THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-46-0021

State Farm Fire and Casualty Company, ... Respondent,

v.

Phyllis Paden-Adams and Alonzo Adams, ... Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This lawsuit was commenced by State Farm on January 5, 2011 when it filed a complaint for declaratory judgment relief. (R. 20) State Farm's complaint sought a declaration that State Farm policies issued to the defendants did not provide UIM coverage for Phyllis Paden-Adams' accident on October 21, 2009. (Declaratory Judgment Complaint, ¶ 26) (R. 27) On February 2, 2011 the defendants filed an answer and counterclaim (R. 29) and on April 7, 2011 State Farm filed a reply to the defendants' counterclaim. (R. 47)

On June 21, 2011 State Farm moved for summary judgment on its declaratory judgment action and on the defendants' counterclaims. (R. 111-114) This motion set forth a number of separate, independent grounds for the motion. The defendants neither scheduled depositions to defend against State Farm's motion for summary judgment (Judge Hayes' Order of November 14, 2011, p. 3) (R. 18) nor requested that the motion for summary judgment be

continued until they could conduct discovery. (State Farm's Memorandum in Opposition to the Defendants' Motion for Reconsideration, pp. 4, 5; transcript of August 29, 2012 hearing) (R. 340, 341) (R. 67-109) Although the defendants requested that summary judgment not be granted until further discovery was conducted, the defendants never specified what circumstances needed further development. (Judge Hayes' Order of November 14, 2011, p. 3) (R. 18)

On August 29, 2011 State Farm's motion for summary judgment was argued before Judge John Hayes, III. (R. 67-109) Judge Hayes initially issued an Order of September 2, 2011 denying State Farm's motion for summary judgment. (R. 4-8) However, even this Order concluded that "[w]ere the Court here only dealing with the statutory language [§ 38-77-140] *stare decisis* would require the granting of summary judgment." (September 2, 2011 Order of Judge Hayes, p. 3) (R. 6) At this time Judge Hayes believed the language of the policy provided more expansive coverage than the statute and, therefore, case law interpreting and applying the statute was not dispositive. (Judge Hayes' September 2, 2011 Order, p. 4) (R. 7) State Farm then filed a motion for reconsideration. (R. 317-319) The ground for this motion was that Judge Hayes' Order of September 2, 2011 contained a factual and legal error in that it stated the State Farm's policy offered more coverage than was required under § 38-77-140. (State Farm Motion for Reconsideration filed September 15, 2011) (R. 317) In fact, as explained in State Farm's motion, the policy offered less coverage than the statute. Consequently, if cases applying the statute required a finding of no coverage, the insureds could not find solace in the policy on the theory that the policy expanded coverage beyond the statute. On October 24, 2011 Judge Hayes issued an Order agreeing with State Farm and granting State Farm's motion for summary judgment. (R. 9-13) This Order stated that "*stare*

decisis requires the granting of summary judgment." (Judge Hayes' Order of October 24, 2011, p. 2) (R. 12)

The defendants then moved on November 4, 2011 for the trial court to reconsider its Order granting State Farm's motion for summary judgment. (R. 329-336) This motion was denied by Judge Hayes' Order of November 14, 2011. (R. 16-19) That Order expanded the Order of October 24, 2011 to explicitly grant summary judgment to State Farm on the defendants' first, second and fourth counterclaims, summary judgment on the third counterclaim having already been granted. (R. 18) The defendants then served a Notice of Appeal to this Court on December 21, 2011.

STATEMENT OF THE FACTS

On October 21, 2009 Phyllis Paden-Adams was involved in a one car automobile accident on Craig Road in York County. (Defendants' Answer and Counterclaim, ¶¶ 10, 21, 24) (R. 33, 34) The accident occurred when Adams lost control of her vehicle and struck an embankment. (Defendants' Statement of the Case, p. 1) At the time of the accident no vehicles or other equipment of the South Carolina Department of Transportation (SCDOT) were being used on Craig Road. (Defendants' Answer to Plaintiff's Supplemental Interrogatory 11) (R. 355) Adams did not come into contact with any SCDOT vehicles or other equipment, she did not see any equipment or vehicles of the SCDOT being used on Craig Road at the site of her injury nor did she take any action to avoid a collision with any piece of equipment or vehicle of the SCDOT. (Defendants' Answers to Plaintiff's Supplemental Interrogatories 12, 13 and 14) (R. 356) No vehicle or other piece of equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of

Adams' injury. (Defendants' Answer to State Farm's Supplemental Interrogatory 10) (R. 355)

Mrs. Adams and her husband filed suit against the SCDOT. (Amended Complaint in Civil Action No. 2010-CP-46-00854) (R. 61-66) In this lawsuit the Adams' alleged their injuries were caused by a negligent road resurfacing project on Craig Road on October 8, 2009, thirteen days before the accident. (Amended Complaint in Civil Action No. 2010-CP-46-00854) (R. 62, 63) The Adams' settled their claim against the SCDOT in exchange for a written covenant not to execute. (Defendants' Answer and Counterclaim, ¶ 14) (R. 31) The Adams' also submitted a claim for UIM benefits to State Farm under policies issued by State Farm.

