N O T I C E

IN THE MATTER OF MARVA ANN HARDEE, PETITIONER

Petitioner was suspended from the practice of law for two years, with conditions. *In re Hardee-Thomas*, 391 S.C. 451, 706 S.E.2d 507 (2011). Petitioner has now filed a petition seeking to be reinstated.

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Committee on Character and Fitness
P. O. Box 11330
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These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
November 2, 2022

The Supreme Court of South Carolina

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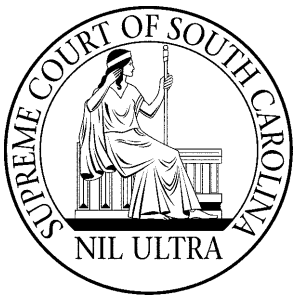
Any submissions must be in Adobe Acrobat portable document format (.pdf).

Submissions will be accepted through December 7, 2022.

Columbia, South Carolina
November 2, 2022



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
November 2, 2022
Patricia A. Howard, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

State Farm Mutual Automobile Insurance Company,
Petitioner,

v.

Myra M. Windham, Respondent.

Appellate Case No. 2020-001693

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 28121
Heard April 27, 2022 – Filed November 2, 2022

AFFIRMED AS MODIFIED

Alfred Johnston Cox and Jessica Ann Waller, both of Gallivan, White & Boyd, PA, of Columbia, for Petitioner.

Stephen H. Cook and John K. Koon, both of Koon Cook and Walters, LLC, of Columbia, for Respondent.

JUSTICE HEARN: Respondent Myra Windham was seriously injured while driving a rental car[1] that constituted a temporary substitute vehicle under her State Farm policy. In this declaratory judgment action instituted by Petitioner State Farm, we are asked to determine whether Windham can stack her underinsured motorist ("UIM") coverage pursuant to section 38-77-160 of the South Carolina Code. The circuit court agreed with State Farm that stacking was prohibited, and the court of appeals reversed. Because both parties offer reasonable interpretations of the policy language, we believe an ambiguity exists, which we construe against the drafter. Accordingly, we agree with the court of appeals that Windham can stack and affirm as modified.

FACTUAL AND PROCEDURAL HISTORY

Within the span of only six days and through no fault of her own, Myra Windham was in two car accidents. The first, on September 29, 2012, rendered her car inoperable. Consequently, on the date of the second accident, October 5, 2012, she was driving the rental car provided to her through the insurance of the first accident's at-fault driver.

In the second accident, Windham sustained injuries that exceeded the tortfeasor's liability insurance and sought to stack her UIM policies. Windham was insured under five separate policies[2] with State Farm at the time of the second accident. Though she was permitted to collect under one UIM policy, State Farm denied she could stack.

The parties stipulated the rental car in question meets the definition of a "temporary substitute car" as defined in Windham's State Farm policies. Further, the parties stipulate the rental car is not a vehicle shown under the "YOUR CAR" heading of the declarations page on any of the policies issued to Windham or her husband, nor does the car meet the definition of "owned by" in the policies.

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[1] To be clear, under the terms of this policy, "temporary substitute cars" do not include all rental cars, but only those used while the insured's car is inoperable for one of the enumerated reasons. For example, vehicles rented while on vacation, for moving furniture or other goods, or while on a work trip would not qualify as temporary substitute cars under this policy.

[2] Windham paid for the maximum $100,000 of UIM coverage on each vehicle.

Upon cross-motions for summary judgment, the circuit court found the policy's "not owned by" language controlled and thus stacking was prohibited. The court of appeals reversed, relying on a separate policy provision that states when a car is both a non-owned vehicle and a "temporary substitute car," it is considered a temporary substitute car only. We then granted certiorari.

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Each side in this dispute asserts the case involves a legal question, i.e., an analysis of Windham's policy with State Farm and its interplay with S.C. Code Ann. § 38-77-160. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Further, while declaratory judgment actions are generally "neither legal nor equitable[,]" assessing coverage under an insurance policy "is [an action] at law." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013).

LAW/ANALYSIS

I. *S.C. Code Ann. § 38-77-160*

Stacking enables the insured to recover under more than one policy. *See Nationwide Ins. Co. v. Rhoden*, 398 S.C. 393, 400 n.3, 728 S.E.2d 477, 481 n.3 (2012). In South Carolina, an individual must be a Class I insured in order to stack. *See Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 211, 473 S.E.2d 843, 845 (Ct. App. 1996). "A Class I insured is an insured or named insured who *has* a vehicle in the accident. An insured is a Class II insured if none of his vehicles are involved in the accident." *Id*. (emphasis added). Here we are asked to determine whether Windham, as the operator of a rental car, is a Class I or Class II insured.

The General Assembly has set forth this delineation between Class I and Class II:

> 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.

S.C. Code Ann. § 38-77-160 (emphasis added). Windham argues this language plainly includes rental car drivers, whereas State Farm contends the statute excludes all non-owners. In our view, neither position is supported by the statutory language.[3]

Contrary to State Farm's argument, this Court has previously recognized that the possessive relationship—"Insured's…vehicle"—means something less than ownership. *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998)[4]. Equally true, however, is that the relationship between driver and vehicle must be sufficient to make the possessive language logical. *See Montgomery v. Spartanburg Cnty. Assessor*, 419 S.C. 77, 81, 795 S.E.2d 866, 868 (Ct. App. 2016) ("This court must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (internal quotations omitted). Accordingly, the parties may contract for the coverage of certain, specifically defined vehicles; rental cars *could* be covered by the policy, but the statute in no way mandates that result. Thus, just as the court of appeals did, we

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[3] This Court has already once found the relevant language in section 38-77-160 ambiguous "at best" and turned to public policy to guide an interpretation. *Rhoden*, 398 S.C. at 402, 728 S.E.2d at 482 ("Thus, at best, the statutory language is ambiguous, and until the legislature clarifies this particular provision of section 38–77–160 to the contrary, the public policy… governs this case.").

[4] State Farm asserts the holding in *Concrete Services* that "[w]e have never required 'ownership' as a prerequisite to stacking" is irrelevant to Windham's case. We disagree. Though answering a certified question in which the first issue was dispositive, the Court chose to continue to the second question to "clarify apparent confusion concerning whether, in order to stack UIM coverage, an insured must own the vehicle involved in the accident[.]" *Concrete Servs.*, 331 S.C. at 512, 498 S.E.2d at 868. We concluded that ownership is not required, and "on the contrary, we have consistently held the determinative factor is Class I status." *Id.* at 513, 498 S.E.2d at 868.

The Court came to this conclusion in *Concrete Services* after noting that prior cases assessed only Class I status, leaving the door open to classes of people who do not own the vehicle. *Id.* at 513, 498 S.E.2d at 868 ("Under that definition, it is patent that one may be the spouse or relative of a named insured and reside in the same household without owning the vehicle."). We therefore reiterate that Class I status, and *not* ownership, is the determinative measure of an insured's ability to stack.

must look to the policy itself to determine whether the parties intended Windham's relationship to her rental car be sufficient to render her a Class I driver, able to stack.

