THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS

ROGER E. HENDERSON, CIRCUIT COURT JUDGE

CASE NO. 2014-CP-16-1027

James Lee Williams, Personal Representative
Of the Estate of Mary Frances Williams,

Respondent,

v.

South Carolina Farm Bureau Mutual
Insurance Company,

Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

This case arises out of a collision which occurred at approximately 5:00 p.m. on or about March 17, 2012. (R. p. 1, lines 7-8). Respondent's wife was travelling southbound on Society Hill Road, a/k/a South Carolina Highway 133 ("Society Hill Road"), and her two (2) minor children were passengers in the vehicle. (R. p. 1, lines 8-10). At that same time, Dennis James Shaw ("Shaw") was traveling northbound on Society Hill Road and Stuart Walter Berry ("Berry") was operating an ATV, while intoxicated, and traveling on Watkins Road approaching the intersection of Society Hill Road. (R. p. 1, lines 10-13). When Berry reached the stop sign at the intersection of Watkins Road and Society Hill Road, he failed to stop for the stop sign and entered the roadway in the southbound lane of travel. (R. p. 1, line 13-p. 2, line 2). By turning directly into the path of Mrs. Williams, Berry forced her to swerve to avoid hitting him on his ATV, which caused her to collide with a 1990 Chevrolet truck being operated by Shaw. (R. p. 2, lines 2-4). Mrs. Williams was killed, and her two (2) children were injured in the collision. (R. p. 2, lines 4-5; R. p. 110-19).

Williams thereafter made a claim for uninsured (UM) benefits against his automobile insurer, South Carolina Farm Bureau Mutual Insurance Company ("Appellant"), because the ATV Berry was operating was not insured. (R. p. 2, lines 5-6). Appellant denied the claim, and on December 19, 2014, Williams filed this declaratory judgment action seeking to recover UM benefits under his policy. (R. p. 2, line 7).

The case came before the Honorable Roger Henderson on November 28, 2017,

on the parties' cross motions for summary judgment. (R. p. 1, lines 3-4). The court granted Respondent's motion in an Order dated January 18, 2018. (R. p. 8). Appellant filed a motion for reconsideration on February 8, 2018, and Respondent filed a memorandum in opposition on March 21, 2018. Judge Henderson issued an Order denying Appellant's motion on July 23, 2018, without a hearing. (R. p. 9). Appellant served its Notice of Appeal on August 22, 2018.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. This Court's scope of review is limited to correcting errors of law." *Harleysville Group Ins. Corp. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288, 294 (2017); *Auto-Owners Ins. Co. v. Hamlin*, 368 S.C. 536, 629 S.E.2d 683, 685 (Ct. App. 2006); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574, 578 (2009).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT BASED UPON AN AMBIGUITY IN THE INSURANCE POLICY.

In South Carolina, insurance policies are construed most strongly in favor of coverage and against the insurer who drafted them. *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 245 S.E.2d 598 (1978); *Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188, 1192 (D.S.C. 1982). Further, exclusions in an insurance policy are always construed most strongly against the insurer. *American Credit v. Nationwide*, 663 S.E.2d 492, 378 S.C. 623 (2008).

A. The phrase "designed *primarily* to be used on public roads" is inherently ambiguous.

While there appears to be no South Carolina cases directly on point, numerous state and federal courts around the country have considered the issue of whether an ATV constitutes a "motor vehicle" for insurance purposes, and, particularly, where a motor vehicle is defined by statute or insurance policy as "designed for use on public roads[.]" In fact, the trial court's Order granting summary judgment cites several cases around the country in which courts have held that this phrase in the context of insurance policies is ambiguous and, therefore, have declared judgment in favor of insurance coverage. (R. p. 5-7).

In addition to the cases cited in Judge Henderson's Order, a federal appellate court has come to the identical conclusion as Judge Henderson. In *Boyett v. Redland Ins. Co.*, 741 F.3d 604 (5th Cir. 2014), the Fifth Circuit Court of Appeals considered, *inter alia*, this same language and determined that a forklift was a "motor vehicle" for purposes of uninsured motorist (UM) coverage.

In *Boyett*, a forklift operated on a public highway in North Carolina injured a Louisiana man. 741 F.3d 605. After the plaintiff's automobile insurer denied his claim for UM coverage, he filed suit in Louisiana federal court. Id. The district court determined the forklift was not a motor vehicle for purposes of insurance coverage, citing the language in Louisiana's state statutes defining motor vehicle under the financial responsibility laws. Id. at 606. The Louisiana statute is very similar to South Carolina's statues, defining an insured motor vehicle for insurance purposes as a vehicle "designed for use on public highways and required to be registered in this state[.]" Id. at 611. The definition of uninsured motor vehicle, however, only refers to a motor vehicle without the additional requirement of being "designed for use on public highways". Id.

