

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County
Court of Common Pleas

Alexander S. Macaulay
Circuit Court Judge

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Case No. 2010-CP-04-2124

SC Court of Appeals

Denise F. Bowen.....Appellant,

vs.

State Farm Mutual Automobile
Insurance Company.....Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court properly analyze the undisputed facts of the case to draw the only logical and reasonable inference and conclusion that Appellant was not a resident relative of her father for purposes of obtaining UIM benefits under her father's automobile insurance policies?
- II. Did the lower court properly apply the factors adopted and set forth by South Carolina courts in evaluating whether Appellant was a resident relative of and with her father at the time of the accident?
- III. Did the lower court reasonably construe the term "resides," giving the term its plain, ordinary and popular meaning, in determining Appellant was not a resident relative of her father?
- IV. Does the policy of insurance issued by State Farm violate South Carolina public policy in defining a relative to include those persons related by blood, marriage or adoption who reside "primarily with you?"

STATEMENT OF THE CASE

On June 18, 2010, the Appellant, Denise F. Bowen, ("Appellant" or "Bowen") initiated this matter by filing a Summons and Complaint for declaratory judgment in the Anderson County Court of Common Pleas. (R. pp. 16-18). In her Complaint, Appellant contended she was a resident relative with her father, Larry Thrasher ("Thrasher"), on January 16, 2010, when she was involved in an automobile accident. She therefore sought a ruling from the lower court establishing she was entitled to recover underinsured motorist benefits under insurance policy number 40-8552-371, issued by State Farm Mutual Automobile Insurance Company ("State Farm") to Thrasher. On or about July 13, 2010, in an effort to properly identify State Farm, Appellant filed an Amended Summons and Complaint¹ seeking the same declaratory relief. (R. pp. 20-22).

¹ While Appellant's Amended Summons and Complaint still did not correctly identify State Farm, the caption was corrected upon motion made by Bowen and granted on November 18, 2010. The Consent Order filed by the lower court on November 19, 2010, amended the caption to reflect State Farm Mutual Automobile Insurance Company as the proper party to the action. (R. pp. 14-15).

In response to Appellant's Amended Complaint, State Farm filed an Answer and Counter-Claim, denying Bowen was entitled to any underinsured motorist benefits under Thrasher's policy, asserting multiple affirmative defenses, and asserting a Counter-Claim, seeking a judicial declaration that the policy at issue provides no coverage to Appellant, who is not an insured under the terms of the policy. (R. pp. 23-26). Bowen filed a Reply to the Counter-Claim on September 22, 2010. (R. p. 27).

On October 28, 2010, Appellant filed a Motion for Summary Judgment, seeking judgment as a matter of law. (R. p. 28). On November 19, 2010, State Farm also filed a Motion for Summary Judgment seeking dismissal of Appellant's Amended Complaint as a matter of law and entry of judgment in its favor. (R. pp. 29-30). A hearing on the cross-motions for summary judgment was held before the Honorable Alexander S. Macaulay in the Anderson County Court of Common Pleas on March 10, 2010. After considering the initial memoranda of law in support of the cross-motions for summary judgment submitted by both parties (R. pp. 31-47), arguments of counsel, and supplemental memoranda submitted by the parties (R. pp. 48-54), the lower court granted State Farm's motion for summary judgment. Judge Macaulay executed the Order Granting Summary Judgment to State Farm Mutual Automobile Insurance Company on October 14, 2011, which was subsequently filed on October 17, 2011. (R. pp. 2-12).

On November 14, 2011, Appellant timely served a Notice of Appeal from the Order entered by the lower court. The Notice of Appeal was filed with the Court of Appeals on November 15, 2011. (R. p. 183).

STATEMENT OF FACTS

This declaratory judgment action arises from an automobile accident that occurred near Anderson, South Carolina on January 16, 2010. On that date Appellant, Denise F. Bowen, was riding as a passenger in an automobile driven by Rebecca Gilliam. Just before the accident Gilliam stopped at the intersection of Cherry Drive and S.C. Highway 24, intending to make a left turn onto Highway 24 to travel toward Anderson. Gilliam apparently failed to see a vehicle driven by Timothy Michael Arndt, traveling from her left, and entered the intersection directly in front of Arndt's vehicle, thereby causing the accident and injuries sustained by Appellant.

Following the accident, Appellant first made a claim against Gilliam for Appellant's alleged injuries and damages. Gilliam's automobile liability insurance carrier paid its liability limits to Appellant in exchange for a covenant not to execute against Gilliam. While Appellant had purchased and maintained her own automobile insurance policy, issued by Travelers for a 1994 Saturn² she owned, Appellant's policy did not provide for underinsured motorist coverage. Appellant therefore made a claim against State Farm, seeking recovery of \$25,000 in underinsured motorist benefits under a policy issued by State Farm to Appellant's father, Larry Thrasher. State Farm denied Appellant's claim for UIM benefits under her father's policy on grounds that Appellant was not a resident relative as defined under the terms of the policy and, therefore, was not an insured. Appellant filed this declaratory judgment action to determine whether the policy provides coverage applicable to the accident.

² Bowen maintained her 1994 Saturn, and her insurance coverage through Travelers on the vehicle, until approximately six months prior to her deposition in September 2010, when the motor blew up. (Bowen Depo., R. p. 70, line 19-p. 71, line 19).

