

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Juan Michael Ramirez, Appellant,

OCT 23 2017

v.

S.C. SUPREME COURT

Progressive Northern Insurance Company, Respondent,

Appellate Case No. 2016-002312

Appeal from Laurens County
R. Lawton McIntosh, Circuit Court Judge

BRIEF OF RESPONDENT

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October 20, 2017

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STATEMENT OF ISSUES ON APPEAL

Did the Court of Appeals properly find that a Class II insured is not entitled to stack underinsured motorist coverage?

STATEMENT OF THE CASE

This appeal follows an order of the Court of Appeals, which applied South Carolina Code § 38-77-160 and years of South Carolina case law interpreting that statute to prohibit a Class II insured from stacking more than one underinsured motorist (“UIM”) policy limit per accident.

On August 4, 2014, Petitioner filed a Complaint in the Laurens County Court of Common Pleas against Respondent asserting a breach of contract claim and seeking a declaration that he was entitled to Respondent’s full UIM limit of \$25,000.¹ (R. pp. 7-13). On September 11, 2014, Respondent filed an Answer, a Counterclaim, a Motion to Strike certain parts of the Complaint, and a Motion to Dismiss Petitioner’s breach of contract claim. (R. pp. 14-20, 68-71). On October 10, 2014, Petitioner filed a Reply to Respondent’s Counterclaim. (R. pp. 21-22). Thereafter on October 20, 2014, Respondent filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c), SCRPC. (R. pp. 65-67).

On February 2, 2015, a hearing was held before the honorable Judge R. Lawton McIntosh in the Laurens County Court of Common Pleas on all of the outstanding motions. (See R. p. 1). On March 17, 2015, the Circuit Court granted Respondent’s Motion for Judgment on the Pleadings and ruled that all other outstanding motions were rendered moot

¹ Petitioner sought \$16,666.67 from Respondent in his complaint. Petitioner had already received \$8,333.33 from Respondent in exchange for a release of policy benefits other than the remaining portion of the policy limit.

by its Order. (R. pp. 1-4). Petitioner did not file a Motion to Alter or Amend the judgment of the Circuit Court. (*See* R. pp. 98-100).

On April 13, 2015, Petitioner filed a Notice of Appeal. (R. p. 76). By Order dated June 8, 2016, the Court of Appeals affirmed the circuit court's ruling. *Ramirez v. Progressive N. Ins. Co.*, No. 2015-000788, 2016 WL 3208935 (S.C. Ct. App. June 8, 2016). By Order filed October 27, 2016, the Court of Appeals denied Petitioner's Petition for Rehearing En Banc. This appeal followed.

STATEMENT OF THE FACTS

I. The April 11, 2013 Accident

On April 11, 2013, Petitioner was involved in a single vehicle accident.² (R. pp. 9, 14). At the time of the accident, Petitioner was a passenger in a 2001 Chevrolet owned and operated by John S. Bryan, Jr. (*Id.*). Mr. Bryan was at fault for the accident. (*Id.*). As a result of the accident, the liability insurer for Mr. Bryan, State Farm, tendered its \$25,000 liability limits³, which Petitioner accepted. (R. pp. 10, 14).

II. Petitioner's Demand for Three UIM Policy Limits

Petitioner also sought UIM benefits under three other insurance policies, insuring "at home" vehicles that were not involved in the accident. These included: (1) a Bristol West policy issued to Petitioner on a vehicle he owned; (2) a State Farm policy issued to Petitioner's stepfather, Paul Eclavea, under which Petitioner qualified as a resident-relative; and (3) a Progressive Northern Insurance Company policy issued to Petitioner's

² Because this case is on appeal from a grant of judgment on the pleadings, the facts are taken from the pleadings.

³ The State Farm policy insuring Mr. Bryan did not include UIM coverage.

mother, Kandi Ramirez, under which Petitioner qualified as a resident-relative. (R. pp. 9-10, 14). Petitioner made demand upon all three carriers for their UIM policy limits of \$25,000. (R. pp. 10, 14). Bristol West and State Farm each tendered their \$25,000 UIM limits, which Petitioner accepted, receiving a total of \$50,000 in UIM benefits. (R. pp. 2, 10, 14).

