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Insurance

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INSURANCE

I. IMPLIED CONSENT

Omnibus clauses in insurance contracts have been a major source of litigation,[1] and many of the disputes have involved the issue of "permission, express or implied."[2] This issue is primarily "fact-oriented rather than law-oriented."[3] Quite frequently the question of permission relates "to whether a person who was using the car at the time of the accident had been allowed by the named insured to use it only for a limited time or limited purpose."[4]

It is not uncommon for a named insured to give permission to use his car to another, who in turn gives permission to a third person to use the named insured's car.[5] In *Keeler v. Allstate Insurance Co.*,[6] the plaintiff-appellant instituted a suit against Allstate Insurance Company to recover for personal injuries and property damage suffered in an automobile collision. The accident occurred when the automobile which Keeler was driving collided with an automobile being driven by Troy Taylor. Taylor, a minor, was driving the vehicle with the express permission of Raymond Williams also a minor, who had recently purchased it. Prior to purchasing the car, Raymond had discussed with his parents the possibility of including it on his father's Allstate insurance policy. An Allstate agent told Raymond's mother the automobile could be added to the existing policy if the title were placed in his father's name. Accordingly, after purchasing the automobile, Raymond registered and titled it in his father's name. Raymond made all the payments for the automobile and paid his portion of the insurance coverage.[7]

Raymond was given general and unrestricted permission for his personal use of the vehicle, but he was expressly prohibited by his father from allowing other persons to drive it. Mr. Williams specifically instructed his son that Troy Taylor was not to drive the automobile.

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1. R. KEETON, INSURANCE LAW § 4.7(b) (1971).
2. *Id.* at 223.
3. *Id.* at 225.
4. *Id.* at 223.
5. *Id.* at 226.
6. 261 S.C. 151, 198 S.E.2d 793 (1973). The court filed a three to two decision in which Justice Brailsford concurred in the results and filed an opinion. Justice Lewis dissented and also filed an opinion in which Justice Bussey concurred.
7. These facts were stipulated by the parties to the lower court and are from Ms. Williams' testimonial affidavit and addendum introduced at the trial.

On the date of the collision, Raymond wanted to "try out" Troy's new car. At Raymond's suggestion the two exchanged automobiles for a few hours. Thus, at the time of the accident, Taylor was operating Raymond's automobile with his express permission.

Keeler brought suit against Taylor and was awarded $12,000 in damages. Allstate, however, refused to defend the action on the ground that Taylor was not a permissive user of the automobile within the terms of the policy. Subsequently, Keeler brought the present action against Allstate to recover $10,000 under Allstate's bodily injury provision and $500 under the property damage coverage.[8]

The trial judge, sitting without a jury, concluded that the "actual use" of the automobile at the time of the collision was without the permission of the *named insured* (the father) and that Taylor's use of the vehicle violated the specific prohibition by the named insured. The trial judge further found that Taylor's use of the automobile did not serve a purpose of or benefit either the named insured or Raymond, the original permittee.[9]

The supreme court, by a three to two vote, affirmed the lower court holding. Regarding the issue of whether Taylor was using the car with permission of the named insured, the court affirmed the trial court's finding of no permission, and hence no coverage under the insurance policy.[10]

The court stated:

> The permission which puts the omnibus or extended coverage clause of the policy of liability insurance into operation may be either express 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 of someone having authority to bind him in that respect.[11]

8. 261 S.C. at 154, 198 S.E.2d at 794.

9. *Id.* at 154, 198 S.E.2d at 795.

10. *Id.* Section 1 of the Allstate insurance policy defined insured as ". . . (3) any other person with respect to the owned automobile, provided the *actual use* thereof is with the permission of the *named insured*." (Emphasis added).

The South Carolina statute extends omnibus coverage to "any person who uses [the insured vehicle] with the consent, expressed or implied, of the named insured . . . ." S.C. CODE ANN. § 46-750.31(2) (Cum. Supp. 1973).

11. 261 S.C. at 155, 198 S.E.2d at 795. *See also* Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746 (1961); Government Employment Ins. Co. v. White, 260 S.C. 163, 194 S.E.2d 884 (1973).

Furthermore, the court asserted that:

> Implied consent . . . rests upon proof of circumstances from which an inference of actual permission or consent reasonably arises. The implication is one of fact based upon circumstantial evidence. Implied consent involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent.[12]

The court determined that the trial judge had reached a conclusion "of which the facts are susceptible;"[13] it thus considered itself bound by his findings of fact. Because the case was tried by the judge without a jury, his findings of fact had the same force and effect of a jury verdict.[14] The court considered its rulings in three previous cases[15] to be dispositive of the issue of implied consent.

The court also affirmed the trial court's determination that Raymond Williams, even though the "real owner," did not occupy the equivalent position of the named insured under the Allstate liability insurance policy.[16] Quoting from *State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.*,[17] the court said that "omnibus coverage in this case depends upon the consent, not of the owner but of the named insured . . . ."[18] The plaintiff-appellant, in his brief, had attempted to persuade the court to elevate the son to the equivalent of the named insured in accord with principles of reformation of a contract. The contention was that Allstate, through its agent, had knowledge of the true circumstances of the ownership, possession and use of the automobile by Raymond. Various jurisdictions have held the

12. 261 S.C. at 155, 198 S.E.2d at 795. *See also* Crenshaw v. Harleysville Mut. Cas. Co., 246 S.C. 549, 554, 144 S.E.2d 810, 813 (1965); Government Employment Ins. Co. v. White, 260 S.C. 163, 169, 194 S.E.2d 884, 887 (1973).

13. 261 S.C. at 156, 198 S.E.2d at 795.

14. *Id.*

15. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 255 S.C. 392, 179 S.E.2d 203 (1971); Dearybury v. New Hampshire Ins. Co., 255 S.C. 398, 179 S.E.2d 206 (1971); and Southern Farm Bureau Cas. Ins. Co. v. Hartford Accident & Indem. Co., 255 S.C. 427, 179 S.E.2d 454 (1971). However, in his concurring opinion in *Keeler*, Justice Brailsford stated these cases were not controlling, and thus agreed with Justices Lewis and Bussey on this point. Nevertheless, Justice Brailsford concurred in the result of the court based on the findings of fact of the trial judge. It appears that the dissent correctly interpreted these cases.

16. 261 S.C. at 157, 198 S.E.2d at 796.

17. 255 S.C. 392, 179 S.E.2d 203 (1971).

18. *Id.* at 397, 179 S.E.2d at 205.