The Fifth Circuit held that the courts could not presume that the Louisiana legislature intended for the additional requirement attached to the definition of an insured motor vehicle (designed for use on public highway) to apply to an uninsured motor vehicle since the language was specifically omitted. Id. at 612.

Likewise, while the definition of "motor vehicle" contained in South Carolina's Financial Responsibility Act, S.C. Code Ann. 38-77-30(9) (2012), defines motor vehicle as a vehicle "designed for use upon a highway[.]" The definition of "motor vehicle" contained in S.C. Code Ann. 56-1-10(7) (2012) contains no such requirement. The definition of "uninsured motor vehicle" does not specify which definition of motor vehicle should be employed or utilized. This error will be corrected effective November 19, 2018, at which time an amendment to the Financial Responsibility Act will become effective specifically noting that the "motor vehicle" identified in the uninsured motor vehicle definition is specifically as defined in Section 9 of the Act rather than any other definition.

This amendment, however, cannot be applied retroactively.

In addition to noting that the uninsured motor vehicle definition did not contain the additional requirement of being "designed for use on a public highway", the Fifth Circuit also determined that the forklift ***did*** meet the general definition of motor vehicle as set out by the Louisiana legislature, whose definition is nearly identical to South Carolina: "every self-propelled device and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails." Id. at 613. As the Fifth Circuit noted, the fact that the forklift could not be operated *legally* on public highways did not mean the forklift did not constitute a motor vehicle. Id. While Berry may not have been able to operate his ATV *legally* on South Carolina highways and streets such is not dispositive of whether it constituted a motor vehicle.

Another ambiguity in the definition of motor vehicle is created by Appellant's own, inconsistent language and definitions. The policy defines "motor vehicle" as "a self-propelled vehicle or trailer designed for use on public roads." (R. p. 3). In defining "auto", however, the policy states such "means a self-propelled motor vehicle, designed *primarily* to be used on public roads[.]" (R. p. 2). The word "primarily" has now been inserted in an apparent attempt or effort to reduce the scope of covered vehicles. The word "primarily" does not appear in any of the Legislature's definitions of motor vehicle.

Thus, it appears Appellant attempts to improperly utilize a policy definition of motor vehicle that is substantially narrower than South Carolina law. "The General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts, and should prevail." *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 403 S.E.2d 662, 665 (Ct. App. 1990); *Brown v. Martin*, 203 S.C. 84, 88, 26 S.E.2d 317,

318 (1943). Therefore, Appellant's attempt to narrow the definition of "motor vehicle" is improper and unlawful, creating another ambiguity.

Interestingly, neither South Carolina statute nor Appellant's policy specifically exclude an ATV from the definition of motor vehicle, something the Legislature or Appellant could easily have written. In fact, Appellant specifically lists eight (8) separate vehicles which it excludes. *Roberts v. Country Mut. Ins. Co.*, 596 N.E.2d 185, 231 Ill. App. 3d 713 (Ill. App. 1992) speaks directly on this issue.

In *Roberts*, like here, the insurer contended the ATV was not a "motor vehicle" for UIM purposes because the policy had a definition identical to the policy here defining "motor vehicle" as "designed for use principally on public roads." Id. at 185. The Illinois statute defining "motor vehicle," however, is identical to South Carolina's statute – both of which define "motor vehicle" as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, except for vehicles moved solely by human power and motorized wheelchairs." Id. at 186-87 (citing 625 ILCS 5/1-146). In affirming the lower court, which found in favor of UIM coverage, the Illinois Appellate Court noted that "[I]f an ATV was not to be considered a motor vehicle for purposes of the uninsured motorist statute, the legislature could have provided an exclusion". Id. at 187.

The same conclusion was reached in *Harper v. Lumbermens Mut. Ins. Co.*, 572 N.Y.S.2d 195, 174 A.D.2d 1031 (N.Y. App. Div. 1991), in which the New York Supreme Court's Appellate Division, determined and held that where the Legislature did not insert a specific exclusion of ATVs from its statutory definition of motor vehicle, it should presume they are not excluded.

