THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-000906

Terri L. Johnson,..... Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly grant summary judgment on Appellant's breach of contract cause of action where, prior to the date of loss, the insured requested cancellation of the policy and the policy provided the insured the right to cancel?

2. Alternatively, did the circuit court correctly grant summary judgment on Appellant's breach of contract cause of action where at the time of the loss for which a claim for underinsured motorist coverage was made the insured lacked an insurable interest because he had previously transferred possession, custody, ownership and title to the salvage vehicle that had previously been insured under the subject policy to Respondent?

3. Did the circuit court correctly grant summary judgment on Appellant's bad faith cause of action where Respondent had a reasonable ground to deny an underinsured motorist coverage claim, given it is undisputed the named insured requested cancellation of the automobile insurance policy under which the claim was made prior to Appellant's date of loss?

STATEMENT OF FACTS

I. The Scion Policy

State Farm issued an automobile insurance policy to Appellant and her husband, Stephen Johnson, insuring Mr. Johnson's 2005 Toyota Scion (the "Scion") effective January 3, 2014 (the "Scion Policy"). (Stip. of Facts ¶ 1, R. 20; Policy Renewal, Stip. of Facts Ex. 1, R. 78-81.) Mr. Johnson was the sole owner of the Scion, and Wells Fargo Dealer Services ("Wells Fargo") had a lien on the Scion. (Stip. of Facts ¶ 2, R. 20.)

Under the terms of the Scion Policy, Mr. Johnson had the unilateral right to cancel the contract of insurance and inform State Farm of the effective date of the cancellation, no action or consent from State Farm was necessary to make such cancellation effective, and the insured's cancellation was effective regardless of the return of unearned premium or timing of the same:

> **GENERAL TERMS**
>
> * * *
>
> 8. **Cancellation**
>
> a. **How You May Cancel**
>
> ***You*** may cancel this policy by providing to ***us*** advance notice of the date cancellation is effective. ***We*** may confirm the cancellation in writing.
>
> * * *
>
> c. **Return of Unearned Premium**
>
> . . . Any unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date.

(General Terms §§ 8(a), (c) of Policy, Stip. of Facts Ex. 1, R. 74, 75 (emphasis in original).)

II. Automatic Debit of Premium

Appellant and Mr. Johnson had two other auto policies with State Farm, one insuring a Buick (the "Buick Policy"), the other insuring a Tundra (the "Tundra Policy"). (Stip. of Facts ¶ 1, R. 20.) The Johnsons were enrolled in the State Farm Payment Plan ("SFPP"), under which a single payment of the premiums for the three policies was automatically drafted from the Johnsons' bank account on the 10th of each month (or the first business day thereafter). (Stip. of Facts ¶ 3, R. 20-21.) The amount automatically drafted on the 10th of each month was billed by SFPP on the 20th of the preceding month (or the first business day thereafter). (Stip. of Facts ¶ 3, R. 20-21.) Changes in the amount of premium to be collected that occurred *after* the billing on the 20th were not reflected in the following automatic draft on the 10th; they were reflected in the next amount billed on the 20th. (*See* Feb. 20, 2014 Notice of Automated Payment, Stip. of Facts Ex. 6, R. 94 ("Prepared February 20, 2014" and stating, "Recurring payment . . . will be entered MAR 10, 2014 through your financial institution," "Future notices will only be mailed if your amount due changes," and "Changes and payments made after February 20, 2014 will be reflected on a subsequent billing notice").)

III. Mr. Johnson's January 6 Accident: Loss of the Scion

On January 6, 2014, Mr. Johnson was involved in an automobile accident (the "January 6 accident") while driving the Scion. (Stip. of Facts ¶ 4, R. 21.) The Scion was towed from the scene of the January 6 accident to Ballentine Collision Repair and was never driven again. (Stip. of Facts ¶ 5, R. 21.) The Scion was the only vehicle insured under the Scion Policy, and Mr. Johnson had no intention of replacing the Scion with a different vehicle following the January 6 accident. (Declarations Page, R. 25; S. Johnson Dep. at 22:4-21, 25:16-26:1, R. 113, 116-17.)

IV. Mr. Johnson's Transfer of Ownership of the Scion to State Farm

With Mr. Johnson's authorization, State Farm took possession of the Scion on January 17, 2014 and declared the vehicle a total loss. (Stip. of Facts ¶¶ 7, 8, R. 21.) On January 24, 2014, Mr. Johnson and State Farm agreed that State Farm, in exchange for ownership of the totaled Scion, would both pay off Wells Fargo for the loan on the Scion, which was $5,828.31, and pay the remainder of the value of the Scion, $1,871.69, to Mr. Johnson. (Stip. of Facts ¶ 10, R. 21-22.)

Shortly thereafter, State Farm made both payments as agreed upon with Mr. Johnson and in exchange for ownership of the Scion, of which State Farm already had possession. (Stip. of Facts ¶¶ 10-12, R. 21-22.) First, it issued and mailed to Wells Fargo a check in the amount of $5,828.31 on January 30, 2014. (Stip. of Facts ¶ 12, R. 22.) The payment was accepted by Wells Fargo, which in turn released the lien and title to State Farm. (Stip. of Facts ¶ 12, R. 22.) Then, on February 5, 2014, Mr. Johnson accepted a check from State Farm made payable to him in the amount of $1,871.69 and, in return, gave State Farm a Power of Attorney executed by him authorizing State Farm to transfer title to the Scion (which had been in possession of the lienholder) to State Farm. (Stip. of Facts ¶ 13, R. 22; Power of Attorney, Stip. of Facts Ex. 4, R. 89; *see also* Ltr. of Guaranty, Stip. of Facts Ex. 3, R. 87.) On February 5, 2014, it was Mr. Johnson's intention to transfer title of the Scion to State Farm in exchange for State Farm's payment of $1,871.69 to him and payment of $5,828.31 to Wells Fargo. (Stip. of Facts ¶ 13, R. 22; S. Johnson Dep. 43:12-21, R. 127.)

