No. 281A22 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.,	)	
Plaintiff/Appellant,	)	
v.	)	From Wake County
	)	No. COA22-82
MATTHEW BRYAN HEBERT,	)	
Defendant/Appellee.	)	

****

AMICUS CURIAE BRIEF OF NORTH CAROLINA ADVOCATES FOR JUSTICE

****

INDEX

TABLE OF AUTHORITIES

Cases:

Statutes and Sessions Law:

Rules:

Other Authorities:

No. 281A22 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.,	)	
Plaintiff/Appellant,	)	
v.	)	From Wake County
	)	No. COA22-82
MATTHEW BRYAN HEBERT,	)	
Defendant/Appellee.	)	

****

***AMICUS CURIAE* BRIEF OF**
NORTH CAROLINA ADVOCATES FOR JUSTICE

****

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Advocates for Justice submits this brief in support of Defendant Matthew Bryan Hebert.[1]

[1] In compliance with N.C. R. App. P. 28(i)(2), counsel for *amicus curiae* states that no person or entity other than *amicus curiae*, its members, or its counsel authored this brief directly or indirectly or made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. GENERAL STATUTE § 20-279.21(b)(4) PERMITS HEBERT TO STACK ALL UIM COVERAGES, SO THE TRIAL COURT AND COURT OF APPEALS DID NOT ERR.

A. Read in context, the Financial Responsibility Act permits stacking here.

This Court reads statutes in the context of their purpose. *See*, *e.g.*, *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 548, 809 S.E.2d 853, 859 (2018) ("When read in context and in accordance with ordinary English usage"); *Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 379 N.C. 524, 558, 866 S.E.2d 869, 898 (2021) ("Reading this statutory language in context"). The purpose of our Financial Responsibility Act ("FRA") is unambiguous. This Court has "recognized the remedial nature of subdivision 20-279.21(b)(4) and explained that the statute should be 'liberally construed' in order to accomplish its purpose of 'protect[ing] . . . innocent victims who may be injured by financially irresponsible motorists.'" *Lunsford v. Mills*, 367 N.C. 618, 626, 766 S.E.2d 297, 303 (2014) (internal citations omitted). UIM coverage addresses "circumstances where the tortfeasor has insurance, but his or her coverage is in an amount insufficient to compensate the injured party for

his or her full damages." *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 519, 866 S.E.2d 710, 722 (2021) (Berger, J., concurring).

Section (b)(4) of the FRA addresses UIM coverage. There are six paragraphs in section (b)(4), which has been modified multiple times, including four times since the Court of Appeals decided *Benton v. Hanford*, 195 N.C. App. 88, 671 S.E.2d 31 (2009).

The second paragraph of section (b)(4) determines the "applicable" UIM limits:

> **In any event** … **Furthermore**, if a claimant is **an insured** under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage **applicable** to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy;

N.C. Gen. Stat. 20-279.21(b)(4) (emphasis added).[2]

It is undisputed that Hebert was the named insured under his personal auto policy and an "insured" for UIM under the resident-relative policy. (R pp 7, 39) When a claimant for UIM qualifies as an insured on

---

[2] The only exception to this stacking mandate is "nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10)."

multiple policies, the UIM limit derives from combining the UIM coverage on all policies. N.C. Gen. Stat. § 20-279.21(b)(4). Combining UIM coverage is known as "stacking." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989). The legislature signaled its intent to provide a broad right to UIM stacking by using the inclusive language "in any event" and "furthermore."

Yet Plaintiff would have this Court ignore the entire second paragraph of section (b)(4). The first three words of that paragraph ("In any event") modify what comes before them: the entire first paragraph, on which Plaintiff focuses. This Court has used "in any event" to mean "notwithstanding everything preceding." *See State v. Ramseur*, 374 N.C. 658, 682, 843 S.E.2d 106, 121 (2020). "In any event" has the same meaning as "regardless," which is "in spite of everything; anyway." Regardless, The American Heritage Dictionary 1040 (2d ed. 1982).

This Court held more than thirty years ago:

> … that the language of N.C.G.S. § 20–279.21(b)(4) **allows the stacking of an insured's UIM coverages in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle."** The statute compares the aggregate liability coverage of the tortfeasor's vehicle to the applicable limits of liability under the owner's policy, meaning the aggregate or stacked UIM "limits" under the policy. To the extent

> that the provisions of a statute and the terms of the policy conflict, the provisions of the statute will prevail.

