THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No.: 2011-CP-40-1022
(Appeal Tracking No.:2013-000821)

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SC Court of Appeals

Robin E. Otterbacher, Appellant,

v.

Jeremy and Tamara Snyder, individually and as guardians and parents of Blaze Kendall Snyder, Blaze Kendall Snyder individually, and Selective Insurance Company of America and Auto Owners Insurance Company,

Respondents.

APPELLANT'S REPLY BRIEF

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I. The issue of whether the "furnished or available for the regular use" exclusion was ambiguous is properly preserved for appeal.

a. Appellant raised the issue regarding the ambiguity of the operative exclusion and it was ruled on by the lower court.

It is well settled law in South Carolina that "issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 22, 602 S.E.2d 772, 779-80 (2004). *See also Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); and *S.C.A.C.P.*, Rule 210(c) (record on appeal shall not include matter which was not presented to lower court.)

> There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

South Carolina Dept. of Transportation v. First Carolina Corp., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting *Jean Hoefer Toal, et al.*, Appellate Practice In South Carolina, 57 (2d ed. 2002)). An objection at the trial court level need not be phrased in exact legal terms as long as the objection raised at the trial court was a "meaningful objection with sufficient specificity to allow the trial court to rule on the issue." *South Carolina Dept. of Transportation,* 372 S.C. at 302, 641 S.E.2d at 907 (citing *State v. Russell*, 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding that a party need not use the exact name of a legal doctrine in order to preserve an argument, but it must be clear that the argument has been presented on that ground)). In other words, all

that is required to preserve an issue for appeal is that the trial court be given an opportunity to resolve the issue before it is presented to the appellate court." *In the Interest of Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (citing *Toal, Vafai, & Muckenfuss*, Appellate Practice In South Carolina, at 66 (South Carolina Bar 1999)) (internal citations omitted).

Here, Respondent contends that Appellant failed to raise the issue concerning the ambiguity of the "furnished or available for the regular use" before the lower court. This Court need only look to the transcript of the hearing before the lower court to warrant a finding that the issue was raised by Appellant:

> Mr. Hewett: And so, you got to look at his deposition testimony when construing the provision which would exclude coverage for him being furnished with this car made available for his regular use. We obviously contend that it was not and at a minimal the ***policy is susceptible to a reasonable interpretation*** that this was not a vehicle that was furnished and made available for his regular use.
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> * * * *
>
> So Your Honor, given the testimony of Daniel Liale, looking at the policy, following our court's precedent of these types of exclusionary provisions that are to be strictly construed and when there's more than one susceptible meaning of the policy and provision that the Court should side in favor of coverage. We believe this was not a vehicle that was furnished and made available to Jeremy Snyder for his regular use; therefore, he and his son would be covered under that Selective policy.
>
> * * * *
>
> He was not – and Mr. Liale stated numerous times in his deposition, this is not a truck that's permanently assigned to Jeremy Snyder, which gives way to a reasonable susceptible interpretation of coverage in this case. Not only that, Selective could define what regular use constituted in the policy; they didn't do that.
>
> * * * *
>
> And again, Your Honor, based on Mr. Liale's testimony and I know there's divergent testimony between Mr. Snyder and Mr.

> Liale, I certainly think it gives rise to a reasonable interpretation that this was not a vehicle made available to Snyder for his regular use such that there would be coverage.

[Hearing Transcript, pp. 11, 13, 26-27, emphasis supplied].

The excerpts above demonstrate that the issue of an interpretation as to the "furnished or available for the regular use" exclusion was preserved for appeal.

Although the trial court does not expressly delve into the ambiguity of this phrase in its Order, it ultimately granted Respondent's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment. Consequently, the trial court considered the arguments on the issue of the ambiguity of the "furnished or available for the regular use" exclusion levied by Appellant during the hearing and ruled on the issue by granting Respondent's dispositive motion.

