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**Dec 14 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court  
Appellate Case No. 2020-001693

APPEAL FROM LEXINGTON COUNTY  
Civil Action No. 2016-CP-32-815  
G. Thomas Cooper, Jr., Circuit Court Judge

State Farm Mutual Automobile Insurance Company..... Petitioner

vs.

Myra M. Windham .....Respondent

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**RETURN TO PETITION FOR REHEARING**

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## ARGUMENT

### **I. THE STIPULATIONS ENTERED INTO BY THE PARTIES WERE PROPERLY CONSIDERED IN THE COURT'S MAJORITY OPINION AND DO NOT PREVENT THE INSURED FROM STACKING HER UIM COVERAGE WHILE OCCUPYING A "TEMPORARY SUBSTITUTE CAR" – A RENTAL CAR PROVIDED TO HER BECAUSE HER PRIMARY CAR WAS OUT OF SERVICE, DISABLED.**

The stipulations of fact essentially confirm facts based on the language of the insurance policy. The car involved in the second wreck by policy definition was a temporary substitute car owned by Enterprise Leasing Corporation as a replacement for Windham's Camry which was out of service from the first wreck on September 29, 2012. The rental car driven by Windham does not meet the definition of "owned by" in the policy. None of the five vehicles "owned by" the Windham family were involved in the wreck pursuant to the policy terms.

None of those stipulations affect the Court's majority opinion. The Court properly found that the following policy provision created an ambiguity: "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). When read naturally, this gives the impression that a temporary substitute car will be treated as an owned car even though the insured does not actually own it. The apparent purpose of this provision is to remove temporary substitute cars from the consequences of being non-owned cars.

The Majority Opinion properly concluded that facing diametrically-opposing yet reasonable interpretations, the policy is ambiguous and must be construed against the drafter.

### **II. THE MAJORITY OPINION PROPERLY INTERPRETS AND CONSTRUES POLICY LANGUAGE**

State Farm contends that the majority Opinion misapprehends and misconstrues policy

language. State Farm fails to accept that an ambiguity was created with the policy provision cited in the majority Opinion: “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).

State Farm further contends that “the majority Opinion tortures the policy language to create an ambiguity where none exists (and none has been argued). . . .” In Footnote 2 of its Petition for Rehearing, State Farm argues that a review of the record reveals that Windham’s argument regarding ambiguity was cursory at best. Windham’s counsel is not aware of a rule regarding the minimum number of times that a position must be argued. Counsel for Windham argued the ambiguity in the policy on five (5) occasions in his Summary Judgment argument before the Circuit Court. (App. 144, 145, 146, 148). Counsel for Windham also argued the ambiguity created by this policy provision on two occasions when responding to questions in oral argument from two Justices.

The State Farm provision explains that if a “temporary substitute car” also meets the definition of a “non-owned car,” it is not to be considered a non-owned car but is a “temporary substitute car” only. (App.195). When read naturally, this gives the impression that a temporary substitute car will be treated as an owned car even though the insured does not actually own it. The opposite of non-owned is owned.

The Supreme Court has explained that insurance contracts are to be read in accordance with reasonable expectations. *Bell v. Progressive*, 407 S.C. 565, 578-581, 757 S.E.2d 399, 405-407 (2014). This doctrine cannot serve as an end-around clear policy language, but insurance contracts are rarely models of clarity, and the doctrine does not thwart any clear policy language here. A reasonable insured would read “substitute,” “replace,” and the clause explaining a “temporary substitute car,” is not a “non-owned car” to mean that a “temporary

substitute car” will be treated as an owned car. The apparent purpose of this provision is to remove temporary substitute cars from the consequences of being non-owned cars.

The Majority Opinion properly concludes that facing diametrically-opposing yet reasonable interpretations, the policy is ambiguous and must be construed against the drafter, permitting Windham to stack her UIM Coverages.

### **III. THE MAJORITY OPINION PROPERLY INTREPRETS SECTION 38-77-160 AND SOUTH CAROLINA JURISPRUDENCE REGARDING STACKING**

State Farm’s third argument for rehearing is primarily based on its assertion that no ambiguity exists in the policy. It argues that the Court misinterprets the statutory and caselaw because Windham’s vehicle was not involved in the second wreck.

The “involvement” standard is satisfied when the insured is injured while occupying a short-term replacement for the insured’s actual vehicle. The Supreme Court has explained “involved” in the UIM statute to mean “to relate to or have an effect on...to draw in as a participant...[to] implicate, include, affect.” *Merck v. Nationwide*, 318 S.C. 22, 24, 455 S.E. 2d 697, 698 (1995). The term has been construed to encompass a vehicle that did not play an active role in the collision. *Merck* held a vehicle was “involved” even though it was disabled and loaded on a wrecker when a drunk driver ran off the road and struck the insured, the wrecker driver, and the wrecker. *Id.* In holding the insured could stack, the Court noted the disabled vehicle was present at the scene and the accident had an effect on the vehicle.

Windham’s Camry was not present at the second wreck or directly affected, but her circumstances fit different parts of *Merck’s* involvement definition – the explanation that involvement describes the insured’s vehicle relating to or having an effect on the incident. Windham’s principal vehicle was put out of service and inoperable, and the rental car was a

short-term replacement and substitute for her primary car. Unlike a situation where someone uses a rental car for pleasure or while out-of-town, the rental car *was acting as* Mrs. Windham's own car for a brief time. Mrs. Windham's insured vehicle was "involved" in this wreck. It was out of service, requiring her to use the rental car that she was operating.

This definition of involved is broad, but it fits the UIM statute's purpose. South Carolina's appellate courts have repeatedly explained the UIM statute's purpose is not to limit coverage, but "to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist." *Carter v. Standard Fire*, 406 S.C. at 615, 763 S.E.2d at 518 (quoting *Floyd vs. Nationwide*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005)). The UIM statute was enacted "for the benefit of injured persons" and "should be liberally construed to effect [that purpose]." *Id.* "Involved" must be construed broadly.

*Nationwide Mutual Insurance Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012), involved the public policy of binding an owner to the amount of UIM on the vehicle in the wreck. The majority Opinion noted that the Supreme Court discussed the "involvement" standard in *Rhoden*. When the Supreme Court discussed the "involvement" standard in *Rhoden*, it explained the UIM statute was ambiguous "at best" and turned to public policy to guide the interpretation.

The Court in *Rhoden* also stated that UIM's "personal and portable" character required allowing resident relatives to stack because they did not own the measuring vehicle, which had no UIM. *Rhoden*, 398 S.C. 393, 401-402, 728 S.E.2d 447, 481-482 (2012). The Court also expressly acknowledged a prior decision that noted the court has never required ownership as a prerequisite to stacking. *Id.* at 401, n.5, 728 S.E.2d at 481 n.5 (citing *Concrete Services v. U.S. Fidelity and Guarantee*, 331, S.C. 506, 512, 498, S.E.2d 865, 868 (1998)).

While not binding on this Court, an Order issued in United States District Court found that the State Farm insured driving a temporary substitute car could stack her UIM policies. *State Farm Fire & Casualty Insurance Co. v. Holmes*, No. 6:14-CV-04050-TMC (D.S.C. Jan. 7, 2016). The policy in the federal court case had much of the same policy language Mrs. Windham has identified here- the fact that a “temporary substitute car” is not a “non-owned car.” (App.279-284). State Farm did not appeal that Order.

### **CONCLUSION**

For the foregoing reasons this Court should deny the Petition for Rehearing.

Respectfully submitted,

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