THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No. 2016-CP-32-00815
Appellate Case No. 2016-002185

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SC Court of Appeals

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

v.

Myra M. Windham .............................. Appellant.

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## STATEMENT OF ISSUE ON APPEAL

Whether Myra Windham is entitled to stack the Underinsured Motorist Coverage from her five automobile insurance policies when she was injured while occupying a "temporary substitute car"—a rental car provided to her because her primary car was out of service, disabled, and inoperable.

## STATEMENT OF THE CASE

This declaratory judgment is about the right to stack Underinsured Motorist Coverage—"UIM." The circuit court held stacking was prohibited because Myra Windham was driving a rental car instead of a vehicle she owned. Mrs. Windham believes the circuit court's holding is incorrect and that this Court should reverse.

The salient facts appear in the parties' two-page stipulation. (R.pp.19-20). Mrs. Windham was involved in an automobile wreck in September of 2012, while driving her Toyota Camry. (R.p.19, ¶1). Six days later, in October, she was involved in a second wreck, while driving a rental car. (R.p.19, ¶2).

The first wreck left Mrs. Windham's Camry inoperable. (R.p.19, ¶3). The rental car Mrs. Windham was driving in the second wreck was being provided by the insurance company for the other driver in the first wreck. (R.p.19, ¶4).

State Farm issued five (5) policies to Mrs. Windham or her husband. Each policy has a UIM limit of $100,000 per person. (R.p.11, ¶10). State Farm paid Mrs. Windham a single limit of $100,000 from one of her policies. (R.p.20, ¶13).

State Farm filed this lawsuit in March of 2016, asking the court to declare Mrs. Windham could not stack the UIM coverage on the other four policies. (R.pp.10-14). Mrs. Windham filed an answer and a counterclaim alleging she was entitled to stack. (R.pp.15-

18). In terms of what is at stake, this case is about whether there is $400,000 of additional insurance coverage to apply towards Mrs. Windham's damages.

Both sides moved for summary judgment, relying on their respective interpretations of the State Farm policies and of the automobile insurance code.

State Farm argued stacking was prohibited under the UIM statute, by precedent, and by its policy language. State Farm believed an insured must own the vehicle he or she is occupying in order to stack. (R.pp.30-31). This varied from State Farm's policy, which treats a leased car as an owned car if the lease is for at least 31 consecutive days. (R.p.113). Everyone agreed Mrs. Windham did not own or lease the rental car. (R.p.19, ¶12). State Farm believed these facts compelled a ruling in its favor.

Mrs. Windham argued stacking was required by the policy language, the UIM statute, and precedent. She said the policy entitled her to stack because a "temporary substitute car" is a car that is substituted for the insured's own car for a short time and under limited circumstances. (R.p.40). She believed the policy language explaining a "temporary substitute car" *is not* a "non-owned car" naturally means a "temporary substitute car" will be treated as an "owned car" even though the insured does not actually own it. (R.pp.40-42). She supported her argument by noting a U.S. District Judge had followed this same reasoning in a case involving the same insurance company—State Farm. (R.pp.42-43). She also argued this furthered the UIM statute's purpose and honored an insured's reasonable expectations. (R.pp.43-45); (R.p.63, line 8 - p.64, line 10).

The court had a summary judgment hearing on June 23, 2016. (R.pp.49-67). On August 8, 2016, the court granted summary judgment to State Farm. (R.pp.1-8).

Mrs. Windham filed a motion to reconsider on September 6, 2016. (R.p.46). This was timely because she did not receive the summary judgment order until August 26, 2016.

The circuit court denied reconsideration in a one-page order filed September 26, 2016. (R.p.9). Mrs. Windham noticed this appeal October 26, 2016.

## ARGUMENT

There are two reasons this Court should reverse.

First, the relevant statutes, when properly construed, treat this sort of vehicle as the insured's own vehicle, prohibiting any limitation on stacking. The UIM statute entitles an insured to stack when the insured's vehicle "is involved" in a wreck. This standard is satisfied if the insured is injured while occupying a short term replacement for the insured's vehicle. This is bolstered by the common understanding of the words "replace" and "substitute," and it furthers the UIM statute's purpose. The statute does not require actual ownership. Denying stacking renders Mrs. Windham's coverage on her Camry illusory.