In October 2010 a State Farm claim representative inspected the site of Mrs. Adams' accident. (State Farm Answer to Defendants' Interrogatory 5) (R. 364) [1] On April 30, 2010 counsel for the defendants wrote Lindsay Smith of State Farm. (R. 358, 359) This letter articulated the Adams' position of why UIM coverage should apply to Mrs. Adams' accident. (Keith Martens' letter of April 30, 2010 to Lindsay Smith; ¶ 15 of defendants' answer and counterclaim in response to ¶ 19 of complaint; ¶ 37 of defendants' counterclaim) (R. 358, 359; R. 31; R. 37) The letter cited State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998), and State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999), in support of the defendants' position. (R. 358, 359) However,

[1] Page two of the defendants' brief references State Farm's answer to interrogatory 5 and asserts "State Farm did not visit the accident scene." This statement is incorrect. Interrogatory 5 states that Haskell Faulkenberry of State Farm did inspect the site of the collision. (R. 364) The defendants' Statement of the Case also references State Farm's answer to interrogatory 20 (R. 371) in support of a claim that State Farm "did not conduct any legal research concerning State Farm's potential liability for UIM benefits." (Defendants' Brief, p. 2) Again, the defendants have misquoted State Farm's answer to the defendants' interrogatory.

when State Farm later cited these very cases in support of its motion for summary judgment the defendants took the contrary position that "Aytes and its progeny are not controlling precedent." (Defendants' Memorandum in Opposition to State Farm's Motion for Reconsideration, pp. 1, 2, 4) (R. 320, 321; 323)[2]

STANDARD OF REVIEW

As set forth in State Farm's motion and memorandum in support of its motion for summary judgment there are a number of reasons why UIM coverage does not apply to the defendant's accident. Judge Hayes' Order only explicitly addresses one of the reasons UIM coverage is inapplicable – the requirement that for UIM coverage to apply the underinsured motor vehicle must have been used for transportation purposes at the time of the injury. (Judge Hayes' October 24, 2011 Order, p. 2) (R. 12)

An appellate court may affirm a trial court order for any reason appearing in the Record on Appeal. I'on v. Town of Mt. Pleasant, 526 S.E.2d 716, 723 (S.C. 2000) There are a number of reasons in the Record on Appeal to affirm Judge Hayes' Order which are not argued in the defendants' Brief. This omission cannot be corrected in a Reply Brief because an Appellant is precluded from asserting an argument for the first time in a Reply Brief. Jones Ex Rel. Jones v. Enterprise Leasing Company, 678 S.E.2d 819, 824, footnote 6 (S.C. App. 2009) Additionally, the failure to argue an issue in an Appellate Brief is an abandonment of that issue. Richland County v. Carolina Chloride, 677 S.E.2d 892, 903 (S.C. App. 2009) Accordingly, the statement at page 3 of the defendants' Brief that "of the arguments advanced

[2] The defendants' letter also cited Aytes for the proposition that one of the elements for establishing UIM coverage is that "the underinsured vehicle was being used for transportation **at the time of the act** giving rise to injury." (Emphasis added) (R. 359) Although this statement is the law as the defendants wish it to be, it is not in fact the law as acknowledged in the defendants' own Brief to this Court.

by State Farm, only one bears on this appeal –" is incorrect. Every reason in the Record on Appeal for granting State Farm's motion for summary judgment – even reasons not ruled upon by Judge Hayes – may justify an affirmance. I'on v. Town of Mt. Pleasant, 526 S.E.2d 716, 723 (S.C. 2000)

ARGUMENT

I. The trial court correctly concluded the defendants are not entitled to UIM coverage for Phyllis Paden-Adams' accident of October 21, 2009.

The facts germane to the issue of whether UIM coverage applies to the defendant's accident are undisputed. On October 8, 2009 the SCDOT completed a road resurfacing project on Craig Road in York County. (R. 33) Thirteen days later Phyllis Paden-Adams was involved in a one car accident on Craig Road in the area of the road resurfacing project. (R. 33) The accident occurred when Adams lost control of her car and struck an embankment. (R. 33, 34) No immediate temporal relationship existed between Adams' accident and the alleged negligence of the SCDOT. Furthermore:

- At the time of the accident no vehicles or other equipment of the SCDOT were being used on Craig Road;
- Adams did not come into contact with any SCDOT vehicles or other equipment;
- Adams did not see any equipment or vehicles of the SCDOT being used on Craig Road at the site of her injury;
- Adams did not take any action to avoid a collision with any piece of equipment or vehicle of the SCDOT;

- No vehicle or other piece of equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of Adams' injury. (Defendants' Answer to State Farm's Interrogatories 10-14) (R. 355, 356)

The defendants are correct in one respect – the precise facts of this accident have not been addressed by the appellate courts of this state. However, the same could be said for a variety of other factual scenarios addressed for the first time by the appellate courts of this state in which the courts concluded that insurance coverage was inapplicable. A summary of cases finding insurance coverage for an accident arising out of the operation, use, ownership or maintenance of a motor vehicle and those cases finding no coverage where an accident did not arise out of or was caused by the operation, ownership, maintenance or use of a motor vehicle is set forth below:

Cases finding accidents arose out of operation, ownership, maintenance of use of a motor vehicle

