THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 2016-CP-32-815

Appellate Case No. 2020-001693

State Farm Mutual Automobile Insurance Company, Appellant,

v.

Myra M. Windham, Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

Whether the Court of Appeals correctly held that Windham was entitled to stack the Underinsured Motorist Coverage from her five automobile insurance policies when she was injured while occupying a "temporary substitute car", a rental car provided to her because her primary car was out of service, disabled, and inoperable, pursuant to South Carolina Statutory and Common Law?

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 PRIMARY CAR WAS OUT OF SERVICE, DISABLED AND INOPERABLE.

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. § 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. § 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 the 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, 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. (App. 196, 201, 207, 211, 215, & 218.) 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." (App.217). 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*." (App.195) (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. (App.217). State Farm insists that the definitions of "temporary substitute car" and "non-owned car" have no bearing on whether or not an insured can stack UIM coverages. State Farm's position ignores the principle that insurance contracts are to be read in accordance with reasonable expectations of insureds.

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. (App.195). 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." (App.282-284). State Farm chose not to appeal the U.S. District Court's decision.

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

Pursuant to Rule 220(c), SCACR, Respondent requests that this Court affirm the Court of Appeals' decision based upon the foregoing reasons or upon any ground or grounds appearing in

the Record on Appeal. *Overland, Inc. v. Nance,* 423 S.C. 253, 254, 815 S.E.2d 431, 432 (2018). Respondent requests that this Court remand the matter to the circuit court to re-assess the Plaintiff's Motion for Summary Judgment and counterclaim for attorney's fees consistent with this opinion. See (App.100, ¶ 19).

Respectfully submitted,

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