Second, the policy itself treats this sort of vehicle as the insured's own vehicle. The policy's language about a "temporary substitute car" *not being* a "non-owned car" naturally means it will be treated like an owned vehicle even though the insured does not actually own it. The doctrine of reasonable expectations supports this reading. The circuit court ignored the District Court decision following this logic, overlooking the fact that the insurance code and individual insurance policies work in tandem. UIM coverage is required to be offered, and in the case of required coverage, the statute sets the boundaries. If this was not so, different insurance companies could offer varying coverages that are all misleadingly labeled as "UIM," but the coverages will not be the same. This Court should reverse.

## I. The proper construction of the relevant statutes requires treating Mrs. Windham's rental car as her own vehicle, prohibiting any limitation on stacking.

"Stacking" refers to an insured recovering damages under multiple insurance policies until all policy limits have been exhausted or the insured has recovered all of his or her damages. It is driven by the concept that a "Class I insured"—the person named in the policy and that person's resident relatives—is insured regardless of the vehicle he or she is occupying at the time of the wreck. See, e.g., *Holloway v. Nationwide*, 376 So. 2d 690, 694-695 (Ala. 1979).

The same is not true for guests or permissive users: those persons are insured for the sole reason that they occupy the vehicle at the time of a wreck. Stacking relies on the premise that a Class I insured is covered everywhere, and in a pure stacking analysis, Class I insureds have a right to stack because they (or their family members) paid the policy's premiums, giving them a right to the coverage they purchased. *Id.*; see also *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 73, 310 S.E.2d 814, 817 (1983) ("[t]he crucial test" for stacking is the number of coverages that were "paid for.").

### a. Statutory law entitles an insured to stack as long as the insured's vehicle "is involved" in the wreck.

In South Carolina, the right to stack UIM is controlled by statute. The same is true for *Uninsured* Motorist coverage: both UM and UIM are "required coverages" because they are defined by statute and required to be offered. *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 179, 700 S.E.2d 283, 287 (Ct. App. 2010); *Ruppe v. Auto-Owners*, 329 S.C. 402, 405, 496 S.E.2d 631, 632 (1998).

Two statutes inform the UIM stacking analysis.

The first is the definition of "insured" which delineates two classes of individuals: (1) the named insured, his or her spouse, and his or her resident relatives; and (2) permissive users and guests. S.C. Code Ann. § 38-77-30 (7) (Supp. 2016). Class I insureds have the right to stack UIM because the definition of insured explains they are insured "while in a motor vehicle *or otherwise*"—meaning their status as an insured is portable. *Davidson v. E. Fire & Cas. Ins. Co.*, 245 S.C. 472, 477-78, 141 S.E.2d 135, 138 (1965).

The second applicable statute is the definition of UIM, which contains two limitations on the right to stack. If the insured is occupying one of his or her vehicles at the time of a wreck, stacking is limited to the amount of coverage on the vehicle involved. S.C. Code Ann. § 38-77-160 (Supp. 2016). If none of the insured's vehicles is involved, the insured may not stack, and may recover under only one of his or her UIM coverages. *Id.* The two sentences containing these limitations are sometimes referred to as the "If, however" clause of the UIM statute. *Carter v. Standard Fire*, 406 S.C. 609, 624, 753 S.E.2d 515, 523 (2013). The clause means South Carolina does not follow a "pure stacking" analysis—stacking is not tied *exclusively* to the number of premiums an insured pays. Instead, the statute embodies a compromise, allowing stacking when the insured's vehicle is involved and tying the stackable coverage to the amount of UIM on the involved vehicle.

**b. The "involvement" standard is satisfied when the insured is injured while occupying a short term replacement for the insured's actual vehicle.**

The Supreme Court has explained "involved" in the UIM statute means "to relate to or have an effect on . . . to draw in as a participant . . . [to] implicate, include, affect." *Merck*

*v. Nationwide*, 318 S.C. 22, 24, 455 S.E.2d 697, 698 (1995). The term has been construed to encompass a vehicle that did not play any active role in the collision: *Merck* held a vehicle was "involved" even though it was disabled and loaded on a wrecker when a drunk driver ran off the road and struck the insured, the wrecker driver, and the wrecker. *Id.* In holding the insured could stack, the Court noted the disabled vehicle was present at the scene and the accident had an effect on the vehicle.

