The State of South Carolina
In The Supreme Court

APPEAL FROM LAURENS COUNTY

Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-002312

JUAN MICHAEL RAMIREZ, Petitioner,

v.

PROGRESSIVE NORTHERN INSURANCE COMPANY, Respondent.

Reply Brief of Petitioner

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Table of Contents

Table of Authorities

Cases

Statutes

ARGUMENT

1. This is not a stacking case.

Respondent argues that Ramirez's, "demand for additional limits of UIM coverage amounts to stacking." (Brief at 4) Throughout its Brief, Respondent continues to confuse stacking cases with this one, a basic UIM portability case. Ramirez is not seeking to stack multiple coverages on several vehicles insured by Progressive. Rather, he asked Progressive pay the basic UIM coverage on the one vehicle in the household that Progressive insured. The issue is not stacking. Rather, whether Progressive may limit the basic, portable UIM coverage on a single-vehicle policy because other carriers provided UIM coverage in policies written for the household's other vehicles.

The need to distinguish between a stacking and portability is crucial to the legal analysis here. Ramirez's status as a Class I or Class II insured is not relevant to basic UIM portability case like this one. In *Nationwide Mut. Ins. Co. v. Erwood,* this Court said that when an insured, "is not seeking to stack insurance coverage, we are not concerned by her status as a Class I insured." *Nationwide Mut. Ins. Co. v. Erwood*, 644 S.E.2d 62, 65 n.1, 373 S.C. 88 (S.C., 2007).

In *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401, 728 S.E.2d 477 (S.C., 2012), referring to what is a stacking case and what is not, this Court stated: "[W]e interpret the pertinent language of [38-77-160] as setting a cap on the amount which can be *stacked* . . . ." *Id.* (quoting S.C. *Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 445, 405 S.E.2d 396,

398 (1991)) (emphasis in original). In *Rhoden* this Court analyzed the "if, however," language of Section 38-77-160:

> If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. *If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.* Benefits paid pursuant to this section are not subject to subrogation and assignment. . . .

S.C. Code Ann. § 38-77-160 (emphasis added). Stacking refers to an insured recovering multiple policy coverages above the Section 38-77-160 cap. Even when an individual is a Class II insured, the basic UIM portability coverage of statutory insureds must be included in a carrier's automobile insurance policy. The amount of that coverage may be capped depending on the insured's status as a Class I or Class II insured, or by the amount of UIM coverage purchased in other policies. Thus, if Kandi Ramirez had two vehicles on her Progressive policy, then her son would have been eligible to just the limits on one. In affirming, the *Rhoden* Court said, "the issue here was not stacking. . . ." *Nationwide Mut. Ins. Co. v. Rhoden*, 373 S.C. at 41–42, 644 S.E.2d at 42–43 (Ct. App. 2012).

The *Rhoden* court quoted extensively the case of *Burgess v. Nationwide Mutual Insurance Company*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007). *Burgess* analyzed the "if, however" language of Section 38-77-160 and described the language as setting stacking limits.

> [W]e agree with the Court of Appeals that the "if, however" sentence in § 38-77-160, relied upon by Nationwide here, does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage
>
> The Court of Appeals held the "If, however" sentence in § 38–77–160 applied only to stacking cases, found the issue here was not stacking....

> [W]e agree with the Court of Appeals that the "if, however" sentence in § 38-77-160, relied upon by Nationwide here, does not literally apply to these facts since Burgess is not attempting to stack excess UIM coverage from his Nationwide policy . . . . .The "If, however" sentence in § 38-77-160 evinces the legislature's intent, in a stacking situation, to bind the insured....
>
> Neither § 38-77-160 nor our prior decisions decide the [non-stacking] issue presented here[.]

Burgess v. Nationwide Mutual Insurance Company, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007). The *Rhoden* Court concluded: "In *Burgess*, we decided a non-stacking case by considering the public policy that UIM is personal and portable rather than looking to section 38-77-160. *Id.* Consequently, we must do so again here." *Rhoden,* 398 S.C. at 401.

Respondent cites *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984). (Respondent's Brief at 8). The case does not support its argument that asking for the basic portable UIM coverage on a policy amounts to stacking. In *Garris*, two Class II insured litigants were attempting to stack coverages for multiple vehicles on two policies. One policy had two vehicles and one four. The *Garris* Court ruled the insureds could not stack and were eligible to, "only recover benefits on one vehicle with the coverage." *Garris*, 280 S.C. at 156. Here, Ramirez seeks coverage on only the one vehicle under Respondent's policy.

Respondent argues *State Farm Mut. Auto Ins. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), supports its argument. However, the issue in *Wannamaker* was whether the insureds could stack two coverages for two vehicles insured by State Farm.

> State Farm Mutual Automobile Insurance Company (State Farm) brought a declaratory judgment action to determine if underinsured motorist coverage was available to the respondents under two automobile insurance policies issued to Wannamaker by State Farm, and, if so, whether the underinsured coverage could be stacked.

