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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellant Case No. 2019-001644
Case No. 2018-CP-23-02782

Bristol West Preferred Insurance Company,.....Respondent,

v.

Lemore Young, James E. Young, Darius Jerard Allen and
Latusa Nicole Reid,.....Defendants,

Of Whom Janice A. Fisher as Personal Representative for Lemore Young is the..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

Brian T Smith
S.C. Bar No: 70232
714 Pettigru Street
Greenville, South Carolina 29601
Telephone: (864) 239-2007
Fax: (864) 239-2039
bsmith@btsmithlaw.com

Attorney for Appellant

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I. RESPONDENT'S CLAIM THIS APPEAL IS MOOT BECAUSE APPELLANT'S TORT CLAIMS AGAINST THE UNINSURED MOTORIST ARE BARRED BY THE STATUTE OF LIMITATIONS FAILS BECAUSE C.A. NO. 2017-CP-23-00523 WAS RESTORED

In Respondent's first argument, they assert that this appeal is moot. Reasoning that, "Because the statute of limitations and the one-year tolling period under Rule 40(j) have expired, Appellant will not be able to maintain his action against the alleged uninsured motorist." (Respondent's Brief p. 7). Respondent's argument that this appeal is moot fails, as the action against the uninsured motorist has been restored.

On December 7, 2021, Appellant filed a Notice of Motion and Motion to Restore Case to Active Docket in C.A. No. 2017-CP23-00523. (Motion to Restore, R. pp. 120-121). Appellant's Memorandum in Support of Motion to Restore Case to Active Docket followed on December 30, 2020. (Memorandum in Support, R. pp. 122-131). A hearing was held on January 5, 2021, before the Honorable Perry H. Gravely. Judge Gravely stated in his January 6, 2021 Order resorting the case that, ""Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period." *Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (S.C. Sup. Ct. 2003)." (Order p. 2, R. p. 16). Respondent argued at the hearing that the case should not be restored. Respondent's argument failed and Judge Gravely determined that, "Plaintiff asserts the Statute of Limitations are tolled because of provisions in S.C. Probate Code and for other equitable reasons. Therefore, the Court grants Plaintiff's Motion to Restore,..." (Order p. 2, R. p. 16).

Appellant explains in their Memorandum in Support of Motion to Restore Case No. 2017-CP23-00523 to Active Docket that,

> "Prior to the Consent to 40(j) Order being filed on May 6, 2019, Counsel for Plaintiff and Counsel for Bristol West, Andrew F. Carson of Willson Jones Carter & Baxley, P.A. were in negotiations regarding coverage under their insureds, James E. Young's policy. It was verbally agreed between counsel that the outcome of the Bristol West case would determine if this case should be restored, as coverage under the Bristol West policy was likely available to the Plaintiff and a settlement may be reached. A settlement was not reached. Instead, the Bristol West case, 2018-CP-23-02782, came before the Court for non-jury trial on August 22, 2019 on a Declaratory Judgement Action in which the Court granted the declaratory judgment and issued a finding that the vehicle being driven by Darius Jerard Allen and owned by Latusa Nicole Reid was uninsured at the time of the Accident. Plaintiff Young timely filed an appeal."

(Memo in Support pp. 2-3, R. pp. 123-124). The failed negations were followed by the Declaratory Judgment, which resulted in this appeal, and the now restored case against Darius Jerard Allen and Latusa Nicole Reid. Appellant has restored the case against the Darius Jerard Allen and Latusa Nicole Reid and asserts that the avenue to "obtain a judgment against the at fault uninsured motorist," is still available. (Respondent's Brief p. 6). By the forgoing reasons, this appeal is not moot and should not be dismissed.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE AUTOMOBILE POLICY ISSUED BY RESPONDENT TO JAMES YOUNG DID NOT INCLUDE UNINSURED MOTORIST COVEREAGE

A. Rejected Coverage

The trial court erred in holding that the automobile insurance policy issued by Respondent to James Young did not include uninsured motorist coverage. The trail court found that James E. Young made a valid rejection of UM coverage. (Amended Order p.2, ¶ 4 and p. 3, ¶ 3, R. p. 8 ¶4 and p. 9 ¶ 3).