II. *Windham's policy with State Farm*

This Court "must enforce, not write, contracts of insurance and [] must give policy language its plain, ordinary, and popular meaning." *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994). In doing so, the Court must not "extend or defeat coverage that was never intended by the parties." *Id.*

Relevant portions of Windham's policy state:

> ***Non-Owned Car*** means a ***car*** that is in the lawful possession of ***you*** or any ***resident relative*** and that neither:
>
> 1. is ***owned by***: a. ***you***; b. any ***resident relative***; c. any other ***person*** who resides primarily in ***your*** household; or d. an employer of any ***person*** described in a., b., or c. above; nor
> 2. has been operated by, rented by, or in the possession of: a. ***you***; or b. any ***resident relative*** during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or ***loss***…
>
> ***Owned By*** means: 1. owned by; 2. registered to; or 3. leased, if the lease is written for a period of 31 or more consecutive days…
>
> ***Temporary Substitute Car*** means a ***car*** that is in the lawful possession of the ***person*** operating it and that…replaces ***your car*** for a short time while ***your car*** is out of use due to its: a. breakdown; b. repair; c. servicing, d. damage; or e. theft; and neither ***you*** nor the ***person*** operating it own or have registered. If a ***car*** qualifies as both a ***non-owned car*** and a ***temporary substitute car***, then it is considered a ***temporary substitute car*** only…
>
> ***Your Car*** means the vehicle shown under "YOUR CAR" on the Declarations Page. ***Your car*** does not include a vehicle that you no longer own or lease.

> If a ***car*** is shown on the Declarations Page under "YOUR CAR[,"] and ***you*** ask ***us*** to replace it with a ***car*** newly ***owned by you***, then the ***car*** being replaced will continue to be considered ***your car*** until the earliest of:
>
> 1. the end of the 30th calendar day immediately following the date the ***car*** newly ***owned by you*** is delivered to ***you***;
>
> 2. the date this policy is no longer in force; or 3. the date ***you*** no longer own or lease the ***car*** being replaced.

State Farm contends, and the circuit court agreed, that only owned vehicles or those listed as "your car" on the declarations page can stack, and there is no basis in the policy for finding that a temporary car is an owned vehicle under the policy. In reply, Windham argues the label temporary *substitute* car implies it took the place of her owned car for the duration of its temporary use. State Farm claims the policy intends to treat a temporary car as a non-owned car because "by its very definition, a 'temporary substitute car cannot be 'owned by' an insured." It comes to this conclusion by analyzing the section defining a temporary substitute car as a car "***you*** nor the ***person*** operating it own or have registered." State Farm then ties this to its argument that the legislature intended ownership as a prerequisite to stacking in most cases under section 38-77-160.

Immediately following the sentence quoted by State Farm is this provision which we find significant[5]: "If a ***car*** qualifies as both a ***non-owned car*** and a ***temporary substitute car***, then it is considered a ***temporary substitute car only***." Windham contends the only apparent purpose of this sentence is to remove temporary substitute cars from the consequences of being non-owned cars. While normally all temporary cars would be considered non-owned because, as State Farm points out, they are by their definition not owned, the policy ostensibly exempts them from this consequence by denominating them temporary substitute cars only.

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[5] Although we find this sentence key to the policy's ambiguity, we are mindful that it cannot be alone dispositive. *See Beaufort Cnty. School Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("An insurance contract is read as a whole document so that one may not, by pointing out a single sentence or clause, create an ambiguity.") (internal quotations omitted). Instead, we look to the policy as a whole and consider this sentence in tandem with the plain language arguments asserted by Windham.

While it is debatable that this alone transforms them into owned vehicles, that is nevertheless a reasonable interpretation. On one hand temporary substitute vehicles are not-owned, but on the other, the policy clearly states they are not to be considered non-owned. Thus, both a finding of coverage and a finding against coverage could be reasonably supported by a reading of the policy language concerning non-owned and not non-owned.

State Farm posits that these inconsistent interpretations should be resolved by reading the UIM section in isolation which lists coverage exclusions and, it argues, purposefully omits temporary substitute cars *from being exempted from those exclusions*. However, this does not explain what the sentence under construction actually means nor does it remove the ambiguity created, because the basis of these exclusions still rests on ownership[6], returning us to the question of precisely where a car that is "not non-owned," as temporary substitute cars are reasonably articulated to be, fits within this policy.

Offering only the circular argument that the policy is facially clear because it is[7], State Farm produces no viable resolution to the inconsistencies presented. Therefore, facing diametrically-opposing yet reasonable interpretations, the policy is ambiguous and, construing the provision against the drafter, Windham should be permitted to stack her UIM coverage. *See Gaskins v. Blue Cross-Blue Shield of*

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[6] The "Underinsured Motor Vehicle Coverage" section of the policy does limit stacking under "If Other Underinsured Motor Vehicle Coverage Applies," paragraph three, but only on the basis of ownership: "If: a. ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage***: (1) while ***occupying*** a motor vehicle ***not owned by you*** or any ***resident relative***…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." (emphasis in original). The question of whether "not non-owned" means owned still infects the interpretation of this section and thus this section alone does not rescue the policy term from ambiguity.

[7] Unlike the dissent, we do not view the stipulations as dispositive or this insurance policy as a model of clarity. While the parties stipulated that the rental car did not qualify as "owned by[,]" they also stipulated that it was a "temporary substitute vehicle[.]" Neither of these stipulations resolve the fundamental question of whether the driver of a temporary substitute vehicle can stack because we must view the policy as a whole.

South Carolina, 271 S.C. 101, 105, 245 S.E. 2d 598, 600 (1978) ("The terms of an insurance policy must be construed most liberally in favor of the insured, and if the policy, words and language of the policy, when considered as a whole, give rise to a patent ambiguity or are capable of two or more reasonable interpretations, at least one of which favors coverage, that construction which is most favorable to the insured must be adopted."); *S.C. State Budget & Control Bd., Div. of Gen. Servs., Ins. Reserve Fund v. Prince*, 304 S.C. 241, 248, 403 S.E.2d 643, 647 (1991) (holding that when an "internal inconsistency in the policy renders it ambiguous and when a policy is susceptible to more than one reasonable interpretation, one of which would provide coverage, this Court must hold as a matter of law in favor of coverage") (internal quotations omitted); *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (holding that conflicting terms in an insurance policy are construed against the insurer).[8]

Therefore, we find the policy's contradictory provisions support both positions advanced by the parties. Construing this ambiguity in favor of coverage for the insured, Windham is a Class I insured able to stack.

For the forgoing reasons, the court of appeals is **AFFIRMED AS MODIFIED**.

Acting Justices John D. Geathers and H. Bruce Williams, concur. JAMES, J., dissenting in a separate opinion in which FEW, J., concurs.

[8] Counsel for Windham argued before the circuit court that this provision of the policy was ambiguous, but the circuit court ruled in favor of the insurer. Thereafter, the court of appeals found the plain language of the policy dispositive and did not discern an ambiguity. While neither party has argued before us that this policy is ambiguous, their competing interpretations are both reasonable, therefore creating an ambiguity which must be construed against State Farm and in favor of coverage. *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797.

JUSTICE JAMES: I dissent. Windham has been paid the $100,000 in UIM coverage to which she is entitled. The provisions of the State Farm policy align with applicable statutes and, under these facts, unambiguously prohibit Windham from stacking UIM coverage because none of her vehicles was involved in the accident.

