

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 REPLY BRIEF OF APPELLANT

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INTRODUCTION¹

As did the Circuit Court's Order, State Farm's brief bases its reasoning on the overly-simplistic and faulty premise that a claimant's recovery of multiple coverages is always considered "stacking" and must therefore be governed by stacking rules discussed in South Carolina appellate decisions from the 1980s and 1990s. This approach overlooks more recent decisions of the Supreme Court that permit the recovery of multiple coverages under the principle of portability and invalidate policy provisions which seek to restrict such a recovery.

ARGUMENT

The lynchpin of State Farm's argument in support of the portability restriction in the Nissan Frontier Policy is that Appellant is attempting to stack coverages² and restrictions on stacking are permissible. Its argument is summarized in the portion of its brief where it attempts to distinguish portability cases:

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.'" ... Thus, when Appellant seeks recovery under more than one State Farm policy, it is "stacking" as that term has been defined by the court.

(Initial Brief of Respondent, pp. 12-13) (citations omitted).

If the definition of stacking were this simple, then every case involving the recovery of bodily injury and UIM coverages, every case involving the recovery of primary and excess coverages, every case involving the recovery of "involved vehicle" and portable coverages, and every other case where a claimant is able to recover under more than one policy would be considered "stacking cases"; and, according to State Farm's rationale, all such cases would be governed by stacking rules.

¹ In this Reply Brief, capitalized terms are defined as in Appellant's primary brief.

² By way of illustrating this point, State Farm uses the terms "stack" or "stacking" 41 times in its brief per Appellant's counsel's count.

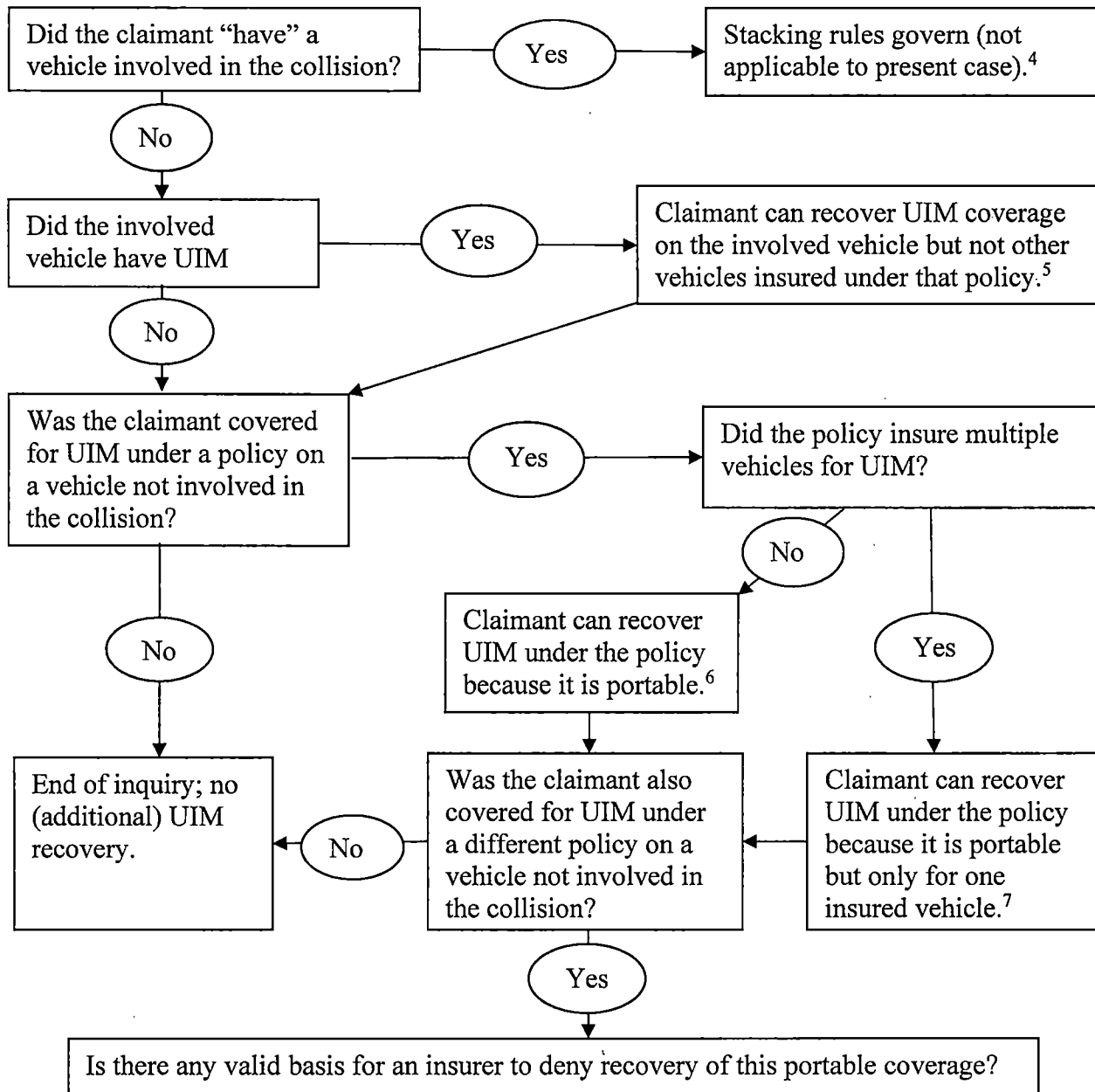
South Carolina appellate courts have long recognized recoveries under multiple policies in situations that are not characterized as stacking. For example, in *South Carolina Farm Bureau Mut. Ins. Co. v. United States Fidelity & Guar. Ins. Co.*, 320 S.C. 489, 465 S.E.2d 777 (Ct. App. 1995), this Court addressed a situation where it acknowledged an injured Class II claimant (if his damages were sufficient) could recover liability coverage from an at-fault motorist, UIM coverage on the vehicle he occupied at the time of the collision (as primary UIM coverage), and UIM coverage he had on an “at home” vehicle (as excess UIM coverage). Nowhere was it suggested that his potential “recovery of damages under more than one policy until all his damages are satisfied” constituted stacking or triggered any limitations on stacking, as argued by State Farm. *Accord Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 174 S.E.2d 391 (1970) (Class II claimant covered by primary (involved vehicle) UM coverage and excess (at home) UM coverage; no discussion of stacking rules); *Midwest Mut. Ins. Co. v. Fireman’s Fund Ins. Co.*, 258 S.C. 533, 189 S.E.2d 823 (1972) (same).

