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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2016-CP-32-815
Appellate Case No. 2020-001693

State Farm Mutual Automobile Insurance Company .....Appellant.

vs.

Myra M. Windham .....Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Petitioner State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") hereby petitions this Court for rehearing and reconsideration to review Opinion No. 28121 of the Court, filed November 3, 2022. The majority Opinion affirmed as modified the Court of Appeals' reversal of the Circuit Court's order granting summary judgment to State Farm. Because the majority Opinion misapprehended stipulated facts, unambiguous policy language, and South Carolina jurisprudence central to its analysis and holding, State Farm respectfully requests rehearing be granted and that this Court issue a new opinion reinstating the Circuit Court's ruling in favor of State Farm, or, at a minimum, order rehearing and further oral argument.

ARGUMENT

I. The Court's Majority Opinion Overlooks the Stipulations Entered Into by Windham and Misapprehends Unambiguous Policy Language

Respectfully, the Court's majority Opinion not only misapprehended facts central to its analysis and holding, it overlooked and actively disregarded *stipulated* facts in this insurance coverage dispute regarding stacking. Specifically, the parties expressly stipulated that none of the Windhams' vehicles was involved in the accident at issue, that the rental car meets the definition of a "temporary substitute car" under the policy, and that the rental car did not meet the definition of "owned by" in the policy. (App. 102). Thus, the majority Opinion ignores the very crucial and binding stipulation that Windham did not own the rental car. *See Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (noting that a stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorney that is, "of course, . . . binding upon those who make them"). The majority did "not view the stipulations as dispositive" and found that the "stipulations [did not] resolve the fundamental question of whether the driver of a temporary substitute vehicle can stack[.]" (Op. p.7, n.7).

The majority Opinion's failure to give the appropriate deference to the stipulations which bound the parties is flawed. Indeed, as noted by the dissent, the policy's anti-stacking provision clearly provides Windham cannot stack if she was "occupying a motor vehicle not **owned by** [her] or any resident relative." "Owned by" is a specifically defined term in the UIM coverage section. Thus, in the face of the clear policy language, the stipulations *are* dispositive.[1] The majority Opinion's conclusion to the contrary is error and requires reconsideration.

[1] There is no basis in the record nor has there been any request by Windham that she be relieved from the stipulations or that she did not intend to stipulate to the facts as she did. The parties stipulated to these particular facts because they are true, accurate and not in dispute.

II. The Majority Opinion Misapprehends and Misconstrues Policy Language

Ignoring the stipulations, the majority Opinion clung to Windham's grasping argument that because the policy provided that the rental car would be treated as a "temporary substitute" car instead of a "non-owned" car, it is reasonable to promote the rental car's status to that of an "owned" car under the policy terms, despite binding factual stipulations to the contrary. Respectfully, the majority Opinion relies on an unreasonable interpretation and rewriting of the contract to create an ambiguity,[2] despite the policy's clear definitions and language and despite being contrary to South Carolina's jurisprudence on stacking.

Indeed, the policy *expressly* defines all three operative terms upon which the majority Opinion based its holding:

- "Non-Owned Car":

  [A] ***car*** that is in the lawful possession of ***you*** or any ***resident relative*** and that neither:

  1. is owned by:
     a. ***you***;
     b. any ***resident relative***;
     c. any other ***person*** who resides primarily in your household; or
     d. an employer of any ***person*** described in a, b, or c, above; nor
  2. has been operated by, rented by, or in the possession of:
     a. ***you***, or
     b. any ***resident relative***;

     during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or loss.

(App. 194-95) (emphasis added in underline).

[2] The majority Opinion suggests that Windham argued ambiguity in her motion for summary judgment. (Op. p. 8). However, a review of the record – including Windham's summary judgment briefing, arguments, and motion for reconsideration – reveals that any argument regarding ambiguity was cursory at best. In fact, Windham argued that the definition of temporary substitute vehicle was "clear and unambiguous." (App. 144-145). Thus, the majority Opinion's decision is based on argument that was never properly presented to the Circuit Court and never presented to the Court of Appeals or this Court.

