

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

ORIGINAL

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 Which State Farm Mutual Automobile Insurance
Company is the Respondent.

FINAL BRIEF OF RESPONDENT

NELSON MULLINS RILEY & SCARBOROUGH LLP

Charles R. Norris

E-Mail: charles.norris@nelsonmullins.com

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

Counsel for Respondent

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ARGUMENT

- I. The order of the trial court should be affirmed because James Plemmons was not an insured for purposes of underinsurance motorist (UIM) coverage.
- II. The order of the trial court should be affirmed because, even if the plaintiffs are insureds under the State Farm Mutual Automobile Insurance Company (State Farm) policy, they are Class II insureds and are not entitled to stack UIM coverage from a State Farm policy on UIM coverage from a policy with Plaza Insurance Company.
- III. The order of the trial court should be affirmed because the vehicle insured by State Farm was outside the chain of causation for the accident which resulted in James Plemmons' injuries.
- IV. The order of trial court granting State Farm's motion for summary judgment on the plaintiffs' claim of bad faith and claim for statutory attorney's fees should be affirmed because State Farm had a reasonable basis for denying the plaintiffs' claim.

STATEMENT OF ISSUES ON APPEAL

- I. Should the order of the trial court be affirmed because the plaintiff was not an insured for purposes of UIM coverage under the State Farm policy?
- II. Should the order of the trial court be affirmed because, even if the plaintiffs are insureds under the State Farm policy, they are Class II insureds and are not entitled to stack UIM coverage from the State Farm policy on UIM coverage from the policy with Plaza Insurance Company?
- III. Should the order of the trial court be affirmed because the vehicle State Farm insured was outside the chain of causation for the accident which resulted in the plaintiff's injuries?
- IV. Should the order of the trial court granting State Farm's motion for summary judgment on the plaintiffs' claim of bad faith and claim for statutory attorney's fees be affirmed because State Farm had a reasonable basis for denying the plaintiff's claim?

STATEMENT OF THE CASE

This lawsuit was commenced on January 25, 2012 when the plaintiffs filed suit in the Court of Common Pleas in Spartanburg County. (R. pp. 15-28) On February 22, 2012, the defendant Plaza Insurance Company removed the case to Federal Court based on diversity jurisdiction. In May 2012 the plaintiffs moved to amend their complaint to join two non-diverse defendants – Howard Newton and the Stover Company, Inc. The U.S. District Court granted the plaintiffs' motion to amend the complaint to include the two non-diverse defendants. Because the addition of two non-diverse defendants ended the basis for diversity jurisdiction, the U.S. District Court issued an order on August 24, 2012 remanding the case to State Court. (R. pp. 7-14; August 24, 2013 Order of Judge Mary G. Lewis, Entry No. 46) During the approximate six months the case was in Federal Court the parties filed FRCP 26(f) reports stating their positions. (R. pp. 48-56; Plaintiffs' Rule 26(f) Report filed March 28, 2012) After the case was remanded to State Court the plaintiffs submitted a second amended complaint dated October 11, 2012. (R. pp. 29-39) On October 18, 2012 State Farm filed an answer to the plaintiffs' second amended complaint. (R. pp. 40-47)

On September 21, 2012 State Farm filed a motion for summary judgment on all of the plaintiffs' claims.¹ (R. pp. 60-62; State Farm Motion for Summary Judgment dated September 18, 2012, Filed September 21, 2012) State Farm submitted a 23 page memorandum and attachments in support of this motion. (R. pp. 63-185; State Farm Memorandum in Support of Motion for Summary Judgment and attachments dated September 18, 2012, filed September 21, 2012) This motion set forth a number of separate, independent grounds for the motion. On May 7, 2013 the plaintiffs submitted a motion for partial summary judgment on the basis

¹ The second amended complaint did not necessitate any changes in State Farm's motion for summary judgment.

that “the undisputed facts show that plaintiff James Plemmons is a State Farm insured and entitled to UIM coverage.” (R. pp. 209, 210; Plaintiffs’ Motion for Partial Summary Judgment submitted May 7, 2013)

On May 13, 2013 State Farm filed a supplemental motion for summary judgment. (R. pp. 188, 189; State Farm Supplemental Motion for Summary Judgment dated May 13, 2013, filed May 16, 2013) State Farm’s supplemental motion for summary judgment was supported by a supplemental memorandum with attachments dated May 13, 2013 and filed May 16, 2013. (R. pp. 190-207; State Farm’s Memorandum in Support of its Supplemental Motion for Summary Judgment dated May 13, 2013, filed May 16, 2013)