Respondent argues that,

> "The Declaration Page issued by Respondent to James Young shows that uninsured motorist coverage was "REJECTED," and no premium was charged for that coverage. (Respondent Trial Exhibit 2). **There is no evidence that James Young did not reject uninsured motorist coverage, which is optional in Michigan**, and therefore the trial court correctly ruled that James Young did not have uninsured coverage on his policy." (emphasis added).

(Respondent's Brief p. 9). Michigan's insurance code does not outline requirements of UM coverage as it is not mandatory under Michigan's No-Fault Insurance laws. Michigan is one of a few No-Fault Insurance states in the United States. Since the benefit details and specific amounts of optional UM coverage are not properly outlined within the Bristol West Policy, the Declaration Page or the UM Rejection Form, it seems that the insured, James Young, didn't understand the benefits or amount of coverage he was rejecting. The trial transcript confirms that the insured, James Young, believed he had coverage and indicated to his brother, Lemore Young, that he did. Appellant's counsel stated during trail:

> That's the issue. My client is a guest in the car and I think that, you know, after we get further into it, his perspective is that, you know, in South Carolina UM, uninsured motorist coverage is mandatory, there's coverage on the car, he asked his brother if there was coverage on the car. So, his perspective as a guest needs to be considered in the case.

(Trial Transcript p. 12, lines 6-16, R. p. 143, lines 6-16).

In *State Farm Mut. Auto Ins. Co v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987), the South Carolina Supreme Court adopted the Supreme Court of Minnesota's four-part test for determining whether an insurer has complied with its requirements when offering optional coverage. Under *Wannamaker*:

> (1) the insurer's notification process must be commercially reasonable whether oral or in writing; **(2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;** (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured

> must be told that optional coverages are available for an additional premium. 291 S.C. at 521. (emphasis added).

Respondent agrees in their brief that, "**Uninsured motorist coverage is optional** and is not mandated by the no-fault act." Cole v. Auto Owners Ins. Co., 723 N.W.2d 922, 924 (Mich. Ct. App. 2006)." (Respondent Brief p. 8). (emphasis added). After a review of the Bristol West policy (R. pp. 163-235), the Declarations Page (R. p. 163), and the UM Rejection Form (R. p. 241), this Court can very quickly conclude that the standard set forth in *Wannamaker* were certainly not met. There is no question that there is an UM Rejection Form signed by James Young. Under *Wannamaker,* in determining that James Young was properly informed and rejected the coverage, it can also be easily concluded that there must be a standard by which to determine that.

Appellant, as a guest, should be able to rely on the insured's representation that he believed there was coverage.

B. Reliance on *Newton*

Respondent's argument that the automobile insurance policy issued to James Young by Respondent did not include uninsured motorist coverage relies solely on the holding of *Newton v. Progressive Northwestern Ins. Co*., 347 S.C. 271, 554 S.E.2d 437 (Ct. App. 2001). Arguing in their brief, "Based on this Court's holding in Newton under almost identical facts, in the instant case this Court should hold that the trial court did not err in finding that the automobile insurance policy issued to James Young by Respondent did not include uninsured motorist coverage." (Respondent's Brief p. 10).

Appellant's counsel outlines at trial several differences, but one of the main differences between *Auto Owners Ins Co. v. Rollison*, 663 S.E.2d 484, 378 S.C. 600 (S.C. 2008) and *Newton*,

> The issue in that case was that it looked to see if there was permissive -- well, it was a little different but it looked but it did

> create an analysis of a guest having coverage as an insured under the statute whereas in Newton you're looking at the named insured.

(Trial Transcript p. 21, lines 6-10, R. p. 152, lines 6-10). Also pointing out that,

> But what it did is it clearly articulated grounds to analyze, you know, the perspective of a guest and I think that I would be covered under the law and I think that the policy itself allows -- allows that.

(Trial Transcript p. 24, lines 17-21, R. p. 155, lines 17-21). Appellant's counsel further explains,

> ...And I think because this policy itself allows reformation to the state in which the accident happened, we' re going -- South Carolina's going to look at the perspective of Lamore as a guest and find that there's coverage. He didn't have anything -- he was not the named insured. He didn't know, he just assumed that there was coverage in South Carolina since there's coverage on every vehicle.

