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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2021-CP-33-00342
Appellate Case No. 2022-000232

Kevin L. Grant, ... Appellant,

v.

State Farm Mutual Automobile
Insurance Company, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This lawsuit was filed on August 9, 2021. The Appellant's Complaint sought declaratory relief and alleged bad faith refusal to pay first party benefits. (See gen. Pl.'s Compl.) The Complaint alleged the State Farm policy provided $25,000 of UIM coverage (Pl.'s Compl. ¶ 6), that on July 16, 2018 the Appellant was injured as a pedestrian when Hughes Sellers, driving a 1997 Chevrolet SUV, hit him (Pl.'s Compl. ¶ 9), that Sellers had liability insurance with Integon Insurance Company which paid the liability limits of that policy to the Appellant on a covenant not to execute (Pl.'s Compl. ¶ 11), that in addition to receiving liability coverage from Integon the Appellant recovered UIM coverage with GEICO (Pl.'s Compl. ¶ 12) and the Appellant's claim for UIM coverage with State Farm was denied (Pl.'s Compl. ¶ 15). The Complaint did not allege any vehicle insured with State Farm was involved in the accident.

In response to the Appellant's complaint, State Farm filed a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. (Mot. to Dismiss.) The motion to dismiss was based upon case law and the allegations in the Appellant's Complaint. (Mot. to Dismiss.) In addition to moving to dismiss the Appellant's claim for declaratory relief, State Farm also moved to dismiss the Appellant's cause of action alleging bad faith refusal to pay first party benefits. (Mot. to Dismiss ¶ 8)

On September 27, 2021, the trial court heard State Farm's motion to dismiss. The Appellant did not move to continue the hearing so he could conduct discovery. After the hearing the trial court requested each party submit a proposed order. Initially, the trial court issued the order submitted by the Appellant when, in fact, the trial court intended to issue the order submitted by State Farm. On October 20, 2021, the trial court issued a Form 4 order acknowledging it had mistakenly signed the prior order denying State Farm's motion and rescinding the order mistakenly

denying State Farm's motion to dismiss. (Oct. 20, 2021 Form Order) The trial court advised the parties the order submitted by the Appellant was inadvertently signed and on November 4, 2021, the court advised counsel for the respondent to e-file the proposed order submitted by State Farm. (Emails of Judge Michael Nettles dated Oct. 20, 2021 and Nov. 4, 2021) On November 8, 2021, the court issued an order granting State Farm's motion to dismiss. (Nov. 8, 2021 Order) The Appellant then filed a motion for reconsideration and State Farm submitted a brief in opposition to that motion (Pl.'s Mot. for Recons. and State Farm's brief opposing that motion) On January 28, 2022, the trial court issued a Form 4 order which stated "after review of the pleadings and materials associated with this case, plaintiff's motion for reconsideration under SCRCP 59 is denied." (Jan. 28, 2022 Order) The Appellant filed a notice of appeal.

STANDARD OF REVIEW

This appeal does not involve a factual determination in the court below. Because the facts germane to State Farm's motion to dismiss are undisputed, this appeal involves a pure question of law; namely, whether the Appellant is a Class II insured because no vehicle insured by State Farm was involved in the accident and whether under these facts the Appellant can stack UIM coverage from the State Farm policy after receiving UIM benefits from GEICO.

An appellate court applies the same standard of review as a trial court when reviewing dismissal of an action pursuant to Rule 12(b)(6). A ruling granting a 12(b)(6) motion must be based solely on the allegations in the complaint. Appellate courts are free to decide questions of law with no deference to the trial court. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (S.C. Ct. App. 2009); Fabian v. Lindsay, 410 S.C. 475, 481-82, 765 S.E.2d 132, 136 (2014); Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 429 S.C. 502, 507, 839 S.E.2d 468, 470 (S.C. Ct. App. 2020).