Accordingly, the validity of State Farm’s anti-portability provision cannot be answered by the flawed syllogism “recovery of multiple coverages is always stacking; Appellant seeks to recover multiple coverages; therefore, Appellant is seeking to stack.”³

Similarly, the question before this Court is not answered by South Carolina appellate court cases cited in State Farm’s brief. Those cases are distinguishable in that they either dealt with “pure stacking” issues or recovery of multiple coverages under a single policy; none

³ Although a recently appointed federal district court judge accepted this argument in *Sessions v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 1027343 (D.S.C. 2020), her conclusion is not binding precedent in this Court. Moreover, the conclusion there suffers from the same faulty premise as the Circuit Court’s Order in the present case; that is, it is predicated upon the conclusion that an effort to recover more than one portable coverage is stacking. *Id.* at *2 (“Here, Plaintiff is seeking to stack UIM coverage. Mr. Sessions wishes to recover damages ‘under more than one policy’, *i.e.*, the policy under which he already received payment plus the six (6) remaining policies, ‘until all of his damages are satisfied or the limits of all available policies are met.’”).

addressed a situation like the present case, where a claimant is covered by multiple portable policies issued to different insureds. The following flowchart illustrates this point.



⁴ *Merck v. Nationwide Ins. Co.*, 318 S.C. 22, 455 S.E.2d 697 (1995).

⁵ *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984); *Concrete Services, Inc. v. United States Fidelity & Guar. Co.*, 331 S.C. 506, 498 S.E.2d 865 (1998).

⁶ *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012).

⁷ *Garris, supra.*; *Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 370 S.E.2d 85 (1988); *Putnam v. South Carolina Farm Bureau Mut. Ins. Co.*, 323 S.C. 494, 476 S.E.2d 902

At first blush, *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), may appear similar to the present case. However, its holding is not dispositive for several reasons.

That case involved an attempted recovery of coverages under multiple policies issued to the same insured (as in the cases cited in footnote 7 above). Here, State Farm issued separate policies to separate insureds; the decedent was an additional insured under each separate policy. Moreover, as noted in Appellant's primary brief, *Wannamaker* pre-dated more recent cases that distinguish between portability and stacking and the claimant there did not argue that distinction.

Finally, the *Wannamaker* court only briefly and somewhat simplistically addressed the recoverability of at-home UIM coverage as a question of stacking, without any discussion or apparent consideration of portability. Its analysis on the multiple recovery issue was limited to:

The trial judge held, and we agree, that *Wannamaker* is not entitled to stack his underinsured coverage. Our statute provides:

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. Coverage on any other vehicles shall not be added to that coverage. S.C. Code Ann. § 56-9-831 (Supp. 1986). (emphasis added.)

