policy. Southern Mutual contended that purchasing new insurance before the expiration of an existing policy, with an intention to substitute, constituted in law an effective and voluntary cancellation.[9] In discussing this contention, the supreme court relied upon *Appleman* for a concise statement of Southern Mutual's position:

> [P]rocuring new insurance to commence before the expiration of existing insurance has been held by some courts to constitute a voluntary cancellation . . . . However, the cancellation of a policy . . . requires a clear and unequivocal present intention to cancel. In addition, the mere intention to cancel a policy will not suffice to effect cancellation; such intent must be shown by some act clearly expressing that intent.[10]

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6. *Id.* at 172, 191 S.E.2d at 8. *See* Guy v. National Old Line Ins. Co., 252 S.C. 47, 164 S.E.2d 905 (1968).

7. 259 S.C. at 173, 191 S.E.2d at 8. The court in ruling for the plaintiff limited its decision to the facts of the case.

8. 259 S.C. 223, 191 S.E.2d 255 (1972).

9. *Id.* at 230, 191 S.E.2d at 258.

10. *Id., quoting* 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4225 (rev. ed. 1972).

The court then considered the only case in South Carolina in which the *Appleman* reasoning has been applied, *McCormack v. Equitable Fire Insurance Co.*[11] The court easily distinguished this decision from the instant case because in *McCormack* at the time of the fire the insured intended to cancel his policy. In *Emmanuel*, however, the court found no evidence to support the contention that the church or its agents intended or accepted the oral binder as a substitute.[12]

Southern Mutual also argued that the policy contained a limitation on the amount of insurance that the church was permitted to carry and that violation of this limitation voided the policy.[13] The supreme court concluded that the only provision which referred expressly and exclusively to other insurance was the following clause: "Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto."[14] Because there was no endorsement attached, the court decided Southern Mutual had to rely solely on the valuation clause, wherein the parties had agreed that the amount of insurance carried would be the face amount of the policy.[15]

The court again cited *Appleman* for the hoary proposition that ambiguous provisions in an insurance policy which cause forfeitures are to be construed in favor of the insured.[16] The court reasoned that, in the absence of an endorsement to the "Other Insurance" clause, an "average person" might not realize that additional coverage was prohibited and also might not comprehend the limitation in the valuation clause. Thus, by resolving this ambiguity in favor of the church, the court allowed it to enforce the policy.

The second decision in the multiple policy area was *Hutchinson v. Metropolitan Life Insurance Co.*[17] In this case the insured sought recovery of total disability benefits for an injury sustained in 1968. Metropolitan attempted to avoid liability by contending that, because Hutchinson had not returned to a con-

11. 102 S.C. 473, 86 S.E. 1059 (1915). Prior to bringing the instant action, the plaintiff compromised a suit brought against the second insurer. Since both companies could not be liable, the court considered this positive proof of an election.

12. 259 S.C. at 231, 191 S.E.2d at 258.

13. *Id.*

14. 259 S.C. at 231-32, 191 S.E.2d at 259.

15. *Id.*

16. 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4146 (rev. ed. 1972).

17. 259 S.C. 219, 191 S.E.2d 157 (1972).

dition of partial disability after an accident suffered in 1965, he could not have entered a new period of total disability in 1968. To reinforce this contention, Metropolitan elicited testimony establishing that Hutchinson had continuously received total disability benefits under another policy between 1965 and 1968. The trial court held for the plaintiff, and Metropolitan appealed, arguing that the court had erroneously ignored the evidence concerning the other policy.[18]

The supreme court considered this argument to be without merit primarily because Metropolitan under its own policy had paid the plaintiff for only 52 weeks of total disability after the 1965 accident. Moreover, Metropolitan failed to prove that the other policy in question was identical to its own. Thus the court held the testimony concerning that policy had been correctly disregarded as irrelevant because the receipt of benefits under another policy "ordinarily sheds no light on whether or not the insured is totally disabled under the policy issued by the defendant."[19]

IV. COVERAGE

During the survey period this aspect of insurance was the most frequently litigated. Six of the seven cases included within this area dealt with the extent of statutory coverage, and significantly, with the exception of the uninsured motorist decisions, the court in each case refused to liberalize coverage.

