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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEROGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-000034

April Brooke Cox, as Personal Representative of the Estate of Elijah Cox, deceased, — Appellant,

v.

State Farm Mutual Automobile Insurance Company and Glen Bauer, Jr. — Respondents,

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FINAL BRIEF OF RESPONDENT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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STATEMENT OF ISSUE ON APPEAL

Can an injured party stack at-home underinsured motorist coverage by recovering under more than one at-home policy or vehicle if neither they nor their family member owns a vehicle involved in the accident?

STATEMENT OF THE CASE

The Respondent State Farm Mutual Automobile Insurance Company ("State Farm") does not dispute the procedural history set forth by the Appellant.

STANDARD OF REVIEW

The Respondent agrees the standard of review is de novo as the issue is merely a question of law on stipulated facts.

FACTS

The parties entered into a stipulation of fact. (Stipulation, R. p 25-26). Elijah Cox sustained fatal injuries from a motor vehicle accident on June 11, 2018. (Stipulation R. p, 25) Cox was riding as a passenger in a friend's motor vehicle. (Stipulation, R. p. 25) Neither Cox nor any of his family members owned a vehicle involved in the accident. (Stipulation, R. p. 25) There were three "at-home" vehicles[1] insured by State Farm Mutual Automobile Insurance Company ("State Farm") in Cox household insured by his resident relative grandparents. (Stipulation, R. p. 26) State Farm paid

[1] "At-home" vehicle or "at-home" policy is a term that has been used by practitioners and courts to describe any vehicle that was not involved in the accident. See Carter v. Standard Fire Ins. Co., 406 S.C. 609, 753 S.E.2d 515 (2013); Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 644 S.E.2d 40 (2007).

the underinsured bodily injury limits on one of the three vehicles, but refused to pay any additional underinsured motorist coverage from the other two vehicles on the basis of State Farm's policy language and South Carolina law. (Stipulation R. p. 26).

ARGUMENT

Appellant attempts to advance a novel theory: the Estate can collect from more than one at-home State Farm underinsured motorist policy, even though neither the deceased nor any of his resident relative had a vehicle involved in the accident. State Farm contends the Estate of Elijah Cox is entitled to only one at-home vehicle/policy and has already paid that policy. The Estate contends it is entitled to an additional at-home policy.[2] The Estate maintains this is not a question of stacking, but instead one of portability.

The starting point for this analysis should be the underinsured motorist statute itself. In fact, the statute may be the start and end point of the analysis because it is clear. Under §38-77-160:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. 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. <u>If none of the insured's or named insured's vehicles is involved in the accident, coverage</u>

[2] The Estate has elected for "strategic reasons" not to pursue more than one additional at-home policy, (Hearing, p, 6, R. p. 175) although the logical conclusion of their argument would apply to recovery under all at-home policies.

is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

Per the underlined language above, coverage is only available on one vehicle if none of the insured or named insured's vehicles are involved in the accident. State Farm's policy language follows the statute. On page 27 of the policy under the heading "If Other Underinsured Motor Vehicle Coverage Applies" there are four statements that describe rules.

Under scenario three, the policy states:

> 3. If:
>
> a. **you** or any **resident relative** sustains **bodily injury** or **property damage**:
>
> i. while **occupying** a motor vehicle not **owned by you** or any **resident relative**; or
> ii. 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.

(Policy, p. 27, R. p. 58)

Section 4 provides a different rule if the insured is occupying a motor vehicle owned by "you" or a "resident relative" other than the car that is on the declarations page In this situation, the policy on an at-home vehicle applies to the extent of underinsured coverage on the involved vehicle. (Policy p. 27, R. p. 58)

There are thirty five years of cases interpreting S. C. Code §38-77-160 which follow this same basic rule set forth in the statute and the insurance policy. A review of previous

decisions may be helpful.

In Garris v. Cincinnati Insurance Co., 280 S.C. 149, 311 S.E.2d 723 (1984), Huntley and Garris were killed while occupying a work truck owned by Bryce Mechanical Contractors. They were killed by a drunk driver with minimum limits coverage. The policy on the truck the decedents were occupying had 17 vehicles on it. Mr. Garris owned a policy of liability insurance issued by Allstate which covered four personal at-home vehicles. Mr. Huntley owned a policy of liability insurance that provided coverage for two personal at-home vehicles. The court first decided that the deceased men could not stack the 17 policies covering the work truck and 16 other vehicles. As occupants of the vehicle owned by Bryce Mechanical Contractors they were only entitled to the coverage from the vehicle they were occupying. However, the deceased's estates also argued they were entitled to stack their at home policies. The court rejected this view. The court stated: "The obvious intent of the Legislature is to allow insureds or named insureds to take advantage of the benefit of their bargain with their insurance carrier when they are injured by an underinsured motorist and their vehicle is not involved in the accident. However, the recovery here is limited to the extent of coverage on one vehicle with the underinsured motorist coverage, as the decedents are members of the second class. Thus, plaintiffs cannot stack the coverage of the other vehicles under the policies issued to them, but may only recover benefits on one vehicle with the coverage." (emphasis added).

