The State of South Carolina
In The Court of Appeals

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-000788

JUAN MICHAEL RAMIREZ, Appellant,

v.

PROGRESSIVE NORTHERN INSURANCE COMPANY, Respondent.

Brief of Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Does Respondent's automobile insurance policy, which seeks to reduce portable UIM coverage to less than the statutory minimum limits of $25,000, violate South Carolina public policy.

2. Did the trial court err by granting Respondent's motion for judgment on the pleadings under Rule 12, SCRCP, when factual issues raised by those pleadings were in dispute and Appellant requested time for discovery?

STATEMENT OF THE CASE

On August 4, 2014, Appellant Juan Michael Ramirez (hereinafter "Ramirez") filed a Summons and Complaint seeking declaratory judgment and asserting a breach of contract claim against Respondent Progressive Northern Insurance Company (hereinafter "Progressive Insurance Company"), an automobile insurance company. Ramirez claimed he was entitled to recover the full, declared, underinsured motorist (UIM) coverage amount ($25,000) on Respondent's policy. Respondent paid Ramirez only $8,333.33. (R. pp. 7-13)

On September 11, 2014, Respondent filed an Answer that admitted some of the facts asserted in the Complaint. However, Respondent also denied that its policy language offered $25,000 of UIM coverage and denied that it owed Ramirez any more money. Respondent's pleading asserted a counterclaim seeking declaratory judgment that it owed Ramirez no additional money. (R. pp. 14-20) Contemporaneously, Respondent filed a Rule 12 Motion for Judgment on the Pleadings.[1] (R. pp. 65-67)

On October 10, 2014, Ramirez filed a Reply denying the counterclaim. (R. pp. 21-22)

On February 2, 2015, the Laurens County Circuit Court heard argument between the parties. (R. pp. 23-64) On March 17, 2015, the Court granted Respondent's Motion for Judgment on the Pleadings.[2] (R. pp. 1-5) On April 13, 2015, Ramirez timely filed his Notice of Appeal. (R. p. 76)

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[1] Respondent also filed a Motion to Strike and Dismiss Ramirez's breach of contract claim. (R. pp. 70-71)

[2] The Court ruled that all of the other pending motions were mooted by its Order granting Respondent's Rule 12(c) motion for judgment on the pleadings. (R. p. 1)

FACTS

On April 11, 2013, Ramirez was a passenger in an underinsured 2001 Chevrolet that John S. Bryan was driving. Bryan, who was speeding, lost control of the Chevrolet and crashed it into trees next to the roadway. (R. pp. 2, 14)

The bones in Ramirez's right upper arm shattered in the collision. On April 11, 2013, he underwent a closed reduction operation on his right arm. A closed reduction operation is a hospital emergency room procedure where the doctor pulled and yanked on Ramirez's broken right arm to move the pieces of the fractured bone into a better alignment. On April 18, 2013, Ramirez underwent an open reduction internal fixation of right humeral shaft fracture and exploration of the radial nerve operation. In this procedure, doctors cut open Ramirez's arm and bound the fractured pieces of bone together with screws, metal rods, and K-wires. (R. pp. 10, 14)

Ramirez incurred medical expenses of $65,169.18 for treatment of his collision-related injuries. He lost approximately $3,407.95 in wages. He endured pain, anxiety, and mental distress, and lost of enjoyment of life. He sustained a permanent impairment and permanent scarring. (R. pp. 10, 14) Respondent admits and stipulates that Ramirez's uncompensated harms and losses exceed $25,000, the

declared amount of its UIM $25,000 policy limits. (R. pp. 9, 14, and 27)

Respondent is in the profitable business of writing automobile insurance policies and selling them across the State of South Carolina. It collects substantial revenue in premiums from South Carolina's citizens. (R. p. 97).

Respondent sold Policy Number 33143869-1 to Kandi Ramirez, Michael Ramirez's mother. The policy declared UIM coverage limits of $25,000 for one automobile. (R. pp. 9, 14) In accordance with S.C. Code Ann. § 38-77-350, Respondent issued a form explaining UIM coverage under the policy. (R. pp. 9, 14) The form was checked and signed by Kandi Ramirez. It stated that she paid an additional $25 premium in exchange for $25,000 of UIM coverage. (R. pp. 9, 14, and 81-82) Pursuant to State law, the policy's UIM coverage protected Kandi Ramirez and her resident family members including her son, Michael (Appellant). There is no dispute that on the date of the collision Michael Ramirez lived with his mother and his step father, Paul Eclavea ("Eclavea") in their family home. ((R. pp. 9, 14) Respondent did not insure any of the other vehicles garaged at the Ramirez household.