ARGUMENT

I. The Appellant is a Class II insured and, as such, cannot stack UIM coverage from the State Farm policy.

This appeal is predicated upon a faulty premise; namely, that the facts of this case concern the portability of UIM coverage when, in fact, this case is an attempt by a Class II insured to stack UIM coverage.[1] State Farm does not contest the proposition UIM coverage is portable and this coverage follows the individual. Indeed, if the Appellant had not already recovered UIM coverage from GEICO (Pl.'s Compl. ¶ 12) and the only UIM coverage sought was under the State Farm

[1] A Class I insured is an insured or named insured who has a vehicle involved in the accident. Only Class I insureds can stack coverages. Auto-Owners Ins. Co. v. Horne, 586 S.E. 2d 865 (S.C. App. 2003)

policy, the Appellant would be entitled to the benefit of UIM coverage under the State Farm policy. But that is not what happened.

The seminal case on the portability of UIM coverage is Burgess v. Nationwide Mutual Insurance Co., 373 S.C. 37, 644 S.E.2d 40 (2007). The concept of portability is that UIM coverage "follows the individual insured rather than the vehicle insured." Id. 373 S.C. at 41, 644 S.E.2d at 42. The purpose of portability is to provide UIM coverage "where [the insured] is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself". Id. 373 S.C. at 42, 644 S.E.2d at 43. In other words, portability gives an insured who has purchased UIM coverage access to some UIM benefits where the insured's vehicle is not involved in the accident. Here, however, the Appellant has recovered UIM benefits under the GEICO policy. (Pl.'s Compl. ¶ 12.) The question is whether the Appellant, having already recovered UIM benefits, can recover additional UIM benefits under a policy insuring a car not involved in the accident.

As noted in the trial court's order granting State Farm's motion to dismiss (Nov. 8, 2021 Order p. 5), the portability of UIM coverage does not allow stacking of UIM coverage because stacking and portability are two distinct concepts. Nakatsu v. Encompass Indem. Co., 390 S.C. 172, 181, 700 S.E.2d 283, 288 (S.C. Ct. App. 2010). "Stacking is only allowed if the insured has the specific type of coverage ***on the vehicle involved in the accident***. On the other hand, portability refers to a person's ability to use his coverage on a vehicle not involved in an accident as a basis for recovery of damages sustained in the accident." (emphasis added) Id. Indeed, acceptance of the Appellant's argument will render nugatory the distinction between Class I and Class II insureds and will directly contravene the language in S.C. Code Ann. § 38-77-160.

The limitations on stacking—defined as recovery of damages under more than one policy (Nationwide Ins. Co. v. Rhoden, 398 S.C. 393, 400, 728 S.E.2d 477, 481 n.3 (2012))—derives

from S.C. Code Ann. § 38-77-160 which states in part, "If none of the insured's or named insured's vehicle is involved in the accident, coverage is available only to the extent of coverage on any **one** of the vehicles with the excess or under insurance coverage." (emphasis added). No vehicle insured with State Farm was involved in the accident and the Appellant has recovered UIM benefits under one policy – GEICO. The statute forbids anything more under these facts.

The Appellant argues recovery of UIM coverages with different carriers does not involve stacking of coverages. The Appellant, who appears to concede his status as a Class II insured, maintains the prohibition of Class II insured's stacking of coverages only applies where an insured is "seeking recovery for multiple coverages under multiple policies from the same carrier." (Initial Br. of Appellant at 4) This is incorrect because the fact the involved vehicle was insured by a separate insurance company – here GEICO – than the insurance company insuring the at-home vehicle – here State Farm – is irrelevant under the typical stacking analysis. Carter v. Standard Fire Ins. Co., 406 S.C. 609, 617, 753 S.E.2d 515, 519 n.6 (S.C. 2013). Although footnote 6 in Carter is cited in the trial court's order (Nov. 8, 2021 Order pp. 1, 2), the Appellant's brief makes no attempt to address this holding in Carter.