Although State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), is usually cited because it is the seminal case on meaningful offers of underinsured motorist coverage, the case also addressed stacking. William Wannamaker

had insurance coverage with State Farm under two insurance policies. His daughter was killed in an accident which did not involve either of the insured's vehicles. Wannamaker's two policies each had limits of liability coverage of $50,000/$100,000/$25,000, but no underinsured motorist coverage. The trial court concluded Wannamaker had not been given a meaningful offer of underinsured coverage. Therefore, coverage was added by operation of law. The trial court also concluded Wannamaker was not entitled to stack because none of his vehicles were involved in the accident. The Supreme Court affirmed the trial court on both rulings. As to the issue of stacking, the Court cited then § 56-9-831 (which is now §38-77-160) and held "the present case is one clearly excluded by the statute since none of the insured's vehicles were involved in the wreck."

In Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co., 295 S.C. 538, 370 S.E.2d 85 (1988), the court considered several issues including the involved vehicle stacking rule in an uninsured motorist coverage case. (The rules regarding stacking of underinsured and uninsured motorist coverage are almost identical and the "involved vehicle" rule is derived from §38-77-160 which references both excess uninsured coverage and underinsured coverage.) Fireman's involved a motor vehicle accident wherein Mullins was driving a vehicle owned by Locklear, who was a passenger in her own vehicle. The tortfeasor was insured under a Florida policy with only $10,000/$20,000 coverage. The Court first had to determine whether the tortfeasor was uninsured, underinsured or both. The Court concluded the tortfeasor did not have coverage equal to South Carolina's minimum limits and was therefore deemed uninsured. He was not underinsured as the Court concluded those terms are mutually exclusive. Mullins had liability, uninsured and

underinsured motorist coverage on three at-home vehicles insured with Fireman's. Mullins sought to stack uninsured (or underinsured if the court had determined the tortfeasor was underinsured) motorist benefits for each of the three vehicles. The Court held that since Mullins did not have a vehicle involved in the accident (he was driving Locklear's automobile), Mullins was not entitled to stack coverages from his own at-home vehicle policies. Thus the court again applied the involved vehicle stacking rule.

In Concrete Services, Inc. v. United States Fidelity and Guaranty Company, 331 S.C. 506, 498 S.E.2d 865 (1998), the Court heard the case of a plaintiff who was injured in an automobile accident while driving a vehicle owned by her husband's company, Concrete Services, Inc. After recovering underinsured benefits under the policy insuring the vehicle which she was driving, plaintiff sought to stack underinsured motorist coverages on the other vehicles owned by Concrete Services, Inc. The Court examined two certified questions in the case, the first involving the proper classification of the plaintiff as a Class I or Class II insured, and the second as to whether ownership of an involved vehicle is required in order to stack coverage. As to the first question, the Court deemed plaintiff could not qualify as a spouse or resident relative of the named insured Concrete Services, Inc. because corporations do not have spouses or relatives. As to the second question, the court held "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." Thus, the injured party or his resident relative must have a vehicle involved in

the accident in order to stack coverage.

In National Gen. Ins. Co. v. Pena, 308 S.C. 521, 419 S.E.2d 375 (Ct. App. 1992), Pena was a passenger on an uninsured motorcycle owned by a friend. The motorcycle driver was the uninsured motorist. Pena wished to reach home for coverage on four vehicles under his mother's policy. National General conceded Pena was entitled to one policy limit, however Pena sought the limits for all four vehicles. The Court held Pena was not permitted to stack. He was not considered a Class I insured with respect to having a vehicle involved in the accident. The Pena decision would later be overruled in part due by footnote four of Concrete Services, but only because the Concrete Services Court wanted to make clear that requiring a person to have a vehicle involved in the accident means either they or a resident relative family member must own a vehicle in the accident.

In Putnam v. S.C. Farm Bureau Mut. Ins. Co., 323 S.C. 494, 476 S.E.2d 902 (1996), the Supreme Court considered a case where the Court of Appeals decided an insured could not even contract for an insurance policy which provided for stacking if none of his vehicles are involved in the accident. The Supreme Court found that the Court of Appeals had gone a bit too far in that statement. The Supreme Court concluded it was possible to contract for a policy that provides greater coverage than what was required by statute. However, the Supreme Court found the policy did limit the insured to the one highest coverage if none of his vehicles as involved in the accident.

