

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 2014-UP-389 (S.C. Ct. App. filed November 12, 2014)

James Luther Plemmons and Wanda Sue Clark Plemmons, Petitioners,

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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 17, 2014.

QUESTION PRESENTED

- I. The Court of Appeals erred in applying the case of Hite v. Hartford Accident & Indemnity Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) because it simply does not control under the facts of this case, and in declining to recognize and rule upon the actual novel issue of law presented by Petitioners – whether a towed vehicle is a vehicle in use under South Carolina law.

STATEMENT OF THE CASE

James Luther Plemmons and Wanda Sue Clark Plemmons ("Petitioners") 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 Petitioners were entitled to recover underinsured ("UIM") motorist benefits under the State Farm policy. (Appendix p. 18). Petitioners

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. (Appendix p. 32). The Amended Complaint was timely answered. (Appendix p. 43). This appeal arises from the Cross Motions for Summary Judgment of Petitioners and State Farm Mutual Automobile Insurance Company ("Respondent"). (Appendix pp. 61, 211). These motions were heard on May 17, 2013 before the Honorable J. Mark Hayes II. (Appendix p. 309). Judge Hayes ruled in favor of Respondent. (Appendix p. 4). The Court of Appeals affirmed the judgment of the circuit court. (Appendix p. 451). Petitioners timely filed a Petition for Rehearing, which was denied. (Appendix pp. 453-468). This Petition for Writ of Certiorari followed.

FACTS

On or about July 31, 2010, at approximately 5:00 a.m., Petitioner James Plemmons ("Plemmons") was standing alongside his tow truck, which was legally parked with the engine was running on the paved median headed south on U.S. Highway 29 in Spartanburg County, South Carolina. Plemmons 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. Petitioner had already loaded a 2005 Dodge Neon belonging to John Carson and insured by Respondent ("Carson vehicle"). This car was atop the tow truck. Plemmons was in sole control of the Carson vehicle while it was atop the tow truck. Plemmons 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 Petitioner. The crash instantly severed his leg above the knee and caused extraordinary blood loss and injury. The Carson vehicle, insured by Respondent and under Plemmons's control at the time of the accident, was partially thrown from the tow truck and was damaged by the crash. Plemmons sustained significant damages well in excess of Diaz's liability coverage and in excess of his own UIM policy. Plemmons's injuries caused a loss of consortium for his wife. At the time of the incident, Carson was a user of the Carson vehicle, and therefore sought recovery under the State Farm UIM policy. (Appendix pp. 43, 312-314, 329-334, 345, 353, 358).

ARGUMENT

- I. **The Court of Appeals erred in applying the case of Hite v. Hartford Accident & Indemnity Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) because it simply does not control under the facts of this case, and in declining to recognize and rule upon the actual novel issue of law presented by Petitioners – whether a towed vehicle is a vehicle in use under South Carolina law.**

The State Farm Policy at issue provided coverage as follows:

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***.

(Appendix p. 379).

The Policy also provides that an insured includes “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;

(Appendix p. 380).

Petitioners’ position is straightforward: Because the Carson vehicle was in use by Plemmons at the time of the accident, they are legally entitled to recover underinsured motorist benefits under the State Farm Policy. The Court of Appeals, however, did not address the issue of whether a towed vehicle is a vehicle “in use” under South Carolina law. Instead, it misapplied the holding in Hite v. Hartford Accident & Indemnity Co., 288 S.C. 616, 344 SE.2d 173 (Ct. App. 1986), which does not relate to the facts of this case at all.

The Court of Appeals relied exclusively on Hite in upholding the trial court’s Order denying coverage to James Plemmons. Specifically, the Court of Appeals cited the following three premises from the Hite decision as the basis of its ruling:

- (1) “Although ‘use’ is unquestionably a broader term than ‘operate’ or ‘drive,’ the difficult determination is whether [the] situation of any injury sustained remote to the actual operation of the vehicle is encompassed by the term ‘use.’” (Appendix p. 452).
- (2) “If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its ‘use.’” (Appendix p. 452).

(3) “[T]he key to determining whether injuries remote to the operation of an automobile occur during a ‘use’ of the vehicle is the existence of a causal connection between the injury and the use.” (Appendix p. 452).

The facts of Hite are inapposite, any parallels drawn by the Court of Appeals are misplaced, and none of these premises relied upon by the Court operates to bar coverage for Petitioners.

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 confront another man, Martin. 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 employer’s vehicle and Hite’s injuries. Despite the fact that Hite left the vehicle running, Hite was arguing with a third party a significant distance from the car, and the injury had nothing to do with the insured vehicle in any way.

Plemmons, on the other hand, sustained injuries that were not directly caused by some independent or intervening cause wholly disassociated from, independent of, or remote to the operation of his tow truck. He was not injured, like Hite, remotely from the Carson vehicle. Rather, he was performing a towing operation on his tow truck, which was towing the Carson vehicle, at the time the accident occurred. The Carson vehicle was in use as a towed vehicle, and was damaged in the accident.