V. Mr. Johnson's Cancellation of the Scion Policy

After taking all the steps to transfer ownership of the Scion to State Farm, Mr. Johnson spoke on the phone with Lori Valvano, the office manager of his State Farm Agent Gary Williamson's office. On that call, Mr. Johnson informed Ms. Valvano he was not going to replace

the totaled Scion with a different vehicle, he did not want to keep the Scion Policy, and he desired and intended to cancel the Scion Policy. (Valvano Dep. 24:7-25:18, R. 151-52; S. Johnson Dep. 37:10-38:17, 39:18-40:10, 78:24-79:20, R. 121-24, 130-31.) Mr. Johnson expected the Scion Policy would be canceled immediately:

> Q: . . . [W]hen you hung up the phone, you thought based on that communication that Lori understood you wanted her to cancel the policy on the Scion?
>
> A: Yes, I was not going to get another vehicle, did not want to keep the third policy open, it made no sense to do so, and I expected her to cancel that policy on the Scion, yes.
>
> Q: And that's what you communicated to her in some way or another - -
>
> A: Yes.
>
> Q: - - in this phone call?
>
> A: Yes.
>
> . . .
>
> Q: All right. And when you hung up the phone, you expected policy to be canceled at that moment, right?
>
> A: That's correct.
>
> Q: You did not want to pay for any more insurance on that Scion?
>
> A: That is correct.

(S. Johnson Dep. 39:20-40:5, R. 123-24; S. Johnson Dep. 79:14-20, R. 131.)

Mr. Johnson could not recall the precise date of this telephone call, but confirmed it could have occurred on February 7, 2014 or, in any event, no later than February 10, 2014. (S. Johnson Dep. 78:24-79:20, R. 130-31.) Ms. Valvano did recall the precise date of this telephone call, which was February 7, 2014. (Valvano Dep. 24:7-25:18, R. 151-52.) Ms. Valvano confirmed she received Mr. Johnson's request for cancellation on February 7, 2014, and that because the Scion was a total

loss, unable to be driven, Mr. Johnson's cancellation could be retroactive to the date of the January 6 accident and that he would be refunded the premiums. (Valvano Dep. 24:7-25:18, R. 151-52.) According to Ms. Valvano, Mr. Johnson wanted the cancellation of the Scion Policy effective retroactively. (Valvano Dep. 24:7-25:18, R. 151-52.)

Having been instructed by Mr. Johnson to cancel the Scion Policy, Ms. Valvano submitted the insured's cancellation request to State Farm's underwriting department on Friday, February 7, 2014 to cancel the Scion and to backdate the cancellation to the January 6 accident. (Valvano Dep. 24:7-25:18, R. 151-52; S. Johnson Dep. 37:10-38:17, 39:18-40:10, 78:24-79:20, R. 121-24, 130-31; Stip. of Facts ¶ 14, R. 22.)

As scheduled, the amount of premium billed by SFPP on January 22, 2014 was automatically drafted from the Johnsons' bank account on Monday, February 10, 2014. (Stip. of Facts ¶ 15, R. 22.) However, on the next SFPP billing date, February 20, 2014, State Farm mailed Appellant and Mr. Johnson a Notice of Automated Payment for the upcoming March 10, 2014 debit of premium through SFPP, noting that a credit of $105.93, the unearned premium collected on the Scion from the January 7, 2014 effective date of cancellation, would be applied against the Johnsons' other premiums on the March 10, 2014 automatic payment of premium. (Stip. of Facts ¶ 19, R. 23; Notice of Automated Payment, Stip. of Facts Ex. 6, R. 94-95.) State Farm also issued an Acknowledgement of Cancellation Request confirming the Scion Policy had been canceled effective 12:01 am January 7, 2014 as requested and that any refund of premium would be handled through the SFPP. (Stip. of Facts ¶ 18, R. 23; Ack. of Cancellation Request, Stip. of Facts Ex. 5, R. 92.)

VI. Appellant's February 19, 2014 Accident and UIM Claims

On February 19, 2014, nearly two weeks after Mr. Johnson canceled the Scion Policy, Appellant was involved in an accident while driving her Buick. (Stip. of Facts ¶ 16, R. 23.) Appellant submitted a claim for UIM benefits to State Farm on March 30, 2015, over a year after her February 19, 2014 date of loss. (T. Johnson Dep. 105:20-22, R. 141.) State Farm paid her full UIM benefits under the Buick Policy and the Tundra Policy, totaling $150,000. (Pl.'s Second Am. Compl. ¶ 15, R. 8.) Approximately three years after the accident State Farm received a letter from Appellant's counsel dated February 9, 2017 demanding payment of $100,000 in UIM benefits under the Scion Policy. (Feb. 9, 2017 Ltr. to State Farm, Pl.'s Am. Compl. Ex. 1, R. 17-18.) Responding to that letter, State Farm informed Appellant's counsel that there were only two active policies on the February 19, 2014 date of loss and that the UIM policy limits had been paid under both. (Feb. 28, 2017 Ltr. from State Farm, Pl.'s Am. Compl. Ex. 2, R. 19.) Appellant commenced her lawsuit a few weeks later, suing in part for State Farm's refusal to pay UIM benefits under the Scion Policy. (*See gen.*, Pl.'s Am. Compl.)