Appellant and her father presently live in two separate mobile homes that are not physically connected³ in any respect, although they are located on the same parcel of land in Anderson County. (Bowen Depo. R. p. 61, line 18-p. 62, line 2). The genesis of this living arrangement developed in 2006 after Appellant's father, Thrasher, who was living in Greenville, South Carolina, developed various forms of cancer and became increasingly ill. (Thrasher Depo. R. p. 121, lines 4-5). During that time, Appellant was traveling to Greenville from her mobile home at 207 Cherry Seed Lane in Anderson, SC, where she lived with her husband, Raymond Bowen, in order to take care of Thrasher's physical needs. (Bowen Depo. R. p. 62, line 22-p. 63, line 2). Eventually it was decided Thrasher should move to Anderson to be closer to Appellant in light of his medical needs. (Bowen Depo. R. p. 63, lines 3-19; p. 103, line 18-p. 104, line 8). Rather than moving Thrasher into the same mobile home in which Appellant was living, Appellant and her husband purchased, in or around May 2006, a used double-wide mobile home, which they moved to the same parcel of land on which they were living. (Bowen Depo. R. p. 64, line 10-p. 65, line 10; p. 66, lines 18-20). In order to have two dwellings located on the same property, Appellant and her husband sought a special variance from the Anderson County Codes Office. (Thrasher Depo. R. p. 121, lines 6-13; Bowen Depo. R. p. 65, lines 11-19; p. 66, line 21-p. 67, line 7). The variance to locate two separate mobile homes on the same parcel was granted only to accommodate Thrasher's medical needs, the request for which was supported by a statement from Thrasher's doctor that he needed to live close to Appellant. (Thrasher Depo. R. p. 121, line 11-p. 122, line 12). Each of the mobile homes had to have separate mailing addresses and separate

³ Appellant's Brief (p.3) states Appellant's lot has two "adjoining" mobile home trailers, which would seem to imply they are connected, but which is not an accurate depiction. There is no dispute in this case that the mobile homes are not connected to each other.

mailboxes. (Thrasher Depo. R. p. 123, lines 7-12; Bowen Depo. R. p. 67, lines 8-10). Hence, the new mobile home was designated as 209 Cherry Seed Lane and the existing mobile home was designated as 207 Cherry Seed Lane. (Bowen Depo. R. p. 63, lines 7-19). In the event Thrasher improves, dies, or has to move to a nursing home or other facility, the mobile home at 207 Cherry Seed Lane will not be permitted to remain on the property. (Thrasher Depo. R. p. 122, line 13-p. 123, line 2; Bowen Depo. R. p. 89, line 20-p. 90, line 2). If or when that occurs, Appellant and her husband have no intention of moving into the mobile home designated as 207 Cherry Seed Lane, but will remain living in their current mobile home and remove Thrasher's home within 30 days as required by the variance. (Bowen Depo. R. p. 90, lines 3-9; p. 90, line 11-p. 91, line 8).

Appellant and her husband spent a year upfitting the newer mobile home for their use while continuing to live in and receive their mail at 207 Cherry Seed Lane. In approximately May 2007, Appellant and her husband moved to the new/upfitted mobile home, immediately changing their mailing address to 209 Cherry Seed Lane, which remains their mailing address to this date. (Bowen Depo. R. p. 67, lines 11-25; p. 69, lines 11-23). At about the same time, Appellant gave Thrasher Appellant's old mobile home, designated as 207 Cherry Seed Lane, which remained on the same parcel of land. According to Bowen, when Thrasher moved to 207 Cherry Seed Lane, the intention was that he have his own home and that Bowen have her own home. (Bowen Depo., R. p. 91, lines 13-16). Thrasher also agreed 209 Cherry Seed Lane, where Appellant's husband lives full-time, is Appellant's primary address and residence, to which she always returns when not caring for him. (Thrasher Depo. R. p. 127, lines 9-21). While Appellant had some of her personal items at 207 around the time of the accident in January 2010,

including a bed and some articles of clothing, most of her belongings remained at 209. (Thrasher Depo. R. p. 132, lines 9-12).

While Appellant has not required Thrasher to pay rent to live in the mobile home at 207 Cherry Seed Lane since he moved there⁴, they did have a verbal understanding regarding payment and handling of expenses relating to the mobile home. (Bowen Depo. R. p. 68, lines 1-6). As described by Thrasher, he treats the trailer completely as his own in terms of expenses and has paid all of the expenses for the upkeep of the home, including for the food consumed in the home, the utilities, the former telephone land line⁵, his cell phone, and the power, heat and air-conditioning. (Thrasher Depo. R. p. 125, lines 3-16; p. 125, line 22-p. 126, line 7; p. 133, lines 5-7; Bowen Depo. R. p. 76, line 17-p. 77, line 1; p. 77, line 24-p. 78, line 15; p. 78, line 25-p. 80, line 9; p. 81, lines 4-6). Finances are also managed separately. (Thrasher Depo. R. p. 127, lines 4-8). While only one water bill is issued for both mobile homes because they are located on the same parcel of land, the cost of the bill is split, such that Thrasher essentially pays for the water he uses in the mobile home at 207 Cherry Seed Lane and Appellant pays for hers. (Thrasher Depo. R. p. 126, line 11-p. 127, line 3; Bowen Depo. R. p. 77, lines 3-22). Similarly, Thrasher and Appellant split the taxes so that Thrasher pays the taxes on the mobile home designated as 207 Cherry Seed Lane. (Bowen Depo. R. p. 73, line 24-p. 75, line 1). On only a single occasion, in October 2009, did Appellant and her husband pay the taxes on Thrasher's mobile home when, due to his surgery and medical expenses, Thrasher did not have the money to pay the taxes. Hence, Appellant's husband paid them out of the "goodness of his heart." (Bowen Depo. R. p. 75, lines 2-12). At no time has

⁴ The mobile home is paid for and does not have any type of monthly mortgage or bank line on it. (Bowen Depo. R. p. 80, lines 10-20).