(Trial Transcript p. 22, lines 14-21, R. p. 153, lines 14-21). In regard to the language of the policy,

> ... the policy is allowed to be reformed because I think what it did in Rollison is establish that the Court's going to look at the perspective of innocent guests and award coverage, especially a South Carolina resident that had no knowledge of Michigan law that is permissive.

(Trial Transcript p. 23, lines 18-23, R. p. 154, lines 18-23).

Defendant James Young's Michigan issued personal auto policy in part F, clearly states that:

> If an accident to which this policy applies occurs in any state or providence other than the one in which your covered auto is principally garaged, and ***if a statute of that state or providence that is applicable to us deems out-of-state automobile or motor vehicle policies issued by us to provide particular forms or limits of coverage not provided for in this policy when your covered auto is involved in an accident in that state, then for purposes of that accident only, we will interpret your policy as providing the minimum coverage deemed to be provided,*** *at the minimum amounts permitted by law*, and subject to the exclusions set forth in any coverage part of this policy, to the fullest extent permissible by law." (emphasis added) (Plaintiff's Exhibit 1 - Michigan Auto Policy, page 42-43, R. pp. 213-214).

S.C. Code Ann §56-9-353 lays out the requirement that a policy issued in another state must conform to a limit of not less than twenty-five thousand dollars coverage because of bodily injury. The plain language of the Bristol West policy in part F, confirms that if a state requires the policy to reform, the insurer "will interpret your policy as providing the minimum coverage deemed to be provided." (Plaintiff's Exhibit 1 - Michigan Auto Policy, page 42-43, R. p. 213-214). "The foremost rule in interpreting an insurance contract is to give effect to the intent of the parties as shown by the language of the contract itself." *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 178, 504 S.E.2d 127,129 (Ct. App. 1998).

Michigan Law under MCLS § 500.3177, brings light to the very fact that when an uninsured vehicle is involved in an accident, carriers are required to pay benefits "for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle." The plain language that under Michigan law, coverage is intended to exist in accidents involving uninsured motorist is evidenced here:

> MCLS § 500.3177 Recovery by insurer of benefits and costs from owner or registrant **of uninsured motor vehicle**; written agreement to pay judgment in installments; notice.
>
> Sec. 3177. (1) **The <u>insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle</u>** as a motor vehicle may recover all benefits paid, incurred loss adjustment costs and expenses, and incurred attorney fees from the owner or registrant of the uninsured motor vehicle or from his or her estate. Failure of the owner or registrant to make payment within 30 days after a judgment is entered in an action for recovery under this subsection is a ground for suspension or revocation of his or her motor vehicle registration and license as defined in section 25 of the Michigan vehicle code, 1949 PA 300, MCL 257.25. **<u>For purposes of this section, an uninsured motor vehicle is a motor vehicle with respect to which security as required by sections 3101(1) and 3102 is not in effect at the time of the accident.</u>**

As opposed to requiring an insured to carry specifically named UM coverage, Michigan requires all policies include Personal Injury Protection [hereinafter "PIP"]. MCLS § 500.3101(2). Under PIP coverage, the insurer is liable for personal protection benefits without regard to fault for "bodily injury" and "accidental bodily injury". MCLS § 500.3105. To date, Appellant has not received any benefits from the insured's Personal Injury Protection coverage, despite the demand for all coverage available under the Bristol West policy, related to the accident with the uninsured motorist.

As it's plain to see, relying on "Newton under almost identical facts," is flawed, as the facts of this case and vital surrounding circumstances are vastly different from *Newton* as further explained below. (Respondent's Brief p. 10).

1. In *Newton,* Newton was the plaintiff, driver, and insured. Newton possessed a Georgia issued insurance policy, where he was the one who knowingly rejected UM coverage. In the case at bar, Appellant Young, was the passenger of Respondent's insured's vehicle and Appellant had no knowledge or reason to believe he was uncovered by his brother's policy, as he was told coverage was available.

