STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN April Brooke Cox, as Personal Representative of the Estate of Elijah Cox, deceased, Plaintiff vs. State Farm Mutual Automobile Insurance Company and Glen Bauer, Jr., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO.: 2018-CP-22-00869 FINAL ORDER RECEIVED JAN 08 2020 SC Court of Appeals

This matter came before the Court on cross-motions for summary judgment and stipulated facts. The parties agree the case is ripe for disposition and that the Court should grant one of the motions and deny the other motion. The basic issue is whether the Estate of Elijah Cox may collect from more than one underinsured motorist policies issued by State Farm to his grandparents when a family vehicle was not involved in the fatal accident.

As provided by the stipulation of the parties, on June 11, 2018, Elijah Cox ("Cox") was a passenger in and occupying a 2007 Chevrolet pickup operated by L.L. (a minor who is identified only by his initials) and owned by Kathy Lambert Powell. The Chevrolet pickup operated by L.L. was not owned by Cox or any of his resident relatives. While Cox was a passenger in said vehicle, L.L. was involved in a collision in Georgetown County, South Carolina (the "Collision"). The Collision was directly and proximately caused by L.L.'s negligence in the operation of the Chevrolet pickup. As a direct and proximate result of the

1
MHC

Collision, Cox sustained personal injuries resulting in his death. Plaintiff was duly appointed as personal representative for the estate of Cox. At the time of the Collision, the vehicle L.L. was operating was insured by Travelers Property Casualty Insurance Company ("Travelers"). The policy issued by Travelers covering L.L. at the time of the Collision provided bodily injury ("BI") liability coverage with limits of $25,000 per person. The policy issued by Travelers covering L.L. at the time of the Collision also provided underinsured motorists bodily injury ("UIMBI") coverage, each with limits of $25,000 per person. As a result of Plaintiff's claim, Travelers, on behalf of its insured driver, L.L., agreed to tender the $25,000 limits of its BI coverage and the $25,000 limits of its UIMBI coverage to Plaintiff.

Prior to his death, Cox resided in the same household with his grandparents, Glen Bauer, Jr. ("Glen") and Ernestine Bauer ("Ernestine"), who were married to one another and resided together. No member of the Cox-Bauer household owned any vehicle involved in the Collision. At the time of the Collision, Defendant State Farm Mutual Automobile Insurance Company ("State Farm") had in effect a policy insuring a 2002 GMC K1500 (the "GMC Policy"), issued to Ernestine as named insured. The GMC Policy provided UIMBI coverage with limits of $50,000 per person. State Farm has tendered to Plaintiff $50,000 in UIMBI coverage under the GMC Policy.

At the time of the Collision, State Farm also had in effect a policy insuring a 2009 Nissan Frontier (the "Nissan Frontier Policy"), issued to Glen as named insured. The Nissan Frontier Policy provided UIMBI coverage with limits of $50,000 per person. At the time of the Collision, State Farm also had in effect a policy insuring a 2003 Nissan Crew Cab (the "Nissan Crew Cab Policy"), issued to Glen as named insured. The Nissan Crew Cab Policy provided UIMBI coverage with limits of $50,000 per person; however, Plaintiff is making no claim for

BRC

UIMBI coverage under the Nissan Crew Cab Policy for Cox's wrongful death and conscious pain and suffering as a result of the Collision.[1]

The parties agree the damages proximately resulting from Cox's wrongful death and conscious pain and suffering as a result of the Collision exceed the sum of $200,000.

State Farm's policy provides under the heading "If Other Underinsured Motor Vehicle Coverage Applies" certain rules for different factual scenarios.

Under section three, the policy states:

> 3. If:
>
> a. **you** or any **resident relative** sustains **bodily injury** or **property damage**:
> (1) while **occupying** a motor vehicle not **owned by you** or any **resident relative**; or
> (2) while not **occupying** a motor vehicle; and
>
> b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to **you** or any **resident relative** by the **State Farm Companies** apply to the same **bodily injury** or **property damage**, then
>
> the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. **We** may choose one or more policies from which to make payment.

Section 4 provides a different rule if the insured is occupying a motor vehicle owned by "you" or a "resident relative" other than the car that is on the declarations page. In that situation, the coverage applies to the extent of underinsured coverage on the involved vehicle.

The plaintiff argues the language in section three is void as against public policy and inconsistent with South Carolina law.

[1] Counsel for the plaintiff explained this was simply a "strategic decision."

The starting point to determine whether this provision should be declared against public policy is the underinsured motorist statute itself. Under §38-77-160:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

Per the underlined language above, coverage is only available on one vehicle if none of the insured or named insured's vehicles are involved in the accident. [2] State Farm's policy language follows the statute.