BACKGROUND

Windham and her husband were the named insureds under five State Farm automobile insurance policies that covered separate vehicles; one policy covered their Toyota Camry. Each policy contains identical language, and each provides $100,000 in UIM coverage for covered damages. The Camry was damaged in a two-car wreck on September 29, 2012, with a driver insured by Allstate. Allstate provided Windham a rental vehicle owned by Enterprise Leasing Corporation. Six days later, Windham was driving the rental vehicle and was involved in a second accident with Jennifer McArdle. Windham claims the second accident was McArdle's fault and further claims she sustained damages exceeding the total of McArdle's liability insurance coverage and the $500,000 in UIM coverage from her five State Farm policies. Windham has been paid the full amount of McArdle's liability coverage. State Farm paid Windham the $100,000 limit of UIM coverage from one policy and claims Windham cannot stack UIM coverage from the other four policies. State Farm commenced this declaratory judgment action to resolve the stacking issue.

The parties filed cross-motions for summary judgment, and the circuit court granted State Farm's motion, concluding Windham could not stack UIM coverage under the terms of her policy and South Carolina Code section 38-77-160 (2015). The circuit court explained the "clear and unambiguous language" of Windham's policy prohibits stacking when the insured is injured in a vehicle that is not "owned by" the insured. The circuit court found that because the rental car was not "owned by" Windham, the policy prohibited stacking. The circuit court further ruled the policy's anti-stacking provision was consistent with section 38-77-160: "Because there is no dispute that Windham did not own the vehicle involved in the accident and [because] none of her vehicles were involved in the accident, she did not 'have' a vehicle in the accident as is required by the statute." *See* S.C. Code Ann. § 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 court of appeals reversed. *State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 850 S.E.2d 633 (Ct. App. 2020). The court of appeals explained section

38-77-160 permits a Class I insured to stack UIM coverage, and "a Class I insured is an insured or named insured who 'has' a vehicle involved in the accident." *Id.* at 149, 850 S.E.2d at 641 (alteration omitted) (quoting *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401, 728 S.E.2d 477, 481 (2012)). The court of appeals held Windham "had" a vehicle involved in the accident because the rental car met the policy definition of "temporary substitute car" and, therefore, "took the place of her vehicle[.]" *Id.*

The court of appeals did not meaningfully discuss the policy's anti-stacking provision, but it appears the court of appeals held the provision conflicts with section 38-77-160 and is unenforceable. *See id.* at 148, 850 S.E.2d at 640 ("We have never required 'ownership' as a prerequisite to stacking . . . . Accordingly, we hold that prior cases requiring a person to 'have' a vehicle involved in the accident as a prerequisite to stacking mean[s] only that a person must be a Class I insured." (emphasis omitted) (quoting *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 513, 498 S.E.2d 865, 868 (1998))).

The relevant portion of section 38-77-160 states,

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

(emphasis added). In case law, we have explained stacking in terms of Class I and Class II insureds. A Class I insured is a named insured, his or her spouse, or resident relative who "has a vehicle involved in the accident." *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 443 n.1, 405 S.E.2d 396, 397 n.1 (1991); *Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 544, 370 S.E.2d 85, 88 (1988); *Concrete Servs.*, 331 S.C. at 512, 498 S.E.2d at 868. A Class II insured is a named insured, his or her spouse, or resident relative "whose vehicle was not involved in the accident." *Mooneyham*, 304 S.C. at 443 n.1, 405 S.E.2d at 397 n.1; *Fireman's Ins. Co.*, 295 S.C. at 544, 370 S.E.2d at 88; *Concrete Servs.*, 331 S.C. at 512-13, 498 S.E.2d at 868. Absent policy provisions broadening the right to stack UIM coverage, only Class I insureds can stack such coverage.

"[I]nsurance policies are contracts to be interpreted in accord with contract law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52,

717 S.E.2d 589, 595 (2011). I will first review the State Farm policy to ascertain the parties' intent. *See Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021) (explaining that a coverage analysis begins with the insurance policy and then looks to whether its provisions "violate[] any legislatively-expressed public policy").

STIPULATIONS AND POLICY PROVISIONS

The parties entered into several stipulations of fact, most of which relate to policy provisions pertinent in this case. These stipulations and policy provisions are:

First, Windham and her husband are the insureds under each policy.

Second, none of the Windhams' vehicles was involved in the second accident.

Third, the rental vehicle was a "temporary substitute car." Each policy defines "*Temporary Substitute Car*" as:

> [A] *car* that is in the lawful possession of the *person* operating it and that:
>
> 1. replaces *your car* for a short time while *your car* is out of use due to its:
>
>   a. breakdown;
>
>   b. repair;
>
>   c. servicing;
>
>   d. damage; or
>
>   e. theft; and
>
> 2. neither *you* nor the *person* operating it own or have registered.

The temporary substitute car provision also states, "If a *car* qualifies as both a *non-owned car* and a *temporary substitute car*, then it is considered a *temporary substitute car* only."

Fourth, each policy defines "*Non-Owned Car*" as:

> [A] *car* that is in the lawful possession of *you* or any *resident relative* and that neither:

1. is *owned by*:

    a. *you*;

    b. any *resident relative*;

    c. any other *person* who resides primarily in *your* household; or

    d. an employer of any *person* described in a., b., or c. above; nor

2. has been operated by, rented by, or in the possession of:

    a. *you*; or

    b. any *resident relative*

    during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or *loss*.

Fifth, the parties stipulate the rental vehicle was not "owned by" Windham. Each policy defines "*Owned By*" as:

1. owned by;

2. registered to; or

3. leased, if the lease is written for a period of 31 or more consecutive days, to.

Sixth, the rental vehicle is not shown on any declarations page as "YOUR CAR." Each policy defines "*Your Car*" as "the vehicle shown under 'YOUR CAR' on the Declarations Page. *Your car* does not include a vehicle that *you* no longer own or lease."

Seventh, the UIM section of each policy contains the following paragraph concerning an insured's ability to stack coverage:

3. If:
    a. *you* or any *resident relative* sustains *bodily injury* or *property damage*:

(1) while *occupying* a motor vehicle not *owned by you* or any *resident relative*; or

(2) 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.

Paragraph 3 prohibits stacking if the insured is injured while occupying a vehicle that is not "owned by" the named insured, his or her spouse, or resident relative. This paragraph unambiguously prohibits Windham from stacking and does not violate section 38-77-160.

ANALYSIS

I. The policy unambiguously prohibits stacking when an insured is injured in an accident while occupying a temporary substitute car.

As noted above, the last sentence of the "temporary substitute car" definition provides, "If a *car* qualifies as both a *non-owned car* and a *temporary substitute car*, then it is considered a *temporary substitute car* only." Because Windham's rental car qualifies as both, it is a temporary substitute car only. Windham stipulates the rental car does not meet the policy definition of a car "owned by" her, and the policy's anti-stacking provision plainly provides Windham cannot stack if she was "*occupying* a motor vehicle not *owned by* [her] or any *resident relative*."

In the face of Windham's stipulation that the rental car was not "owned by" her, Windham curiously argues that because the rental car is a temporary substitute car and not a "non-owned car," the rental car must "be treated like an owned vehicle even though [Windham] does not actually own it." Equally curious is Windham's argument that her previously damaged Camry was "involved" in the second accident for stacking purposes, as she stipulated that none of her vehicles was involved in that accident.