⁵ Thrasher no longer maintains a telephone land line. (Thrasher Depo. R. p. 126, lines 3-4).

Appellant been dependent on her father in any way for food, clothing or care since he has lived at 207 Cherry Seed Lane. (Bowen Depo. R. p. 91, lines 9-12).

According to Thrasher, he underwent surgery on or about November 28, 2009, in Charleston, South Carolina, after which he remained hospitalized for another couple of weeks before returning home. (Thrasher Depo. R. p. 113, lines 1-9). After being discharged from the hospital, Thrasher was told by his medical provider he was required to have someone present to care for him, particularly when he was trying to sleep, due to the presence of tubes in his airways and the possibility he might encounter difficulty breathing. (Thrasher Depo. R. p. 118, lines 10-24; p. 130, lines 1-17). While nurses came to check on Thrasher for a period of four weeks, Appellant filled the necessary role of staying during the night with her father because of his condition and to be present in case he choked or encountered a medical emergency. (Thrasher Depo. R. p. 118, lines 19-24; p. 119, line 25-p. 120, line 2; p. 129, line 22-p. 131, line 9; p. 131, lines 7-9; Bowen Depo. R. p. 83, line 19-p. 84, line 8; p. 84, line 25-p. 85, line 16; p. 86, lines 13-15; p. 87, lines 3-19; p. 88, lines 22-24; p. 106, lines 12-14). Prior to Thrasher's surgery, Appellant had never stayed the night with her father at 207 Cherry Seed Lane. (Thrasher Depo. R. p. 132, lines 15-25; Bowen Depo. p. 82, line 23-p. 83, line 7). Thrasher estimated Appellant had stayed about seven or eight days with him by the time Appellant was involved in the automobile accident at issue herein. (Thrasher Depo. R. p. 118, lines 7-9). During that time, Appellant did not sleep on those nights, but would stay up to address any medical needs Thrasher encountered. (Bowen Depo. R. p. 84, line 25-p. 85, line 23).

After Appellant's accident in January 2010, and as Thrasher continued to recover and improve, Appellant needed only to stay the night with her father when he was having a "bad night" in terms of pain and breathing difficulty. (Thrasher Depo. R. p. 128, line 6-p. 129, line 4; p. 129, lines 20-24; Bowen Depo. R. p. 85, lines 17-23). Otherwise, Appellant returned to her residence at 209 Cherry Seed Lane. (Thrasher Depo. R. p. 127, lines 20-21; p. 129, lines 2-7; p. 136, line 24-p. 137, line 4). This pattern of Appellant staying with her father when he was having some medical difficulty or a "bad night," while returning home when her assistance was not needed, remained consistent through September 2010, when Thrasher was deposed. (Thrasher Depo. R. p. 131, line 14-p. 132, line 5; p. 133, line 8-p. 134, line 3; p. 135, lines 4-10, 14-20). At that time, he expected some additional need for Appellant's periodic assistance until he was able to secure removal of tubes from his nose. (Thrasher Depo. R. p. 135, lines 17-20). As attested to by Thrasher, the reason Appellant stayed with him was not for the purpose of living with him or to make 207 Cherry Seed Lane her residence, but only to help him, always with the "intention" of returning to 209 Cherry Seed Lane. (Thrasher Depo. R. p. 133, line 21-p. 134, line 3; p. 135, lines 21-24; p. 136, lines 22-23).

While Appellant did not install a separate driveway on the parcel of land to allow each mobile home to have its own driveway, she maintained her own vehicle and accompanying insurance coverage thereon until approximately six months prior to her deposition, taken in September 2010 (which would equate to a couple of months following the accident at issue), when the motor of her 1994 Saturn "blew." (Bowen Depo. R. p. 70, line 19-p. 71, line 16). Appellant has since been using Thrasher's car, which remains registered in his name, because Thrasher is no longer able to drive and

Appellant is required to take Thrasher to his doctor's appointments and to run errands for him. (Bowen Depo. R. p. 70, lines 6-24). Both Appellant and her husband maintained their own insurance coverage on their vehicles through Travelers Insurance. (Bowen Depo. R. p. 71, lines 17-19). They did not depend on Thrasher, who had his own vehicle and who purchased and paid for his own automobile insurance through State Farm, to purchase coverage for them. (Bowen Depo. R. p. 71, line 20-p. 72, line 20; p. 89, lines 5-6; Thrasher Depo. R. p. 139, lines 8-12).

Given the above, there was very little to no intermingling of the households, financial matters and/or insurance as between Appellant and Thrasher, making it abundantly clear, as further set forth below, that summary judgment was appropriately granted in favor of State Farm.

ARGUMENT

- I. **Because the only reasonable inference to be drawn from the evidence is that Bowen established and maintained her residence separate and apart from that of her father, summary judgment was appropriately granted and should be affirmed.**

Based on the undisputed facts of this case, the lower court appropriately granted summary judgment to State Farm after Appellant failed to establish evidence she was a resident relative of her father at the time of the accident at issue entitled to claim UIM benefits under her father's automobile policy. In reviewing the grant of summary judgment, this Court applies the same standard of review as the lower court under Rule 56, SCRPC. See Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). A trial court may properly grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. See also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Loadholt v. South Carolina State Budget and Control Bd., 339 S.C. 165, 169, 528 S.E.2d 670, 673 (Ct. App. 2000).

