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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

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

Appellant.

FINAL BRIEF OF RESPONDENT

M. Kyle Thompson, S.C. Bar No. 68283
Allison M. Mabbs, S.C. Bar No. 101795
325 Rocky Slope Road, Suite 201
Greenville, SC 29607
(864) 908-3813
mkthompson@wjlaw.net
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. IS THE APPEAL MOOT DUE TO THE FACT THAT THE STATUTE OF LIMITATIONS IN THE UNDERLYING CASE HAS RUN?
2. DID THE TRIAL COURT CORRECTLY HOLD THAT RESPONDENT'S AUTOMOBILE INSURANCE POLICY ISSUED TO JAMES YOUNG DID NOT PROVIDE UNINSURED MOTORIST COVERAGE?
3. DID THE TRIAL COURT CORRECTLY HOLD THAT APPELLANT WAS NOT ENTITLED TO A MEANINGFUL OFFER OF UNINSURED MOTORIST COVERAGE?
4. DID TRIAL COURT PROPERLY INTERPRET INSURANCE POLICY ISSUED BY RESPONDENT TO JAMES YOUNG?

STATEMENT OF THE CASE

On May 10, 2018, Bristol West Preferred Insurance Company (Respondent) brought this action seeking a declaratory judgment against Lemore Young (Appellant), James E. Young, Darius Jerard Allen, and Latusa Nicole Reid. This action sought a declaration that Respondent did not provide any uninsured motorist coverage on a policy issued to James Young under which Appellant sought coverage as a result of a motor vehicle accident that occurred February 9, 2014. James Young, Darius Jerard Allen, and Latusa Nicole Reid did not answer or otherwise appear in the matter, and Respondent was granted default judgment as to those three parties. Appellant filed an answer on February 20, 2019.

Appellant had previously filed suit against Darius Jerard Allen, and Latusa Nicole Reid in an underlying tort action on January 30, 2017, entitled Lemore Young vs. Darius Jerard Allen, and Latusa Nicole Reid, C.A. No. 2017-CP-23-00523. That case was dismissed under Rule 40(j), South Carolina Rules of Civil Procedure, on May 6, 2019. It has not been restored, nor has a motion been filed to restore it.

This declaratory judgment action was called for a non-jury trial on August 22, 2019, before the Hon. Alex Kinlaw, Jr. At the conclusion of the trial, Judge Kinlaw indicated that he was going to rule in favor of the respondent and grant the requested declaratory judgment. He issued a formal order on September 24, 2019. He subsequently issued an amended order on October 18, 2019. This appeal followed.

STATEMENT OF FACTS

Respondent is an insurance company authorized to do business in the state of Michigan. James E. Young, a resident of Michigan, purchased a policy of automobile insurance from respondent on February 4, 2014. The policy was in effect from February 4, 2014, to August 4, 2014. It insured a 2006 AUDI A4 2.0T Quattro and had liability limits of \$20,000 per person and \$40,000 per accident. (R. p. 8, lines 3-6).

At the time that he purchased the policy, James E. Young made a valid rejection of Uninsured Motorist (“UM”) coverage on the policy, which was issued and delivered in the State of Michigan. The vehicle in question, the 2006 AUDI A4 2.0T Quattro, was registered and garaged in the State of Michigan. James E. Young was licensed as a driver in Michigan and had no connection to South Carolina. (R. p. 8, lines 7-11, 18-19).

On February 9, 2014, James Young was driving the 2006 AUDI A4 2.0T Quattro in South Carolina, and Appellant was a passenger. Young had driven to South Carolina for the purpose of picking up Appellant, his brother, and driving him back to Michigan; he was not attempting to establish residency in South Carolina. The vehicle was involved in a motor vehicle collision with another vehicle being driven by Darius Jerard Allen and owned by Latusa Nicole Reid. Appellant claims he was injured in that collision.

Upon information and belief, the vehicle being driven by Darius Jerard Allen and owned by Latusa Nicole Reid was uninsured at the time of the collision. Appellant presented a UM claim under the policy issued by Respondent for bodily injury and other damages arising out the collision despite UM coverage being rejected under the policy by James E. Young.

Appellant filed a separate lawsuit in tort on January 30, 2017, alleging that Allen and Reid were responsible for his injuries sustained in the collision. (R. pp. 20-23). In that action, he served

Respondent as the purported UM carrier. Respondent appeared, answered, and defended that case as allowed by S.C. Code Sec. 38-77-150. It subsequently filed this declaratory judgment action. The tort case was dismissed pursuant to South Carolina Rules of Civil Procedure 40(j) on May 6, 2019, while this action was pending. (R. p. 12). The tort case has not been restored, and the statute of limitations in the would have run on May 6, 2020, as the statute of limitations only tolls for one year following a dismissal under Rule 40(j).