In its Order, the trial court specifies that "[t]his Court agrees with Selective's position and finds that coverage for the Snyders is barred by operation of Exclusion B.2." [Order of Judge Alison Renee Lee, filed March 26, 20130, pg. 2]. The trial court went on to provide: "[b]ecause a company truck was furnished or available for Mr. Snyder's regular use, no coverage is provided under the Personal Auto Policy issued by Selective on the Snyders' personal vehicles." [Order of Judge Alison Renee Lee, filed March 26, 20130, pg. 3]. Judge Lee's finding that the Exclusion B.2. barred coverage confirmed that the lower court rejected Appellant's contention that the "furnished or available for the regular use" exclusion was ambiguous.

The Record clearly establishes that the Appellant raised the issue of the subject exclusion's ambiguity and the lower court ruled on the issue by denying Appellant's Motion for Summary Judgment and granting Respondent's dispositive motion, which

was founded on the argument that the exclusion operated to bar coverage. All of the four basic requirements to preserve issues for appeal have been met. The Record establishes that (1) the issue was raised to and ruled upon by the trial court; (2) it was raised by the Appellant; (3) it was raised in a timely manner; (4) and was raised to the trial court with sufficient specificity. See *South Carolina Dept. of Transportation*, 372 S.C. at 302; 641 S.E.2d at 907. Those are all the requirements necessary to preserve an issue for appeal.

Yet, despite the clear record, Respondent argues that the issue was not properly preserved because Judge Lee did not address in her order whether the term "regular" was ambiguous. Undoubtedly, Judge Lee's grant of summary judgment confirmed that she considered Respondent's assertion that the exclusion was ambiguous and ruled otherwise. Respondent posits that Appellant should have filed a post-trial motion to obtain a ruling on the issue. Respondent's argument is misplaced. In fact, Appellant would have been placed in the precarious position of filing an improper successive motion that would have merely restated her prior motion.

Under South Carolina law, post-trial motions are only required to preserve issues that have not been ruled upon by the trial court. "A Rule 59(e) motion is required to preserve issues that have not been ruled upon by the trial court." *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court)).

South Carolina's Rules contemplate two basic situations in which a party should consider filing a post-trial motion. "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps fail to rule on an

argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or an argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam*, 361 S.C. at 24 (emphasis in the original). Here, post-trial motions were not necessary because the trial court ruled the "furnished or available for your regular use" exclusion barred coverage. It was obvious that the court considered Appellant's argument of ambiguity and rejected the same. Thus, this issue was raised and ruled on and is properly preserved for appellate review.

b. The case of *Grantham v. U.S. Fidelity & Guaranty Co.* is binding precedent.

The crux of Appellant's argument before the lower court was that there existed a genuine issue of material fact as to whether the vehicle was furnished to Jeremy Snyder for his regular use. However, Appellant also addressed the ambiguity of the "furnished or available for your regular use" exclusion in her argument before the trial court. The trial court ruled on that issue by granting Respondent's motion for summary judgment as founded on the "furnished or available for your regular use" exclusion. Respondent now relies on *Grantham v. United States Fidelity & Guaranty Co.*, 245 S.C. 144, 139 S.E.2d 744 (1964) in support of its position that the subject phrase is unambiguous. Appellant was unaware of the *Grantham* decision but concedes that the case constitutes binding precedent.

Our court in *Grantham* held that the phrase "furnished or available for your regular use" within the context of an insurance policy is unambiguous but that its application depended upon the facts of the particular case. *Id.*, 139 S.E.2d at 746. Appellant contends, in contravention of *Grantham* and its progeny, that the phrase "regular use" is ambiguous and susceptible to more than one reasonable interpretation. In

Continental Ins. Co. v. Paschal, the Fourth Circuit in light of *Grantham* described "regular use" to be "usual, steady, principal or frequent, as distinguished from occasional, unusual, incident or casual use." 842 F.2d 1289 (4th Cir. 1988). Understanding that the ambiguity of this phrase was addressed by our court in *Grantham*, Appellant maintains that the phrase is susceptible to more than one reasonable interpretation.