A. Fire and Windstorm Coverage

In *McNeely v. South Carolina Farm Bureau Mutual Insurance Co.*,[20] the only question presented to the supreme court was whether the insurer under a fire and windstorm policy could elect to replace property totally destroyed by wind rather than pay the full face amount of the policy. The insured frivolously maintained that section 37-154 of the South Carolina Code[21] required the insurer to pay the face amount for a total loss caused either by fire or wind. Although the statute plainly obligates an insurer to

18. *Id.* at 221-23, 191 S.E.2d at 158-59.

19. *Id.* at 223, 191 S.E.2d at 159, *quoting* Garrett v. Mutual Benefit Ins. Co., 239 S.C. 575, 583, 124 S.E.2d 36, 40 (1962).

20. 259 S.C. 39, 190 S.E.2d 499 (1972).

21. S.C. CODE ANN. § 37-154 (1962).

pay the full amount when fire is the cause, it does not mention total losses caused by wind. Thus the court compared the pre-1947 statute[22] with the present, amended version and perfunctorily reasoned that if the legislature had desired to include "total loss by wind" it easily could have done so.[23] The court then examined the policy in question to determine whether it allowed the insurer the option of replacing and, upon ascertaining that it did, held for the insurer.[24]

B. Non-Owner Clause

In *Adcox v. American Home Assurance Co.*[25] the named insured, Adcox, was operating his mother's automobile when he was involved in a three-car collision caused by his negligence and that of another driver, Stephens. Three victims of the accident then brought an action against both drivers. Stephens' insurer, State Farm, was the only company defending because Adcox's insurer denied coverage on the basis of its non-owner provision. After a verdict had been returned against the defendants, State Farm loaned each plaintiff the amount of his judgment and in return obtained unconditional demand notes made out to itself and to its insured. The judgment of each plaintiff was then filed against Adcox, but none was filed against State Farm's insured.[26]

Adcox went before the lower court seeking to have his insurer, American Home, declared liable for the judgments, his defense fees, and damage to his credit resulting from the judgments. The accident victims also filed an answer and cross action

22. No. 49, [1896] S.C. Acts & Jt. Res. 1130.

23. 259 S.C. at 42-43, 190 S.E.2d at 500-01; S.C. CODE ANN. § 37-154 (1962) reads as follows:

> No company writing fire insurance policies, doing business in this state, shall issue a policy for more than the value stated in the policy or the value of the property to be insured, the amount of the insurance to be fixed by the insurer and insured at or before the time of issuing the policy. In case of *total loss by fire* the insured shall be entitled to recover the full amount of insurance . . . . [Emphasis added.]

Prior to 1947 the statute read: "[A]nd in the case of *total loss by fire*, the insured shall be entitled to recover the full amount of insurance . . . ." No. 49, [1896] S.C. Acts & Jt. Res. 1130 (emphasis added).

24. The policy authorized the insurer "to replace the property destroyed . . . with other of like kind and quality within a reasonable time . . . ." 259 S.C. at 44, 190 S.E.2d at 501.

25. 258 S.C. 331, 188 S.E.2d 785 (1972).

26. *Id.* at 334-35, 188 S.E.2d at 786-87.

against American Home seeking satisfaction of their judgments. American Home's defenses were that its non-owner clause excluded coverage, that, because Adcox and Stephens were jointly liable, State Farm by its loan arrangement had satisfied the judgments, and that State Farm was the real party in interest and as such had no claim against Adcox. The trial judge held for the plaintiffs on all three issues and American Home appealed.

The supreme court found that the policy afforded coverage to Adcox as the named insured by interpreting the phraseology and punctuation of the non-owner clause to mean that only non-scheduled automobiles *owned by the named insured* were excluded from coverage. The court reasoned that the remaining exclusions applied solely to the named insured's spouse. Therefore Adcox did have coverage when driving a vehicle owned by a member of his household.[27]

Considering the appellant's next exception, the court reviewed State Farm's loan arrangements and determined that since coverage existed the plaintiffs had a right to demand that American Home satisfy their judgments. The court disagreed with American Home's argument that the judgments had been paid, because no judgment had been entered against State Farm's insured and under South Carolina decisions a plaintiff can elect to sue tort-feasors severally or jointly.[28]

In disposing of American Home's third exception, the court decided that State Farm was not the real party in interest and thus affirmed a line of cases approving the use of loan-receipt arrangements.[29] The court, however, did find for American Home

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27. The policy provided in part:

> The insurance does not apply
>
> a. as respects the named insured, to any automobile owned by the named insured *and as respects the spouse of the named insured,* to any automobile owned by the named insured, such spouse or member of the same household
>
> . . . .