Harris Through Freedman v. Nationwide Mut. Ins. Co., 332 N.C. 184, 192, 420 S.E.2d 124, 129 (1992). *Harris*, which has dictated UIM stacking for over thirty years, is dispositive here.

After *Sutton* and *Harris*, the legislature amended the FRA. Although it prohibited UM stacking and UIM intra-policy stacking, it retained UIM inter-policy stacking. 1991 N.C. Ch. 646, 1991 N.C. SB 688.[3] The language as to inter-policy stacking codified *Harris*. The FRA still "allows the stacking of an insured's UIM coverages in determining whether a tortfeasor's vehicle is an 'underinsured highway vehicle.'"

Statutory construction involves ensuring:

> that the purpose of the legislature is accomplished. Accordingly, 'a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish.' Also, "[i]t is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result" when it enacted the particular legislation. Furthermore, "the statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

[3] The title of the Bill is misleading as it allows inter-policy stacking – "An Act to Prohibit the Stacking of Uninsured and Underinsured Motorist Coverage."

Harris, 332 N.C. at 191, 420 S.E.2d at 128–29 (internal citations omitted). Thus, all the sections within (b)(4) should work in harmony.[4]

While Plaintiff's brief makes a passing reference to prior decisions reading the FRA in context, it does not seek to do so. Instead, it focuses on the first paragraph of section (b)(4), without reference to the next paragraph and its allowance of stacking. Yet

> [A] statute may not be interpreted in a manner which would render any of its words superfluous. This Court has repeatedly held that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.

State v. Geter, 382 N.C. 484, 491, 881 S.E.2d 209, 214 (2022) (internal citations omitted). Plaintiff wants this Court to focus on its labored

---

[4] The "multiple claimant" language in (b)(4) resulted from *Ray v. Atlantic Cas.,* 112 N.C. App. 259, 435 S.E.2d 80 (1993) and only prevents a claimant from collecting UIM and liability coverage off the same vehicle if the claimant has no additional UIM to "stack." If there are two potential interpretations of a remedial statute, the one which provides the intended purposes of the Act should prevail. As now-Justice Dietz explained, "We address the General Assembly's intent and the potential for injustice in this case only because N.C. Gen. Stat. § 20-279.21(b)(4), read in its entirety, is open to more than one reasonable interpretation and is therefore ambiguous." *Nationwide Affinity Ins. Co. of Am. v. Le Bei*, 259 N.C. App. 626, 635, 816 S.E.2d 251, 257 (2018).

assessment of "underinsured highway vehicle" to the exclusion of the next paragraph. According to Plaintiff, the language of the first paragraph renders "in any event," "furthermore," and the entire second paragraph a dead letter in this situation. The fallacy of Plaintiff's position is reinforced by the FRA's purpose: to protect people like Hebert. *See N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 190, 861 S.E.2d 705, 713 (2021) (citing *Sutton*, 325 N.C. at 265, 782 S.E.2d at 783).

To prevail, Plaintiff must ignore the second paragraph of General Statute § 20-279.21(b)(4). This Court should not permit that result, which goes against the FRA's purpose and reads the statute out of context.

II. PLAINTIFF SHOULD NOT ACCOMPLISH HERE WHAT IT FAILED TO DO TWO YEARS AGO IN *LUNSFORD*, IN SPITE OF STATUTORY LANGUAGE FROM TENNESSEE ABSENT FROM NORTH CAROLINA LAW.

A. This case is an indirect attack on very recent precedent from this Court.

The 2021 *Lunsford* case[5] involved UIM coverage issued in Tennessee. That case turned on what UIM coverage was "applicable" under the circumstances. *Id.* at 188-89, 861 S.E.2d at 712.

---

[5] The *Lunsford* case from two years ago is not to be confused with *Lunsford v. Mills*, *supra*, from 2014. All references in this section of the brief to *Lunsford* are to the 2021 *Lunsford* case.