Similarly, the Missouri Court of Appeals used the same logic in *American Family Mut. Ins. Co. v. Peck*, 169 S.W.3d 563 (Mo. 2005), where it held that under the state legislature's definition of motor vehicle, which did not exclude ATVs, the three-wheeled vehicle, even if designed primarily for off-road use, constituted a vehicle and therefore coverage existed.

Likewise, in *Montgomery v. Progressive Advanced Ins. Co.*, 2015 U.S. Dist. LEXIS Civil Action No. 2:14-cv-00231 (E.D. Va. March 6, 2015)[1], the United States District Court for the Eastern District of Virginia first determined that an ATV is a motor vehicle in that it is self-propelled and does not travel on rails. Therefore, an ATV meets the standard definition of a motor vehicle. Id. at *11.

Moving on to the issue of whether or not the ATV is "designed for use primarily on public roads," the court noted that the ATV, like the one in this case, was four-wheeled vehicle, self-propelled, capable of being driven forward or in reverse, had headlamps for night driving, was capable of traveling up to 45 mph, and, according to the ticket issued by law enforcement to Berry, should have been registered with the State. Id. at *14. The court concluded that while the ATV manual, as here, indicated the vehicle was designed for off-road use, "the reality is that the vehicle was equipped to legally operate both on public highways and off-road, and was operated both on and off public highways." Id. The court further found that since the insurer did not specifically exclude ATVs, as here, the policy was ambiguous, and coverage was afforded. Id. at *11. This identical holding was reached in *Porter v. Buck*, 137 F. Supp. 3d 890 (W.D. Va. 2015).

[1] Respondent cites to two (2) out-of-state unpublished opinions, not for their precedential or authoritative value, but the reasoning and analysis used by those courts supporting those decisions.

In *Reed v. Government Employees Insurance Company*, Civil Action No. 4:11-cv-00109-DPJ-FKB (S.D. Miss. June 19, 2012), the Southern District of Mississippi held that where the policy excluded motor vehicles "designed for use principally off public roads", but where the ATV was being used ***on*** a public road at the time of the accident, the exclusion was ambiguous and must be construed against the insurer, and the court determined coverage should apply. Id. at *1 (emphasis added).

Additionally, in this case, despite the manufacturer's "suggestions" to the contrary of whether this vehicle was, in fact, designed for use on public highways (R. p. 125-35), there is evidence in the record suggesting the vehicle had attributes of a vehicle designed to be driven on a public highway. Attached to Appellant's motion for summary judgment were photos of the vehicle which showed head lamps on the vehicle. There is also evidence in the record establishing that the vehicle was, and is, designed to travel at fast speeds. The portion of the manual attached as an exhibit to the Affidavit of Don Miller filed by Appellant specifically refers to such: ***"Practice turning at low speeds before attempting to turn at faster speeds. Do not turn at excessive speeds . . . Never go over the top of a hill at high speed . . . Never do down a hill at high speed."*** (R. p. 120-35) (emphasis added). Furthermore, the vehicle is specifically designed for ***"pulling a trailer[.]"*** Id. (emphasis added).

Thus, while there may be attributes of the vehicle that may make it less safe for use on a public highway, it has substantial attributes of vehicles designed for use on public highways, was being used on a public highway at the time of the collision, and the Court properly considered all evidence before it.

Appellant argues that the Court erroneously conflated the terms "not designed for

use on public roads" (the policy language) with the phrase "capable of being driven" on public highways. This is simply not the case. Rather, the Court analyzed Appellant's choice of words (contained in its own policy) in defining autos as designed "*primarily* to be used on public roads[.]" (R. p. 4) (emphasis added). Being designed to be driven "*primarily*" off public highways is very different that not being designed to ever be driven on a public highway. This was the ambiguity in which the Court relied in Appellant's own definitions, and not a definition the Court created. As clearly stated in the Order Granting Summary Judgment, the term "capable of being driven" on public roads is simply a factor other courts have looked at and considered when trying to determine if a vehicle is designed "primarily" for use off public highways. (R. p. 8).

CONCLUSION

Based upon the foregoing, Respondent Williams respectfully requests the trial court's ruling granting Respondent's Motion for Summary Judgment in his favor be affirmed. Additionally, Respondent Williams would ask that the judgment be affirmed for any other reason appearing in the record of the case.

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CERTIFICATE OF COMPLIANCE

I, William E. Hopkins, Jr., Esquire, counsel for the Respondent, hereby certify that the foregoing Respondent's Final Brief is in compliance with Rule 211(b) of the South Carolina Appellate Court Rules.

William E. Hopkins, Jr.

Pawleys Island, South Carolina
December 27, 2018