THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case Tracking No. 2016-2185

APPEAL FROM LEXINGTON COUNTY
Civil Action No. 2016-CP-32-815
G. Thomas Cooper, Jr., Circuit Court Judge

State Farm Mutual Automobile Insurance Company ..... Plaintiff

vs.

Myra M. Windham ..... Defendant

PETITION FOR A WRIT OF CERTIORARI OF STATE FARM MUTUAL AUTOMOBILE INSURANCE

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and ruled upon by the Court of Appeals on December 1, 2020.

QUESTIONS PRESENTED FO REVIEW:

I. **Did the Court of Appeals err in reversing the circuit court's order granting summary judgment to State Farm and denying summary judgment to Windham, ultimately concluding that Windham is entitled to stack UIM coverages even though she did not have a vehicle involved in the accident?**

STATEMENT OF THE CASE

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner State Farm Mutual Automobile Insurance Company hereby petitions this Court for a writ of certiorari to review Opinion No. 5764 of the Court of Appeals. The Opinion reverses the circuit court's order which granted summary judgment to State Farm and denied summary judgment to Appellant Myra M. Windham ("Windham"). Petitioner now seeks a writ of certiorari so that this Court may review the Court of Appeals' Opinion, which if it stands, creates contradictory insurance law and ignores and otherwise tortures plain and unambiguous policy language. The Court of Appeals Windham is entitled to stack at-home UIM coverages when she was involved in an automobile accident while driving a car that she nor any resident relative owned at the time of the accident.

On October 5, 2012, Windham was involved in an automobile accident with Jennifer Mary McCardle ("McCardle") while operating a rental car owned by Enterprise Leasing Corporation ("Enterprise"). Windham was using the rental car as a temporary substitute vehicle following a previous automobile accident with Stephen Keever ("Keever") that occurred on September 29, 2012. Windham claims that she was injured as a result of both accidents and that her injuries exceed the amount of Keever's and McCardle's liability insurance. Windham filed suit against

Keever and McCardle in March 2013 in the Lexington County Court of Common Pleas, c/a number 2013-CP-32-1043 ("underlying case").

In 2014, Windham served State Farm as the Underinsured Motorist ("UIM") carrier, seeking recovery of UIM benefits against State Farm. State Farm issued five automobile policies to Myra Windham and/or Paul Windham. As a result of the October 5, 2012 accident, Windham has received $100,000 from McCardle's liability carrier and State Farm issued payment to Windham under the UIM Coverage in the amount of $100,000.00. Windham contends she is entitled to stack the remaining UIM limits from the other vehicles listed in the Policy Declarations because she was operating a "temporary substitute car." State Farm denies that Windham was entitled to stack coverage to recover UIM benefits under multiple policies, because none of her vehicles were involved in the October 5, 2012 accident.

State Farm filed this declaratory judgment action, seeking a declaration that Windham is not permitted to stack UIM coverage under the terms of State Farm's Policies or South Carolina law because none of her vehicles were involved in the accident on October 5, 2012. Windham filed an answer and counterclaim, contending she was entitled to stack. Both sides moved for summary judgment, stipulating to the material facts and contending the question was a matter of law based on statutory and policy interpretation.

A hearing on the cross-motions for summary judgment was held on June 23, 2016. On August 6, 2016, the circuit court denied Windham's motion and granted State Farm's motion for summary judgment, finding Windham was not permitted to stack UIM coverages while operating a temporary substitute vehicle pursuant to South Carolina law and the unambiguous language found in the policies. The circuit court denied Windham's motion for reconsideration on September 6, 2016. Windham filed a notice of appeal on October 26, 2016. The Court of Appeals issued its

Opinion reversing the circuit court on August 19, 2020. State Farm timely filed its Petition for Rehearing, which was denied by Order of December 1, 2020.

STATEMENT OF THE FACTS

A. The Accidents

The following facts were stipulated by the parties on June 22, 2016.

On September 29, 2012, Windham was involved in an automobile accident with Keever, while operating her Toyota Camry. Keever's liability carrier provided Windham a 2013 Dodge rental car as a temporary substitute vehicle following the accident, paid for by Keever's carrier. The Dodge meets the definition of a "temporary substitute car" as defined by each of the Policies. The Dodge is not an a vehicle shown under "your car" on the Policies' declarations pages, nor does it meet the definition of "owned by" as defined by the Policies. On October 5, 2012, Windham was involved in an automobile accident with McCardle while operating the Dodge rental car owned by Enterprise. None of the Windham household vehicles were involved in the McCardle accident. Windham was injured as a result of both accidents. She claims that her injuries exceed the amount of Keever's and McCardle's liability insurance. Windham filed suit against Keever and McCardle in March 2013.