The Appellant concedes his coverages with GEICO and State Farm were "on a vehicle not involved in the accident." (Initial Brief of Appellant at 4) He further concedes "he cannot stack multiple UIM coverages under the GEICO policy…" (Initial Br. of Appellant at 4) And yet, the Appellant claims he can recover UIM coverage under both the State Farm and GEICO policies. This is an attempt to stack UIM coverage by a Class II insured, no matter how described by the Appellant.

The Appellant could have chosen to recover UIM benefits under the State Farm policy instead of the GEICO Policy. Doing so would not involve stacking. Presumably, the Appellant

chose UIM benefits under the GEICO policy because that policy provided UIM coverage of $100,000 (Pl.'s Compl. ¶ 12), rather than the State Farm policy which provided $25,000 of UIM coverage. (Pl.'s Compl. ¶ 6) If the portability of UIM coverage can be used as a basis to recover additional UIM benefits despite having no vehicle insured in the accident, the limitation on stacking in § 38-77-160 and the legion of cases applying that statute's limitation on stacking will be subverted. Any motorist will be able to recover UIM benefits under multiple policies – stacking – despite not having the vehicle with UIM coverage involved in the accident. Simply put, portability and stacking are distinct concepts, and the former may not be used as a justification to subvert South Carolina law that limits stacking.

At p. 7 the Appellant argues acceptance of State Farm's position will result in no benefit "to purchasing UIM coverage for multiple vehicles." This argument is incorrect. There is a benefit to purchasing UIM coverage for multiple vehicles **if** one of those vehicles is involved in the accident. For example, if the Appellant had a vehicle insured with State Farm with UIM coverage involved in the accident and had other vehicles with UIM coverage insured with State Farm, the Appellant would receive the benefit of buying UIM coverage on multiple vehicles by stacking those coverages. There is therefore no "disincentive" to buy UIM coverage on multiple vehicles as argued at pg. 8.

The Appellant attempts to avoid the consequences of being a Class II insured by claiming he is not attempting to stack UIM benefits. (Initial Br. of Appellant at 6) That is, however, exactly what the Appellant is attempting because, as noted in the trial court's order, "stacking" is defined as an insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies. (Nov. 8, 2021 Order p. 1) Simply put,

the Appellant cannot avoid the limitations of stacking of UIM coverages by denying he is attempting to stack these coverages.

The Appellant argues because he was a pedestrian standing next to his truck insured with GEICO, instead of being in the truck itself, principles of stacking do not apply. (Initial Br. of Appellant at 5) No case is cited in support of this proposition and the Appellant's argument ignores the fact the Appellant's status as a pedestrian did not preclude his entitlement to UIM coverage under the GEICO policy. In other words, the Appellant maintains his status as a pedestrian entitled him to UIM coverage on the vehicle beside which he was standing at the time of the accident, but his status as a pedestrian, as opposed to an occupant of the vehicle, means the law of stacking of UIM coverage is inapplicable. This is a distinction without a difference. Or, as stated by the trial court, whatever does not make any difference does not matter. (Nov. 8, 2021 Order p. 4)

II. The Appellant is conflating portability of UIM coverage with stacking of UIM coverage.

In an attempt to avoid the prohibition of a Class II insured to stack UIM coverages, the Appellant misdescribes what he is attempting. It is undisputed from the allegations in the Appellant's complaint GEICO paid its UIM coverage limits. It is further undisputed from the allegations in the complaint the Appellant, having received UIM benefits from GEICO, now seeks additional UIM benefits under a State Farm policy when no vehicle insured by State Farm was involved in the accident. It is inaccurate to portray what the Appellant attempts as involving the portability of UIM coverage. What the Appellant is really attempting is stacking which has been defined as an insured's recovery of damages under more than one policy until the insured satisfies all of his damages or exhausts the limits of all available policies. Nationwide Mut. Ins. Co. v. Smith, 376 S.C. 60, 69, 654 S.E.2d 837, 842 (S.C. Ct. App. 2007). As noted by the trial court, "there is no question that plaintiff is attempting to stack UIM benefits." (Nov. 8, 2021 Order p. 1)