Id. at 336-37, 188 S.E.2d at 787 (emphasis added).

28. *Id.* at 338, 188 S.E.2d at 788. *See* American Fidelity Fire Ins. Co. v. Hartford Accident & Indem. Co., 251 S.C. 507, 163 S.E.2d 926 (1968); Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 155 S.E.2d 591 (1967). The last case was cited by plaintiffs as holding:

> Under the laws of this State, one injured by the actionable negligence of two or more joint tort-feasors may elect that party or parties whom he will sue and may pursue the collection of a judgment procured against any one or more of the judgment debtors.

Id. at 598, 155 S.E.2d at 594.

29. *See* Wrenn & Outlaw, Inc. v. Employers' Liab. Assurance Corp., 246 S.C. 97, 142

on its fourth exception by declaring that the evidence was insufficient to sustain an award for damage to Adcox's credit.[30]

C. *The Motor Vehicle Safety Responsibility Act*

During the survey period two cases were decided in the South Carolina Supreme Court and one in the federal court interpreting the Motor Vehicle Safety Responsibility Act.[30.1] In each case the court held that the Act provides no coverage when members of an insured's household drive vehicles not scheduled in his policy.

In *Crenshaw v. Preferred Risk Mutual Insurance Co.*,[31] the step-daughter of the named insured was involved in an accident while driving a non-scheduled vehicle, and a judgment was subsequently obtained against her by the accident victim, Crenshaw. Crenshaw then sued the named insured's carrier, Preferred Risk, contending that the step-daughter was a statutory insured under section 46-750.31(2) of the Motor Vehicle Safety Responsibility Act.[32]

Preferred Risk denied liability and requested summary judgment, arguing that its policy defined the term "insured," for the purpose of non-scheduled vehicles, as the named insured and spouse.[33] The supreme court accepted this interpretation of the policy. By adopting the reasoning from *Willis v. Fidelity & Casualty Co.*,[34] it also decided that sections 46-750.31(2) and 46-750.32 of the Act[35] did not require coverage for the step-daughter. In *Willis* the court had examined the wording of section 46-750.32. It determined that use of the term "such vehicles," when referring

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S.E.2d 741 (1965); Martin v. McLeod, 241 S.C. 71, 127 S.E.2d 129 (1962); South Carolina Elec. & Gas. Co. v. Aetna Life Ins. Co., 230 S.C. 340, 95 S.E.2d 596 (1956); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146 (1944).

30. 258 S.C. at 339, 188 S.E.2d at 789.

30.1. S.C. CODE ANN. §§ 46-701 *et seq.* (Cum. Supp. 1971).

31. 259 S.C. 302, 191 S.E.2d 718 (1972).

32. S.C. CODE ANN. § 46-750.31(2) (Cum. Supp. 1971) reads:

> The term "*insured*" means the named insured and, while resident of the same household, the spouse of any such 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 such motor vehicle to which the policy applies or the person representative of any of the above.

See also "Uninsured Motorist Coverage" section of this Survey *infra*.

33. 259 S.C. at 304, 191 S.E.2d at 719.

34. 253 S.C. 91, 169 S.E.2d 282 (1969).

35. S.C. CODE ANN. § 46-750.31(2), -750.32 (Cum. Supp. 1971).

to required coverage, indicates that the legislature intended statutory coverage for section 46-750.31 insureds only when their liability arises from the ownership, maintenance, or use of *scheduled vehicles*.[36] Thus, because the insured's step-daughter was driving a non-scheduled vehicle, she was not covered when the collision with Crenshaw occurred.

In *Aetna Insurance Co. v. Government Employees Insurance Co.*,[37] a case identical to *Crenshaw*, the supreme court in a per curiam opinion affirmed the denial of coverage by simply citing *Crenshaw*.[38]

The federal district court in *State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co.*[39] dealt with another fact situation very similar to that in *Crenshaw*. The court, in considering State Farm's motion for a declaration that none of its three auto policies afforded coverage to the named insured's daughter, cited *Crenshaw* as binding on the scope of section 46-750.31(2).[40] The court recognized, however, that the *Crenshaw* holding only limited statutory coverage; it was still necessary for the court to interpret the policy in order to ascertain whether voluntary coverage existed.