- "Temporary Substitute Car":

  [A] ***car*** that is in the lawful possession of the person operating it and that:

1. Replaces ***your car*** for a short time while ***your car*** is out of use due to its:
   a. Breakdown;
   b. Repair;
   c. Servicing;
   d. Damage; or
   e. Theft; and
2. Neither ***you*** nor the ***person*** operating it own or have registered.

   If a ***car*** qualifies as both a ***non-owned car*** and a ***temporary substitute car***, then it is considered a ***temporary substitute car*** only.

(App. 195) (emphasis added in underline).

- "Owned by":

  1. owned by;
  2. registered to; or
  3. leased, if the lease is written for a period of 31 or more consecutive days, to.

(App. 194-95).

Finally, the UIM portions of the Policies provide:

3. If:
   a. ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage***:
      (1) while ***occupying*** a motor vehicle not ***owned by you*** or any ***resident relative***; or
      (2) while not ***occupying*** a motor vehicle; and
   b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to **you** or any ***resident relative*** by the State Farm Companies apply to the same ***bodily injury*** or ***property damage***, then the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

(App. 214) (emphasis added in underline).

An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. *Nationwide Mutual Ins. Co. v. Comm.*

Bank, 325 S.C. 357, 479 S.E.2d 524 (Ct. App. 1996). When – as here – a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *C.A.N. Enterprises, Inc. v. S.C. Health & Human Services Finance Comm'n,* 296 S.C. 373, 373 S.E.2d 584 (1988).

The majority Opinion appropriately cites *Fritz-Pontiac-CadillacBuick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) for the well-settled proposition that it "must enforce, not write, contracts of insurance and [it] must give policy language its plain, ordinary, and popular meaning." The Opinion also properly cites *Fritz* for the proposition that the Court "must not extend or defeat coverage that was never intended by the parties." But the Court omits *Fritz's* preceding admonition that "[Courts] *should not torture the meaning of policy language* to extend or defeat coverage that was never intended by the parties." 312 S.C. at 318, 440 S.E.2d at 369 (emphasis added). Respectfully, the majority Opinion disregards *Fritz's* warning and proceeds to torture the policy, extending coverage to Windham that was never intended by the parties.

The analysis the majority Opinion should have employed is straightforward: The policy provides that "[i]f a car qualifies as both a **non-owned car** and a **temporary substitute car**, then it is considered a **temporary substitute car** only." Certainly, as stipulated, Windham's rental car qualifies as both, and therefore it is a "temporary substitute car" *only* pursuant to the policy language. What is not straightforward is to then promote a "temporary substitute car" to the status of an "owned by" car in the second part of the analysis, which focuses on stacking. [3] State Farm's

[3] The majority Opinion suggests that because the policy provides that the rental car, which qualifies as both a temporary substitute car and a non-owned car, will be treated as a temporary substitute car only, this essentially morphs the vehicle into the opposite of a "non-owned" car, i.e., an "owned" car, ignoring that the term "owned by" is a defined term. Such a conclusion disregards the policy's intentional and deliberate delineation of these terms with respect to various terms, coverages, and exclusions. The policy when read as a coherent whole operates on a sliding scale, intentionally providing less coverage to a "non-owned car" than a "temporary substitute car," and

anti-stacking language in the policy is clear: If an insured is occupying a motor vehicle other than "your car" that is "owned by" the insured or any resident relative, stacking is prohibited. "Owned by" is expressly defined in the Policy as "[] owned by; [] registered to; or [] leased, if the lease is written for a period of 31 or more consecutive days, to." Windham *stipulated* the rental car does not meet the policy definition of a car "owned by" her, and this fact, even absent the stipulation, was not debatable. "Owned by" is not the equivalent of "temporary substitute car." Not only does a temporary substitute car not fall within the definition of "owned by," a temporary substitute car cannot, by its very definition, be owned, as that term is commonly used, by an insured. Thus, as the dissent concluded, the policy language clearly and unambiguously prohibits stacking in these circumstances. The majority Opinion's finding this is only one of two reasonable interpretations is not consistent with the policy language.

