THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
J. Mark Hayes, II, Circuit Court Judge

S.C. Court of Appeals Opinion No.: 2014-UP-389 filed November 12, 2014
Supreme Court Case No.: 2015-000125

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 the ..... Respondent.

RETURN OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The central issue is whether Plemmons was "using" Carson's car at the time of the accident and Hite v. Hartford Accident and Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), is dispositive of this issue.

II. The Federal Court cases and other authorities cited at pages 6 and 7 of the Petition for Writ of Certiorari are distinguishable.

III. The decision of the Court of Appeals should be affirmed because the Petition for Writ of Certiorari fails to challenge one of the grounds for affirmance of the trial court's Order; namely, that irrespective of whether James Plemmons was "using" the Carson vehicle at the time of the accident, the Plemmons' 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.

IV. The State Farm policy is to be strictly construed against State Farm only if there is an ambiguity in the policy and the Petitioners have not preserved this argument for appellate review nor explained how the policy is ambiguous.

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)

Prior to answering the Second Amended Complaint, 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

[1] The Second Amended Complaint did not necessitate any changes in State Farm's Motion for Summary Judgment.

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 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)

On November 12, 2014 the Court of Appeals affirmed in an unpublished decision the Order of Judge Hayes. The Petitioners then filed a Petition for Rehearing

which argued the Court of Appeals misapplied Hite v. Hartford Accident and Indemnity Company, 344 S.E. 2d 173 (S.C. App. 1986), to the facts of this case. On December 17, 2014 the Court of Appeals issued an Order denying the Petition for Rehearing. The Petitioners then filed a Petition for Writ of Certiorari to the Supreme Court.

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 of the tow truck 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 the rear of his

[2] The Plaintiffs' brief to the Court of Appeals did not contest the factual findings in Judge Hayes' Order.

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)

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)

ARGUMENT

I. The central issue is whether Plemmons was "using" Carson's car at the time of the accident and Hite v. Hartford Accident and Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), is dispositive of this issue.

Page 7 of the Petitioners' Final Brief to the Court of Appeals stated that the threshold question was "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 to be entitled to UIM coverage under the State Farm policy Plemmons must have been using the Carson vehicle at the time of the accident. (See p. 8 of Respondent's Final Brief)

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; and,
- The Carson car was simply sitting in a fixed, stationary position.[3]

In fact, the Plaintiffs' Second Amended Complaint alleged in paragraph 16 that "the Neon was otherwise inoperable." (R. p. 32; Plaintiffs' Second Amended Complaint, ¶ 16) The Petitioners would therefore have this Court rule as a matter of law that a vehicle not being driven, not being repaired, not occupied, which is inoperable, and which is sitting in a fixed, stationary position is, nonetheless, in use. As pointed out by State Farm to the Court of Appeals (State Farm's Final Brief, p. 11),

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[3] Judge Hayes' Order held on page 2 that there was no evidence that the Dodge Neon owned by Carson and insured by State Farm touched Plemmons or otherwise caused his injuries, nor was there evidence that the at fault car operated by Diaz touched the Carson car on top of the tow truck bed. (R. p. 2) The Petitioners did not appeal these factual findings.

under the Plaintiffs' theory any vehicle in the Plaintiff's repair shop would be constantly "used" by the Plaintiff. Page 8 of the Petition even insinuates that "exercising supervisory control" is tantamount to "using" a vehicle. Acceptance of this argument would mean that a vehicle simply sitting in Plemmons' repair shop for a week waiting on the arrival of a part would constantly be "in use" by Plemmons and Plemmons would be able to claim entitlement to UIM coverage for any vehicle sitting in his repair shop.

There must be some nexus between an insured vehicle and the person seeking to recover insurance benefits on that vehicle. This nexus can be established if the person seeking coverage is: (1) the named insured or a spouse or resident relative, or (2) using the insured car. The Petitioners' argument will expand (2) so as to make the definition of an insured under UIM coverage virtually limitless. For example, anyone exercising supervisory control over a vehicle would, by this fact alone, be an insured under UIM coverage. This would expand UIM coverage far beyond anything allowed by statute, case law or the contract of insurance.

Page 8 of the Petition also claims that at the time of the accident Plemmons was guiding the movement of the Carson vehicle. This statement is inconsistent with the Plaintiffs' Second Amended Complaint which alleges in paragraphs 11 and 12 that the Dodge Neon was "atop the wrecker for towing" while the Plaintiff was loading another car - the vehicle owned by Mills. (R. p. 31; Plaintiffs' Second Amended Complaint, ¶¶ 11, 12). It is also inconsistent with the factual findings on p. 2 of Judge Hayes' Order (R. p. 2), none of which have been appealed.