The majority rightly acknowledges the reasonableness of State Farm's argument that under the policy's terms, a temporary substitute car is not "owned by" the insured. However, the majority joins in Windham's torture of the plain language of the policy and concludes:

> While normally all temporary [substitute] cars would be considered non-owned because, as State Farm points out, they are by their definition not owned, the policy ostensibly exempts them from this consequence by denominating them temporary substitute cars only. While it is debatable that this alone transforms them into owned vehicles, that is nevertheless a reasonable interpretation.

(emphasis added). In reaching this conclusion, the majority ignores the parties' stipulation that Windham did not own the rental car. The majority then concludes State Farm's and Windham's interpretations are equally reasonable and therefore result in an ambiguity in the policy that must be resolved against State Farm. The majority rewrites the policy to provide that if rental cars qualify as both non-owned cars and temporary substitute cars, they are "not non-owned," thus transforming them into owned cars. I disagree because there is no ambiguity. Even absent the stipulations, the only reasonable interpretation of the policy is that Windham did not own the rental car.

Advancing a similar argument, Windham cites *Bell v. Progressive Direct Insurance Co.*[9] for the proposition that State Farm's reading of the policy "ignores the principle that insurance contracts are to be read in accordance with reasonable expectations of insureds." Specifically, Windham points to the definition of "temporary substitute car" as a car that "replaces" a car listed on the declarations page. Windham claims it was her reasonable expectation that the rental car "replace" the Camry for all purposes under the policy, including UIM coverage. Windham's invocation of the doctrine of reasonable expectations should fail, as we specifically noted in *Bell* that "the doctrine cannot be used to alter the plain terms of an insurance policy." *Id*. at 581, 757 S.E.2d at 407. The plain terms of the State Farm policy compel the conclusion that the rental car was not owned by Windham.

II. Windham did not have a vehicle involved in the accident.

As acknowledged by the majority and the court of appeals, a Class I insured is a named insured, his or her spouse, or resident relative who has a vehicle involved

[9] 407 S.C. 565, 578-81, 757 S.E.2d 399, 405-07 (2014).

in the accident. *Windham*, 432 S.C. at 146, 850 S.E.2d at 639. Only a Class I insured may stack UIM coverage. *Concrete Servs.*, 331 S.C. at 509, 498 S.E.2d at 866; *see Mooneyham*, 304 S.C. at 444, 405 S.E.2d at 397.[10]

In their effort to determine what it means "to have" a vehicle involved in the accident, the court of appeals and the majority mistakenly seize upon our isolated statement in *Concrete Services* that "[w]e have never required 'ownership' as a prerequisite to stacking" to conclude section 38-77-160 contains no ownership requirement. *Windham*, 432 S.C. at 149, 850 S.E.2d at 641 (quoting *Concrete Servs.*, 331 S.C. at 513, 498 S.E.2d at 868). A proper reading of *Concrete Services* demonstrates section 38-77-160 prohibits stacking when the named insured is injured in a vehicle owned by neither the named insured, his or her spouse, nor a resident relative.

Concrete Services presented two certified questions related to stacking. Ann Mickle was injured while driving a vehicle owned by her husband's company, Concrete Services. Concrete Services was the named insured on the vehicle's insurance policy, and Mickle's husband was the sole shareholder of Concrete Services. Answering the first certified question, we held Mickle was not a Class I insured because the corporation—the named insured—could not possibly have a spouse or resident relatives. We therefore held Mickle could not stack.

Even though our answer to the first certified question resolved the case, we then turned to the second certified question: "Where the South Carolina Appellate Courts have required an insured to 'have' a vehicle involved in the accident in order to stack UIM coverage, is it required that the insured own the vehicle involved in the accident?" *Concrete Servs.*, 331 S.C. at 508, 498 S.E.2d at 865. We answered that certified question "no" and held section 38-77-160 does not require the insured to personally own the vehicle involved in the accident in order to stack. We held, "[I]n order to 'have' a vehicle involved in the accident, it is necessary only that the insured qualify as a Class I insured." *Id.* at 513, 498 S.E.2d at 868. We recognized that in many instances, the spouse or resident relative of the named insured does not own the insured vehicle. We explained that under the Class I definition, "it is patent that one may be the spouse or relative of a named insured and reside in the same household without owning the vehicle. We have never required 'ownership' as a prerequisite to stacking; on the contrary, we have consistently held the determinative factor is Class I status." *Id.* (footnote omitted).

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[10] Of course, the insurer and the insured can contract for coverage greater than what is minimally required by statute.

The context of our holding in *Concrete Services* is key. The majority isolates the statement "[w]e have never required 'ownership' as a prerequisite to stacking" and concludes section 38-77-160 is completely devoid of any ownership requirement. This reading of *Concrete Services* ignores the plainly stated context of our holding—even if the named insured's spouse or resident relative does not personally own the vehicle involved in the accident, that person may stack UIM coverage if the named insured had a vehicle involved in the accident. At the least, we require the named insured to own the vehicle. Accordingly, the majority's reliance on *Concrete Services* for the blanket proposition that ownership is not a prerequisite to stacking is misplaced.

Ultimately, the answer to the question of whether section 38-77-160 contains an ownership requirement lies in the language employed by the General Assembly. To repeat, section 38-77-160 provides, "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." "Insured" is defined to include the named insured, his or her spouse, and resident relatives. *See* S.C. Code Ann. § 38-77-30(7). Incorporating this definition, section 38-77-160 plainly allows a policy to prohibit stacking if the named insured, his or her spouse, or resident relatives do not own a vehicle involved in the accident. This interpretation is supported by both the plain language of the statute and an in-context review of *Concrete Services*.

CONCLUSION

"As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014). The anti-stacking provision in Windham's policy does not contravene section 38-77-160, nor does it expand Windham's right to stack beyond the statutory minimum required by section 38-77-160.

Because the rental car was not owned by Windham, her husband, or a resident relative, Windham did not "have" a vehicle involved in the accident. Windham has been paid the $100,000 in UIM coverage to which she is entitled, and she cannot stack additional UIM coverage under the terms of the policy. Therefore, I would reverse the court of appeals' decision.

FEW, J., concurs.

The Supreme Court of South Carolina

Re: Amendments to Resolution of Fee Disputes Board Rules, Rule 416, South Carolina Appellate Court Rules

Appellate Case No. 2022-000439

ORDER

The South Carolina Bar has proposed amending two rules within the Resolution of Fee Disputes Board Rules, which are found in Rule 416 of the South Carolina Appellate Court Rules (SCACR). The proposed amendments add a provision stating that members of the Board are immune from suit and delete a provision allowing for the appointment of a Board member as counsel for a party in a fee dispute.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we adopt the Bar's proposed amendments to Rule 4 and Rule 14 of the Resolution of Fee Disputes Board Rules, with minor changes to the Bar's proposed change to Rule 4.

Rule 4 of Rule 416, SCACR is amended to add the following sentence to the end of the rule: "Members of the Board shall be absolutely immune from liability and suit while acting within the scope of their duties under this Rule." Rule 14 of Rule 416, SCACR, is amended to delete the final two sentences of Rule 14, which permit the appointment of a member of the Board as counsel for a party in a fee dispute. These amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 2, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Isaac D. Brailey, Claimant, Appellant,

v.