The portability of UIM coverage and the stacking of UIM coverage are two distinct concepts. Nakatsu v. Encompass Indem. Co., 390 S.C. 172, 181, 700 S.E.2d 283, 288 (S.C. Ct. App. 2010 These concepts are mutually exclusive because using one concept – portability – to recover UIM benefits under multiple policies – stacking – when the policy providing the sought after UIM benefits did not insure a car involved in the accident will directly contravene S.C. Code Ann. § 38-77-160. The Appellant's entire appeal rests upon the false premise he is simply attempting to enforce the portability of UIM coverage when, in fact, he is trying to stack UIM coverage as a Class II insured. As noted by the trial court, acceptance of the plaintiff's argument will render meaningless the distinction between Class I and Class II insureds.

III. This case does not involve a novel issue of law because the facts dispositive of the Appellant's case are alleged in the complaint.

Section 6 of the Appellant's brief argues novel issues of the law "such as this" should not be decided on a Rule 12(b)(6) motion to dismiss. The Appellant, however, never explains what the novel issue of law is. In fact, this case does not involve a novel issue of law; rather, it involves the well-established law of whether a Class II insured is entitled to stack UIM benefits. That the Appellant was a pedestrian, as opposed to an occupant of the vehicle, does not itself create a novel issue of law.

Additionally, the Appellant argues Rule 12(b)(6) motions should not be granted "until all underlying facts are undisputed." (Initial Br. of Appellant at 10) The Appellant never explains what facts germane to this case are in dispute. As noted by the trial court, while it is true novel questions of law should not ordinarily be resolved in a rule 12(b)(6) motion, this general rule is inapplicable where, as here, the determinative facts are not in dispute. (Nov. 8, 2021 Order pp. 3-4) As further noted by the trial court "the analysis of stacking is unaffected by whether the plaintiff

is a pedestrian standing adjacent to the vehicle insured with GEICO or was an occupant in the vehicle insured with GEICO at the time of the accident." (Nov. 8, 2021 Order p. 4)

The purpose of not deciding novel issues of law in the context of a Rule 12(b)(6) motion is the need to conduct some discovery to more fully establish the facts. The Appellant never explains what further discovery is needed. In fact, the Appellant never sought discovery prior to the hearing on State Farm's motion to dismiss. Again, as noted by the trial court, "simply denying the Defendant's Rule 12(b)(6) motion to allow the parties to engage in discovery when the facts relevant to the Defendant's motion are not in dispute will be wasteful to the parties and a waste of judicial resources." (Nov. 8, 2021 Order p. 4)

Instead of asking this Court to reverse the trial court and remand the case for discovery, the Appellant requests this Court "declare that he can recover UIM coverage under the State Farm policy because of the collision." (Initial Br. of Appellant at 11) Doing so, however, will involve what the Appellant claims is improper - deciding a novel issue of law without discovery.

IV. No part of State Farm's policy allows the Appellant, as a Class II insured, to stack UIM coverage where no vehicle insured by State Farm was involved in the accident.

The Appellant argues State Farm's denial of his claim for UIM coverage somehow constitutes a rejection of the portability of UIM coverage. This argument mis-describes State Farm's position and attempts to inject something into the State Farm policy – a limitation on the portability of UIM coverage – that is not there. Neither State Farm's policy nor State Farm's rejection of the Appellant's claim for UIM coverage under the facts of this case constitute a rejection of the law that UIM coverage is portable. UIM coverage is indeed portable, but that concept does not negate the law forbidding stacking of UIM coverage by a Class II insured. Again,

acceptance of the Appellant's argument will render meaningless the distinction between Class I insureds and Class II insureds in the ability to stack UIM coverages.