When Petitioner demanded Progressive's \$25,000 UIM limit in addition to the \$50,000 he had already received from the other UIM insurers, Progressive denied Petitioner's demand because Petitioner did not "have" a vehicle involved in the accident for stacking purposes. (R. pp. 2, 9, 10, 16-17, 29). Therefore, because Petitioner was a Class II insured, he was only entitled to the single highest limit of UIM coverage available under one of the applicable UIM policies – i.e. one UIM limit of \$25,000.⁴ (R. pp. 2, 16-17, 29). Petitioner had already recovered more than this amount from the other two UIM insurers. (R. pp. 2, 10, 14). Pursuant to the "Other Insurance" provision, Progressive offered Petitioner its pro rata share of a single \$25,000 UIM limit – \$8,333.33 (one third of \$25,000) in exchange for a release. (R. pp. 2, 10-11, 17, 19-20). The release reserved Petitioner's right to litigate whether he was owed \$16,666.67 more in UIM coverage from Respondent but released all other claims for coverage the Petitioner may have had under the Progressive Policy. (R. pp. 19-20). Petitioner accepted the \$8,333.33 from Respondent and executed the release on April 3, 2014. (*Id.*).

⁴ Once the insured receives the single highest limit of UIM coverage from one insurer, the "Other Insurance" provisions of the UIM insurers' policies determine the proportion of that single highest limit each insurer must contribute to the insurer that paid the insured the single highest limit.

ARGUMENT

The Circuit Court and Court of Appeals correctly applied longstanding South Carolina stacking law to hold that Petitioner is only entitled to the single highest limit of UIM coverage available under the three applicable UIM policies, not the UIM limit from each policy. Petitioner is a Class II insured because he did not “have” a vehicle involved in the accident. Therefore, in accordance with South Carolina Code § 38-77-160 and the case law interpreting it, the maximum amount of UIM coverage the Petitioner was entitled to recover was \$25,000. This amount is the single highest limit of UIM coverage available under any one of the applicable UIM policies. (R. p. 10). Petitioner has previously recovered more than this amount from his other insurers. (R. pp. 2, 10).

Petitioner’s demand for additional limits of UIM coverage amounts to stacking.⁵ However, an insured can only stack if he has a vehicle involved in the accident. Petitioner did not. Therefore, he cannot stack, and his recovery is limited to the single highest limit on any one at-home vehicle - \$25,000. Given that Petitioner has already received more than the single highest limit from the other insurers, he is not entitled to any amount of UIM coverage under the Progressive Policy. Despite Petitioner’s best attempts to evade the plain language of South Carolina Code § 38-77-160 and years of South Carolina stacking case

⁵ To the extent Petitioner seeks to couch his argument in terms of portability, Petitioner has already “ported” his own policy with Bristol West to recover UIM benefits. *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 181, 700 S.E.2d 283, 288 (Ct. App. 2010) (“[P]ortability refers to a person’s ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident.”). Now Petitioner is seeking to “stack” the Progressive UIM policy limit onto the policy limits he has already received from Bristol West and State Farm. *Continental Ins. Co. v. Shives*, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997) (“Stacking is the insured’s recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies.” (emphasis added)).

law, the Circuit Court and Court of Appeals correctly held that Petitioner is not entitled to stack the Progressive UIM policy limit onto the other UIM limits he has already received. Therefore, Progressive does not owe Petitioner any further obligations under the policy and did not owe him the amount previously paid.

I. By statute, South Carolina sets a limit on the amount of UIM coverage an insured is entitled to recover, which is determined solely by whether the insured had a vehicle involved in the accident.