In Merck v. Nationwide Mut. Ins. Co., 318 S.C. 22, 455 S.E.2d 697 (1995), the Court defined the extent to which a vehicle must actually be involved in an accident in order to stack coverage. The question presented was not whether the involved vehicle

rule applied, but rather how the Court should define the term "involved" for the purpose of applying the rule. Merck experienced car trouble. As Merck's vehicle was being loaded onto a wrecker, a drunk driver ran off of the road striking Merck, the wrecker driver and the wrecker. Merck was not in his vehicle. Further, the drunk driver's vehicle did not directly hit Merck's vehicle. The drunk driver was considered an underinsured motorist. Nationwide argued that Merck's vehicle was not hit and that he was not occupying it, so Merck should not be able to stack his three at-home policies. The South Carolina Supreme Court adopted a definition of the term "involved" meaning "to relate to or have an effect on...to draw in as a participant...[to] implicate, include, affect." Because Merck's vehicle was present at the scene and the contact between the drunk driver and the wrecker had knocked Merck's vehicle off the wrecker, the Merck vehicle was "involved in the accident." As a result, Merck could stack the coverage of his three other vehicles.

There are two South Carolina District Court cases applying the principle that a person without a family member's vehicle being involved in the accident cannot collect more than one policy or vehicle. In Sessions v. State Farm Mutual Auto. Ins. Co., 2020 WL 1027343, 2020 U.S. Dist. Lexis 36956 (D.S.C. 2020), the Honorable Sherri A. Lydon considered the same arguments raised by the Appellant in the present case, including the argument this is an issue of portability, not stacking. The injured party was occupying his employer's vehicle when he was involved in an accident caused by an underinsured motorist. The injured party had seven policies issued to him or a resident relative. The Court concluded that State Farm's policy language unambiguously allowed recovery of

coverage from only one policy and that the language not against South Carolina public policy.

The involved vehicle stacking rule was also considered by the Honorable Richard M. Gergel in the federal case of State Farm Mut. Auto. Ins. Co. v. Sakash, 2017 U.S. Dist. LEXIS 77063, 2017 WL 2225110 (2017). In that case, the injured party was a pedestrian who had two at-home policies with $100,000 underinsured limits each. Judge Gergel considered language identical to the language used by State Farm in the present case. He held that "language prohibits stacking underinsured coverages where the insured is not occupying a motor vehicle or is occupied a vehicle not owned by the insured or any resident relative. The provision is valid under South Carolina law. *See* Putnam v. S.C. Farm Bureau Mut. Ins. Co., 323 S.C. 494, 476 S.E.2d 902, 902-03 (S.C. 1996). It is undisputed that at the time of the underlying accident, George Sakash was a pedestrian not occupying a motor vehicle."

At the hearing below, the Appellant suggested it may make some difference if there is one policy per vehicle versus one policy with multiple vehicles. Appellant does not seem to be arguing this theory in her brief. However, if it is being argued, State Farm is an insurance company which writes one policy per vehicle in South Carolina. Several of the cases cited by State Farm above illustrate the point that one policy per car makes no difference to the rule that there must be an involved vehicle in order to stack. In Wannamaker, the insured had two separate at home policies on two different vehicles. But the insured was only allowed to collect one policy due to not having a vehicle involved in the accident. In both the Sakash and Sessions there were separate policies of

insurance on each vehicle. However, stacking was not allowed because the injured parties did not have a vehicle involved in the accident. In contrast, in Garris, Pena, and Fireman's the at-home policies were multiple vehicles under one policy. Still, the injured party could go home for only one at home policy because they did not have a vehicle involved. The stacking rules do not change depending on whether there are multiple cars per policy. And it doesn't matter whether there are different insurance companies for different vehicles. Carter v. Std. Fire Ins. Co., 406 S.C. 609, 617, 753 S.E.2d 515, 519 (2013) ("the fact that the involved vehicle was insured by a separate insurance company than the insurance company insuring the at-home vehicles is insignificant under the typical stacking analysis."). In fact, South Carolina has expressly stated in the stacking context that it doesn't matter whether there are separate policies or multiple vehicles on one policy. Esler v. United Services Automobile Association, 273 S.C. 259, 255 S.E. 2d 676 (1979) ("the crucial test to be applied in determining whether stacking is permissible is not the number of policies issued but rather the number of additional coverages which were separately contracted and paid for").

Appellant relies heavily on Nationwide Mut. Ins. Co v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012) when arguing the instant case is about "portability," not stacking. However, "[s]tacking is defined as 'the insured's recovery of damages under more than one policy until all his damages are satisfied or the limits of all available policies are met.'" Giles v. Whitaker, 297 S.C. 267, 376 S.E.2d 278 (1989). As was noted by Judge Lydon in her recent decision in Sessions, the Rhoden quoted the Giles definition of stacking. Rhoden, 398 S.C. at 400, 728 S.E.2d at 481 n.3. Thus, when Appellant seeks recovery

under more than one State Farm policy, it is "stacking" as that term has been defined by the court.

