THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-1022

Robin E. Otterbacher, ... Appellant,

v.

Jeremy and Tamara Snyder, individually and as guardians and parents of Blaze Kendall Snyder, Blaze Kendall Snyder individually, Selective Insurance Company of America and Auto-Owners Insurance Company, ... Respondents.

BRIEF OF RESPONDENT SELECTIVE INSURANCE COMPANY OF AMERICA

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Selective Insurance Company of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF THE CASE

The Appellant Robin E. Otterbacher commenced this declaratory judgment action to determine, in part, whether the Respondent Selective Insurance Company of America owes coverage to Jeremy Snyder, Tamara Snyder, and/or Blaze Snyder for injuries Otterbacher is alleged to have sustained in a November 13, 2010 motor vehicle accident. At the time of the accident, Blaze Snyder, the minor child of Jeremy and Tamara Snyder, was operating a 2000 Chevrolet truck, VIN 1GCGC34R9YR194762, with a learner's permit. His father, Jeremy Snyder, was also in the vehicle. (R. 167-168). The Snyders were driving to Jeremy Snyder's place of employment -- Columbia Commercial Tire a/k/a Lugoff Tire Company. (R. 171).

Selective Insurance Company issued a Personal Auto Policy to the named insureds, Jeremy Snyder and Tamara Snyder, bearing Policy Number F-5127609, which was in effect at the time of the November 13, 2010 motor vehicle accident. (R. 118). It is undisputed that the 2000 Chevrolet truck was not owned by Jeremy Snyder, Tamara Snyder, or Blaze Snyder. Instead, the truck was owned by Jeremy Snyder's employer, Columbia Commercial Tire a/k/a Lugoff Tire Company. (R. 169). It is also undisputed that the 2000 Chevrolet truck is not listed as a "covered auto" on the declarations of the Selective policy. (R. 118).

Selective Insurance Company denied coverage for the November 13, 2010 motor vehicle accident. Selective determined that Otterbacher's claim is excluded by Exclusion B.2, which provides:

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> 2. Any vehicle, other than "your covered auto," which is
>
> a. Owned by you; or
>
> b. Furnished or available for your regular use.

(R. 125). Selective specifically denied coverage for Otterbacher's claim against the Snyders because the vehicle involved in the accident was not a "covered auto" as defined by the Personal Auto Policy and because that vehicle was furnished or available for Jeremy Snyder's regular use.

The term "you" is defined by the policy as referring to the named insured and the spouse of the named insured. (R. 122). As indicated, the named insureds listed on the declaration pages are Jeremy and Tamara Snyder. (R. 118). Thus, "you" for this policy refer to Jeremy and Tamara Snyder only. The "covered autos" under the policy are a 1995 Chevrolet pick-up, a 1998 Isuzu Trooper, and a 2004 GMC Sierra. (R. 118).

The vehicle involved in the November 13, 2010 accident was a 2000 Chevrolet truck owned by Columbia Commercial Tire a/k/a Lugoff Tire Company.

That vehicle is not listed as a "covered auto" on the declaration pages. (R. 118). A company truck, as Jeremy Snyder testified, was furnished for his regular use. He was always provided with a company vehicle although the vehicles would change. (R. 169-170). Because the company truck was furnished or available for Mr. Snyder's regular use, Selective took the position that no coverage is provided under the Personal Auto Policy issued by Selective on the Snyders' personal vehicles.

After Selective denied coverage for the November 13, 2010 accident, Otterbacher commenced this declaratory judgment action against both Selective and Auto-Owners Insurance Company. Auto-Owners provided commercial auto coverage on the 2000 Chevrolet truck involved in the accident. Auto-Owners denied coverage on the basis that Blaze Snyder was not a permissive user.