The General Assembly has established the amount of UIM coverage Petitioner can recover under the facts of this case. The statute at issue in this case is South Carolina Code § 38-77-160, which states that “[i]f none of the insured’s or named insured’s vehicles is involved in the accident, coverage is available only to the extent of coverage **on any one of the vehicles with the excess or underinsured coverage.**” S.C. Code § 38-77-160 (emphasis added). South Carolina courts have consistently interpreted this statute to mean that insureds who do not have vehicles involved in the accident may not stack UIM coverages. *See, e.g., Brown v. Cont’l Ins. Co.*, 315 S.C. 393, 395, 434 S.E.2d 270, 272 (1993) (“We find the plain and obvious meaning of § 38–77–160 prohibits stacking where none of the insured vehicles is involved.”). “Stacking refers to an insured's recovery of damages under more than one insurance policy in succession until all of his damages are satisfied or until the total limits of all policies have been exhausted.” *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 178, 700 S.E.2d 283, 286 (Ct. App. 2010) (emphasis added); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997).

“The critical question in determining whether an insured has the right to stack is whether he is a Class I or Class II insured.” *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998); *Shives*, 328 S.C. at 474, 492 S.E.2d at 810.

("Our courts have consistently held that to ascertain whether an insured may stack under section 38-77-160 the court must determine whether the insured qualifies as a Class I or Class II insured."). Only a Class I insured may stack. *Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 545 370 S.E.2d 85, 89 (1988); *Nakatsu*, 390 S.C. at 178, 700 S.E.2d at 287. A Class I insured is one who "has" a vehicle involved in an accident. *South Carolina Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 443 n.1, 405 S.E.2d 396, 397 n.1 (1991). A Class II insured is one – like Petitioner – who does not have a vehicle involved in an accident. *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 156, 311 S.E.2d 723, 727 (1984). A Class II insured is limited to the extent of coverage on any one of his vehicles with UIM coverage and may not stack additional coverages. S.C. Code § 38-77-160; *Brown*, 315 S.C. at 395, 434 S.E.2d at 271–72 (stating that the statutory language of § 38-77-160 "clearly restricts stacking by providing for coverage from 'any one' vehicle").

II. Petitioner is a Class II insured for the accident at issue, limiting his right to recover to the single highest UIM limit on one vehicle.

In *Fireman's Ins. Co. of Newark, New Jersey v. State Farm Mut. Auto Ins. Co.*, this Court recognized that the South Carolina statutory scheme creates two classes of automobile insureds:

The first class, or Class I, applies when an insured or named insured has a vehicle involved in an accident. The second class, or Class II, insured is an insured whose vehicle(s) was not involved in the accident.

295 S.C. 538, 544, 370 S.E.2d 85, 88 (1988). Based on the undisputed facts, Petitioner qualifies as a Class II insured. Petitioner concedes that he is a Class II insured with regards to the accident at issue. (R. p. 30). Moreover, Petitioner did not "have" a vehicle involved in the accident. This Court also includes within the definition of Class I insureds those who

are named insureds on a policy insuring the accident vehicle or resident relatives of such named insured. *Concrete Servs., Inc.*, 331 S.C. at 513, 498 S.E.2d at 868 (“We hold that prior cases requiring a person to ‘have’ a vehicle involved in the accident as a prerequisite to stacking mean only that a person must be a Class I insured with respect to a vehicle involved in the accident, i.e., they must be either the named insured, or the spouse or relative living in the same household with the named insured.” (emphasis added)). Neither Petitioner nor any other member of his household owned a vehicle involved in the accident. (R. p. 9). Therefore, Petitioner qualifies as a Class II insured for this accident, which limits his recovery of UIM benefits to a single UIM limit. See *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 522, 354 S.E.2d 555, 557 (1987); *Fireman's Ins. Co.*, 295 S.C. at 545 370 S.E.2d at 89; *Brown*, 315 S.C. at 395, 434 S.E.2d at 271–72.