Ramirez was insured by two other automobile UIM insurance polices at the residence. First, Ramirez owned a car. His car was

insured by Bristol West Insurance Services. Bristol West's policy provided Ramirez with UIM coverage of $25,000. (R. pp. 9, 14) Second, Eclavea (Ramirez's step father) owned vehicles. Eclavea's cars were insured by State Farm Insurance Company with $25,000 UIM coverage limits. (R. pp. 9, 14)

On September 12, 2013, Ramirez made a claim against Bryan's liability insurance company (State Farm). On September 26, 2013, State Farm tendered the liability policy limits ($25,000) in exchange for a Covenant Not to Execute against Bryan's personal assets. Ramirez accepted the offer. (R. pp. 10, 14)

On October 21, 2013, Ramirez made a claim for UIM coverage against the Bristol West insurance policy. On or about October 30, 2013, Bristol West tendered its $25,000 UIM coverage limits. (R. pp. 10, 14)

On November 21, 2013, Ramirez made UIM claims against Eclavea's State Farm and Respondent's policies. On December 16, 2013, State Farm tendered its $25,000 UIM limits. (R. pp. 10, 14) Respondent, however, asserted a policy defense and refused to tender the declared $25,000 UIM coverage.[3] Instead, on March 6, 2014, Respondent tendered $8,333.33, a "pro-rated portion" of Respondent

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[3] Respondent's policy is not part of the court record.

limits. (R. pp. 9, 16, and 19-20) Respondent retained the remaining $16,666.67 of its declared $25,000 UIM coverage.

ARGUMENTS

1. South Carolina mandates that automobile insurance companies offer consumers the option to purchase a minimum of $25,000 of UIM coverage for every automobile insurance policy sold. A Policy provision that attempts to limit the mandatory minimum UIM coverage is void because it violates South Carolina public policy.

Ramirez v. Progressive Northern Ins. Co. is an important public policy case because an order affirming the Circuit Court's March 17, 2015, Order will eliminate UIM coverage for thousands of South Carolina families.

Respondent claims this is a stacking case. Generally, "[s]tacking refers to an insured's recovery of damages under more than one insurance policy in succession until all of his damages are satisfied or until the total limits of all policies have been exhausted." Nakatsu v. Encompass Indemnity Co., 390 S.C. 172, 178, 700 S.E.2d 283 (2010) (emphasis added). The circuit court became confused by Respondent's loose use of the term "stacking."

The case law discussing automobile insurance stacking is nuanced and potentially confusing because South Carolina appellate

courts have used the term differently depending on the facts. If the case involves liability insurance, stacking means one thing. If it is an unininsured (UM) or UIM case, it means something different.

The best way to avoid confusion is to recognize that this is a case about "portability" rather than thinking it is a case about stacking. "[P]ortability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident." Id. 390 S.C. at 181. Instead of getting side-tracked by various and sundry stacking opinions, a Court must direct its focus into the plain terms of the UIM statute. When focus is directed appropriately on the UIM statute, the law is clear.

The South Carolina UIM statute states as follows:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

See S.C. Code Ann. § 38-77-160 (emphasis added).[4]

On its face, Respondent's policy declared it provided the minimum allowed UIM coverage ($25,000). (R. pp. 9, 14) The UIM statute provides that even when an insured vehicle is not involved in an accident, the coverage must equal at least "the extent of coverage" on any one of the vehicles with the excess or underinsured coverage. See id. Respondent only insured one vehicle. The extent of coverage it insured here on its one vehicle was $25,000. Therefore, it is illegal for Respondent (or any automobile insurance company) to try to redefine the mandatory UIM coverage minimums by reliance upon alleged policy language.

Regulations promulgated by the Department of Insurance (DOI) confirm this clear statutory directive. The DOI regulation was properly issued because the Legislature directed the DOI to issue forms to be used by carriers, and guidance to explain the mandatory automobile insurance coverages to consumers. Insurance companies must use the DOI forms (or similar forms approved by the DOI). See S.C. Code Ann. § 38-77-350. This legislative mandate was met with DOI Bulletin Number 2006-03. (R. pp. 85-91)

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[4] The current South Carolina liability and UM limits are $25,000 per person and $50,000 per accident.

Like the UIM statute, Page 1 of the Bulletin states insurers are required to offer the "minimum automobile liability insurance limits." It says, "These are minimum requirements." (R. p. 85) The DOI's UIM coverage explanation, aimed at South Carolina consumers, states, "[Y]our insurance company is required to offer, optional underinsured motorist coverage in various limits up to the limits of liability coverage you have purchased." (R. p. 88)

Respondent used the DOI-approved form and presented it to Kandi Ramirez when she chose to buy Respondent's offered $25,000 of UIM coverage. She selected limits of "25/50/25."[5] (R. pp. 81-82) Thus, Respondent's policy declared UIM coverage of $25,000.