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP.

ARGUMENT

I. The circuit court's Order granting summary judgment on Appellant's breach of contract claim should be affirmed.

The circuit court granted summary judgment to State Farm on Appellant's breach of contract claim for two independent reasons. First, the Scion Policy had been effectively canceled by Mr. Johnson prior to the February 19, 2014 date of loss. Second, the Scion Policy was void on the February 19, 2014 date of loss for lack of insurable interest. Summary judgment should be affirmed for either or both independent grounds relied upon by the circuit court.[1]

A. Summary judgment was appropriate because the named insured canceled the Scion Policy prior to the February 19, 2014 date of loss.

Appellant argues Mr. Johnson's cancellation of the Scion Policy was ineffective for two reasons. First, she argues Mr. Johnson could not request retroactive cancellation under the terms of the Scion Policy. (Appellant Br. 10.) Second, she argues alternatively that cancellation could

[1] Appellant argues the circuit court was wrong on both counts and the breach of contract claim "should have been set for trial." (Appellant Br. 9.) However, Appellant filed a cross motion for summary judgment on breach of contract, thereby conceding that the issue should be decided as a matter of law. "When cross motions for summary judgment are filed, the issue is decided as a matter of law." *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) (citing *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)).

only have been accomplished by mutual agreement of the parties, and that such mutual agreement was lacking. (Appellant Br. 11-12.) Neither of these arguments were raised to and ruled on by the circuit court and, therefore, neither are preserved for appellate review. Regardless, the arguments fail on their merits. The Scion Policy was effectively canceled prior to the February 19, 2014 date of loss.

1. *Under the Scion Policy and the law of this State, the only action necessary to effect Mr. Johnson's cancellation of the Scion Policy was his direct request to State Farm's agent.*

Cancellation of an insurance policy at the request of the insured is "a very different situation from the insurer desiring to cancel the policy." *Hicklin v. State Farm Mut. Auto. Ins. Co.*, 176 S.C. 504, 180 S.E. 666, 669 (1935). A direct request to cancel by the insured to the insurer or its agent is enough to abrogate the contract of insurance. *Id.* (finding no merit "in the suggestion that the policies themselves were not in fact . . . actually canceled" because "a direct request to cancel by the insured to the company or its proper agent is held sufficient to abrogate the contract"). There are no statutory requirements on the part of the insured or the insurer and, absent a policy provision to the contrary, no action by or consent of the insurer is necessary to make the insured's cancellation effective. *Hicklin*, 176 S.C. at 504, 180 S.E. at 669; *see also Moore v. Palmetto Bank*, 238 S.C. 341, 344, 120 S.E.2d 231, 233 (1961).

Thus, when an insured requests cancellation of his auto insurance policy, notice of the cancellation by the insurer to the insured is not required for the cancellation to be effective and, if given, has no impact on the effective date of cancellation. *See* S.C. Code Ann. § 38-77-120(b) (stating insurer's statutory notice requirements for effective cancellation do not apply if the "named insured has demonstrated by some overt action to the insurer or its agent that he expressly intends that the policy be canceled"); *Wilbanks v. Prudential Prop. & Cas. Ins. Co.*, 277 S.C. 256,

258-59, 286 S.E.2d 127, 128-29 (1982) (finding insured unilaterally canceled policy prior to date of loss when the insured's agent received notice of the insured's intent to cancel the policy despite the fact that the insurer's cancellation notice said the cancellation was effective after the date of loss). Likewise, absent a policy provision to the contrary, the insured's cancellation is effective without regard to the return of unearned premium or the timing of the same. *Hicklin*, 176 S.C. at 504, 180 S.E. at 669; *see also Nance v. Blue Ridge Ins. Co.*, 238 S.C. 471, 475, 120 S.E.2d 516, 517 (1961) (holding the failure of the insurer to return unearned premium to its insured did not destroy the effectiveness of the insurer's cancellation of the policy where the policy stated "payment or tender of unearned premium is not a condition of cancellation"); *McElmurray v. Am. Fid. Fire Ins. Co.*, 236 S.C. 195, 204-05, 113 S.E.2d 528, 533 (1960) (finding policy was effectively canceled despite no refund of unearned premium where the policy expressly negated necessity of return to the insured of the unearned premium to effect cancellation of the policy).

Under the terms of the Scion Policy, Mr. Johnson had the unilateral right to cancel the contract of insurance and inform State Farm of the effective date of such cancellation: "***You*** may cancel this policy by providing to ***us*** advance notice of the date cancellation is effective." (General Terms § 8(a) of Policy, Stip. of Facts Ex. 1, R. 74 (emphasis in original).) The Scion Policy required no action or consent from State Farm to make such cancellation effective: "***We*** may confirm the cancellation in writing." (General Terms § 8(a) of Policy, Stip. of Facts Ex. 1, R. 74 (emphasis in original).)[2] Further, the Scion Policy expressly provided that the return of unearned premium and timing of the same had no impact on the effective date of cancellation: "Any

[2] *See Waites v. S.C. Windstorm & Hail Underwriting Ass'n*, 279 S.C. 362, 365, 307 S.E.2d 223, 224 (1983) (declining to interpret the word "may" to mean "shall" and agreeing with the trial court that the word "may" in a statute providing that an aggrieved person "may . . . appeal to the Commission" meant that the appeal was permissive and not mandatory).

unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date." (General Terms § 8(c) of Policy, Stip. of Facts Ex. 1, R. 75.) Thus, under both the terms of the Scion Policy and South Carolina law, the only action necessary to make cancellation of the Scion Policy effective immediately was a direct request to cancel the Scion Policy made by Mr. Johnson to State Farm or its agent. According to Mr. Johnson's sworn deposition testimony he made that direct request prior to the February 19, 2014 date of loss. (S. Johnson Dep. 39:20-40:5, R. 123-24 (explaining the agent understood Mr. Johnson wanted her to cancel the Scion Policy as he "did not want to keep" it open, "it made no sense" to keep the policy, and he "expected her to cancel that policy"); S. Johnson Dep. 78:24-79:20, R. 130-31 (explaining timing of call); *see also* Valvano Dep. 24:7-25:18, R. 151-52 (confirming date of call).)

Appellant claims for the first time on appeal that a request for *retroactive* cancellation could not have been honored under the Scion Policy, and there was no *agreement* to cancel the Scion Policy reached between Mr. Johnson and State Farm. (Appellant Br. 10-12.) However, this Court should affirm the circuit court's grant of summary judgment given a direct request for cancellation of the Scion Policy by Mr. Johnson to a State Farm agent was the only action necessary to abrogate the contract of insurance immediately and it is undisputed such request was made prior to the February 19, 2014 date of loss.

2. *Appellant's arguments are not preserved for appellate review.*

State Farm's argument that Mr. Johnson unilaterally canceled the Scion Policy prior to the February 19, 2014 date of loss was fully briefed by State Farm prior to the summary judgment hearing, advanced by State Farm at the summary judgment hearing, and accepted by the circuit court. (*See gen.*, Order, R. 1-5.) Prior to the summary judgment hearing, Appellant filed a "Reply

in Opposition to State Farm's Motion for Partial Summary Judgment" which did not address, much less oppose State Farm's cancellation argument. Appellant's argument that Mr. Johnson did not or could not request cancellation retroactively and her argument there was no agreement reached between State Farm and Mr. Johnson regarding his requested cancellation—the merits of which are addressed below—were not presented to the circuit court and are being raised for the first time on appeal. Because they were not raised to and ruled on by the circuit court, these arguments are not preserved for appellate review. *E.g.*, *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); *see also Kosciusko v. Parham*, Op. No. 5690, 2019 WL 5778083, at *11 (S.C. Ct. App. Nov. 6, 2019) (if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review).

3. *Mr. Johnson's cancellation—whether effective January 7 or February 7, 2014—was effective prior to the February 19, 2014 date of loss.*

Appellant's first argument is that either Mr. Johnson did not request cancellation with a retroactive effective date or that he could not retroactively cancel the Scion Policy. (Appellant Br. 10-11.) The circuit court's grant of summary judgment does not hinge upon the Scion Policy being retroactively canceled. In fact, the circuit court ruled "the [Scion] policy had been cancelled at the request of the policyholder, Mr. Johnson," and "Cancellation was effective *on the date it was requested.*" (Order at 2, R. 2 (emphasis added).) Appellant's argument does not create a genuine issue of fact as to whether the Scion Policy was in force on the February 19, 2014 date of loss. Whether Mr. Johnson canceled effective immediately or canceled effective retroactively is a

distinction without a difference.[3] Mr. Johnson's direct request for cancellation of the Scion Policy—which, as explained above, abrogated the contract of insurance—was made to State Farm well in advance of the February 19, 2014 date of loss.

In addition, Appellant cites no authority to support her conclusion that her husband's cancellation could not be retroactive because of the Scion Policy's provision allowing the insured to provide State Farm advance notice of the effective date of the insured's requested cancellation. There is nothing in the Scion Policy or the laws of this State which would require State Farm to dishonor an insured's request for immediate or retroactive cancellation. Even if advance notice by the insured to State Farm were mandatory under the Scion Policy,[4] such advance notice would be for the benefit of State Farm, not the insured, and it is well settled that a party to a contract may unilaterally waive or abandon a provision or condition in the contract that is for the benefit of that party. *See Sterling Dev. Co. v. Collins*, 309 S.C. 237, 241, 421 S.E.2d 402, 404 (1992) ("A waiver does not require consideration . . . where a party elects to abandon some provision or condition inserted in a contract for his benefit."); *see also Swygert v. Durham Life Ins. Co.*, 229 S.C. 199, 204, 92 S.E.2d 478, 481 (1956) ("It is equally well settled that where, as here, in order to effect a change of beneficiary the policy must be delivered to the Company for endorsement, such requirement is primarily for the protection of the Company and may be waived by it during the

[3] The date of effective cancellation would make a difference with respect to the amount of unearned premium returned to Appellant and her husband, which is why cancellation was requested retroactive to January 7, 2014, but that is irrelevant to this appeal. State Farm returned unearned premium based on an effective cancellation date of January 7, 2014. If retroactive cancellation was improper and Mr. Johnson's cancellation should have been effective February 7, 2014, the date he made the request for cancellation, the amount of unearned premium returned to the Johnsons would have been less, but the Scion Policy still would have been canceled prior to the February 19, 2014 date of loss.

[4] The use of the word "may" compels the conclusion that advance notice was permissive, not mandatory. *See* note 2 *supra*.

lifetime of the insured."). Furthermore, to prevent an insurer from effectively crediting an insured with a premium refund for a period during which an automobile was totaled, unusable, and incurring no risk would be nonsensical. Regardless of whether Mr. Johnson requested or State Farm should have honored retroactive cancellation, Mr. Johnson's direct request for cancellation—which has not and cannot be disputed—effectively canceled the Scion Policy prior to the February 19, 2014 date of loss.