Michelin North America, Inc., (US7), Employer, and Safety National Casualty Corp., Carrier, Respondents.

Appellate Case No. 2019-000556

Appeal From The Workers' Compensation Commission

Opinion No. 5906
Heard February 9, 2022 – Filed April 27, 2022
Withdrawn, Substituted, and Refiled November 2, 2022

REVERSED AND REMANDED

Stephen Benjamin Samuels, of Samuels Reynolds Law Firm LLC, of Columbia, for Appellant.

Grady Larry Beard and Jasmine Denise Smith, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Respondents.

WILLIAMS, C.J.: Isaac D. Brailey appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) denying his claim for benefits against Michelin North America, Inc. Brailey contends the Commission erred in finding (1) he failed to prove he sustained a compensable injury; (2) his claim was barred by the fraud in the application

defense under *Cooper v. McDevitt & Street Co.*;[1] (3) Michelin proved the elements of *Capers v. Flautt*;[2] and (4) he intentionally and willfully caused injury to himself. We reverse and remand, finding Brailey's injury is compensable under South Carolina's workers' compensation law.

FACTS/PROCEDURAL HISTORY

Brailey was hired by Michelin on April 17, 2017. He passed a physical during Michelin's hiring process and was cleared for full duty. He trained as a rubber stretcher for very large mining tires. In his deposition, Brailey denied being trained in the correct procedures for filing workers' compensation claims or for reporting injuries at work. He said his back started bothering him when he began the physical work at Michelin, but his supervisor and the Michelin nurse told him it was normal to have back pain when stretching rubber. Brailey went to the emergency room (ER) on June 11, 2017, for back pain. He did not tell anyone at Michelin, and he was not ordered out of work. The ER doctor prescribed Flexeril for the back pain. Brailey stated he saw his family doctor for minor back pain on June 13. The medical records from the visit with his family doctor showed Brailey described pain that was a "ten out of ten" and showed that Brailey had been having back pain for two weeks prior to the visit. He did not disclose the June 13 doctor's visit to Michelin, and he was not ordered out of work by the family doctor on June 13.

On Saturday, June 24, 2017, Brailey suffered sharp back pain while stretching rubber at Michelin. He tried to see the Michelin nurse but the office was closed. He went to the ER and was prescribed multiple pain medications and restricted from work for three days. Brailey claimed he called his supervisor during the ER visit and the supervisor told him to see the Michelin nurse. Brailey told him the nurse's office was closed, and the supervisor told him to wait until Monday. The Michelin nurse called Brailey and told him to relax, take Aleve, and see the Michelin doctor on Monday morning.

Brailey saw Michelin's doctor, Dr. Stephen Izard, on Monday, June 26. Dr. Izard told him to take Ibuprofen and Flexeril, to not follow up with a neurosurgeon, and to return to work on June 27 with no restrictions. Despite instructions from his Michelin supervisors to follow up with Dr. Izard, Brailey missed his follow up

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[1] 260 S.C. 463, 196 S.E.2d 833 (1973).
[2] 305 S.C. 254, 407 S.E.2d 660 (Ct. App. 1991).

appointment because he did not want to drive while taking pain medicine and refused transportation offered by Michelin. He did not return to work at Michelin after June 24. He went back to the ER on June 27 because he was feeling "terrible." He received an x-ray and a shot and was restricted from work for three days.

The ER referred Brailey to Dr. Scott Boyd, a neurosurgeon. Dr. Boyd ordered an MRI and physical therapy in July 2017. Dr. Boyd filled out a medical questionnaire that stated it was his opinion to a reasonable degree of medical certainty that, more likely than not, Brailey injured his lumbar spine at his employment on June 24, 2017. Dr. Boyd stated in his deposition that Brailey had a herniated disk and there was no way to tell how long it had been present. Dr. Boyd recalled that Brailey told him he injured his back on June 24 stretching rubber at Michelin and he had previous back problems twenty-five years ago that resolved without treatment.

During his deposition, Dr. Boyd reviewed Brailey's medical records from his June 11 and June 13 doctor's visits. Dr. Boyd stated that Brailey's complaints and symptoms of back pain on June 11 and 13 were similar to what he reported on June 24 but were perhaps more severe on June 24. Under cross-examination, Dr. Boyd stated he was uncertain about the exact date of Brailey's injury. At the conclusion of the deposition, Dr. Boyd opined, "I believe, based on his history and in his records, that [the injury] was related to his work at Michelin in the continuum with some event on about June 24 that made things worse."

At the hearing before the single commissioner, Brailey testified about his prior work history. He recalled that he experienced middle-back pain three weeks after beginning work at Richtex Brick in 1997.[3] Brailey was placed under a no-heavy-lifting restriction in 1997 until he saw a surgeon. He did not see a surgeon and settled a workers' compensation claim with Richtex Brick for $2,500.[4] Brailey then worked at Westinghouse for sixteen years before being laid off. Brailey indicated he did not suffer from back pain while working at Westinghouse.

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[3] Brailey claimed his current pain was in a different area of his back.

[4] The doctor at Richtex Brick noted that Brailey was probably not physically able to perform the work at Richtex Brick and may have had a "litigation thought process."

Brailey testified that during training at Michelin in 2017, he filled out a form that asked if he had ever had medical attention for back injury, backache, or back pain. He answered "no" on the form. Brailey did not list Richtex Brick as a previous employer on his Michelin employment application.

The safety manager at Michelin, Mark Gross, testified that all incoming employees are trained in safety and workers' compensation protocol. Gross verified that Michelin relies on the answers given by employees on hiring forms. Gross stated that he called Brailey in June 2017 to offer to send a taxi to pick him up for the follow-up visit with Dr. Izard. Brailey told him to talk to his lawyer and hung up on him.

Brailey filed a workers' compensation claim that Michelin denied in July 2017. After a hearing, the single commissioner denied the claim. In affirming the single commissioner's denial of benefits to Brailey, the Commission found Brailey was not credible based on his testimony and the single commissioner's observations of him. The Commission found Brailey was not clear about the date of injury and found the medical records were inconsistent with his testimony. The order noted that Brailey had a "very similar incident" at Richtex and omitted information about Richtex on his Michelin employment application. The Commission found that Brailey

> repeatedly attempted to justify his answers during his testimony. We find that while testifying, the claimant gave confusing answers when asked direct questions by his attorney. As noted by the [single] [c]ommissioner throughout the proceeding, the claimant provided vague responses when questioned by defense counsel. He would not answer defense counsel's questions, rambling through responses.

The Commission's order stated "causation [was] not provided in the medical records because Dr. Boyd had no knowledge of the extent of claimant's prior back issues." The order noted Dr. Boyd opined on the medical questionnaire that "[Brailey] injured his lumbar spine at Michelin on June 24, 2017, the injury resulted in radiculopathy down [his] left leg, . . . and [Brailey] had not reached maximum medical improvement." The order further stated that Dr. Boyd opined in his deposition that "more likely than not, [Brailey] injured his lumbar spine at Michelin, including 'some episode on June 24.'"

