

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III
Circuit Court Judge

Case No. 2011-CP-46-00021

State Farm Fire and Casualty Respondents,
Phyllis Paden-Adams and Alonzo Adams. Appellants.

APPELLANTS' FINAL BRIEF

August 7, 2012

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in concluding an insured was not entitled to UIM benefits as a matter of law, despite evidence that the insured's injuries were caused by accident arising from the use or operation of an underinsured motor vehicle?
- II. Did the circuit court err when it ruled, as a matter of law, that an insurance carrier had no obligation to pay UIM benefits to its insured, even though the contractual terms of the policy would provide coverage if the policy were enforced as it was written?
- III. Did the circuit court err when it dismissed an insured's counterclaims for breach of contract and bad faith as a matter of law?

STATEMENT OF FACTS / STATEMENT OF THE CASE

Phyllis Paden-Adams is a long-time resident of York County (R. p. 33, ¶ 22). On October 21, 2009, as she was driving to work, Ms. Adams lost control of her vehicle and struck an embankment after encountering an area of loose gravel that had been left on the roadway several days earlier by an SCDOT "chip seal" crew. *Id.* at ¶ 24. As a result, Ms. Adams' broke her neck, and was rendered quadriplegic. (R. p.34, ¶ 25).

Chip sealing is a road maintenance procedure used by SCDOT to resurface asphalt roads. To complete the procedure, a motor vehicle known as an asphalt distributor or "tack" truck drives along the road, applying a layer of liquid asphalt to the road bed (R. p. 191, ¶ 4). Next, a layer of gravel is spread over the liquid asphalt, and rolled until the gravel is embedded in the asphalt. *Id.* ¶ 3. When applied properly, chip-seal forms a uniform road surface suitable for traffic. *Id.* When applied improperly, however, chip-sealing can leave quantities of loose gravel on the road and create a hazard

to motorists (R. p. 192, ¶ 6). In fact, Ms. Adams reported that it felt as if she was “driving on marbles” just before she lost control of her vehicle. Id. ¶ 9.

Initially, Ms. Adams filed suit against SCDOT. In late 2010, SCDOT paid Ms. Adams the statutory limits available to her under the South Carolina Tort Claims Act in exchange for a covenant not to execute. Ms. Adams then submitted a claim to her automobile insurance carrier, State Farm, seeking additional Underinsured Motorist (UIM) benefits under her own policy.

By the express terms of Ms. Adams’ policy, State Farm agreed to “pay damages for bodily injury or property damages an insured: (1) is legally entitled to collect from the owner of an underinsured motor vehicle; or (2) would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute. The bodily injury or property damage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle” (R. p. 212).

As shown by State Farm’s discovery responses in this action, State Farm first had notice of Ms. Adams’ accident and injuries in October 2009, and had notice of her intention to pursue UIM benefits by March 23, 2010. State Farm Activity Log (R. pp. 270; 277). Between that date and October 29, 2010, State Farm did nothing to investigate Ms. Adams’ accident, or her claim for UIM benefits. State Farm did not interview Ms. Adams or any other witness (R. pp. 249-250, # 6). It did not seek to determine or ascertain the cause of Ms. Adams’ accident. It did not conduct any legal research concerning State Farm’s potential liability for UIM benefits (R. p. 244, # 20). Instead, State Farm relied upon its “general understanding” of South Carolina law, and dismissively rejected Ms. Adams’ claim for benefits, referring Adams’ counsel to the

Policy's definition of "motor vehicle" and stating "the trucks you mention in your letter are not designed for use on public roads." (R. p. 316) On January 5, 2011, State Farm brought this action, seeking a judicial declaration that it had no duty to pay.

On June 16, 2011, State Farm moved for summary judgment, asserting various arguments as to why it should be relieved of its contractual duties to Ms. Adams. (R. p. 317). Of the arguments advanced by State Farm, only one bears on this appeal – State Farm argued that, as a matter of law, Ms. Adams could not recover UIM benefits because no underinsured SCDOT vehicles were physically present on the morning that Ms. Adams lost control of her car and suffered her injuries. Consequently, State Farm argued that the three-pronged test announced in State Farm Mutual Automobile Ins. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998) and Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E.2d 475 (2006) precluded Ms. Adams from recovering UIM benefits as a matter of law.