4. *The automatic debit of premium from the Johnsons' bank account did not resurrect the canceled Scion Policy.*

Appellant's second argument is that the Monday, February 10, 2014 automatic withdrawal of premium for their auto policies after the Friday, February 7, 2014 cancellation request,[5] and the parties' stipulation that premiums for the Scion Policy had been paid up to date on the February 19, 2014 date of loss[6] show there was no agreement between Mr. Johnson and State Farm regarding cancellation of the Scion Policy, or that there is a question of fact as to the effective date of cancellation agreed upon by Mr. Johnson and State Farm. (Appellant Br. 11-12.) This argument

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[5] The amount of the single payment of premiums for the Johnsons' automobile insurance policies drafted on February 10, 2014 was billed by SFPP on January 22, 2014, and no changes to the policies occurring between January 22, 2014 and February 10, 2014 would have been reflected in the payment drafted on February 10. *See* discussion *supra* Statement of Facts Section II. The next payment of premium was billed on February 20, 2014 and drafted on March 10, 2014 and reflected the change in premiums given the cancellation of the Scion Policy. (Stip. of Facts ¶ 19, R. 23; Stip. of Facts Ex. 2, R. 83, 85; Notice of Automated Payment, Stip. of Facts Ex. 6, R. 94-95.)

[6] Because the Johnsons' next premium payment occurred on March 10, 2014, the unearned premium on the Scion Policy had not yet been credited against their other premiums on the February 19, 2014 date of loss. This has no bearing on the effective date of Mr. Johnson's requested cancellation. (General Terms § 8(c) of Policy, Stip. of Facts Ex. 1, R. 75 ("Any unearned premium may be returned within a reasonable time ***after*** cancellation. ***Delay in the return of any unearned premium does not affect the cancellation date.***") (emphasis added).) *See also Hicklin*, 176 S.C. at 504, 180 S.E. at 669 (holding a debtor-creditor relationship may arise from an insurance company's failure to return unearned premium, but the policy does not remain in force until the unearned premium is returned).

fails on the merits because an agreement between State Farm and Mr. Johnson concerning cancellation was not required.

As discussed above, it is well settled that an insured may unilaterally cancel his insurance. Appellant even acknowledges this: "An insurance policy can be cancelled in two ways . . . First, either party has the right by complying with the terms of the policy, to terminate the contract. The consent of the other party is not necessary to effect a cancellation." (Appellant Br. 10.) Appellant has not disputed her husband's sworn deposition testimony concerning his request to cancel the Scion Policy, and she has not disputed the circuit court's ruling that "the policy had been cancelled at the request of the policyholder, Mr. Johnson," and "Cancellation was effective on the date it was requested." No "agreement" or "mutual assent" by State Farm was necessary, and she cites no authority to support any contention that Mr. Johnson's cancellation of the Scion Policy, which was effective immediately, could be destroyed subsequently by an automated, recurring debit of premium. Even if unilateral cancellation was not sufficient, the record demonstrates that the premiums withdrawn on February 10, 2014 were withdrawn according to what was billed on January 22, 2014—before cancellation was requested—and are completely consistent with Mr. Johnson's cancellation request.

B. Summary judgment was appropriate because the Johnsons lacked any insurable interest in the Scion on the February 19, 2014 date of loss.

Appellant makes two arguments for overturning the insurable interest ground. First, she argues that her husband had an insurable interest in the Scion because the salvage title bearing State Farm's name as owner was not "formally issued" by the Department of Motor Vehicles until after the February 19, 2014 date of loss and, therefore, her husband faced hypothetical statutory liabilities as of the February 19, 2014 date of loss (Appellant Br. 13-14); next she argues that even if there was no insurable interest in the Scion, she prevails due to her and her husband's "insurable

interest in themselves" (Appellant Br. 15-16). Both arguments fail on the merits, and because they were not preserved for appellate review.

1. *Appellant's arguments are not preserved for appellate review.*

Appellant's argument that Mr. Johnson had an insurable interest in the Scion because he faced hypothetical liabilities in relation to the Scion on the February 19, 2014 date of loss is made for the first time on appeal. Because this argument was not raised to and ruled on by the circuit court, it is not preserved for appellate review. *E.g.*, *In re Walter M.*, 386 S.C. at 392, 688 S.E.2d at 136. In addition, the circuit court did not rule on Appellant's argument that she had an insurable interest in herself on the February 19, 2014 date of loss with respect to UIM coverage under the Scion Policy, and Appellant chose not to file a Rule 59 motion. As a result, this argument is not preserved for appellate review. *Kosciusko*, Op. No. 5690, 2019 WL 5778083, at *11.

2. *On the February 19, 2014 date of loss, Appellant and her husband derived no benefit from the Scion's existence, would not have suffered a loss from its destruction, and faced no potential liability from its use or operation. That the SC DMV had not "formally issued" a salvage title does not mandate reversal.*

The circuit court correctly held Appellant lacked an insurable interest in the Scion on the February 19, 2014 date of loss. (Order at 3-4, R. 3-4.) Appellant argues her husband had an insurable interest on the date of loss under the theory that he could have, hypothetically, been exposed to certain liabilities[7] on the date of loss because the Scion's salvage or branded certificate

[7] Appellant points to three sections of the S.C. Code for these hypothetical liabilities: § 56-5-4230, § 29-15-10(D), § 56-5-5635. (Appellant Br. 14.) Appellant cites to these statutes because they refer to an "owner." None give rise to or otherwise create a genuine issue as to whether the Johnsons had an insurable interest in the Scion on the February 19, 2014 date of loss.