On May 17, 2013 State Farm’s motion for summary judgment, its supplemental motion for summary judgment and the plaintiffs’ motion for partial summary judgment were heard before Judge J. Mark Hayes, II. (R. pp. 306-341) On May 22, 2013 Judge Hayes issued an order granting State Farm’s motion for summary judgment on all of the plaintiffs’ causes of action and denying the plaintiffs’ motion for summary judgment. (R. pp. 1-7; Order of Judge J. Mark Hayes, II dated May 22, 2013, filed May 23, 2013) The plaintiffs then filed a Notice of Appeal from Judge Hayes’ order. (R. pp. 303-305)

STATEMENT OF THE FACTS

In July 2010 James Plemmons operated a tow truck service in addition to being a mechanic with his own garage in Spartanburg. (R. pp. 141, 142; Plemmons Depo., pp. 6, 7) On July 30, 2010 Plemmons was contacted by Kim Carson to come to her house and pick up her car because it would not operate. Plemmons then went to Carson’s house and loaded Carson’s car on Plemmons’ tow truck. The tow truck was insured under Plemmons’ policy with Plaza Insurance Company with \$100,000 of UIM coverage. (R. p. 33; Plaintiffs’ Second

Amended Complaint, ¶¶ 26, 32; R. p. 52; Plaintiffs' Rule 26(f) Report, p. 3) The Carson car was insured with State Farm. (R. p. 30; Plaintiffs' Second Amended Complaint, ¶ 3) Once Plemmons loaded the Carson vehicle on his tow truck he took it to his house rather than his garage because his garage was not open Friday evenings nor was it open on Saturdays. (R. pp. 143-145; Plemmons Depo., pp. 10-12)

Early the next morning Plemmons received a call to pick up another car. Plemmons received this call because he was on a rotating list of tow truck operators to pick up vehicles. Plemmons then drove his tow truck with the Carson car already on top to Highway 29 in Spartanburg County to pick up a car owned by a Ms. Mills. (R. pp. 144-147; Plemmons Depo., pp. 11-14) The Mills car had been pulled over because the driver of that car had been stopped by the police. At this time it was around 4:00 or 5:00 in the morning and there was very little traffic. (R. pp. 147, 148; Plemmons Depo., pp. 14, 15)

When Plemmons arrived to pick up Mills' car on Highway 29 the 2005 Dodge Neon owned by Kim Carson's father, John Carson, and insured with State Farm was on the flatbed secured in a stationary position. (R. p. 149; Plemmons Depo., p. 18) Other than being "atop the wrecker for towing" (R. p. 31; Plaintiffs' Second Amended Complaint, ¶ 12), "the Neon was otherwise inoperable." (R. p. 32; Plaintiffs' Second Amended Complaint, ¶ 16) No one was driving the Dodge Neon at the time of the accident, nor was it being used for transportation at the time of the accident. In fact, the Dodge Neon could not be used for transportation because it was inoperable. (R. pp. 151, 152; Plemmons Depo., pp. 25, 26) According to Plemmons, the only "use" he was making of the Dodge Neon at the time of the accident was transporting it back to his shop. (R. p. 153; Plemmons Depo., p. 27) The Dodge Neon neither caused the accident nor contributed to it (R. p. 156; Plemmons Depo., p.

32) and there is no one to blame for Plemmons' injury other than Tereso Diaz whose car hit Plemmons' tow truck. (R. pp. 154, 157; Plemmons Depo., pp. 30; 48) There is no evidence the Dodge Neon insured by State Farm touched Plemmons or otherwise caused his injuries, nor is there evidence that the at fault car operated by Diaz touched the Carson car on top of the tow truck bed. (R. p. 2; May 22, 2013 Order of Judge Hayes, p. 2)²

Plemmons did not see the accident because at the time of the accident he was looking at the car owned by Ms. Mills which Plemmons was securing to his tow truck. (R. p. 150; Plemmons Depo., p. 20) However, police officer Amanda Barnes did observe the accident as she was standing next to Plemmons when the car operated by Diaz struck Plemmons' tow truck. While Barnes was standing a foot and a half from Plemmons she observed out of the corner of her eye a vehicle southbound on Highway 29 traveling at a high rate of speed. The car traveling at the high rate of speed was operated by Diaz and hit the front of the tow truck. (R. pp. 159-168; Barnes Depo., pp. 9-18) The impact knocked the tow truck back and it skidded over Plemmons' left leg. (R. pp. 168, 169; Barnes Depo., pp. 18, 19)

