THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-000034

April Brooke Cox, as Personal Representative of the Estate of Elijah Cox, deceased, Appellant,

v.

State Farm Mutual Automobile Insurance Company and Glen Bauer, Jr., Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Can an automobile insurer validly restrict the portability of otherwise applicable underinsured motorist coverage because the resident relative insured is also entitled to recover underinsured motorist coverage under another insurance policy?

STATEMENT OF THE CASE

Appellant filed this action on October 11, 2018, seeking a declaratory judgment that a motor vehicle liability insurance policy issued by Respondent State Farm Mutual Automobile Insurance Company ("State Farm") to Respondent Glen Bauer provided underinsured motorist ("UIM") coverage for claims asserted by Appellant as a result of a motor vehicle collision that occurred in Georgetown County, South Carolina, on June 11, 2018. (R. pp. __; Complaint, ¶¶ 11-14, 26).

State Farm filed an Answer on December 12, 2018. (R. p. __; Answer of State Farm). Its Answer admitted many of the operative factual allegations but denied its policy provided UIM coverage for Appellant's claims. (R. p. ___; Answer of State Farm).

Respondent Glen Bauer did not respond to the Complaint or participate in this action.

On February 4, 2019, the parties filed a Stipulation of relevant facts. (R. p. ___; Stipulation).

Appellant thereafter filed a Motion for Summary Judgment on July 1, 2019 (R. p. __; Motion for Summary Judgment) and filed a Memorandum in Support of that motion on July 12, 2019. (R. p. __; Memorandum in Support). State Farm filed its Motion for Summary Judgment on July 15, 2019 (R. p. __; Motion for Summary Judgment) and, on July 16, 2019, filed a Memorandum in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment (R. p. __; Memorandum in Support and in Opposition).

The pending motions came before Circuit Judge Benjamin H. Culbertson for a hearing on July 26, 2019. (R. p. __; Tr. p. 1). By Order dated September 24, 2019, Judge Culbertson granted State Farm's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment. (R. p. __; Order dated September 24, 2019).

On October 1, 2019, Appellant filed a Motion to Alter or Amend Judge Culbertson's Order. (R. pp. __; Motion to Alter or Amend). Judge Culbertson denied the Motion to Alter or Amend without a hearing via a Form 4 Order dated December 18, 2019. (R. p. __; Form 4 Order dated December 18, 2019).

On January 8, 2020, Appellant filed a timely Notice of Appeal as to the Orders granting State Farm's Motion for Summary Judgment and denying Appellant's Motion to Alter or Amend. (R. p. __; Notice of Appeal). On January 27, 2020, at the request of the Clerk of Court, Appellant filed an Amended Notice of Appeal to correct a deficiency. (R. p. __; Amended Notice of Appeal).

STANDARD OF REVIEW

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin,* 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Communities of N.C. v. Harleysville Mut. Ins. Co.,* 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Properties v. City of Sumter,* 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). "In such cases, the appellate court owes no

particular deference to the trial court's legal conclusions." *J.K. Construction v. W. Carolina Regional Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

> When cross motions for summary judgment are filed, the issue is decided as a matter of law. When reviewing an insurance policy, the general rules of contract construction apply. An insurer may impose conditions on a policy provided they do not contravene public policy or violate a provision of law. Further, the interpretation of a statute is a question of law, which [the appellate court must] review de novo.

Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) (internal citations omitted). "Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." *State Farm Mut. Auto. Ins. Co. v. Calcutt,* 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000) (citation omitted).

ARGUMENT

1. Facts

Appellant's teenage son, Elijah Cox ("Cox"), sustained bodily injuries resulting in his death as a result of a motor vehicle collision that occurred on June 11, 2018 (the "Collision"). (R. p. ___; Stipulation, ¶ ___). At the time of the Collision, Cox was a passenger in a Chevrolet pickup that neither he nor his family members owned. (R. p. ___; Stipulation, ¶ ___). The driver of the Chevrolet, L.L.,[1] caused the Collision. (R. p. ___; Stipulation, ¶ ___).