The Commission found Brailey committed fraud in the application for employment with Michelin because he knowingly and willfully made a false representation as to his prior back condition on a Michelin medical questionnaire and Michelin relied on those false answers.

The order stated,

> This claim is denied in its entirety based on evidence of numerous issues relating back to 1997 through 2017. The claimant has failed to carry his burden of proof of an accident being sustained on June 24, 2017, due to his lack of credibility, the lack of sufficient medical evidence to support his allegations, and moreover, due to medical evidence to the contrary. We find the claimant was unable to return to work after June 24, 2017, due to a previous incident. We find the June 24, 2017, incident is not compensable based upon the greater weight of the evidence and the other reasons stated within this finding.

The order stated Brailey "did not sustain compensable injury to his low back while under the employ of [Michelin] on June 24, 2017, as alleged." The order also stated,

> Under § 42-9-60, assuming [Brailey] actually sustained an injury by accident on June 24, 2017 . . . [he] intentionally and willfully did so by failing to alert or notify his employer he was allegedly suffering from ten out of ten low back pain for at least 4 weeks prior to that date and seeking medical treatment on his own without any knowledge by his employer due to his failure to provide same.

This appeal followed.

ISSUES ON APPEAL

I. Did the Commission err in finding Michelin proved the elements of the *Cooper v. McDevitt & Street* defense?

II. Did the Commission err in finding the claim was barred by *Capers v. Flautt*?

III. Did the Commission err in finding Brailey's claim was barred by section 42-9-60 of the South Carolina Code (2015)?

IV. Did the Commission err in finding that Brailey did not meet his burden of proof to show he injured his back in an accident arising out of his employment at Michelin?

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2021). "An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Clemmons v. Lowe's Home Ctrs., Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017). This court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Frampton v. S.C. Dept. of Nat. Res.*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (Ct. App. 2020) (final alteration in original) (quoting § 1-23-380(5)(d), (e)).

In workers' compensation cases, the Commission is the ultimate fact finder, and its findings are presumed correct and will not be set aside unless unsupported by substantial evidence in the record. *Holmes v. Nat'l Serv. Indus.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011). "'Substantial evidence' is not a mere scintilla of evidence[,] nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached . . . in order to justify its action." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495–96, 243 S.E.2d 192, 193 (1978)). When evidence conflicts, either in testimony given by different witnesses or by the same witness, the Commission's factual findings are conclusive. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492–93, 541 S.E.2d 526, 528 (2001). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being

supported by substantial evidence." *Liberty Mut. Ins. v. S.C. Second Inj. Fund*, 363 S.C. 612, 620, 611 S.E.2d 297, 301 (Ct. App. 2005). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Commission]." *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011).

LAW/ANALYSIS

I. Fraud in the Application Defense

Brailey argues the Commission erred in finding Michelin proved the elements of fraud in the employment application under *Cooper v. McDevitt & Street Co.* We agree.

The *Cooper* court set forth the following factors that must be present before a false statement in an employment application will bar benefits:

> (1) The employee must have knowingly and wil[l]fully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation[,] and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

Cooper, 260 S.C. at 468, 196 S.E.2d at 835. "All factors must be present for the employer to avoid paying benefits." *Vines v. Champion Bldg. Prods.*, 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993).

Here, the Commission made the following findings of fact with regards to the *Cooper* defense:

> We find Dr. Boyd provided restrictions of no heavy lifting. However, we find causation is not provided in the medical records because *Dr. Boyd had no knowledge of the extent of [Brailey's] prior back issues*. This finding is based upon the greater weight of the evidence in the record, the deposition testimony of Dr. Boyd, and the testimony of [Brailey].

> We find [Brailey] knowingly and willfully made a false misrepresentation as to his prior back condition. We find [Michelin] relied on the claimant's misrepresentations on his post-hire medical questionnaire. *We find a causal relationship exists between [Brailey's] prior back problems and the subsequent back problems arising from his alleged work-related accident.* This finding is based upon the testimony of all witnesses and the medical evidence in the record.

(emphases added). The Commission concluded as a matter of law that all three *Cooper* elements were met in this case.

While substantial evidence supports the Commission's findings that Michelin met the first two *Cooper* elements,[5] Michelin has not proven a causal connection between the false representation and the injury. *See Corbin v. Kohler Co*., 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) ("Expert medical testimony is intended to aid the Appellate Panel in coming to the correct conclusion."); *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("[W]hile medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.").

The Commission found Dr. Boyd was not aware of "the extent" of Brailey's 1997 back injury. However, the record contains no evidence that the 1997 injury did not resolve, and the record does not indicate the "extent" of the injury. In the medical notes from 1997, the Richtex doctor noted that Brailey had been improving.

Dr. Boyd's deposition testimony shows that although he wavered on a specific date of injury he opined that Brailey's back problems were related solely to his work at Michelin, and the injury was aggravated on June 24. The record contains no medical evidence that Brailey's 1997 back injury somehow contributed to the June 24 injury or that he was predisposed to back injury. Indeed, Brailey worked at Westinghouse for sixteen years without a back injury. *See Vines*, 315 S.C. at 16, 431 S.E.2d at 586 ("There is no evidence Vines' previous injury contributed to the

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[5] Substantial evidence supports the Commission's findings that Brailey willfully and knowingly made false statements as to his physical condition to Michelin on his employment application. Further, Michelin proved it relied on those statements and they were a substantial factor in hiring Brailey.

occurrence of the accident. Additionally, although there was evidence indicating Vines was predisposed to back injuries because of his previous injury and surgery, Vines' physician testified the accident alone without any prior injury would have been sufficient to cause an injury of this nature."); *cf. Givens v. Steel Structures, Inc.*, 279 S.C. 12, 14, 301 S.E.2d 545, 547 (1983) (finding the claimant's condition was one of disc degeneration reflecting the cumulative effect of successive injuries). Here, because the medical testimony is the only competent evidence in the record relating to a causal connection, or lack thereof, between Brailey's false representation of the 1997 back injury and the 2017 injury, the Commission erred in finding Michelin proved its fraud in the application defense. *See Burnette v. City of Greenville*, 401 S.C. 417, 428, 737 S.E.2d 200, 206 (Ct. App. 2012) (stating that when the Commission bases its finding on its own medical opinion, rather than the opinion of a medical provider, the finding is unsupported by substantial evidence in the record). Therefore, we reverse this finding.

II. *Capers v. Flautt*

Brailey contends the Commission erred in finding his claim was barred by *Capers v. Flautt*. We agree.

The *Capers* court found that contact dermatitis suffered by the claimant, a dishwasher, was not an accidental injury and had been experienced by the claimant in previous employment. *Capers*, 305 S.C. at 257, 407 S.E.2d at 661. The claimant's physician considered him "totally disabled from work which involved exposure to soap," but the claimant again applied for a job as a dishwasher two years later. *Id.* at 256, 407 S.E. 2d at 661. The court defined accident as "an unlooked for or untoward event that the injured person did not expect, design or intentionally cause" and found the contact dermatitis could have been anticipated given past experience. *Id.*

We find the circumstances of the present case differ from *Capers* and render the case inapplicable. Here, Brailey recovered from his 1997 back injury, and there is no indication in the record that he could have expected to have similar back problems at Michelin in 2017. Significantly, Brailey worked at Westinghouse for sixteen years with no back problems. Brailey testified his 1997 back injury was in a different area of his back than the 2017 injury. Dr. Boyd's testimony and opinion, which is the only medical testimony and opinion relating to the 2017 injury, do not support the theory that Brailey's 2017 injury was non-accidental and could have been expected given past experience. *See Mullinax v. Winn-Dixie*

Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) ("Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission."). Thus, we reverse this finding.