1. Chapman v. Allstate Insurance Company, 211 S.E.2d 876 (S.C. 1975)
2. Wausau Underwriters Insurance Company v. Howser, 422 S.E.2d 106 (S.C. 1992)
3. Home Insurance Company v. Towe, 441 S.E.2d 825 (S.C. 1994)

Cases finding accidents did not arise out of operation, ownership, maintenance or use of a motor vehicle

1. Hite v. Hartford Accident Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986)
2. Canal Insurance Company v. Insurance Company of North America, 431 S.E.2d 577 (S.C. 1993)
3. Carraway v. Smith, 467 S.E.2d 120 (S.C. App. 1995)
4. State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998)
5. Doe v. South Carolina State Budget and Control Board, 523 S.E.2d 457 (S.C. 1999)

6. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999)

7. South Carolina Property and Casualty Guaranty Association v. Yensen, 548 S.E.2d 880 (S.C. App. 2001)

8. Peagler v. USAA Insurance Company, 628 S.E.2d 475 (S.C. 2006)

9. South Carolina Farm Bureau Mutual Insurance Company v. Kennedy, 700 S.E.2d 258 (S.C. 2010)

The three cases which have found an injury arose out of the operation, use or ownership of a vehicle involved factual scenarios where an injury was sustained by falling out of the vehicle (Chapman), by a gunshot from the vehicle (Howser), and by a bottle thrown from the vehicle (Towe). In these cases the court held the motor vehicle in question was an active accessory giving rise to the injuries and that the use of the automobile and the act causing the injury were inextricably linked as one continuing act. These factual situations are distinguishable from the present case where the Adams' claim roadwork completed on October 8, 2009 caused a one car accident thirteen days later.

The cases listed in the synopsis above where no UIM coverage was found involved a variety of factual situations. As demonstrated by the synopsis of cases listed above South Carolina courts have found UIM coverage not to exist far more frequently than finding it does exist. These cases hold that the following factors must **all** exist for an accident to arise out of the operation or use of a motor vehicle:

1. For an injury to be caused by the "use" of a vehicle the injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile the injury cannot be said to arise out of its "use." Hite v. Hartford Accident Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986) In Hite the mere temporal disconnection of leaving an automobile and walking 50 feet from it was an independent or intervening cause wholly disassociated from, independent of and remote from the use of the insured automobile. 344 S.E.2d at 176, 177

2. The use of a motor vehicle under § 38-77-140 is limited to transportation uses. For example, a truck crane not being used for transportation at the time of the accident cannot be a source of insurance coverage. Canal Insurance Company v. Insurance Company of North America, 431 S.E.2d 577 (S.C. 1993) The underinsured motor vehicle must be used for transportation purposes at the time of the injury. Peagler v. USAA Insurance Company, 628 S.E.2d 475 (S.C. 2006)

3. There must be a causal connection between the underinsured vehicle and the injury and there must exist no act of independent significance breaking the causal link. Carraway v. Smith, 467 S.E.2d 120, 121 (S.C. App. 1995) The causation analysis for determining tort liability is not the same as the causation analysis for determining insurance coverage. The causation analysis in the context of insurance coverage is a three

part test. Doe v. South Carolina State Budget and Control Board, 523 S.E.2d 457, 458 (S.C. 1999) This test involves whether the underinsured vehicle was an "active accessory" to the injury and whether the injury was foreseeably identifiable with the normal use of an automobile. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181, 182 (S.C. 1999); Peagler v. USAA Insurance Company, 628 S.E.2d 475, 479 (S.C. 2006); State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998) In contrast, causation in a tort case requires proof of causation in fact and legal cause, the latter of which involves foreseeability. Eadie v. Krause, 671 S.E.2d 389 (S.C. App. 2008) (Plaintiff's Memorandum filed August 22, 2011 in Opposition to Defendants' Motion to Consolidate, footnote 2 at p. 5) (R. 137)

In summary, South Carolina law requires that for insurance coverage to exist the vehicle alleged to have caused the injury must:

- Be used for transportation purposes at the time of the injury;
- Be an active accessory to the injury;
- The injury must be foreseeably identifiable with the normal use of the vehicle; and
- No act of independent significance breaks the causal link between the vehicle and the injury.

As State Farm argued to the trial judge the Adams' must establish all of these elements. (State Farm Memorandum in Support of Motion for Summary Judgment, p. 25) (R. 172) Not only can the Adams' not prove all of these elements, they cannot prove any of them. (R. 172)

A. The vehicles the Adams' claim constitute UIM vehicles – vehicles owned and operated by the SCDOT – were not being used for transportation purposes at the site of Phyllis Paden-Adams injury on Craig Road at the time of her injury on October 21, 2009.

The South Carolina Supreme Court has made it explicitly clear that one requirement for an injury to arise out of the ownership, maintenance or use of a motor vehicle is that the vehicle must be used for transportation purposes at the time of the injury. Peagler v. USAA Insurance Company, 628 S.E.2d 475, 478 (S.C. 2006) The defendants' answer to State Farm's supplemental interrogatory 10 states no vehicle or other piece of equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of Phyllis Paden-Adams' injury. (R. 355) This alone is sufficient to affirm Judge Hayes' Order.

