THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2020-001693

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

RECEIVED

**Jan 29 2021**

S.C. SUPREME COURT

State Farm Mutual Automobile Insurance Company……. Petitioner

vs.

Myra M. Windham …….....Respondent

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW:

Respondent would re-state the question presented as follows:

I. **Did the Court of Appeals correctly rule that Section 38-77-160 permits stacking for Windham while occupying a "temporary substitute car" – a rental car provided to her because her primary car was out of service, disabled?**

## 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 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."

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 38-77-160 PERMITS STACKING FOR WINDHAM WHILE OCCUPYING A "TEMPORARY SUBSTITUTE CAR" – A RENTAL CAR PROVIDED TO HER BECAUSE HER PROMIARY CAR WAS OUT OF SERVICE, DISABLED.

The relevant statutes, as properly construed by the Court of Appeals, treat this sort of vehicle as the insured's own vehicle, prohibiting any limitations on stacking. The UIM statute entitles an insured to stack when the insured "is involved" in a wreck. This standard is satisfied if the insured is injured while occupying a short term replacement vehicle for the insured's vehicle. This is bolstered by the common understanding of the words "replace"

and "substitute," and it furthers the UIM statute's purpose. The statute does not require actual ownership. Denying stacking renders Mrs. Windham's coverage on her Camry illusory.

The policy itself treats this sort of vehicle as the insured's own vehicle. The policy's language about a "temporary substitute car" *not being* a "non-owned car" naturally means it will be treated like an owned vehicle even though the insured does not actually own it. The doctrine of reasonable expectations supports this reading. The insurance code and individual insurance policies work in tandem. UIM coverage is required to be offered, and in the case of required coverage, the statute sets the boundaries. If this were not so, different insurance companies could offer varying coverages that are all misleadingly labeled as "UIM," but the coverages will not be the same.

Two statutes inform the UIM stacking analysis. The first is the definition of "insured" which delineates two classes of individuals: (1) the named insured, his or her spouse, and his or her resident relatives; and (2) permissive users and guests. S.C. Code Ann Section 38-77-30 (7) (Supp.2016). Class I insureds have the right to stack UIM because the definition of insured explains they are insured "while in a motor vehicle *or otherwise*" which means their status as an insured is portable. *Davidson v. E. Fire & Cas. Ins. Co.*, 245 S.C. 472, 477-78, 141 S.E.2d 135,138 (1965).

The second applicable statute is the definition of UIM, which contains two limitations on the right to stack. If the insured is occupying one of his or her vehicles at the time of a wreck, stacking is limited to the amount of coverage on the vehicle involved. S.C. Code Ann. Section 38-77-160 (Supp. 2016). If none of the insured's vehicles is involved, the insured may not stack, and may recover under only one of her UIM coverages. *Id.* The

two sentences containing these limitations are sometimes referred to as the "If, however" clause of the UIM statute. *Carter v. Standard Fire*, 406 S.C. 609, 624, 753 S.E.2d 515, 523 (2013). This clause means that South Carolina does not follow a "pure stacking" analysis – stacking is not tied *exclusively* to the number of premiums an insured pays. Instead, the statute embodies a compromise, allowing stacking when an insured's vehicle is involved and tying the stackable coverage to the amount of UIM on the involved vehicle.

The "involvement" standard is satisfied when the insured is injured while occupying a short term replacement for the insured's actual vehicle. The Supreme Court has explained "involved" in the UIM statute to mean "to relate to or have an effect on…to draw in as a participant…[to] implicate, include, affect." *Merck v. Nationwide*, 318 S.C. 22, 24, 455 S.E. 2d 697, 698 (1995). The term has been construed to encompass a vehicle that did not play an active role in the collision: *Merck* held a vehicle was "involved" even though it was disabled and loaded on a wrecker when a drunk driver ran off the road and struck the insured, the wrecker driver, and wrecker. *Id.* In holding the insured could stack, the Court noted the disabled vehicle was present at the scene and the accident had an effect on the vehicle.

Mrs. Windham's Camry was not present at the second wreck or directly affected, but her circumstances fit different parts of *Merck's* involvement definition – the explanation that involvement describes the insured's vehicle relating to or having an effect on the incident. Everyone concedes that Mrs. Windham's principal vehicle was put out of service and inoperable and that the rental car was a short-term replacement and substitute for her primary car. Unlike a situation where someone uses a rental car for pleasure or while out-of-town, everyone concedes that the rental car *was acting as* Mrs. Windham's own car for a

brief time. Mrs. Windham's insured vehicle was "involved" in this wreck. It was out of service, requiring her to use the rental car that she was operating.

This definition of involved is broad, but it fits the UIM statute's purpose. South Carolina's appellate courts have repeatedly explained the UIM statute's purpose is not to limit coverage, but "to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist." *Carter*, 406 S.C. at 615, 763 S.E.2d at 518 (quoting *Floyd vs. Nationwide*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005)). The UIM statute was enacted "for the benefit of injured persons" and "should be liberally construed to effect [that purpose]." *Id*. "Involved" must be construed broadly.

