THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-3136

Omni Insurance Company...Appellant,

v.

Lionel Evans and Lionel Evans,
as the Personal Representative of the
Estate of Antonio Dickey...Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in granting Respondents' Motion for Summary Judgment and holding that Respondent Evans was entitled to Underinsured Motorist Coverage as guest in a stolen vehicle, where there is no evidence to suggest that Respondent Evans knew the vehicle was stolen?

STATEMENT OF THE CASE

Appellant filed this Declaratory Judgment action on November 27, 2012. After an appropriate discovery period, Respondents moved for Summary Judgment by Motion filed February 27, 2014. The Motion was argued June 18, 2014, and by Order dated August 11, 14, Respondents' Motion was Granted and the case dismissed. Appellant filed this Notice of Appeal on September 11, 2014.

STATEMENT OF FACTS

On the night of February 8, 2009, Respondent Lionel Evans ("Evans") received a phone call from Respondent Antonio Dickey ("Dickey"). Evans Dep. 9:6-13. Dickey invited Evans to ride with him to the club that evening, and Evans accepted. Id. Although Dickey and Evans had been friends since childhood, this was their first time seeing each other in nearly a year. Evans Dep. 4:16-32 and 8:3-6.

When Dickey arrived at Evans' house to pick Evans up, Dickey was driving a Chevy SUV. Evans Dep. 8:9-10. There was another gentlemen already in the car by the name of Mario Lowery. Evans Dep. 10:11-23. Because Evans had not seen Dickey in nearly a year, he had no knowledge of Dickey's current transportation situation, although he had know Dickey to own vehicles in the past. Evans Dep. 5:4-11. Evans had no reason to suspect that the SUV did not belong to Dickey and had no reason to ask. See, e.g. Evans Dep. 11:22-12:6 ("Well, I mean he came and got me. He was like this is his vehicle, I mean I didn't even ask him..."); Evans Dep. 13:10-14 (Evans had never known

Dickey to have participated in vehicle theft in the past). The three men proceeded to Club Rain in Florence, with Dickey driving the entire time. Evans Dep. 11:3-5.

After spending a few hours at the club, the men left, again with Dickey driving the SUV. At some point, a police officer pulled up behind the SUV and activated his lights. Evans Dep. 20:17-21:8. Rather than pulling over, Dickey Sped off. Id. A high speed chase ultimately ensued where after Dickey lost control of the vehicle and crashed into a ditch. Evans Dep. 23:16-25. Evans was severely injured in the wreck. Dickey was killed.

The vehicle, a 2003 Chevrolet Trailblazer, was owned by one Rederick Thompson and insured under Omni Insurance Policy No. 3389124. Compl. Ex. 1. Omni alleges that Dickey had stolen the vehicle from Mr. Thompson approximately a week prior to the accident, and was therefore operating the vehicle without the owner's permission. Compl.

As a result of his injuries, Evans filed suit against Dickey in the Florence County Court of Common Pleas in an action styled as Lionel Evans v. Estate of Antonio Dickey, 2011-CP-21-3414.[1] Citing the alleged theft of the vehicle, Omni argued that Dickey was not a permissive driver, and therefore refused to defend or indemnify Dickey under the liability coverage of the Policy. Evans thereafter served copies of the pleadings upon Omni as an Uninsured Motorist carrier pursuant to S.C. Code Ann. § 38-77-150. Omni appeared to defend the underlying action and separately filed this declaratory judgment action seeking a declaration that Evans is not entitled to Uninsured Motorist coverage under the Omni policy. Evans filed a Motion for Summary Judgment on February 27,

---

[1] The case was stricken from the trial roster pursuant to Rule 40(j) and has since been restored under case number 2014-CP-21-1063.

2014. Omni filed no response to the motion, nor any other papers or affidavits, but did appear to contest the Motion at the June 8, 2014 hearing. The Trial Court ultimately granted Respondents' Motion for Summary Judgment and Omni appeals.

ARGUMENT

Omni's Complaint requested a declaration that Evans was not entitled to Uninsured Motorist Coverage under the Omni policy because Evans was a passenger in a stolen vehicle and further alleges that Evens either knew or should have known that the vehicle was stolen. See Compl. Evans denied these allegations. See Answer.

I. The Trial Court did not err in granting Respondents' Motion for Summary Judgment because, under the facts presented, Respondents are entitled to judgment as a matter of law.

A party is entitled to summary judgment where the pleadings, discovery, affidavits, and other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c). Once the defendant establishes an entitlement to judgment as a matter of law, summary judgment is appropriate unless the plaintiff comes forward with evidence giving rise to a genuine issue of material fact. CFL Productions, LLC v. Rozelle, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004). A party's response to a motion for summary judgment "must set forth specific facts , admissible in evidence, showing there is a genuine issue for trial." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 499, 453 (1988). "If he does not so respond, summary judgment should be entered against him. Id. "The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001).