Indeed, to reach this conclusion, the majority Opinion tortures the policy language to create an ambiguity where none exists (and where none has been argued) and therefore allow stacked coverage that was not contracted for under the guise of "reasonable interpretations." *See Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage."). As the dissent noted,

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then of course providing the greatest coverage to vehicles actually "owned by" the insureds. For example, many exclusions which are applicable to "non-owned cars" are not applicable to "temporary substitute cars" and "owned by" cars. (*See, e.g.*, App. 198-99, exclusions 7, 8, and 9). Thus, it was inappropriate to allow the "key" sentence highlighted by the majority Opinion as ambiguous to trump every other sentence in the policy; when that "key" sentence is read in the context of the policy as a whole, it is a consistent statement of the sliding scale of coverage – giving an insured operating a "temporary substitute car" that may also qualify as a "non-owned car" more coverage than a "non-owned car" is afforded. Given the reasons for operating a temporary substitute car as opposed a non-owned car, this protection makes sense and is consistent with the plain language of the policy as a whole.

there is no ambiguity given the plainly-defined terms and anti-stacking provision, and thus the only *reasonable* interpretation of the policy is that Windham did not own the rental car, the rental car does not meet the definition of "owned by" and therefore stacking of UIM coverage is not permitted. This conclusion could have been reached by the majority on either the stipulations alone or the policy language alone, and it certainly should have been the majority's conclusion given the combination of the two.

Nevertheless, in footnote 6, the majority Opinion implies that the ultimate question "is whether 'not non-owned' means owned[.]" (Op. p. 7). But this is a question already answered by the clear language of the policy—the definition of "owned by." The policy's definition – "[] owned by; [] registered to; or [] leased, if the lease is written for a period of 31 or more consecutive days, to" – neither includes a "temporary substitute car" nor a car that is not "non-owned." In fact, those defined terms expressly *exclude* vehicles *owned by* an insured. While the majority Opinion latched onto the final sentence of the definition of the temporary substitute car as being "key to the policy's ambiguity," it then offers assurances it looked to the policy as a whole. (Op. p. 6, n.5). But, had it looked at the policy as a whole, including the *entire* definition of temporary substitute car which (in preceding sentences) expressly excludes vehicles owned by an insured or resident relative, it would have easily dismissed the notion of a perceived ambiguity.

Given the expressly-defined terms, read in their entirety and together, the court's duty is "limited to the interpretation of the contract made by the parties themselves 'regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.'" *C.A.N. Enterprises, Inc.*, 296 S.C. at 378, 373 S.E.2d at 587 (citing *Gilstrap v. Culpepper,* 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984)); *Cf. Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 149, 781 S.E.2d 137, 144 (Ct. App. 2015) (holding "that the term 'similar' is

not defined in the Endorsement creates ambiguity as to its precise meaning" and noting that the insurer could have easily defined the term to avoid a finding of ambiguity). There is no basis in law or the policy to alter and rewrite the express definition of "owned by" to include vehicles that are not "non-owned." The two terms are not mutually exclusive such that if a car is not one, it must be the other. This makes no sense factually or logically when the policy is read as a coherent whole. Yet the majority Opinion rewrites the terms of contract on the basis of Windham's unreasonable, illogical suggestion that a temporary substitute vehicle given greater coverage than a "non-owned" vehicle is somehow promoted to the highest level of coverage reserved for "owned by" cars *simply by default*. There is no basis in law or fact for this conclusion: (1) "Non-owned" and "owned by" are specifically defined and do not, at any point in the policy, overlap because they are defined not to do so; and (2) the factual stipulations that the Windhams did not own the rental car and that the rental car does not meet the definition of "owned by" render a finding that it was an "owned by" car an impossibility. Such error warrants rehearing and reconsideration.

III. The Majority Opinion Misconstrues and Misapprehends Section 38-77-160 and South Carolina Jurisprudence Regarding Stacking.

Although the majority Opinion suggests State Farm reads the policy in isolation, the majority Opinion proceeds to do just that with respect to both Section 38-77-160 and the broader context of the *Concrete Services, Inc. v. U.S. Fid. & Guar. Co.,* 331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998) language upon which it and the Court of Appeals erroneously relied to justify the allowance of stacking.

