ORIGINAL

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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. The trial court erred in holding that State Farm UIM coverage did not apply because it improperly held that the insured vehicle must be causally related to Appellant's injuries.

II. The trial court erred in holding that State Farm UIM coverage did not apply because Appellant was using the Carson vehicle as a matter of law and was therefore an "insured".

III. The trial court erred in holding that Appellant impermissibly sought to stack UIM insurance coverage.

STATEMENT OF THE CASE

James Luther Plemmons and Wanda Sue Clark Plemmons ("Appellant") brought this action on January 25, 2012 against State Farm Mutual Automobile Insurance Company, John Carson, and Plaza Insurance Company seeking, among other relief, a declaratory judgment that Appellant was entitled to recover underinsured ("UIM") motorist benefits under the State Farm policy. (R. p. 15). Appellant filed an Amended Summons and Complaint on October 12, 2012 deleting John Carson as a defendant, and adding The Stover Company, Inc. and Howard E. Newton, III. (R. p. 29). Defendants timely answered. (R. p. 40). This appeal arises from the Cross Motions for Summary Judgment of Appellant and State Farm Mutual Automobile Insurance Company ("Respondent"). (R. pp. 58, 208). These motions were heard on May 17, 2013 before the Honorable J. Mark Hayes II. (R. p. 306). Judge Hayes ruled in favor of Respondent. (R. p. 1). This appeal followed.

FACTS

On or about July 31, 2010, at approximately 5:00 a.m., Appellant was standing alongside his tow truck, which was legally parked and idling on the paved median headed south on U.S. Highway 29 in Spartanburg County, South Carolina. Appellant was operating the lever on his truck and was in the process of loading a vehicle. The tow truck was capable of towing two vehicles at the same time. Appellant had already loaded a 2005 Dodge Neon belonging to John Carson and insured by Respondent ("Carson vehicle"). This car was atop the tow truck. Appellant was in sole control of the vehicle while it was atop the tow truck. Appellant had picked up the Carson vehicle at the specific request of the owner for the purpose of transporting the vehicle his shop.

Tereso Garcia Diaz, now deceased, was driving a 1999 Volkswagen headed north on U.S. Highway 29, under the influence of alcohol and cocaine. Diaz was traveling approximately thirty miles per hour over the posted speed limit. Diaz crossed over the median and crashed into the front of the tow truck. The impact of the Diaz vehicle caused the tow truck, which was legally parked and under the supervision of the Greer Police Department, to roll backwards, running over Appellant. The crash instantly severed his leg above the knee and caused extraordinary blood loss and injury. The Carson vehicle was partially thrown from the tow truck and was damaged by the crash. Appellant sustained significant injuries in excess of Diaz's liability coverage and in excess of his own UIM policy. Appellant's injuries caused a loss of consortium for his wife. At the time of the incident, Appellant was a user of the Carson vehicle, and therefore sought recovery under the State Farm UIM policy. (R. pp. 40, 309-311, 326-331, 342, 350, 355).

STANDARD OF REVIEW

A determination of whether coverage exists under an insurance policy is an action at law. The Court of Appeals can make its own determinations on questions of law, and need not defer to the lower court's findings of fact if there no evidence that reasonably supports them. South Carolina Farm Bureau Mutual Ins. Co. v. Kennedy, 398 S.C. 604, 730 S.E.2d 862 (2012). Further, the Underinsured Motorists Statute is remedial in nature, and enacted for the benefit of injured persons. Therefore, it should be liberally construed to effect this legislative intent. Floyd v. Nationwide Mutual Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005).

ARGUMENT

I. The trial court erred in holding that State Farm UIM coverage did not apply because it improperly held that the insured vehicle must be causally related to Appellant's injuries.

The trial court's Order denying coverage is based on the premise that there must be a causal connection between the Carson vehicle (the State Farm insured vehicle) and Appellant's injuries. This premise is unfounded and based on the trial court's misapplication of the existing law. There is no decision from this Court or the Supreme Court requiring a causal connection between the insured vehicle and the claimant's injuries to apply UIM coverage.

Initially, this holding does not comport with many decisions of this Court which have determined that UIM coverage, unlike liability coverage, follows the insured – not the vehicle. Given the purpose and application of UIM coverage, it would be illogical to require that the insured vehicle be involved in the accident. This is made clear by the

UIM statute which provides for a method of determining UIM coverage limits "[i]f none of the insured's or named insured's vehicles is involved in the accident...." S.C. Code Ann. § 38-77-160.