The defendants appear to concede that Supreme Court precedent requires a finding of no UIM coverage. Instead, what the defendants urge this Court to do is either reverse Supreme Court precedent (Peagler), or simply engage in a de facto reversal by not following Peagler. Specifically, the defendants argue this Court should "reconsider" Aytes and Peagler. (Defendants' Brief, p. 6) The defendants also argue Aytes and Peagler have somehow become "corrupted" and that these cases no longer serve the cause of justice. (Defendants' Brief, p. 6) The defendants further argue Aytes and Peagler are "artificial" in that they deprive the

defendants of insurance benefits. (Defendants' Brief, p. 7) How the application of case law to a set of facts is somehow "artificial" is left unexplained.[3]

The defendants argue that Peagler "simply does not work in all cases" and that South Carolina's existing case law imposes artificial limitations of temporal and physical proximity. (Defendants' Brief, p. 10) In urging this Court to simply disregard precedent on the theory it imposes "artificial limitations" the defendants are attempting to create an entirely new area of insurance coverage not recognized in any contract, statute or case law. The defendants' theory that UIM coverage should apply to an accident and injury which occurs days or weeks after a negligent act would significantly expand the scope of UIM coverage. If, as the defendants urge, UIM coverage applies to roadwork with no immediate temporal connection to an accident, then UIM carriers will be subject to coverage not just for negligent accidents but also for negligent roadwork. This slippery slope, once embarked upon, could lead to UIM coverage for injuries resulting from negligent construction of roadways, bridges and even buildings where the injury occurs weeks, months or even years after the construction. As argued by State Farm to the trial judge (State Farm Memorandum in Support of Motion for Summary Judgment, p. 11) (R. 158) if a one car accident occurring 13 days after roadwork involving SCDOT equipment or motor vehicles is found to arise out of the use of a motor vehicle, it is difficult to conceive of when automobile insurance coverage would not exist for injuries attributable to defective roadways. This reasoning could also apply to injuries caused by defective bridges or buildings constructed through some use of motor vehicles. If such a

[3] Again, although the defendants now urge the Court to "reconsider" Aytes, the defendants cited Aytes in support of their argument to State Farm that UIM coverage should apply to Mrs. Adams' accident. (Keith Martens' letter of April 30, 2010 to Lindsay Smith; (R. 358, 359) ¶ 15 of defendants' answer and counterclaim in response to ¶ 19 of complaint; (R. 31) ¶ 37 of defendants' answer and counterclaim) (R. 37)

significant expansion of the scope of UIM coverage is to be adopted it should be effected by the legislature, not by the courts.

B. State Farm was entitled to summary judgment on the issue of UIM coverage because the SCDOT vehicles were not an active accessory to Phyllis Paden-Adams' accident.

One of the requirements for UIM coverage to apply is that the vehicle alleged to have caused the injury must have been an active accessory to the injury. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999) The requirement that the vehicle be an active accessory to the injury is part of the analysis of whether a causal connection exists between the vehicle and the injury. Bookert, 523 S.E.2d at 182

The Supreme Court's use of the adjective "active" means that the vehicle alleged to have caused the injury must be something more than a mere accessory to the accident. As a matter of law motor vehicles or equipment of the SCDOT used on a road resurfacing project on October 8, 2009 and removed from the road on that date could not be an active accessory to an injury occurring 13 days later.

C. State Farm was entitled to summary judgment because no causal connection existed between the SCDOT vehicle and Phyllis Paden-Adams' injury on October 21, 2009.

Part of the causal connection test is whether the vehicle was an active accessory to the injury. The other requirements are that the vehicle's contribution to the accident be something less than proximate cause but more than the mere site of the injury and that the injury must be foreseeably identifiable with the normal use of the automobile. No coverage exists where the injuries are not foreseeably identifiable with the normal use of an automobile. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181, 182 (S.C. 1999)

The normal use of an automobile is to transport a person or goods from point A to point B. Using this common sense definition of the normal use of a vehicle, the defendant's injury was not foreseeably identifiable with the SCDOT's equipment. Mrs. Adams did not come into contact with any SCDOT vehicle being operated on October 21, 2009, she did not swerve to avoid any vehicle being improperly operated by the SCDOT at the date, time and location of her injury and no vehicle of the SCDOT was used for transportation on Craig Road on the date of Mrs. Adams' injury on October 21, 2009. (R. 355, 356) Under these undisputed facts the defendant's injuries were not foreseeably identifiable with the normal use of an automobile.

D. State Farm is entitled to summary judgment because an act of independent significance broke the causal link.

Another element of the three part test for determining whether injuries arise out of the ownership, maintenance or use of an automobile is that no act of independent significance breaks the causal link. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999); State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998); Hite v. Hartford Accident, 344 S.E.2d 173, 176, 177 (S.C. App. 1986) Here, the temporal disconnection of thirteen days between the completion of the road resurfacing project and the defendant's injury is itself an act of independent significance to break the causal link. Any rule otherwise could create potential UIM exposure for injuries occurring months or even years after the alleged negligent act.