Appellant has recovered all bodily injury liability ("BI") insurance coverage applicable to L.L., as well as underinsured motorist ("UIM") coverage applicable to L.L.'s vehicle. (R. p. ___; Stipulation, ¶ ___). The policy applicable to L.L.'s vehicle is not at issue in this action.

On the date of the Collision, Cox resided with his grandparents, Ernestine Bauer ("Ernestine") and Glen Bauer ("Glen"). (R. p. ___; Stipulation, ¶ ___). Ernestine had an

[1] L.L. is a minor who is identified only by his initials.

automobile insurance policy issued by State Farm, under which Cox was an insured as a resident relative. (R. p. ___; Stipulation, ¶ ___). State Farm has paid Appellant UIM coverage under Ernestine's policy (R. p. ___; Stipulation, ¶ ___) and it is not at issue in this action.

In addition, Glen had two automobile insurance policies issued by State Farm that provided UIM coverage. (R. p. ___; Stipulation, ¶ ___). As Glen's resident relative, Cox was an insured under both of these policies. (R. p. ___; Stipulation, ¶ ___).

Appellant asserted that UIM coverage applicable to Cox under one of Glen's policies (the "Nissan Frontier Policy") was "personal and portable" and therefore recoverable as a result of the Collision.[2] Accordingly, she made a claim with State Farm for that UIM coverage. (R. p. ___; Stipulation, ¶ ___).

State Farm refused to pay UIM coverage under the Nissan Frontier Policy asserting that, because she had already recovered UIM coverage under Ernestine's policy, Appellant was improperly attempting to stack UIM coverage. (R. p. ___; Stipulation, ¶ ___). As a result of State Farm's denial, Appellant filed the present declaratory judgment action.

State Farm's position – with which the Circuit Court agreed – is based upon a specific anti-stacking provision in the Nissan Frontier Policy. That provisions states that, when a named insured's (here, Glen's) resident relative (here, Cox) is injured in a non-owned vehicle and:

> [UIM] Coverage provided by [the Nissan Frontier Policy] and one or more other vehicle policies issued to ***you*** or any ***resident relative*** [here, Ernestine] 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.

(R. p. ___; Stipulation, Ex. ___, pp. ___).

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[2] Glen's other State Farm policy is not at issue in this action. (R. p. __; Tr. pp. 5-6).

Despite this coverage denial, the parties agreed that, in the event of a final judgment that the Nissan Frontier Policy provides recoverable UIM coverage, State Farm will pay $50,000 in UIM benefits to Appellant. (R. p. ___; Stipulation, ¶ ___).

2. UM and UIM coverages are "personal and portable" in South Carolina.

Automobile insurers in South Carolina must offer to their insureds UIM coverage, the purpose of which is "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...." S.C. CODE ANN. § 38-77-160 (1976, as amended); *Broome v. Watts*, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). Although UIM coverage is not mandatory like uninsured motorist ("UM") coverage, an insurer is required to offer it and to provide it when an insured chooses to purchase it; therefore, when an insurer provides UIM coverage, any contractual exclusions to that coverage are invalid if they conflict with statutory language or public policy. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515, 518-19 (2013).

Under the public policy of this state, UM and UIM coverages are personal to an insured and are "portable"; that is, they follow the insured individual rather than the insured vehicle. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007). This public policy is founded on the language of the UM and UIM statutes, which provide that insureds are protected at all times, without regard to their activities at the time of injury and regardless of whether they were using an insured vehicle. *Hogan v. Home Ins. Co.*, 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973).

Consequently, the UIM coverage under the Nissan Frontier Policy, under which Cox was an insured, followed Cox when he was traveling as a passenger in L.L.'s vehicle. Appellant can

recover this UIM coverage unless there is a valid basis for State Farm to exclude its recoverability under these circumstances.

3. Portability is different from stacking.

As noted above, State Farm's denial of UIM coverage under the Nissan Frontier Policy was based upon an anti-stacking argument. Portability is not stacking.