After the completion of discovery, the parties filed cross-motions for summary judgment, and a hearing was held before Circuit Court Judge Alison Renee Lee on December 13, 2012. By order filed March 26, 2013, Judge Lee granted Selective's motion for summary judgment and issued the following declaratory judgment: "Selective Insurance Company does not owe a duty to defend nor a duty to indemnify to Jeremy Snyder, Tamara Snyder, and/or Blaze Kendall Snyder with respect to any claims arising from the November 13, 2010 motor vehicle accident which is the subject of this action including any claims made by the Plaintiff." (R. 7). Judge Lee denied Otterbacher's motion for

summary judgment as well. (R. 7). In a separate order, Judge Lee also granted summary judgment to Auto-Owners after Otterbacher conceded the permissive use issue at the motion hearing. (R. 9-10).

Otterbacher did not file a motion pursuant to Rule 59(e), SCRCP. Instead, she proceeded to file an appeal to this Court.

ARGUMENTS

In the Circuit Court, Judge Alison Renee Lee granted summary judgment for the Respondent Selective Insurance Company of America finding that coverage was excluded by Exclusion B.2 because the company truck involved in the November 13, 2010 motor vehicle accident was furnished or available for Jeremy Snyder's regular use. (R. 6). On appeal, the Appellant Robin Otterbacher makes two arguments. First, Otterbacher argues that the "furnished or available for the regular use" exclusion is ambiguous and specifically that the term "regular" is ambiguous. Second, Otterbacher argues that there is a genuine issue of material fact concerning whether the vehicle was furnished or available to Jeremy Snyder for his regular use. Each issue is discussed below.[1]

---

[1] In the Circuit Court, Otterbacher focused her arguments on Exclusion B.3 which Judge Lee found to be inapplicable. Judge Lee concluded that "Exclusion B.3 is not applicable because the 2000 Chevrolet truck was not furnished to a 'family member' but to the named insured himself (Jeremy Snyder)." (R. 6-7). Otterbacher has not appealed that ruling and makes no arguments on appeal based on Exclusion B.3. In addition, in the Circuit Court, Otterbacher argued that the 2000 Chevrolet truck was a "temporary substitute" vehicle based on the definition of "your covered auto" set forth in Paragraph J.4 of the "Definitions" section of the Selective policy. Judge Lee concluded that "the vehicle involved in the accident was not a 'temporary substitute' that is covered under the Selective policy, and as a result, Paragraph J.4 of the policy has no applicability." (R. 7). Otterbacher has not appealed that ruling and makes no argument on appeal that the 2000 Chevrolet truck was a "temporary substitute" vehicle.

I. The "furnished or available for the regular use" exclusion at issue is not ambiguous as previously determined by the South Carolina Supreme Court.

Otterbacher contends on appeal that the "furnished or available for the regular use" exclusion is ambiguous and should be construed in favor of coverage. She specifically complains that the term "regular" is undefined in the policy.

This is an issue raised for the first time on appeal and therefore is not preserved for appellate review.[2] Certainly, Judge Lee did not address in her order whether the term "regular" is ambiguous and should be construed in favor of coverage, and Otterbacher did not file a Rule 59(e) motion to obtain a ruling on that issue. The Supreme Court and this Court have repeatedly explained that an appellant cannot raise an issue on appeal that was not first raised to *and* decided by the lower court. In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C.

---

[2] This issue was not raised in the memorandum of law submitted by Otterbacher to the Circuit Court. (R. 92-111).

406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original). Thus, any issues regarding ambiguity of the exclusion as a whole or of the term "regular" are not preserved for appellate review.

Nonetheless, even if the issue were preserved for appeal, it has absolutely no merit. As Judge Lee recognized, the appellate courts of this State have upheld similar exclusions barring coverage for automobiles not listed on the policy but which are furnished or available for the regular use of an insured. *See e.g., Willis v. Fidelity & Casualty Co. of New York*, 253 S.C. 91, 169 S.E.2d 282 (1969); *Tollison v. Reaves*, 277 S.C. 443, 289 S.E.2d 163 (1982). In *Tollison*, the Supreme Court explained the purpose of such an exclusion:

> The purpose of automobile policy provisions excluding coverage for injuries sustained while occupying an automobile "furnished for the regular use of" an insured or relative is clear. It is to afford coverage for the infrequent and casual use of vehicles other than the one described in the policy, but *not to cover the insured with respect to his use of another vehicle which he frequently uses or has the opportunity to use.* It is to protect the insurer from a situation whereby an insured could purchase a policy covering one automobile and be covered without qualification as to all automobiles available for his use.