E. The fact that neither the State Farm policy nor § 38-77-140 refer to the requirement that the vehicle causing the injury be used for transportation purposes at the time of the injury does not entitle the defendants to UIM coverage.

The defendants argue they are entitled to UIM benefits because neither the State Farm policy nor the UIM statute state that an underinsured motor vehicle be used for transportation at the time of the insured's injury. The defendants argue that "that requirement [that the motor vehicle be used for transportation at the time of the injury] has been grafted onto the statute by the courts." (Defendants' Brief, pp. 7, 8) What the defendants characterize as "grafting on" to a statute is no more than the process of developing case law to determine if a statute or a contract applies to a variety of factual situations.

The requirements of UIM coverage are determined by reference to case law, statutes and the terms of the contract of insurance. The defendants argue that the holding of the South Carolina Supreme Court in Peagler is not enforceable because the holding of that case is not incorporated into the terms of the State Farm policy. (Defendants' Brief, p. 7) Were this requirement to exist, all insurance contracts would be hundreds of pages long in order to incorporate the holdings of various appellate court decisions interpreting contracts and statutes. Not surprisingly, the defendants cite no authority for this novel proposition. By the same token, the holding in Peagler that the vehicle causing the injury must be used for transportation purposes at the time of the injury is an interpretation and application of § 38-77-140. The defendants appear to argue that a statute must incorporate the holdings of case law which interpret and apply that statute. (Defendants' Brief, pp. 7, 8) Again, no authority is cited for this novel proposition.

F. The defendants' argument that the case law is unfair and should be changed requires intervention by the legislature, not the courts.

The defendants' argument that the test in Peagler "simply does not work in all cases" (Defendants' Brief, p. 10) is a policy argument that the law should be something other than

what it is. While the plaintiff does not agree with the defendants' argument that the law as it exists is unfair, is artificial and unfairly deprives the defendants of insurance coverage, if the law is to be changed as advocated by the defendants it must be done by the legislature and not the courts. If the results of the conclusions of courts are inimitable to the public welfare it is a matter for legislative action and not one for the courts. Johnson v. Collins Entertainment, 508 S.E.2d 575, 580 (S.C. 1998) It is the province of courts to construe and not to make laws. Abraham v. Palmetto Unified School District, 538 S.E.2d 656, 663, footnote 5 (S.C. App. 2000) If, as argued by the defendants, South Carolina's existing insurance jurisprudence does not contemplate this set of facts and the case law of this state provides insurers with "a loophole that should be closed" (Defendants' Brief, pp. 10, 11), the remedy lies with the legislature, not the courts.

G. The trial judge correctly held that *stare decisis* required that State Farm's motion for summary judgment be granted.

Judge Hayes' Order granting State Farm's motion for summary judgment states that "as stated in the Court's prior Order, *stare decisis* requires the granting of summary judgment." (Judge Hayes' Order of October 24, 2011, p. 2) (R. 12) This ruling was correct because Peagler requires as a condition of UIM coverage that the vehicle alleged to have caused the injury be used for transportation purposes at the time of the injury. 628 S.E.2d at 478

While the defendants' Brief characterizes South Carolina case law as "artificial," "corrupted" and providing a "loophole," the defendants sidestep the issue of whether Peagler requires a finding of no UIM coverage and whether it was an error for Judge Hayes to follow South Carolina precedent. Even though this issue is avoided by the defendants, the answer is

obvious - applying Peagler to the undisputed facts requires a finding of no coverage and this ruling should be affirmed by this Court.[4]

H. Following foreign precedent would require South Carolina precedent to be disregarded.

The defendants have found one decision outside South Carolina to support their position - Jackson v. Daley, 739 So.2d 1031 (Miss. 1999). There are several reasons why this decision should not be followed. First and foremost, adherence to Daley would require this Court to either expressly overrule or simply disregard South Carolina precedent. In arguing that South Carolina case law provides insurers with a loophole that should be closed (Defendants' Brief, p. 11) the defendants concede that South Carolina precedent requires finding that no UIM coverage exists for the defendant's accident. The defendants urge this Court to simply disregard Aytes and Peagler and, instead, adopt a decision from a foreign jurisdiction. As stated in the previous section, if this is to be done it must be done by the legislature, not the courts.

Additionally, following the Daley case would in essence make UIM coverage conterminous with causation in the context of a tort. Again, that would expand UIM coverage far beyond anything contemplated by § 38-77-140, the State Farm contract or the case law interpreting and applying § 38-77-140.

The illogic and inconsistency of the defendants' position is revealed by the defendants' argument that the accident occurred on October 8, 2009 when the SCDOT allegedly negligently operated its motor vehicles, rather than on October 21, 2009 when Mrs. Adams'

[4] The Court of Appeals may not overrule Supreme Court precedent. Campbell v. Robinson, 726 S.E.2d 221, 225 (S.C. App. 2012) See also, S.C. Constitution Article V, § 9.

lost control of her car and was injured. (Defendants' Brief, p. 11)[5] The defendants then further argue that the SCDOT vehicles were present at the time of the accident, even though the SCDOT vehicles had long been removed from the scene of the accident at the time of the defendant's accident and injuries. (Defendants' Brief, pp. 11, 12) In fact, the defendants' own counterclaim alleges the defendant was in a serious automobile collision on October 21, 2009. (Defendants' Answer and Counterclaim, ¶¶ 10, 24) (R. 30; 33, 34)