The Circuit Court failed to distinguish accurately between stacking and portability. Although it mentioned Appellant's reliance upon portability rules, the court recited a stacking definition from *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37 n. 1, 644 S.E.2d 40 n. 1 (2007) – a case that did not involve the issue presented here – and failed to analyze the differences between portability and stacking. (R. p. __; Order dated September 24, 2019, pp. 9-10).

Thus, it is important at the outset to distinguish between these concepts.

In its Order granting State Farm's Motion for Summary Judgment (R. p. __; Order dated September 24, 2019), the Circuit Court failed to mention one of the cases Appellant primarily relied upon, *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010). There, this Court clarified the frequently confused concepts of stacking and portability as follows:

> *Burgess*, as the opinion notes, did not involve stacking; it involved portability. *These are two distinct concepts.* Stacking is only allowed if the insured has the specific type of coverage on the vehicle involved in the accident. On the other hand, *portability 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.*

Id. at 181, 700 S.E.2d at 288 (emphasis added).[3]

In other words, when – as in this case – an insured is injured as a passenger in someone else's vehicle such that the insured does not have UIM coverage applicable to that vehicle,

[3] The Supreme Court endorsed the *Nakatsu* court's reasoning and holding in *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621, 753 S.E.2d 515, 521 (2013).

stacking rules and restrictions are not implicated. Rather, under those circumstances, whether the insured can use UIM coverage from a non-involved vehicle is a question of portability.

4. Restrictions on UIM portability generally violate public policy.

On several occasions, the South Carolina Supreme Court has addressed insurers' attempts to prohibit the portability of UM or UIM coverage via restrictive policy language. However, it has invalidated and refused to apply such policy language when contrary to public policy.

For example, in *Hogan, supra,* the Supreme Court held that a policy provision "which excludes resident relatives of the named insured from uninsured motorist coverage except when occupying the vehicle described in the policy" violated the public policy behind the UM statute and was therefore void. 260 S.C. at 162, 194 S.E.2d at 892. As a result, the court held that the estate of a teenage boy who was killed while a passenger in at-fault vehicle could recover UM coverage from his mother's policy, under which he was insured as a resident relative.

On the other hand, in *Burgess, supra,* the Supreme Court upheld application of a policy provision that restricted portability of UIM coverage to protect an insured who was injured in a vehicle he owned but chose not to insure under the policy providing the UIM coverage. The court reasoned that the restrictive provision did not offend public policy because it "encourages persons to purchase UIM insurance on all their vehicles." 373 S.C. at 41, 644 S.E.2d at 42. A contrary holding would have permitted an owner of multiple vehicles to purchase UIM on only one of those vehicles yet obtain coverage as to all of them, a result the court deemed inconsistent with public policy.

More recently, in *Nationwide Mut. Ins. Co. v. Rhoden,* 398 S.C. 393, 728 S.E.2d 477 (2012), the Supreme Court affirmed this court's holding "that public policy is offended by a limitation on UIM portability when applied to resident relatives ... who do not own the vehicle

involved in the accident." *Id.* at 398, 728 S.E.2d at 479. There, while a passenger in her sister's vehicle, Dickey was injured in a collision caused by an underinsured motorist. Dickey made a claim for UIM coverage under her mother's Nationwide policy that did not insure her sister's vehicle. Dickey was insured as a resident relative under both her sister's and mother's policies. Nationwide argued a clause restricting portability of UIM coverage prohibited Dickey from recovering under her mother's policy.

The Supreme Court rejected Nationwide's argument and found the clause offended public policy. In refusing to apply the restriction on portability, the court reasoned:

> Here [mother] purchased UIM coverage for herself and Dickey for situations in which they could not otherwise insure themselves, like when they were passengers in [sister's] car. Despite Nationwide's assertion, it was unlikely that [mother] and Dickey had any more influence over the insurance coverage purchased on a relative's vehicle, such as [sister's], than that of any other individual with whom they may travel. Furthermore, the same considerations underpinning the exception to the general public policy that UIM is personal and portable in *Burgess* are not present in this case because unlike the petitioner in *Burgess*, [mother] and Dickey are not owners of the vehicles.