289 S.E.2d at 165. (Emphasis added).

More importantly, in the case of *Grantham v. United States Fidelity & Guaranty Co.*, 245 S.C. 144, 139 S.E.2d 744 (1964), which was not cited by

Otterbacher in her brief, the Supreme Court directly addressed the issue now raised by Otterbacher and concluded that "the meaning of the policy provision is unambiguous." 139 S.E.2d at 746. The Supreme Court was analyzing the "furnished for regular use" language in an exclusionary clause. The Supreme Court noted that the weight of the authority on the issue from other jurisdictions found "such policy provisions are generally held to be unambiguous." *Id.* Citing an Illinois decision, the Supreme Court offered the following explanation:

> We are unable to agree with plaintiff's contention that there is an uncertainty as to the meaning of the language of the policy. It plainly states that an insured, injured while riding in any other car furnished for the "regular use" of such person, shall not be entitled to certain benefits payable under the policy. Taken in its plain, ordinary sense, this language can only mean that the insured is not covered by the policy on the insured vehicle if he is injured in some other car which he can regularly use. The policy does not state that the exclusion applies only in case the other car is used on any particular number of occasions. On the contrary, an insured, upon reading the same, could readily understand that the protection thereunder did not extend to every car in which he might be riding, but only to those which he did not have the right to use regularly. The factor determining whether the car used comes within the exclusion clause is whether such car is furnished for the regular use of the insured. In such situation, the rule that ambiguous language in an insurance contract shall be construed in favor of the insured has no application.

Id., *citing Harter v. Country Mutual Ins. Co.*, 20 Ill.App.2d 413, 156 N.E.2d 243, 247 (1959). The Supreme Court thus concluded that the "furnished for regular

use" language is unambiguous as a matter of law. Notably, Otterbacher has not cited any decision that supports her position that the exclusion is ambiguous. She cites no contra authority to *Grantham* and makes no argument that *Grantham* was wrongly decided or is not binding precedent on this issue.

II. The record establishes without dispute that the 2000 Chevrolet truck involved in the motor vehicle accident, as one of a pool or fleet of company vehicles, was furnished or available for the regular use of Jeremy Snyder, and as a result, there is no genuine issue of material fact that precludes the summary judgment entered in favor of Selective Insurance Company.

Otterbacher argues that there is a genuine issue of material fact concerning whether the vehicle was furnished or available to Jeremy Snyder for his regular use thereby precluding summary judgment for Selective Insurance Company.[3] Otterbacher argues that the 2000 Chevrolet truck was not furnished or available for the regular use of Jeremy Snyder based upon the deposition testimony of Danny

---

[3] While Otterbacher requests that this Court reverse the summary judgment in Selective's favor, she also asks this Court to "hold as a matter of law in favor of coverage." *See*, Appellant's Brief, p. 20. If Otterbacher is asking this Court to grant her cross motion for summary judgment, which was denied by Judge Lee, such relief is precluded for two principal reasons. First, it is well settled that an order denying summary judgment is never appealable. In *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003), the South Carolina Supreme Court held that the denial of a motion for summary judgment is never immediately appealable nor even appealable after final judgment. 580 S.E.2d at 443. *See also*, *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). Therefore, to the extent that Otterbacher is appealing the denial of her motion for summary judgment, that appeal should be dismissed. Second, if Otterbacher is correct that a genuine issue of material fact precludes summary judgment for Selective (which is denied), then that same genuine issue of material fact precludes judgment as a matter of law for her as well.

Lyell, the owner of Columbia Commercial Tire a/k/a Lugoff Tire Company.

In his testimony, Lyell believed that the truck involved in the accident was not permanently assigned to Jeremy Snyder but rather was a truck available for use by various employees to make deliveries, i.e. the so-called "route truck." Although he was not certain, Lyell testified that the 2000 Chevrolet truck may have been temporarily assigned to Snyder, but he admittedly could not dispute Snyder's testimony that Snyder had been driving that vehicle for six months. (R. 179, 193-197). Lyell, nonetheless, was certain that Jeremy Snyder was assigned a company vehicle at all times during his employment. (R. 193-194).