2. In *Newton,* Newton was involved in an accident in South Carolina with an uninsured motorist. Newton sued Progressive to reform his policy under the grounds that UM coverage was mandatory in South Carolina, despite the fact he fully understood he declined the coverage. In *Newton*, no expectation of coverage should exist. In the case at bar, Appellant was not afforded the opportunity as a guest and an insured as defined in *Rollison*, to make an affirmative rejection of coverage. As a South Carolina resident, being that all South Carolina policies have UM coverage, Appellant should have the expectation that the coverage should exist.

3. In *Newton,* the Court held that S.C. Code Ann. section 38-77-150 (Supp. 2000) has limited reach regarding policies issued out-of-state. This prospective in *Newton* is regarding an out-of-state driver who knowingly declined coverage in his home state of Georgia and sought coverage under the laws of South Carolina as a means recovering his loss. In *Rollison*, the Court specified that a guest is one of the types of insureds and is deserving of their own analysis. Appellant deserves his own analysis. S.C. Code Ann. §56-9-353 and the policy declaring that Bristol West "will interpret your policy as providing the minimum coverage deemed to be provided.", should be considered when analyzing coverage available to the Appellant. (Plaintiff's Exhibit 1 - Michigan Auto Policy, page 42-43, R. p. 213-214).

The trial court made a consequential error and the Appellant presented substantial information supporting his position to the lower court at trial. "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." In re *Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (quoting *WDW Props. 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." *Id*. at 301–02, 584 S.E.2d at 155 (quoting *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth*., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)).

In Judge Kinlaw's analysis of *Newton* and S.C. Code Ann. §38-77-30, he states,

> " But I think the thing that stands out for me, counsel, is this language in Section 38-77-30 Subsection 1, that section limits automobile insurance to liability insurance including uninsured motorist coverage written or offered by the automobile insurers. And that section goes on in Subsection 2 **to define the term automobile insurer as an insurer licensed to do business in South Carolina and authorized to issue automobile insurance policies.**"

(Trial Transcript p. 27, line 25 - p. 28, line 7, R. p. 158, line 25 - R. p. 159, line 7). Appellant disagrees and asserts that, "Questions of statutory interpretation are questions of law, which we

are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

Powers v. DAIIE, 398 N.W.2d 411 (Mich. 1986), outlines how Michigan law intends for polices to be interpreted:

> 2) An insurer may not "escape liability by taking advantage of an ambiguity...." Hooper, supra at 393. "`[W]herever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted.'" DeLand, supra at 18.
>
> 4) An insurer may not "escape liability by taking advantage of... a forced construction of the *624 language in a policy...." Hooper, supra. "[T]echnical constructions of policies of insurance are not favored...." Pietrantonio, supra.
>
> 5) "The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all question might have been avoided by a more generous or plainer use of words." Hooper, supra.
>
> 6) "[N]ot only ambiguous but deceptive." "[T]he policyholder must be protected against confusing statements in policies ...." DeLand, supra at 17-18.

For the forgoing reasons, *Newton* is not the proper standard to determine Appellant's case. The language of the policy regarding compliance with the statues of other states, the requirements of S.C. Code Ann §56-9-353, and the fact that the Appellant as the "insured" as defined in *Rollison* and §38-77-30(7) 2002, should be able to expect coverage is available for bodily injury and accidental bodily injury, as all policies in South Carolina provide that protection , and the fact Respondent's insured believed there to be coverage, prove that Bristol West's Michigan issued policy should be reformed.

III. MEANINGFUL OFFER OF UNINSURED MOTORIST COVERAGE

The insurer has the burden of proving that a meaningful offer of optional coverage has been made to the insured. *Butler v. Unisun Ins. Co.*, 475 S.E. 2d 758, 759 (1996). "A noncomplying offer has the legal effect of no offer at all." *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of the liability insurance carried by the insured." *Butler* at 760, citing *Dewart v. State Farm Mut. Auto. Ins. Co.*, 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1998).

In the Amended Order, Judge Kinlaw found that, "Accordingly, it is hereby Ordered that the Policy does not provide any UM coverage due to a valid rejection of coverage by James R. Young, that S.C. Code Ann. § 38-77-150 does not affect the Policy, and that neither South Carolina's financial responsibility law nor public policy require the Policy be reformed to add UM coverage. (Amended Order p. 3 ¶ 4, R. p. 9, ¶ 4).