In *Lunsford*, there was a dispute about the interplay between the FRA, Tennessee law, and the insured's Tennessee policy. "Under Tennessee law, an 'uninsured motor vehicle does not include a motor vehicle . . . [i]nsured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part.'" *Id*. at 184, 861 S.E.2d at 709. The Tennessee language is unambiguous, direct, and clear. Our FRA contains nothing like that Tennessee language. Yet Plaintiff seeks to achieve the result that such language would provide, without our General Assembly having used those words.

Had our legislature wanted to prevent insureds from recovering liability and UIM coverages under the same policy, it could have done so directly. It would have defined "underinsured highway vehicle" not to include vehicles "insured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part." The General Assembly, however, declined to take such action, despite our appellate court first permitting recovery of UIM and liability coverages under the same policy in 1994. *State Farm Mut. Auto Co. v. Young*, 115 N.C. App. 68, 443 S.E.2d 756 (1994), *reconsidered* 122 N.C. 505, 470 S.E.2d 361 (1996), 345 N.C. 353, 483 S.E.2d 191 (1997).

Plaintiff, therefore, is seeking to rewrite section (b)(4) of the FRA. It defies reason that the General Assembly would leave it to claimants, insurance companies, and our courts to glean its intent from confusing words and phrases. Our legislature would not leave breadcrumbs of intent via references to "owner's policy," "limits" being plural, and the phrase "notwithstanding the immediately preceding sentence." Rather, it would have inserted clear language to circumvent these disputes.

In *Lunsford*, the dissent focused on the implications of Tennessee law. "As it is undisputed that underinsured motorist coverage is not capable of being applied under Tennessee law in the facts of this case, there are no 'limits of underinsured motorist coverage,' applicable under the Chapman Policy." *Id.* at 200, 861 S.E.2d at 719 (Barringer, J., dissenting). The majority and dissent agreed in *Lunsford* that Tennessee law differs drastically from our FRA. Ironically, Plaintiff now seeks to have this Court reach a similar result to what it sought in *Lunsford* in a case involving North Carolina law only.

Without citing, let alone seeking to distinguish *Lunsford*, Plaintiff would have this Court overrule *Lunsford* based on our own FRA. North Carolina law does not permit such a result.

B. *Lunsford* is correct and controlling.

The facts are much less favorable to Plaintiff than in *Lunsford*. In *Lunsford*, this Court held that "[b]ecause the amount of the stacked UIM coverage limits exceed[ed] the sum of the applicable bodily injury coverage limits," the vehicle at issue was "an 'underinsured motor vehicle' as defined by the FRA." *Id.* at 183, 861 S.E.2d at 708. This Court focused on what UIM coverage(s) applied to that loss. *Id*. at 187, 861 S.E.2d at 710. "If the Nationwide UIM coverage limit is 'applicable,' then—under Court of Appeals precedent which NC Farm Bureau does not challenge—Lunsford is entitled to stack the Nationwide UIM coverage limit ($50,000) with the NC Farm Bureau coverage limit ($50,000)." *Id*. (citing *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 33 (2009)). Thus, the question was what UIM coverage was available to be stacked. *Id*.

Plaintiff's position in *Lunsford* undermines its argument here:

> Rather than defend the Court of Appeals' reasoning—or ask this Court to overrule *Benton* and other cases recognizing the propriety of interpolicy stacking—NC Farm Bureau contends that interpolicy stacking is not permitted in this case because Chapman was a Tennessee resident who entered into a contract with Nationwide in Tennessee.

Id. at 188, 861 S.E.2d at 712. Thus, in *Lunsford*, Plaintiff did not challenge longstanding precedent, or the statutory language that forms its basis. Yet here, Plaintiff reverses course, and asks this Court to do exactly that.

Lunsford turned on this Court's reading of the phrase "applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy." *Id*. The *Lunsford* Court focused on "the statutory language the General Assembly selected." *Id*. at 189, 861 S.E.2d at 712. It held that the term "applicable" was not dispositive. *Id*. Instead,

> The provision does not state that "applicable" means "contained in a policy which would by its own terms define the tortfeasor's vehicle as underinsured." The text contains only the phrase "applicable limits." The question before this Court is what meaning the General Assembly intended to communicate by including that phrase.