The pages of the State Farm policy quoted at pages 8 and 9 of the Appellant's brief are not inconsistent with the portability of UIM coverage. No part of this section of the policy limits portability. This section is titled "If Other Underinsurance Motor Vehicle Coverage Applies." UIM coverage under the other policies may apply if stacking is allowed. If so, this section concerns which policy is primary and which policy is excess and, under certain scenarios, how much UIM coverage is recoverable. No part of this policy allows a Class II insured to stack UIM coverages.

The Appellant insinuates, without directly saying so, the State Farm policy is ambiguous. (Initial Br. of Appellant at 9) First, ambiguity was not asserted below and any argument as to ambiguity is, therefore, waived on appeal. Bruning v. SCDHEC, 418 S.C. 537, 549 795 S.E.2d 290, 297 n.3 (S.C. Ct. App. 2016). Second, no explanation is given as to how the policy is ambiguous.

Additionally, the part of the State Farm policy discussed at pages 8 and 9 of the Appellant's brief does not entitle the Appellant, as a Class II insured, to avoid the law disallowing Class II insureds from stacking UIM coverages. As noted at page 5 of the court's order granting State Farm's motion to dismiss, section 5 of the policy quoted at page 8 of the Appellant's brief is subject to items 1, 2, 3 and 4 and none of these 5 paragraphs reference stacking nor allow insureds to stack UIM benefits in circumstances where the insured would otherwise be precluded from stacking such benefits. Instead, these paragraphs concern whether State Farm's UIM coverage is primary or excess to other policies providing UIM coverage.

V. The trial court dismissed the Appellant's cause of action alleging bad faith refusal to pay first party benefits and the Appellant's brief does not contest this part of the trial court's order.

State Farm's Rule 12(b)(6) motion to dismiss sought in paragraph 8 dismissal of the Appellant's cause of action alleging bad faith refusal to pay benefits. (Mot. Dismiss ¶ 8) The trial court granted State Farm's motion to dismiss and dismissed the case with prejudice. (Nov. 8, 2021 Order p. 5) In doing so the order not only dismissed the declaratory judgment cause of action, it also dismissed the cause of action alleging bad faith refusal to pay benefits. Neither the Appellant's motion for reconsideration nor the Appellant's initial brief contest this part of the trial court's order. This issue is therefore not preserved for appellate review. See Bruning, supra. Furthermore, the Appellant cannot now, in his reply brief, challenge the trial court's order dismissing his cause of action alleging bad faith refusal to pay first party benefits. An Appellant may not use either oral argument or a reply brief to argue issues not argued in the Appellant's brief. Harbin v. Williams, 429 S.C. 1, 9, 837 S.E.2d 491, 495 (S.C. Ct. App. 2019); ABB, Inc. v. Integrated Recycling Grp. of SC, LLC, 432 S.C. 545, 553 854 S.E.2d 171, 175 (S.C. Ct. App. 2021).

In any event, State Farm as a matter of law had a reasonable basis for denying UIM coverage and in such circumstances it is proper to grant summary judgment on the bad faith claim. BMW of North America v. Complete Auto Recon Serv., Inc., 399 S.C. 444, 731 S.E.2d 902 (S.C. Ct. App. 2012). Indeed, Appellant argues this is a "novel issue" under the law.

CONCLUSION

There are no disputed facts. All the facts needed to decide this case are in the Appellant's complaint. Attempting to recover UIM benefits under a State Farm policy following recovery of UIM benefits under the GEICO policy, where no vehicle insured under the State Farm policy was involved in the accident, is nothing more than an attempt to do something the law forbids – stack UIM coverages by a Class II insured. The Appellant cannot prevail simply by mischaracterizing

an attempt to stack UIM coverages as seeking to enforce the portability of that coverage. For all these reasons, the order of the trial court should be affirmed.

Respectfully submitted,

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