STANDARD OF REVIEW

In South Carolina, declaratory judgments are neither legal nor equitable. See Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015); Felts v. Richland Cnty., 303 S.C. 354, 400 S.E.2d 781 (1991); Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue. See Bundy, supra.; Doe v. S. C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001).

The underlying issue in this action is the determination of coverage under an insurance policy. An action to ascertain whether coverage exists under an insurance policy is an action at law. See Horry Cnty. v. Ins. Reserve Fund, 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001); State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000). In an action at law, the appellate court should not disturb the trial court's findings unless they are without any reasonable evidentiary support. See Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Horry Cnty., supra.

ARGUMENTS

I. THIS APPEAL IS MOOT BECAUSE APPELLANT'S TORT CLAIMS ARE NOW BARRED BY THE STATUTE OF LIMITATIONS

As a preliminary matter, before considering any of the Appellant's arguments as to the decision of the trial court, this Court should determine that this appeal is now moot.

"A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court." Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (citing S.C. Ret. Syst. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013)). "[M]oot appeals result when intervening events prevent a decision

on appeal from having an immediate impact on the parties." 15 S.C. Jur. Appeal and Error § 19 (Supp. 2014). Appellate courts will not consider moot and academic questions nor make an adjudication where there remains no actual controversy. See Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001).

Under the particular facts of this case, even if the Court rules in favor of Appellant, he cannot get the relief he seeks. In order for Appellant to recover the uninsured motorist coverage to which he claims to be entitled, he would first have to obtain a judgment against the at fault uninsured motorist. As our Supreme Court has set forth:

Recovery under the uninsured motorist endorsement of liability is subject to the condition that the insured establish legal liability on the part of the uninsured motorist, and such action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damages. After judgment is entered against the uninsured motorist a direct action *ex contractu* can be brought by insured to recover from insurer on its uninsured motorist endorsement and policy defenses may be properly raised by the insurer.

Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 66, 145 S.E.2d 673, 677 (1965). Without establishing liability against the uninsured motorist and determining the amount of damages, there can be no recovery against an uninsured motorist carrier.

The subject accident occurred February 9, 2014. Any claims arising out of that accident are subject to a three years statute of limitations. See S.C. Code Ann. § 15-3-530(5). Therefore, the statute would have run on February 9, 2017.

Appellant filed suit against the alleged uninsured motorist within the statute of limitations, January 30, 2017. He then consented to dismissing that action under Rule 40(j), SCRPC. Rule 40(j) states in relevant part:

A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made

within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored.

This matter was dismissed on May 6, 2019. When that occurred, Appellant had one year to refile before the statute of limitations could potentially apply to that cause of action. Appellant did not move to restore the tort suit before May 6, 2020, and still has not moved to do so.¹

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. The purpose of the Rule 40(j) tolling provision is to extend the deadline for filing a claim within the statute of limitations, which naturally requires an inquiry into the date a cause of action accrued and when it will expire. See Pers. Care, Inc. v. Theos, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019); Goodwin v. Landquest Dev., LLC, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015). The effect of Rule 40(j) is not to set a new deadline but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year. See id. The procedure under Rule 40(j) for restoring a case is not automatic; the rule contemplates the filing of a motion and a hearing before the case can be reinstated. See id.

In the Pers. Care, Inc. case, the appellant moved to restore a case that had been dismissed under Rule 40(j), although more than one year had passed since the case had been stricken. The trial court denied the motion and ruled *sua sponte* that the statute of limitations would bar the restoration of the case, as the statute of limitations had run. The Court of Appeals agreed. See Pers. Care, Inc., supra.

¹ As of the date of the filing of the Initial Brief of Respondent.

Applying the holding of Pers. Care, Inc. to the present case and the underlying tort case, the Appellant would be barred from restoring the tort action against the uninsured motorist because the statute of limitations has expired. Because Appellant cannot not establish liability and damages that would serve as the basis for him to collect any uninsured motorist coverage, this appeal is moot and should be dismissed.

II. THE AUTOMOBILE INSURANCE POLICY ISSUED BY RESPONDANT TO JAMES YOUNG DID NOT CONTAIN UNINSURED MOTORIST COVERAGE

The trial court correctly held that the automobile insurance policy issued by Respondent to James Young did not include uninsured motorist coverage.