Section 56-5-4230 pertains to damage to a highway or highway structure caused by the illegal operation, driving or moving of the owner's vehicle upon the highway or highway structure. There

of title had not yet been "formally issued" to identify State Farm as the owner of the Scion and, therefore, he was still the legal owner of the scrap vehicle. (Appellant Br. 13-14.) Appellant's insurable interest argument fails because Mr. Johnson was not the owner of the Scion on the February 19, 2014 date of loss and he faced no liabilities as such.

The Appellant attempts to escape *stipulated facts* establishing as a matter of law Mr. Johnson no longer owned the Scion—that Mr. Johnson agreed to transfer ownership to State Farm in exchange for payment of his loan and equity in the Scion on January 24; that State Farm paid off Mr. Johnson's loan on January 31; that his lienholder "in turn released the lien and title to State Farm"; that on February 5, Mr. Johnson accepted State Farm's payment for his equity in the Scion and Mr. Johnson signed a Power of Attorney "authorizing State Farm to secure" and "transfer title to the Scion" to it; and that it was Mr. Johnson's "intention to transfer title of the Scion to State Farm" and "transfer ownership to State Farm" in exchange for the payments made on January 31 and February 4—because the South Carolina Department of Motor Vehicles had not "formally issued" a salvage title in State Farm's name by the time of the February 19, 2014 date of loss. (Appellant Br. 13.)

Appellant's support for Mr. Johnson's status as "owner" is section 56-19-10 that defined owner as "a person ... having the property in ***or title to a vehicle***." (Appellant Br. 13 (emphasis in original) (citing to S.C. Code Ann. § 56-19-10(21), which was deleted by 2017 Act No. 89

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is nothing in the record to suggest the Scion—which was a totaled vehicle sitting at a salvage yard—was at risk of being illegally driven or moved while awaiting issuance of the salvaged title. Neither section 56-5-5635 nor section 29-15-10(D) appear to impose any liability on an owner. The former provides for notice to vehicle owners and lienholders when a vehicle has been taken into custody at the direction of law enforcement, and the latter provides the magistrate may sell an abandoned vehicle and that the proceeds may be applied to the storage costs accrued at the repair or other facility where it was abandoned, given certain requirements are met. There is nothing in the record to suggest the Scion was at risk of being taken into custody by law enforcement or was abandoned.

(H.3247), Section 31, eff. Nov. 19, 2018).) However, Mr. Johnson did not "have title to" the Scion. To the contrary, under the stipulated facts he had transferred ownership and title to State Farm before the loss. And while Appellant may argue in reply that the definition did not mean "have title to" but meant "listed on the DMV's certificate of title after transfer of ownership but during the period in which a salvage title was being processed by the DMV," the statute said no such thing. Thus, that definition of "owner" and the statues cited by Appellant are inapplicable to the facts of this case.

Appellant also cites S.C. Code Ann. § 56-19-320 which states simply that "[a] certificate of title issued by the Department of Motor Vehicles is prima facie evidence of the facts appearing on it." However, the certificate of title Appellant relies on was not in Mr. Johnson's possession and he had signed all rights to the title to State Farm by February 5, 2014. Additionally, the certificate merely states that the title was issued on July 13, 2012, that the owner at that time was Mr. Johnson, and that Wells Fargo was the lienholder. The July 13, 2012 certificate of title is not evidence of ownership of, lien on, or insurable interest in the Scion as of February 19, 2014 which, according to the stipulated facts, was after State Farm made the agreed upon payment "in exchange for ownership of the totaled Scion," after the lienholder had accepted the payoff of its loan and had "released the lien and the title to State Farm," after Mr. Johnson had executed a Power of Attorney "authorizing State Farm to secure the title" and "transfer title" to it, and after Mr. Johnson "inten[ded] to transfer title of the Scion to State Farm." (Stip. of Facts ¶¶ 10-13, R. 21-22.) Appellant cites no case to support her position that section 56-19-320 can give rise to an insurable interest, and her reliance on section 56-19-320 to argue Mr. Johnson owned the Scion after the date by which she has stipulated that Mr. Johnson transferred ownership of the Scion to State Farm is illogical.

Further, the South Carolina Supreme Court has deemed the purchaser the true owner of a vehicle after the sale of the vehicle, even though the seller's name is still on the vehicle's certificate of title and the formal transfer of certificate of title had not yet been accomplished. *See, e.g.*, *Travelers Ins. Co. v. Lawson*, 276 S.C. 587, 589-90, 281 S.E.2d 116, 117-18 (1981); *Grain Dealers Mut. Ins. Co. v. Julian*, 247 S.C. 89, 99, 145 S.E.2d 685, 690 (1965). In *Grain Dealers*, the Supreme Court held that where an automobile was sold by the owner and delivered to the purchaser, the purchaser was the owner of the vehicle thereafter, even though the assignment and delivery of the certificate of title to the purchaser had not been made. 247 S.C. at 99-100, 145 S.E.2d at 690. In that case, Marion Davis sold a 1949 Plymouth to Charles Julian on January 6, 1962, and thereafter Mr. Davis exercised none of the incidents of ownership or control over the Plymouth. *Id.* at 94, 145 S.E.2d at 687. The issue on appeal was whether Mr. Julian, the purchaser, owned the vehicle on June 16, 1962, even though by that date he did not have a certificate of title to the Plymouth. *Id.* at 92, 145 S.E.2d at 686. The Supreme Court held that title to a vehicle passes to a purchaser notwithstanding the want of compliance with South Carolina's certificate of compliance laws, and, under the facts of that case, that Mr. Julian was the owner of the Plymouth on June 16, 1962 even though he did not have a certificate of title to the Plymouth. *Id.* at 99, 145 S.E.2d at 690.