The Court of Appeals correctly relied upon Hite v. Hartford Accident and Indemnity, 344 S.E. 2d 173 (S.C. App. 1986), as dispositive. The Hite case concerned whether Hite was entitled to uninsured motorist (UM) coverage on a car insured with Hartford. The Court of Appeals held Hite would be entitled to UM coverage under the Hartford policy if, among other things, he was occupying or using the automobile. 344 S.E. 2d at 175 Because Hite was not occupying the car, the Court's analysis focused on whether Hite was using the car under which he sought UM coverage. The Court of Appeals held that:

> It is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident.
>
> . . . . . .
>
> The 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. 344 S.E. 2d at 177[4]

Because there was no causal connection between the accident and Hite's use of the insured vehicle, the Court held that Hite was not using the car and was not entitled to UM coverage under the Hartford policy. Hite mandates the same result in the present case.

In seeking a Writ of Certiorari the Petitioners claim this case presents a novel question of law. It does not. Instead, it presents a novel set of facts of which Hite is dispositive.

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[4] Page 5 of the Petitioners' Final Brief to the Court of Appeals claims "the Court in Hite never held that there must be a 'causal connection' between the injury and the insured vehicle." The Court of Appeals did indeed so hold in resolving whether the person seeking coverage was using the vehicle under which he sought coverage.

II. The Federal Court cases and other authorities at pages 6 and 7 of the Petition for Writ of Certiorari are distinguishable.

Pages 6 and 7 of the Petition reference the same Federal Court cases and cite to Couch on Insurance as at pages 7 and 8 of the Petitioners' Final Brief to the Court of Appeals. Rather than reiterating why these cases are inapplicable, State Farm refers the Court to pages 9 -11 of its Final Brief to the Court of Appeals. These pages explain why Pinson, America Fire, and the citation to Couch on Insurance are distinguishable.

The Petition does cite two cases - Hartford Accident and Indemnity Co. v. Travelers Insurance Co., 400 A. 2d 862 (N.J. 1979) and Dairyland Insurance Co. v. Drum, 568 P. 2d 459 (Colo. 1977) - which were cited for the first time in the Petition for Rehearing. Neither case persuaded the Court of Appeals to change its decision.

It is noteworthy that both of these cases existed at the time of the Court of Appeals' decision in Hite, and although the Court of Appeals in Hite referenced some 9 out-of-state cases, neither of the cases cited in the Petition were mentioned in the Court of Appeals' opinion. In any event, by virtue of the Hite decision it is unnecessary to refer to the law of other jurisdictions to determine the issue before the Court. Instead, the Court need only refer to the Hite decision.

Additionally, Dairyland Insurance Co. v. Drum is factually distinguishable from the present case because in Dairyland a truck owned by one Miller became disabled on the highway. Miller obtained a tow from Drum. Drum then drove his own vehicle while Miller steered his. As Drum attempted to make a u-turn he stopped and left Miller's vehicle in the center of the road where it was hit by another vehicle. Under these facts the Colorado Supreme Court cited cases from other jurisdictions that "use"

in insurance policy terms is found where the vehicle under which coverage is sought was dealt with in a manner that created or had the potential of creating an unreasonably dangerous situation. 568 P. 2d at 462 Here, in contrast, the Carson vehicle did not create nor had the potential to create an unreasonably dangerous situation. Instead, the Carson car was simply sitting in a fixed, stationary position and had no involvement in causing the accident.

III. The decision of the Court of Appeals should be affirmed because the Petition for Writ of Certiorari fails to challenge one of the grounds for affirmance of the trial court's Order; namely, that irrespective of whether James Plemmons was "using" the Carson vehicle at the time of the accident, the Plemmons' were Class II insureds and, as such, were not entitled to stack UIM coverage from the State Farm policy on UIM coverage from the policy with Plaza Insurance Company.

The Respondent's Final Brief to the Court of Appeals argued as an additional sustaining ground that the Order of Judge Hayes should be affirmed because the Plaintiffs were Class II insureds and were not entitled to stack UIM coverage from the State Farm policy on UIM coverage from a policy with Plaza Insurance Company. Judge Hayes ruled that even if the Plaintiffs were entitled to UIM coverage under the State Farm policy insuring the Dodge Neon, the Plaintiffs' status as Class II insureds precluded them from stacking UIM coverage under the State Farm policy on UIM coverage Plaza Insurance Company. (R. p. 4, 5) This issue was briefed at pp. 13 - 15 of the Respondent's Final Brief to the Court of Appeals.

