THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No. 2011-193846
Opinion No. 175 (S.C. Ct. App. filed April 18, 2011)

Thomas M. Carter, Debra Carter, and Christopher Michael Carter .... Respondents,

v.

The Standard Fire Insurance Company and Frank L. Siau Agency, Inc. ....Defendants,

Of whom
The Standard Fire Insurance Company is the.. ......Petitioner.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

During the relevant time period, Respondent Michael Carter lived at home with his parents, Respondents Thomas M. Carter and Debra Carter (R. p. 206, lines 11-21). He owned a Dodge Charger, which was titled in both his and his mother's names. (R. p. 57, ¶ 6; p. 38, ¶ 3; pp. 280-299). Michael had been listed as a driver on his parents' policy with Petitioner Standard Fire Insurance Company ("Standard Fire"); however, his mother removed him from that policy and helped him get his own policy covering his Dodge Charger, so that he would assume responsibility for his own policy and also to get a lower premium. (R. p.200, lines 6-16; p. 201, lines 6-23; p.209, lines 3-7; p.210, line 7; p.211, line 19; p.172, lines 21-24; p.179, line 3 - p.180, line 1). Michael's Charger was

insured under a policy issued by Allstate. (R. pp. 57-58, ¶ 7; R. p. 210, lines 4-6). It was never insured under his parents' policy with Standard Fire. (R. p. 210, lines 4-6).

On November 11, 2006, Michael was occupying his Charger when he sustained grievous injuries in a collision. (R. p. 57, ¶ 6; p. 38, ¶ 3; pp. 280-299). Allstate settled with Michael on behalf of the estate of the alleged driver, Bernie Collins, by paying the available limit of liability coverage ($250,000), as well as another $100,000 in liability coverage under a policy that Allstate had issued to Mr. Collins, in exchange for a covenant not to execute. (R. p. 57, ¶ 7 - p. 58, ¶ 9; p. 220, lines 6-11). In addition, as the insurer of the Charger, Allstate paid Michael $500,000 in UIM coverage ($250,000 on the Charger and $250,000 on another of Michael's vehicles insured under his Allstate policy), bringing the total paid by Allstate to $850,000. (R p. 57 ¶ 7 – p. 58, ¶ 9; p. 220, lines 11-20; p. 206, line 22 - p. 208 line 19).

Michael's parents' Standard Fire policy included UIM bodily injury coverage of $250,000 per person and $500,000 per accident on each of the three vehicles listed on the policy. (R. pp. 364- 67). After settling with Allstate, the Carters sought UIM coverage in the amount of $750,000 ($250,000 coverage on three vehicles) from Standard Fire. (R. p. 58, 10; p. 59, 14).

The Standard Fire policy contains the following exclusion:

EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for "bodily injury" or "property damage" sustained by any person:

1. While "occupying" . . . any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy . . . .

(R. p. 338). The policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." (R. p. 310).

Standard Fire contends that its exclusion is applicable and was essentially sanctioned by this Court in *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). (R. pp. 97-98). Respondents contend that *Burgess* is distinguishable in that *Burgess* did not involve stacking, and that Standard Fire's exclusion improperly restricts stacking. (R. pp. 95-96; 252).

Standard Fire's motion for summary judgment was granted and Respondents' motion for summary judgment was denied. On appeal, the South Carolina Court of Appeals reversed, relying on *Nakatsu v. Encompass Indemnity Co.,* 390 S.C. 172, 178-81, 700 S.E.2d 283, 287-88 (Ct. App. 2010), reh'g denied (Oct. 29, 2010). This Court granted Standard Fire's Petition for a Writ of Certiorari and, on December 11, 2013, affirmed the Court of Appeals' decision.

ARGUMENT

1. The Court overlooked a critical portion of the applicable statute, and therefore misapprehended its literal meaning and the legislature's intent.

Section 38-77-160 (Supp. 2012) governs stacking of UM and UIM coverage. *Carter v. The Standard Fire Ins. Co.*, Op. No. 27340 at 65 (S.C.Sup.Ct. filed Dec. 11, 2013). *See also National General Ins. Co. v. Pena*, 308 S.C. 521, 419 S.E.2d 375 (Ct.App. 1992) ("From a review of the cases we conclude §38-77-160 is the authoritative statute on stacking of uninsured and underinsured motorist coverage."), overruled by *Concrete Services, Inc. v. U.S. Fidelity and Guar. Co.*, 331 S.C. 506, 498 S.E.2d 865 (to

the extent that it suggests that a Class I insured must "own" vehicle in order to stack UIM coverage).

The key to determining the validity of the Standard Fire exclusion is the construction of the following sentence in § 38-77-160:

> If, however, an insured or named insured is protected by . . . [UIM] coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident.

