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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2021-CP-33-00342
Appellate Case No. 2022-000232

Kevin L. Grant,…………………..………………………….… Appellant,

v.

State Farm Mutual Automobile
Insurance Company,……………………………………………Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Can an automobile insurer validly restrict the portability of otherwise applicable underinsured motorist coverage because a pedestrian is also entitled to recover underinsured motorist coverage under another insurance policy?
2. Did the circuit court err by deciding a matter concerning a novel issue of law on a Motion to Dismiss?

STATEMENT OF THE CASE

The issue in this case is whether Appellant Kevin Grant may collect underinsured motorist coverage ("UIM") under Respondent State Farm Mutual Automobile Insurance Company ("State Farm") policy of insurance, policy number 572 5466-E15-40A[1] ("Policy") for injuries he sustained in an incident with an underinsured motorist on July 16, 2018 ("Collision"). The Policy included UIM coverage in the amount of twenty-five thousand ($25,000) dollars in bodily injury coverage. (R. p. 25; Complaint ¶ 6). Appellant was listed as the principal driver of the insured vehicle and was also the spouse and resident relative of Mrs. Kaprisha Grant. (R. pp. 24-25; Complaint ¶¶ 3-4). Therefore, he is a named insured as defined in the policy. (R. p. 25; Complaint ¶ 5)

Appellant also made a claim for UIM coverage under the State Farm Policy, and Respondent denied coverage to Appellant. (R. p. 26; Complaint ¶ 15). Appellant then filed a Complaint in the Marion County Court of Common Pleas on July 9, 2021, requesting a declaratory judgment from the court that Appellant was entitled to UIM coverage under the Policy issued by Respondent. (R. p. 23-31; Complaint).

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1. The Complaint mistakenly referenced the State Farm Policy Payment Number of 1490915527 instead of the policy number of 572 5466-E15-40A.

Respondent, State Farm, filed a Motion to Dismiss under SCRCP 12(b)(6) on August 12, 2021. (R. p. 32; Motion to Dismiss). A hearing on the Motion was held on Monday, September 27, 2021, in Marion County before the Honorable Michael G. Nettles. (R. p. 8; Transcript of Hearing). The circuit court issued an Order on November 8, 2021,[2] granting Respondent's Motion to Dismiss. (R. pp. 8-14; Order dated Nov. 8, 2021). Appellant filed a Motion to Reconsider on November 18, 2021, (R. pp. 45-47; Motion to Reconsider) which was denied by order of the circuit court on January 28, 2022. (R. pp. 15-17; January 28, 2022, Form 4 Order). This appeal follows.

STANDARD OF REVIEW

Considering the Respondent's 12(b)(6) motion, the Court must solely consider the allegations in the Complaint. *Toussaint v. Ham*, 292 S.C. 415, 416 357 S.E.2d 8, 9 (1987). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

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2. Counsel for the undersigned initially received a signed but unfiled Order dated October 6, 2021, from the Court denying Respondent's Motion to Dismiss on or about October 15, 2021. Counsel's office subsequently filed this Order with the Marion County Clerk of Court on October 19, 2021, following inquiry to Judge Nettles' chambers. Counsel for the parties were advised on October 20, 2021, that the Order was inadvertently signed October 6, 2021, and that Judge Nettles would file a Form 4 Order rescinding the Order filed on October 19, 2021, and would continue to take the matter under advisement. (R. p. 5; October 20, 2021, Form 4 Order).

ARGUMENT

1. Facts

On July 16, 2018, while Appellant was a pedestrian in the roadway, he was hit by a car operated by Hughes Sellars. (R. p. 25; Complaint ¶ 9). Appellant sustained serious and painful injuries because of this accident. (R. pp. 25-26; Complaint ¶ 10). Sellars, the at-fault party, was insured by Integon National Insurance Company who tendered the limits of $30,000 in liability coverage to Appellant on a covenant not to execute. (R. p. 26 and 109; Complaint ¶ 11). Appellant owned several personal vehicles, some of which were insured by Geico and some of which were insured by State Farm. (R. p. 26; Complaint ¶ 12). Appellant resolved an UIM claim with GEICO which insured different vehicles than those insured by State Farm. (R. p. 26 and 111; Complaint ¶ 12). Appellant asserted that UIM coverage applicable to him under the State Farm Policy was "personal and portable" and therefore recoverable because of the Collision. State Farm refused to pay UIM coverage under the Policy asserting that because he had recovered UIM coverage under the Geico policy, Appellant was improperly attempting to stack UIM coverage. (R. pp. 32-34; Motion to Dismiss). Because of State Farm's denial, Appellant filed the present declaratory judgment action.

2. Underinsured Motorist coverage is personal and portable in South Carolina.

Automobile insurers in South Carolina must offer to their insureds UIM coverage, the purpose of which is "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist…" S.C. Code Ann. § 38-77-160 (1976, as amended); *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). Although UIM coverage is not mandatory like uninsured ("UM") coverage, an insurer must offer it and provide it when an insured purchases it; therefore, when an insurer provides UIM

coverage, any contractual exclusions to that coverage are invalid if they conflict with statutory language or public policy. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515, 518-519 (2013).

