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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2016-CP-32-815
Appellate Case No. 2020-001693

State Farm Mutual Automobile Insurance Company, Appellant,

v.

Myra M. Windham, Respondent.

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. THE COURT OF APPEALS ERRED IN HOLDING SECTION 38-77-160 PERMITS STACKING EVEN THOUGH NEITHER WINDHAM NOR ANY OTHER RESIDENT RELATIVE OWNED THE VEHICLE INVOLVED IN THE ACCIDENT.

2. THE COURT OF APPEALS' OPINION TORTURES AND REWRITES THE PLAIN AND UNAMBIGUOUS POLICY WHILE IGNORING FACTUAL STIPULATIONS

ARGUMENT

"Under the proper structure for analyzing any insurance policy, the analysis begins with the insuring language." *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 862 S.E.2d 248, 254 (2021). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citation omitted). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977) (citation omitted). Courts and litigants cannot ignore the plain language of a policy simply because they desire a different result. To do so renders insurance policies and the terms contained therein utterly meaningless. Thus, State Farm relies on the language of the insurance policy, which is supported by both case law and South Carolina statues, to show Windham is not entitled to stack her underinsured motorist coverage (UIM) on a car neither she nor her resident relatives own.

The underinsured motorist coverage (UIM) insuring agreement states, "We will pay damages for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an underinsured motor vehicle." (Appendix 215). The insuring agreement continues with a list of exclusions, and one that specifically relates to stacking:

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

(App. 214). "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." *State Farm Mut. Auto. Ins. Co. v. Sakash*, No. CV 2:16-2531-RMG, 2017 WL 2225110, at *2 (D.S.C. May 22, 2017) (citing *Putnam v. S.C. Farm Bureau Mut. Ins. Co.*, 323 S.C. 494, 495-96, 476 S.E.2d 902, 902-03 (S.C. 1996)). Each bold term has a specific definition in the policy, which must be defined only as the policy or statutes dictate. (App. 214-15).

Windham attempts to insert her own definitions into the policy in an effort to frame the policy in a more favorable light. For example, the policy states a car is a "temporary substitute car" if "neither you nor the person operating it own or have registered [it]." Therefore, despite Windham's best effort, a temporary substitute car cannot, by its own definition, be the insured's own car. This is further supported by the definition of "owned by," which is also ignored by Windham, including cars "owned by," "registered to", or "leased, if the lease is written for a period of 31 or more consecutive days, to[.]" "Owned by" is a defined term in the policy and its definition does not include "temporary substitute car." Windham mischaracterizes the import of the definitions of "temporary substitute car" and "non-owned car" in relation to whether an insured can stack UIM coverages. Rather, by inserting the plain and unambiguous definition of "owned by," as well as the definition of "temporary substitute car" into the relevant portion of the policy, it becomes clear this vehicle falls within the prohibition on stacking under the language of the policy as well as section 38-77-160 and case law.

The South Carolina Supreme Court in *Putnam v. S.C. Farm Bureau Mut. Ins. Co.*, 323 S.C. 494, 495-96, 476 S.E.2d 902, 902-03 (S.C. 1996) upheld the previous Court of Appeals holding and finding, S.C. Code Ann. § 38-77-160 "prohibits stacking of [UIM] where none of the insured's vehicles are involved in the accident." "An insured may contract for insurance coverage which is greater than that required by statute." *Id.* However, here the Windhams did

not. The District Court also upheld this prohibition on stacking in *State Farm Mut. Auto. Ins. Co. v. Sakash*, No. CV 2:16-2531-RMG, 2017 WL 2225110, at *2 (D.S.C. May 22, 2017). There, a pedestrian, who met the definition of "while not occupying a motor vehicle" under the UIM exclusion, was hit by a vehicle, driven by an insured who had multiple State Farm policies. The Court found "[u]nder the policy language above, the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies, which has already been paid." *State Farm Mut. Auto. Ins. Co. v. Sakash*, 2017 WL 2225110, at *2. This is similar to the current facts, where Ms. Windham has already been paid under the singular UIM policy.