Here, while some of Appellant’s rhetoric may appear to suggest otherwise⁶, Appellant does not seem to contend there remains a genuine issue of material fact or that the lower court erred in setting forth the undisputed facts, but rather that the lower court erred in the conclusions and/or inferences drawn from those facts. Specifically, Appellant finds fault in the conclusion reached by the lower court that Appellant was not a resident relative of her father. A simple review of the undisputed facts, however, clearly establishes the lower court drew the only logical and reasonable inference it could draw from those facts, making summary judgment in favor of State Farm proper.

While the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, see Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998), the inferences to be drawn from the evidence must be logical and reasonable in looking at the record as a whole. See Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003) (discussing the only logical inferences that could be drawn from the record); Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (“[A] court ‘cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.’”); Main v. Corley, 281 S.C. 525, 526–27, 316

⁶ Appellant’s assertions on page 6 of her Brief that “[t]he factual record is undisputed that at the time of the collision (January 16, 2010) Bowen resided in Thrasher’s trailer” is patently false and confuses what constitutes the undisputed facts of the case with the conclusion that the lower court was tasked to reach in drawing inferences from the undisputed facts (*i.e.*, where Appellant resided for purposes of insurance coverage).

S.E.2d 406, 407 (1984) (a “judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine”). Where the evidence is susceptible of only one *reasonable* inference, the question is no longer one for the jury but one of law for the court. See Ward v. Zelinski, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973).

As an initial matter, Appellant’s statement that “[t]he factual record is undisputed that at the time of the collision (January 16, 2010) Bowen resided in Thrasher’s trailer,” confuses the undisputed facts with the conclusions and inferences made by the lower court. Whether Appellant was a resident relative with her father is the conclusion or inference that the lower court was asked to draw from the undisputed facts. It is the inference made by the lower court that Appellant challenges. Under the circumstances of this case, the undisputed facts establishing all of the true indicia of residency, including receipt of mail, location of the vast majority of Appellant’s personal effects, financial obligations, payment of bills, maintenance of separate insurance coverages, and representations to local, state and federal governments for tax purposes, clearly support the inference reached by the lower court that Appellant was not a resident relative of or with her father, but was a resident of 209 Cherry Seed Lane. These indicia of residency considered by the lower court are not, as alleged by Appellant, inordinately technical matters, but are factors considered by other courts in analyzing resident relative status. See, e.g., Smith v. Auto-Owners Ins. Co., 377 S.C. 512, 660 S.E.2d 271 (Ct. App. 2008) (among factors considered were purchase of homeowners and automobile insurance, filing of joint tax returns, receipt of mail and payment of bills); Cook v. State Farm Auto. Ins. Co., 376 S.C. 426, 656 S.E.2d

784 (Ct. App. 2008) (considering handling of bills and expenses, including payment of property tax assessments, electrical services, phone services, septic tanks, and insurance policies).

While Appellant contends the lower court cherry picked among the undisputed facts and ignored certain “important” facts in reaching its conclusion⁷, a review of the “important” facts Appellant contends were ignored makes clear that they were non-determinative and trivial rather than being probative in evaluating the residency issue. Among those “important facts,” Appellant first notes the vehicles used by Thrasher, Appellant and her husband all parked in the same driveway. It is axiomatic, however, that the mere location in which one chooses to park a vehicle does not establish where that person resides. Appellant certainly makes no contentions that her husband resides in both of the mobile homes by virtue of the fact he uses a driveway that services both homes. Moreover, it is undisputed that the placement and maintenance of two separate mobile homes on the same parcel of land was never intended to be permanent. Hence, it stands to reason why a separate driveway would not be installed for a structure that was expected to be removed as soon as it was no longer occupied by Thrasher.

Appellant further cites as important the fact that single bills were issued for water⁸ and for property taxes on both 207 and 209 Cherry Seed Lane,⁹ while ignoring the

⁷ In connection with Appellant’s argument that the lower court only focused on certain facts while ignoring other “important” facts, Appellant boldly adds the lower court made “factually inaccurate” rulings relating to Bowen’s alleged primary residence with her husband. (Appellant’s Brief, p. 8) Despite Appellant’s assertions in that regard, she then wholly fails to identify any of the alleged factual inaccuracies the lower court set forth, instead arguing the court focused too heavily on some facts while ignoring others.

⁸ Only one water bill was issued by the provider to the homes located on the parcel of land based on the fact that both used a single septic tank. (Bowen Depo. R. p. 77, lines 19-20).

⁹ While Appellant also stated the mobile homes shared a power bill, this statement is wholly contradicted by Appellant’s own testimony and unsupported by any other evidence appearing in the record. As attested by Appellant, there is a separate electric bill for 207 Cherry Seed Lane, which Thrasher pays. (Bowen Depo. R. p. 78, lines 2-15)

undisputed fact that she and her father went through the trouble of splitting payment of those bills. The mere fact that bills were issued singly for all of the structures located on the same parcel of land is inconsequential to the determination of residency and attempts to shift the focus to what utility companies and tax authorities were doing from a billing standpoint rather than properly focusing on the actions of Thrasher and Appellant in the handling and payment of those bills, which is the telling and determinative factor.¹⁰ It is undisputed that all bills, whether received jointly or separately, were nonetheless paid separately. Finally, the mere fact Bowen had “free access” to the residence and did not have to obtain prior permission to take a shower or take food from the refrigerator is non-determinative. It could hardly be said that a person who visits the home of another and stays in that home for one or more days establishes residency simply because that person does not have to ask permission to shower or open the refrigerator during their stay. As Appellant points to no other facts she believes to be significant in establishing residency, it is abundantly clear the lower court considered all of the appropriate issues to reach the only reasonable inference it could draw from the evidence.