III. The statutory limitation on stacking applies with equal force to inter-policy and intra-policy stacking.

“Stacking does not depend upon the number of policies issued but rather the number of additional coverages for which the insured has contracted.” *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404 n.3, 496 S.E.2d 631, 632 n.3 (1998); *Esler v. United Servs. Auto. Ass'n*, 273 S.C. 259, 263, 255 S.E.2d 676, 679 (1979). Inter-policy stacking (stacking UIM coverages from vehicles covered by multiple policies) and intra-policy stacking (stacking UIM coverages from multiple vehicles covered by a single policy) are viewed identically and treated the same for stacking purposes. It makes no difference that Petitioner qualified as an insured under three separate policies insuring three separate vehicles rather than one policy insuring three vehicles. According to the plain language of South Carolina Code § 38-77-160, if the insured does not have a vehicle involved in the accident, “coverage is available only to the extent of **coverage on any one of the vehicles**

with the excess or underinsured coverage.” S.C. Code § 38-77-160. The statute states that recovery is limited to coverage on one vehicle, not to coverage on one vehicle per policy.

In one of the earliest stacking cases before this Court, *Garris v. Cincinnati Ins. Co.*, the driver and passenger of a company owned truck were injured in a collision with an at fault motorist. 280 S.C. 149, 152, 311 S.E.2d 723, 725 (1984). The driver and passenger potentially qualified as insureds for UIM benefits under two policies: (1) both of them qualified under the Cincinnati policy issued to their employer and covering the vehicle involved in the accident along with sixteen (16) other vehicles; and (2) each of them also maintained personal auto policies, Garris being insured by Allstate under a policy covering four (4) vehicles and Huntley covered by a State Auto policy covering two (2) vehicles. The court determined that both Huntley and Garris were Class II insureds since they did not “have” a vehicle involved in the accident. Therefore, “the recovery here is limited to the extent of coverage on one vehicle with the underinsured motorist coverage, ... Plaintiffs cannot stack the coverage of the other vehicles under the policies issued to them, but may only recover benefits on one vehicle with the coverage. *Id.* at 156, 311 S.E.2d at 727.⁶

In *State Farm Mut. Auto Ins. Co. v. Wannamaker*, the insured’s daughter was killed in a car wreck that “did not involve either of his insured vehicles.” 291 S.C. 518, 520, 354 S.E.2d 555, 556 (1987). State Farm had issued two automobile insurance policies to the

⁶ This case and the *Wannamaker* case discussed below were both decided under a previous version of South Carolina Code § 38-77-160 – Section 56-9-831 of the Code of Laws of South Carolina (1976) – which also states that “[i]f none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.” *Id.* at 156, 311 S.E.2d at 727. The changes to the statute after the 1987 amendment did not change this restriction on stacking. *Brown*, 315 S.C. at 395, 434 S.E.2d at 271.

insured. *Id.* at 519–20, 354 S.E.2d at 555. State Farm brought a declaratory judgment action to determine whether, among other issues, the underinsured coverage from the two policies could be stacked. *Id.* This Court limited the insured’s recovery to a single UIM limit. *Id.* at 522, 354 S.E.2d at 557. This Court held that while insureds are generally permitted to stack underinsured coverage amounts, “the present case is one clearly excluded by statute since none of the insured’s vehicles were involved in the accident.” *Id.* In accordance with the statute, this Court looked to the determinative factor for deciding the number of UIM limits an insured is entitled to recover – whether the insured has a vehicle involved in an accident. *Id.*

Finally, in *Putnam v. South Carolina Farm Bureau Mut. Ins. Co.*, the insured did not have a vehicle involved in the accident. 323 S.C. 494, 476 S.E.2d 902 (1996). This Court stated that “the Court of Appeals correctly held that S.C. Code Ann. § 38-77-160 (supp. 1995) prohibits stacking of underinsured motorist insurance (UIM) where none of the insured’s vehicle are involved in the accident.” *Id.* at 496, 476 S.E.2d at 902. The insured had two separate Farm Bureau insurance policies that provided UIM limits. *Id.* at 496 n.1, 476 S.E.2d at 903 n.1. Farm Bureau paid the insured the UIM limit under one policy but refused to pay UIM benefits under the second policy. *Id.* This Court did not require the insurer to provide the UIM limit of coverage from the second policy. *See id.* at 496, 476 S.E.2d 902, 903. Rather, this Court affirmed the decision of the Court of Appeals in favor of the insurer, which limited the insured’s recovery to one limit of UIM coverage. *Id.* Thus, regardless of whether the insured asserts entitlement to inter-policy stacking or intra-policy stacking, an insured without a vehicle involved in the accident is prohibited from stacking UIM coverages.