The State Farm Policy ("Policy") does require a "causal connection" in order for UIM coverage to apply; however, the "causal connection" must be between the underinsured vehicle and the claimant's injuries. The Policy provides:

> We will pay damages for ***bodily injury*** or ***property damage*** an ***insured***:
>
> 1. Is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle***;
>
> 2. ....
>
> The ***bodily injury*** **or** ***property damage*** must be caused by accident arising out of the operation or ownership of the ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured***.
>
> (R. p. 376)

The Policy also defines underinsured motor vehicle as:

> ***Underinsured Motor Vehicle*** – means a ***motor vehicle***, as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in the ***Financial Responsibility Act*** and:
>
> 1. The amount of the insurance or bond is less than the amount of the ***insured's*** damages; or
>
> 2. The ***insured's*** damages exceed any damages cap or limitation imposed by statute.
>
> (R. p. 376)

Here, all of the requirements for UIM coverage to exist are met. Appellant sustained bodily injury arising out of the operation of an underinsured vehicle; to wit, the Diaz vehicle.

The trial court found that the case of Hite v. Hartford Accident and Indemnity Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) is dispositive of the issue against Appellant. The lower court erred as a matter of law.

In Hite, Hite borrowed his employer's car. He stopped by the employer's car lot, got out of the borrowed vehicle, and walked fifty feet across the parking lot to yell to another man, Martin, to stop his vehicle. Martin sped toward Hite, knocked him down, and ran over his legs. The court held that Hite was not "using" the employer's car at the time of the accident because there was no causal relation between the insured vehicle and Hite's injuries. Despite the fact that Hite left the vehicle running, Hite's injury had nothing to do with the insured vehicle. The Court in Hite used the "causal connection" test to determine whether Hite was "using" the insured vehicle; the Court in Hite never held that there must be a "causal connection" between the injury and the insured vehicle. The requirement imposed by the trial court is made from judicial whole cloth.

Hite is easily distinguished. No court has found that "use" encompasses leaving a vehicle to engage a person in another car. Under South Carolina law, as noted below, a towed vehicle is in use by the person towing the vehicle. The Carson vehicle was indisputably in use as a towed vehicle while Appellant was engaged in a towing operation. Appellant was injured while engaged in the towing operation. To the extent, as the lower court insisted, a "causal connection" is somehow necessary; there is clearly a causal connection between Appellant's engagement in the towing operation while using his tow truck and the towed vehicles thereon.

The Court's decision in State Farm Mutual Automobile Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (2000) affirms the requirement that there must be a "causal

connection" between the underinsured vehicle and the claimant's injury. Bookert was insured under a State Farm policy which insured a vehicle belonging to Bookert's mother. This policy included UIM coverage. Bookert was not driving the insured vehicle at the time of the accident. Instead, Bookert was simply walking into a McDonald's when a passenger of a car riding in the parking lot fired a shotgun, striking Bookert. Bookert sought UIM coverage from State Farm. The Court denied coverage because Bookert's injury did not arise out of the ownership, maintenance, or use of the underinsured vehicle. Although the underinsured vehicle was used for transportation and there was a causal connection between the underinsured vehicle and the injury, the Court nonetheless held that there was no coverage because the injury Bookert sustained "was not foreseeably identifiable with the normal use of an automobile." Id. at 293, 523 S.E.2d at 182.

Again, Bookert is easily distinguished. Appellant's injury was directly caused by the use of the underinsured vehicle – the Diaz vehicle. Furthermore, Appellant's injury is reasonably foreseeable with the normal use of an automobile. It is foreseeable that a vehicle which is being operated carelessly and recklessly can cross over its marked lane of travel and strike other vehicles on the road.

Because there is no requirement that the insured vehicle be causally related to Appellant's injuries and because the Diaz vehicle did directly cause Appellant's injuries, the Policy provides UIM coverage to Appellant so long as he was "using" the Carson vehicle.

II. The trial court erred in holding that State Farm UIM coverage did not apply because Appellant was using the Carson vehicle as a matter of law and was therefore an "insured".

The threshold question is whether Plemmons was "using" the Carson vehicle as a matter of law at the time of the accident. If so, he is entitled to coverage under the State Farm policy.

Appellant was an insured under the plain language of the Policy, which defines an "insured" as follows:

> Insured- means:
>
> 1. ***you, your spouse,*** and ***relatives***;
> 2. Any other ***person*** while ***occupying*** or using ***your car***, a ***newly acquired car***, or a trailer attached to either, if such vehicle is:
>   a. Insured under the liability coverage; and
>   b. Being used with ***your*** consent; . . .
>
> (R. p. 377).

The Policy also defines underinsured motor vehicle as:

> ***Underinsured Motor Vehicle*** – means a ***motor vehicle***, as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in the ***Financial Responsibility Act*** and:
>
> 3. The amount of the insurance or bond is less than the amount of the ***insured's*** damages; or
> 4. The ***insured's*** damages exceed any damages cap or limitation imposed by statute.
>
> (R. p. 376).

Respondent does not dispute that the State Farm policy provides for UIM coverage. The record is clear that Appellant was using the Carson vehicle with the owner's consent at the time of the accident. "In South Carolina, the term 'use' has been broadly, not narrowly, construed." State Farm Fire and Casualty v. Pinson, 984 F.2d 610, 612 (4th Cir. 1993). As noted by the Fourth Circuit Court of Appeals, South Carolina state courts have approved an expansive definition of "use." Id. at 612-23. The Court in

Pinson reached the conclusion that a boat being towed by a vehicle is in "use." Id. at 613 (recognizing that the Fourth Circuit, applying South Carolina law, had already recognized that a towed car was in use).