Unless this sentence requires stacking of UIM by Class I insureds, there is no statutory mandate. In the within case, this Court construed it to include such a mandate:

> [We] find that Standard Fire's interpretation of section 38-77-160 fails to account for the portion of the statute that unequivocally states that once the insured **"is protected by . . . UIM coverage in excess of the basic limits"** the insurer **"shall provide"** UIM coverage up to the amount held on the vehicle involved in the accident. Because the exclusion in question conflicts with this clear language, we hold the exclusion is void.

Carter v. The Standard Fire Ins. Co., Op. No. 27340 at 67 (S.C.Sup.Ct. filed Dec. 11, 2013) (citations omitted) (emphasis in original).

In short, this Court's construction of the "If, however" sentence is that, if the insured has excess UIM coverage, the insurer **must** provide UIM coverage up to the amount of such coverage on the vehicle involved in the accident. In other words, if a Class I insured has excess UIM, the insurer must allow him to stack in the amount of the coverage he has on the vehicle involved in the accident. However, this sentence contains no such requirement. When read in its entirety (including the word, "only"), it is apparent that its only requirement is that an insured's recovery of UIM benefits is limited to the amount of such coverage that he or she has on the vehicle involved in the accident.

That is, if the insured has excess UIM coverage, the policy must provide that he "is protected **only** to the extent of the coverage he has on the vehicle involved in the accident." S.C. Code Ann. § 38-77-160 (Supp. 2012). (emphasis added).

Both the language and the syntax chosen by the legislature reveal its intent that, where the condition set out in the beginning of the sentence has been met, (i.e., the insured is protected by UIM in excess of the basic limits), the policy "shall provide" that the insured "is protected **only** to the extent of the coverage he has on the vehicle involved in the accident." (emphasis added). That is, if the insured has excess UIM, the policy must provide for a cap on that protection to the extent of the coverage he has on the vehicle involved in the accident. It is respectfully submitted that neither this sentence nor any other portion of the statute provides that insurers "shall provide" UIM coverage from other vehicles or other policies up to that amount. In other words, § 38-77-160 does not require stacking. Rather, it merely requires that policies set a cap on any recoverable excess UIM coverage. The legislators' use of the word "only" indicates that their intent was merely to put a cap on the amount stackable – not to require stacking.

The description of the 1978 Act enacting § 56-9-831 (Exhibit A) supports this conclusion. It indicates that it was added to the 1976 Code "So As To Require Insurers To Offer At The Option Of The Insured Underinsured Motorist Coverage Up To The Limits Of The Insured's Liability Coverage." It does not refer to stacking. While there is no question but that this is a summary description of the contents of the statute, it is another indication that the legislature's focus was on requiring that insurers offer UIM coverage. It is respectfully submitted that, if the intent was not only to require insurers to offer UIM, but also to mandate stacking, the latter would have been explicitly referenced

in the title or in the statute, or both. While the title of a code section is not part of the law, it may be considered as an aid in its construction to show the legislature's intent. *State v. Standard Oil Co. of N.J.*, 195 S.C. 267, 10 S.E.2d 778, 780 (1940) (stating the title of a Code section forms no part of the law); *Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.").

"Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, where the consequences may be." *Beaty v. Richardson*, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899).

The Carters' Standard Fire policy complies with the "If, however" sentence's requirement, i.e., it limits an insured's recovery of UIM coverage to the extent of such coverage he has on the vehicle involved in the accident. (R. p. 329 at "Split Limits" and pp. 364-365). Standard Fire acknowledges that stacking is "generally permitted unless limited by statute or by a valid policy provision." *See Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 342 S.E.2d 603 (1986) (declined to be followed by *Ruppe v. Auto Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998)). However, it is respectfully submitted that, if the legislature had intended to require stacking of UIM coverage, it would have included a sentence to that effect. The "If, however," sentence assumes that coverage that is available may be stacked, and sets a cap on the amount stackable. It does not, however, require that UIM coverage from all polices under which the claimant may qualify as an insured be available for stacking. Because the exclusion at issue is valid by virtue of *Burgess*, UIM coverage under the Standard Fire policy is not "available" to

Michael. *See Giles v. Whitaker*, 297 S.C. 267, 268-69, 376 S.E.2d 278, 279 (1989) ("Stacking is defined as the insured's recovery of damages under more than one policy until all of his damages are satisfied or the limits of all **available** policies are met." (emphasis added)). Moreover, since § 38-77-160 does not require stacking, then the exclusion does not interfere with a statutory right to stack.