In addition to her contention that the lower court ignored certain important facts, Appellant believes the decision of the lower court was influenced and informed by “erroneous and unnecessary factual determination[s]” that Appellant intended to reside with her husband and that Appellant’s stays with her father were a matter of temporary convenience. To the extent Appellant’s intention regarding where she would reside is

¹⁰ Appellant even attested she had a verbal agreement with Thrasher regarding use of the residence to which Thrasher moved and as to division of expenses pertaining to the homes and property. (Bowen Depo. R. p. 68, lines 1-14).

determinative of resident relative status¹¹, a review of both Appellant's actual testimony *and* her actions both belie her arguments that she intended to reside either with her father or with both her father and husband.¹² To the contrary, it is abundantly clear Appellant's intent was to establish two separate residences and that she had to go through a fair amount of trouble to do so, beginning with her efforts to obtain variances and separate addresses from Anderson County. While Thrasher, Appellant and her husband certainly could have opted to reside in the same home, Appellant and her husband spent a year remodeling an older mobile home they purchased so that Appellant and her husband could live in one home and Thrasher could live in the other.

In none of the testimony cited by Appellant on page 6 of her Brief did she ever, as she has argued, testify she "intended" to live with either her father or with both her husband and father. Rather, Appellant specifically agreed that the "intention" was for Thrasher to have his own home and for Appellant to have her own home when Thrasher moved to 207 Cherry Seed Lane in May 2007. (Bowen Depo. R. p. 66, lines 15-17; p. 91, lines 13-16). This arrangement and intent was borne out by the fact that Bowen *never* stayed the night with her father prior to her father's surgery in November 2009. (Thrasher Depo. R. p. 132, lines 13-25). Hence, they lived separately in their respective mobile homes, without Bowen ever staying the night with her father, for approximately 2 ½ years prior to Thrasher's surgery of November 2009. Moreover, Appellant agreed she has "no intention" of returning to live at 207 Cherry Seed Lane should it be vacated by

¹¹ A person's intent is not necessarily determinative on the issue of whether a person qualifies as a resident relative for insurance purposes. See Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998) (a person may be a resident relative even though he does not have an intent to permanently reside with the insured).

¹² Appellant's brief on this point is muddled. In one sentence, she states her undisputed testimony showed her intent was to live in 207 with her father. (Appellant's Brief, p. 6). A mere two sentences later, Appellant states that several times during her deposition she "testified she intended to live with, 'both [her] father and [her] husband.'"

her father for any number of reasons. (Bowen Depo. R. p. 90, lines 3-9; p. 90, line 11-p. 91, line 8).

It was only after Thrasher's surgery and discharge from the hospital, with the accompanying instruction from Thrasher's medical provider that someone *had* to be present to care for him, particularly when he was sleeping, that Bowen first *stayed*¹³ with her father. (Thrasher Depo. R. p. 118, lines 10-18; p. 130, lines 1-17). Even when she did so, Appellant did not sleep on those nights, but would stay up to address any medical needs Thrasher encountered. (Bowen Depo. R. p. 135, line 25-p. 136, line 23). When Thrasher began to recover and improve, Appellant did not continue to stay at 207 Cherry Seed Lane at night with her father, but would only stay when needed, *i.e.*, when Thrasher was having a "bad night." (Thrasher Depo. R. p. 128, line 6-p. 129, line 4; p. 129, lines 20-24; Bowen Depo. p. 85, lines 17-23). Otherwise, Appellant returned to her own home. As Thrasher testified, Appellant did not stay with Thrasher in order to establish a residence or live with him, but only to help Thrasher and always, as Thrasher agreed, with "the intention of going back to 209." (Thrasher Depo. R. p. 133, line 21-p. 134, line 3; p. 135, lines 21-24; p. 136, lines 22-23). While Appellant takes issue with any reference to the arrangement between Appellant and her father as a matter of "convenience," it is abundantly clear their relationship and interactions were borne out of an acute need and temporary necessity and, in that sense, was designed to be of a use and benefit to Thrasher during his recovery.

When the record is viewed as a whole, it is overwhelmingly clear the lower court properly focused on the appropriate and probative facts indicative of residency and drew

¹³ While Appellant states in her Brief, p. 6, she "moved into Thrasher's trailer" more than a month before the accident, those terms are not actually borne out by Appellant's deposition testimony, in which discussions focused on those times Appellant was required to stay with her father for medical purposes.

the only logical and reasonable inference it could from the record, to wit, that Appellant was not a resident relative with her father. That ruling should be affirmed.

II. Implicit in the lower court's consideration and discussion of the undisputed facts of this case was a proper analysis and application of the factors adopted by South Carolina courts in assessing whether Appellant was an insured resident of her father's household.

Appellant's assertion that the lower court failed to follow the test first adopted by the South Carolina Supreme Court in State Farm Fire and Cas. Co. v. Breazell, 324 S.C. 228, 478, S.E.2d 831 (1996), and later applied in Smith v. Auto Owners Ins. Co., 377 S.C. 512, 660 S.E.2d 271 (Ct. App. 2007), in evaluating whether Appellant was a resident relative of her father is unfounded. As an initial matter, the applicable law set forth by the lower court included a discussion of both the Breazell factors as well as a discussion of the factual background and holdings of the Smith case. (See Order, R. pp. 7-9). In that regard, it is important to note that all of the factors set forth by the court in Breazell must be met in order for a person to qualify as a resident relative. Specifically, the person must be "1) living under the same roof, 2) in a close, intimate and informal relationship, and 3) where the intended duration of the relationship is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their own conduct in reliance thereon." Breazell, 324 S.C. at 231, 478 S.E.2d at 832.

