

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2012-CP-42-00346

James Luther Plemmons and Wanda Sue Clark Plemmons, Appellants,

v.

State Farm Mutual Automobile Insurance Company, Plaza Insurance Company,
The Stover Company, Inc., and Howard E. Newton, III..... Defendants,

Of whom,

State Farm Mutual Automobile Insurance Company is Respondent.

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SC Court of Appeals

REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

I. Whether the Carson vehicle was within the chain of causation for the accident is irrelevant to the issue of State Farm's coverage and the trial court erred in granting summary judgment to State Farm on this basis.

The trial court's Order must be reversed because it is based on a faulty premise. The Order leads with the following finding: "The first reason State Farm is entitled to summary judgment is that the vehicle it insured was completely outside the chain of causation for the plaintiff's injuries and outside the chain of causation for the accident which resulted in the plaintiff's injuries." (May 23, 2013 Order). The trial court denied coverage based on the misreading and misapplication of Hite v. Hartford Accident and Indemnity Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986), from which it took the erroneous premise that there must be a causal connection between the Carson vehicle and Appellant's injuries. No South Carolina case law holds that the insured vehicle must be within the chain of causation for the accident in order for underinsured coverage to apply.

The trial court relied on this erroneous finding to grant summary judgment. Appellant in its brief led with this dispositive argument. Respondent, seeking to avoid the argument, buried its response on little more than a single page toward the end of its brief. Even then, Respondent cites no case law supporting this premise. Respondent can make no such cite because there is no South Carolina case that requires the insured vehicle in an underinsured coverage case to be within the chain of causation for the accident.

Taking the Hite analysis step-by-step, this becomes clear.

Hite was driving his employer's car, with permission. The car was insured by Hartford. Hite drove onto the employer's car lot. He was hailed by a security guard, who wanted him to

stop another man, Martin, from leaving the parking lot. Hite walked 50 feet from his employer's borrowed vehicle and tried to stop Martin. Martin ran over Hite. Grange, which insured the vehicle Martin was driving, denied coverage because Martin did not have permission to drive the car. Martin was therefore uninsured.

Hite sought to recover uninsured benefits from his employer under the Hartford policy. The Court applied the language of the Hartford policy to determine if Hite was an insured. The Hartford policy language provided that Hite was an insured if (among other options) he was "using a covered automobile."

The Court then analyzed the question of whether Hite was using the Hartford-insured vehicle. There was no South Carolina law establishing "use" when a person walked 50 feet away from a vehicle and engaged in an independent purpose.

The Court found that there was no situation in Hite "that would put the fact situation within the parameters of 'use' as defined in South Carolina." Id. at 177. There being no South Carolina law on point, the Court resorted to the law of other jurisdictions in order to determine whether Hite's specific situation should come within "use." The Court thereafter discussed law from other jurisdictions, which applied a "causal connection" test to determine whether a person was "using" an insured vehicle. The Court found, under the specific facts of the Hite's case, that he was not using his employer's vehicle, and therefore was not an insured entitled to recover benefits under the Hartford policy.

In sum, Hite only applied the causal connection test to determine whether the insured vehicle was in use because it was not clear under South Carolina law. Here, there is no need to resort to any "causal connection" test to determine whether Appellant was "using" the Carson

vehicle under South Carolina law. South Carolina law, as discussed below, has established that a towed vehicle is in use.

Further, there is no case law or other authority to support any requirement that the insured vehicle be involved in or contribute in any way to the accident or injuries in order to recover under a UIM provision. S.C. Code Ann. § 38-77-160. Respondent completely ignores this key issue in the substance of its brief. The only causal connection required by law or by the State Farm policy is between the **underinsured vehicle** and the injury. There is no question that Appellant's injuries were caused by the Diaz vehicle.

II. State Farm UIM coverage applies because Appellant was using the Carson vehicle with permission and is an Insured under the Policy.

Appellant was an insured under the Policy as a matter of law because he was “using” the Carson vehicle with the owner’s consent at the time of the accident. (Policy, p. 20). The Policy does not define use. However, case law defining the parameters of “use” encompass Appellant’s use of the Carson vehicle. Further, Respondent’s attempts to distinguish plain South Carolina law strains reason and often borders on the absurd.

