THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-5885

Court of Appeals Case No.: 2016-002185

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

v.

Myra M. Windham.....Appellant.

RESPONDENT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent State Farm Mutual Automobile Insurance Company ("State Farm") hereby petitions for the Court for rehearing. The opinion of the Court (Opinion No. 5764) was filed August

19, 2020. The opinion reverses the grant of summary judgment in favor of the Appellant, finding that she is entitled to stack her underinsured motorist (UIM) coverage from her policies when she was in an automobile accident while driving a rental car. State Farm respectfully asserts that the issues set forth below warrant reconsideration by this Court.

I. INTRODUCTION

The Court's decision, in an unprecedented manner, reverses the grant of summary judgment in favor of the Appellant, allowing her to stack underinsured motorist benefits when she was involved in an automobile accident while driving a car that neither she nor any other insured under the policy owns. The decision fundamentally transforms stacking laws and eviscerates sound precedent which requires an insured or its spouse or resident relatives to "have" and therefore own a vehicle in the accident in order to stack. Furthermore, the Court ignores the plain and unambiguous terms the insurance policy while torturing others to extend coverage that was never intended by the parties. The Court also ignores the record and the stipulations of fact agreed upon by Appellant in reaching its decision.

Rehearing is warranted on multiple grounds. As detailed below, the Court's opinion misapprehends facts, law, and arguments critical to its determination. State Farm therefore respectfully requests that the Court grant its petition for rehearing.

II. STANDARD OF REVIEW

The purpose of a petition for rehearing "is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 238 (1933). Where, as here, the existing record does not support the decision, a petition for rehearing is appropriate. *See, e.g.*, *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 409 S.C. 487, 492 n.4, 763 S.E.2d 19, 21 n.4 (2014) ("If, based on the

current record, we have misapprehended the scope of PCS's indemnification claim against Ross, we invite a rehearing petition. . . "); *Arnold*, 168 S.C. at 172, 167 S.E. at 238 (court is "bound by the transcript of record as to the facts of the cause."). *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."); Rule 221(a), SCACR (petition shall state the points "supposed to have been overlooked or misapprehended"). These standards are met here.

III. ARGUMENT

A. The Court's Opinion Contradicts Years of Established Law Regarding the Rules and Limitations Concerning Stacking of Underinsured Motorist Coverage.

Respectfully, the Court significantly erred in its review, analysis and interpretation of South Carolina statutory and case law concerning UIM coverage, and a rehearing is necessary to protect the rights of State Farm and to prevent contradictory precedent.

Section 38-77-160 of the South Carolina Code states, in pertinent part:

> 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.

S.C. Code Ann. § 38-77-160.

Respectfully, there is nothing in the relevant statutes to support the Court's conclusion that the "relevant statutes treat the vehicle in question the same as the insured's own vehicle, prohibiting any limitation on stacking."

Our case law is clear that a Class I insured is an insured or named insured that has a vehicle involved in the accident. *South Carolina Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 442 n.1, 405 S.E.2d 396, 397 n.1 (1991); *Nationwide Mut. Ins. Co. v. Rhoden*, 728 S.E.2d 477 (2012). In *Rhoden*, the Supreme Court analyzed section 38-77-160 and reasoned that "'[h]aving a vehicle involved in the accident reasonably implies ownership of the vehicle." *Rhoden*, 728 S.E.2d at 481.

The Court relies heavily on *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998) in reversing the trial court. *Rhoden* was decided twelve years after *Concrete Services*. As noted by *Rhoden*, *Concrete Services* suggested a contrary interpretation of section 38-77-160 but *Concrete Services* does not mandate reversal of the circuit court's sound order. In *Concrete Services*, the Supreme 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." 331 S.C. at 513, 498 S.E.2d at 868. Notably, the Supreme Court stated under the Class I insured definition, "it is patent that one may be the spouse or relative of a named insured and reside in the same household without owning the vehicle." *Id.*

The import of *Concrete Services* is clear: spouses and resident relatives of named insureds, though often times not the owner of the insured vehicle, are permitted to stack because they are resident relatives of someone who does own the vehicle. *Concrete Services'* "purely academic" dicta simply clarified that stacking, where applicable, is

permitted among the entire class of Class I insureds, so as to not penalize families who do not collectively own each insured vehicle under an insurance policy.[1]

The Court's misapplication of *Concrete Services* not only leads to an improper result here, it also opens the door for a host of other scenarios in which insureds such as Windham, operating borrowed cars for a variety of reasons are permitted to stack insurance policies, undoing well-established precedent, contradicting the legislative intent and purpose of section 38-77-160, and eviscerating the insurance policy language. It is the purview of the General Assembly, not the judicial branch, to decide if stacking should be expanded to the use of rental cars. *See Widenhouse v. Colson*, 405 S.C. 55, 58, 747 S.E.2d 188, 190 (2013) ("The primary source of the declaration of the public policy of the state is the General Assembly...." (quoting *Citizens' Bank v. Heyward,* 135 S.C. 190, 204, 133 S.E. 709, 713 (1925)) (internal quotation marks omitted); *State v. Corey D.*, 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

At the time of the October 5, 2012 accident, Windham occupied a vehicle that was owned by Enterprise and was temporarily rented to her. It is stipulated that Windham had no ownership interest in this vehicle. South Carolina law is clear that, pursuant to section 38-77-160, in order to be a Class I insured, the insured must "have" a vehicle