Here, it is evident the lower court's focus was on the third element in particular, which included an assessment of the intended duration of the relationship, formality versus informality of the relationship, and an assessment of the extent to which the parties considered their relationship in the intermingling of their households and/or personal affairs.

(See Order, R. pp. 10, 11). Specifically, as set forth by the lower court, the intended duration of the relationship between Appellant and her father was expected to be limited to assisting Thrasher during his acute phase of recovery from surgery and as needed for healthcare assistance.¹⁴ This is borne out and further supported by the fact that Appellant never once stayed in her father's trailer during the first 2 ½ years after he moved in before his November 2009 surgery. When Appellant did stay nights with her father following his surgery, she admittedly did not sleep, but would have to stay up to address Thrasher's medical needs. (Bowen Depo. R. p. 84, line 25-p. 85, line 23). Finally, as Thrasher began to recover, Appellant only stayed with him as needed when he was having a "bad night" and needed medical attention or monitoring. (Thrasher Depo. R. p. 128, line 6-p. 129, line 4; p. 129, lines 20-24; Bowen Depo. R. p. 85, lines 17-23). Otherwise, Appellant returned to her residence at 209 Cherry Seed Lane. (Thrasher Depo. R. p. 127, lines 20-21; p. 129, lines 2-7; p. 136, line 24-p. 137, line 4). Hence, while Thrasher's recovery was fairly prolonged and required diligent attention at times by Appellant, the evidence does not suggest Appellant intended to stay with Thrasher at any time, unless specifically needed for healthcare assistance.¹⁵

The lower court further noted that, based on the undisputed facts, it was abundantly clear the households were run completely separate and apart from one another. All finances to operate each of the households were kept separate. Even on the occasion a joint bill was received due to the fact that both trailers were located on the

¹⁴ As stated by the lower court, Appellant spent nights in her father's home solely for the purpose of assisting with his healthcare, which, while certainly important, was a matter of convenience for Appellant and Thrasher during Thrasher's acute phase of recovery. (See Order, R. p. 10).

¹⁵ The fact Appellant stayed with Thrasher only during those specific times when she was needed for healthcare purposes also negates that the relationship between Thrasher and her father, pursuant to which Appellant would stay in her father's trailer, was informal in nature. To the contrary, it is clear Appellant only stayed there by necessity and that she otherwise returned to her own home.

same parcel of land, Appellant and her father divided payment so that each paid for their respective portion of the bill. Moreover, in no way does the evidence establish or even suggest that Appellant and Thrasher considered their relationship in contracting about such matters as insurance, evidenced by the fact that they maintained their own automobile insurance through separate companies, even 2 ½ years after they began living on the same parcel of land. Hence, given the above-referenced analysis, it is abundantly clear Appellant fails to meet the third prong set forth by the courts in Breazell and Smith.

In light of the above, it becomes clear the absence of any South Carolina cases supporting the proposition that an emancipated adult can be a resident of more than one household in no way constrained the lower court in reaching the conclusion that Appellant was not a resident relative with her father, as argued by Appellant. Under the facts of this case, Appellant would not qualify as a resident of her father's home even if South Carolina recognized the principle of law that a person can be a resident of multiple households. However, the lack of any ruling by a South Carolina court that an emancipated adult can be a resident of multiple households does serve to bolster the lower court's conclusions regarding Appellant's residency.

Appellant's contentions that the South Carolina insurance statute, case law, and public policy do not support the lower court's finding that a person cannot be a resident of more than one household for purposes of recovering UIM benefits are without support. As an initial matter, Appellant contends that a broad construction of S.C. Code Ann. §38-77-30(7), which defines "insured" to mean a named insured and, "while resident of the same household, the spouse of any named insured and relatives of either . . ." somehow implies a person does not have to be limited to a single residence. While South Carolina

statutory law indeed provides that the automobile insurance statutory law is to be liberally construed in order to achieve its purposes, one of which is to provide that every automobile insurance risk that is insurable is entitled to automobile insurance, see S.C. Code Ann. §§38-77-10 and 38-77-20, the definition of an “insured,” as set forth in S.C. Code Ann. §38-77-30(7), in no way addresses the issue of whether an emancipated adult can reside in more than one household, nor does it imply multiple residences are possible. Moreover, while South Carolina statutes and public policy both favor liberal construction in favor of coverage, South Carolina courts also recognize that the parties have a right to make their own contract and that it is not the function of the courts to extend coverage never intended by the parties. See Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975).

Not only is there no support in any South Carolina statute for the position advocated by Appellant, but there is also no South Carolina case that has adopted a rule that a person can be a resident of multiple households. To the extent any South Carolina court can be said to have even potentially held open the possibility that a person could be considered a resident of more than one household under appropriate circumstances, it has not been under any factual scenario even remotely similar to the circumstances of this case. While Appellant relies on the cases of Auto Owners Ins. Co. v. Horne, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003), and Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633 (1967), to establish that South Carolina courts have endorsed the principle that an insured may be a resident relative of multiple households, neither of those cases stand for such a broad proposition.