Here, the evidence is susceptible to only one reasonable interpretation: State Farm owned the Scion on the February 19, 2014 date of loss. It is stipulated by the parties that Mr. Johnson transferred possession and custody of the Scion to State Farm in January; and it was Mr. Johnson's intent to transfer title of and ownership to the Scion by accepting payment for the Scion and executing the Power of Attorney on February 5, 2014. (Stip. of Facts ¶¶ 10-13, R. 21-22.) There can be no doubt that it was the intent of both Mr. Johnson and State Farm that possession, custody,

control, and ownership of and title to the Scion pass to State Farm before the February 19, 2014 date of loss.

Appellant had the burden of setting forth specific facts showing there was a genuine issue for trial, which included providing evidence that she or her husband had an insurable interest in the Scion both at the time the Scion Policy was issued and on the February 19, 2014 date of loss. For the reasons stated above, the status of the certificate of title on the February 19, 2014 date of loss does not create a genuine issue of material fact as to insurable interest. *See Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004) (finding no question of fact existed as to whether the insured had an insurable interest and holding "We may not draw an inference that [the insured] had an insurable interest without sufficient evidence to support such a conclusion.").

3. *An "insurable interest in oneself" cannot create an insurable interest in a vehicle one does not own.*

Appellant seeks to eliminate the insurable interest requirement from claims involving UIM coverage due to the portability of UIM coverage. This argument fails because it has already been rejected by this Court in the context of uninsured motorist ("UM") coverage and it is inapplicable to the facts of this case.

a. <u>This Court has already rejected the Appellant's argument.</u>

Appellant's argument that an insured need not have an insurable interest in the vehicle in the context of personal and portable coverage under an automobile insurance policy has been expressly rejected by this Court. In *Nationwide Mutual Insurance Company v. Smith*, this Court held that the named insured of an automobile insurance policy with UM coverage must have an insurable interest in the vehicle insured under the policy for there to be any UM coverage available under that policy. 376 S.C. 60, 66-67, 654 S.E.2d 837, 840-41 (2007). An "automobile insurance

policy, like other forms of insurance, **must be supported by an insurable interest** in the named insured," and "Where a named insured does not have any insurable interest in the vehicle, the insurance policy is illegal." *Id.* at 67, 654 S.E.2d at 840-41 (emphasis added). While acknowledging UM coverage is personal and portable, the Court held that "UM coverage does not exist in and of itself, but rather is a requirement of and **dependent on** a valid automobile insurance policy . . . UM coverage, consequently, is **indirectly dependent on the existence of an insurable interest**." *Id.* at 66-67, 654 S.E.2d at 840-41 (emphasis added). Thus, this Court held that whether the named insured had an insurable interest in the vehicle insured under the policy containing UM coverage is "pivotal" in determining whether UM benefits are recoverable under that policy. *Id.* at 71, 654 S.E.2d at 843. Here, the Appellant's lack of an insurable interest in the Scion is similarly pivotal and the circuit court correctly ruled that the lack of an insurable interest in the Scion barred her recovery of benefits under the Scion policy.

Appellant attempts to distinguish *Smith* because it involved UM rather than UIM coverage. However, this distinction does not make a difference in this context. Appellant's argument hinges on the portability of UIM coverage, just like the insured's argument in *Smith* hinged on the portability of UM coverage. The portability of UM and UIM is identical, and the analysis of portability under *Smith* is equally applicable here.[8] Whether or not UIM is mandatory is irrelevant

[8] "[P]ortability refers to a person's ability to use ***his coverage on a vehicle not involved in an accident*** as a basis for recovery of damages sustained in the accident." *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 181, 700 S.E.2d 283, 288 (Ct. App. 2010) (emphasis added). Likewise, stacking (for both UM and UIM coverage) relies upon the existence and number of at-home *vehicles* insured under automobile policies. *See, e.g., S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 446, 405 S.E.2d 396, 398 (1991) (explaining "the amount of [UIM] coverage which may be stacked ***from policies on vehicles not involved in an accident*** is limited to an amount no greater than the coverage on the vehicle involved in the accident") (emphasis added); *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 9, 339 S.E.2d 501, 503 (1985) (holding the same stacking rules apply to UIM and UM coverages). The argument of the *Smith* plaintiffs

to the *Smith* analysis. Regardless, while "UIM is not mandatory coverage in the sense that an insured chooses to purchase excess UIM coverage on a vehicle and a specific amount is not required by statute," the Supreme Court has held "it is statutorily required coverage in the sense it is required to be offered" up to the limits of the insured's liability coverage. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621-22, 753 S.E.2d 515, 521-22 (2013); *see also Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404–05, 496 S.E.2d 631, 632 (1998) ("Statutorily required coverage is that which is required to be offered or provided."). UIM cannot be separated from liability coverage and the insurable interest requirement given it is coverage purchased "on a vehicle" and which the insurer must offer in an amount up to the limits of the liability coverage. *See Carter*, 406 S.C. at 621-22, 753 S.E.2d at 521-22. Thus, Appellant's UIM coverage under the Scion Policy was dependent on the Scion Policy being a valid automobile insurance policy and, therefore, dependent on the existence of an insurable interest in the Scion, not just at the policy's inception, but also on the February 19, 2014 date of loss.