The Court of Appeals, despite being asked, never actually answered the question of whether the Carson vehicle, as a towed vehicle on a tow truck being used in a towing

operation was “in use” by the operator of the tow truck. The answer is yes, and this affirmative answer operates to provide coverage to Petitioners.

Respondent does not dispute that the State Farm policy provides for UIM coverage. The record is also 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. See also, Hartford Acc. & Indem. Co. v. Travelers Ins. Co., 400 A.2d 862 (N.J. 1979) (the act of towing a vehicle is use of the vehicle, even when the towed vehicle did not contribute to, nor was involved in, the actual impact);

Dairyland Ins. Co. v. Drum, 568 P.2d 459 (Colo. 1977) (the towing of a vehicle is neither rare nor unforeseeable).

“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.

At the hearing on the motion for summary judgment, Respondent argued that James Plemmons responded to a tow call and "began the process of connecting the front of the Mills' vehicle to the back of his tow truck so he could tow both vehicles to his garage," and that he was injured "[w]hile he was in the process of I think operating the lever at the back of his tow truck, he was standin' at the, at the right rear of the tow truck." Respondent also admitted that the Diaz vehicle crashed into the tow truck, amputating Mr. Plemmons's leg, and that the Carson (insured) vehicle was also on the tow truck, and was knocked off the tow truck during the accident, sustaining damage. (Appendix pp. 313-314). These are facts of record that were raised to and relied upon by the trial judge in rendering the summary judgment order in this case. The summary

judgment order itself states that "[t]his lawsuit arises out of an accident on July 31, 2010 in which James Plemmons was injured while operating a tow truck." (Appendix p. 4).

Respondent's admitted version of the facts presented to and relied upon by the trial judge clearly differentiate this case from the Hite decision, where the injured party was dealing with a situation completely remote from the insured vehicle, which Hite had parked and walked away from across a parking lot, where he was subsequently injured by another vehicle. Here, Plemmons was actively involved in the towing operation while the tow truck was running – which is reflected in the trial court's order - and Petitioners' position has been throughout this case and continues to be that Plemmons's use of the tow truck constituted use of the towed vehicles as well. In that situation, there is absolutely the kind of causal connection called for by Hite.

Plemmons 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. He was engaged in a towing operation when he was injured. That towing operation involved the use of Carson vehicle as a matter of law, and requires coverage for Petitioner's claims.

Finally, 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.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Supreme Court grant their Petition for Writ of Certiorari to review the decision of the Court of Appeals.

January 16, 2015



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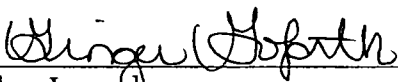
State Farm Mutual Automobile Insurance Company, Plaza Insurance Company,
The Stover Company, Inc., and Howard E. Newton, III Defendants,

Of whom,

State Farm Mutual Automobile Insurance Company is Respondent.

PROOF OF SERVICE

I, the undersigned, hereby certify the Petition for Writ of Certiorari 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 16, 2015.



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JAN 21 2015

January 16, 2015

The Honorable Jenny Abbott Kitchings
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S.C. Supreme Court

**Re: James Luther Plemmons and Wanda Sue Clark Plemmons v.
State Farm Mutual Automobile Insurance Company, Plaza
Insurance Company, The Stover Company, Inc., and Howard
Newton, III**

C.A.No:2012-CP-42-00346

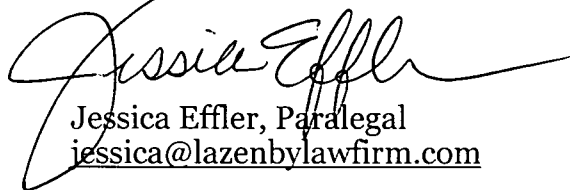
Appellate Case No. 2013-001454 COA #

Dear Ms. Kitchings:

I enclose herewith an original and seven copies of Appellants' Petition for a Writ of Certiorari and a Proof of Service showing service of same upon Respondent's Counsel Charles Norris, Esq.

Please file the original and send a clocked copy back to me in the envelope I have enclosed for your convenience. I appreciate your assistance in this regard.

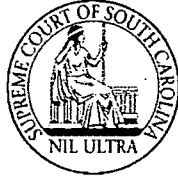
Sincerely,



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Enclosures

cc: Charles Norris, Esq. (via US Mail only)
Andy Johnston, Esq. (via email only)



The Supreme Court of South Carolina

Lazenby Law

01/22/2015

RECEIPT #74813

Fee Type:	Case Initiation Fee
Amount:	\$100.00
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Comments:	James Luther Plemmons, et al v. State Farm Mutual