Finally, State Farm cited case law from a foreign jurisdiction in support of its motion for summary judgment. (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 10, 11) (R. 157, 158) In Worthington v. State of Wyoming, 598 P.2d 796 (Wyo. 1979) the Wyoming Supreme Court refused to extend insurance coverage to an accident involving a similar set of facts. State Farm also cited Raube v. Christiansen, 70 N.W.2d 639 (Wisc. 1955) to the trial court. (Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 11) (R. 158) Unlike Daley, Worthington has been cited and relied upon by South Carolina courts in considering the applicability of insurance coverage – Hite v. Hartford Accident, 344 S.E.2d 173, 176 (S.C. App. 1986).

II. The UIM statute provides more, broader coverage than the State Farm policy and, therefore, if coverage does not exist under the broader terms of the statute it necessarily does not exist under the terms of State Farm's policy.

Section II of the defendants' Brief asserts that any ambiguity in the policy must be construed against the insurer, but never explains what the ambiguity is. In any event, in opposing State Farm's motion for summary judgment the defendants did not assert the State Farm policy is ambiguous. This argument is therefore not preserved for appellate review as an

[5] Page 11 of the Defendants' Brief references the accident as occurring in October 2010. The accident actually occurred in 2009 as acknowledged in the Defendants' Statement of the Facts.

argument cannot be raised for the first time on appeal. Accordingly, the defendants' argument of ambiguity not only fails on its merits because the State Farm policy is not ambiguous, this argument is also not preserved for appellate review because it was not raised to the lower court.

Part II of the defendants' Brief also repeats the argument that the defendants are entitled to coverage because the policy does not require that an underinsured motor vehicle be used for transportation at the time of the injury. As explained in the Section I(E) of State Farm's Brief, it is not necessary for an insurance contract to incorporate holdings of case law interpreting contracts and statutes.

Part II of the defendants' Brief further argues the trial court focused too narrowly on cases interpreting South Carolina's UIM statute and did not consider the policy's provisions. (Defendants' Brief, pp. 12, 13) However, as explained in State Farm's motion for reconsideration filed September 15, 2011 the statute provides broader coverage than the policy. (R. 317-319) Citing Hite v. Hartford Accident and Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), the trial court concluded the language in the policy does not expand coverage beyond that required by § 38-77-140 and § 38-77-160. (Judge Hayes' Order of October 24, 2011, p. 2) (R. 12) In other words, if the statute provides no coverage for the defendant's accident, the defendants cannot seek refuge in the policy which provides less coverage than the statute.

III. The trial court properly granted State Farm's motion for summary judgment on the defendants' counterclaim for bad faith.

Part III of the defendants' Brief argues State Farm should not have been granted summary judgment on the defendants' counterclaims for breach of contract and bad faith because:

- State Farm improperly interpreted its own policy;
- State Farm did little or nothing to investigate the Adams' claim;
- State Farm is not insulated from liability for bad faith merely because there is no clear precedent. (Defendants' Brief, pp. 13, 14)

The defendants' Brief fails to explain how State Farm failed to properly interpret its own policy. The Brief is devoid of any explanation of what specific language was improperly interpreted or applied.

The defendants' Brief gives no explanation of what additional investigation State Farm should have made and, more importantly, what difference it would have made. The crucial fact relevant to coverage – that Mrs. Adams' single car accident occurred 13 days after the alleged UIM vehicles completed the road resurfacing project – was known to all parties at the inception of the defendants' UIM claim. Paragraph 42 of the defendants' counterclaim does allege what an investigation by State Farm would have revealed, but all of these specifications concern who was at fault in causing the accident, not whether coverage exists for the accident. (R. 39, 40)

Furthermore, there is clear precedent to resolve the coverage issue raised under the facts of this case. Judge Hayes' Order even concluded that "as stated in the Court's prior Order, *stare decisis* requires the granting of summary judgment." (Judge Hayes' Order of October 24, 2011, p. 2) (R. 12) The defendants' Brief appears to even concede that there is clear precedent mandating a decision in favor of State Farm as the defendants' Brief argues

that applicable precedent is "artificial," "unfair" and constitutes a "loophole." Indeed, if there was no clear precedent the defendants would not need to make these arguments.

As argued to the trial judge (State Farm's Memorandum in Support of Motion for Summary Judgment, p. 17) (R. 164) an insurer acts in bad faith only where there is no reasonable basis to support its decision. Where the only reasonable inference is that an insurer did not act in bad faith nor unreasonably in handling a claim there is no error in the lower court's decision to direct a verdict in favor of the insurance company. American Fire & Casualty v. Johnson, 504 S.E.2d 356, 359 (S.C. App. 1998) In fact, as long as an insurer denies coverage in good faith and with a reasonable basis in fact and law it has no extra contractual duty to determine the existence of coverage by bringing a declaratory judgment action or otherwise. Brown v. South Carolina Insurance Company, 324 S.E.2d 641, 645 (S.C. App. 1984)

