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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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

State Farm and the Circuit Court's Order operate under the faulty assumption that in every situation where a claimant seeks to recover under multiple insurance coverages, that claimant is attempting to "stack" coverages. If this were the case, all cases involving recovery under more than one policy would be considered a "stacking case." This simplistic view of the distinction between stacking and portability is flawed and overlooks decisions of the South Carolina Supreme Court that permit recovery of multiple coverages under the principle of portability.

ARGUMENT

Respondent's entire argument supporting the restriction of Appellant's ability to recover under his UIM coverage is based upon a misapplication of stacking principles. Respondent identifies the seminal stacking case, Nakatsu v. Encompass Indem. Co., quoting the important distinction between portability and stacking. 390 S.C. 172, 700 S.E.2d 283 (S.C. Ct. App. 2010); (Resp't's Br. p. 5).

> "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."

Nakatsu, 390 S.C. at 181, 700 S.E.2d at 288 (emphasis added).

As demonstrated in this quote, when an insurance claimant (Appellant) attempts to use "his coverage on a vehicle ***not involved in an accident*** as a basis for recovery of damages," the case involves the concept of portability. See Id. Appellant is seeking coverage on a "vehicle not involved in the accident;" therefore the concepts of portability apply. As the Supreme Court decision in Burgess v. Nationwide Mut. Ins. Co. demonstrates, when a case involves a person using their coverage on a vehicle not involved in an accident as the basis for their recovery of damages sustained in the

accident, the case concerns questions of UIM portability and not stacking. 373 S.C. 37, 41, 644 S.E.2d 40, 42 (S.C. 2007); See Carter v. Standard Fire Ins. Co., 406 S.C. 609, 621, 753 S.E.2d 515, 521 (S.C. 2013) (". . . Burgess did not involve stacking."). Accordingly, in cases analyzing the portability of UIM coverage, S.C. Code Ann. § 38-77-160, South Carolina's "stacking statute," and judicial decisions based on this statute do not apply to the facts. See Burgess, 373 S.C. at 41, 644 S.E.2d at 42.

In the case at hand, Appellant was a pedestrian when he was struck by an at-fault motorist. As Appellant was not in a vehicle when he was hit, he ***did not have a vehicle involved in the accident***. Because Appellant is attempting to recover for damages sustained in the accident, and he did not have a vehicle involved in the accident, his basis for recovery is grounded in the concept of portability. See Nakatsu, 390 S.C. at 181, 700 S.E.2d at 288.

Further the public policy supports providing UIM coverage to Appellant under these facts. "The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist," and therefore, the UIM statute "should be construed liberally [for the benefit of the injured person] to effect the purpose intended by the Legislature." See Carter, 406 S.C. at 615, 753 S.E.2d at 518 (citing Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (S.C. 2005)). 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." Burgess, 373 S.C. at 42, 644 S.E.2d at 43 (emphasis added). Finally, public policy supports "encourage[ing] persons to purchase UIM insurance on all their vehicles" and thus provide themselves with the greatest possible insurance policy coverage. Id.

Appellant was injured while he was a pedestrian. Public policy requires liberally construing the UIM statute in favor of compensating injured individuals such as

Appellant. See Carter, 406 S.C. at 615, 753 S.E.2d at 518 (citations omitted). He had no vehicle involved in this accident and accordingly could not have any insurance coverage relevant to the vehicle involved in this accident. Not having the ability to insure the vehicle involved in the accident, Appellant's only insurance protection comes in the form of his UIM policies. See Burgess, 373 S.C. at 42, 644 S.E.2d at 43. Public policy encourages individuals to insure themselves to the greatest extent, including holding a UIM policy on each vehicle they own – Appellant did just that – obtain optional UIM coverage, at an additional financial expense to himself, in the event he was involved in such an accident. Id.

Respondent notes that in Carter v. Standard Fire Ins. Co., the Court acknowledged that ***in a typical stacking analysis***, it is irrelevant that the involved vehicle was insured by a separate insurance company than the insurance company insuring the at-home vehicle – as is the case here. (Resp't's Br. p. 6); 406 S.C. at 617, 753 S.E.2d at 519 n.6. Therefore, they conclude that there likewise is no notable distinction in the instant case. However, his conclusion is misguided because the case in Carter addressed a "typical stacking analysis," and the case *sub judice* deals exclusively with the concept of portability. Id. When analyzing insurance portability cases, judicial decisions based on stacking do not apply. See Burgess, 373 S.C. at 41, 644 S.E.2d at 42. Although a multiple insurance carrier coverage distinction may be irrelevant in a traditional stacking case, when analyzed through a portability lens of a pedestrian's rights, it provides a novel question of law for this court to decide.