At the time of the subject accident, Young was a resident of Michigan. The vehicle he was operating and in which Appellant was a passenger at the time of the accident was garaged and registered in Michigan. As a result, he had an automobile insurance policy issued by the state of Michigan at the time of the accident. Young had driven to South Carolina for the purpose of picking up Appellant, his brother, and driving him back to Michigan; he was not attempting to establish residency in South Carolina.

In Michigan, all vehicle owners are required to have personal protection insurance and property protection insurance and residual liability insurance. MCLS § 500.3101(1). No insurance automobile insurance policy in Michigan can be issued without personal protection insurance and property protection insurance and residual liability insurance. MCLS § 500.3101(2). These are the only coverages required in the State of Michigan. Uninsured motorist insurance coverage is not addressed anywhere in Michigan's state statutes.

In Michigan, uninsured motorist coverage is a matter of contract and is not required by law. "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). "Uninsured motorist benefits

are not required by statute.” Rohlman v. Hawkeye-Sec. Ins. Co., 502 N.W.2d 310, 313 (Mich. 1993).

The Declaration Page issued by Respondent to James Young shows that uninsured motorist coverage was “REJECTED,” and no premium was charged for that coverage. (R. p. 237). 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.

Appellant argues to this Court that the policy language of the policy issued to James Young by Respondent requires the policy to be amended to conform to the laws of South Carolina, which require policies to include uninsured motorist coverage. Specifically, he references the section entitled “COVEREAGE DEEMED GRANTED BY OUT-OF-STATE STATUTE”. (R. p. 216, line 36-p.217, line 17). Appellant argues that the statues of South Carolina, specifically § 38-77-150 (uninsured motorist coverage statute) and § 56-9-560 (financial responsibility of non-resident), require uninsured motorist coverage on any policy of insurance on a vehicle operating in this state. Appellant further argues that those statutes require the policy issued by Respondent to James Young be reformed to include uninsured motorist coverage.

This argument completely ignores the holding of Newton v. Progressive Northwestern Ins. Co., 347 S.C. 271, 554 S.E.2d 437 (Ct. App. 2001). In Newton, the plaintiff was a Georgia resident and drove a vehicle garaged in Georgia. Uninsured motorist coverage was optional in Georgia, and the plaintiff did not purchase it when he obtained automobile insurance from Progressive. After he was involved in an accident in South Carolina with an uninsured driver, he sued Progressive to reform his policy and add uninsured motorist coverage on the ground that it was mandatory in South Carolina.

The Court of Appeals first pointed out that S.C. Code Section 56-9-560 did not apply in that scenario because that section of the code dealt with persons who previously had unsatisfied judgments entered against them as a result of an earlier accident. Newton, *supra* at 276, 554 S.E.2d at 439. There is no evidence that James Young has an unsatisfied judgment as a result of a prior accident, so that section would similarly not apply in this case.

The bigger issue that Appellant ignores is Newton's holding on the applicability of § 38-77-150:

Perhaps the biggest hurdle Newton faces is the limited reach of S.C. Code Ann. section 38-77-150 (Supp. 2000), the statute that mandates uninsured motorist coverage be included in an "automobile insurance policy." S.C. Code Ann. section 38-77-30(10.5) (Supp. 2000) expressly defines the latter term as used in Chapter 77 to mean "a policy . . . issued or delivered in this State" S.C. Code Ann. section 38-77-30(1) (Supp. 2000) further limits "automobile insurance" to "liability insurance, including . . . uninsured motorist coverage, . . . written or offered by automobile insurers." S.C. Code Ann. section 38-77-30(2) (Supp. 2000) defines the term "automobile insurer" as "an insurer licensed to do business in South Carolina and authorized to issue automobile insurance policies."

Section 38-77-150 does not affect policies issued in other states, including Georgia. A policy issued and delivered outside of South Carolina is not "a policy issued or delivered in this State." As noted above, Progressive issued its policy in the State of Georgia to a Georgia resident through a Georgia insurance agent.

Furthermore, the policy in question is not one written or offered by a licensed South Carolina insurer. Progressive, a licensed Georgia insurer, wrote or offered it. "The fact that an accident which is within the risk covered by an accident policy occurred in a certain state does not make the contract one of that state."²

Newton, *supra*, at 276-277, 554 S.E.2d at 440 (emphasis added).

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.

² 2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 24.15, at 24-24 (1997).