State Farm argues that the Court of Appeals' Opinion misinterpreted and misapplied *Rhoden.* Dictum in Rhoden indicated 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 correctly distinguished *Rhoden* as a non-stacking case and noted that the *Rhoden* Court classified as "purely academic " dictum. *Rhoden* involved the public policy of binding an owner to the amount of UIM on the vehicle in the wreck. When the Supreme Court discussed the "involvement" standard it explained the UIM statute was "at best" ambiguous and that UIM's "personal and portable" character required allowing resident relatives to stack because they did not own the measuring vehicle, which had no UIM. *Rhoden*, 398 S.C. 393, 401-402, 728 S.E.2d 447, 481-482 (2012). The Court also expressly acknowledged a prior decision that noted the court has never required ownership as a prerequisite to stacking. *Id*. at 401, n.5, 728 S.E.2d at 481 n.5 (citing *Concrete Services v. U.S. Fidelity and Guarantee*, 331, S.C. 506, 512, 498, S.E.2d 865, 868 (1998)). The Court explained its prior discussion as dictum and governed by public policy considerations

*Rhoden* did not present. *Id.*

All of the public policy considerations operate in Mrs. Windham's favor. She did not elect to put UIM on some of her policies and not others. She and her husband purchased UIM on all the vehicles they owned. True, she was not driving the vehicle she owned, but she would have been driving her own car if it were not disabled and inoperable. Everyone agrees the rental car was a short term substitute or replacement for the insured car. The common understanding of "substitute" and "replace" is to take the place of another.

Denying stacking created the undesirable situation where the insurance contract on Mrs. Windham's Camry is rendered illusory. Each of Windham's four other policies gave her liability coverage, personal injury protection coverage, UIM Coverage, and the rest of her purchased coverages while she was driving the rental. (R.pp.114, 119, 125, 129, 133, & 136.) If Mrs. Windham cannot stack, her premiums on her Camry count for nothing the whole time the car sat in the shop. Her policy was worthless.

The Court of Appeals was correct in its construction of the relevant statutes requiring treating this vehicle as Mrs. Windham's own vehicle, entitling her to stack. The "involvement" standard must be construed broadly, and public policy supports her receiving the benefit of her bargain rather than rendering her insurance policy temporarily worthless.

## II. THE COURT OF APPEALS' OPINION CORRECTLY APPLIED THE TERMS OF THE POLICY AND STATUTORY AND CASELAW TO DETERMINE THAT WINDHAM WAS ENTITLED TO STACK HER UIM COVERAGE.

In its Opinion, the Court of Appeals correctly enforced the terms of the State Farm policy and gave policy language its plain, ordinary, and popular meaning. The policy's language is found in four numbered paragraphs under the heading "If Other Underinsured

Motor Vehicle Coverage Applies." (R.p.135). The first paragraph explains the policy is primary coverage if an insured suffers bodily injury while occupying "your car" – a defined term. *Id.* The second paragraph explains the policy otherwise supplies excess coverage. *Id.* The third numbered paragraph limits stacking if bodily injury occurs while the insured is occupying a motor vehicle not "owned by" you – another defined term – or any resident relative. *Id.* The fourth numbered paragraph discusses recovering UIM when a wreck occurs while occupying a vehicle that is "owned by you" but is not "your car." *Id.* In short, the policy limits stacking unless an insured is driving "your car", a vehicle "owned by you," or a vehicle "owned by" a resident relative.

Stacking is allowed when an insured is driving "your car." One set of key language is the definition of "temporary substitute car," explaining that a temporary substitute car "replaces *your car*." (R.p.113) (emphasis in original.) As a temporary substitute car, the rental stands in the place of Mrs. Windham's Camry, making her UIM primary under the first numbered paragraph in the "Other Insurance Coverage" heading. (R.p.135).

More key language is in the same definition. The policy explains that if a "temporary substitute car" also meets the definition of a "non-owned car," it is not to be considered a non-owned car, but is a "temporary substitute car" only. (R.p.113). When read naturally, this gives the impression that a temporary substitute car will be treated as an owned car even though the insured does not actually own it. The opposite of non-owned is owned.

The Supreme Court has explained that insurance contracts are to be read in accordance with reasonable expectations. *Bell v. Progressive*, 407 S.C. 565, 578-581, 757 S.E.2d 399, 405-407 (2014). This doctrine cannot serve as an end-around clear policy language, but insurance contracts are rarely models of clarity, and the doctrine does not

thwart any clear policy language here. A reasonable insured would read "substitute", "replace," and the clause explaining a "temporary substitute car," is not a "non-owned car" to mean that a "temporary substitute car" will be treated as an owned car.

The Court of Appeals did rely 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." State Farm contends that the policy language at issue was very different in *Holmes* than here. The policy in the federal court case had much of the same policy language Mrs. Windham has identified here- the fact that a "temporary substitute car" is not a "non-owned car." (R.pp.200-202).

The Court of Appeals correctly applied the terms of the policy and the statutory law and caselaw to rule that Mrs. Windham was entitled to stack her UIM coverage.

## CONCLUSION

For the foregoing reasons this Court should deny the petition.

Respectfully submitted,

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