IV. Judgment on the pleadings was appropriate as there were no fact issues raised in the pleadings to preclude summary judgment, and any argument to the contrary has been waived.

Judgment on the pleadings is proper because the facts are admitted and only an issue of law is raised. *Wooten v. Standard Life & Cas. Ins. Co.*, 239 S.C. 243, 248–49, 122 S.E.2d 637, 639–40 (1961). Here, there were no fact issues raised by the pleadings to preclude summary judgment. As the circuit court recognized, all of the relevant facts were admitted by the parties in their pleadings and during their arguments at the hearing. (R. p. 1). In its Answer, the Respondent admitted the factual allegations set forth in the Petitioner’s Complaint and only disputed the ultimate legal conclusion based on those facts. (R. pp. 9-11, 14-15).

The parties did not dispute any of the pertinent facts concerning the Progressive Policy, including the named insured under the Policy, the amount of coverage, and Petitioner’s status as a resident relative. (*Id.*). The Respondent did not rely on any particular policy language limiting stacking because stacking in this case is prohibited by statute. *See Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 336, 342 S.E.2d 603, 604 (1986) (“Stacking is generally permitted unless limited by statute or by a valid policy provision.” (emphasis added)). Because of the statutory prohibition on stacking by Class II insureds, none of the facts alleged in Petitioner’s Complaint, if resolved in his favor, would entitle him to judgment. *See Douglass ex rel. Louthian v. Boyce*, 336 S.C. 318, 323, 519 S.E.2d 802, 805 (Ct. App. 1999), *aff’d*, 344 S.C. 5, 542 S.E.2d 715 (2001) (“A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the

complaint which, if resolved in favor of the plaintiff, would entitle him to judgment.”) (emphasis added). Therefore, judgment on the pleadings was proper.

Moreover, Petitioner has waived any argument that factual issues precluded judgment on the pleadings. Petitioner did not raise this argument at the hearing before the Circuit Court nor in any subsequent motion to alter or amend the Circuit Court’s judgment. (See R. pp. 23-64, 98-100). Thus, the issue is not preserved for appellate review. *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) (“In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.”); *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.”); *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (“It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.”) (citations omitted). Therefore, judgment on the pleadings was proper as the facts are admitted, leaving only a question of law, and Petitioner waived any argument that factual issues precluded judgment on the pleadings.

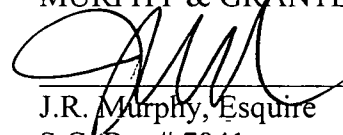
CONCLUSION

As a Class II insured, Petitioner’s recovery of UIM benefits is statutorily limited. He is entitled to recover the single highest limit of UIM coverage available under the various policies applicable to him, but he is not entitled to stack multiple limits from those

policies. Petitioner has already received more than this amount of UIM coverage. Consequently, Respondent owed Petitioner no further obligations under its policy and properly denied Petitioner's demand for its UIM limit. Thus, the Court of Appeals' June 8, 2016 Order affirming judgment on the pleadings in favor of Respondent should be affirmed.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to be 'JRM', is written over a horizontal line.

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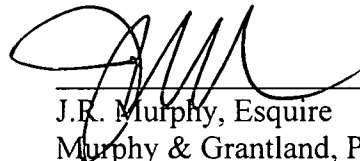
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R. Lawton McIntosh, Circuit Court Judge

PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Juan Michael Ramirez by depositing a copy of it in the United States Mail, postage prepaid, on October 23, 2017, addressed to his attorney of record, Edwin L. Turnage, Esquire, Harris and Graves, P.A. Post Office Box 6263, 812 Laurens Road, Greenville, SC 29606.



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CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Respondent, certify that the Respondent's Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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