Case law interpreting S. C. Code §38-77-160 follow this basic rule set forth in the statute and the insurance policy. Plaintiff has not cited any case or statute declaring the involved vehicle stacking policy language invalid. Nor has plaintiff cited any case where an injured party was allowed to collect more than one at home policy in a situation where the insured's family did not have a vehicle involved in the accident. Plaintiff relies heavily on Nationwide Mut. Ins. Co v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012), but that case is not applicable to this factual scenario for the reasons addressed below. In contrast, State Farm has cited multiple cases applying similar policy language and S.C. Code § 38-77-160 or its precursor statute § 56-9-831.

In Garris v. Cincinnati Insurance Co., 280 S.C. 149, 311 S.E.2d 723 (1984), Huntley and Garris were killed by a drunk driver while occupying a work truck owned by Bryce Mechanical Contractors.. The policy on the truck they were occupying had 17 vehicles on it. Mr. Garris had insurance issued by Allstate which covered four personal "at-home" vehicles. Mr. Huntley had coverage for two personal "at-home" vehicles. The court first decided the deceased men could not stack the 16 additional vehicles on the same policy as the work truck. The deceased's estates also argued they were entitled to stack their "at home" policies. The court rejected this view. The court stated: "The obvious intent of the Legislature is to allow insureds or named insureds to take advantage of the benefit of their bargain with their insurance carrier when they are injured by an underinsured motorist and their vehicle is not involved in the accident. But, the recovery here is limited to the extent of coverage on one vehicle with the underinsured motorist coverage, as the decedents are members of the second class. Thus, plaintiffs cannot stack the coverage of the other vehicles under the policies issued to them, but may only recover benefits on one vehicle with the coverage." (emphasis added).

Another case applying the involved vehicle requirement is State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987). William Wannamaker had insurance coverage with State Farm under two insurance policies. His daughter was killed in an accident that did not involve either of the insured's vehicles. Wannamaker's two policies each had limits of liability coverage of but no underinsured

[2] Concrete Services, Inc. v. United States Fidelity and Guaranty Company, 331 S.C. 506, 498 S.E.2d 865 (1998) made clear that if any resident family member's vehicle is involved,

motorist coverage. The trial court concluded Wannamaker had not been given a meaningful offer of underinsured coverage. Therefore, the underinsured coverage was added by operation of law. The trial court also concluded Wannamaker was not entitled to stack because none of his vehicles were involved in the accident. The Supreme Court affirmed the trial court on both rulings. As to the issue of stacking, the Court cited § 56-9-831 (which is now §38-77-160) and held "the present case is one clearly excluded by the statute since none of the insured's vehicles were involved in the wreck."

In Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co., 295 S.C. 538, 370 S.E.2d 85 (1988), the court considered the involved vehicle scenario in an uninsured motorist case. The rules regarding stacking of underinsured and uninsured motorist coverage are almost identical and the involved vehicle principle is derived from §38-77-160 which references both excess uninsured coverage and underinsured coverage. In Fireman's, Mullins was driving a vehicle owned by Locklear who was a passenger in her own vehicle. Because the tortfeasor was insured under a Florida policy with only $10,000/$20,000 coverage, the court had to first determine whether the tortfeasor was uninsured, underinsured or both. The court concluded the tortfeasor did not have coverage equal to South Carolina minimum limits and was therefore uninsured. Mullins had uninsured motorist coverage on three at home (non-involved) vehicles insured with Fireman's Insurance Company. Mullins sought to stack uninsured motorist benefits for each of the vehicles insured by Fireman's. The court held that since Mullins did not have a vehicle involved in the accident (he was driving Locklear's automobile), Mullins was not entitled to stack coverages from his own at-home vehicle policies. He could collect only one.

---

then coverage from the other vehicles may be stacked.

In National Gen. Ins. Co. v. Pena, 308 S.C. 521, 419 S.E.2d 375 (Ct. App. 1992), Pena was a passenger on an uninsured motorcycle owned by a friend. The motorcycle driver was the uninsured motorist. Pena wished to reach home for coverage on four vehicles under his mother's policy. National General conceded that Pena was entitled to one policy limit, however Pena sought the limits for all four vehicles. The court held Pena was not permitted to stack. He was not considered a Class I insured with respect to having a vehicle involved in the accident.

In Concrete Services, Inc. v. United States Fidelity and Guaranty Company, 331 S.C. 506, 498 S.E.2d 865 (1998), the court heard the case of a plaintiff who was injured in an automobile accident while driving a vehicle owned by her husband's company, Concrete Services, Inc. After recovering underinsured benefits under the policy insuring the vehicle which she was driving, plaintiff sought to stack underinsured motorist coverages on the other vehicles owned by Concrete Services, Inc. The Court examined two certified questions in the case, the first involving the proper classification of the plaintiff as a Class I or Class II insured, and the second as to whether ownership of an involved vehicle is required in order to stack coverage. As to the first question, the Court deemed plaintiff could not qualify as a spouse or resident relative of the named insured Concrete Services, Inc. because corporations do not have spouses or relatives. As to the second question, the court held that "prior cases requiring a person to 'have' a vehicle involved in the accident as a prerequisite to stacking mean only that a person must be a Class I insured with respect to a vehicle involved in the accident, i.e., they must be either the named insured, or the spouse or relative living in the same household with the named insured."