The Carson vehicle atop the tow truck was not being used at the time of the accident (R. p. 170; Barnes Depo., p. 20), it did not hit Plemmons (R. p. 170; Barnes Depo., p. 20; R. p. 2; Order of Judge Hayes, p. 2), it was not being used for transportation at the time of the accident and it did not contribute to the accident. (R. pp. 171-173; Barnes Depo., pp. 21, 22; 26; R. p. 2; Order of Judge Hayes, p. 2) Instead, Diaz's car was the sole cause of the accident as every other vehicle was standing still out of the way and doing nothing. (R. p. 174; Barnes Depo., p. 28) In fact, none of the diagrams of the collision scene even reference the Carson car secured on top of the tow truck. (R. pp. 175-184; Barnes Depo., pp. 39-43; Exhibits 2-6)

² The Plaintiffs' brief does not contest the factual findings in Judge Hayes' order.

The plaintiffs stacked UIM coverages under the Plaza policy. (R. p. 54; Plaintiffs' Rule 26(f) report, p. 5) In addition to these funds, the plaintiffs received another \$100,000 from Plaza to resolve the plaintiffs' claim to reform the Plaza policy insuring the tow truck. (R. pp. 203-206; State Farm Memorandum in Support of Supplemental Motion for Summary Judgment, Exhibit B)

STANDARD OF REVIEW

The plaintiffs' Brief does not challenge any of the factual conclusions in the trial court's order. This is consistent with the plaintiffs' answer to Rule 26.01 Interrogatories when this case was pending in Federal Court. Page two of the plaintiffs' interrogatory answer stated that:

Plaintiffs' declaratory judgment action against State Farm Mutual Automobile Insurance Company does not have questions of material fact and should be decided as a matter of law by a judge. (R. p. 137; State Farm Memorandum in Support of Motion for Summary Judgment – Exhibit B)

Accordingly, this appeal presents only questions of law. An appellate court reviews questions of law *de novo*. Smith v. Regional Medical Center, 713 S.E.2d 656, 658 (S.C. App. 2011); Crystal Pines Home Owners Association v. Phillips, 716 S.E.2d 682, 685 (S.C. App. 2011) When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. GEICO v. Draine, 698 S.E.2d 866, 868 (S.C. App. 2010)

Although State Farm moved for summary judgment on a number of grounds, the trial court did not address all of these grounds in its order. (R. p. 3; Judge Hayes, May 22, 2013 Order, p. 3) However, an appellate court may affirm a trial court order for any reason appearing in the Record on Appeal. I'on v. Town of Mount Pleasant, 526 S.E.2d 716, 723

(S.C. 2000) Accordingly, every reason in the Record on Appeal for granting State Farm's motion for summary judgment – even reasons not ruled upon by Judge Hayes – may justify an affirmance. I'on v. Town of Mount Pleasant, 526 S.E.2d 716, 723 (S.C. 2000)

ARGUMENT

I. The order of the trial court should be affirmed because the plaintiffs were not insureds under the State Farm policy.

Page 7 of the plaintiffs' Brief states "the threshold question is whether Plemmons was 'using' the Carson vehicle as a matter of law at the time of the accident." State Farm agrees this is a threshold question. The disagreement is whether under the undisputed facts Plemmons was "using" the Carson vehicle at the time of the accident.

Page 20 of Form 8403 (R. 117) of the State Farm policy insuring the Carson vehicle defines an insured for purposes of UIM coverage as either **you** (p. 4 of this Form defines **you** as the named insured or named insureds on the declarations page), **your spouse and relatives**. (emphasis in policy) (R. pp. 86-135; Exhibit A to State Farm's Memorandum in Support of Motion for Summary Judgment) It is undisputed that James Plemmons was not a named insured nor a spouse or relative of a named insured under the State Farm policy. However, the definition of insured for UIM coverage also includes any other **person** "using **your car** . . ." (emphasis in policy) (R. p. 117; Exhibit A attached to State Farm's Memorandum in Support of Motion for Summary Judgment; p. 20 of Form 8403) Therefore, unless James Plemmons was "using" the Carson car at the time of the accident Plemmons was not an insured entitled to claim UIM coverage under the Carson vehicle.