At trial, Counsel for Appellant argued,

> But that's what the policy says. And because my client was, under Rollison, a guest, you have to look at his perspective. He becomes and insured in his own right. Because UM is a mandated coverage in this state, of course he assumed that there was coverage on the car. And so, therefore, I think that under Rollison we should reform the policy to the minimum coverage, Your Honor.

(Trial Transcript p. 18, lines 6-12, R. p. 149, lines 6-12).

> ... And I think because the policy itself allows reformation to the state in which the accident happened, we're going -- South Carolina's going to look at the perspective of Lamore as a guest and find that there's coverage. He didn't have anything -- he was not the named insured. He didn't know, he just assumed that there was coverage in South Carolina since there's coverage on every vehicle.

(Trial Transcript p. 22, lines 14-21, R. p. 153, lines 14-21).

The terms of the policy that allow for its reform and the perspective of the Appellant under *Rollison,* create the opportunity for coverage for the Appellant. As a guest and insured, he was not afforded the right to decline coverage.

IV. THE TRIAL COURT ERRED IN INTERPRETING THE POLICY ISSUED BY RESPONDENT TO JAMES YOUNG

Because uninsured motorist coverage is not required by statute, the language of the insurance policy determines the conditions of coverage. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 470; 566 NW2d 517 (1996). An insurance policy that is clear and unambiguous must be enforced in accordance with its terms. *Id*. at 469. Where the terms of an insurance policy are ambiguous, the ambiguity must be construed against the insurer and in favor of the insured. *Id*. If a fair reading of the entire contract of insurance leads to a conclusion that there is coverage under particular circumstances, and another fair reading results in a conclusion that there is not coverage under the same circumstances, the contract is ambiguous. *Auto Club Ins Ass'n v. DeLaGarza*, 433 Mich 208, 213; 444 NW2d 803 (1989).

Neither Appellant Young or his estate, have yet to receive any compensation for his injuries from the insured or the uninsured. Appellant has been deprived of the compensation he is due under the Respondent's "No-Fault" policy. Respondent states in their brief that, "Appellant may have been able to make a claim under the policy of Personal Protection Insurance issued by Respondent to James Young, but that was not the question for the trial court, and that is not the question that is before this Court." (Respondent's Brief p. 13). The trial court had the duty to justly interpret the Michigan issued policy that allows for reform to South Carolina's minimums. *Powers v. DAIIE,* 398 N.W.2d 411 (Mich. 1986), as previously outlined, provides the considerations that Michigan uses when holding insurers accountable to injured parties. Appellant

asks this Court to interpret the policy, and all applicable laws, and find any and all coverage that is available to the Appellant.

CONCLUSION

Thus, for the reasons set forth more fully above, Appellant, Lemore Young, would ask this Honorable Court to reverse the lower Court's decision.

Respectfully Submitted,

s/Brian Smith

Brian Smith (S.C. Bar No. 0070232)
Law Offices of Brian T. Smith
714 Pettigru Street
Greenville, S.C. 29601
Phone: 864-239-2007
Fax: 864-239-2039
Attorney for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted,

s/Brian T. Smith

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Brian T. Smith (S.C. Bar No. 70232)
The Law Office of Brian T. Smith
714 Pettigru Street
Greenville, SC 29601
Phone: 864-239-2007
Fax: 864-239-2039
bsmith@btsmithlaw.com
Attorney for Appellant

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PROOF OF SERVICE

I certify that on this March 10, 2021, I have served the Final Reply Brief of Appellant on the Respondent's counsel of record via electronic service to the email address listed below:

M. Kyle Thompson
mkthompson@wjlaw.net

March 10, 2021
Greenville, SC

s/Brian T. Smith

Brian T. Smith (S.C. Bar No. 70232)
The Law Office of Brian T. Smith
714 Pettigru Street
Greenville, SC 29601
Phone: 864-239-2007
Fax: 864-239-2039
bsmith@btsmithlaw.com
Attorney for Appellant