Id. at 399 n. 2, 728 S.E.2d 480 n. 2.

In sum, in cases where insureds have challenged the validity of "non-portability" clauses, our Supreme Court has held that public policy prevents insurers from relying upon those clauses to prohibit resident relative insureds from recovering portable UM and UIM coverages when they are injured while passengers in non-owned vehicles. The only instance where it has expressly validated a restriction on portability was in *Burgess*, a case in which the claimant was injured in his own vehicle for which he rejected UIM coverage.

5. <u>The effect of State Farm's policy language is to restrict UIM portability contrary to this State's public policy and the Circuit Court erred in finding otherwise.</u>

The Policy's language, as sanctioned by the Order, prohibits portability of UIM coverage to a resident relative insured (Cox) who was injured in a non-owned vehicle. This is contrary to

public policy favoring portability of UIM coverage. There is no countervailing public policy that validates State Farm's denial of UIM coverage.

The pertinent facts of the present case are indistinguishable from those in *Rhoden*:

- Dickey – like Cox – was not the owner of the vehicle involved in the collision;
- Dickey – like Cox – had no influence on whether the involved vehicle had UIM coverage;
- Dickey – like Cox – was an additional insured with respect to the involved vehicle by virtue of the statutory "omnibus" definition of insured, S.C. Code Ann. § 38-77-30(7) (1976, as amended);
- Dickey – like Cox – was also covered for UIM under a resident relative's policy;
- Dickey – like Cox – was protected under the relative's policy because of the relative's decision to purchase UIM to protect his/her resident relatives; and
- Nationwide – like State Farm – relied upon policy language in an effort to prevent portability of the resident relative's UIM coverage for the injured person's claim.

The Supreme Court's holding in *Rhoden* should dictate the outcome in this case. Just like the resident relative insured in *Rhoden* (Dickey) – as well as the resident relative insured in *Hogan* – Cox (via Appellant) should be able to recover portable UIM coverage from his relative's (Glen's) policy (the Nissan Frontier Policy). The Circuit Court should have rejected State Farm's attempt to restrict portability of UIM coverage under that policy as violative of public policy and erred in ruling otherwise.

Instead, the Circuit Court distinguished the *Rhoden* holding based upon the erroneous conclusion that it allowed Dickey to recover UIM coverage under her mother's policy because the involved vehicle was an "insured vehicle" with respect to Dickey given that her sister owned it. (R. p. ___; Order dated September 24, 2019, p. 9) ("*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."). This conclusion reflects a misunderstanding of the *Rhoden* case.

In addition to Dickey, another claimant (Arrieta) sought UIM coverage in *Rhoden*. However, Arrieta's situation was different than Dickey's – Arrieta owned the vehicle involved in the collision. The *Rhoden* court's distinction regarding ownership of the involved vehicle was the predicate for its finding that the public policy articulated in *Burgess* supported a denial of the UIM claim by Arrieta, who "chose not to purchase UIM coverage for her vehicle, which was involved in the accident." *Rhoden*, 398 S.C. at 399, 728 S.E.2d at 480.

To the contrary, Dickey did not have an insured vehicle in the collision because she did not own the involved vehicle. *Id.* at 401, 728 S.E.2d at 481 ("'Having' a vehicle involved in the accident reasonably implies ownership of the vehicle."). The *Rhoden* majority opinion acknowledged the dissent's argument that Dickey's right to UIM coverage could be denied because, as an "insured" (by virtue of her status as a resident relative), she was in the same class as Arrieta. However, it rejected that argument because it was based on what could "at best" be characterized as ambiguous statutory language and "until the legislature clarifies this particular provision of section 38-77-160 to the contrary, the public policy stated in *Burgess* that UIM is 'personal and portable' governs this case." *Id.* at 401-02, 728 S.E.2d at 481-82.