First and foremost, South Carolina courts have sanctioned a broad definition of the term “use.” State Farm Fire and Casualty v. Pinson, 984 F.2d 610, 612-613 (4th Cir. 1993). The Court in Pinson reached the conclusion that a boat being towed by a vehicle is in “use.” Id. at 613. Also applying South Carolina law, the Court in American Fire & Cas. Co. v. Allstate Ins. Co., 214 F.2d 523 (1954) held that a towed car is also in “use.” Specifically, the Court noted that “it would violate the usual rule of liberal interpretation of such an agreement in favor of the insured, if it should be held that a car being transported under the circumstances was not actually in use.” Id. at 524-525.

Even standard legal reference books acknowledge that a towed vehicle is “used” during towing. 7 Am. Jur. 2d Automobile Insurance § 95, citing 8 Couch on Ins. § 111:36.

Appellant was towing the Carson vehicle at the time of the accident with Carson's consent. Appellant, and Appellant alone, was exercising supervisory control and guidance over the Carson vehicle during the towing operation. The tow truck was running, and Appellant was standing right next to the tow truck while engaged in the towing operation. Because Appellant was using the Carson vehicle as a matter of law, he was Insured under the Policy, and entitled to UIM coverage benefits.

III. State Farm UIM coverage applies because Appellant is a Class I insured.

The Underinsured Motorist (“UIM”) Statute is remedial in nature, and was enacted for the benefit of injured persons. The Court has held that it should be liberally construed to effect its legislative purpose. Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005).

Appellant maintains the position that this is not a stacking case. Appellant was using the Carson vehicle at the time of the accident, and is seeking UIM benefits under the State Farm policy as an insured. Appellant is not seeking successive UIM benefits on any other vehicles owned by Carson. He is only seeking such benefits on the vehicle involved in the accident. See, e.g., Merck v. Nationwide Mut. Ins. Co., 318 S.C. 22, 455 S.E.2d 697 (1995) (holding that a vehicle loaded onto a tow truck while it was stopped was “involved in the accident” for purposes of underinsured motorist coverage).

Even if stacking were an issue, Appellant submits that he is entitled to recover UIM benefits as a Class I insured.

Under South Carolina law, a Class I insured is an insured or a named insured that has a vehicle involved in the accident. Mangum v. Maryland Cas. Co., 330 S.C. 573, 500 S.E.2d 125 (Ct. App. 1988). In contrast, a Class II Insured is an insured without a vehicle involved in the accident. Id. Class I Insureds can stack available UIM coverage.

Appellant qualifies as a Class I Insured for purposes of the UIM coverage available under the State Farm Policy because he owned the tow truck, and the tow truck was involved in the accident. There is no dispute about either of these facts. Appellant can therefore stack all available UIM coverage, including coverage on the Carson vehicle.

Respondent insists that Appellant is a Class II Insured based upon the Policy language. Respondent also points to Appellant's Rule 26(f) Report, in which Plaintiffs stated that they "believe Mr. Plemmons to be a Class II user of the vehicle." This initial reading of the 26(f) Report does not bind Appellant, and also does not change the fact that Appellant is a Class I Insured under the UIM statute because he had a vehicle involved in the accident.¹ South Carolina courts have repeatedly held that freedom of contract is subordinate to public policy. While insurers have the right to limit their liability and impose conditions upon an insured, they cannot contravene a statutory provision or public policy. See, e.g., Nationwide Mut. Ins. Co. v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012).

Respondent cites a number of cases purporting to support its position that Plaintiff is only a Class II insured for purposes of underinsured coverage, including the recent case of Carter v. Standard Fire Company, South Carolina Supreme Court Op. No. 27340, which was filed on

¹ The conference and report required by Rule 26, FRCP constitute initial disclosures based upon information reasonably available to the parties at the time that they are made. The case has not been fully investigated, and the parties have not engaged in expanded discovery. Discovery is ongoing, and investigation can reveal information that can change both the facts and theory of the case.