II. Respondent has not proven that the vehicle was a part of a "pool" or "fleet" and the law is not established on the application of the "furnished or available for the regular use" exclusion to a "pool" or "fleet" of vehicles.

Respondent fails to cite any controlling authority in support of its position that Jeremy Snyder regularly used a pool of vehicles maintained by his employer. In fact, Respondent fails to establish that Jeremy Snyder's employer actually provided a "pool" or "fleet" of vehicles for the use of its employees. While the Respondent contends that this case involves a "pool" or "fleet" of vehicles made available to Jeremy Snyder, it has failed to conclusively establish that Jeremy Snyder's employer even maintained such a "pool" or "fleet" of vehicles. Even assuming that Jeremy Snyder's employer did house a "pool" or "fleet" of vehicles for the use of its employees, the Respondent has provided only a handful of decisions from other state courts on this issue. South Carolina has yet to rule on the issue of whether a vehicle belonging to a pool or fleet necessitates a finding that the vehicle was regularly furnished or used by the employee thereby triggering a policy exclusion.

Respondent does not define what constitutes a "pool" or "fleet" of vehicles and the Court is left to decide at what point a company's ownership of more than one vehicle transcends into the furnishing of a "pool" or "fleet." Danny Lyell estimated that at the time of the automobile accident in 2010, his company may have owned 12 to 14 vehicles.

[Deposition of Danny Lyell, pg. 19]. Appellant respectfully requests that this Court rebuff Respondent's unfounded assertion that the subject vehicle was a component of a "pool" or "fleet" of vehicles. Rather, Respondent has failed to offer support for its declaration that the vehicle used by Jeremy Snyder was a part of a "pool" or "fleet" of vehicles made available to him during the course of his employment.

Other courts have addressed this issue and held that an employee's use of a vehicle that was part of a "pool" or "fleet" does not dictate a finding that such use was "regular." In *Government Employees Insurance Company v. Bernstein*, the District of Columbia Court of Appeals found that where an insured used any one of several vehicles provided from her employer's fleet on about ten occasions over a two-year period and had to request use of fleet vehicles on each occasion, the insured's use of her employer's vehicle was not "regular" within the meaning of the policy. 263 A.2d 259 (D.C. 1970). In *Insurance Co. of North America v. Coffman*, the insurer denied coverage on the basis that its insured was provided with a non-owned automobile by his employer for "regular use. 52 Md. App. 732 (1982). The Court of Special Appeals of Maryland rejected the insurer's "pooling argument" in "light of the completely disparate types, functions, and uses of the various vehicles" maintained by the insured's employer. *Id.* 52 Md. App. at 740.

Neither Jeremy Snyder nor Danny Lyell testified that Columbia Commercial Tire owned a "pool" or "fleet" of vehicles that was made available to employees. Even assuming this Court construes the ownership of 12-14 vehicles as having a "pool" or "fleet" of vehicles, the Respondent has failed to set forth any evidence to justify its

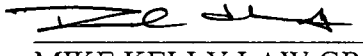
position that all of the vehicles within such "pool" or "fleet" would have been available to Jeremy Snyder.

Respondent has failed to substantiate that Jeremy Snyder's employer maintained a "pool" or "fleet" of vehicles or if such a "pool" or "fleet" existed that all of the vehicles would have been available to Jeremy Snyder. Accordingly, Appellant requests that this Court reverse the lower's court's holding that the vehicle was one of a pool or fleet of company vehicles that were furnished or available for Jeremy Snyder's regular use as part of his employment.

CONCLUSION

There are genuine issues of material fact as to whether Jeremy Snyder regularly used the subject vehicle. Further, the operative exclusion is susceptible to more than one reasonable interpretation. Respondent has failed to establish that the vehicle was a part of a "pool" or "fleet" of vehicles and that all such vehicles would have been made available to Jeremy Snyder. Appellant requests that this Court reverse the trial court's grant of summary judgment for Respondent.

Respectfully Submitted,

By: 

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August 19, 2013