"real owner" to be the named insured by applying principles of estoppel, waiver, oral contract, or reformation.[19] In the present case, it appears significant that no evidence was presented to indicate that Allstate knew Raymond was paying his share of the insurance premium. The record does not reveal whether Raymond paid his portion of the premium directly to the insurance company or whether he paid his father who then forwarded only a single payment to Allstate. Justice Lewis, in his dissenting opinion in which Justice Bussey concurred, appears to have correctly interpreted *State Farm* as not controlling.[20] His assertion was that the court in *State Farm* had recognized a distinction between the extent of the omnibus coverage under South Carolina law and the coverage which might be provided under policy provisions similar to the one involved in this case.[21] In *State Farm* omnibus coverage was determined by the South Carolina statute[22] which provided coverage to "any person who uses [the vehicle] with the consent, express or implied, of the named insured . . . ." Although the court was primarily concerned with the statutory language in *State Farm*, it noted that other jurisdictions have dealt with the question of omnibus coverage where the policy language was similar, if not identical, to that in *Keeler*.[23] Most courts have interpreted the language in such policies to provide broader coverage than the statutory language. In such cases, even in the face of a violation of the named insured's prohibition, courts have extended omnibus coverage to third persons by distinguishing between "use" and "operate" to find that at the time of the accident, the vehicle was employed for a permitted purpose or "use".[24] The distinction made by the courts is that the use or actual use must be permitted and the question of whether the person who is using the vehicle has been given permission is unimportant.[25] In *Keeler* it was undisputed that, "at the time of this accident the automobile was being used for its intended pur-

19. Rocky Mountain Fire & Cas. Co. v. Rose, 62 Wash. 2d 896, 385 P.2d 45 (1963); Doyle v. Allstate Ins. Co., 4 Wis. 2d 411, 90 N.W.2d 562 (1958); Traders & General Ins. Co. v. Lucas, 281 S.W.2d 188 (Tex. Civ. App. 1955).

20. 261 S.C. at 160, 198 S.E.2d at 798.

21. 255 S.C. at 395-97, 179 S.E.2d at 204-05.

22. S.C. CODE ANN. § 46-750.31 (Cum. Supp. 1973).

23. *See note* 10 *supra* for the policy language in *Keeler* which employs the term "actual use."

24. *Id.*

25. 261 S.C. at 161, 198 S.E.2d at 798.

pose."[26] Therefore, Justice Lewis concluded that the insurance policy afforded coverage to Taylor because the actual use of the automobile had been permitted by the named insured. "[T]he fact that the named insured may have instructed his son not to allow a third party to drive . . . is irrelevant, since such prohibition refers to the operation of the vehicle and not the purpose for which the use is permitted."[27]

In *Government Employment Insurance Co. v. White*,[28] the court also considered the issue of implied consent. A declaratory judgment action was instituted to resolve a dispute over liability between two insurance companies. Wright, a teenage boy, had left his father's car at Glover's service station to be serviced. He later returned to the station accompanied by Jeffords, who was fourteen years old, unlicensed and could not drive an automobile. While Wright, Jeffords, and the owner of the station, Mr. Glover, were waiting in the office portion of the station, an employee, White, serviced the automobile. White went to the door of the office area and asked one of the three to start the car so he could check the oil filter. Jeffords, apparently in response to White's request, walked past Wright and Glover into the service area. When Jeffords attempted to start the car, it was in gear and lunged forward, pinning White to the wall and injuring him.

The supreme court concluded that when Wright surrendered the automobile to Glover, the custody and control of the vehicle also passed to Glover. The court found that Glover granted full permission to White to service the vehicle, including the right to operate or use it as necessary in servicing. White was, therefore, acting within the scope of employment and within the permission granted by Glover.[29] When White, the original permittee, allowed

26. *Id.* at 162, 198 S.E.2d at 799. *See also* 7 AM. JUR. 2d *Automobile Insurance* § 117 (1963). The rule that a permittee may not allow a third party to "use" the named insured's automobile has generally been held not to preclude recovery under an omnibus clause where: (1) the original permittee is riding in the automobile with the second permittee at the time of the accident; or (2) if the second permittee, in using the vehicle, is serving some purpose of the original permittee.

27. 261 S.C. at 161-62, 198 S.E.2d at 798. This distinction is fully discussed in Annot., 4 A.L.R.3d 10, 66-75 (1965). South Carolina is considered to follow the strict construction rule involving disputes over "permission" under omnibus clauses. Eagle Fire Co. of N.Y. v. Mullins, 238 S.C. 272, 280, 120 S.E.2d 1, 5 (1961); Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 227, 119 S.E.2d 746, 751 (1961). For a discussion of the distinctive lines of authority which have developed concerning this issue, *see* R. KEETON, INSURANCE LAW § 4.7(b) (1971).

28. 260 S.C. 163, 194 S.E.2d 884 (1973). This case was cited in *Keeler* as defining implied consent.

29. *Id.* at 169, 194 S.E.2d at 887.

Jeffords to start the automobile, Jeffords became the second permittee and was acting for the benefit of White and Glover.[30] The court held that Jeffords had the express permission of White and the implied permission of Glover to operate or use the automobile. Since Jefford's use of the automobile was within the scope of the original permission granted to White by Glover, Jeffords therefore, was an insured under the omnibus clause of the garage liability policy issued to Glover.[31]

Obviously *Keeler* is distinguishable because an express prohibition had been given to the original permittee not to allow Taylor to drive the vehicle. No such prohibition was present in *White*. In addition, implied consent was more clearly inferable in *White* because the named insured, Glover, was in the office area with Jeffords when White requested assistance.

The garage insurer also contended that its policy did not apply "to bodily injury to an employee of the insured arising out of and in the course of his employment by the insured . . . ."[32] The court held that the exclusionary clause was inapplicable because the "insured" under this provision referred to Jeffords, and White was an employee of Glover, not of Jeffords.[33]

The court also considered the issue of implied consent in *Allstate Insurance Co. v. State Farm Mutual Automobile Insurance Co.*[34] An action was instituted seeking a declaratory judgment to determine the liability of the insurance companies. In the lower court, a jury determined that Mitchell K. Robertson, Jr., was operating an automobile with the consent of its owner, Linda H. Robertson, his estranged wife.[35] On appeal the South Carolina Supreme Court considered only one basic issue—whether the evidence, as a whole, was susceptible of the inference that Mitchell was driving his wife's automobile with her consent, express or implied, when it collided with another vehicle.[36]

The Robertsons were separated in 1971, but it appears that "[t]he relationship between the estranged couple remained

30. *Id.*

31. *Id.* at 170, 194 S.E.2d at 887, *citing* with approval Strickland v. Georgia Cas. & Surety Co., 224 Ga. 487, 162 S.E.2d 421 (1968).