Id., 291 S.C. 519-20. The *Wannamaker* court ruled that State Farm was required to pay one basic UIM coverage but not both. Here, Ramirez has not demanded Progressive stack two coverages. Rather, Ramirez is asking only for the basic, portable UIM coverage on the one vehicle insured under the Progressive policy.

The other case Respondent cited was *Putnam v. South Carolina Farm Bureau Mut. Ins. Co.*, 323 S.C. 494, 476 S.E.2d 902 (1996). However, like in *Wannamaker,* Putnam sought to stack two household coverages issued by the same carrier. Farm Bureau voluntarily paid its insured the basic, portable UIM coverage:

> Respondent paid petitioner UIM benefits under one insurance policy but refused to pay UIM benefits under petitioner's second insurance policy.

Id., 476 S.E.2d 903 n.1. *Wannamaker* and *Putnam* are stacking cases. This is not.

2. Section 38-77-160 is aimed at individual automobile insurance companies that write policies, and not the whole automobile insurance industry.

Respondent's brief argues Section 38-77-160 limits the portable basic UIM coverage to coverage on one vehicle, not to coverage on one vehicle per policy." (Respondent Brief at 8) It directs the court to the statutory language: "If none of the insured's or named insured's vehicles is involved in the accident, coverage is available **only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage**." S.C. Code Ann. § 38-77-160 (emphasis in Respondent's Brief) Respondent is therefore arguing that this sentence was written in favor of the whole automobile insurance industry rather than individual insurance policies. Respondent is apparently claiming that the Legislature intended to limit the amount of Class II UIM coverage that the automobile insurance industry may provide to, "only one of the vehicles." If so, that is an unsound reading of the

Statute that makes no sense in context of the statutory purpose and intent. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.")

First, Respondent's interpretation is inconsistent with Section 38-77-20: "This chapter is to be liberally construed in order to achieve its purposes." S.C. Code Ann. § 38-77-20. The statute is not designed to benefit the automobile insurance industry. Rather, the purpose of automobile insurance is to insure the people from automobile risk. See S.C. Code Ann. § 38-77-10.

Two, Section 38-77-160 is included under Article 3 titled, "Mandate to Write and Insurance Coverage." The Title confirms our Legislature's intent is to instruct individual automobile insurance companies about mandatory coverages which must be written into every automobile insurance policy issued.

> ARTICLE 3
>
> Mandate to Write and Insurance Coverage

Three, the clear language of the rest of Section 38-77-160 confirms its provisions are aimed at individual automobile insurance companies and the policies they write.

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

S.C. Code Ann. § 38-77-160 (emphasis added). By referencing a carrier's "offer," the text of the statute refers to an individual insurance company. The statutory language makes no sense when one reads "carriers" in the plural as if referring to the whole automobile

insurance industry. How does the automobile insurance industry make an offer to an individual insured? That the legislature intended "carriers" in the singular is made clear by the following clause, "at the option of the insured," which is singular.

Finally, the Article is not intended to confer some kind of nebulous obligation (or benefit) upon the whole automobile insurance industry. Respondent's interpretation of "carriers" in the plural makes no sense when read in context with the Sections related to Section 38-77-160. "In ascertaining the intent of the Legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). For example, Section 38-77-150(A) provides, in part, as follows:

> No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140.

S.C. Code Ann. § 38-77-150 (emphasis added); *see also* S.C. Code Ann. § 38-77-140 ("No automobile insurance policy or contract may be issued or delivered unless it contains a provision . . . .") Section 38-77-160 follows the same thread. The phrase "one of the vehicles with excess or underinsured coverage" means "in the carrier's policy" not "in the carriers' policies" as Respondent apparently contends.

3. Petitioner never waived or abandoned his argument that factual issues remained and he was entitled to discovery.

Respondent argues judgment on the pleadings was proper because only issues of law were raised. Petitioner's Complaint alleged that the policy promised $25,000 of UIM coverage. (R. p. 12) Respondent's Answer did not deny the allegation but stated instead,

"Progressive would crave reference to the policy." (R. p. 15) The insurance policy itself was not filed with the pleading and is not a part of this court record. Factual issues related to whether the policy language was ambiguous or if it limited stacking were never litigated nor addressed by the Circuit Court. However, Petitioner does agree that the Court had sufficient factual information to direct a verdict on the pleadings in favor of Ramirez because public policy prohibited Respondent from limiting the basic UIM portable coverage required in every automobile insurance policy.

Respondent contends that Ramirez waived the argument. However, at the hearing and in the memorandum, counsel informed the Court that there were factual disputes raised by the pleadings and Petitioner asked for discovery. (R. pp. 53, 74)

CONCLUSION

For the foregoing reasons, the Court must reverse the Order in favor of Ramirez on the issue of his $25,000 UIM coverage, and remand the case to the Circuit Court for further proceedings on the relief sought including costs, attorney's fees, and prejudgment interest.

11/1, 2017

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Proof of Service

I certify that I have served the Reply Brief of Petitioner on Progressive Northern Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on November 2, 2017 addressed to its attorney of record, J.R. Murphy, Post Office Box 6648, Columbia, South Carolina 29260.

November 2, 2017

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