THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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

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

v.

Myra M. Windham ..... Appellant.

REPLY BRIEF

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ARGUMENT

In spite of what State Farm says, 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. Precedent requires reading the relevant statutes honestly *and* with a lean in the insured's favor. Mrs. Windham's construction satisfies both requirements. The circuit court's construction does not.

Second, the policy itself, under a sensible and reasonable reading, honors the UIM statute and treats this sort of vehicle as the insured's own vehicle. The average person does not scour his insurance policy looking for holes; the average person thinks all UIM is the same. When a reasonable person reads State Farm's policy, the language implies a "temporary substitute car" will be treated as an "owned car" even though the insured does not own it. For all intents and purposes, Mrs. Windham's rental car *was* her car while her Camry was inoperable. It should be treated that way for stacking. After all, State Farm's policy labels the vehicle as a "substitute," not a "poor substitute" or a "substitute-light."

A. Mrs. Windham does not agree with—and respectfully, does not understand—State Farm's contention that her statutory construction argument was not presented to the circuit court.

The parties argued a single issue to circuit court: whether stacking was permitted or prohibited. Mrs. Windham argued stacking was required by the UIM statute and by State Farm's policy language, which *is* ambiguous. State Farm said it would "violate" the UIM statute to allow stacking. Some cases have several issues. This is not one of those cases.

Statutory arguments hinge on statutory language, and two statutes are in play here. The first is the statute differentiating Class I and Class II insureds. S.C. Code Ann. § 38-77-

30(7) (Supp. 2016). The second is the UIM statute, basing the right to stack on whether the insured's vehicle was "involved" in an accident. S.C. Code Ann. § 38-77-160 (Supp. 2016).

Both parties argued these statutes to the circuit court. State Farm said the UIM statute required the insured to own the vehicle involved in the wreck. (R.p.51, line 24 - p.52, line 2). State Farm also said stacking came down to whether Mrs. Windham was a Class I insured. (R.p.52, lines 2-6). Mrs. Windham followed suit, specifically arguing she was a Class I insured with respect to this vehicle (R.p.64, lines 1-2), and citing the UIM statute's requirement that her vehicle be involved. (R.pp.44-45). The circuit court had all of these arguments for its decision.

Mrs. Windham's brief to this Court argued the UIM statute's "involvement standard" is satisfied when a named insured is injured while occupying a temporary rental car provided after a wreck. (Brief of Appellant, pp.5-6). Mrs. Windham is unable to perceive how this argument is any different from her argument that she is a Class I insured while using a rental car temporarily substituting for and replacing her primary car. See, e.g. (R.p.63, line 20 - p.64, line 6). Involvement is determined by an insured's status as Class I or Class II. This is exactly the same argument. The words are different but the point is identical.

The circuit court held having a vehicle "involved" required the insured to own the vehicle in the wreck. (R.pp.4-5). Mrs. Windham's appellate brief contests this holding with the same arguments she made below. Mrs. Windham's summary judgment memo explained UIM coverage generally follows the insured and that the rental car should be treated as her own car because it was a temporary substitute for her own vehicle, which was inoperable. (R.pp.44-45). Mrs. Windham's appellate brief is making exactly the same argument when

it explains "substitution" and "replacement" are the critical concepts satisfying the UIM statute's involvement standard. (Brief of Appellant, p.6). All of these points drive in the same direction—this case's central dispute comes down to ownership versus causation. State Farm convinced the circuit court that "involved" requires owning the car in the wreck. Mrs. Windham says "involved" is describing a causal connection between the insured, the insured's vehicle, the insurance policy, and the accident. That connection is present here. Mrs. Windham was Class I with respect to this vehicle because the car she owned was inoperable and this rental car was furnished as a substitute.

B. On the merits, State Farm repeats the same errors it sold to the circuit court, selectively quoting precedent and missing the command to construe the UIM statute in the insured's favor.

State Farm's argument on the merits repeats the same errors from the circuit court's analysis.

First, State Farm continues to insist stacking requires an insured to own the vehicle involved in the wreck. State Farm pushed this argument to the circuit court, saying "[o]ur Courts have for years" held an insured "has to be driving a vehicle that they own." (R.p.51, line 24 - p.52, line 2). Later, State Farm argued Mrs. Windham was asking the circuit court to impermissibly "expand the law" by allowing "the law to say, well, you don't really have to own it to stack, you can be renting[.]" (R.p.66, lines 6-9). The circuit court agreed. (R.pp.4-5).

It is very difficult to reconcile the circuit court's holding with precedent. It is directly contrary to the Supreme Court's language in *Concrete Services Inc. v. U.S. Fidelity & Guaranty Co.*, noting "We have never required 'ownership' as a prerequisite to stacking."

331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998). It is also directly contrary to State Farm's policy, which defines ownership to include a certain type of rented vehicle—a vehicle leased for more than 31 consecutive days. (R.p.113). An ownership standard is not *really* an ownership standard if people can define ownership to mean whatever they want.