While Ms. Adams readily acknowledges that no SCDOT motor vehicles were present that fateful morning, the evidence indicates that in carrying out its chip-seal work, SCDOT negligently operated its asphalt distributor truck, leaving a dangerous condition that proximately caused Ms. Adams' injuries 13 days later (R. pp. 352-353; R. p. 193, ¶ 9). Specifically, the undisputed evidence reveals that SCDOT's asphalt distributor truck was improperly operated, so that it applied an insufficient amount of liquid asphalt to the roadway – significantly less than that required by SCDOT's own standards (R. pp. 192-193, ¶¶ 7-8). As a result, the gravel layer did not properly adhere to the roadway, became dislodged, and created the unsafe driving conditions that Ms. Adams encountered days later. Id. ¶ 9.

Initially, the trial court denied State Farm's motion for summary judgment, holding, among other things, that "the subject policy does not restrict coverage to an event coterminous with injury, but extends coverage to injury or damage 'caused by accident.'" (R. p. 7). State Farm moved for reconsideration, and the trial court reversed itself, noting that it was constrained by language in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998), that an underinsured vehicle must be used for transportation "at the time of the injury" in order for underinsured motorists coverage to be found under S.C. Code § 38-77-140 (R. p. 12). While the trial court stated that it believed Aytes "wrongly focuses on the time of the injury, not the time of the tortious act," the court granted summary judgment since no SCDOT vehicles were being used for transportation purposes at the time of Ms. Adams' injury. Id. at 2 and n.1. Judge Hayes recognized that the fact pattern presented in this case has never been addressed by our courts, but noted several cases from Mississippi which found coverage under an identical UIM statute and similar facts. Id. n. 1; *see also* Sep. 2, 2011 Order at 2 ("[I]t is worth noting that a court applying language which mirrors that of our applicable statutory language has extended coverage in a similar setting."). This appeal followed.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial judge. Summary judgment is appropriate only when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact, and that the moving party must prevail as a matter of law. Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011); RULE 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable

inferences must be viewed in the light most favorable to the non-moving party.” Id. (citing Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002)). In order to withstand a motion for summary judgment, the non-moving party is only required to submit a scintilla of evidence. Id. (citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

ARGUMENT

This case raises the novel question of whether an insurer is liable under an underinsured motorist provision for injuries ‘arising out of the ownership, maintenance, or use’ of an underinsured vehicle, where the vehicle’s ‘use’ and resulting injury are separate in time (R. p. 5). South Carolina’s courts have frequently wrestled with vehicular “causal connection” cases over the years, seeking to distinguish between those cases in which a vehicle was an “active accessory” to the plaintiff’s injury, and those in which the vehicle was merely the location of an injury. *See, e.g.*, Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992); Canal Ins. Co. v. Insurance Co. of North America, 315 S.C.1, 4, 431 S.E.2d 577, 579 (1993); State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998); Peagler v. USAA Ins. Co., 368 S.C. 153, 160, 628 S.E.2d 475 (2006). However, our courts have never considered the factual situation presented here - where the alleged negligent operation of a motor vehicle is the direct cause of the plaintiff’s injuries, but where the injurious act and resulting injury are separated by time.

The trial court’s order granting summary judgment to State Farm makes clear that the court’s decision focused upon a single determinative fact – no SCDOT vehicles were being used for transportation at the time Ms. Adams suffered her injuries (R. p. 12.)

Consequently, the trial court concluded as a matter of law, that the three-prong test announced in Aytes and Peagler *required* it to grant judgment in State Farm's favor. Id.

As the trial court seemingly acknowledged in its order, the three-prong test announced in Aytes and applied in Peagler has become corrupted, and no longer serves the cause of justice in this state. Instead, the Aytes/Peagler test, which focuses artificially on the instant an injury is suffered, has become a convenient "escape clause" for insurance carriers like State Farm to avoid contractual obligations to their insureds.

Neither Aytes nor Peagler dealt with facts similar to those presented by this case. Consequently, those cases do not preclude a finding of coverage under the Adams' policy. However, if this court is constrained to follow Aytes and Peagler as *stare decisis*, the Adams urge this court to reconsider the value of those cases under the facts presented by this case, and to reverse the trial court's grant of summary judgment.

I. The trial court erred in granting summary judgment to State Farm because it focused upon the instant of Ms. Adams' injury, and not upon SCDOT's operation of underinsured motor vehicles to cause accidental injury.