Further, despite Windham's best efforts to characterize this as "involving" her vehicle, her citation to *Merck v. Nationwide Mut. Ins. Co.*, 318 S.C. 22, 23, 455 S.E.2d 697, 698 (1995) is easily distinguishable from the current facts. The Court of Appeals also did not base its decision on this issue. In *Merck*, the insured vehicle was damaged at the incident where she sought UIM coverage, and, in considering whether the vehicle was involved, the South Carolina Supreme Court noted the "vehicle was present at the scene and that the accident had an effect on the vehicle." *Merck*, 318 S.C. at 24, 455 S.E.2d at 698. Windham concedes her vehicle was not present at the second wreck or directly affected. However, she argues she would not have been driving the rental car unless her insured vehicle was being repaired, and so therefore the vehicle being repaired somehow had an effect on the current accident. This argument is tenuous at best.

Windham also argues "the 'involvement' standard is satisfied when the insured is injured while occupying a short-term replacement for the insured's actual vehicle." Adopting such an expansive definition of "involvement" or allowing stacking when someone is "occupying a short term replacement" vehicle would open a pandora's box of UIM stacking litigation. Such an

adoption would also transform what is now a fairly straightforward analysis confined by the language in the policy, statutes, and case law – is the insured in a car owned by the insured or a family member – into an unpredictable, almost unlimited application of UIM stacking by anyone with UIM coverage. All anyone would have say to stack UIM coverage is that their car was unavailable for some reason – dead battery, out of gas, broken down, not trusted on long trips, someone else using it, or just the simple fact that the "replacement car" gets better gas mileage than the insured's vehicle. Such a result is contrary to State Farm's unambiguous policy language and S.C. Code Ann. 38-77-160.

Further, Windham misconstrues the interplay between *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012) and *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 498 S.E.2d 865 (1998). *Rhoden* does not include any self-professed, "purely academic" discussion as the court described in *Concrete Services*. Rather, *Rhoden* classifies itself as a "non-stacking case," and therefore, did not need to apply § 38-77-160 to the facts. *Concrete Services*, on the other hand, was a stacking case, which merely clarified stacking, where applicable, is permitted among the entire class of Class I insureds, so as to not penalize families who do not collectively own each insured vehicle under an insurance policy. Thus, when read in full, *Concrete Services* is not inapposite to the result reached by the circuit court in the current case. While both *Rhoden* and *Concrete Services* involve vehicles owned by resident relatives, neither reach a conclusion regarding a vehicle no one in the family owns.

Windham also conflates the notions of portability and stacking. The statement contained in Windham's brief that "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" is incorrect. It is absolutely clear a named insured or resident relative

cannot stack UIM coverages if not in a vehicle at the time of the accident. The insured must "have" a vehicle involved in the accident.

Later, Windham argues "[i]f [she] cannot stack, her premiums on her Camry count for nothing the whole time the car sat in the shop." Windham's statement that the policy on the Camry is illusory is meritless. Windham received $100,000 in UIM coverage from the Camry policy as a result of the accident. That is hardly illusory, and in fact, is exactly what she is entitled to under the terms of the policy and South Carolina law. Pursuant to State Farm's policy and South Carolina statutory law, Windham recovered one level of UIM, she is simply not permitted to stack additional coverages under the facts and the policy presented in this case.

Windham also seeks to ignore the plain policy language and attempts to avoid an "undesirable" result of limiting stacking by advancing the doctrine of reasonable expectations. The Court of Appeals did not base its decision on the reasonable expectations doctrine, presumably because the Supreme Court has held that the doctrine of reasonable expectations will not be used to alter the plain terms of an insurance policy. *Bell v. Progressive Direct Ins. Co.,* 407 S.C. 565, 581, 757 S.E.2d 399, 407 (2014) (stating "while we now hold that reasonable expectations may be used as another interpretive tool, the doctrine cannot be used to alter the plain terms of an insurance policy"). While the Court of Appeals glossed over the policy language in reaching its conclusion, it is beyond debate that the policy language is plain and unambiguous and as such, the doctrine of reasonable expectations does not apply.

CONCLUSION

As outlined above and in previous briefings, this Court should reverse the Court of Appeals' decision and interpret the insurance policy as it is written with the definitions provided, which is supported by both case law and South Carolina statues, thereby reinstating the circuit

court's grant of summary judgment to State Farm.

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