In 2014, Windham served State Farm as UIM carrier, seeking recovery of UIM benefits against State Farm. State Farm issued five automobile policies to Myra Windham and/or Paul Windham. To date, as a result of the October 5, 2012 accident, Windham has received $100,000 from McCardle's liability carrier and State Farm issued payment to Windham under the UIM Coverage in the amount of $100,000.00. The parties agreed to pursue this declaratory judgment action to determine whether Windham can stack the additional coverages under the other four policies.

B. The Policies

State Farm issued five automobile policies to Myra Windham and/or Paul Windham, policy numbers 162 8590-D19-40C; 234 0370-A08-40M; 203 0864-F04-40C; 4629-A16-40Q; and 457 1883-B10-40A ("the Policy or Policies"), to Myra M. Windham and/or Paul A. Windham. The Policies were in full force and effect on the date of the accident. The Policies included Underinsured Motorist ("UIM") Coverage limits in the amount of $100,000/$300,000/$50,000.

The UIM portions of the Policies provide:

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

The Policy further provides,

> 4. If ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle other than ***your car*** that is ***owned by you*** or any ***resident relative***, then this coverage applies only to the extent of the underinsured motor vehicle coverage applicable to the motor vehicle that the ***insured*** was occupying.
>
> However, if the motor vehicle that the ***insured*** was ***occupying*** was not insured for underinsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to ***you*** or any ***resident relative*** by the State Farm Companies is the minimum limits required by the

Financial Responsibility Act. We may choose one or more policies from which to make payment.

The term "**owned by**" is defined in the Policy as:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

The term "Your car" is defined in the policy as, "the vehicle shown under 'YOUR CAR' on the Declarations Page. ***Your car*** does not include a vehicle that ***you*** no longer own or lease."

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules outlines some of the considerations used in deciding whether a writ of certiorari is appropriate. Two of those considerations are present in this action and weigh in favor of this Court issuing a writ of certiorari to review and reverse the Court of Appeals' Opinion. Specifically, the Court of Appeals' Opinion raises a novel question of law on the subject of UIM coverage for vehicles borrowed by or rented to insureds and conflicts with prior decisions of this Court and the interpretations of statutory law and insurance policies. See Rule 242(b)(1) and (3), SCACR.

On the subject of stacking, a novel question of law exists with regard to whether an insured who does not have an automobile involved in the accident and who stipulated to such facts can nevertheless reach back and stack multiple at-home UIM coverages. The Court of Appeals' Opinion greatly expands stacking law by allowing stacking of UIM coverages when the insured is driving a borrowed or rented car, violates the province of the General Assembly by reading terms into section 33-77-160 of the South Carolina Code which do not exist, and creates a new wave of UIM law that has not heretofore existed.

Review is also appropriate in this matter because the Court of Appeals' decision defies several cardinal rules of insurance policy interpretation, by invoking policy definitions that are not relevant to the analysis, while ignoring those that are. It also makes an unprecedented leap in torturing policy language to create a result neither supported by the insurance policy language or the statutory or case law in finding Windham could stack.

Special and important reasons exist supporting the issuance of a writ of certiorari in this matter, and this Court should grant certiorari and reverse the Court of Appeals, thereby reinstating the grant of summary judgment to Petitioner State Farm.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 38-77-160 PERMITS STACKING EVEN THOUGH NEITHER WINDHAM NOR ANY OTHER RESIDENT RELATIVE OWNED THE VEHICLE SHE WAS DRIVING AT THE TIME OF THE ACCIDENT.

The Court of Appeals erred in its analysis and interpretation of South Carolina statutory and case law concerning UIM coverage. In so doing, the Court of Appeals has expanded the ability to stack UIM coverage beyond the parameters of section 33-77-160 of the South Carolina Code and created both new and contradictory precedent.

Section 38-77-160 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 (emphasis added).

This Court has interpreted section 38-77-160 on numerous occasions in the context of stacking, never reaching the result reached by the Court of Appeals in its Opinion. In *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42–43 (2007), this Court stated:

> [T]he "If, however" sentence in § 38–77–160 evinces the legislature's intent, in a stacking situation, to bind the insured to the amount of UIM coverage he chose to purchase in the policy covering the vehicle *involved* in the accident. Thus, the statute itself contains a limit on the "portability" of UIM coverage.

(emphasis added). Indeed, our case law is clear that a Class I insured, i.e., an insured entitled to stack, 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).