Appellant also attempts to distinguish *Smith* because the policy in *Smith* may have been void from inception. Appellant's implication that the insurable interest requirement is gauged only at the time the contract for insurance is made ignores this Court's holding in *Powell v. Insurance Company of North America* that "In order to recover on a policy of insurance, the insured must prove an insurable interest . . . **at the time of the loss.**" 285 S.C. 588, 590, 330 S.E.2d 550, 552 (Ct. App. 1985) (emphasis added). Instead, Appellant quotes a ninety-year old holding of a circuit court judge that "When the reason for [a] rule ceases, the rule ceases," in a case that did not involve insurance, much less the insurable interest rule. (Appellant Br. 15-16) (quoting *Penning v. Reid*,

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and Appellant, that portability allows one to have UIM coverage without an insured vehicle, runs counter to the concept of portability and the law of stacking.

167 S.C. 263, 166 S.E. 139, 147 (1932)). The rule is "Where a named insured does not have any insurable interest in the vehicle, the insurance policy is illegal," *Smith*, 376 S.C. at 67, 654 S.E.2d at 840–41, and the rule has not ceased.

b. Appellant's theory is inapplicable to the facts of this case.

Appellant's argument that she and her husband had an insurable interest in themselves on the February 19, 2014 date of loss, because "nothing in South Carolina prohibits a party from agreeing to indemnify an auto-less person who is injured by an underinsured driver," (Appellant Br. 15), would seem more apt—though it would fail for the reasons discussed *supra*—if she was suing over some "auto-less" UIM policy. However, Appellant did not have a standalone "UIM policy" separate and independent from the Scion Policy. She had the Scion Policy that provided UIM coverage among other coverages. (Scion Policy, Stip. of Facts Ex. 1, R. 25-77.) Her ability to recover or stack UIM benefits under the Scion Policy is dependent on the Scion Policy being a valid and enforceable contract of insurance on the date of loss and, therefore, dependent on her or her husband having an insurable interest in the Scion on the February 19, 2014 date of loss. *Smith*, 376 S.C. at 66-67, 654 S.E.2d at 841; *Powell*, 285 S.C. at 590, 330 S.E.2d at 552.[9]

II. The circuit court's Order granting summary judgment on Appellant's bad faith claim should be affirmed.

An insurer acts in bad faith if "there is no reasonable basis" to contest a claim and, conversely, there is no bad faith if "there is a reasonable ground" for contesting a claim. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (citing

[9] The Scion Policy states that State Farm "agree[s] to provide insurance according to the terms of this policy . . . in reliance on the following statements: (1) that the named insured shown on the Declarations Page is the sole owner of your car, [the Scion]" (This Policy § 3(b)(1) of the Policy, Stip. of Facts Ex. 1, R. 33.)

Cock–N–Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996); *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992)). In this regard, the circuit court correctly granted State Farm summary judgment on Appellant's bad faith claim because the direct request to cancel the Scion Policy made by Mr. Johnson to State Farm's agent before the February 19, 2014 date of loss was a reasonable ground for State Farm's conclusion that the Scion Policy did not provide coverage for the February 19, 2014 date of loss. (Order at 4, R. 4.)

Appellant's argument for reversal of the circuit court's grant of summary judgment on her bad faith claim consists of twenty words: "at least a genuine issue of fact exists as to the effective date of any cancellation of the Scion Policy." (Appellant Br. 18.) Appellant does not dispute the fact that Mr. Johnson made a request to his State Farm agent to cancel the Scion Policy before the February 19, 2014 date of loss, nor does she dispute that the requested cancellation was a reasonable ground for State Farm contesting the claim for UIM coverage.[10] In other words, she does not dispute the grounds on which the circuit court granted summary judgment. Whether or not there is a question of fact as to the effective date of the Scion Policy's cancellation has no bearing on the undisputed fact that Mr. Johnson requested cancellation of the Scion Policy before the February 19, 2014 date of loss, [11] and it also has no bearing on whether State Farm had a reasonable ground for contesting coverage. Appellant's argument does not create a genuine issue

[10] Appellant may not make these arguments for the first time in her reply brief. *E.g.*, *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (holding appellant waived its right to make an argument where it was raised for the first time in appellant's reply brief); *Divine v. Robbins*, 385 S.C. 23, 44 n. 4, 683 S.E.2d 286, 297 n. 4 (Ct. App. 2009) (declining to address argument raised by appellant for the first time in her reply brief because "The reply brief is not the appropriate vehicle to raise new issues on appeal").

[11] *See* note 3 *supra.*

of material fact as to whether State Farm had a reasonable ground for contesting the claim and this Court should affirm the circuit court's grant of summary judgment.

CONCLUSION

Based on the above, this Court should affirm the circuit court's order granting State Farm's motion for summary judgment. The trial court properly held that Mr. Johnson had effectively canceled the Scion Policy prior to the February 19, 2014 date of loss. The trial court also properly held that even if the Scion Policy had not been canceled, it was void on the February 19, 2014 date of loss for lack of insurable interest in the named insured. This Court should not consider Appellant's arguments not properly preserved for appeal.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-000906

Terri L. Johnson,..... Appellant,

v.

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

CERTIFICATE OF COUNSEL REGARDING RESPONDENT'S FINAL BRIEF

I, the undersigned, certify that Respondent's Final Brief comply with Rule 211(b), SCACR.

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