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SC Court of Appeals

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 Which State Farm Mutual Automobile Insurance Company is the	Respondent

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RETURN OF RESPONDENT TO APPELLANTS' PETITION FOR REHEARING

Pursuant to SCACR 240(e) State Farm Mutual Automobile Insurance Company (State Farm) files this Return to the Appellants' Petition for Rehearing. The Petition for Rehearing is based upon SCACR 221(a) which requires that a petition state with particularity the points overlooked or misapprehended by the Court. The Petition for Rehearing should be denied because it merely reargues cases and arguments in the Appellants' Final Brief and which were discussed at oral argument on October 14, 2014. Additionally, the Petition attempts to argue a point – whether James Plemmons'

injury was caused by the car insured with State Farm – not preserved for appellate review.

I. The Appellants' Petition for Rehearing misstates the application of Hite v. Hartford Accident & Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), to this case.

Page seven of the Appellants' Final Brief stated that "the threshold question is whether Plemmons was "using" the Carson vehicle as a matter of law at the time of the accident." This was indeed the threshold question because if Plemmons was not using the Carson vehicle at the time of the accident, Plemmons was not an insured entitled to claim underinsurance motorist (UIM) coverage under the Carson vehicle. (State Farm's Final Brief, p. 8)

Page five of the Appellants' Final Brief even cited the Hite decision for the proposition that a causal connection test is used to determine if the party seeking insurance was "using" the insured vehicle. For coverage to exist, Hite requires a connection between the injury and the insured vehicle. Here, as in Hite, there was none. As explained at page 12 of State Farm's Final Brief, the Hite decision supports State Farm's position that Plemmons was not "using" the Carson vehicle at the time of the accident because in the present case, as in Hite, there was no causal connection between the insured vehicle and the plaintiff's injuries. Accordingly, as explained at pages 12 and 13 of State Farm's Final Brief, even under the Appellants' own analysis Plemmons was not "using" the Carson vehicle at the time of the accident. Therefore, Plemmons was not an insured under the State Farm policy and was not entitled to collect UIM coverage.

In essence, the Appellants seek to have this Court either implicitly overrule Hite, or simply ignore it. At oral argument counsel for the Appellants even referred to Hite as an "anomaly." Whether Hite is an "anomaly" is beside the point. The point is that Hite requires a causal connection between the insured vehicle and the plaintiff's injuries for Plemmons to qualify as an insured entitled to UIM coverage.

At the time of the accident the insured vehicle was not being driven, it was not being repaired, it was not occupied and it was simply sitting in a fixed, stationary position on the bed of the tow truck owned by the plaintiff. Under these facts the insured vehicle could not possibly have caused James Plemmons' injuries.

II. The Appellants have not preserved for appellate review the argument that the Carson vehicle caused James Plemmons' injuries.

The Appellants' argument in paragraph 3 of their Petition that "a causal connection existed between the Carson vehicle and Mr. Plemmons's injuries" is not preserved for appellate review. This is because the Appellants never contested Judge Hayes' factual finding that "there is no evidence that the Dodge Neon insured by State Farm touched Plemmons or otherwise caused his injuries . . ."

The Appellants' Petition attempts to claim for the first time some connection between James Plemmons' injuries and the Carson vehicle. Page two of the Petition states that:

> James Plemmons was not injured remotely from the Carson vehicle, but was injured while performing a towing operation that directly involved the Carson vehicle that was being towed by his tow truck at the time of the accident.

Aside from not preserving this argument for appellate review, the Record on Appeal contained no evidence of a causal connection between James

Plemmons' injuries and the Carson vehicle. Additionally, as explained in State Farm's Final Brief (p. 11) and in oral argument on October 14, 2014, the 4th Circuit case of American Fire & Casualty v. Allstate, 214 F.2d 523 (4th Circuit 1954), is inapposite.

CONCLUSION

It is too late for the Appellants to now claim for the first time on appeal a causal connection between the Carson vehicle and James Plemmons' injuries. In any event, even if the Appellants had preserved this argument for appellate review, there was no evidence in the record that the Dodge Neon caused James Plemmons' injuries. The Hite case is directly on point and is dispositive. The purpose of a Petition for Rehearing is not to present points which lawyers for the losing party have overlooked or misapprehended. Kennedy v. S.C. Retirement System, 564 S.E.2d 322 (S.C. 2001); Herron v. BMW, 719 S.E.2d 640 (S.C. 2011) The Appellants' Petition for Rehearing should be denied.

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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 counsel in this action with a copy of the pleading(s) hereinbelow specified mailing a copy of the same via U.S. Mail, postage paid, and via electronic mail to the following addresses:

Pleadings: RETURN OF RESPONDENT TO APPELLANTS' PETITION FOR REHEARING

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December 3, 2014