In his deposition, Jeremy Snyder testified that the 2000 Chevrolet truck involved in the accident was furnished or available for his regular use by his employer. Snyder testified that the truck was assigned to him by the company and that he had been driving that particular vehicle for five or six months. (R. 169-170). He further testified that throughout his employment he was provided a company truck that he was allowed to take home. His job included providing 24 hour road service, and as a result, it was common for him to leave on service calls from his home. (R. 169-170). Jeremy Snyder further testified as follows:

> Q. So am I correct then, Mr. Snyder, that that 2000 Chevrolet vehicle was furnished to you by the company for your regular use?
>
> A. Yes, sir.

Q. That's a correct statement?

A. Yes, sir, for company use.

Q. For company use?

A. Right.

Q. But whenever you –

A. Not to go to the grocery store, not to go to the mall, not to go to the movies, for business use.

Q. But you used it on a regular basis for your business purposes?

A. Yes, sir.

Q. And that included going home at night from the office?

A. Yes, sir.

Q. And going to work?

A. Yes, sir.

Q. And making calls?

A. Making calls, delivering product. I do a lot of -- of -- my job's not just to sit behind a desk. I deliver tires and parts to all the satellite units. I deliver -- get out of bed at three in the morning and drive to the store, get a tire out for one of the guys here, one of the units here in Columbia, there or at Lugoff, that doesn't have a tire on their truck that they need. I gather parts, deliver. I mean, I do a lot of different things, and I still run road calls.

(R. 172-173).

While it may not necessarily be clear from the deposition testimony whether the vehicle involved in the accident was Snyder's assigned vehicle or the "route truck" available to various employees, that dispute is not material and does not preclude summary judgment. At best, Otterbacher argues that it is disputed whether the company truck actually involved in the accident was permanently assigned to Jeremy Snyder. Yet, that disputed fact (if indeed in dispute) is not a material fact. This Court has explained that "[i]n determining what constitutes a general [sic] issue as to any material fact for purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331, 332 (Ct. App. 1988). *See also, Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 701 S.E.2d 776, 779 (Ct. App. 2010). Whether the company truck actually involved in the accident was assigned to Snyder does not affect the result of the action and hence is *not* a material fact because it is undisputed that Snyder was always assigned some company vehicle.

That is entirely consistent with Danny Lyell's testimony and is not in dispute. Lyell confirmed that Jeremy Snyder was always assigned some company vehicle. He also confirmed that Snyder was authorized to drive company vehicles including the "route truck" which he also used on a regular basis. These points are

undisputed based on the following testimony from Lyell's deposition:

Q. As I understand your testimony, Mr. Snyder clearly would have been assigned a company vehicle during his employment with your company; is that right?

A. Yes.

Q. And if it wasn't the 2000 Chevrolet truck, he was assigned some vehicle?

A. Yes, uh-huh.

Q. And that vehicle was assigned to him for his regular use for company purposes; is that right?

A. It was -- it's assigned for, you know, company business, mostly service truck -- service calls or deliveries.

Q. And as far as the route truck, as you were referring to it, that would have been available as well to Jeremy Snyder in order to use to make deliveries, correct?

A. Correct, yes.

Q. And is it your testimony that he would regularly use that vehicle to make deliveries?

A. Not daily, but usually on a regular basis.

(R. 193-194).

Q. And so then that route truck -- again, using that terminology -- would be a vehicle that was available for him to use when he needed it?

A. Yes, it -- it was, uh-huh.

Q. So it wasn't unusual for him to be seen driving that vehicle?

A. No, it was not.

(R. 195).

Therefore, as Judge Lee determined, "[g]iven Mr. Lyell's and Mr. Snyder's testimony, it is undisputed that Jeremy Snyder was always assigned a company vehicle (although the exact vehicle could change), and that a company vehicle was involved in the accident." (R. 6). Importantly, Otterbacher does not challenge that undisputed finding on appeal, and it is that undisputed finding that fully supports the summary judgment in favor of Selective.