Page 7 of the plaintiffs' Brief simply declares that "the record is clear that appellant was using the Carson vehicle . . ." Left unexplained is exactly what use the plaintiff was

making of the Carson vehicle at the time of the accident. It is undisputed that at the time of the accident:

- The Carson vehicle was not being driven;
- The Carson car was not being repaired;
- The Carson car was not occupied;
- The Carson car was simply sitting in a fixed, stationary position.

In fact, the plaintiffs' second amended complaint even alleges in paragraph 16 that "the Neon was otherwise inoperable." (R. p. 32; Plaintiffs' Second Amended Complaint, ¶ 16) It is inconsistent and contradictory for the plaintiff to claim that he was "using" a car which he alleges was "inoperable."

The plaintiff does not cite a single South Carolina case for the proposition that under the facts of this case the Carson vehicle was being used by the plaintiff at the time of the accident. Instead, the plaintiff relies on federal case law. However, as State Farm explained in its memorandum in support of its motion for summary judgment, the case of State Farm Fire and Casualty Company v. Pinson, 984 F.2d 610 (4th Circuit 1993) is distinguishable. (R. pp. 74-76; State Farm Memorandum in Support of Motion for Summary Judgment, pp. 12 - 14) In Pinson, Donald Rider was towing a pontoon boat behind his pickup truck. Rider entered an intersection without stopping and his truck and boat were struck by a vehicle driven by Pinson. Rider's boat was insured by State Farm under a boat owners policy. Pinson made a claim of coverage under the State Farm boat owners liability policy arguing that his injuries arose in part from the boat's "use." The 4th Circuit held that a towed boat is in "use." The 4th Circuit stated that:

Arguably a towed boat presents a stronger case for coverage than a towed vehicle. Usually, a vehicle is towed only when its owner is **unable** to put it to its intended purpose. A boat, on the other hand, **must** be towed in order for a landlocked owner to derive any enjoyment from boat ownership. 984 F.2d at 612 (Emphasis in original)

In concluding that the policy intended a towed boat to be in “use” the majority noted that “unless a boat is permanently moored, it must be frequently transported to and from water to be put to its intended purpose.” 984 F.2d at 613 The 4th Circuit concluded that “we believe that South Carolina would continue to construe ‘use’ broadly and find that a towed boat is in “use.” 984 F.2d at 613 The court further noted that there was no question that the towing of a boat caused or contributed to Pinson’s injuries and that “the causal connection is particularly strong” because Pinson actually struck the boat as well as Rider’s truck during the accident. 984 F.2d at 614 Here, in contrast, Plemmons never came in contact with the Carson vehicle. (R. pp. 151, 155; Plemmons Depo., pp. 25; 31)

It is logical to consider a boat that is not permanently moored to be in use while it is being transported to water as otherwise the boat cannot be used for its intended purpose. In contrast, an inoperable car being transported to a repair shop is not in “use.”³ Additionally, unlike the facts in Pinson, there is no causal connection between Plemmons’ towing of the Carson car and Plemmons’ injuries. Plemmons has admitted there is no one to blame for his injury other than Diaz, that the Dodge Neon itself did not hit Plemmons and that the Dodge Neon did not cause the accident nor contribute to the accident. (R. pp. 154-156; Plemmons Depo., pp. 30-32) Similarly, Amanda Barnes testified the towed vehicle was not being used at

³ The concept of a towed vehicle being “involved” in an accident should not be confused with the issue of whether the towed vehicle was being “used” at the time of the accident. Merck vs. Nationwide, 455 S.E.2d 697 (S.C. 1995), considered whether a towed vehicle was “involved” in an accident. That case did not consider whether the towed vehicle was in use. This distinction is referenced in footnote 2 of State Farm’s Memorandum in Support of its Motion for Summary Judgment. (R. p. 76)

the time of the accident and that the towed vehicle did not contribute to the accident. (R. pp. 170-173; Barnes Depo., pp. 20-22; 26) Instead, Diaz's car was the sole cause of the accident and every other vehicle was simply standing still out of the way and doing nothing. (R. p. 174; Barnes Depo., p. 28)

The plaintiffs' reference to Couch on Insurance is also distinguishable. (Plaintiffs' Brief, pp. 8, 9) The citation from Couch references when a vehicle "is being towed, pulled or pushed . . ." (Emphasis added) In contrast, the Carson vehicle was not actually being towed at the time of the accident. Instead, it was purely stationary.