32. *Id.* at 168, 194 S.E.2d at 886.

33. *Id.* at 170, 194 S.E.2d at 887, *citing* State Farm Mut. Auto. Ins. Co. v. Employers' Fire Ins. Co., 256 N.C. 91, 123 S.E.2d 108 (1961).

34. 260 S.C. 350, 195 S.E.2d 711 (1973).

35. *Id.* at 351, 195 S.E.2d at 712.

36. *Id.* at 352, 195 S.E.2d at 712.

friendly, if not cordial."[37] On a Saturday morning in September, 1971, Mitchell picked up his wife's automobile to repair it for her without charge, leaving his personal car for her use. She explained that she was planning to drive to North Carolina that afternoon and would need her automobile at 4 or 4:30 p.m. However, Mitchell apparently did not begin working on the automobile until 3 or 4:00 p.m. Linda attempted to contact Mitchell when she was ready to leave but, unable to reach him, she decided to travel with a friend. She left a note on his car requesting that he leave her automobile, as well as $10.00 to pay for the repair. At approximately 10:30 p.m. that evening, while Mitchell was driving his wife's automobile he was killed in a collision with another vehicle.

The supreme court determined that the permissive use of the automobile did not expire at 4:30 p.m. when Mitchell failed to return the car to Linda's apartment. To the contrary, the court concluded that the evidence was susceptible of the inference that Linda and Mitchell had at least impliedly agreed that each would use the car of the other until the exchange was made.[38] The court stated that implied permission to use an automobile may be established from:

(1) the direct evidence, drawing all pertinent circumstances and proper inferences therefrom;

(2) the general relationship of the parties (possibly the paramount consideration);

(3) a course of conduct or relationship in which mutual acquiescence or a lack of objection might signify assent.[39] The court held that a reasonable inference of consent could be found in the relationship of mutual trust between Linda and Mitchell. The lower court, therefore, had correctly submitted the issue of consent to the jury.[40]

II. UNINSURED MOTORIST COVERAGE

A. *Physical Contact Requirement*

In *Louthian v. State Farm Mutual Insurance Co.*,[41] a passen-

37. *Id.*

38. *Id.* at 354, 195 S.E.2d at 713.

39. *Id. See also* Southern Farm Bur. Cas. Ins. Co. v. Hartford A. & I. Co., 255 S.C. 427, 179 S.E.2d 454 (1971); St. Paul Fire & Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 159 S.E.2d 921 (1968); and Crenshaw v. Harleysville Mut. Cas. Co., 246 S.C. 549, 144 S.E.2d 810 (1965).

40. 260 S.C. at 354, 195 S.E.2d at 713.

41. 357 F. Supp. 894 (D.S.C. 1973). The district court granted plaintiff's motion for

ger in an insured vehicle brought an action against the host's automobile insurer seeking to recover, under uninsured motorist coverage, a judgment obtained against an unidentified owner or operator of a hit-and-run vehicle. The hit-and-run vehicle collided with an intervening vehicle causing that vehicle to strike the host's automobile. Although there was no physical contact between the unidentified vehicle and the one in which the plaintiff was a passenger, it was uncontested that the intervening vehicle first collided with the unidentified vehicle before striking the passenger-plaintiff's vehicle.[42]

The district court held that the physical contact requirement of the South Carolina statute[43] and of the insurance policy was satisfied by physical contact between the hit-and-run vehicle and the intervening vehicle which ultimately collided with the plaintiff's automobile. The court determined that the South Carolina Supreme Court had not specifically ruled on this aspect of the issue of physical contact.[44] The district court therefore relied upon cases from other jurisdictions in deciding the issue in favor of the plaintiff-passenger.[45] This holding appears to be consistent with

summary judgment in part by holding that even though the case involved interpretation of a South Carolina statute, and state law was unclear, abstention was improper where no constitutional issue was involved. *See also* Survey of Practice and Procedure *infra.*

42. 357 F. Supp. at 896.

43. S.C. CODE ANN. § 46-750.34 (Cum. Supp. 1973), which reads in part:

> 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 . . . .

44. However, a similar question was considered by the supreme court in Coker v. Nationwide Ins. Co., 251 S.C. 175, 161 S.E.2d 175 (1968). In *Coker* the plaintiff's automobile collided with a second vehicle, whose driver was identified. The second vehicle had been racing with a third vehicle, whose driver was unknown. There was no physical contact between the unknown vehicle and either the second vehicle or with plaintiff's vehicle. The court held that in view of the statute, the absence of any such physical contact was fatal to plaintiff's claim. But the court specifically left open the fact situation now present in *Louthian*:

> Cases have been cited where the vehicle driven by the unknown motorist struck another vehicle and knocked it into the vehicle of the insured . . . . Whether or not such would satisfy the physical contact provisions of our statute is not involved in this case. Here there was no contact between the unknown vehicle and any other vehicle involved in the collision. 251 S.C. at 182, 161 S.E.2d at 178-79.

See also Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971).

45. State Farm Mut. Auto. Ins. Co. v. Spinola, 374 F.2d 873 (5th Cir. 1967), *citing* with approval the following cases: Inter-Insurance Exchange of the Automobile Club of Southern Cal. v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1965); Motor Vehicle Accident Indemnification Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524 (1966). The court was also persuaded by the implications contained in *Coker*, 251 S.C. at 182, 161 S.E.2d at 178.

the generally accepted view.[46] Since the purpose of the physical contact requirement of the South Carolina uninsured motorist statute[47] is to prevent or eliminate fraud by parties creating "phantom" hit-and-run accidents, the district court's decision is sound.[48]

B. Amount of Insurer's Liability

The case of *Ferguson v. State Farm Mutual Automobile Insurance Co.*[49] presented an issue of first impression in this state. An action for recovery under the uninsured motorist clause was brought by the executrix of a deceased insured motorist's estate against the deceased's insurer. The deceased, while driving his own automobile in the course and scope of his employment, was fatally injured in a collision with an automobile driven by an uninsured motorist. The decedent's statutory dependents recovered under workmen's compensation law. The insurer denied recovery, alleging that a limiting clause in the policy allowed sums received under workmen's compensation claims to be subtracted from the amount recoverable under the uninsured motorist clause.