Rhoden did not alter the rule requiring an owned vehicle to be involved in the accident. In Rhoden, there was a family member's vehicle involved in the accident. Thus, the Rhoden claimants would normally be allowed to stack. But Rhoden involved application of the rule that an insured can stack no more than the amount on the involved vehicle. See e.g. S.C. Farm Bureau Ins. Co. v. Mooneyham, 304 S.C. 442, 405 S.E.2d 396 (1991). In Rhoden, the vehicle's owner (Arrieta) had a vehicle involved in the accident, but the amount of UIM on that involved vehicle was zero due to Arrieta's declining underinsured coverage. Nationwide argued that under the precedent of Mooneyham, the zero UIM vehicle was the measuring stick for recovery for all the claimants. The Rhoden court concluded public policy was not offended by blocking the owner of the involved vehicle from recovery against an at-home vehicle because the owner made a choice not to purchase underinsured coverage. However, the court reasoned it would violate public policy to limit the insureds other than the named insureds.[3] Rhoden did not state stacking or portability would be allowed even if there is no insured vehicle involved in the accident.

The Appellant compares Rhoden to the present case through a series of observations about its similarity to the instant case concluding with the point that the lack of ownership of the vehicle allowed Ms. Dickey and Ms. Rhoden to recover precisely

[3] There is some dispute over whether the Rhoden court allowed the persons who didn't make a choice to get one or two policies. Because they had a vehicle involved in the accident, they would normally get to stack. However, the court expressly stated that Rhoden, like Burgess v. Nationwide Mut. Ins. Co, was not a stacking case.

because they did not own the vehicle involved in the accident. While this is accurate, it fails to adequately explain the principles and the statutory basis. And it fails to state that Ms. Rhoden and Ms. Dickey had a family member's vehicle involved in the accident. Rhoden (and Burgess v. Nationwide Mutual Insurance Company, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007)) are cases about the next to last sentence of § 38-77-160---"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." The insurer was using this sentence of the statute to try to deny all of the injured parties any recovery whatsoever. Because Mr. Burgess and Ms. Arrieta were the owners of the involved vehicle with zero underinsured on the involved vehicle, they were denied any recovery. In Rhoden, Ms. Dickey and Ms. Rhoden would not be penalized for Arrieta's choice not purchase underinsured motorist coverage. The Rhoden court interpreted the next to last sentence of § 38-77-160 as not applying to Ms. Dickey and Ms. Rhoden. The present case involving the Estate of Elijah Cox involves the last sentence of § 38-77-160, not the next to last sentence. In the same way, Garris, Wannamaker, Firemans, Pena, Concrete Services, Putnam, Sessions and Sukash all concern the final sentence of § 38-77-160: "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." The two different sentences involve different considerations and create different limitations.

Nor are cases like Nakatsu v. Encompass Indem. Co., 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010) or Carter v. Standard Fire Ins. Co, 406 S.C. 609, 753 S.E.2d 515

(2013) helpful to the Appellant's position other than discussing the concept of portability. Nakatsu and Carter both involved attempts to exclude at-home policy coverage when the injured party was occupying a family member's vehicle insured by a different insurance company. In both those cases, the injured party was occupying a vehicle they or a family member owned. However, in both cases, the involved vehicle was insured by a different insurance company than the at-home vehicles. The Court made clear that if the injured party has a family member's vehicle involved in the accident, all attempts to restrict recovery from their at-home policies are invalid. Thus, it is not permissible to have an exclusion denying coverage just because the involved vehicle is insured by a different insurance company. This is an entirely different question from whether a person with no family vehicles involved in the accident can go home to collect multiple policies.

Quite simply, the Estate of Cox has not cited a single South Carolina case where payment was due under more than one policy or vehicle when neither the injured party nor his family members had a vehicle involved in the accident. This Court should not disregard over thirty five years of consistent case law applying the last sentence of § 38-77-160 based on an interpretation of Rhoden which involved a different sentence of the same statute. Each sentence creates distinctly different limitations on recovery of at-home policies.

CONCLUSION

This court should affirm the decision of the lower court because South Carolina law is clear: the injured insured must have a family member's vehicle involved in the accident in order to collect the coverage from more than one vehicle. This is true whether the at-home vehicles are written on one policy or on multiple policies. This is true even after Rhoden. This case is not about "portability." Recovery under more than one policy squarely fits within the definition of stacking created by Giles and reiterated in Rhoden.

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RULE 211(b) CERTIFICATE

I certify the final brief of Respondent complies with Rule 211(b).

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