Page 9 of the plaintiffs' Brief claims the plaintiff was using the Carson vehicle at the time of the accident because he was exercising "supervisory control and guidance of its movements . . ." (Plaintiffs' Brief, p. 9) This argument conflates having custody or control over a vehicle with use of the vehicle. Under this theory, any vehicle in the plaintiffs' repair shop would be constantly "used" by the plaintiff. Additionally, at the time of the accident the plaintiff was not guiding the movements of the Carson vehicle. Instead, the Dodge Neon was "atop the wrecker for towing" (R. p. 31; Plaintiffs' Amended Complaint, ¶ 12) while the plaintiff was guiding the movement of another car – the vehicle owned by Mills. (R. p. 31; Plaintiffs' Amended Complaint, ¶ 11)

Another federal case relied upon by the plaintiff is American Fire and Casualty v. Allstate, 214 F.2d 523 (4th Cir. 1954). (Plaintiffs' Brief, p. 8) There, unlike the present case, the vehicle being towed "was moving on the road by means of its own running gear..." at the time of the accident. Additionally, that decision cites no South Carolina case in support of its decision.

The plaintiff also argues he is entitled to coverage because the State Farm policy "must be strictly construed against the insurer." (Plaintiffs' Brief, p. 9) Aside from the fact that this argument was neither raised to nor ruled upon by the trial court, this statement is incorrect because the concept of strict construction against the drafter of a contract only applies where the court first finds an ambiguity in the policy. Judge Hayes did not find, nor was he asked to find, an ambiguity in the policy. In the absence of ambiguity the terms of a policy are to be taken in their plain, ordinary and popular sense. Smith v. Liberty Mutual Insurance Company, 437 S.E.2d 142 (S.C. App. 1993); Nationwide Insurance Company v. Commercial Bank, 479 S.E.2d 524, 526 (S.C. App. 1996); Holmes v. McKay, 513 S.E.2d 851, 853 (S.C. App. 1999)

The plaintiff further argues that if State Farm had wanted to exclude coverage for towed vehicles it could have included such an exclusion in the policy. (Plaintiffs' Brief, p. 9) No exclusion is necessary, however, because no South Carolina case holds that under the facts of this case a towed vehicle is in use. The Federal cases cited by the plaintiffs are distinguishable.

Page 5 of the plaintiffs' Brief cites Hite v. Hartford Accident and Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), for the proposition that a causal connection test is used to determine if the party seeking insurance was "using" the insured vehicle. Hite therefore supports State Farm's position that Plemmons was not "using" the Carson car at the time of the accident because here, as in Hite, there was no causal relation between the insured vehicle and the plaintiff's injuries. As stated at page 5 of the plaintiffs' Brief, "Hite's [or Plemmons'] injury had nothing to do with the insured vehicle." The factual finding at page 2 of Judge Hayes' order that "there is no evidence that the Dodge Neon insured by State Farm touched Plemmons or otherwise caused his injuries..." is not contested by the plaintiffs. Accordingly,

under the plaintiffs' own analysis James Plemmons was not "using" the Carson car at the time of the accident and, therefore, was not an insured under the State Farm policy.

II. The order of the trial court should be affirmed because, even if the plaintiffs were insureds under the State Farm policy insuring the Carson vehicle, the plaintiffs are Class II insureds and, as such, are not entitled to stack UIM coverage from a State Farm policy on UIM coverage from a policy with Plaza Insurance Company.

Page 9 of the Plaintiffs' Brief asserts that whether the plaintiffs are a Class I insured or a Class II insured is irrelevant as the plaintiffs are not attempting to stack coverage. The plaintiffs are correct that the Class I versus Class II distinction is only relevant to the issue of whether coverages can be stacked. However, page 5 of the Plaintiffs' Rule 26(f) Report filed when the case was in Federal Court stated that:

Plaintiffs filed a Declaratory Judgment action against the Defendant State Farm to determine coverage under a policy in effect between John Carson and State Farm, of which plaintiffs believe Mr. Plemmons to be a Class II user of the vehicle. (R. p. 54; Plaintiffs' Rule 26(f) Report, p.5)

The only reason for the plaintiffs to have made that statement in a report to a court is to concede that they could not stack coverages under a State Farm policy with other coverages.