State Farm predictably contended that the non-owner clause in its policy provided bodily injury and property damage liability coverage only for the named insured and his spouse. The court examined the non-owner clause and found that the coverage did appear to be so limited. After construing this clause as a whole, however, the court was struck by the apparent disharmony of subsection 1(c) with other parts of the clause, in that it gave the impression of extending coverage beyond the other sections.

Section 1 of the non-owner clause provided bodily injury and property damage coverage for the named insured (subsection (a)) and for his spouse (subsection (b)); but subsection (c) declared, "Any person or organization not owning or hiring such automobile [is covered], but only with respect to his or its liability for the use of such automobile by an insured as defined in subsections (a) and (b) . . . ."[41] Thus, subsection (c) appeared to ex-

36. 253 S.C. at 96-7, 169 S.E.2d at 284-5.
37. 253 S.C. 306, 191 S.E.2d 720 (1972).
38. *Id.* at 308, 191 S.E.2d at 721.
39. 349 F. Supp. 158 (D.S.C. 1972).
40. S.C. CODE ANN. § 46-750.31(2) (Cum. Supp. 1971).
41. 349 F. Supp. at 161.

tend coverage to "any [other] person" by its first part and yet to limit coverage by its second part to those persons mentioned in subsections (a) and (b).[42] Relying upon *Heffron v. Jersey Insurance Co.*,[43] the court decided that the ambiguity of the non-owner clause required a finding that bodily injury and property damage coverage did exist for persons other than the named insured and spouse.

Another important question before the court was whether coverage was limited to a single policy or extended to all three policies issued by State Farm. The court found that State Farm's liability was confined to the highest applicable limit of all policies issued to the same named insured. In the instant case State Farm had issued two of its three policies to the father of the minor driver and the third to the mother. Therefore, the court determined State Farm's total liability to be the higher applicable limit of the two policies issued to the father combined with the applicable limit of the single policy issued to the mother.[44]

D. Uninsured Motorist Coverage

In *Criterion Insurance Co. v. Hoffman*[45] the insured, the victim of a hit-and-run accident, had been unable to locate the driver and therefore obtained a "John Doe" default judgment pursuant to the Uninsured Motorist Act.[46] A copy of the summons was forwarded to Hoffman's carrier, Criterion, through the Secretary of State, but no complaint was filed or served. Criterion brought an action to avoid liability on the judgment, contending that its policy afforded Hoffman no coverage since he had failed to serve the complaint and summons as required both by statute and the policy. Hoffman in turn denied failure of service and

42. *Id.* at 162. The court in reviewing the non-owner clause decided that subsection 1(c) was meaningless. This would seem incorrect because the clause provides coverage for third parties to the extent (policy limit) they are exposed to suit by the actions of subsection 1(a) and 1(b) insureds. Therefore, subsection 1(c) may be out of harmony with the rest of the clause, but it is not meaningless.

43. 144 F. Supp. 5 (D.S.C. 1956), *aff'd*, 242 F.2d 136 (4th Cir. 1957).

44. The applicable policy provision read: "[T]he total limit of the company's liability under all such policies shall not exceed the highest applicable limit of liability under any one such policy." 349 F. Supp. at 163. The court determined that this paragraph referred only to policies issued to the named insured because it did not contain the broad reference to "*any person* insured hereunder," found elsewhere in the provision. *Id.* at 164.

45. 258 S.C. 282, 188 S.E.2d 459 (1972).

46. S.C. CODE ANN. §§ 46-750.31 to -750.40 (Cum. Supp. 1971).

alleged that his attorney had notified Criterion's adjuster of the suit, and that Criterion had failed to make an appearance in the "John Doe" action because it believed Hoffman's policy had been cancelled.

The South Carolina Supreme Court examined the applicable statute and decided that, unlike the usual uninsured motorist action, a suit involving a hit-and-run vehicle or an unidentified motorist requires service of both a summons and a complaint.[47] The court next examined the uninsured motorist endorsement to Criterion's policy and found that it was consistent with the statute because it too made service of a complaint a condition precedent to establishing a right of action.[48]

Dismissing Hoffman's challenges to the statutory requirements, the court held that sections 46-750.31 through 46-750.35 of the Code were exclusive as to uninsured motorist actions and that the general statutory procedures for filing[49] were thus not applicable. To reinforce this interpretation of legislative intent, the court noted that the legislature had acted with purpose in changing the statutory provision to require service of both a summons and a complaint.[50] The court then sought refuge from the

47. *Id.* § 46-750.35 provides:

If the owner or operator of any vehicle causing injury or damages by physical contact be unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made *by delivery of a copy of the summons and complaint or other pleadings* to the clerk of the court in which the action is brought . . . . [Emphasis added.]