Mrs. Windham's Camry was not present at the second wreck or directly affected, but her circumstances fit different parts of *Merck*'s involvement definition—the explanation that involvement describes the insured's vehicle relating to or having an effect on the incident. Everyone concedes Mrs. Windham's principal vehicle was out of service and inoperable. Everyone concedes the rental car was a short-term replacement and substitute for Mrs. Windham's primary car. Unlike a situation where someone uses a rental car for pleasure or while out-of-town, everyone concedes that this rental car *was acting as* Mrs. Windham's own car for a brief time. Mrs. Windham's insured vehicle was "involved" in this wreck. It was out of service, requiring Mrs. Windham to use the rental car she was operating.

This definition of involved is broad, but it fits the UIM statute's purpose. South Carolina's appellate courts have repeatedly explained the UIM statute's purpose is not to limit coverage, but "to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist." *Carter*, 406 S.C. at 615, 753 S.E.2d at 518 (quoting *Floyd v. Nationwide*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005)). The UIM statute was enacted "for the benefit of injured persons" and "should be liberally construed to effect [that purpose]." *Id.* "Involved" must be construed broadly.

### c. The circuit court incorrectly held having a vehicle "involved" requires ownership.

The circuit court held the UIM statute "reasonably implies ownership of the vehicle," relying on the Supreme Court's decision in *Nationwide v. Rhoden*. (R.pp.4-5).

The circuit court accurately quoted *Rhoden*, but it took the language out of context, and the circuit court's reasoning is contradicted by a different decision. *Rhoden* involved the public policy of binding an owner to the amount of UIM on the vehicle in the wreck. When the Supreme Court discussed the "involvement" standard, it explained the UIM statute was "at best" ambiguous and that UIM's "personal and portable" character required allowing resident relatives to stack because they did not own the measuring the vehicle, which had no UIM. *Nationwide v. Rhoden*, 398 S.C. 393, 401-402, 728 S.E.2d 477, 481-482 (2012). The Court also expressly acknowledged a prior decision that noted the court *has never* required ownership as a prerequisite to stacking. *Id.* at 401 n.5, 728 S.E.2d at 481 n.5 (citing *Concrete Services v. U.S. Fidelity and Guaranty*, 331 S.C. 506, 512, 498 S.E.2d 865, 868 (1998)). The Court explained its prior discussion as dictum and governed by public policy considerations *Rhoden* did not present. *Id.*

All of the public policy considerations operate in Mrs. Windham's favor. She did not elect to put UIM on some of her policies and not others. She and her husband purchased UIM on all the vehicles they owned. True, she was not driving a vehicle she owned, but she would have been driving her own car if it was not disabled and inoperable. Everyone agrees the rental car was a short term substitute or replacement for the insured car. The common understanding of "substitute" and "replace" is to take the place of another.

Denying stacking also creates the undesirable situation where the insurance contract on Mrs. Windham's Camry is rendered illusory. Each of Mrs. Windham's four other policies gave her liability insurance, personal injury protection coverage, UIM coverage, and the rest of her purchased coverages while she was driving the rental. (R.pp.114, 119, 125, 129, 133, & 136). If Mrs. Windham cannot stack, Mrs. Windham's premiums on her Camry count for nothing the whole time the car sat in the shop. Her policy was worthless.

The proper construction of the relevant statutes requires treating this vehicle as Mrs. Windham's own vehicle, entitling her to stack. The "involvement" standard must be construed broadly, and public policy supports Mrs. Windham receiving the benefit of her bargain rather than rendering her insurance policy temporarily worthless.

## II. State Farm's policy, when read naturally and in view of an insured's reasonable expectations, treats such a vehicle as the insured's own vehicle.

The policy's stacking language is found in four numbered paragraphs under the heading "If Other Underinsured Motor Vehicle Coverage Applies." (R.p.135). The first paragraph explains the policy is primary coverage if an insured suffers bodily injury while occupying "your car"—a defined term. *Id.* The second paragraph explains the policy otherwise supplies excess coverage. *Id.* The third numbered paragraph limits stacking if bodily injury occurs while the insured is occupying a motor vehicle not "owned by" you—another defined term—or any resident relative. *Id.* The fourth numbered paragraph discusses recovering UIM when a wreck occurs while occupying a vehicle that *is* "owned by you" but is not "your car." *Id.* In short, the policy limits stacking unless an insured is driving "your car," a vehicle "owned by you," or a vehicle "owned by" a resident relative.

### a. The circuit court focused on the wrong language, overlooking that a temporary substitute car replaces "your car" and is *not* a "non-owned car."