This case highlights the harsh consequences that can result when trial courts are required to apply artificial "bright-line" tests to questions of insurance coverage. Without question, Ms. Adams presented evidence that she suffered catastrophic personal injuries as a result of SCDOT's negligent operation of one or more underinsured motor vehicles (R. p. 16). However, because those vehicles were not still in operation at the instant Ms. Adams was injured, the trial court concluded that existing South Carolina law precludes Ms. Adams from recovering underinsured motorist insurance benefits for her injuries (R. p. 12). In so ruling, the trial court deprived Ms. Adams of insurance benefits that she had purchased, paid for, and was contractually entitled to recover.

State Farm moved for summary judgment because no SCDOT motor vehicles were being used for transportation purposes “at the time of [Ms. Adams’] injury.” (R. p. 111). Initially, the trial court denied State Farm’s motion, concluding that there were issues which made summary judgment improper (R. p. 7). On reconsideration, however, the trial court felt constrained to apply the “bright line” test of Aytes and Peagler, even though it expressed serious concern with the logic of that test (R. p. 12). The trial court’s application of Aytes and Peagler to the facts of this case artificially deprives Ms. Adams of her insurance benefits.

By its express terms, Ms. Adams’ policy entitles her to UIM benefits for injuries “caused by accident arising out of the operation or ownership of [an] underinsured motor vehicle.” (R. p. 212). Nowhere does the policy drafted by State Farm require that an underinsured motor vehicle be “used for transportation at the time of injury” to trigger coverage. Likewise, South Carolina’s UIM statute provides that any automobile insurance policy issued in this state must insure “against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use” of an underinsured motor vehicle. S.C. Code Ann. § 38-77-140 (Law. Co-op. 2002). The statute contains no requirement that underinsured motor vehicles must be used for transportation “at the time of injury” to trigger coverage. That requirement has been grafted onto the statute by the courts. However, when the cases interpreting South Carolina’s UIM statute are reviewed in context, it is easy to see how a requirement that may have once made sense in some situations has become corrupted and overly restrictive.

A. *South Carolina's insurance jurisprudence:
A shifting standard*

The overwhelming majority of South Carolina cases considering whether an injury arose out of the “ownership, maintenance or use” of a motor vehicle involve intentional assaults, not accidents. See Peagler v. USAA Ins. Co., 368 S.C. 153, 160, 628 S.E.2d 475, 478 n. 3 (2006)(noting that, with one exception, all South Carolina cases dealing with issue arose from intentional assaults). Over time, South Carolina’s courts developed a two-pronged test to determine whether an injury arose out of the “ownership, maintenance or use” of an insured (or uninsured) automobile. First, the “party seeking coverage must establish a causal connection between the vehicle and the injury.” State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)(citing Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992)). Second, “there must exist no act of independent significance breaking the causal link” between the vehicle and resulting injury. Id. In Canal Insurance Co. v. Insurance Co. of North America, South Carolina’s Supreme Court added a third requirement – to trigger coverage, the vehicle must have been used for transportation “at the time of the accident.” 315 S.C.1, 4, 431 S.E.2d 577, 579 (1993).

In State Farm Automobile Ins. Co. v. Aytes, that same three-pronged test was applied to determine whether coverage was available for injuries arising from an intentional “assault.” 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). As Canal and Aytes made clear, courts determining coverage questions must focus on the manner in which a vehicle was used at the time of the injury-causing act. “No distinction is made as to

whether the injury resulted from a negligent, reckless, or intentional act.” Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994).

Over time, reported South Carolina cases considering the availability of insurance coverage began replacing the words “assault” and “accident” with the word “injury.” *See, e.g., Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159-160, 628 S.E.2d 475, 478 (2006)(citing the third prong of the Aytes test as “whether the vehicle was being used for transportation purposes at the time of the *injury*.”). Thus, a judicially-developed test that initially focused on a causal *act* (i.e. – an accident or assault) now apparently focuses on the *result* of that act (an injury).