Here, Respondents argued that they were entitled to judgment as a matter of law based upon the existing precedents established by Unisun v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) and Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008). Further, Respondents argued that Omni had failed to produce any evidence that Evans knew or should have known that the vehicle was stolen. Evans submitted to the Court his sworn deposition testimony in support of his motion.

Omni did not file any responsive memoranda whatsoever. Omni failed to submit any affidavits, testimony, documentary or other evidence. Indeed, aside from the mere allegations in the complaint, there is no evidence on the record to prove that the vehicle was even stolen – no incident report, no affidavit or testimony from the owner, and no evidence whatsoever to meet Omni's burden of proving, as an initial matter, that Dickey was not a permissive user of the vehicle at the time of the accident. This alone entitles Respondents to summary judgment.

Nonetheless, assuming that Dickey was operating the vehicle without the permission of its real owner, Respondents would be entitled to judgment as a matter of law unless Omni could set forth evidence that Evans knew or should have known that the car was stolen. As set forth more fully below, Omni failed to meet this burden as well, making summary judgment appropriate.

A. The Trial Court correctly found that Respondent Evans was a guest in the subject vehicle at the time of the accident.

South Carolina Code § 38-77-150 creates the requirement that all insurance contracts include uninsured motorist coverage. S.C. Code Ann. § 38-77-150. The law is aimed to further the public policy of protecting insured motorists against loss caused by the wrongful conduct of an uninsured motorist. Ferguson v. State Farm Mut. Auto. Ins.

Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973). Omni argues that the Trial Court erred in holding that Evans may be qualified as a "guest" in the accident vehicle within the meaning of S.C. Code Ann. § 38-77-30.

1. Denial of liability converts an insured vehicle into an uninsured vehicle

Our Supreme Court has addressed similar questions in the past. The first in this line of cases was Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000). In Unisun, the liability carrier successfully denied coverage for an injured passenger because the driver was a non-permissive driver of the vehicle. Unisun at 365, 529 S.E.2d 280, 281. However, the Court held that the insurer's denial of liability converted the otherwise insured vehicle into an uninsured motor vehicle. Unisun at 367, 529 S.E.2d 280, 282.

The Court based its holding on the statutory definition of "uninsured motor vehicle" as when "there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder..." Id., *quoting* S.C. Code. Ann. § 38-77-30(13)(b) *amended as* § 38-77-30(14)(b). The Unisun Court continued to echo the statutes' historic public policy in its opinion, "[t]he purpose of the uninsured motorist law is 'to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle.'" Unisun at 368, 529 S.E.2d 280, 283, *quoting* Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973).

Therefore, based on Dickey's alleged non-permissive use, Omni's denial of liability converted Thompson's otherwise insured vehicle into an uninsured motor vehicle pursuant to S.C. Code Ann. § 38-77-30(14)(b).

While Unisun squarely addressed the issue of what constitutes an uninsured motor vehicle, its holding was fairly narrow as to the applicability of uninsured motorist coverage for guests. In Unisun, all parties conceded that the injured passenger had the named insured's permission to ride in the vehicle. Unison at 364, 529 S.E.2d 280, 281. However, Unisun's narrow application was expanded in the subsequent case of Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008)

2. "Guest" status is determined from the passenger's perspective

In Rollison, a teenager drove a car off his grandfather's car dealership without permission. Rollison, at 603, 663 S.E.2d 484, 485. The teenager picked up a friend, and was later involved in a single-car accident. Id. The passenger sought recovery for injuries through the vehicle's general liability policies, but was denied because the insurance carrier determined the injured passenger was neither a permissive user, nor a permissive guest in the vehicle at the time of the accident. Rollison at 609, 663 S.E.2d 484, 488. As a result, the Rollison Court revisited Unisun's narrow holding regarding the statutory qualifications of a "guest." Id.

Unisun had briefly discussed the definition of "guest," under the South Carolina Uninsured Motorist Statute. Unisun at 366, 529 S.E.2d 280, 282 (2000). "'Insured' means the named insured and ... a guest in the motor vehicle to which the policy applies or the personal representative of any of the above." S.C. Code Ann. § 38-77-30(7). Unison reaffirms the notion that "[t]he uninsured motorist statute 'is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished." Unisun at 339 S.C. 362, 366, 529 S.E.2d 280, 282 *quoting* Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824

(1968). Therefore, the Court determined that the statutory language "to which the policy applies," is for identification, not exclusion. Unisun at 367, 529 S.E.2d 280, 282. As such, the statute is focused more on the vehicle identified in the policy, and less on the status of the "guest" within the vehicle.