48. The policy clause in question read:

4. Notice of legal action. If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of the automobile involved in the accident, a copy of the summons *and complaint* or other process served in connection with the legal action shall be forwarded immediately to the company by the insured or his legal representative.

. . . .

8. Action against the company. *No action shall lie against the company unless, as a condition precedent thereto, the insured or his legal representative has fully complied with all the terms of this amendment.*

258 S.C. at 290-91, 188 S.E.2d at 463 (emphasis added).

49. S.C. CODE ANN. §§ 10-401, -633 (Supp. 1972).

50. No. 311, [1959] S.C. Acts & Jt. Res. 567, reads as follows:

[A]nd service of process may be made by delivery of a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought and service upon the insurance company issuing the policy shall be made as prescribed by the law as though such insurance company were a party defendant.

issue by declaring that the right of action was created by the legislature and thus only it could relax the service requirements.

In considering Hoffman's final allegation, that Criterion had waived its right to contest service by denying liability, the court reviewed the actions of both parties and found no evidentiary support for the allegation. The court, however, did reverse in part the trial judge's ruling that Hoffman was barred from further pursuit of his claim, holding that the record did not justify such a conclusion.

The second case involving uninsured motorist coverage was *Midwest Mutual Insurance Co. v. Fireman's Fund Insurance Co.*,[51] an action to compel contribution. The accident upon which this suit was based occurred in 1966 when S.W. Towles was struck by an uninsured motorist while driving a friend's motorbike. Midwest Mutual was the uninsured motorist carrier for the motorbike and settled Towles' claim. It then contacted Fireman's Fund, Towles' mother's carrier, and sought contribution. Fireman's Fund refused on the basis of its uninsured motorist endorsement and convinced the trial judge that, because its endorsement only provided excess coverage when other insurance was available to the insured for a non-owned automobile, it was not liable for contribution until Midwest Mutual's applicable limits had been exhausted.[52]

Midwest Mutual appealed, arguing that a motorbike was not encompassed by the term "automobile" when used in an insurance policy. Relying on definitions of "automobile" borrowed from several foreign decisions,[53] the supreme court accepted that argument. The court concluded that if Fireman's Fund intended to be excess in the case of "motorbikes" the policy should have

51. 258 S.C. 533, 189 S.E.2d 823 (1972).

52. The uninsured motorist endorsement to the Fireman's Fund policy provided:

> Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under this endorsement shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Id. at 536-37, 189 S.E.2d at 825.

53. *Id.* at 537-38, 189 S.E.2d at 825-26, *citing* Westerheusen v. Allied Mut. Ins. Co., 258 Iowa 969, 140 N.W.2d 719 (1966); Mittelsteadt v. Bowee, 9 Wis. 2d 44, 100 N.W.2d 376 (1960).

so stated in plain language, and that its failure to do so made Fireman's Fund liable for contribution.

Fireman's Fund had contended that there could be no contribution between insurers when only pro rata liability existed, and that Midwest Mutual's statutory right to subrogation against the tort-feasor was its only remedy. The court, however, resolved both contentions against Fireman's Fund: First, because the liability of each insurer was for the full amount stated in its policy as required by the Uninsured Motorist Act,[54] with the pro rata clause simply controlling the rights between the two insurers; and second, because the Act evidenced no intent to make subrogation against the tort-feasor the exclusive remedy.[55]

V. MISCELLANEOUS

In *Hester v. Harleysville Insurance Co.*,[56] a vehicle owned by Spartanburg Heating, Inc., was involved in an accident while being used without permission. The plaintiff, Hester, obtained a default judgment against Spartanburg Heating, but its insurer, Harleysville, never received the service of process required by the policy. Hester in the instant case then sought to compel Harleysville to pay the judgment, maintaining that by various actions Harleysville had waived its right to notice. Although the civil court held for the plaintiff, the county court reversed, finding no evidence from which a waiver could be inferred.

The single exception before the supreme court was based upon a letter written by Harleysville to Hester's insurance company. In the letter Harleysville denied coverage because Spartanburg Heating had informed it that the vehicle had been used without permission. Hester contended that this letter constituted a waiver of Harleysville's right to notice.