Respondent alleged in its Answer that a policy provision limited the UIM coverage here to $8,333.33. However, "[A]ny limiting language in an insurance contract which has the effect of providing less protection than made obligatory by the statute is contrary to public policy and is of no force and effect." See Ferguson v. State Farm Mut. Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522 (1973); see also Nationwide Mut. Ins. v. Howard, 288 S.C. 5, 339 S.E.2d 501 (1985). Any such policy provision in Respondent's policy must be declared void. "A policy of automobile insurance must provide at least the

minimum amount of coverage outlined in the statute, and 'a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended.'" Carter v. Standard Fire Ins. Co., 406 S.C. 609 (2013) (quoting Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App.2002)). Jackson v. State Farm Mutual Auto. Ins. Co., 288 S.C. 335, 342 S.E.2d 603 (1986), and Giles v. Whitaker, 297 S.C. 267, 376 S.E.2d 278 (1989). "In Jackson and Giles, we held that a policy provision which attempts to limit stacking of 'statutorily required coverage' is invalid. In Jackson, we specifically noted that required coverage includes coverage that is required to be provided or required to be offered. 342 S.E.2d at 604, n. 1." Brown v. Continental Ins. Co., 315 S.C. 393, 396 (1993) (quoting Jackson). See Carter, 406 S.C. at 612 (using the clearer terminology discussing UIM stacking as "stack coverages under the Policy"). See also Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 202, 603 S.E.2d 861 (Ct. App. 2004) ("UIM statute is also remedial in nature and enacted for the benefit of injured persons. It should be construed liberally to effect the purpose intended by the legislature.")

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[5]The DOI bulletin explained to consumers that these terms in a policy declaration or form refer to UIM coverage of $25,000 per person.

The Order cites Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 496 S.E.2d 631 (1998), Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984), and Firemans Ins. Co. v. State Farm Mut. Auto Ins. Co., 370 S.E.2d 85 (S.C. 1988), in support of its holding that Respondent could limit the declared amount of UIM coverage to less than $25,000.[6] None of the cited cases support the Order's conclusion.

Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 496 S.E.2d 631 (1998), is a liability insurance stacking case. The case did block Ruppe's attempt to stack liability coverages on multiple vehicles. But the Supreme Court distinguished Ruppe from the UIM and UM stacking cases by noting the important distinction between automobile liability insurance coverage and UIM and UM coverage. "Liability coverage, therefore, while statutorily required, is limited to the particular vehicle for which it is purchased." Id. 329 S.C. at 406. UIM coverage, on the other hand, is portable. UIM and UM coverage follow the person. See Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 201, 603 S.E.2d 861 (Ct. App. 2004) ("South Carolina falls in the category where UIM coverage follows the person.") The portability of the $25,000 UIM coverage on Respondent's policy is the basis of Ramirez's claim and

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[6] The Order actually holds that Respondent owed Ramirez no UIM coverage whatsoever. (Order)

the real issue here. Thus, Ruppe is distinguished and its holding offers no specific precedent in analyzing this a UIM portability case.

Garris was a wrongful death case involving two Class II insureds' UIM claims against State Auto Mutual Insurance Company (State Auto) and Allstate Insurance Company (Allstate). Roderick Lee Huntley insured two vehicles under a State Auto policy. Thomas H. Garris was insured by Allstate, which provided coverage of four vehicles. Huntley and Garris were passengers in a non-owned vehicle and were classified, like Ramirez, as a class II insureds for purposes of UIM coverage analysis.[7] After analyzing the statutory language, the Garris opinion stated:

> The obvious intent of the legislature is to allow insureds or named insureds to take advantage of the benefit of their bargain with their insurance carrier when they are injured by an underinsured motorist and their vehicle is not involved in the accident. . . . Thus, plaintiffs cannot stack the coverage of the other vehicles under the policies issued to them, but may only recover benefits on one vehicle with the coverage.

Garris, 280 S.C. at 156 (emphasis added). Elsewhere, the opinion states, "If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with excess or underinsured coverage.

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[7] It is undisputed that Ramirez was injured while a passenger in a vehicle not owned by him or any of his resident relatives.

Coverage on any other vehicles shall not be added to that coverage." Id. Here, Ramirez seeks to recover benefits on only the one vehicle insured under Respondent's policy. If Respondent had insured more than one car in the Ramirez household, Ramirez would concede that because he is a Class II insured Respondent's policy could have precluded him from stacking the other vehicles' UIM coverages.