The Rollison court went further and stated, "A review of the plain language of the statute reveals that 'guest' is listed independently as a person who constitutes an 'insured.' As we interpret the statute, a person ... need only have the status of a "guest" to qualify as an 'insured.'" Rollison at 610, 663 S.E.2d 484, 489. Since the legislature did not include language of consent in the statute, the Court did not require the named insured's consent as a prerequisite for "guest" status. Id. Therefore,

> **[A] passenger can only rely on the driver's representations** regarding his status as a permissive user. Thus, a determination of whether a passenger qualifies as a "guest" under the statute must be viewed from the passenger's perspective.
>
> We believe that **to define "guest" otherwise would lead to an absurd result** which would require a passenger to specifically inquire whether the driver either owned the vehicle or had permission from the named insured to drive the vehicle. Clearly, such an interpretation would be contrary to the intention of the Legislature as well as the remedial purpose and inclusive nature of the uninsured motorist statute.

Rollison at 611-12, 663 S.E.2d 484, 489-90 (emphasis added).

The Trial Court found the analysis and statutory interpretations of Rollison controlling in the present case and went on to analyze the facts, viewing them in a light most favorable to Omni, to determine whether the facts of this case presented any genuine issue for trial.

B. The Trial Court correctly applied existing law to the facts of this case in holding that Respondent Evans was entitled to Uninsured Motorist coverage.

Omni argues that Rollison is distinguishable from the present case in that the present case involves a stolen vehicle whereas the Rollison case merely involves a driver who does not have permission to operate the vehicle. Omni argues that, in a situation with a stolen vehicle, the UM coverage should cut off and should not follow the vehicle.

This argument is unpersuasive and illogical. Indeed, it appears to be a distinction without a difference. A driver who takes and operates a vehicle without the owner's permission is technically stealing the vehicle. That the Rollison case involved family members is of little consequence. The only difference between Rollison and the present case is that the vehicle owner in Rollison chose not to report his vehicle stolen or press charges against the non-permissive user who, by all definitions, was still a thief.

Even assuming there is some true difference between a non-permissive use case and a theft case, the Court should not analyze the issue any differently. The holdings in Rollison and Schmidt are based heavily upon public policy considerations. That is to say, we have a strong public policy reason for ensuring that some type of insurance coverage exists for passengers who are injured while occupying motor vehicles in this state. The Rollison Court noted that

> [O]ne who is a "guest" at the invitation of the driver has, by implication, the consent of the named insured. Presumptively then a guest has the consent of the named insured unless he or she has knowledge to the contrary. Logically, because the named insured would rarely be present in a situation as in the facts of this case, a passenger can only rely on the driver's representations regarding his status as a permissive user. Thus, a determination of whether a passenger

qualifies as a "guest" under the statute **must be viewed from the passenger's perspective.**

Rollison, 378 S.C. at 612.

Viewing both the Rollison case and the present case from the passenger's perspective, Omni's distinction disappears. Indeed, the entire problem noted by the Rollison Court is that the passenger is not in the best position to know of the status of the driver. If our Supreme Court has already recognized the "absurd result" that would occur if we expected a passenger to know whether the driver was a permissive user or not, it makes little sense bifurcate the classes of non-permissive use further. If a passenger is not in a position to know whether or not the driver has permission to use the vehicle, how can he or she be required to determine, if the answer is no, whether or not the driver is a mere "non-permissive user" or whether he is a full blown thief? In any event, the question is purely academic because the passenger would lose protection anyway if he or she knew that the driver did not have permission to drive the vehicle in the first place, regardless of the driver's substatus as either a mere "non-permissive user" or a full blown thief.

For these reasons, the Trial Court correctly declined to draw a distinction between the facts of the Rollison case and those presently at issue, and held that the legal analysis in Rollison was binding in the present matter.

C. The Trial Court correctly found that Appellant presented no evidence that Respondent knew or should have known that the vehicle was stolen.

Omni goes on to argue that, even under Rollison, it can avoid coverage for Respondent Evans if Evans knew or should have known that he was a passenger in a

stolen vehicle. This argument is at least partially accurate.[2] However, this is a question of fact on which Omni must show a material dispute in order to withstand a motion for summary judgment.