The plaintiffs have already recovered UIM benefits under multiple policies of Plaza Insurance Company based upon one Plaza policy insuring the tow truck involved in the accident. The plaintiffs are now trying to claim additional UIM benefits under a State Farm policy insuring another vehicle – the Carson vehicle – also involved in the accident. The attempt to recover multiple UIM coverages on multiple vehicles involved in an accident constitutes stacking because stacking refers to an insureds recovery of damages under more than one insurance policy in succession until all damages are satisfied or until the total limits of all policies are exhausted. Nakatsu v. Encompass Indemnity Company, 700 S.E.2d 283, 286

(S.C. App. 2010); Nationwide Mutual Insurance Company v. Rhoden, 728 S.E.2d 477, 481 (S.C. 2012); Carter v. Standard Fire Company, 2013 WL 6492397 filed December 11, 2013

After arguing they are not attempting to stack coverages (Plaintiffs' Brief, p. 9), the plaintiffs alternatively argue they qualify as a Class I insured for purposes of UIM coverage and are allowed to stack UIM coverage on the Carson vehicle. (Plaintiffs' Brief, p. 10) This argument is incorrect for several reasons. First, the plaintiffs never explain why they initially stated in their Rule 26(f) Report that they believed Plemmons was a Class II user of the Carson vehicle. (R. p. 54; Plaintiffs' Rule 26(f) Report, p. 5) Second, a Class I insured is a named insured, his spouse and relatives residing in his household. Richardson v. South Carolina Farm Bureau, 519 S.E.2d 120, 121 (S.C. App. 1999); Carter v. Standard Fire Company, 2013 WL 6492397 filed December 11, 2013. One who is not a resident relative of the named insured's household is not a Class I insured entitled to stack UIM benefits. Auto Owner's Insurance v. Horne, 586 S.E.2d 865, 874 (S.C. 2003) A person is entitled to pursue stacking **only if** he is a Class I insured under the at-home policy. Carter, supra, footnote 5 Plemmons had no "at-home" policy with State Farm.

Even if James Plemmons is somehow deemed to have been "using" the Carson vehicle at the time of the accident, one who is not the named insured or the named insured's spouse or a resident relative and is only using the vehicle with the named insureds' permission is a Class II insured and is not entitled to stack coverage. Ex-parte: United Services Automobile Association; In Re: Smith v. Moore, 614 S.E.2d 652 (S.C. App. 2005) Plemmons was not a named insured under the State Farm policy, he was not a spouse of the named insured under the State Farm policy, nor was he a resident relative of the named insured under the State Farm policy.

Page 10 of the Plaintiffs' Brief argues that in the context of analyzing a claim of who can stack UIM benefits it is not appropriate to consider cases in which uninsured (UM) coverage was at stake. (Plaintiffs' Brief, p. 10) However, the same rules of stacking coverages apply to both UIM and UM coverage. S.C. Farm Bureau v. Mooneyham, 405 S.E.2d 396, 397 (Footnote 2) (S.C. 1991) Accordingly, cases involving stacking of UM coverages are appropriate to consider on questions involving stacking of UIM coverages.

The plaintiffs' final argument is that even if he is a Class II insured for purposes of liability coverage, he is a Class I insured under the UIM statute. (Plaintiffs' Brief, pp. 10, 11) However, the Class I versus Class II distinction is only relevant in the context of stacking UM or UIM coverage because liability coverages are limited to the particular vehicle insured. Ruppe v. Auto-Owners Insurance Company, 496 S.E.2d 631 (S.C. 1998) There is therefore no such thing as a Class II insured for the purpose of liability coverage.

III. The order of the trial court should be affirmed because the vehicle State Farm insured was outside the chain of causation for the accident which resulted in the plaintiff's injuries.

State Farm's memorandum in support of its motion for summary judgment cited to the trial court a number of cases which require that for insurance coverage to exist a vehicle must be an active accessory to the injury, it must be used for transportation purposes at the time of the injury, the injury must be foreseeably identifiable with the normal use of the vehicle and no act of independent significance breaks the causal link between the vehicle and the injury. (R. pp. 66-80; State Farm's memorandum in support of motion for summary judgment, p. 4 – 18) The crux of the plaintiffs' argument is that in the context of this case these requirements apply to the vehicle operated by Diaz and not to the Carson vehicle insured by State Farm. This

argument is summarized at Page 6 of the Plaintiffs' Brief which states that "there is no requirement that the insured vehicle be causally related to Appellant's injuries..."

Both State Farm and the trial court relied upon Hite v. Hartford Accident and Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986). Hite is not distinguishable and acceptance of the plaintiffs' argument would effectively overrule Hite.