The final case cited was Firemans Ins. Co., 370 S.E.2d 85. Rather than supporting Respondent's position, it makes Ramirez's case. It should be noted that Firemans Ins. Co. is a UM case, but the analysis of UM coverage for a class II insured is the same as for UIM coverage. Mullins (the class II insured in Firemans Ins. Co.) was driving a vehicle insured by State Farm Mutual Insurance Company. He collected the UM coverage on the vehicle from State Farm, and made a second claim against his Firemans Insurance Company, which insured three of Mullins' vehicles for $35,000 each. The Court ruled that Mullins was, "only entitled to $35,000 uninsured coverage as set forth in the policy." Firemans Ins. Co. , 295 S.C. at 546. Therefore, the Fireman Ins. Co. case demonstrated that a class II insured is able to collect the full amount of coverage on at least one of the vehicles under a policy. This is exactly what section 38-77-160 requires, and what Ramirez's Complaint seeks.

Based upon the statute, regulatory guidance, and our precedent, it is clear the March 17, 2015, Order must be reversed. This case should be remanded to the Circuit Court for further proceedings on the relief sought by Ramirez.

2. Judgment on the pleadings in favor of Respondent was improper because disputed issues of fact were raised in the pleadings and Ramirez is entitled to discovery under Rule 56(f).

The Order granted Respondent judgment on the pleadings based upon Rule 12(c), SCRCP. Rule 12(c), SCRCP provides as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Importantly, Respondent's policy was never filed or introduced into the Circuit Court record. The Circuit Court never reviewed the alleged policy language that Respondent claims limited Ramirez's UIM coverage. As such, it was impossible for the court to render a judgment on the pleadings or under Rule 12 or Rule 56, SCRCP.

The trial court granted Respondent's motion for judgment on the pleadings because counsel for Respondent asserted that there were no

disputed issues of fact. (R. pp. 56-57) However, in Paragraphs 25 through 35 of the Complaint, Ramirez alleged that Respondent's policy language, as a factual matter, established that Ramirez was entitled to the $25,000 of UIM coverage. (R. pp. 10-12) Ramirez alleged that Respondent's promise of $25,000 of coverage was reflected in the UIM Coverage Election Form and that offer established $25,000 of UIM coverage under Respondent's policy as a factual matter. (R. pp. 81-82) In the Answer, Respondent denied Ramirez's factual allegations and referred to its unfiled policy. (R. pp. 14-16).

The Circuit Court assumed that Respondent's policy unambiguously prohibited Ramirez from collecting the $25,000 coverage. Such an assumption is contradicted by the case law. Generally, an insured can stack policies unless limited by statute or by a valid policy provision. See Jackson v. State Farm Mut. Auto. Ins. Co., 288 S.C. 335, 342 S.E.2d 603 (1986). Thus, the question of whether the policy validly prohibited recovery of the declared $25,000 of UIM coverage here remained open and disputed under the pleadings.[8]

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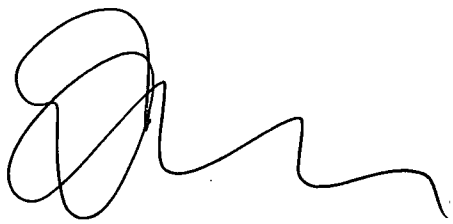
[8] Ramirez contends any policy language that attempts to alter the minimum UIM coverage required by law is invalid and void as a matter of law. Alternatively, it at least contradicts the coverage form signed by Kandi Ramirez and renders Respondent's policy ambiguous.

Ramirez argued below that granting a Rule 12(c) motion was premature because Ramirez had not had an opportunity for discovery. Specifically, Ramirez's memorandum argued, "To the extent the motion is based upon Rule 56, the motion is obviously premature. Michael [Ramirez] has had no opportunity to undertake discovery. Under Rule 56(f), the Court must deny Defendant's motion when a party requests 'discovery be had.'" (R. p. 74) See Home Builders Asson of SC v. School Distr. No. 2 of Dorchester Co., 405 S.C. 458, 748 S.E.2d 230 (2013) ("Because we find issues of fact raised by the complaint that must be resolved before the constitutionality of 2009 Act No. 99(Act) can be determined, we reverse and remand for further proceedings.") The Circuit Court clearly misapplied the procedural standard of Rule 12(c).

CONCLUSION

For the foregoing reasons, the Court must reverse the Order, and remand the case to the Circuit Court for proceedings on the relief sought by Ramirez.



September 14, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR.

September 22, 2015

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PROOF OF SERVICE

I certify that I have served the Brief of Appellant and Reply Brief of Appellant on Progressive Northern Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on September 22, 2015, addressed to its attorney of record, Bradley L. Lanford, Post Office Box 8057, Columbia, South Carolina 29202.

September 22, 2015

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