[1] The facts of *Concrete Services* are also important: the insured corporation's sole shareholder's wife was injured in an automobile accident while operating a vehicle owned by the corporation. The Supreme Court held that the wife could not stack coverages from other vehicles owned by the corporation because the wife was not a spouse or family member of the named insured, a corporation. The vehicle's status under the policy was not at issue. Here, it is the status of vehicle, in conjunction with State Farm's specific policy language, which must lead the analysis and mandates a rehearing from this Court.

involved in the accident, and "having" a vehicle involved in the accident reasonably implies ownership of the vehicle, *Rhoden*, 728 S.E.2d at 481, by at least another Class I insured, *Concrete Services*, 331 S.C. at 513, 498 S.E.2d at 868. Because it is undisputed that neither Windham nor her husband owned the vehicle involved in the accident, she did not "have" a vehicle in the accident as is required by the statute. Respectfully, rehearing and reconsideration is warranted in this regard.

B. The Court's Opinion Tortures and Rewrites the Plain and Unambiguous Policy While Ignoring the Factual Stipulations.

In its opinion, the Court correctly notes that it "must enforce, not write, contracts of insurance and [it] must give policy language its plain, ordinary, and popular meaning." The Court also properly noted that it "should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." Respectfully, however, the Court went on to break both of these cardinal rules of insurance policy interpretation, by invoking policy definitions that are not relevant to the analysis, while ignoring those that are. It then makes an unprecedented leap, neither supported in the policy language or statutory law that operating a "temporary substitute car" equates to having and owning a car involved in an accident.

At the time of the October 5, 2012 accident, Windham occupied a vehicle that was owned by Enterprise and was temporarily rented to her. It is stipulated that Windham had no ownership interest in this vehicle. She has stipulated that the rental car does not meet the definition of "your car" under the Policy. Yet, the Court now ignores those stipulations and finds essentially that Windham's own car was involved in the accident. Furthermore, the Court ignores the unambiguous policy language prohibiting stacking

unless an insured is occupying a vehicle that meets either the definition of "your car" or a vehicle "owned by" "you" or a "resident relative."

The UIM coverage portion of the Policy controls when determining who can stack UIM coverage. In order to stack, the UIM provisions unequivocally state that the vehicle being operated at the time of the accident must be "owned by" the insured and provides a definition for that term. A "temporary substitute car," by its very definition, cannot be owned by the insured. If it is owned by the insured, then it does not meet the definition of a "temporary substitute car." The terms are mutually exclusive. Yet the Court determined, in one short paragraph, that because the vehicle was a "temporary substitute car," Windham "had" a vehicle in the accident and is entitled to stack.

In reaching its abrupt conclusion, the Court relies in part on *State Farm Fire & Casualty Insurance Co. v. Holmes*, No. 6:14-CV-04050-TMC (D.S.C. Jan. 7, 2016), noting that *Holmes* "has similar facts to the present case." While *Holmes* also involved a rental car and an accident, the policy language at issue was very different than here. The policy in the federal court case did not define "owned by." Here, the policy language provides that stacking is *only* permitted when a car "owned by" an insured is involved, which is a defined term that specifically does not include "temporary substitute car." Thus, the Court's reliance on *Holmes* in conjunction with its failure to appreciate the differences in the policy language and definitions of the two circumstances is a significant error in a declaratory judgment action concerning policy provisions.

When the Policy at issue here is read as a whole, it is clear that the "temporary substitute car" definition does not and was not intended to apply to UIM coverage. However, the Court's leap concluding that because she was driving a "temporary

substitute car," Windham "had" a vehicle involved in the accident wholly lacks foundational reasoning, tortures the clear and unambiguous language of the policy and in fact rewrites the policy language. Moreover, the UIM sections and the definition of "owned by" and its application to the prohibition on stacking are consistent with section 38-77-160, *Rhoden*, and *Concrete Services*' clarification. Given the Court's misapplication of insurance policy construction rules and its perfunctory conclusion, rehearing is warranted.

IV. CONCLUSION

The Court's opinion ignores the precedent of *Rhoden* and broadens the dicta of *Concrete Services* to create new stacking laws permitting an insured to *stack* policies despite not having an owned vehicle involved in the accident. Moreover, the Court ignores the cardinals of insurance policy construction and manipulates the valid policy definitions and provisions related to UIM to find stacking coverage that was never intended to be there and which does not comport with section 38-77-160.

Reversing the circuit court's grant of summary judgment deprives State Farm of the benefit of its bargain and opens the door for numerous stacking scenarios unintended and unsupported by our well-established statutory laws and jurisprudence. Simply put, the Court's opinion has misapprehended, and at times ignored, the stipulated facts and the applicable law, expanding stacking in heretofore unpermitted ways.

For the foregoing reasons, State Farm respectfully submits that this Court misapprehended or overlooked matters of both law and fact that compel a different outcome in this case. Accordingly, rehearing is warranted and the Court should withdraw its current opinion and issue a new opinion affirming the grant of summary judgment in

favor of the State Farm, as requested by State Farm in its appellate briefing and in this Petition for Rehearing.

Respectfully submitted,

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