III. RESPONDENT WAS NOT REQUIRED TO MAKE MEANINGFUL OFFER OF UNINSURED MOTORIST COVERAGE TO APPELLANT

Appellant argues that he was entitled to a meaningful offer of uninsured motorist coverage that was not afforded to him, and as a result he should be afforded uninsured motorist coverage under a policy not sold or issued to him.

As a preliminary matter, Appellant failed to preserve this issue for appeal. Issues cannot be raised for the first time on appeal but must have been raised and ruled upon at trial. See, e.g., Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). Where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal. See Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993).

The Amended Order of the trial court does not rule on or reference any argument that Appellant was entitled to a meaningful offer of uninsured motorist coverage. Appellant did not file a Rule 59(e) motion asking the trial court to alter or amend its ruling in this case. Therefore, Appellant has waived his right to argue this issue before this Court.

To the extent the issue may somehow be preserved, Appellant points to no law or precedent that indicates a passenger in an automobile should be able to have a court reform the automobile insurance policy issued to the owner of that car if the owner properly declined an optional coverage. He references Auto Owners Ins. Co. v. Rollison, 663 S.E.2d 484, 378 S.C. 600 (2008) for the proposition that a passenger in a vehicle as a guest can be entitled to uninsured motorist coverage **when the policy covering the vehicle includes uninsured motorist coverage**. However, nothing about that case stands for the proposition that a guest can reform the policy to require the carrier to provide an optional coverage that was not selected by the policyholder.

Such an interpretation would result in the absurd result of allowing passengers to reform policies when they are not the vehicle owner or policy holder, when they did not pay any of the insurance premium, and when they generally have no responsibility for the liabilities that may be created by the ownership and/or operation of the vehicle. “Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.” State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). Clearly the Legislature did not intend for guest passengers to have the ability to reform policies for which they did not pay.

The Court should reject Appellant’s argument that the Court should reform the policy because Appellant, as a guest, did not receive a meaning offer of uninsured motorist coverage.

IV. THE TRIAL COURT DID NOT ERR IN INTERPRETING THE POLICY ISSUED BY RESPONDENT TO JAMES YOUNG

Appellant’s final argument appears to be that the trial court didn’t understand the policy issued by Respondent and didn’t understand Michigan insurance law, and as a result the trial court erred in its ruling. This argument is without merit.

As with the argument as to whether Appellant received a meaningful offer of uninsured motorist coverage, Appellant did not preserve this argument for appeal. This was not addressed in the Amended Order or raised in a post-trial motion, and therefore this Court should not consider this issue. See Pye, supra.

Furthermore, Appellant’s argument is essentially that the trial court was not aware of how the insurance scheme for Michigan operated and how it differed from that in South Carolina. Appellant had every opportunity to explain that to the trial court so the trial court would be fully informed before making a ruling. It is not the duty of the Respondent to make arguments on behalf of Appellant or point out every possible factual issue for the trial court to consider.

Appellant would have this Court believe that the Michigan No-Fault Personal Protection Insurance serves essentially the same purpose as South Carolina's mandatory uninsured motorist insurance. He points to no case, statute, law review article, or treatise for this premise. In fact, they are different and serve different purposes, proof of which is the fact that Respondent offers uninsured coverage as an optional coverage for purchase.

Appellant may have been able to make a claim under the policy of Personal Protection Insurance issued by the Respondent to James Young, but that was not the question before the trial court, and that is not the question that is before this Court. The trial court clearly interpreted the policy issued by Respondent to James Young correctly.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the trial court. Appellant's appeal is now moot. The trial court correctly held that the insurance policy issued by Respondent to James Young did not include uninsured motorist coverage and should not be interpreted as such. Appellant was not an insured who needed to be given a meaningful offer of uninsured motorist coverage. The trial court correctly interpreted the policy issued by Respondent in light of Michigan's No-Fault insurance scheme and Personal Protection Insurance.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

s/ M. Kyle Thompson _____

M. Kyle Thompson

Allison M. Mabbs

325 Rocky Slope Road, Suite 201

Greenville, SC 29607

(864) 908-3813

Attorneys for Respondent

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Janice A. Fisher as Personal
Representative for Lemore Young

is

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

WILLSON JONES CARTER & BAXLEY, P.A.

s/ M. Kyle Thompson
M. Kyle Thompson
Allison M. Mabbs
S.C. Bar No.: 68283
325 Rocky Slope Road, Suite 201
Greenville, South Carolina 29607
(864) 908-3813
mkthompson@wjlaw.net
Attorney for Respondent