The court held that any exclusionary language in an insurance contract which has the effect of providing less protection than that required by the uninsured motorist statute[50] is contrary to public policy and thus is of no force and effect. The court adopted the generally accepted rule[51] and concluded that:

> [the insurer's] liability under the uninsured motorist endorsement is contractual in nature and arises after the liability of the uninsured motorist has been established and is not subject to reduction by the amounts received . . . under the Workmen's Compensation Law for the reason that such provision places a

46. Annot., 25 A.L.R.3d 1299 (1969).

47. S.C. CODE ANN. § 46-750.34 (Cum. Supp. 1973).

48. *See* Coker v. Nationwide Ins. Co., 251 S.C. at 181, 161 S.E.2d at 177-78. This same issue of physical contact, involving the driver of plaintiff-passenger's vehicle in *Louthian* was recently decided by the South Carolina Supreme Court in Spaulding v. State Farm Mut. Auto. Ins. Co., 202 S.E.2d 653 (S.C. 1974). The court's decision agreed with the holding in *Louthian*.

49. 261 S.C. 96, 198 S.E.2d 522 (1973).

50. S.C. CODE ANN. §§ 46-750.32 and 750.33 (Cum. Supp. 1973), obligates the insurer ". . . to pay the insured all sums which he shall be legally entitled to recover . . . from the owner or operator of an uninsured motor vehicle . . . ."

51. 261 S.C. at 101, 198 S.E.2d at 525. For the general rule, *see* Annot., 26 A.L.R.3d 873 (1969).

limitation upon the requirement of the statute and conflicts with the terms thereof.[52]

The court stated that the purpose of the uninsured motorist statutes was to provide benefits and protection against injury or death caused by an uninsured motorist to an insured motorist, his family and the permissive users of his vehicle.[53] "The uninsured motorist endorsement is the contract which the insurance company makes with the insured to protect him against the uninsured motorist."[54] Since the insurance contract between State Farm and Ferguson was controlled by and subject to the Uninsured Motorist Act, any inconsistent policy provisions would be void, and the pertinent provisions of the act would prevail just as if they were expressly incorporated in the policy.[55]

In *Boyd v. State Farm Mutual Automobile Insurance Co.*,[56] the South Carolina Supreme Court considered an issue very similar to that in *Ferguson*. *Boyd* involved the question of whether "other insurance" provisions in insurance policies designed to limit the liability of the insurer to $5,000 on each policy issued to the same insured are invalid as being in derogation of the uninsured motorist statute.[57] The lower court held the limiting provisions invalid because the uninsured motorist statute requires that each policy afford a minimum of $10,000 protection for personal injury to one person.[58]

In *Boyd* the plaintiff-respondent was injured by a hit-and-run motorist while walking home from school. Plaintiff's father, with whom he resided, was the named insured in two automobile liability insurance policies issued by State Farm. The plaintiff was awarded a $33,000 judgment in a "John Doe" action pursuant to the uninsured motorist statute, but State Farm paid the

52. 261 S.C. at 102-03, 198 S.E.2d at 525.

53. *Id.* at 100, 198 S.E.2d at 524. *See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

54. 261 S.C. at 100, 198 S.E.2d at 524.

55. *Id.* at 101, 198 S.E.2d at 524.

56. 260 S.C. 316, 195 S.E.2d 706 (1973).

57. S.C. CODE ANN. § 46-750.32 (Cum. Supp. 1973) prescribes minimum limits for automobile liability insurance policies of $10,000 for injury to or death of one person. Section 46-750.33, Cumulative Supplement, provides that:

> [n]o such [automobile liability] policy or contract shall be issued . . . unless it contains . . . the uninsured motorist provision, undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of Section 46-750.32.

58. 260 S.C. at 319, 195 S.E.2d at 707.

plaintiff only $10,000, claiming that this amount exhausted the coverage under the two policies. Plaintiff then brought this action seeking a declaration that State Farm owed him an additional $10,000.

Affirming the lower court's decision, the supreme court noted the settled rule that statutory provisions relating to an insurance contract are considered part of the contract and that, when a policy provision contravenes such a statute it is to that extent invalid.[59] The court reasoned that the statute's prohibition against the issuance of any liability policy without the prescribed minimum coverage is equivalent to a requirement that each policy issued shall provide this coverage. Thus, the position taken by State Farm would have effectively reduced the statutory minimum by one-half.[60] The statute obligated the insurer "to pay plaintiff *all sums* which he is legally entitled to recover from the tortfeasor up to the limit of insurance provided by both policies. Since plaintiff's damages exceeded the sum of available coverages, the 'other insurance' provisions were ineffective."[61]

The court recognized the split of authority in other jurisdictions on this issue;[62] but, since it found no ambiguity in the uninsured motorist statute, the statute was considered controlling. "If the legislature did not intend the result dictated by the language of the statute, the remedy is by amendment. It does not lie with us."[63]

C. *The "Insured" Under The Uninsured Motorist Statute*

In *Hogan v. Home Insurance Co.*[64] a suit was brought against

59. *Id.*

60. *Id.* at 320, 195 S.E.2d at 707. Even though this precise point had not been previously decided by the court, the result reached was foreshadowed by Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 174 S.E.2d 391 (1970), and Midwest Mut. Ins. Co. v. Fireman's Fund Ins. Co., 258 S.C. 533, 189 S.E.2d 823 (1972). *Whitmire* recognized the validity of "other insurance" clauses when applied for the purpose of determining the liability of insurance companies between themselves, but not for the purpose of affording less coverage than required by the uninsured motorist statute. 254 S.C. at 194-95, 174 S.E.2d at 396.

61. 260 S.C. at 321, 195 S.E.2d at 708.

62. *Id. See generally* Annot., 28 A.L.R.3d 551 (1969).

63. 260 S.C. at 321, 195 S.E.2d at 708. Where statutory language is clear and unambiguous, the court may not look to the legislative history of the act for aid in interpretation or construction. The words are given their plain, ordinary meaning and the act must be enforced as written.

In a companion case, Moore v. Maryland Casualty Co., 260 S.C. 244, 195 S.E.2d 392 (1973), the court in a per curiam decision applied *Boyd* as controlling.

64. 260 S.C. 157, 194 S.E.2d 890 (1973).

an insurer to recover under the uninsured motorist coverage. The South Carolina Supreme Court considered the validity of a provision in the automobile liability insurance policy which excluded resident relatives of the named insured from the uninsured motorist coverage except when occupying the vehicle described in the policy. In affirming the lower court decision, the court concluded that the provision constituted an invalid limitation upon the broad coverage required by statute[65] and was therefore void.