The Supreme Court has held that underinsured motorist coverage is personal and portable and coverage follows the individual and not the vehicle; thus, entitled automobile insureds may recover underinsured motorist benefits under their policy arising out of an accident while riding in a car owned and operated by resident relative, despite the portability limitation provision in the insured's policy. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007); *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). Notwithstanding the portability limitation in the insurance contract, the *Rhoden* court determined that public policy is offended by a limitation on UIM portability when applied to resident relatives who do not own the vehicle involved in the accident. *Id.* at 399, 728 S.E.2d at 480.

Here, Appellant is insured with coverage under different policies with different carriers. He is not seeking recovery for multiple coverages under multiple policies from the same carrier. Because Appellant did not "have" a vehicle involved in the collision, the stacking rules do not govern. *Merck v. Nationwide Ins. Co.*, 318 S.C. 22, 455 S.E.2d 697 (1995). Appellant had UIM coverage through both Geico and State Farm on a vehicle not involved in the collision. Appellant concedes that he cannot stack multiple UIM coverages under the Geico policy, and concedes that he cannot stack multiple UIM coverages from all the vehicles insured under the State Farm Policy. However, Appellant may collect *one* of the UIM coverages under the State Farm Policy under the Court's holding in *Rhoden*, which acknowledges the personal and portable nature of UIM coverage. 398 S.C. at 402, 728 S.E.2d at 482.

3. Portability differs from stacking.

Portability, not stacking, is the basis for Appellant's ability to recover under both the Geico policy and the State Farm Policy. South Carolina public policy dictates that UIM coverages are personal to an insured and are "portable," following the insured *individual* rather than the insured *vehicle*. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007). The language of the UIM statute dictates that insureds are protected at all times2, regardless of their activities at the time of injury and despite whether they were using an insured vehicle at the time of the accident. *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973). The circuit court failed to accurately distinguish between stacking and portability in its Order.

The South Carolina Court of Appeals clarified in *Nakatsu v. Emcompass Indemnity Company,* the distinction between the concepts of stacking and portability as follows:

> *Burgess* [*v. Nationwide Mut. Ins. Co.*], as the opinion notes, did not involve stacking; it involved portability. These are two distinct concepts. Stacking is only allowed if the insured has the specific type of coverage *on the vehicle involved in the accident*.[3] On the other hand, portability refers to a person's ability to use his coverage *on a vehicle not involved in an accident* as a basis for recovery of damages sustained in the accident.

390 S.C. 172, 180, 700 S.E.2d 283, 288 (Ct. App. 2010) (emphasis added).

Because Appellant was a pedestrian when he was involved in the Collision, the circuit court concluded that Appellant is a Class II insured regarding UIM coverage under the State Farm policy and therefore excluded from recovering insurance benefits. (R. p. 10; Order dated Nov. 8, 2021 p. 3). This is an incorrect conclusion, however, because Appellant was not in *any* vehicle when he was injured, the principles of portability and *not* stacking apply. The issue at

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3. The Court describes that stacking is allowed only if (1) the insured has purchased UIM coverage from the insurance carrier, <u>and</u> (2) the insured's vehicle is involved in the accident. (classifying them as a Class I insured). *See id.*, 390 S.C at 178; 700 S.E.2d at 286-87 (citations omitted).

hand, of whether the insured can use UIM coverage from a non-involved vehicle is thus a question of portability and not stacking. Had Appellant been attempting to stack UIM benefits, the Court correctly notes that under a typical stacking analysis the fact that Appellant's UIM policies are held by separate insurance carriers would have been insignificant. (R. p. 11; Order dated Nov. 8, 2021). However, because the question is one of portability and not stacking, that Appellant seeks to recover benefits from policies held by separate insurance carriers is significant.

As the *Nakatsu* Court noted, this exactly how questions of portability are defined—"portability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident." 390 S.C. at 181. The similarities between the *Nakatsu* Court's definition of portability and the facts at issue today are clear and evident. Under the prior guidance provided by the Court of Appeals, today's issues should be properly viewed as questions of portability. As such, the Court's dismissal based on the analysis of S.C. Code § 38-77-160, a stacking statute, should be reversed.

4. Limitation on portability is contrary to public policy.

The effect of Respondent's denial of UIM portability contrary to South Carolina's public policy. The purpose of UIM is to allow an insured to obtain coverage for himself when an at fault damages exceed the amount of coverage purchased by the at-fault. "Essentially, the insured is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself." *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). This is the basis for the public policy of allowing UIM coverage to be both personal and portable.

Respondent argues that Appellant is a Class II insured, because he was not in his vehicle at the time of the accident, and therefore he is barred from "stacking" applicable, portable UIM benefits, carried by multiple insurance providers. If Respondent's contention were true, there would never be a benefit to purchasing UIM coverage for multiple vehicles. For example, if an insured is not the owner of the vehicle involved in an accident and the cost of their injuries exceed the limits on their UIM policy held by insurance carrier A, then the insured could only recover up to the UIM policy limit on one vehicle and thereafter be barred from recovering additional policy benefits purchased on other policies. If so, then multiple UIM policy coverages from separate carries would be essentially useless—offering no additional protection to the insured—regardless that the insured pays a separate, additional insurance premium to increase their coverage protection.