In short, Dickey was entitled to recover UIM coverage on her mother's policy based upon portability principles because – like Cox – she *did not own* the involved vehicle, not because her sister owned that vehicle. *Id.* at 402, 728 S.E.2d at 482 ("[W]e hold South Carolina's public policy that UIM coverage is personal and portable requires UIM coverage to be provided to Rhoden and Dickey, who did not own the vehicle involved in the accident...."). The Circuit

Court erroneously applied the argument advanced by the dissent in *Rhoden*, which was expressly rejected in the majority opinion.

The Circuit Court also erred by basing its decision on stacking principles, which are inapplicable to this situation. Specifically, the court stated that its "starting point" for analyzing the validity of State Farm's policy language was S.C. CODE ANN. § 38-77-160 (1976, as amended). (R. p. __; Order dated September 24, 2019, p. 4). However, Section 38-77-160 relates to stacking and does not govern the resolution of public policy issues applicable to restrictions on portability. The *Burgess* court made this clear when it held:

> Neither § 38-77-160 nor our prior decisions decide the issue presented here: Is public policy offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy?

Burgess, 373 S.C. at 41-42, 644 S.E.2d at 42; *accord Rhoden*, 398 S.C. at 400, 728 S.E.2d at 480 ("As we stated in *Burgess,* section 38-77-160 does not apply in a non-stacking case such as this[.] ... In *Burgess,* we decided a non-stacking case by considering the public policy that UIM is personal and portable rather than looking to section 38-77-160.") (footnote omitted).

Finally, the Circuit Court erred in relying upon *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984), *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), *Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 370 S.E.2d 85 (1988), and *National Gen. Ins. Co. v. Pena*, 308 S.C. 521, 419 S.E.2d 375 (Ct. App. 1992) in support of its conclusion that the Policy's language was consistent with public policy. (R. p. __; Order dated September 24, 2019, pp. 5-7). These cases pre-dated *Burgess*, *Nakatsu*, and *Rhoden*. Moreover, the courts in those cases simply addressed the recoverability of at-home UM or UIM coverage as a question of stacking. It does not appear the parties in those cases argued nor did the courts address the questions of portability and public policy as presented in

this appeal. At the time those cases were decided, our appellate courts had not yet fully explained the public policies supporting portability of UM and UIM coverages or the distinctions between portability and stacking, which they accomplished in the more recent *Burgess*, *Nakatsu*, and *Rhoden* decisions. It was both anachronistic and incorrect for the Circuit Court to have relied on these cases to support its conclusion.

Instead of following the misplaced path of the Circuit Court, this Court should reject the application of inapplicable stacking principles and decide this case based upon portability principles as required by the *Rhoden* decision. Consistent with the public policy of this state, the Court should conclude that the Policy's language restricting portability of UIM coverage for Appellant's claim is invalid and unenforceable.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court reverse the ruling of the Circuit Court and declare that she can recover UIM coverage under the Nissan Frontier Policy as a result of the Collision.

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April Brooke Cox, as Personal Representative
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PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF APPELLANT and DESIGNATION OF MATTER TO BE INLCUDED IN THE RECORD ON APPEAL upon the Respondents herein by mailing same via U.S. First Class Mail, postage prepaid, on February 11, 2020, addressed to:

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The Hon. Jenny Abbott Kitchings
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RE: April Brooke Cox v. State Farm
Appellate Case No. 2020-000034

Dear Ms. Kitchings:

Enclosed are original and one copy each of the Initial Brief of Appellant, Designation of Matter to be included in the Record on Appeal and Proof of Service in the above-referenced matter. Please file the originals, date stamp the copies and return same to me in the provided self-addressed stamped envelope for my file.

By copy to counsel, I am serving copies of the enclosed Initial Brief and Designations upon the Respondents.

Thank you in advance for your kind assistance with the above request. If you have any questions or concerns regarding the enclosed, please advise.

Sincerely,

Bert G. Utsey, III

BGU/hd
Enclosures

cc: Timothy A. Domin, Esquire
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