If there is a reasonable ground for contesting a claim there is no bad faith. Crossley v. State Farm Mutual Automobile Insurance Company, 415 S.E.2d 393, 397 (S.C. 1992) An insurance company should be able to litigate novel issues without fear of being accused of acting in bad faith. Mixson v. American Loyalty Insurance Company, 562 S.E.2d 659, 661, 662 (S.C. App. 2002) If an insurer has a reasonable ground for contesting a claim summary judgment is properly granted as to the bad faith claim. Helena Chemical Company v. Lexington Insurance Company, 594 S.E.2d 455, 462 (S.C. 2004) Here, State Farm as a matter of law had a reasonable ground for denying UIM coverage because, as explained by the trial court, *stare decisis* required a ruling in State Farm's favor. (R. 12) In fact, State Farm even relied upon the very cases cited by the defendants in correspondence to State Farm. (R. 358, 359)

Additionally, one of the elements of a bad faith refusal to pay benefits is a refusal by the insurer to pay benefits due under the contract. Hansen v. United Services Automobile Association, 565 S.E.2d 114, 119 (S.C. App. 2002); Petersen v. West American Insurance Company, 518 S.E.2d 608,614, 615 (S.C. App. 1999); Howard v. State Farm Mutual Automobile Insurance Company, 450 S.E.2d 582, 586 (S.C. 1994) The Adams' counterclaim alleged "State Farm's refusal to pay benefits under the policy was in bad faith." (¶ 55) (R. 43) However, no benefits are due under the contract of insurance as the Adams' do not have a judgment against the SCDOT in excess of its statutory liability. Such a judgment is necessary to create a contractual obligation for State Farm to pay UIM benefits to the Adams'. (Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Lawson v. Porter, 180 S.E.2d 643, 644 (S.C. 1971) By extension this rule applies to UIM coverage.) Finally, when it is determined that an insured is not entitled to recover a claim for insurance benefits (see Section I of this brief) the insured's cause of action for bad faith refusal to pay the claim must fail. Carolina Amusement Company, Inc. v. Connecticut National Life Insurance Company, 437 S.E.2d 122, 127 (S.C. App. 1993)

Furthermore, as explained to the trial judge, State Farm was entitled summary judgment on the Adams' counterclaim for bad faith because it did not cause the Adams any damages. (See, State Farm's Memorandum in Support of Motion for Summary Judgment, pp. 19-23) (R. 166-170) Damage to the insured is one of the four elements of a cause of action for bad faith refusal to pay benefits. Mixson v. American Loyalty, 562 S.E.2d 659 (S.C. App. 2002) For all of these reasons the trial judge correctly granted State Farm's motion for summary judgment on the defendants' counterclaim for bad faith.

IV. The trial court correctly granted State Farm's motion for summary judgment on the defendants' counterclaim for breach of contract.

Recovery under uninsured motorist coverage is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. After judgment is entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement. Lawson v. Porter, 180 S.E.2d 643, 644 (S.C. 1971) By extension, the predicate for recovery under UIM coverage is the establishment of liability on the part of the alleged underinsured motorist - here, the SCDOT vehicles - and a judgment in excess of the damage cap imposed by the South Carolina Tort Claims Act. However, that has not occurred as the case of Adams v. SCDOT has not gone to trial. Until that case is tried and in that the trial the Adams' establish legal liability upon the SCDOT and obtain a judgment in excess of the statutory cap of damages under the Tort Claims Act, the Adams' cannot recover for breach of contract against State Farm even if coverage exists.

Here, as in Snyder v. State Farm Mutual Automobile Insurance Company, 586 F.Supp.2d 453 (D.S.C. 2008), there is no provision in the contract between the insured and State Farm that requires State Farm to disburse any UIM benefits prior to a formal entry of judgment against the tortfeasor in excess of the tortfeasor's liability coverage limits or statutory limit of liability. 586 F.Supp.2d at 462 Where the plaintiff can point to no specific provision of the contract that State Farm violated, the plaintiff's claim that State Farm breached the contract fails as a matter of law. 586 F.Supp.2d at 463 State Farm was therefore entitled to summary judgment on the Adams' counterclaim for breach of contract.

An additional reason State Farm was entitled to summary judgment on the Adams' counterclaim for breach of contract is that there is no UIM coverage applicable to Phyllis Paden-Adams' accident because that accident did not arise out of the operation, ownership, maintenance or use of an underinsured motor vehicle. If there is no UIM coverage, then State Farm cannot be liable for failing to pay the Adams' UIM benefits. For all of these reasons the trial judge correctly granted summary judgment to State Farm on the Adams' counterclaim for breach of contract.

V. The trial court correctly granted State Farm's motion for summary judgment on the defendants' counterclaim for statutory attorney's fees under § 38-59-40.

The defendants' fourth counterclaim was for statutory attorney's fees under § 38-59-40. That statute allows recovery of attorney's fees when the trial judge determines the insurer's refusal to make payment on the contract of insurance was without reasonable cause or in bad faith. The defendants are not entitled to attorney's fees under this statute for several reasons. First, State Farm had a reasonable basis for questioning the defendants' entitlement to UIM benefits and as a matter of law State Farm did not act without reasonable cause and has not acted in bad faith. Second, State Farm does not owe the defendants UIM benefits. For these reasons the trial court was correct in granting summary judgment to State Farm on the defendants' fourth counterclaim for statutory attorney's fees. (R. 18)

VI. There are independent reasons in the Record on Appeal for affirming the trial court's Order which are not argued in the defendants' Brief.