In American Fire & Cas. Co. v. Allstate Ins. Co., 214 F.2d 523 (1954), the Fourth Circuit held that a towed vehicle is also in "use." Specifically, the Court rejected the contention of the appellant that "the bodily injuries suffered . . . did not arise 'out of the ownership, maintenance or use' of the jeep within the meaning of the quoted phrase of the policy, since the jeep was an automotive vehicle capable of self propulsion and designed to be so used." The Court held that the towing of the vehicle was not so unusual as to not have been in the contemplation of the parties to the policy and 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.

"The vehicle which is being towed is also considered as being 'used' during the towing operation, and it has sometimes been said that both vehicles in a towing operation are being 'used' by the owners or operators of each other's vehicles." 7 Am. Jur. 2d Automobile Insurance § 95, citing 8 Couch on Ins. § 111:36, which reads:

> Generally, when a vehicle is being towed, pulled, or pushed by another independent vehicle, the operator of the towing vehicle is found to be "using" the towed vehicle. This broader concept of "use" is based on the operator of the towing vehicle exercising supervisory control or guidance of the towed vehicle's movements. This concept of use has also been extended to encompass the preparation for towing a disabled vehicle. Since it is not uncommon for vehicles to require towing, pulling or pushing, these activities are found to fall within the contemplation of "use" in an omnibus clause.

8 Couch on Ins. § 111:36.

Appellant was towing the Carson vehicle at the time of the accident with Carson's consent. He was exercising supervisory control and guidance of its movements, and he was without question using the Carson vehicle as a matter of law. Appellant was therefore an "insured" under the Policy, and entitled to UIM coverage benefits.

Further, the State Farm policy must be strictly construed against the insurer. If State Farm had wanted to exclude coverage for towed vehicles, it could have provided for this in its policy. It did not.

Because Appellant was an insured under the State Farm policy and sustained injuries caused by an underinsured motorist, he is entitled to recover benefits under the policy as a matter of law.

III. The trial court erred in holding that Appellant impermissibly sought to stack UIM insurance coverage.

First, any potential rules relating to stacking do not apply in this case because Appellant is not attempting to stack coverage. Rather, as discussed more fully above, Appellant was using the Carson vehicle and was therefore an insured under the State Farm policy. Whether he is a Class I insured or a Class II insured is irrelevant, because he is not attempting to stack coverage. Rather, Appellant is directly seeking UIM benefits under the State Farm policy as an insured. Stacking becomes an issue only when a party seeks to recover under policies for vehicles that were not involved in the accident. Appellant is not trying to recover successive UIM benefits on any other vehicles owned by Carson that were not involved in the accident. 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).

Second, and in the alternative, Appellant qualifies as a Class I Insured for purposes of UIM coverage. A Class I insured is an insured or 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). A Class II Insured is an insured whose vehicle was not involved in the accident. Id. The Court further recognized that UM and UIM benefits are mutually exclusive. If one applies, the other does not. Therefore, it is not appropriate to analyze the applicability of UIM coverage using cases in which UM coverage was at stake.

There are four ways in the instant case that Appellant can qualify as a Class I insured: (1) he can be a named insured in the State Farm policy; (2) he can be a spouse of the named insured in the State Farm policy; (3) he can be a relative residing in the household of the named insured in the State Farm policy; or (4) he can own a vehicle involved in the accident. Appellant is a Class I Insured for purposes of UIM insurance because he owned a vehicle involved in the accident.

There is no dispute that Appellant owned the tow truck, which was indisputably involved in the accident. As such, Appellant is allowed to stack available underinsured coverage, including coverage under the Carson vehicle. Even if Appellant is a Class II insured for purpose of liability coverage under the definitions of the State Farm policy, he is clearly a Class I insured under the terms of the Underinsured Motorist Statute, which is to be broadly construed to provide coverage. Floyd v. Nationwide Mutual Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005).

Finally, the trial court held that there was no bad faith claim because no coverage existed. This holding must be reversed and remanded for a decision on the merits of the

bad faith issue in light of the fact that coverage did exist. Appellant's claim for attorney's fees under S.C. Code Ann. § 38-59-40 must be reversed and remanded on the same grounds.

CONCLUSION

For the reasons set forth herein, Appellant respectfully submits that the Court of Appeals must reverse the trial court's decision.

February 19, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR..

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PROOF OF SERVICE

I, the undersigned, hereby certify the Final Brief of Appellant, Final Reply Brief of Appellant, and Record on Appeal in the above referenced matter were mailed, postage prepaid, to Respondent's Attorney, Charles Norris, by sending to Nelson Mullins Riley & Scarborough, LLP, PO Box 1806, Charleston, SC 29402, on February 21, 2014.

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