Id. While prior case law had not defined "applicable limits," that precedent (which, as the *Lunsford* Court emphasized, Plaintiff did not challenge) contradicted the concept that UIM on an insured's own policy was not stackable. *Id*. Rather, in holding that UIM was stackable, it found:

> . . . the General Assembly's use of the phrase "applicable limits" to refer to the UIM coverage limits contained within the insurance policy covering the tortfeasor's vehicle, in a circumstance such as this one where the tortfeasor is the driver and the injured party is a passenger seeking to access the UIM coverage contained within his or her own policy incorporating North Carolina's FRA.

Id. at 190, 861 S.E.2d at 713. This Court accepted that reading of the FRA as consistent with its purpose while rejecting the narrow approach Plaintiff proposed. *Id.*

The holding of *Lunsford* is:

> When a passenger who has previously obtained UIM coverage pursuant to a contract executed in North Carolina is injured while travelling in a vehicle driven by someone else, and the injury results from that driver's tortious conduct, the driver's UIM coverage limits are "applicable" within the meaning of N.C.G.S. § 20-279.21(b)(4).

Id. at 193, 861 S.E.2d at 714. Yet less than two years after that decision allowing injured passengers to stack coverages available to them as "Class I" insureds, Plaintiff seeks to undo that precedent.

Plaintiff's efforts should fail. In *Lunsford*, the one fact cutting in Plaintiff's favor was the possible effect of Tennessee law. That element is absent here. Plaintiff's attempt to undo a case it recently lost should not

succeed. Precedent from this Court ought to remain a beacon on which carriers and insureds alike can rely for consistent outcomes.

C. Legislative inaction before and after *Lunsford* is telling.

Two years ago, Plaintiff took no issue with our courts' analysis of stacking for three decades. Yet having lost in *Lunsford*, Plaintiff has changed its position. Plaintiff seems determined to shift positions until it identifies a way to limit inter-policy stacking. Yet the legislature's acceptance of precedent when it could have acted to ban or limit UIM stacking undermines Plaintiff's efforts. *See Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996) ("[T]he failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation").

Plaintiff should give our General Assembly more credit. Had it wanted to prevent this scenario, it could have just copied legislation from various sister states. For instance, Minnesota law provides:

> Regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, in no event shall the limit of liability for uninsured and underinsured motorist coverages for two or more motor vehicles be added together to determine the limit of

> insurance coverage available to an injured person for any one accident.

Minn. Stat. § 65B.49, subd.3a(6)(2023). This provision bars stacking "unless the parties contract for that right." *Davis v. Am. Fam. Mut. Ins. Co.*, 521 N.W.2d 366, 371 (Minn. App. 1994). The wording there is clear: "in no event shall" UIM limits "be added together" to stack coverage. There is nothing remotely akin to that language in the FRA.

Likewise, Kansas law reads:

> Coverage under the policy shall be limited to the extent that the total limits available cannot exceed the highest limits of any single applicable policy, regardless of the number of policies involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid or vehicles involved in an accident.

K.S.A. § 40-284(d) (2023). This statute limits "underinsured motorist coverage to the policy with the highest limits. It clearly expresses the legislature's intent to prohibit stacking underinsured motorist coverage from separate policies." *Eidemiller v. State Farm Mut. Auto. Ins. Co.*, 933 P.2d 748, 756 (Kan. 1997).

Thus, Plaintiff's argument that "[t]he 2004 Amendment's language and the legislature's intent could not be more clear" rings hollow. Plaintiff's Br. at 20. In fact, the General Assembly could have included

crystal-clear language that prevents stacking or limits it to certain situations. If *Lunsford, Benton,* or any decision went against its will, it could have reacted. Yet our legislature took no such action.

D. Legislative acquiescence also favors Hebert.

Though this Court focuses first on statutory language, it also may glean legislative intent through "legislative acquiescence." This Court in analyzing a criminal statute noted:

> … in 2009, well after our Court of Appeals addressed this issue in *McCracken* and *Jones,* the General Assembly considered legislation that would have amended the opium trafficking statute so that criminal liability would be based on the number of prescription pills involved rather than total weight. H. 1307, 149th Gen. Assemb., Reg. Sess. (N.C. 2009) … While not dispositive, the General Assembly's consideration of the issue and decision not to amend the statute are at least some evidence of tacit approval for applying the statute [as in *McCracken* and *Jones*].