To date, the distinction between an act and an injury in South Carolina’s reported decisions has been relatively inconsequential - in every reported case that considered whether injuries arose from the “use, operation or maintenance” of a motor vehicle, a mere instant in time separated causative act and resulting injury. The laws of physics simply will not allow a bullet or a bottle thrown from a moving car to strike its target at some distant point in the future. In cases like Ms. Adams’, however, the distinction between injurious “accident” and resulting “injury” could not be more critical. Ms. Adams should not be artificially deprived of insurance benefits simply because there was a delay between the “use or operation” of a vehicle that caused her injuries and her resulting injuries. The test announced most recently by South Carolina’s Supreme Court in Peagler simply does not work in all cases, and insulates insurance carriers from liability that our laws would impose upon a tortfeasor.

South Carolina’s courts have regularly found liability where a defendant’s negligent conduct creates a dangerous condition that later causes injury to another.

Furthermore, South Carolina's UIM statute requires that Ms. Adams' policy *must* insure her "against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use" of an underinsured motor vehicle. S.C. Code Ann. § 38-77-140 (Law. Co-op. 2002). By limiting coverage to those instances where an underinsured vehicle is operated for transportation purposes "*at the time of the injury,*" South Carolina's existing case law imposes artificial limitations of temporal and physical proximity that neither Ms. Adams' policy nor the UIM Statute ever contemplated. The absurd result of this interpretation is that, had SCDOT's crew still been working when Ms. Adams was injured, coverage (but not liability) would depend on whether Ms. Adams was injured while the asphalt distributor truck was being "used for transportation purposes." If, for example, the truck was stopped for the driver's lunch break or to determine why the truck was not applying asphalt at an appropriate rate, Aytes and Peagler would find no coverage.

It makes little sense that SCDOT could be liable to Ms. Adams for injuries resulting from its negligent operation of motor vehicles, but that State Farm could avoid paying Ms. Adams UIM benefits for those same injuries. It makes even less sense that State Farm can avoid liability depending upon when Ms. Adams encountered the hazardous condition created by SCDOT's negligent operation of a motor vehicle. South Carolina's existing insurance jurisprudence simply does not contemplate this set of facts, and when these facts are forced into the language of Aytes and Peagler, it provides insurers like State Farm a loophole that should be closed.

B. A More Appropriate Test where a negligent act does not instantly cause injury

As the trial court seemingly recognized in its orders, the test expressed in Aytes and Peagler is particularly problematic in cases like this one. See Sep. 2, 2011 Order at 2 (R. p. 5); Oct. 24, 2011 Order at 2, n.1 (R. p. 12). A much more reasoned approach was followed by Mississippi's Supreme Court in Jackson v. Daley, 739 So. 2d 1031 (Miss. 1999). In that case, Mississippi's Supreme Court recognized that where the negligent operation of a motor vehicle set in motion a foreseeable chain of events that later caused injury to another, the resulting injuries arose from the "ownership, maintenance or use" of the negligently operated vehicle. As that court reasoned, "where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use and operation until broken by [an intervening event] . . . and until an [intervening] event . . . transpires the liability under the policy exists." Jackson v. Daley, 739 So. 2d 1031, 1042 (Miss. 1999).

Here, it is undisputed that SCDOT used motor vehicles (as defined by State Farm's policy) to carry out a chip-sealing project on Craig Road. Those vehicles were used by SCDOT in their intended (and insured) manner, and those vehicles were negligently operated by SCDOT to create a "dangerous situation" that caused Ms. Adams to suffer severe personal injuries when she later encountered it. The "accident" that gave rise to Ms. Adams' injuries occurred when SCDOT negligently operated its motor vehicles to chip seal Craig Road on October 8, 2010. Clearly those vehicles were present at the time of "the accident," even though they were no longer present when Ms. Adams suffered her injuries. Ms. Adams' claim for benefits satisfies the third prong of the Aytes

analysis. At the very least, a question of fact exists as to whether SCDOT's vehicles were being used for transportation "at the time of the 'negligent, reckless, or intentional act'" that gave rise to Ms. Adams' injuries. For that reason, the trial court should have denied State Farm's motion for summary judgment.

II. In granting summary judgment to State Farm, the trial court focused too narrowly upon cases interpreting South Carolina's UIM statute, and did not fully consider whether Ms. Adams is entitled to coverage under the contractual terms of her policy.

The trial court's order granting summary judgment to State Farm considers only whether Ms. Adams might be entitled to "underinsured motorist coverage under § 38-77-140." (R. p. 12). The court did not consider whether the provisions of Ms. Adams' policy, in and of themselves, might entitle her to benefits.