The second error State Farm and the circuit court share on the merits is that they disregard the Supreme Court's acknowledgment that the UIM statute is "ambiguous at best," *Nationwide v. Rhoden*, 398 S.C. 393, 402, 728 S.E.2d 477, 482 (2012), and the command to read the statute broadly rather than narrowly. The UIM statute is remedial, enacted to benefit injured people, and it must be construed to further that purpose. *Carter v. Standard Fire*, 406 S.C. 609, 615, 753 S.E.2d 515, 518 (2013); *Floyd v. Nationwide*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "Involved" could be read as requiring the insured's vehicle to be damaged in the wreck. It could also be read to mean the insured's vehicle must be present at the scene and relate in some way to the wreck. Involved could further encompass the circumstances here—the insured's vehicle was inoperable, causing the insured to temporarily operate a rental vehicle furnished as a substitute and replacement. How does State Farm's narrow definition requiring actual ownership account for these variant readings? It ignores them. How does State Farm's argument construe the statute in Mrs. Windham's favor? It ignores that too.

C. State Farm has no good explanation for the three substantial weaknesses in its position: weakness of violation, expectation, and evisceration.

The argument State Farm sold to the circuit court has at least three core weaknesses, none of which have satisfactory answers.

i. "Violation" - the UIM statute.

First, State Farm's statutory argument directly conflicts with its policy language and with the decision from the U.S. District Court supporting Mrs. Windham's position. State Farm repeatedly told the circuit court allowing Mrs. Windham to stack when she was not driving a car she owned would "violate" the UIM statute. State Farm said this multiple times in writing, see (R.pp.25, 2, 7), and said it again at the hearing. (R.p.51, line 24 - p.52, line 2; p.66, lines 6-9). According to State Farm, allowing Mrs. Windham to stack would be illegal.

Yet, State Farm's policy does not require ownership. Instead, the policy defines "owned by" to include *some* non-owners—leases for more than 31 consecutive days—but not others. (R.p.113). This strikes Mrs. Windham as gamesmanship. State Farm cannot plausibly claim the law sets an ownership standard when ownership can mean whatever State Farm says it means. And how does State Farm handle the U.S. District Court's decision allowing stacking in precisely the same situation—a decision State Farm chose not to appeal? State Farm insists the policy language is different, but again, under State Farm's view of the statute, allowing stacking for a non-owned car is *unlawful*.

The correct viewpoint is the one Mrs. Windham is proposing. A policy cannot permit something the UIM statute prohibits. The UIM statute sets the boundaries for stacking.

ii. "Expectation" - the insured's understanding.

Second, State Farm never explains why Mrs. Windham, or any other reasonable person would not naturally expect a "temporary substitute car" to be treated in all instances as an "owned car."

The policy specifically says a temporary substitute car is not a "non-owned car." (R.p.113). Granted, the policy literally says such a vehicle "is a temporary substitute car only," *id.*, but it seems reasonable to assume most people expect something *not* being treated as a "non-owned car" to be treated as though it is "owned." The same definition also uses words like "replace" and "substitute." *Id.* A replacement is not always as good as the original, but if the discussion is about vehicles (as opposed to something like baseball players), it seems reasonable to conclude people expect their insurance policy to give a temporary replacement car the same terms applicable to their primary car, particularly when the temporary car is furnished out of necessity.

This car *was* Mrs. Windham's car for a short time. A reasonable person could plausibly read "substitute" and "replace" as signifying interchangeability; signaling "temporary substitute car" can be substituted everywhere "your car" appears in the policy. That is what terms like replace and substitute mean. That is why Mrs. Windham is a Class I insured for this vehicle. That is why she can stack.

iii. "Evisceration" - Mrs. Windham does not get her bargain.

Mrs. Windham got nothing for her car insurance premium while her primary vehicle—her Camry—was inoperable and in the shop. She and her husband paid State Farm premiums for five (5) vehicles. These policies had the same policy limits. The parties stipulated the policies had identical language. (R.p.19, ¶7).

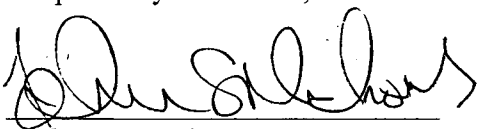
State Farm says Mrs. Windham's coverage on her Camry got her $100,000 in UIM benefits. This only true when one pretends blindness to the fact that Mrs. Windham would have been entitled to collect $100,000 in UIM under any of her other four (4) policies

regardless of who owned the car she was driving. Mrs. Windham paid to have primary UIM protection on five vehicles, but while her Camry was disabled, she was paying one of those premiums for nothing. If State Farm is right about stacking, Mrs. Windham would have done just as well to cancel her policy while her Camry was in the shop. State Farm's desired outcome strikes Mrs. Windham as creating all the wrong incentives. Mrs. Windham is not like the insureds in *Ruppe v. Auto-Owners*, 329 S.C. 402, 496 S.E.2d 631 (1998) and *Burgess v. Nationwide*, 373 S.C. 37, 644 S.E.2d 40 (2007)—Mrs. Windham does not want anything for which she has not paid. Short of hiring a lawyer to look for holes in her policy or refusing to accept a rental car, she could not have done anything more to protect herself.

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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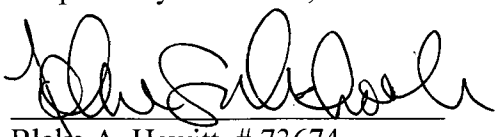
CERTIFICATE OF COMPLIANCE

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,



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