In *Hogan* the insurer issued to Lila S. Hogan, the named insured, an automobile liability policy which included the required uninsured motorist endorsement. The vehicle described in the policy was a 1962 Ford. Residing in the household of the named insured were her son and a nephew. The boys, both minors, were killed in a single-car accident while riding in an uninsured automobile that was titled in the name of Lila S. Hogan, but was actually owned by her nephew. He had purchased the car and exercised exclusive control over it.[66]

As a result of an action for the wrongful death of the son, a judgment was entered against the estate of the nephew. The administrator of the son's estate subsequently sued to recover the judgment from Home Insurance Company under the uninsured motorist provisions of the policy issued to Ms. Hogan. The asserted liability of the insurer was based upon the statutory requirement that the policy provide uninsured motorist protection to the son as a resident member of her household. Home Insurance denied liability, relying upon an exclusionary clause in the uninsured motorist endorsement of the policy.[67]

In its opinion, the court noted the established policy that, if a clause in an insurance contract is in conflict with the statutorily required provisions governing uninsured motorist coverage, the statute controls the rights of the parties.[68] According to the court, the term "insured" in the uninsured motorist statutes,[69] refers to two classes of insureds, each of which receives different coverage:

65. S.C. CODE ANN. §§ 46-750.31(2), -750.33 (Cum. Supp. 1973).

66. 260 S.C. at 159, 194 S.E.2d at 890-91.

67. The exclusionary clause provided: "This endorsement (the uninsured motorist endorsement) does not apply: . . . (b) to bodily injury to an uninsured while occupying an automobile (other than an insured automobile) owned by the named insured or any relative resident in the same household." 260 S.C. at 160, 194 S.E.2d at 891.

68. 260 S.C. at 160, 194 S.E.2d at 891. *See also* Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. at 101, 198 S.E.2d at 524; and Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. at 319, 195 S.E.2d at 707.

69. S.C. CODE ANN. § 46-750.31(2) (Cum. Supp. 1973).

> (1) The named insured, his spouse and his or her relatives resident in the same household, 'while in a motor vehicle or otherwise' and
> (2) any permissive user or guest when occupying the insured motor vehicle. The members of the first class are covered at all times without reference to the use of the insured vehicle; while the members of the second are covered only while using, or a guest in, '[the] motor vehicle to which the policy applies.'[70]

The court clearly distinguished the issue under consideration in *Hogan* from the issue decided in *Willis v. Fidelity & Casualty Co.*[71] In *Willis* the court held that a provision in an automobile liability policy excluding *liability* coverage—as distinguished from uninsured motorist coverage—to an insured while driving an automobile, which was not described in the policy but was owned by the named insured or a member of the same household, was a valid policy provision. The limiting provision did not conflict with the requirements of the South Carolina Motor Vehicle Safety Responsibility Act.[72] The court was required to distinguish *Willis* because the Act defines "insured" as applying to both liability coverage and uninsured motorist coverage.[73]

> The liability contract is only required to insure "the persons defined as insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of" the motor vehicle described in the policy; while uninsured motorist coverage obligates the insurer to pay all sums which the insured "shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." Uninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to an insured. Unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited in the statute to the use of the insured vehicle, and cannot be so limited by the policy provisions.[74]

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70. 260 S.C. at 161, 194 S.E.2d at 892.
71. 253 S.C. 91, 169 S.E.2d 282 (1969).
72. S.C. CODE ANN. §§ 46-750.31(2), -750.32 (Cum. Supp. 1973).
73. 260 S.C. at 161, 194 S.E.2d at 892.
74. *Id.* at 162, 194 S.E.2d at 892. *See also* S.C. CODE ANN. § 46-750.33 (Cum. Supp. 1973).

III. POLICY PROVISIONS

A. *"Direct and Immediate"*

In *Lesley v. American Security Insurance Co.*,[75] the South Carolina Supreme Court considered an insurance policy which was issued to provide coverage "against death of poultry, directly and immediately resulting from . . . fire and lightning . . . ."[76] A number of insured's chickens died as a result of excessive heat and suffocation when an electrical storm apparently caused a power failure. The supreme court, in affirming a trial court verdict, found adequate evidence from which it could reasonably be inferred that the power failure resulted from lightning. Sufficient evidence was also found to support the allegation that the death of the chickens was the "direct and immediate" result of the lightning within the meaning of the insurance policy.

The main issue presented in the case was whether the terms "directly and immediately" should have been equated with "proximate cause".[77] The trial judge charged the jury that the insured was required to prove that lightning was the proximate cause as well as the direct and immediate factor causing the death of the chickens. The judge defined proximate cause as follows:

> [P]roximate cause is the efficient cause. [It] means literally the cause nearest in point of time. But under the law it does not necessarily mean that. It means here the efficient cause, it is the direct cause, the cause without which the loss would not have occurred. So it is your duty to decide what was the proximate cause of the death of the chickens.[78]

The supreme court held that this charge was not erroneous. It asserted the existence of authority in this state which supports the proposition that the terms proximate and immediate are virtually synonymous.[79] The court adopted the generally accepted rule of insurance law that only the proximate cause of loss, and not the remote cause, is regarded in determining whether recov-

75. 199 S.E.2d 82 (S.C. 1973).

76. *Id.* at 84.

77. *Id.* The insurer also raised the issue of intervening causes, but the court stated that this issue was not properly before the court.

78. *Id.* at 84-85.

79. *Id.* at 85, *citing* Suber v. Parr Shoals Power Co., 113 S.C. 317, 102 S.E. 335 (1920).

ery is allowed, and that the loss must be proximately caused by a peril insured against.[80]

B. *"Temporary Use of Substitute"*

In *Whittington v. Ranger Insurance Co.*,[81] the insurer had issued an insurance policy affording liability coverage with respect to the "temporary use of substitute aircraft" if the aircraft described in the policy was "withdrawn from normal use because of its breakdown, servicing, loss or destruction."[82] The court was confronted with the factual question of whether an aircraft was withdrawn from normal use because of its breakdown.