December 11, 2013. Carter, far from dispositive, merely upheld a specific exclusion in Standard Fire's policy that does not exist in this case. The question on appeal was whether the UIM statute allowed the exclusion of coverage to a Class I Insured when he is occupying a vehicle that he owns, but does not insure under the subject policy. This question is completely irrelevant, as Appellant is seeking UIM benefits on the Carson vehicle, which is without dispute a covered vehicle under the Policy.

IV. The trial court erred in granting summary judgment on Appellant's bad faith claim based on its erroneous decision that no coverage existed.

Appellant has not waived its right to argue this point on appeal or abandoned any issue. Appellant raised the issue of bad faith to the trial court and fully argued its grounds. (Plaintiff's Memorandum Opposing Motion for Summary Judgment). Appellant also raised and addressed this issue in its Initial Brief.

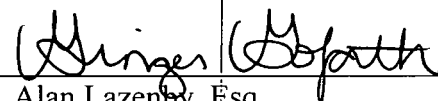
The trial court plainly stated its position on the bad faith issue at the hearing and in the Order. Specifically, the trial court found that the issue of bad faith would only become ripe for decision if the trial court found that Appellant was entitled to recover benefits as a matter of law. (Hearing Transcript pp. 18-19). Because the trial court found in favor of Respondent below, it simply did not reach the substance of the issue of bad faith. The trial court dismissed the bad faith claim only because it found no coverage existed. (May 23, 2013 Order). The trial court stated that if it had found coverage to exist, then there would be a question of fact as to the bad faith issue. (Hearing Transcript pp. 18-19). Appellant could not have obtained a ruling on the bad faith issue unless the trial court found in Appellant's favor on the coverage issue. The bad faith issue has not become ripe for a substantive ruling from the Court of Appeals simply by virtue of the fact that the order was appealed.

Rule 220(c), SCACR provides that an appellate court may affirm a lower court decision on based upon a ground appearing in the record on appeal. However, it is completely within the appellate court's discretion whether to address any additional grounds. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). While Respondent argued below that its denial was "reasonable" as a matter of law, the record reflects that the trial court rejected this argument, stating "I think it would leave a question of fact then to be decided at some other time if I decided the issues all in [Appellant's] favor. . . ." Appellant submits that the Court of Appeals should decline to rule on the arguments made by Respondent with respect to the bad faith issue.

CONCLUSION

James Plemmons was using the Carson vehicle in a towing operation as a matter of law when an undersinsured car crashed into his tow truck, grievously injured him, and permanently maimed him. The underinsured vehicle bore a direct causal connection to Appellant's injuries. Appellant, an insured with a vehicle involved in the accident, is entitled to recover UIM benefits from the Policy. Appellant therefore respectfully submits that the Court of Appeals must reverse the trial court's decision and direct the trial court to enter partial summary judgment in Appellant's favor.

January 3, 2013


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**SUPPLEMENTAL DESIGNATION OF MATTER TO BE INCLUDED IN
RECORD ON APPEAL**

Appellant designates the following material to be included in the Record on Appeal:

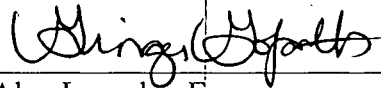
1. Order of May 23, 2013 .
2. January 25, 2012 Complaint

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3. Amended Complaint
4. Answers of Defendants
5. Motion for Summary Judgment of State Farm
6. Motion for Summary Judgment of Plemmons
7. Transcript of May 17, 2013 hearing
8. Deposition of Amanda Barnes, pp. 12--13, 14-16, 20-21, 25 and Exhibit F thereto
9. Deposition of James Plemmons, pp. 11, 13, 22-23
10. Affidavit of Kim Carson and Exhibit E thereto
11. State Farm policy
12. Memo in Opposition to Motion for Summary Judgment filed May 17, 2013

I certify that no information is included in this Designation that is irrelevant.

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Of whom,

State Farm Mutual Automobile Insurance Company isRespondent.

PROOF OF SERVICE

I, the undersigned, hereby certify the Reply Brief of Appellant in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Charles Norris, by sending to Nelson Mullins Riley & Scarborough, LLP, PO Box 1806, Charleston, SC 29402, on January 3, 2014.

SIGNATURE PAGE TO FOLLOW

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