The only testimonial evidence on the record is that of Respondent Evans. During his deposition, Evans clearly and emphatically testified that he had no knowledge that the vehicle was stolen. See, e.g. Evans Dep. 25:9-14 (Did not know vehicle was allegedly stolen until waking up in the hospital a month later). Counsel for Omni could not point to any testimony in this transcript that contradicted this denial or could lead a reasonable jury to find otherwise. In fact, the Trial Court gave Omni every opportunity to point out the facts that were available to Omni to survive summary judgment. See, e.g. Hr'g Tr. 9:13-15 (Omni asked if it has any affidavits or other evidence); 12:23-13-9 (Omni asked if it can point to any part of Evans' deposition that would indicate knowledge)[3]. Omni did not submit testimony from any other people, or evidence of any other kind, to suggest that Evan's had knowledge of the stolen vehicle. There is nobody who says Evans was with Dickey when Dickey stole the car. There is no one who says Evans later admitted to them that he knew the car was stolen. There is no testimony from Mr. Lowery, the other

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[2] Rollison creates a presumption that a guest has the consent of the named insured **unless he or she has knowledge to the contrary.** Thus, there is little doubt that a passenger who knows he or she is riding in a stolen car would not be afforded UM coverage under the Rollison analysis. However, this language from the Rollison case appears to deal only with actual knowledge. It is unclear whether a passenger with constructive knowledge (i.e. "should have known") would also lose the presumption. In either event, there is no evidence on the record in this case that points to either actual **or** constructive knowledge on the part of Evans. Nonetheless, while addressing both actual and constructive knowledge for purposes of this brief, Respondents contend that Omni must show actual knowledge to avoid coverage.

[3] COURT: "Could you point to anything in this deposition that would seem to indicate that [Evans] knew or should have known [that the car was stolen]?"
MR LOFTIS: "No, Your Honor, other than I would assert that Mr. Evans, of course, is not going to say he knows because he is looking to receive money in this case and that the finder of fact could make the determination that Mr. Evans is being untruthful in his testimony..."

gentleman who was in the car at the time of the accident. Indeed, as noted above, there is no evidence that the car was even stolen to begin with!

Instead, Omni's argument rests solely on the grounds that the jury might choose not to believe Evans' sworn testimony.

South Carolina Rule of Civil Procedure 56(e) makes clear that a party may not defeat a motion for summary judgment based on their pleadings. S.C. R. Civ. P. 56(e). Neither, may a party create a genuine issue for trial from hypothetical jury disbelief. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). "One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render summary judgment obsolete, and it is in any event at odds with Rule 56, SCRCP, and our summary judgment jurisprudence." Id.

Therefore, since Omni relies on its pleadings and bare accusations regarding Evans' credibility, the Trial Court correctly found a lack of genuine issue of material fact. Moreover, Omni failed to produce any evidence that Evans even should have known the vehicle was stolen. Evans had not seen Dickey for several months leading up to the accident. He had no reason to notice that Dickey may have been driving a different car than usual. Evans was not with Dickey at the time the car was allegedly stolen, nor was he even communicating with Dickey during that time (they did not re-connect until a week later). Evans had never been to the location where the vehicle was allegedly stolen from. Evans had not known Dickey to ever steal vehicles in the past and had no reason to suspect that this one was stolen. During the course of their friendship, Evans had known

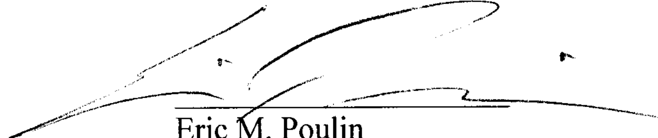
Dickey to own his own vehicle in the past, and had no reason to suspect that the vehicle in question was any different. See, generally, Evans Dep.

Accordingly, the Trial Court did not err in granting summary judgment on this issue.

CONCLUSION

For the reasons stated, the Order of the Trial Court should be affirmed.

Respectfully submitted,



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February 9, 2015

THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
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Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-21-3136

Omni Insurance Company..Appellant,

v.

Lionel Evans and Lionel Evans,
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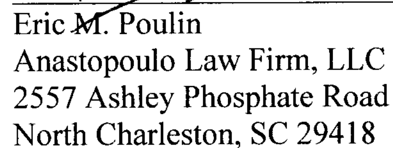
PROOF OF SERVICE

I certify that I have served a copy of Respondents' Initial Brief and Designation of Matter by causing the same to be placed in the United States mail, postage prepaid, and addressed to the attorneys below on this 9th Day of February, 2015.



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February 09, 2015

The Honorable Jenny Abbot Kitchings
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RE: *Omni Insurance Company v. Lionel Evans*
Ct. App. Tracking No.: 2014-001935

Dear Ms. Kitchings:

Enclosed for filing please find Respondents' Initial Brief, Designation of Matter, and Proof of Service of the same on all attorneys of record.

Also enclosed is a copy of each, together with a return envelope. We would appreciate it if you would file the originals and return the stamped copies through the provided envelope. If you should have any questions, please do not hesitate to contact us.

Sincerely,

Eric M. Poulin

Cc: Doug Ledbitter / Todd Loftis
Cc: Jonathan Edwards

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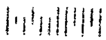

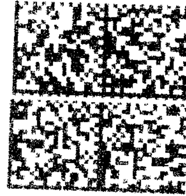

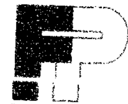

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