In Horne, the court was presented with *only* the question of whether “a minor unemancipated child can be a resident of two households.” Id., 356 S.C. at 69 n.8, 586 S.E.2d at 875. The court held that it did *not* need to reach that issue because the facts of the case established the minor child was not a resident of her non-custodial father’s home on the day of her accident, and therefore, she did not qualify for UIM coverage under her father’s policy. Moreover, every single case cited in Horne, *regardless of the position taken on the issue*, involved an unemancipated minor¹⁶ claiming to be a resident of the households of both parents who were divorced or separated from each other. While Appellant points to a statement made by the court in Horne *in dicta* to argue that the court endorsed the concept that a person may be a resident relative of multiple residences for purposes of insurance coverage, the statement made by the court was expressly limited to “recognition that a child of divorced parents” could be a resident of two households. Id., 356 S.C. at 69 n.8, 586 S.E.2d at 875. (emphasis added). Those circumstances are wholly removed from the factual scenario at issue here. Appellant in this instance was 49 years old on the day of the accident and was not only emancipated, but was married and had virtually all of her belongings in her own home, located just a short distance from the separate trailer in which her father resided. While Appellant may have been staying overnight in her father’s home around the time of the accident, the clear intent behind her actions in doing so was to comply with the mandates of her father’s medical providers and to assist and care for her father during the acute phase of his recovery from surgery. Appellant had never stayed with her father prior to that time and began returning to her

¹⁶ In the only case cited in Horne involving a minor over the age of 18, Elder v. Metro. Prop. & Cas. Co., 851 S.W.2d 557 (Mo. Ct. App. 1993), the twenty year old son of the insured claimed he was an unemancipated minor and should be permitted to recover under his non-custodial father’s policy. As in Horne, the court resolved the case on the grounds that the son was simply not a resident of his father’s household.

own home on those nights she was not needed. The case quoted by the court in Horne and recited by Appellant to lend support to the concept of simultaneous residency in multiple households, Cook v. Fed. Ins. Co., 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975), is also not on point as it did not address the issue in the context of determining availability of insurance coverage, but rather in the context of determining residency for service of process.

Appellant's reliance on Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633 (1967), is likewise wholly misplaced. Contrary to Appellant's description of the facts in Buddin, which are entirely inaccurate, the sole issue for the court was whether or not the named insured's nephew was entitled to liability coverage as an additional insured under his uncle's automobile policy on the grounds he was a resident relative with his uncle. While Appellant states that the nephew had more than one residence, a review of the facts reveals the nephew had moved into his uncle's home at least two months prior to the accident, was not staying anywhere else during that time, and was not, in fact, even looking for another place to live. Appellant's representations that the nephew was living simultaneously on and off with his uncle in Greenville and a sister in North Carolina are simply wrong. It appears Appellant has erroneously drawn in facts from the case of Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 146 S.E.2d 410 (1966), which were discussed by the court in Buddin. Hence, Buddin, which focused solely on determining the residency issue in a single household does nothing to support Appellant's position.

Accordingly, for the *additional* reason that South Carolina courts have not held that an emancipated adult can be a resident of multiple households simultaneously for the

purpose of recovering UIM benefits, the lower court's grant of summary judgment should be affirmed.

III. Because the lower court reasonably construed the term "resides," an undefined term in the State Farm policy, giving the term its plain, ordinary and popular meaning, the lower court came to the appropriate conclusion that Appellant was not a resident relative of her father.

Appellant contends the undefined term "resides" in the underinsured motorist section of Thrasher's State Farm automobile policy is ambiguous and should have been more broadly construed by the lower court in favor of Appellant. Specifically, Appellant argues that the two separate mobile homes, located at 207 and 209 Cherry Seed Lane, constitute one "residence." However, only a tortured and unconventional construction of the term "resides," as proposed by Appellant, would allow the lower court to conclude Appellant was a resident of 207 Cherry Seed Lane with her father and also at 209 Cherry Seed Lane with her husband. While in South Carolina, clauses of inclusion should be broadly construed in favor of coverage, see Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 337-38, 157 S.E.2d 633, 635 (1967), courts should not "torture the meaning of policy language in order to extend" or defeat coverage that was "never intended by the parties." Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). "The contract must be interpreted in the light of the whole agreement in such a way as to carry out the intentions of the parties." Id. "Insurance policies are subject to general rules of contract construction." State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App.2000). Accordingly, courts "should give policy language its plain, ordinary and popular meaning." Id.; Cook v. State Farm Auto. Ins. Co., 376 S.C. 426, 430, 656 S.E.2d 784, 786-87 (Ct. App. 2008).

In support of her contention that the mobile homes at 207 and 209 Cherry Seed Lane constitute a single “residence,” Appellant notes the trailers are located on the same, undivided parcel of land, are in close proximity to each other, and share a driveway. She gratuitously adds that she considers herself, her husband and her father to be one “family unit.” The undisputed facts of the case, however, clearly establish Appellant and her father consistently treated the two mobile homes as completely separate and distinct households. From the day Thrasher moved into his home until the present day, he has paid for the upkeep of his home, including electrical service, his portion of the water bill, the telephone land line for the home (until it was removed), his own cell phone, taxes and every other significant financial matter necessary to run a home. Even in such instances when a single bill was issued to cover services for both of the mobile homes located on the same parcel of property, Appellant and her father divided the bill so as to pay separately for their own usage. Moreover, it is obvious that the proximity of the mobile homes to each other and use of a single driveway were a matter of necessity rather than some conscious decision to turn the separate mobile homes into a single residence. As Appellant testified, the property was “only 0.9 acres,” which was just not enough property to try to divide. (Bowen Depo. R. p. 66, lines 1-11). Given the size of the property and the fact Thrasher’s mobile home at 207 Cherry Seed Lane will have to be moved if and when Thrasher no longer lives there, the fact that a separate driveway has not been installed is not only not surprising, but is certainly not evidence of residency in all physical dwellings serviced by the driveway.