The insured aircraft, a Champion Catabria, was purchased new in December, 1968. After only six flying hours the engine was replaced by the manufacturer as defective. Shortly thereafter, moisture in the voltage regulator necessitated minor additional repairs. The record revealed no further difficulty with the Champion until April 16, 1969, when the pilot, Hysell, flew the Champion from Goat Island, Lake Marion, to the Hampton, South Carolina airport to pick up a passenger. After picking up his passenger, Hysell made several unsuccessful attempts to start the plane; however, he ceased his efforts because he knew the battery would not last very long. Hysell substituted a Cessna 172 for the Champion and flew it to Goat Island with his passenger. The crash occurred on the return trip that evening, fatally injuring his passenger, Whittington. It was undisputed that had Hysell succeeded in starting the Champion, it would have been used rather than the Cessna.[83] The Champion apparently was not flown or used by anyone while the Cessna was being used, "and at least inferentially, the Champion was not flown again for quite some

80. 43 AM. JUR. 2d *Insurance* § 1182 (1969). This section distinguishes proximate cause as applied to insurance cases from proximate cause in tort law. The distinction is made that in tort cases the rules of proximate cause are applied solely to fix culpability, whereas in insurance law the purpose of proximate cause is to determine only the nature of the injury and how it happened. In insurance cases, courts look to see if the nearest efficient cause of the loss is one of the perils insured against. If it is, the court looks no further. If the nearest efficient cause of the loss is not a peril insured against, recovery may still be allowed if the dominant cause is a risk or peril insured against. In other words the proximate cause of an insurance loss may be either the dominant or efficient cause.

But in R. KEETON, INSURANCE LAW § 5.5(b) (1971), the proposition is made that actually the analogy between insurance and tort cases on issues of proximate cause is quite close.

81. 201 S.E.2d 620 (S.C. 1973).

82. *Id.* at 621.

83. *Id.*

time after . . . April 16th."[84] However, no evidence was presented to indicate any repairs were subsequently made to the Champion. There was evidence from which an inference might be made that nothing was mechanically wrong with the plane, but that Hysell was unable to start it either because the engine overheated or "because he thinned out his fuel mixture too much" when landing.[85] Hysell was a primary user of the Cessna, but was also a principal user of the Champion.[86]

The court noted no cases which involved insurance coverage of a temporary substitute airplane under a similar policy clause. Therefore, the court relied upon its construction of an identical clause used in automobile liability policies and held it was a proper jury function to determine whether the airplane was a temporary substitute under the policy.[87] Cases from other jurisdictions were cited to show that the language "withdrawn from normal use because of breakdown" does not require an automobile to be in a garage before it is considered withdrawn.[88] The cases indicated that three or four minutes of unsuccessful attempts to start an automobile[89] or even to change tires in a dangerous condition were considered sufficient to constitute a "breakdown."[90]

The insurer relied upon several court decisions which have held that a substituted automobile was not within the policy provision.[91] The supreme court distinguished these cases by noting that the uses of the substituted automobiles were for "the insureds' desires for comfort or convenience and not because of an inoperable or dangerous condition of the insured vehicle."[92]

Generally, in cases involving the use of a substitute automo-

84. *Id.*
85. *Id.* at 622.
86. *Id.*
87. *Id.* at 623.
88. Lewis v. Bradley, 7 Wis. 2d 586, 97 N.W.2d 408 (1959).
89. *Id.*
90. Mid-Continent Cas. Co. v. West, 351 P.2d 398 (Okla. 1959).
91. 201 S.E.2d at 623.
92. *Id.* On the appeal, the insurer also raised the issue that prompt notice of the accident was not given in compliance with the policy's notice provision. The court held that the evidence presented a question for the jury as to whether there was compliance. The court cited Factory Mut. Ins. Co. of America v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971) for the rule that in an action upon an automobile liability contract in which the rights of innocent third parties are affected, non-compliance with the notice provision does not bar recovery unless the insurer shows that the lack of compliance has substantially prejudiced its rights.

bile when the insured automobile was "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction" coverage has been afforded under the following construction of the "substitute" provision:[93]

(1) The phrase "withdrawn from normal use" requires the described vehicle to be withdrawn from *all* normal use.

(2) The described vehicle must be withdrawn because of its "breakdown, repair, servicing, loss or destruction" and not for the desire for comfort or convenience.

(3) The substitute automobile must not be owned by the named insured.

(4) The use of the substitute vehicle must be a temporary use.

(5) The automobile claimed to be covered under the provision must be actually used as a "substitute" for the described vehicle.

(6) The owner of the substitute vehicle is not covered as an insured under the substitute provision.

It is not clear whether the court considered all of these factors; however, the result reached in *Whittington* appears consistent with their proper application.

C. *"Non-owned Vehicle" Coverage*

In *State Farm Mutual Automobile Insurance Co. v. Nationwide Mutual Insurance Co.*,[94] State Farm sought a declaration by summary judgment that automobile liability policies issued to John S. Johnson and Nina Johnson as the named insureds did not extend coverage to their daughter while driving a "non-owned" automobile. The policies in question provided coverage for two automobiles owned by Johnson and for one owned by his wife. The daughter was involved in an accident while she was driving a car not owned by her or her parents.

The district court held that the "use of non-owned automobiles" clause in the policies was so ambiguous as to be ineffectual. In construing the lack of clarity against the insurer, the court found the daughter to be within the protection of the policies.[95]

93. *See generally* Annot., 34 A.L.R.2d 936 (1954).

94. 477 F.2d 540 (4th Cir. 1973).

95. 349 F. Supp. 158 (D.S.C. 1972). It is settled law that the South Carolina Motor Vehicle Safety Responsibility Act does not require liability coverage for the daughter as a "statutory insured" in her use of a non-owned automobile. S.C. CODE ANN. §§ 46-750.31(2), -750.32 (Cum. Supp. 1973). This point, decided in favor of voluntary contracts,

The court of appeals vacated the district court ruling and remanded the case with directions to sustain the insurer's motion for summary judgment. The court held that the provisions in the liability policies extending coverage to the use of a non-owned automobile by "any other person or organization not owning or hiring such automobile, but only with respect to his or its liability for the use of such automobile by an insured . . ." was not fatally ambiguous, and the daughter was excluded from coverage.[96] The court construed the clause as affording coverage to a non-owner for a liability that might arise from the use of the automobile by the insured, in other words, a liability which is imputable to the non-owner by reason of an act of the insured.[97] In clarification the court explained that if a non-owner is the employer or principal of an insured, or would otherwise be liable for the insured's use of an automobile, then the non-owner is protected under the above provision.[98] The court noted that this construction was the one consistently placed upon this provision.[99]

In *Aetna Casualty & Surety Co. v. Sessions*,[100] the South Carolina Supreme Court examined insurance coverage of non-owned vehicles. The main issue involved was whether a non-owned pickup truck had been furnished to an employee for his "regular use". The lower court found that the employer's vehicle, being driven by the employee at the time of the accident, was not furnished for his regular use. Thus, a provision in the employee's insurance policy excluding coverage of "any automobile . . . furnished for regular use to . . . the Named Insured . . ." did not apply.[101]

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was settled by Crenshaw v. Preferred Risk Mut. Ins. Co., 259 S.C. 302, 191 S.E.2d 718 (1972), and Willis v. Fidelity & Cas. Co., 253 S.C. 91, 169 S.E.2d 282 (1969). This liability coverage issue should be distinguished from the uninsured motorist provision where the statute does afford protection to resident relatives of the named insured's household. *See* note 62 *supra* and accompanying text.