III. Section 42-9-60

Brailey argues the Commission erred in finding his claim was barred by section 42-9-60. We agree.

In pertinent part, section 42-9-60 provides:

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee *or by the wil[l]ful intention of the employee to injure or kill himself or another*. In the event that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

(emphasis added). The record contains no evidence that Brailey deliberately intended to injure himself as described in this section, and the Commission's finding is not supported by substantial evidence. The application of section 42-9-60 is limited to "only . . . those cases where it is shown that the acts of the employee are so serious and aggravated as to evince a wil[l]ful intent to injure." *Zeigler v. S.C. Law Enf't Div.*, 250 S.C. 326, 329, 157 S.E.2d 598, 599 (1967). The facts of this case do not rise to the level of "serious and aggravated." The record contains no evidence Brailey began working at Michelin with the willful intention to injure his back. Further, he was not placed on work restriction after having back pain in the weeks before June 24, 2017, and there is no evidence in the record that his conduct was of such a serious nature as to evidence a willful intent to injure himself. *Cf. id.* at 331, 157 S.E.2d at 600 (finding a "fatal altercation was voluntarily entered into, and the conduct of the deceased was of such a grave or serious nature as to evidence a wil[l]ful intent on his part to injure his fellow employee, thereby barring any right to benefits"). Therefore, we reverse this finding.

IV. Brailey's Back Injury

Brailey argues the Commission erred in finding he did not injure his back in an accident arising out of his employment at Michelin. We agree.

"In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward the end of providing coverage rather than noncoverage in order to further the beneficial purposes for which it was designed." *Shealy v. Aiken Co.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Id.* at 455–56, 535 S.E.2d at 442.

The Commission specifically grounded its findings on Brailey's lack of credibility and his "vague" and "rambling" responses. Our supreme court has noted it has affirmed the factual findings of the Commission based on credibility determinations when credibility constituted a "reasonable and meaningful basis" for the Commission's decision. *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 645, 842 S.E.2d 349, 353 (2020); *see also Shealy*, 341 S.C. at 455–56, 535 S.E.2d at 442 ("In cases in which we affirmed factual findings of the commission based on its credibility determination, we did so because it made sense for the commission to use credibility as the dispositive factor in deciding the particular issue."). Here, Brailey's credibility as to his prior workers' compensation claim and prior back injury in 1997 is not a reasonable and meaningful basis for the Commission's determination that he did not suffer an accidental injury arising out of his employment at Michelin in 2017. Rather, the medical evidence pertaining to his 2017 injury, which consists of an MRI and the expert medical opinion of a neurosurgeon, is not contradicted and constitutes substantial evidence that supports a reversal of the Commission's order. *See Frampton*, 432 S.C. at 256, 851 S.E.2d at 719 (noting the court "may reverse or modify the [Commission's] decision if substantial rights of the appellant have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." (final two alterations in original)). Therefore, we reverse the Commission on this issue.

CONCLUSION

Based on the foregoing, the Commission's order is reversed and the matter is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillippa Smalling, individually and as Next Friend for Jahmerican M., a minor, Appellant,

v.

Lisa R. Maselli, M.D., both individually and as agent/employee of Carolina OB-GYN, Respondent.

Appellate Case No. 2019-001304

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5949
Heard October 3, 2022 – Filed November 2, 2022

AFFIRMED

Edward L. Graham, of Graham Law Firm, PA, of Pendleton, for Appellant.

James Bernard Hood and John O'Connor Radeck, Jr., of Hood Law Firm, LLC, of Charleston, and Deborah Harrison Sheffield, of Hood Law Firm, LLC, of Columbia, all for Respondent.

MCDONALD, J.: Phillippa Smalling, individually and as Next Friend for Jahmerican M., a minor, brought this medical malpractice action against Dr. Lisa Maselli for injuries suffered by Minor during his birth. Smalling challenges the

circuit court's application of section 15-32-230 of the South Carolina Code (Supp. 2022), which requires gross negligence to impose liability in certain emergency and obstetrical care situations. We affirm.

Facts and Procedural History

In 2012, Smalling (Mother) received prenatal care at Carolina OB-GYN. Following an uncomplicated pregnancy, Mother was admitted to Georgetown Memorial Hospital for labor and delivery at 2:00 a.m. on April 27, 2013.

Mother reached ten centimeters dilation at 7:59 a.m. and began pushing.[1] At 8:14 a.m., Minor's head delivered with a nuchal cord.[2] Although Dr. Maselli was able to reduce the cord, she immediately realized Minor's top shoulder was stuck under Mother's pubic bone, signaling shoulder dystocia, an obstetric emergency.[3] Dr. Maselli called for a second labor and delivery nurse to assist, and the nurses performed a McRoberts maneuver by hyperflexing Mother's hips. When the next push did not resolve the shoulder dystocia, Dr. Maselli performed a mediolateral episiotomy. While the nurses applied suprapubic pressure, Dr. Maselli used "moderate/controlled" traction to successfully release the shoulder and complete Minor's delivery.

Due to the relatively quick delivery—sixty seconds elapsed from the delivery of the baby's head to the delivery of the body—Minor suffered no hypoxic injury from oxygen deprivation. However, Minor did suffer a brachial plexus injury. Dr. Maselli's "shoulder dystocia progress note" referenced minimal movement of Minor's right arm but noted the baby's right hand and fingers were moving. A

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[1] Dr. Maselli and a labor and delivery nurse were in the delivery room with Mother at this stage. Pediatrician David Haseltine joined them to provide deep suction once Minor was delivered due to the presence of meconium in the amniotic fluid.

[2] A "nuchal cord" refers to a condition in which the umbilical cord is wrapped around the baby's neck. In this context, "reduce" means to release the umbilical cord over the baby's head.

[3] Mother's expert, Dr. Stephen Pliskow testified, "With shoulder dystocia, the head comes out and the baby gets stuck. The shoulders, which is the next part to come out after the head, doesn't come out; it's stuck by the bony structures of the pelvis."

subsequent MRI revealed Minor's C-5 and C-6 nerve roots were completely avulsed from his spinal cord, and his C-7 nerve root was partially avulsed. Although Minor underwent multiple surgeries and extensive rehabilitative therapy, he has permanent and significant loss of right arm function, and his right arm is shorter than his left due to muscle atrophy.

In response to Mother's medical malpractice complaint, Dr. Maselli raised section 15-32-230's limitation on liability, which requires a showing of gross negligence. Mother later moved for partial summary judgment seeking to preclude the defensive application of § 15-32-230(A), which pertains to claims arising from "care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite." The circuit court denied Mother's motion for partial summary judgment and accompanying motion to stay.

At the close of Mother's case at trial, Dr. Maselli moved for a directed verdict. The circuit court denied the motion as to liability but directed a verdict on punitive damages. Dr. Maselli renewed the directed verdict motion as to liability at the close of her case. Mother also sought a partial directed verdict, again seeking to preclude the application of § 15-32-230(A). The circuit court denied the motions.