The Court of Appeals' Opinion acknowledges this well-established precedent; however, its interpretation and application of such precedent is fatally flawed. As the Opinion acknowledges, 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 of Appeals Opinion distinguished *Rhoden* as a non-stacking case and instead, relies heavily on a discussion in *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998) that the *Rhoden* Court classified as "purely academic" dictum. 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 and in turn, "has" a vehicle involved in the accident. *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.

The facts of *Concrete Services* are also distinguishable from the instant case: The vehicle's status under the policy was not at issue in *Concrete Services* as it is here. In *Concrete Services*, 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 resident relative of the named insured, a corporation. Because neither the driver nor a resident relative owned the vehicle being driven at the time of the accident, she could not stack at-home UIM coverages. There is nothing in *Concrete Services*, section 38-77-160, or any related statute to support the Court of Appeal's conclusion that the "relevant statutes treat the vehicle in question the same as the insured's own vehicle, prohibiting any limitation on stacking." (Opinion No. 5764, p. *4).

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 who borrow cars from individuals, rent cars or are driving "loaners" from a car dealership are permitted to stack UIM coverages, 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. Windham stipulated that she nor any resident realtive had any 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 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. The Court of Appeals Opinion's perfunctory conclusion stating otherwise is wholly unsupported in the law and mandates review by this Court.

II. THE COURT OF APPEALS' OPINION TORTURES AND REWRITES THE PLAIN AND UNAMBIGUOUS POLICY WHILE IGNORING FACTUAL STIPULATIONS.

In its Opinion, the Court of Appeals correctly notes that it "must enforce, not write, contracts of insurance and [it] must give policy language its plain, ordinary, and popular

meaning." The Opinion also properly notes 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 of Appeals does exactly that, breaking both of these cardinal rules of insurance policy interpretation, by invoking policy definitions that are not relevant to the analysis and ignoring those that are. It then makes an unprecedented leap, neither supported in the policy language or statutory law, to find that operating a "temporary substitute car" equates to having and owning a car involved in an accident.

State Farm's policy language is clear and unambiguous. If an insured is occupying a motor vehicle other than "your car" that is "owned by" the insured or any resident relative, stacking is prohibited. "Owned by" is expressly defined in the Policy as "[] owned by; [] registered to; or [] leased, if the lease is written for a period of 31 or more consecutive days, to." The definition of "owned by" does not include a "temporary substitute car." This express definition of "owned by" and its application to the prohibition on stacking is consistent with section 38-77-160 and *Rhoden*. There is no basis in law or the Policy to alter the express definition of "owned by" to include "temporary substitute car" for purposes of stacking.

At the time of the October 5, 2012 accident, Windham occupied a vehicle that was owned by Enterprise and was temporarily rented to her. Windham has stipulated that the rental car does not meet either the definition of "your car" or the definition of "owned by" contained in the policy. Her stipulations on these facts are ***dispositive***. In order for stacking to be allowed under the policy, she must be operating a car that is "owned by" an insured. Windham has stipulated that she did not own it, it was not registered to her and she was not leasing it for a period of more than 31 days. Therefore, the rental car does not meet the definition of "owned by", and she is not permitted to stack under the terms of the UIM coverage. State Farm's policy is consistent with

38-77-160, and the Court's conclusion otherwise subverts the language of the Policy and the statute and the Legislature that wrote it.

Indeed, the Court of Appeals Opinion ignores those stipulations and essentially holds 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 abruptly reaching its holding, 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 Opinion'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 of Appeals Opinion's leap, holding 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. There is simply *nothing* in the Policy language or the statute that supports such an extrapolation. 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.

Notably, the Opinion does not void the Policy or invalidate its provisions; nor does it find that the policy language is ambiguous, contradictory, or otherwise confusing. Rather, the Opinion simply wishes to reach its desired result of stacking, ignoring the contractual and statutory language which prohibit stacking in the circumstances present in this declaratory judgment action. *Cf. Opinion No.* , p. 5764 ("'Generally, stacking of additional coverage for which the insured has contracted is permitted unless limited by statute or a valid policy provision.'" (quoting *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404, 496 S.E.2d 631, 631-32 (1998)).

Given the Court of Appeals Opinion's misapplication of insurance policy construction rules and its perfunctory result-oriented conclusion, this Court's review is warranted.

CONCLUSION

As outlined above, this Court should issue a writ of certiorari to review and reverse the Court of Appeals' decision, thereby reinstating the circuit court's granting of summary judgment to State Farm.