It is not necessary for the Respondent as the winning party in the lower court to present issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. The Respondent may on appeal raise additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have

been presented to or ruled on by the lower court. I'on v. Town of Mt. Pleasant, 526 S.E.2d 716, 723 (S.C. 2000)

The following issues appear in the Record on Appeal and independently justify affirmance of the grant of summary judgment to State Farm:

- Although the trial court granted summary judgment to State Farm on all of the defendants' counterclaims (Judge Hayes' Order of November 14, 2011, p. 3) (R. 18) the defendants' Brief only discusses in passing whether the lower court erred in granting summary judgment to State Farm on the defendants' counterclaim for breach of contract. (Defendants' Brief, pp. 13, 14) On this issue Part IV of State Farm's Brief cites case law and issues raised to the lower court but not addressed in the defendants' Brief.
- One of the grounds State Farm raised for summary judgment on the defendants' second counterclaim for bad faith was that State Farm had a reasonable basis for questioning UIM coverage. (State Farm's Memorandum in Support of Motion for Summary Judgment, pp. 16, 17) (R. 163, 164) The defendants' Brief does not address the issue of whether State Farm had a reasonable basis for questioning the defendants' claim to entitlement of UIM coverage.
- State Farm argued to the trial judge that State Farm was entitled to summary judgment because State Farm did not cause the defendants any damages. (State Farm's Memorandum in Support of Motion for

Summary Judgment, pp. 19-23) (R. 166-170) The defendants' Brief does not address this argument.

- State Farm argued to the trial judge it was entitled to summary judgment on the defendants' fourth counterclaim for statutory attorney's fees. (State Farm's Memorandum in Support of Motion for Summary Judgment, pp. 24, 25) (R. 171, 172) The defendants' Brief does not address this issue.
- State Farm argued to the trial court a number of additional requirements for UIM coverage to exist beyond the requirement that the vehicle alleged to have caused the injury be used for transportation at the time of the injury. These additional requirements are that the underinsured vehicle be an active accessory to the injury, that the injury be foreseeably identifiable with the normal use of the vehicle and that no act of independent significance breaks the causal link between the underinsured vehicle and the injury. The defendants' Brief does not address these requirements for UIM coverage to exist and, instead, focuses almost entirely on the requirement set forth in Peagler that the underinsured vehicle be used for transportation purposes at the time of the injury.

These omissions cannot be addressed in a reply brief because an appellant is precluded from asserting an argument for the first time in a reply brief. Jones Ex Rel. Jones v. Enterprise Leasing Company, 678 S.E.2d 819, 824, footnote 6 (S.C. App. 2009) Additionally, the failure to argue an issue in an appellate brief is an abandonment of that issue.

Richland County v. Carolina Chloride, 677 S.E.2d 892, 903 (S.C. App. 2009) Accordingly, there are multiple, independent reasons in the Record on Appeal to affirm the trial court's Order which are not addressed by the defendants.

CONCLUSION

South Carolina case law has established a number of requirements an insured must prove to establish entitlement to UIM coverage. These requirements are that the vehicle causing the injury must have been used for transportation purposes at the time of the injury, the vehicle must be an active accessory to the injury, the injury must be foreseeably identifiable with the normal use of the vehicle and no act of independent significance breaks the causal link between the vehicle and injury. Unless all of these elements exist there is no UIM coverage. The defendants not only cannot prove all of these elements, they cannot prove any of them. Nonetheless, even if UIM coverage was found to exist the trial court correctly granted summary judgment on the defendants' counterclaim for breach of contract, bad faith and statutory attorney's fees. State Farm respectfully requests that the Order of the trial judge be affirmed.

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July 24, 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-46-0021

State Farm Fire and Casualty Company, ... Respondent,

v.

Phyllis Paden-Adams and Alonzo Adams, ... Appellants.

CERTIFICATE OF COMPLIANCE WITH SCACR 211(b)

I hereby certify that the Respondent's Final Brief complies with SCACR 211(b).

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, counsel for State Farm Fire and Casualty Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by Federal Express, to the following addresses:

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July 24, 2012

Via Federal Express

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: State Farm Fire and Casualty Company v. Phyllis Paden-Adams and Alonzo Adams
Civil Action No.: 2011-CP-46-0021
Claim No. 40-8515-073
Our File No.: 00500/03328

Dear Ms. Kitchings:

Pursuant to SCACR 211 enclosed is an original and 15 copies of the Respondent's Final Brief. In accordance with Rule 211 one copy is being filed unbound. We would appreciate your filing the original, copies and returning one clocked in copy of the Final Brief in the enclosed, self addressed, stamped envelope. We are also filing Proof of Service.

By copy of this letter to counsel for the appellants we are in accordance with SCACR 211 serving him by Federal Express with one copy of the Respondent's Final Brief.

Very truly yours,

Charles R. Norris

CRN:ehartley
Enclosures
cc: W. Keith Martens, Esquire (via Federal Express w/enclosure)