By its express terms, Ms. Adams' policy obligates State Farm to "pay damages for bodily injury or property damages an insured: (1) is legally entitled to collect from the owner of an underinsured motor vehicle; or (2) would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute. The bodily injury or property damage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle." (R. p. 212). The policy contains no limitations regarding the temporal proximity between "operation or ownership" of an underinsured motor vehicle and the injury-causing "accident." Nor does the policy require that an underinsured motor vehicle be "used for transportation at the time of injury" to trigger coverage.

Courts must enforce insurance contracts as they are written and have "no authority to torture the meaning of the policy language to extend or defeat coverage that was never intended by the parties." Diamond State Ins. Co. v. Homestead Indus., Inc.,

318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). Furthermore, any ambiguities in a policy must be resolved strongly against the insurer and liberally in favor of coverage. Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 309 S.C. 141, 420 S.E.2d 511 (Ct.App. 1992).

The SCDOT vehicles used to carry out the chip seal project on Craig Road fall squarely within the policy's definition of underinsured motor vehicles. Furthermore, there is evidence in the record by which a reasonable juror could find that Ms. Adams' accident and resulting injuries were "caused by accident arising out of the operation or ownership" of SCDOT's vehicles. In granting summary judgment to State Farm, the trial court focused too narrowly upon cases interpreting South Carolina's UIM statute and did not adequately consider the policy's provisions under general principles of contract construction. Because there are sufficient facts in the record to support Ms. Adams' claim for UIM benefits under the contractual terms of her policy, the trial court's grant of summary judgment must be reversed.

III. Because the trial court improperly granted summary judgment as to State Farm's claim for declaratory judgment, the trial court's grant of summary judgment on Adam's counterclaims should also be reversed.

The circuit court concluded, as a matter of law, the Adams' counterclaims for bad faith and breach of contract could not proceed if State Farm had no duty to pay benefits to Ms. Adams under the terms of her policy. However, it is well settled that "an insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002)(citing Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 473 S.E.2d 52

(1996)). Furthermore, an insurer's failure to properly interpret its own policy does not constitute reasonable grounds for its failure to pay a claim under that policy. Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 452, 450 S.E.2d 582, 586 (1994) (citing Futrell v. Premiere Life Ins., 526 So.2d 1382 (La.Ct.App.1988)).

There was ample evidence in the record that State Farm improperly interpreted its own policy and did virtually nothing to investigate Ms. Adams' claim until well over a year after she was injured. (R. pp. 270; 277); (R. pp. 249-250); (R. p. 237; 244); (R. p. 316). Because there were genuine issues of material fact presented as to whether the Adams were entitled to UIM benefits, and considerable evidence that State Farm did little or nothing to investigate the Adams' claim before filing this action, the circuit court should not have granted summary judgment to State Farm on the Adams' counterclaims for breach of contract and bad faith.

CONCLUSION

As the Circuit Court recognized, the issues raised in this lawsuit are novel issues (R. p. 5). South Carolina's courts have never considered whether an insurer must pay underinsured motorist benefits for injuries 'arising out of the ownership, maintenance, or use' of an underinsured vehicle, where the underinsured vehicle's 'use or operation' and the resulting injury are separate in time. Existing South Carolina case law is simply inapplicable, yet it is being used by insurers like State Farm to avoid paying legitimate underinsured motorist benefits to insureds like Ms. Adams. Questions of UIM coverage should not turn on such artificial considerations as whether an underinsured vehicle is being used for transportation at the instant an injury is suffered. "Where a dangerous situation causing injury is one which arose out of or had its source in the use or

operation” of an underinsured motor vehicle, the injured party should be covered for her loss. See Jackson v. Daley, 739 So. 2d 1031, 1042 (Miss. 1999). This court should unequivocally announce that Aytes and Peagler were never intended to allow State Farm to avoid paying UIM benefits to Ms. Adams, and should reverse the circuit court’s grant of summary judgment.

August 6, 2012

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State Farm Fire and Casualty Respondents,
Phyllis Paden-Adams and Alonzo Adams. Appellants.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens & Ballou, LLC certifies that the Appellants' Final Brief was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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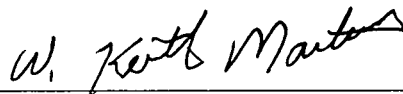
vs.

Phyllis Paden-Adams and Alonzo Adams. Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).

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