The circuit court held ownership was required. This varies from the policy, which does not require actual ownership and defines "owned by" as including a leased vehicle as long as the lease extends for more than 31 consecutive days. (R.p.113). The definition does not, however, include a "temporary substitute vehicle." This was State Farm's argument to the circuit court, (R.p.31), and the court adopted State Farm's analysis. (R.p.7).

The problem with this reasoning is that it relies on the wrong language. Stacking is allowed when an insured is driving "your car." One set of key language is the definition of "temporary substitute car," explaining a temporary substitute car "replaces *your car*." (R. p.113) (emphasis in original). As a temporary substitute car, the rental stands in the place of Mrs. Windham's Camry, making her UIM primary under the first numbered paragraph in the "Other Insurance Coverage" heading. (R.p.135).

More key language is in the same definition. The policy explains that if a "temporary substitute car" also meets the definition of a "non-owned car," it is not to be considered a non-owned car, but is a "temporary substitute car" only. (R.p.113). When read naturally, this gives the impression that a temporary substitute car will be treated as an owned car even though the insured does not actually own it. The opposite of non-owned is owned.

The Supreme Court has explained that insurance contracts are to be read in accordance with the insured's reasonable expectations. *Bell v. Progressive*, 407 S.C. 565, 578-581, 757 S.E.2d 399, 405-407 (2014). This doctrine cannot serve as an end-around clear policy language, but insurance contracts are rarely models of clarity, and the doctrine does

not thwart any clear policy language here. A reasonable insured would read "substitute," "replace," and the clause explaining a "temporary substitute car" is not a "non-owned car" to mean that a "temporary substitute car" will be treated as an "owned car."

**b. The District Court decision is correctly reasoned.**

The circuit court's order did not mention the U.S. District Court decision supporting Mrs. Windham's argument. The District Court decision was driven by some of the same policy language Mrs. Windham has identified here—the fact that a "temporary substitute car" is not a "non-owned car." (R.pp.200-202).

State Farm argued the District Court case was distinguishable because the policy in that case did not define "owned by." (R.p.35, n.2). This fit with State Farm's overall approach to Mrs. Windham's case—State Farm's general argument was two-fold. First, it claimed the statutory law "prohibit[ed]" Mrs. Windham from stacking. (R.p.31). Next, it claimed Mrs. Windham's policy was not "broader than South Carolina law," (R.p.32), implying the State Farm policy the District Court analyzed was more generous than the statute allows. The circuit court adopted this two-step analysis. (R.pp.4-5).

That reasoning collapses on itself—an insurance company cannot voluntarily permit something a statute *prohibits*. Not all coverages are limited by statute. This principle drove the decisions in *Jackson v. State Farm*, 288 S.C. 335, 337, 342 S.E.2d 603, 604 (1986) (involving "non-owned liability coverage"—coverage while driving a vehicle the insured does not own—which has no governing statute) and *Dorman v. Allstate*, 332 S.C. 176, 179, 504 S.E.2d 127, 129 (Ct. App. 1998) (involving collision coverage, which has no statutory limitations). Coverage may be negotiated, but statutory limitations on coverage control.

UIM coverage is limited by statute. It exists to provide coverage when an insured's damages exceed the amount the insured can recover from the at-fault driver, and an insurer cannot have different limitations than the ones in the UIM statute. The court has explained UIM coverage is subject to the UIM Act and insurance policy language inconsistent with the Act is void. *Carter*, 406 S.C. at 615, 753 S.E.2d at 518. The UIM statute sets the boundaries. The statute establishes the vehicle involved as the "measuring vehicle" for stacking and the statute prohibits stacking if none of the insured's vehicles are involved. It is important for insurers to follow these limitations. Otherwise, the coverages various insurance companies label as UIM are not the same and do not all follow the statute.

## CONCLUSION

This Court should reverse. It should hold Mrs. Windham is entitled to stack, and it should remand this matter to circuit court for that court to consider Mrs. Windham's counterclaim for attorney's fees. See (R.p.18, ¶19).

Respectfully submitted,

September 19, 2017

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**CERTIFICATE OF COMPLIANCE**

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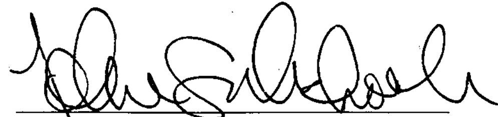
Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



September 19, 2017

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