The appropriate sequential analysis and plain conclusion discussed above are not only mandated by both the stipulations and the unambiguous policy language, but they fully comport with Section 38-77-160. *See Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021) (explaining that a coverage analysis begins with the insurance policy and then

looks to whether its provisions "violate[] any legislatively-expressed public policy"); *see also Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014) ("As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition."). Section 38-77-160 provides, "If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage." "Insured" is defined to include the named insured, his or her spouse, and resident relatives. *See* S.C. Code Ann. § 38-77-30(7). This is exactly what the policy provides and what the stipulations demand. However, the majority Opinion disregards the stipulations, rejects and redefines defined policy terms and language, and ignores the context of *Concrete Services* to create "inconsistencies" which simply do not exist.

At the time of the October 5, 2012 accident, Windham occupied a vehicle that undisputedly was owned by Enterprise and temporarily rented to her. Windham stipulated that neither she nor any resident relative had any ownership interest in this vehicle. South Carolina law is clear that, pursuant to section 38-77-160, in order to be a Class I insured, the insured must "have" a vehicle involved in the accident and "having" a vehicle involved in the accident reasonably implies ownership of the vehicle, *Nationwide Mutual Ins. Co. v. Rhoden*, 398 S.C. 393, 401, 728 S.E.2d, 477,481 (2012), by at least another Class I insured, *Concrete Services*, 331 S.C. at 513, 498 S.E.2d at 868.

State Farm's anti-stacking provision is entirely consistent with this statutory mandate. The provision likewise mandates that if an insured is occupying a motor vehicle other than "your car" that is *"owned by" the insured or any resident relative*, stacking is prohibited. The language "not **owned by** [her] or any resident relative" in the anti-stacking provision actually accounts for the

Concrete Services language that, respectfully, was misconstrued by the majority Opinion and the Court of Appeals. As noted by the dissent, a proper reading of *Concrete Services* demonstrates Section 38-77-160 prohibits stacking when – as here – the named insured is injured in a vehicle "owned by" neither the named insured, his or her spouse, nor a resident relative. Indeed, *Concrete Services* recognized the obvious: In many instances, the spouse or resident relative of the named insured does not own the insured vehicle, explaining that under the Class I definition

> it is patent that one may be the spouse or relative of a named insured and reside in the same household without owning the vehicle. We have never required 'ownership' as a prerequisite to stacking; on the contrary, we have consistently held the determinative factor is Class I status.

331 S.C. at 513, 498 S.E.2d at 868.

The import of *Concrete Services* is clear: A spouse or resident relative of the named insured(s), though often not the owner of the insured vehicle, is permitted to stack based on that relationship with someone who does own the vehicle and, in turn, "has" a vehicle involved in the accident. *Concrete Services'* self-proclaimed "purely academic" dicta simply clarified that stacking, where applicable, is permitted among the entire class of Class I insureds so as to not penalize families who do not collectively "own" each insured vehicle under an insurance policy.

Moreover, State Farm has never argued that Section 38-77-160 "excludes all non-owners" as suggested by the majority Opinion. (Op. p. 4). Rather, State Farm has always maintained that only Class I insureds can stack, and only named insureds, spouses, and resident relatives who have a vehicle involved in the accident qualify as Class I insureds. Consistent with *Rhoden* and *Concrete Services*, State Farm's position has always been that because neither Windham *nor her spouse nor a resident relative* owned the rental car involved in the accident, as so stipulated, Section 38-77-160 and the policy do not permit her to stack her policies of insurance.

CONCLUSION

Section 38-77-160 provides, "If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage." In compliance with the stacking limitation in Section 38-77-160, State Farm's policies prohibit stacking if the named insured, his or her spouse, or resident relatives do not own a vehicle involved in the accident. Windham stipulated that neither she, her husband or a resident relative owned the rental car, that none of the Windhams' vehicles were involved in the October 5, 2012 accident, and the rental car does not meet the definition of "owned by." Thus, the stipulations, policy terms and provisions, Section 38-77-160, and *Rhoden* and *Concrete Services* mandate that Windham did not "have" a vehicle involved in the accident and she is not entitled to stack additional UIM coverage.

For all of the reasons set forth herein, and for the reasons set forth in its appellate briefs, Petitioner State Farm respectfully submits that it is entitled to rehearing and reconsideration of the Court's majority Opinion and so moves.

Respectfully submitted,

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