In Hite, Hite sought coverage under a vehicle owned by his employer and which was insured by Hartford. Hite was struck by an automobile driven by Martin but at the time of the accident Hite was not in, on or touching the vehicle insured by Hartford and under which Hite sought coverage. In analyzing Hite's claim for coverage under the vehicle insured by Hartford the Court of Appeals stated that what appears to be crucial is the existence of a causal connection between an accident or injury and the use of the vehicle. 344 S.E.2d at 176 The Court of Appeals held that Hite's injury was directly caused by Martin and that this was an independent or intervening cause wholly disassociated from, independent of, and remote from the use of the insured automobile. The Court of Appeals concluded that "it is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident." 344 S.E.2d at 177 The Court of Appeals affirmed the trial court's directed verdict for Hartford.

Here, as in Hite, "it is difficult to see where use of the insured automobile [the Carson vehicle insured with State Farm] was directly connected with or a cause of the ensuing accident." The trial court correctly held that here, as in Hite, the injuries are the direct result of an intervening cause wholly disassociated from, independent of, and remote from the use of the insured automobile and, therefore, no coverage is provided. (R. p. 3; Order of Judge Hayes, p. 3)

IV. The order of the trial court granting State Farm's motion for summary judgment on the plaintiffs' claim of bad faith and the plaintiffs' claim for statutory attorneys' fees should be affirmed because State Farm had a reasonable basis for denying the plaintiffs' claim.

One of the grounds for State Farm's motion for summary judgment on the plaintiffs' third cause of action alleging insurance bad faith was that as a matter of law State Farm had a reasonable basis for denying the claim. (R. p. 61; State Farm's Motion for Summary Judgment, p. 2; R. pp. 80-82; Memorandum in Support of Motion for Summary Judgment, pp. 18 – 20) In granting summary judgment to State Farm Judge Hayes did not rule on this basis for State Farm's motion for summary judgment. Instead, Judge Hayes granted summary judgment on the plaintiffs' claim for bad faith "as no insurance coverage existed for the plaintiffs' claim against State Farm." (R. p. 5) Judge Hayes also granted State Farm's motion for summary judgment on the plaintiffs' claim for attorneys' fees. (R. p. 5) This ruling was also based upon Judge Hayes' conclusion that the plaintiffs' claim against State Farm was not covered. (R. p. 5; Judge Hayes' order, p. 5)

Although these grounds for summary judgment are in the Record on Appeal the plaintiffs' Brief fails to address this issue. Instead, the plaintiffs' Brief only argues that the ruling on bad faith should be reversed "in light of the fact that coverage did exist." (Plaintiffs' Brief, p. 11)

It is not necessary for the Respondent as the winning party in the lower court to present issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. The Respondent may on appeal raise additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. I'on v. Town of Mount Pleasant, 526

S.E.2d 716, 723 (S.C. 2000) Whether State Farm was entitled to summary judgment because it had a reasonable basis for denying the claim was raised to the trial judge and, although not ruled upon by the trial judge, this issue can serve as an independent basis for affirming the grant of summary judgment on the plaintiffs' claims. However, this issue is not addressed in the plaintiffs' Brief. This omission cannot be addressed in a Reply Brief because an Appellant is precluded from asserting an argument for the first time in a Reply Brief. Jones Ex. Rel. Jones v. Enterprise Leasing Company, 678 S.E.2d 819, 824, Footnote 6 (S.C. App. 2009) Additionally, the failure to argue an issue in an appellate brief is an abandonment of that issue. Richland County v. Carolina Chloride, 677 S.E.2d 892, 903 (S.C. App. 2009)

The law cited to the trial court as the basis for State Farm's motion for summary judgment on the plaintiffs' claim of bad faith and for statutory attorneys' fees is that where an insurer's decision is reasonable an appellate court will reverse a trial court's determination that the insurer breached the covenant of good faith and fair dealing. Doe v. South Carolina Medical Malpractice Association, 557 S.E.2d 670 (S.C. 2001) Bad faith is a knowing failure on the part of an insurer to exercise an honest and informed judgment in processing a claim. An insurer acts in bad faith only where there is no reasonable basis to support the insurer's decision. Where the only reasonable inference is that an insurer did not act in bad faith or unreasonably in handling the claim, there is no error in the lower court's decision to direct a verdict in favor of the insurance company. American Fire & Casualty v. Johnson, 504 S.E.2d 356, 359 (S.C. 1998)