2. **The stacking cases support the conclusion that the legislative intent behind § 38-77-160 was to set a cap on UM and UIM stacking – not to mandate stacking.**

Although §38-77-160's predecessor, §56-9-831, was virtually identical, the early stacking cases indicate that it was not clear that stacking of UIM coverage was even allowed.[1] In *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983), superseded by statute, S.C. Code Ann. § 38-77-30(14), as recognized in *State Farm Mut. Auto Ins. Co. v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991), one of the questions certified by the United States Court of Appeals for the Fourth Circuit was whether the insured could stack UIM coverage. Of course, the Court answered that question in the affirmative, noting that the statute specifically prohibited stacking in only two situations, neither of which was applicable.

In *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984), superseded by statute, S.C. Code Ann. § 38-77-30(14), as recognized in *State Farm Mut. Auto Ins. Co. v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991), the Court addressed several certified

[1] Section 56-9-831 was amended in 1987 to delete the following sentence: "Coverage on any other vehicles shall not be added to that coverage", and also to insert the word, "not", after "shall" in the last sentence. *See Brown v. Continental Ins. Co.*, 315 S.C. 393, 395, 434 S.E.2d 270, 271 (1993). In *Brown*, the Court held that, even with the revisions, the statute (then recodified as §38-77-160) "provides that when an insured vehicle is not 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.'" *Id.*

questions from the United States District Court for the District of South Carolina, including whether basic UIM coverage on each of the vehicles insured under the policy in question could be stacked. Again, the question was not whether such stacking is required, but whether the statute even allowed it. Citing *Gambrell*, the Court said:

> By expressly stating underinsured coverage in excess of 15-30-5 cannot be stacked, the legislature made clear its intent that underinsurance coverage not exceeding 15-30-5 can be stacked.

(citation omitted).

Finally, in *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985), one of the questions raised in the subject declaratory judgment action was:

> May policies containing underinsured motorist coverage in excess of basic limits be stacked under S.C. Code Ann. §56-9-831 (Supp. 1984)?

Id. at 8, 339 S.E.2d at 502.

The Court clarified its decisions in *Gambrell* and *Garris* as follows:

> S.C. Code Ann. §56-9-831 (Supp. 1984) sets *a cap* on stacking in the amount of basic limits, and does not proscribe stacking of policies with coverage in excess of basic limits *to the extent of this cap.*

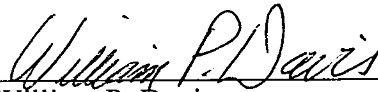
Id. at 9, 339 S.E.2d at 503. (emphasis in original).

When these cases were decided, the "If, however" sentence in § 56-9-831 was the same as that contained in § 38-77-160. However, the certified questions from the federal courts and the opinions themselves indicate that it was not at all clear that stacking of UIM coverage was even permitted. It is respectfully submitted that, if § 56-9-831 required stacking, then there would have been no issue in the first three UIM/UM

stacking cases as to whether or not stacking was permitted. Since stacking is not required by § 38-77-160, and since UIM coverage is voluntary, Standard Fire's exclusion is valid.

CONCLUSION

Because the Court overlooked and misapprehended the pertinent language of S.C. Code Ann, §38-77-160, concluding that it requires stacking, and because UIM coverage itself is optional and voluntary, Petitioner respectfully submits that its Petition for Rehearing should be granted.



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Columbia, South Carolina

January 13, 2014

(R700, H3347) **No. 569**

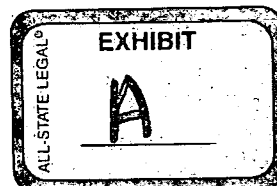
An Act To Amend Sections 56-11-110 And 56-11-140, Code Of Laws Of South Carolina, 1976, Relating to The Minimum Medical, Hospital And Disability Insurance And Economic Loss Benefits Required By The Automobile Reparation Act And To Collision And Comprehensive Coverage, So As To Make Such Benefits Optional To The Insured And To Require Insurers To Provide Such Coverage Subject To Minimum Deductibles; To Amend The 1976 Code By Adding Section 56-9-831 So As To Require Insurers To Offer At The Option Of The Insured Underinsured Motorist Coverage Up To The Limits Of The Insured's Liability Coverage; And To Amend Section 56-11-130, Relating To General Releases And Reduction Of The Amount Recovered By A Claimant, So As To Delete Provisions Relating To Reduction Of Verdicts Because Of Benefits For Economic Loss Recovered From Other Persons Or Insureds.

Be it enacted by the General Assembly of the State of South Carolina:

Insurers to offer uninsured motorist coverage

SECTION 1. The 1976 Code is amended by adding:

"Section 56-9-831. Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 56-9-830. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage 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. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. 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. Coverage on any other vehicles shall not be added to that coverage. Benefits paid pursuant to this section shall be subject to subrogation and assignment."



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SECTION 2. Section
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