The unpublished decision of the Court of Appeals does not address the issue of stacking. However, in deciding whether to grant the Petition for Writ of Certiorari this issue should be considered because even if it is determined that James Plemmons was "using" the Carson vehicle at the time of the accident, Plemmons is nonetheless not

entitled to UIM coverage if the rules of stacking forbid him from stacking State Farm's UIM coverage on UIM coverage from Plaza already received by Plemmons. (see Judge Hayes' Order, pp. 4, 5 - R. p. 4, 5)

Rather than reiterate its argument to the Court of Appeals, State Farm refers the Court to pp. 13 - 15 of its Final Brief to the Court of Appeals on the issue of stacking. This issue should be considered in deciding whether to grant the Petition for Writ of Certiorari because the issue of stacking is a separate, independent reason for affirmance of Judge Hayes' Order.

IV. The State Farm policy is to be strictly construed against State Farm only if there is an ambiguity in the policy, and the Petitioners did not preserve this argument for appellate review nor explain how the policy is ambiguous.

Page 9 of the Plaintiffs' Final Brief to the Court of Appeals argued the Plaintiffs were entitled to coverage because "the State Farm policy must be strictly construed against the insurer." This argument is briefly mentioned at page 8 of the Petition for Writ of Certiorari which claims the State Farm policy must be strictly construed against the insurer and that if State Farm had wanted to exclude coverage for towed vehicles it could have provided such an exclusion in its policy but did not.

This argument is unavailing for several reasons. First, as explained at page 12 of State Farm's Final Brief to the Court of Appeals, no exclusion was necessary because no South Carolina case holds that under the facts of this case a towed vehicle is in use. In other words, an exclusion is unnecessary where no coverage exists in the first place (exclusions can only apply to otherwise covered items, for if the item is not covered it is by definition excluded - Owners Insurance Company v. Clayton, 614 S.E.2d 611, 612 (S.C. 2005)). Second, the argument that the State Farm policy was to

be strictly construed against State Farm was neither raised to nor ruled upon by the trial court and hence was not preserved for appellate review. Third, the statement is itself incorrect because the concept of strict construction against the drafter of a contract only applies when the Court first finds an ambiguity in the policy. Finally, the Petitioners have offered no explanation of how the policy is ambiguous. 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 Co., 437 S.E. 2d 142 (S.C. App. 1993); Nationwide Insurance Co. v. Commercial Bank, 479 S.E. 2d 524, 526 (S.C. App. 1996)

CONCLUSION

Hite v. Hartford Accident and Indemnity Co., 344 S.E. 2d 173 (S.C. App. 1986), is both applicable to the facts of this case and dispositive of the issue of coverage. Additionally, irrespective of whether Plemmons was "using" the Carson vehicle and was therefore entitled to UIM coverage under the State Farm policy insuring the Carson vehicle, Plemmons was a Class II insured and could not stack UIM coverage from a State Farm policy on UIM from the policy of Plaza Insurance Company which insured the Plaintiff's tow truck. For these reasons the Petition for Writ of Certiorari should be denied.

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February 12, 2015

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APPEAL FROM SPARTANBURG COUNTY
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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 the ..... Respondent.

PROOF OF SERVICE

I, the undersigned, do hereby certify the Return of Respondent to Petition for Writ of Certiorari in the above-referenced matter was served, Federal Express, to Petitioners' attorney, D. Alan Lazenby, by sending to Lazenby Law Firm, LLC, 340 East Main Street, Suite 240, Spartanburg, SC 29302, on February 12, 2015.

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February 12, 2015

Via Federal Express

Daniel E. Shearouse
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RE: James Luther Plemmons and Wanda Sue Clark Plemmons v. State Farm Mutual Automobile Insurance Company and Plaza Insurance Company
Appellate Case No. 2015-000125
Civil Case No. 2012-CP-42-00346
Claim No.: 40-8676-404
Policy No.: 1486-207-40A
Matter No.: 2012-02209-SC
Our File No. 00500/03345

Dear Mr. Shearouse:

Enclosed for filing is an original and 7 copies of the Return of Respondent to Petition for Writ of Certiorari. Please file the original and return a clocked-in copy in the envelope provided.

By copy of this letter, a copy of the same is being mailed to Petitioners counsel. Thank you in advance for your assistance with this matter.

Very truly yours,

Charles R. Norris

CRN:mtk
Enclosures
cc: D. Alan Lazenby (via Federal Express w/enclosure)