Wannamaker's two policies each had limits of liability coverage of \$50,000/\$100,000/\$25,000. While underinsured coverage in amounts not exceeding the basic limits of \$15,000/\$30,000/\$5,000 on each vehicle under an insurance policy can generally be stacked, *Garris*, 311 S.E.2d 723, the present case is one clearly excluded by the statute since none of the insured's vehicles were involved in the wreck.

Wannamaker, 291 S.C. at 522, 354 S.E.2d at 557.

The General Assembly subsequently re-codified Section 56-9-831, the statute cited by the *Wannamaker* court, as S.C. CODE ANN. § 38-77-160 (1976, as amended). *Brown v. Continental*

(1996); *National Gen. Ins. Co. v. Pena*, 308 S.C. 521, 419 S.E.2d 375 (Ct. App. 1992); *State Farm Mut. Auto. Ins. Co. v. Sakash*, 2017 WL 2225110 (D.S.C. 2017).

Ins. Co., 315 S.C. 393, 394-95, 434 S.E.2d 270, 271 (1993). At the same time, the General Assembly deleted from the statute the sentence, “Coverage on any other vehicles shall not be added to that coverage.” *Id.* at 395, 434 S.E.2d at 271.

As subsequent cases have demonstrated, the *Wannamaker* court’s reliance on that statute to resolve what should be a portability question was misplaced. Section 38-77-160 (and, thus, its predecessor) does not apply in a portability analysis. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41-42, 644 S.E.2d 40, 42 (2007); *accord Rhoden*, 398 S.C. at 400, 728 S.E.2d at 480. In addition, even if the statute did influence portability when *Wannamaker* was decided, the subsequent deletion of the above-quoted language – while not altering stacking rules, *see Brown*, 315 S.C. at 272, 434 S.E.2d at 395 – arguably removed any effect it had on a portability analysis.

In sum, the cases cited by State Farm do not answer the question presented by this appeal – that is, whether it can restrict the recovery of portable UIM coverage simply because it accepted another premium on a separate policy issued to a different insured. Instead, in cases where insureds have challenged the validity of restrictions on portability, 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. State Farm’s all-encompassing approach would have the effect of permitting insurance companies to limit recovery of coverages under the guise of “stacking” and thus restrict portability principles recently explained by our Supreme Court.

Because State Farm’s policy language prohibits portability of UIM coverage to a resident relative insured who was injured in a non-owned vehicle, it is contrary to public policy and is unenforceable.

CONCLUSION

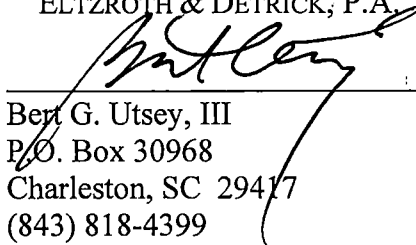
For the reasons set forth above, as well as those discussed in her primary brief, Appellant respectfully requests that the Court reverse the ruling of the Circuit Court and declare that she can recover UIM coverage under the Nissan Frontier Policy as a result of the Collision.

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PROOF OF SERVICE

I certify that I have served the INITIAL REPLY BRIEF OF APPELLANT upon the
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Cc: Trip Riesen; Bert Utsey
Subject: April Brooke Cox v. State Farm - Appellate Case No. 2020-000034
Attachments: 04.21.2020 Transmittal to SCCA - Reply Brief.pdf

Good afternoon Mr. Domin,

Attached is a copy of our transmittal to the South Carolina Court of Appeals with the Initial Reply Brief of Appellant and Proof of Service (by email) in the above-referenced matter.

Kind regards,
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Hildegard Davis

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Appellate Case No. 2020-000034

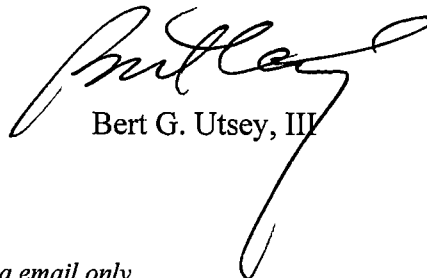
Dear Ms. Kitchings:

Enclosed are original and one copy each of the Reply Brief of Appellant, together with 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 Reply 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,



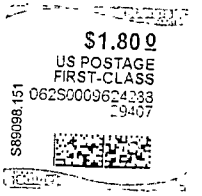
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