The circuit court's jury charges included the relevant language of § 15-23-230 and a standard medical malpractice hindsight charge. The circuit court denied Mother's request to charge the language of § 15-23-230(B), which addresses claims relating to "obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship . . . or the patient has not received prenatal care," finding this subsection inapplicable to the circumstances of Minor's delivery. Without objection, the circuit court submitted a verdict form with special interrogatories addressing the required elements of § 15-23-230(C). Although the jury was unable to reach a unanimous verdict as to the first two questions on the verdict form, it was unanimous as to the remaining questions and sought to return a verdict for Dr. Maselli on that basis. Over Mother's objection, the circuit court accepted the defense verdict.

Standard of Review

"When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court." *Byrd as Next Friend of Julia B. v.*

McLeod Physician Assocs. II, 427 S.C. 407, 412–13, 831 S.E.2d 152, 154 (Ct. App. 2019) (quoting *Wright v. Craft*, 372 S.C.1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006)). "[W]e reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law.'" *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). "Statutory interpretation is a question of law," which this court reviews de novo. *Flowers v. Giep*, 436 S.C. 281, 285–86, 871 S.E.2d 607 (Ct. App. 2021), *cert. denied* (Sept. 7, 2022).

Law and Analysis

I. Directed Verdict and Applicability of Subsections (A) and (B)

Mother argues the circuit court erred in denying her motion for a partial directed verdict, which essentially sought a declaration that section 15-32-230(A)'s gross negligence standard was inapplicable to the circumstances of Minor's delivery. In furtherance of this argument, Mother asserts the General Assembly intended for subsections (A) and (B) to apply together. We disagree.

Section 15-32-230 provides:

> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.
>
> (B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.

> (C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:
>
> (1) in immediate threat of death; or
>
> (2) in immediate threat of serious bodily injury. Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

This court addressed subsections (A) and (B) in *Flowers*, finding "section 15-32-230 provides a defense against simple negligence in two separate and distinct scenarios." 436 S.C. at 288, 871 S.E.2d at 608.

> From a plain reading of the text, we find subsection (A) describes a physician that encounters an emergency while providing care whereas subsection (B) describes a physician treating a patient previously unassociated with the physician or his or her practice or lacking prior prenatal care. Because subsections (A) and (B) describe different factual scenarios in which a physician might provide negligent care, we find the legislature intended subsection (B) to apply separately from subsection (A) rather than as a limitation to (A). Moreover, the language within subsection (B) neither indicates that it is a limitation on the defense provided in subsection (A) nor does it state that subsection (A) only provides a defense for obstetrical care if the requirements within subsection (B) are satisfied. To adopt Appellants' interpretation and read subsection (B) as a limitation to subsection (A) would be a "forced construction" of the text's plain language.

Id. at 287–88, 871 S.E.2d at 607–08 (internal citations omitted).

In an effort to avoid subsection (A)'s limitation on liability, Mother seeks to create an ambiguity through her reading of subsection (B). Although Mother also seeks to limit the application of *Flowers* to the particular facts of that case, we find its analysis applicable here as well. Subsection (B) is inapplicable to Mother's circumstances because Mother was an established patient of Carolina OB-GYN, where she received prenatal care. Accordingly, the circuit court properly denied Mother's motion for a partial directed verdict and properly declined her request to declare the gross negligence standard of § 15-32-230(A) inapplicable.

II. Section 15-32-230(C)

Mother further argues the "emergency statute does not apply because, as a matter of law, there was no proof that this infant was 'not medically stable.'" In her reply brief, Mother clarifies this argument, contending that when certain undefined statutory terms are "properly construed, the statute does not apply as a matter of law." Mother correctly notes that for the emergency statute to apply, a physician "must prove all of the three required elements: (1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate threat of death or serious bodily injury." *Byrd*, 427 S.C. at 414, 831 S.E.2d at 155.

A. Genuine Emergency and Immediate Threat

Mother contends the phrases "genuine emergency," "medically stable," and "immediate threat of death or serious bodily injury," are "ambiguous, in part, and must be construed to signify some factor other than conditions present in any medical emergency." However, because Mother raised only the element of medical instability in her argument on the record at trial, we find unpreserved her contentions that Minor's delivery did not involve a "genuine emergency" or an "immediate threat of death or serious bodily injury." *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

B. Not Medically Stable

Mother asserts Dr. Maselli's experts "provided no evidence whatsoever that *this patient*, in that moment, was medically unstable in a statutory sense." She relies on data collected from the fetal heart monitoring strips, Minor's Apgar scores,[4] and the non-problematic cord blood gases to support her medical stability argument, noting these test results indicated no immediate threat of death or serious bodily harm to Mother or Minor. Citing this data, Mother's experts, Dr. Adler and Dr. Pliskow, opined Mother and Minor were medically stable and there was no risk of injury during the sixty seconds it took Dr. Maselli to resolve the shoulder dystocia. Specifically, Dr. Pilskow testified that "more likely than not, the baby was stable coming in and stable coming out, would have been stable for at [sic] that one-minute period of time from [an] oxygen, acid based standpoint."

By contrast, Dr. Maselli's experts, Dr. Christopher Robinson and Dr. Suneet Chauhan, opined Minor was *not* medically stable and the risk posed by the shoulder dystocia was real and immediate. As Dr. Robinson explained, "You cannot be stable and not be able to breathe." He further noted the Apgar scores and cord blood gases demonstrated Dr. Maselli did a good job managing the delivery in preventing hypoxic injury or death, but such tests have no bearing on whether Minor was medically stable during the period of time his shoulder was stuck. Dr. Chauhan echoed this opinion, testifying, "to me this is a testament of their excellent clinical work in managing obstetrics."

As in *Byrd*, the experts here agreed the data from the fetal heart monitoring strips, Apgar scores, and cord blood gases indicated stability. 427 S.C. at 416, 831 S.E.2d at 156 (noting "the experts seem to agree the data from the fetal heart monitoring strips, Apgar scores, and cord blood gases indicated stability" but "medical stability is not based on this information alone."). However, Dr. Maselli's experts testified shoulder dystocia is a medically unstable situation because if the baby is not timely delivered, lack of oxygen can lead to brain injury or even death. *See id.* ("Respondents' experts view shoulder dystocia as a medically unstable situation because if the baby is not delivered, lack of oxygen [can] lead to a brain injury or

[4] "Apgar scores are given to the baby after delivery based on the baby's color, breathing, tone, movement, respiratory rate, and heart rate." *Byrd*, 427 S.C. at 414 n.2, 831 S.E.2d at 155 n.2.

death."). While Mother disagrees, these opinions provided a basis from which the jury could properly determine the necessary elements of § 15-32-230 were met. Thus, we find the circuit court properly considered the evidence at trial in conjunction with the requirements of the statute in submitting the case to the jury. *See id.* ("We must uphold the trial court's denial of Byrd's motion for a new trial absolute and or judgment notwithstanding the verdict if we find any evidence in the record purporting to satisfy these two remaining elements.").

Conclusion

For the foregoing reasons, the orders of the circuit court are

AFFIRMED.

GEATHERS and HILL JJ., concur.