Quite simply, because it is undisputed that Jeremy Snyder was always assigned some company vehicle, Exclusion B.2 applied and excluded coverage for any company vehicle that Snyder may have been using. The possibility that Snyder could use a number of vehicles from the company fleet does not change that analysis. In reaching that conclusion, Judge Lee cited several cases from other jurisdictions addressing similar issues involving fleet or pool vehicles. (R. 6). In the Circuit Court, Otterbacher never refuted those cases, and on appeal, she makes no mention of them in her brief.

The case law addressing the application of a "furnished or available for the regular use" exclusion to the regular use of fleet or pool vehicles is well

established. For instance, in *Hall v. Southern Farm Bureau Casualty. Ins. Co.*, 670 S.W.2d 775 (Tex. App. 1984), the court held as follows:

> If an employee regularly drives a vehicle in his or her employment, and if the driving of such a motor vehicle constitutes the principal duty of the employment, and if a number of vehicles in a pool are available to that employee, subject either to random assignment or assignment based upon the nature of the job involved, or selection by the employee, then all vehicles in the pool are considered as a matter of law to be vehicles furnished for the employee's regular use.

670 S.W.2d at 777. Similarly, in *Galvin v. Amica Mut. Ins. Co.*, 11 Mass. App. Ct. 457, 417 N.E.2d 34 (1981), the court explained that "all motor vehicles in a pool, any one of which is available to the person insured, [are treated] as within the regular use exclusion." 417 N.E.2d at 36. The court found that "an automobile will be excluded under such policy provisions although it is only one of a group of automobiles from which an automobile is regularly furnished to the named insured by his employer." 417 N.E.2d at 37. *See also*, *Ryan v. State Farm Mut. Automobile Ins. Co.*, 397 Ill. App. 3d 48, 921 N.E.2d 458, 461 (2009) (recognizing "cases involving similar fact situations and policy language have been addressed by a number of other jurisdictions, which have held that a vehicle is available for the insured's regular use if it is one of a pool of vehicles and the insured regularly uses vehicles from that pool").

The case of *Peyton v. Bseis*, 680 So. 2d 81 (La. App. 1996), is particularly

instructive. In that case, the plaintiff made similar arguments as Otterbacher in the case at bar. The plaintiff, who was a New Orleans police officer, argued that he did not have "regular use" of the vehicle actually involved in the accident because it was not permanently assigned to him. Yet, the evidence showed that the vehicle involved in the accident was one of a pool of vehicles available to the plaintiff, and as a result, the court found that the "furnished for regular use" policy exclusion applied. *Accord, Drollinger v. Safeco Ins. Co. of America*, 59 Wash. App. 383, 797 P.2d 540 (1990).

In sum, the foregoing authority from other jurisdictions fully supports Judge Lee's ultimate ruling that the 2000 Chevrolet truck, even if it was not specifically assigned or permanently assigned to Jeremy Snyder but rather was the "route truck," was still one of a pool or fleet of company vehicles that were furnished or available for his regular use as part of his employment. As mentioned, Otterbacher does not challenge on appeal or even attempt to refute any of the cases relied on by Judge Lee. Moreover, there is not a genuine issue of material fact that precludes summary judgment entered in favor of Selective. The Court is respectfully requested to affirm Judge Lee's ruling that Selective Insurance Company does not owe a duty to defend nor a duty to indemnify to Jeremy Snyder, Tamara Snyder, and/or Blaze Kendall Snyder with respect to any claims arising from the November

13, 2010 motor vehicle accident which is the subject of this action including any claims made by the Plaintiff.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Selective Insurance Company of America respectfully requests that this Court affirm the order of Circuit Court Judge Alison Renee Lee granting summary judgment to the Respondent.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Selective Insurance Company of America

Columbia, South Carolina

October 21, 2013

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Selective Insurance Company of America certifies that the Final Brief of Respondent Selective Insurance Company of America complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Selective Insurance Company of America

Columbia, South Carolina

October 21, 2013

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Selective Insurance Company of America certifies that the Final Brief of Respondent Selective Insurance Company of America complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Selective Insurance Company of America

Columbia, South Carolina

October 21, 2013