The Supreme Court's reasoning and consideration of public policy in *Burgess v. Nationwide Mutual Insurance Company*, is instructive on this point. 373 S.C. 37, 644 S.E.2d 40 (2007). In *Burgess*, the Supreme Court considered whether public policy was "offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy?" *Id.* at 41-42. As the Court explained, "[e]ssentially, the insured is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself. When, however, the insured is driving his own vehicle, he has the ability to decide whether to purchase voluntary UIM coverage." *Id*. at 42. The Court ultimately held that

> "[P]ublic policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at-home' UIM coverage when the insured has a vehicle involved in the accident. Upholding this limit on portability encourages persons to purchase UIM insurance on all their vehicles. To hold, as

> did the Court of Appeals, that basic UIM is portable even in this situation permits an individual who owns multiple vehicles to purchase UIM insurance on only one vehicle, yet have basic UIM coverage on all. We find this result undesirable."

Id. (internal citations omitted).

This is the inverse of the Appellant's situation. Unlike Mr. Burgess, Appellant insured himself multiple times, on multiple vehicles with multiple carriers to protect himself against "unknowable" risks, yet he has only the ability to collect on one policy due to Respondents denial of coverage.

If the principles of stacking apply, then individuals would be disincentivized to purchase UIM coverage on multiple vehicles because if, as in the case here, the insured is injured as a pedestrian, the insured could only collect one of the at-home policies despite having paid premiums on multiple policies with multiple coverages which would frustrate the intent behind portability to encourage persons to purchase UIM insurance on all their vehicles. Public policy considerations therefore support Appellant's contention he may have UIM coverage under the State Farm Policy.

5. The State Farms Policy language is consistent with portability of the coverage.

The language in the State Farm Policy seems to contemplate and endorse that the insured can collect UIM from more than one policy. Under the clause "If Other Underinsured Motor Vehicle Coverage Applies" is paragraph 5: which states:

> …if this policy and one or more other sources provide underinsured motor vehicle coverage for the same damages on a:
>
> a) Primary basis, then we will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as primary coverage;
>
> Or;

b) excess basis, then we will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as excess coverage.

(R. pp. 76-77; State Farm Policy)

This language seems to explicitly contemplate situations in which there would be multiple layers of UIM coverage from which an insured can collect beyond the State Farm UIM coverage and provides a formula on the coverage that should be paid. Even assuming stacking principles apply, this paragraph would seem to contemplate collection of coverages beyond what is provided in S.C. Code Ann. § 38-77-160. *Hamrick v. State Farm Mut. Auto. Ins. Co.*, 270 S.C. 176, 241 S.E.2d 548 (1978) ("A policy of insurance issued pursuant to statutory law must at a minimum give the protection therein described. It may give more protection but not less…")

To the extent the language of the policy is vague, it is well settled that "[w]here the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). However, in cases such as this where the language suggests that the insured can collect UIM coverage beyond that paid by another carrier, "[i]t is a question of law for the court whether the language of a contract is ambiguous." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Diamond State Ins. Co. v. Homestead Indust., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995)). The language in State Farm's own Policy therefore supports Appellant's contention he has UIM coverage under the State Farm Policy despite his prior collection of coverage from the Geico policy.

6. Novel issues of law such as this should not be decided on a 12(b)(6) Motion to Dismiss.

Appellant has been unable to locate a South Carolina case which addresses the question currently before the court as to the portability of UIM coverage for a pedestrian. The Supreme Court has held "as a general rule, important questions of novel impression should not be decided on a motion to dismiss." *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). When justice is promoted by trying a novel issue on the merits, the court should deny a motion to dismiss. *Kennedy v. Henderson*, 289 S.C. 393, 396, 356 S.E.2d 526, 527-28 (1986). Even when the technical grounds of demurrer are met under strict law, the court must weigh the potential far reaching effects of deciding a novel issue on first impression, including the effect on the current parties, and the impact on future litigants. *See Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 138-39, 153 S.E.2d 184, 188 (1967) (Novel issues are best decided when viewed in the light of the testimony and facts presented at trial); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (citing *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 459,272 S.E.2d 633, 634 (1980)). Due to the importance of deciding a novel issue of law, courts generally reserve granting 12(b)(6) motions on such issues until all underlying facts are undisputed. *See Palmer v. State*, 427 S.C. 36, 42-43, 829 S.E.2d 255, 259 (Ct. App. 2019). "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing *Williams v. Condon*, 347 S.C. 227, 233 553 S.E.2d 496, 500 (Ct. App. 2001)).

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court reverse the ruling of the Circuit Court and declare that he can recover UIM coverage under the State Farm Policy because of the Collision.

Respectfully submitted,

July 21, 2022
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Kevin L. Grant, ... Appellant,

v.

State Farm Mutual Automobile
Insurance Company .... Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Final Brief of Appellant* and *Final Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

July 21, 2022

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