96. 477 F.2d at 541.

97. *Id.*

98. *Id.* at 541-42. In Beasley v. Allstate Ins. Co., 246 S.C. 153, 142 S.E.2d 872 (1965), the court held that a non-owner clause extending coverage to "any other person . . . legally responsible for use by such named insured . . . of an automobile" was clearly unambiguous. 246 S.C. at 156, 142 S.E.2d at 873.

99. 477 F.2d at 542.

100. 260 S.C. 150, 194 S.E.2d 877 (1973).

101. *Id.* at 153, 194 S.E.2d at 879. This action was a declaratory judgment action brought by Aetna as the insurer of the employer. Nationwide Insurance Company was the carrier of the employee's personal vehicle and thus was joined as a party. Nationwide's policy provided coverage to the employee while driving a non-owned automobile with the consent of the owner.

The employee's insurer appealed. The supreme court reversed, holding that the vehicle had been furnished to the employee for his regular use. Therefore, the exclusionary provision in the policy applied, and the employee's insurer was not liable. The court found that the vehicle was used solely in the employer's pulpwood business each day by the employee, and that the employee was the regular driver and was the only employee licensed to drive. Each day the employee used the truck to transport other employees to and from work.

The court reasoned that the insurance policy covered a non-owned automobile used casually or infrequently, but not one provided for the regular use of the named insured.[102] An insured should not be permitted to receive liability coverage for two regularly used vehicles if only one has been described in the policy and the premium has been determined accordingly.[103]

IV. MISCELLANEOUS

A. *Cancellation for Non-Payment*

In *Government Employees Insurance Co. v. Mackey*,[104] the issue under consideration was whether the liability policy issued to the insured under the assigned risk plan had been validly cancelled for non-payment of premium prior to an accident involving the insured's automobile. The trial court held in favor of the insurance company. On appeal, the supreme court affirmed the decision and found sufficient evidence to establish a legitimate cancellation of the policy because the insured had refused to pay an additional surcharge on the premium. The surcharge had been added to the original premium after the insurer received an official motor vehicle report from the South Carolina Highway Department. The report indicated that the insured's son, listed as co-driver on the policy, had previously been convicted of driving uninsured.[105]

When the insurer billed the insured for the additional premium, a notice was included that the surcharge resulted from the

102. *Id.* at 155, 194 S.E.2d at 879.

103. Grantham v. United States Fidelity & Guar. Co., 245 S.C. 144, 139 S.E.2d 744 (1964). In a case very nearly on point, Seaboard Fire & Marine Co. v. Gibbes, 392 F.2d 793 (4th Cir. 1968), the court reached the same result as in *Aetna. See generally* Annot., 173 A.L.R. 901 (1948), 86 A.L.R.2d 937 (1962).

104. 260 S.C. 306, 195 S.E.2d 830 (1973).

105. *Id.* at 311, 195 S.E.2d at 832. It is customary procedure for automobile insurance carriers to request motor vehicle reports of traffic violations by their policyholders.

conviction of her son for driving uninsured. For approximately two months following the issuance of the policy, the insurer corresponded with the producer of record. The producer informed the insurer of Ms. Mackey's contention of error on the part of the highway department. She asserted that her estranged husband, Robert Mackey, Sr., was the one actually convicted rather than her son, Robert Mackey, Jr. The communications ended with the insurer forwarding a copy of the motor vehicle report to the producer stating, "If you can help us in clearing up this matter, please advise."[106] The producer again advised Ms. Mackey of the reported violation against her son. In response, she asserted that she had a letter from the highway department indicating that her son was not guilty of the alleged violation. Although the producer requested that she promptly bring the letter to him to avoid cancellation, she failed to do so. At least several weeks passed before the policy was cancelled in accordance with the statutorily required procedure.[107]

It appears that the real issue in this case was whether the insurer was justified in relying upon the correctness of the official motor vehicle report after being informed by the producer that the son was not licensed to drive an automobile until more than a year after the alleged traffic violation occurred. In essence, the court was forced to determine whether the insurer had a duty of more extensive investigation or whether Ms. Mackey had an affirmative duty to disprove the allegations.[108] The supreme court stated that the possession of the motor vehicle report by the insurer was *prima facie* evidence of its correctness.[109] It further concluded that it was reasonable for the insurer to have relied upon the report in the absence of any contrary showing by the insured.[110]

B. Fraud

In *Marlowe v. Reserve Life Insurance Co.*,[111] an insurer de-

106. *Id.* at 312, 195 S.E.2d at 832.

107. S.C. CODE ANN. §§ 46-750.51, -138 (Cum. Supp. 1973).

108. The issue is one of fact, looking at all pertinent circumstances surrounding the evidence. Ms. Mackey did produce a letter from the highway department clearing her son of the violation, but the letter was produced and dated approximately two months after she told the producer of record she had such a letter. Also, the automobile accident from which this litigation arose did not occur until five months after the policy was cancelled. Neither Ms. Mackey nor her son was driving the automobile at the time of the accident.

109. 260 S.C. at 314-15, 195 S.E.2d at 834.

110. *Id.* at 315, 195 S.E. 2d at 834.