The supreme court relied upon the reasoning of *Boyle Road & Bridge Co. v. American Employers' Insurance Co.*,[57] wherein the court stated that mere knowledge by an insurance company that the insured has received service of process does not amount to a waiver or an estoppel. There must also be a positive act by the insurer upon which a waiver may be predicated, and this act

54. S.C. CODE ANN. §§ 46-750.33 to -750.38 (Cum. Supp. 1971).
55. 258 S.C. at 539, 189 S.E.2d at 826.
56. 259 S.C. 45, 190 S.E.2d 487 (1972).
57. 195 S.C. 397, 11 S.E.2d 438 (1940).

must be known to the insured. In pursuing this reasoning, the court acknowledged its opinion in *Washington v. National Service Fire Insurance Co.*[58] that a waiver may be inferred when the insurer has denied liability and responsibility for defending. The court considered this rationale inapposite, however, because it believed the lower court was correct in finding no evidence that the insured was denied coverage. The record showed that Spartanburg Heating had no knowledge of Harleysville's letter to Hester's insurer until after the default judgment had been entered. Thus, in the court's view, the letter was only an assertion by one insurance company to another of a defense to be relied upon and was not a formal denial of coverage to the insured. This conclusion led the court to decide that the judgment for Harleysville had to be affirmed because no waiver had occurred, and Harleysville therefore had a right to rely on its policy provisions.

In *Wright Scruggs Shoe Co. v. Equitable Life Assurance Society,*[59] the plaintiff, beneficiary of a life insurance policy issued to its employee by Equitable, brought an action against the insurance company to compel payment of an additional death benefit. The policy provided that the benefit would be paid upon receipt of proof "[t]hat the death of the insured resulted from accidental bodily injury, directly and independently of all other causes," but would not be paid "if the death was caused or contributed to, directly or indirectly, by disease or illness of any kind . . . ."[60]

The trial court granted an involuntary nonsuit because both expert witnesses, a pathologist and a private physician, testified that they believed the insured had died of a heart attack. The supreme court in affirming this decision followed the holding of *Gamble v. Travelers Insurance Co.*,[61] that the plaintiff must carry the burden of proving the insured's death was accidental.

In *Allstate Insurance Co. v. Wilson*[62] J.A. Evans' son collided with Grace Wilson while negligently driving his father's automobile without permission. Allstate's liability policy limited coverage to the named insured, his spouse, and those driving the insured automobile with their consent. Nevertheless, Allstate

58. 252 S.C. 635, 168 S.E.2d 90 (1969).

59. 258 S.C. 253, 188 S.E.2d 477 (1972).

60. *Id.* at 255, 188 S.E.2d 478.

61. 251 S.C. 98, 160 S.E.2d 523 (1968), *citing* Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 128 S.E.2d 699 (1962).

62. 193 S.E.2d 527 (S.C. 1972).

defended Evans and his son under a letter reserving its rights and continued to represent the son after a nonsuit had been granted to Evans.[63] However, when the trial concluded and $9000 in damages were awarded to Mrs. Wilson, Allstate withdrew from the defense and denied coverage. Allstate then sought a declaratory judgment absolving it of liability to Wilson in an action in which Wilson's uninsured motorist carrier, Employers-Commercial, was joined at its own request. Employers-Commercial averred that by defending Evans' son Allstate had waived its reservation of rights, and that this defense had so prejudiced Employers-Commercial's position that Allstate should be held liable for the judgment against the son.

The supreme court decided that Allstate's defense in the original action was required because Wilson's complaint alleged that Evans' son had permission to drive the vehicle covered by Allstate's policy.[64] In the court's view, Allstate's actions had not precluded Employers-Commercial's statutory right to defend or control because the right did not arise until the Evans vehicle had been found uninsured.[65] Therefore, the court concluded that no waiver had taken place and that sufficient prejudice had not occurred to warrant estopping Allstate from denying coverage.

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63. "[Its] policy . . . provided that Allstate would defend any suit alleging bodily injury and seeking damages . . . payable under the terms of the policy." *Id.* at 528.

64. *Id.* at 530, *citing* Hartford Accident & Indem. Co. v. South Carolina Ins. Co., 252 S.C. 428, 166 S.E.2d 762 (1969) (complaint raises the obligation to defend).

65. 193 S.E.2d at 530, *citing* S.C. CODE ANN. § 46-750.31(3)(b) (Cum. Supp. 1971).