In Putnam v. S.C. Farm Bureau Mut. Ins. Co., 323 S.C. 494, 476 S.E.2d 902 (1996), the Supreme Court considered a case where the Court of Appeals decided an insured could not even contract for an insurance policy providing stacking if none of his vehicles are involved in the accident. The Supreme Court found that the Court of Appeals had gone a bit too far. ~~that statement~~. The Supreme Court stated: "The Court of Appeals correctly held that S.C. Code § 38-77-160 prohibits stacking of underinsured motorist insurance (UIM) where none of the insured's vehicles are involved in the accident. However, the Court of Appeals incorrectly held that an insured could not contract for an insurance policy that specifically provided for stacking even if none of his vehicles were involved in the accident, as an insured could contract for insurance coverage that was greater than that required by statute. " This was of no benefit to the injured parties as the Supreme Court found the policy in question did limit the insured to one vehicle if none of his vehicles was involved in the accident.

In Merck v. Nationwide Mut. Ins. Co., 318 S.C. 22, 455 S.E.2d 697 (1995), the Court defined the extent to which a vehicle must actually be involved in an accident in order to stack coverage. The question presented was simply how the Court should define the term "involved" for the purpose of applying the involved vehicle stacking rule. Merck experienced car trouble. As Merck's vehicle was being loaded onto a wrecker, a drunk driver ran off of the road striking Merck, the wrecker driver and the wrecker. Merck was injured, the wrecker driver was killed and Merck's vehicle was thrown off of the wrecker, sustaining damage. The drunk driver's vehicle did not directly hit Merck's vehicle. Merck collected sought to stack coverage of three other vehicles covered by his policy. The South Carolina Supreme Court adopted a definition of the term

"involved" meaning "to relate to or have an effect on...to draw in as a participant [to] implicate, include, affect." Because Merck's vehicle was present at the scene and the accident had an effect on the insured's vehicle, it was "involved in the accident." As a result, Merck could stack the coverage from his other three vehicles.

Plaintiff relies heavily on Nationwide Mut. Ins. Co v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012). But Rhoden did not alter the rule requiring an owned vehicle to be involved in the accident in order to collect on multiple vehicles. In Rhoden a family member's vehicle was involved in the accident. Thus, the Rhoden claimants would normally be allowed to stack. But there was no underinsured coverage on the involved vehicle. Nationwide argued that under the "measuring vehicle" precedent of S.C. Farm Bureau Ins. Co. v. Mooneyham, 304 S.C. 442, 405 S.E.2d 396 (1991), if there was no underinsured on the involved family vehicle, none of the injured family members could claim from other policies. The Rhoden court concluded public policy was not offended by policy language blocking the owner of the involved vehicle from recovery because the owner made a decision not to buy underinsured coverage on the involved vehicle. But the court reasoned it violated public policy not to allow any recovery to the persons who did not make such a choice. Rhoden did not state that stacking (or portability) would be allowed in a situation where no insured vehicle is involved in the accident. That question was not considered because there was a family member's vehicle involved in the accident.

The plaintiff argues the present matter should not be governed by the rules regarding stacking because this is simply a case about "portability." However, "[s]tacking is defined as 'the insured's recovery of damages under more than one policy

until all his damages are satisfied or the limits of all available policies are met.'" Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 644 S.E. 2d 40, fn. 4 (quoting Giles v. Whitaker, 297 S.C. 267, 376 S.E.2d 278 (1989)). Thus, when plaintiff seeks recovery under more than one policy---even if the policies are separate, it is still "stacking" as that term has been defined by the court.

Plaintiff also argues that it makes a difference when State Farm issued three separate policies as opposed to one policy with three vehicles. But plaintiff cites no case or statute suggesting that makes a difference. A careful examination of the case law demonstrates this makes no difference. In State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), the insured had two separate at home policies on two different vehicles. Despite there being two separate policies on two different at-home vehicles, the plaintiff could only collect from one of the policies. Putnam v. S.C. Farm Bureau Mut. Ins. Co., 323 S.C. 494, 476 S.E.2d 902 (1996) also references the existence of two policies. However, the involved vehicle stacking rule limited the injured party to one policy.

Based on the statutes and precedent cited to me by the parties, State Farm's policy language does not violate public policy when it limits underinsured motorist recovery to one vehicle when the injured party and his family does not have a vehicle involved in the accident. For this reason, State Farm's motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

Sept. 24, 2019

Benjamin H. Culbertson
Presiding Judge

Georgetown Common Pleas

Case Caption: April Brooke Cox , plaintiff, et al VS State Farm Mutual Automobile Insurance Company , defendant, et al

Case Number: 2018CP2200869

Type: Order/Summary Judgment

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148