111. 261 S.C. 23, 198 S.E.2d 267 (1973).

fended an action to recover hospital expenses on the ground that there were material misrepresentations in the application as to the insured's medical history.[112] The supreme court held that where the insurer's agent failed to accurately include on the insurance application the truthful information given him by the insured, the insurer was estopped from denying coverage despite a disclaimer of the agent's authority to waive the requirements in the application.[113]

The insured, Helen S. Marlowe, sought hospital insurance for herself and her children, but was informed by one agent that this company would not insure her in view of her medical history. The agent agreed to contact an agent of another company which might provide coverage. John Rouse, an agent of Reserve Life, subsequently contacted Ms. Marlowe and visited her home. It is unquestioned that Ms. Marlowe told him she had been previously refused coverage because her "medical record looks like a dictionary."[114] Nevertheless, the agent filled out the application, which Ms. Marlowe signed without reading. The court imputed the knowledge of the agent to the insurer and stated:

> The general rule is that the knowledge of an agent acquired within the scope of his agency is imputable to his principal, and if an insurance company, at the inception of the contract of insurance has knowledge of facts which render the policy void at its option, and the company delivers the policy as a valid policy, it is estopped to assert such ground of forfeiture.[115]

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112. The insurer conceded that truthful statements were given to its agent by the applicant, and that there was no intent to defraud or deceive by the applicant. The information was "incorrectly" included on the application by the agent. The insurer argued that it could avoid liability because of a provision in the application which limited the agent's authority as follows:

> [t]hat the Company is not bound by any knowledge of or statement made by or to any agent, unless set forth in this application, and no agent has authority to waive the answer to any question on this application . . . or to bind the Company in any way by making any promise or representation. . . . 261 S.C. at 26, 198 S.E.2d at 269.

113. *Id.* at 30-31, 198 S.E.2d at 271. In Muckelvaney v. Liberty Life Ins. Co., 261 S.C. 63, 198 S.E.2d 278 (1973), decided two weeks after *Marlowe*, the court was concerned with the issue of whether the allegations of a complaint showed the existence of a contract of insurance. The court held that the allegation that the insurer's soliciting agent told the plaintiff that the new life insurance policy on her husband had been issued, when the agent was in her home on another mission, was insufficient basis for estoppel. "It was a voluntary remark, made . . . a few hours before the insured's untimely death, on which there was no reliance . . . . Certainly, there is nothing . . . from which prejudice . . . from this statement could possibly be inferred." 261 S.C. at 67, 198 S.E.2d at 280.

114. 261 S.C. at 25, 198 S.E.2d at 268. The facts presented were undisputed.

115. *Id.* at 27, 198 S.E.2d at 269. *See also* Fludd v. Equitable Life Assurance Soc.,

The insurer argued that the foregoing general rule was inapplicable because the agent, in view of the limiting clause in the application, had no authority to waive any of the insurer's rights.[116] But the court stated that the general rule is followed in this state, and that South Carolina also follows the rule that a provision limiting an agent's power is subject to waiver by the insurance company as are all provisions.[117] Since an insurance company must solicit business through its agents, the agents may bind the company by waiving such a provision in the application.

In accordance with the general rule, the court stated:

> [W]here the fact is correctly stated by the applicant for insurance but a false answer is written into the application by an agent . . . without knowledge or collusion of the applicant, the company is bound, and it makes no difference whether the agent acted negligently or fraudulently, or whether the application contained a covenant that the agent could not bind the company by making or receiving any representations or information.[118]

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75 S.C. 315, 55 S.E. 762 (1906); Small v. Coastal States Life Ins. Co., 241 S.C. 344, 128 S.E.2d 175 (1962).

116. 261 S.C. at 27, 198 S.E.2d at 269. Though *Marlowe* involved a question of an agent's alleged limited authority to hold his principal vicariously liable, a 1973 federal court case is worth mentioning for its dicta concerning a master's liability under the doctrine of *respondeat superior*. In Garrett v. Jeffcoat, 483 F.2d 590 (4th Cir. 1973), a passenger in an automobile owned and operated by a federal government employee alleged a cause of action against the employee and the United States under the Federal Tort Claims Act. The passenger had accepted an offer of settlement from the employee's liability insurer and had executed a partial release to both the employee and his insurance carrier. The court of appeals, in reversing the South Carolina District Court, held that the plaintiff-passenger's release of the government employee's liability had no effect on the liability of his employer, the United States Government. "[T]he United States [was] *solely* liable for the negligent acts of its servants while operating motor vehicles within the scope of their employment and that there is no cause of action whatever against the employee himself . . . . [T]he liability of the Government is no longer derivative . . . but is primary and exclusive." 483 F.2d at 593, *citing* the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e).

The court had concluded that South Carolina law was not controlling. The district court had relied upon South Carolina law that an employer's liability was vicarious to that of an employee. Had South Carolina law controlled, a release of an employee would also have released the master. The release would have been effective not merely upon the theory that the master is denied his right of indemnity against the servant but also that, under the doctrine of *respondeat superior*, the sole basis of liability is the wrongdoing of the servant imputed to the master. 483 F.2d at 592-93.

117. Cauthen v. Metropolitan Life Ins. Co., 189 S.C. 356, 1 S.E.2d 147 (1939); Able v. Pilot Life Ins. Co., 186 S.C. 26, 194 S.E. 628 (1938); Rearden v. State Mut. Life Ins. Co., 79 S.C. 526, 60 S.E. 1106 (1908).

118. 261 S.C. at 28-29, 198 S.E.2d at 270. *See also* 45 C.J.S. *Insurance* § 595(5)

The court concluded that the insurer must show that it relied upon the misrepresentations of the insured [applicant] and not upon mistakes or misrepresentations of its own [agent].[119]

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(1946), and 43 AM. JUR. 2d *Insurance* § 1106 (1969), for the general rule which was followed by the South Carolina Supreme Court.

In *Marlowe* it was conceded that the insured had not intended to deceive or defraud the insurer. In Winburn v. Minnesota Mut. Life Ins. Co., 201 S.E.2d 372 (S.C. 1973), this question was on appeal to the supreme court. The insured had received a credit life insurance policy from the insurer in connection with a loan at the Federal Land Bank of Columbia. The court, recognizing that ordinarily a question of fraud in a case of this kind was for a jury, concluded, however, that the case was one of those rare ones where a directed verdict for the insurer should be allowed. The court agreed with the lower court that the only reasonable conclusion from the facts was that the insured intended to deceive and defraud the insurer when she deliberately suppressed the truth and gave false answers as to her health and prior medical treatment.

It appears that the court had no alternative but to affirm the lower court because the plaintiff had failed to establish his case on the record. The plaintiff had wanted to show that the insured had not filled out the entire application, but had merely signed it, and also that an agency relationship existed between the insurer and the Federal Land Bank.

Justice Bussey dissented and filed an opinion. He argued that the plaintiff's evidence should have been introduced.

119. 261 S.C. at 28, 198 S.E.2d at 270.