Hence, because only a tortured interpretation of the term “resides” can be used to establish that Appellant’s residency was in two separate and distinct mobile homes, there

is no other conclusion but that the lower court reasonably construed the terms of the policy and its decision should be affirmed.

IV. State Farm’s policy, in defining a relative as a person related to you or your spouse by blood, marriage or adoption “who resides primarily with you,” does not violate South Carolina public policy by limiting statutory coverage mandated by the underinsured motorist statutes.

Appellant’s contention that State Farm’s policy language, which defines a relative as “a person related to you or your spouse by blood, marriage or adoption, who resides primarily with you,” somehow violates public policy is wholly unsupported. As an initial matter, while the South Carolina automobile insurance statute defines the term “insured” for purposes of use of that term in the Automobile Insurance Chapter, the term “relative” is *not* defined by South Carolina statute. Nor can defining the term “relative” as someone residing primarily with you be said to be inconsistent with any South Carolina statutory provisions. Moreover, while Appellant offers as an unintended effect of defining a relative as someone residing “primarily with you” the potential for exclusion of coverage of minors living primarily away from home in dormitories, the example falls flat. Here, the State Farm policy specifically addresses that issue and provides that the definition of relative *includes* married and unemancipated children who are away at school.

In addition to the above, the cases cited by Appellant to support the proposition that limiting language in a policy that provides less protection than made mandatory by statute is contrary to public policy and has no force and effect are inapposite. Both Ferguson v. State Farm Mut. Ins. Co., 261 S.C. 96, 198 S.E.2d 522 (1973) and Nationwide Mut. Ins. v. Howard, 288 S.C. 5, 339 S.E.2d 501 (1985), address the issue of set-offs to or reduction in uninsured and/or underinsured motorist benefits otherwise available under the applicable policies at issue in those cases. While the issue in those

cases is the *amount* of benefits available and, specifically, whether those benefits may be reduced or diminished below statutory minimums due to set-offs or limitations based on the existence of other insurance, the issue here is *to whom* the underinsured motorist benefits are available based on the definitions set forth in the policy. Defining a relative to mean someone residing “primarily with you” does not serve as a limitation on the amount of statutory coverage required to be available by the underinsured motorist statutes.

Finally, it is important to note that South Carolina courts have addressed similar language in determining the resident relative issue. In Cook v. State Farm Auto. Ins. Co., 376 S.C. 426, 656 S.E.2d 784 (Ct. App. 2008), for instance, the South Carolina Court of Appeals was tasked with determining whether the lower court erred in finding a daughter was not a resident-relative of her grandfather. Three automobile insurance policies issued to the grandfather all contained language extending coverage to the grandfather, his spouse, and his relatives. As here, a relative was defined in each of the grandfather’s policies as “a person related to you or your spouse by blood, marriage or adoption who resides primarily with you.” The Court of Appeals recited the often stated principles that insurance policies are subject to general rules of contract construction and that policy language should not be tortured to extend or defeat coverage never intended by the parties, but rather should be given its plain, ordinary and popular meaning. See id., 376 S.C. at 430, 656 S.E.2d at 786-87 (citing Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App.2000)). The court then noted the determinative issue was whether the daughter resided “primarily with” her grandfather at

the time of the accident and undertook an analysis of the facts determining the daughter's primary residence. The Court of Appeals ultimately affirmed the ruling of the lower court that the daughter did not primarily reside with her grandfather and was, therefore, not entitled to UIM benefits under her grandfather's insurance policies. See also State Farm Mut. Auto. Ins. Co. v. Boyd, 377 F.Supp.2d 511 (D.S.C., 2005) (noting that the policy's definition of "relative," defined as "a person related to you or your spouse by blood, marriage or adoption who resides primarily with you," was unambiguous).

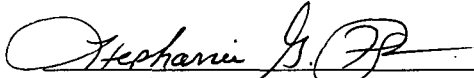
Hence, because no support is offered, nor can any be found, for the proposition that defining a relative as a person who "resides *primarily* with you" is contrary to public policy, the definition is not voidable and should be upheld.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent, State Farm Mutual Automobile Insurance Company, respectfully submits the lower court's grant of summary judgment to it and denial of summary judgment to Appellant should be affirmed.

Respectfully submitted,

May 22, 2012
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Anderson County
Court of Common Pleas

Alexander S. Macaulay
Circuit Court Judge

Case No. 2010-CP-04-2124

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SC Court of Appeals

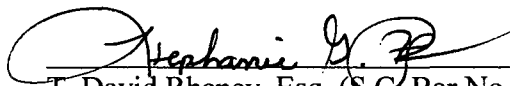
Denise F. Bowen.....Appellant,

vs.

State Farm Mutual Automobile
Insurance Company.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b),
SCACR.



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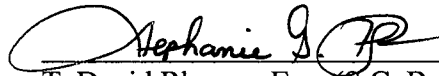
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PROOF OF SERVICE

The undersigned hereby certifies that on the 22nd day of May, 2012, a copy of Respondent's Final Brief was served on counsel for Appellant by placing it in an envelope with sufficient postage prepaid, and mailed to counsel for Appellant as follows:

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