Respondent would prefer the court to believe that every single case where a claimant is able to recover under more than one policy would be considered a "stacking case" and would be governed by stacking rules. However, this presumption overlooks recent decisions of the Supreme Court that permit the recovery of multiple coverages

under the principle of portability. See Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 644 S.E.2d 40 (2007); See also Nationwide Mut. Ins. Co. v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012).

The question of a pedestrian-claimant attempting to recover multiple portable insurance policies held by separate insurance carriers is a novel issue of law, brought about by the unique facts of this case. Appellant was a pedestrian; therefore, he did not "have" a vehicle involved in the collision, and accordingly, could not have had UIM coverage on the involved vehicle. Although Appellant could not have UIM coverage on the vehicle involved in the accident, he was covered for UIM under a policy on a vehicle not involved in the collision (the GEICO policy). In addition to this coverage, Appellant chose to purchase additional insurance by obtaining UIM coverage under a different policy (the State Farm policy) on another vehicle not involved in the collision. Given these facts, the question before the court becomes whether State Farm can identify any valid basis for an insurer to deny recovery of this portable coverage. While Respondent attempts to deny recovery of this coverage on the basis of stacking, traditional stacking rules have no weight in cases addressing questions of portability. See Burgess, 373 S.C. at 41, 644 S.E.2d at 42.

Further, the question before the court has not been answered by any case cited in Respondent's brief. Of the cases cited, the issues in each case are either "pure stacking" cases or involve the recovery of multiple insurance coverages under a single policy with a single carrier. This case involves a claimant that has bargained for and received coverage from multiple portable policies issued by different insurance carriers.

Finally, the State Farm Policy language is consistent with the portability of coverage and offers greater coverage than the minimum threshold required by statute. As discussed in Appellant's initial brief and conceded by Respondent, State Farm's policy

language is consistent with portability of the coverage. (Appellant's Initial Br. at 8-9; Resp't's Br. p. 11 ("No part of this section of the [State Farm] policy limits portability.")). However, Respondent's assertion that "the law [categorically] disallows Class II insureds from stacking UIM coverages" is misguided. (Resp't's Br. p. 11). While it is true that § 38-77-160 provides a floor for the minimum amount of coverage required by law, it by no means also represents the ceiling of the maximum amount of coverage. See Hamrick v. State Farm Mut. Auto. Ins. Co., 270 S.C. 176, 179, 241 S.E.2d 548, 549 (S.C. 1978) (citations omitted) ("A policy of insurance issued pursuant to statutory law must at a minimum give the protection therein described. It may give more protection but not less . . .."). By the language of their own policy, State Farm may increase the amount of coverage required as a statutory minimum. Their Policy language is consistent with portability of coverage and as a result has increased the coverage protection from the minimum required by law. Therefore, Appellant is entitled UIM coverage under the State Farm policy.

CONCLUSION

For the reasons set forth above, as well as those discussed in his primary brief, Appellant respectfully requests that the Court reverse the ruling of the Circuit Court and declare that he can recover UIM coverage under the State Farm Policy because of the Collision.

Respectfully submitted,

June 2, 2022
Columbia, South Carolina

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Kevin L. Grant, ... Appellant,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Reply Brief of Appellant* by email only to the following:

Charles R. Norris, Esq.
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Kalen Reed, Paralegal

June 2, 2022
Columbia, South Carolina

Kalen Reed

From: Kalen Reed
Sent: Thursday, June 2, 2022 5:10 PM
To: charles@whelanmellen.com; katie@whelanmellen.com
Cc: Allison Sullivan; Rod Jernigan
Subject: Kevin L. Grant v. State Farm Mutual Automobile Insurance Company/Appellate Case No. 2022-000232
Attachments: Initial Reply Brief of Appellant.pdf

Good afternoon,

Attached please find the Initial Reply Brief of Appellant which is being served upon you in the above matter.

Thank you,

BLUESTEIN ATTORNEYS
Listening. Lawyering. Leading.

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June 2, 2022

VIA ELECTRONIC FILING (ctappfilings@sccourts.org)
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Kevin L. Grant v. State Farm Mutual Automobile Insurance Company
Appellate Case No.: 2022-000232

Dear Ms. Kitchings:

Please find enclosed for filing the *Initial Reply Brief of Appellant* in reference to this case. I have also enclosed a Proof of Service upon counsel for the Respondents.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Yours truly,

s/ Allison P. Sullivan

Allison P. Sullivan

APS/knr
Enclosures

cc: Charles R. Norris, Esq.
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