If there is a reasonable ground for contesting a claim there is no bad faith. Crossley v. State Farm Mutual Automobile Insurance Company, 415 S.E.2d 393, 397 (S.C. 1992) If an insurer has a reasonable ground for contesting a claim summary judgment is properly granted

as to the bad faith claim. Helena Chemical Company v. Lexington Insurance Company, 594 S.E.2d 455, 462 (S.C. 2004); BMW of North America v. Complete Auto Recon Services, 731 S.E.2d 902 (S.C. App. 2012)

As stated to the trial court, "State Farm had numerous, reasonable grounds for denying the plaintiffs' claim for UIM coverage." (R. pp. 81-83; State Farm's Memorandum in Support of Motion for Summary Judgment, pp. 19 – 21) These reasons are set forth in State Farm's motion for summary judgment, in its memorandum in support of that motion and in sections I, II and III of this brief. Although the trial judge never ruled on this issue, under I'on v. Town of Mount Pleasant, 526 S.E.2d 716, 723 (S.C. 2000), the Court of Appeals may rely upon these reasons to affirm the grant of summary judgment to State Farm. Again, the plaintiffs' Brief fails to argue this point and the plaintiffs cannot now raise this point for the first time in a Reply Brief.

CONCLUSION

This appeal does not challenge the factual findings of the lower court. Instead, only legal issues are presented. The plaintiffs are not entitled to UIM coverage for several reasons. First, James Plemmons was not an insured under the State Farm policy insuring the Carson vehicle because Plemmons was not "using" the Carson vehicle at the time of the accident. Second, the Carson vehicle was outside the chain of causation for the accident which resulted in the plaintiff's injuries. Third, even if the plaintiffs could somehow claim to be insureds under the State Farm policy, they cannot stack UIM coverages under the State Farm policy for which the plaintiffs are Class II insureds on UIM coverages already recovered by the plaintiffs from Plaza Insurance Company which insured the plaintiffs' tow truck. Finally, one of the grounds for State Farm's motion for summary judgment on the plaintiffs' claims of bad faith

and attorneys' fees was that State Farm had a reasonable basis for denying the plaintiffs' claim. (R. p. 61) This issue was raised to but not ruled upon by the trial judge and appears in the Record on Appeal. The plaintiffs' Brief fails to address that issue. Accordingly, the trial court's order granting State Farm's motion for summary judgment on the claims of bad faith and attorneys' fees should be affirmed.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Charles R. Norris
SC Bar No. 004238
E-Mail: charles.norris@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Counsel for Respondent

Charleston, South Carolina

February 12, 2014

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

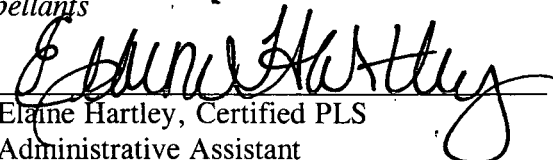
James Luther Plemmons and Wanda Sue Clark Plemmons, .. Appellants
v.
State Farm Mutual Automobile Insurance Company, Plaza Defendants
Insurance Company, The Stover Company, Inc. and
Howard E. Newton, III.....
Of Which State Farm Mutual Automobile Insurance Respondent
Company is the

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for State Farm Mutual Automobile Insurance Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by electronically mailing a copy of the same and by Federal Express, to the following addresses:

Pleadings: FINAL BRIEF OF RESPONDENT
Counsel Served: D. Alan Lazenby Esquire
Lazenby Law Firm, LLC
340 E. Main Street, Suite 240 (29302)
P.O. Box 6099
Spartanburg, SC 29304

Counsel for Appellants


Elaine Hartley, Certified PLS
Administrative Assistant

February 12, 2104

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SC Court of Appeals

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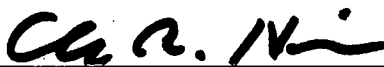
James Luther Plemmons and Wanda Sue Clark Plemmons, .. Appellants
v.
State Farm Mutual Automobile Insurance Company, Plaza Defendants
Insurance Company, The Stover Company, Inc. and
Howard E. Newton, III.....
Of Which State Farm Mutual Automobile Insurance Respondent
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CERTIFICATION

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for State Farm Mutual Automobile Insurance Company, do hereby certify that the Final Brief of Respondent complies with Rule 211(b) and have mailed a copy of the same to counsel of record listed below:

Counsel Served: D. Alan Lazenby Esquire
Lazenby Law Firm, LLC
340 E. Main Street, Suite 240 (29302)
P.O. Box 6099
Spartanburg, SC 29304

Counsel for Appellants


Charles R. Norris, Esquire

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