State v. Ellison, 366 N.C. 439, 443–44, 738 S.E.2d 161, 164 (2013). After *Benton* (filed 20 January 2009), the legislature revised section (b)(4) in "An Act to Revise and Clarify the Requirements For Uninsured and Underinsured Motorist Coverage. . ." 2009 N.C. Sess. Laws 561, 2009 N.C. SB 749. (ratified 28 August 2009); *see State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) ("It is always presumed that the

legislature acted with care and deliberation and with full knowledge of prior and existing law"). Still, the legislature did not modify the language dispositive in *Benton* and at issue now. This Court, in affirming the Court of Appeals in the UM context, explained:

> We approve the careful reasoning of the Court of Appeals. Adhering to the principle of *stare decisis*, we decline to change existing judicial interpretation of the uninsured motorist statute, especially in light of the legislature's recent revision. *See* N.C.G.S. § 20–279.21 (1993).

Anderson v. Baccus, 335 N.C. 526, 529, 439 S.E.2d 136, 138 (1994). The same reasoning applies here. Had the General Assembly disapproved of UIM stacking as it has existed for years, it would have acted. Its failure to do so undermines Plaintiff's argument.

E. Hebert should get what was paid for.

When Hebert and his parents bought the policies at issue, the stacking mandated by *Benton* was part of the bargain. Since early 2009, Plaintiff and all insurance carriers in North Carolina had been paying claims based on the *Benton* decision. Insurance rates are determined by the Rate Bureau ***based on what insurers pay out in claims***. Every year the Rate Bureau collects this data. That information is used to determine rates and refunds. *See* N.C. Gen. Stat. § 58-36-15(d)-(e) (2023).

Thus, North Carolina drivers, including Hebert, pay rates calculated by the insurers and the Rate Bureau, which include payouts for insureds based on stacking under *Benton* and its progeny. Hebert does not seek a windfall, as he has paid Plaintiff for the "*Benton*" coverage he now seeks. If this Court were to deny Plaintiff benefits under his policy, Plaintiff would reap a windfall, as it has been charging all of its policyholders for UIM coverage as determined by *Benton* since 2009.

Hebert is an insured under two UIM policies for which Plaintiff collected two separate premiums. Thus, Plaintiff's efforts to allow the $100 Hebert received from one liability policy to bar an additional $50,000 in UIM are an attempt to shortchange Hebert. If the fundamental structure of UIM benefits is to shift in North Carolina, that change should come from the legislature. Until that happens, Hebert should prevail here and receive stackable UIM coverage.

CONCLUSION

Again, Plaintiff comes to this Court seeking to undermine UIM coverage that has been in place for years. Once again, its efforts should fail. For the reasons set forth herein and in Defendant's brief, this Court

should affirm the Court of Appeals and hold that Hebert can stack UIM coverage in this situation.

This the 14th day of June, 2023.

/s/ Jon Ward
N.C. State Bar # 37122
PINTO COATES KYRE & BOWERS, PLLC
3203 Brassfield Road
Greensboro, NC 27410
Telephone: (336) 282-8848
Facsimile: (336) 282-8409
Electronic mail: jward@pckb-law.com

Counsel for NCAJ

N.C. R. App. P. 33(b) certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had signed it personally.

/s/ Paul D. Coates
N.C. State Bar # 9753
PINTO COATES KYRE & BOWERS, PLLC
3203 Brassfield Road
Greensboro, NC 27410
Telephone: (336) 282-8848
Facsimile: (336) 282-8409
Electronic mail: pcoates@pckb-law.com

Counsel for NCAJ

/s/ C. Douglas Maynard, Jr.
N.C. State Bar # 19367
LAW OFFICES OF C. DOUGLAS MAYNARD, JR., PLLC
514 South Stratford Road, Suite 321
Winston-Salem, NC 27103
Telephone: (336) 777-1411
Facsimile: (336) 777-8882
Email: DMaynard@DougMaynardLaw.com

Counsel for NCAJ

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for NCAJ hereby certifies that the foregoing brief, which is prepared using a fourteen-point proportionally spaced font with serfis, is fewer than 3,750 words (excluding covers, captions, indexes, tables of authorities, signature blocks, and certificates) as reported by the word-processing software.

This the 14th day of June, 2023.

/s/ Jon Ward
N.C. State Bar # 37122
PINTO COATES KYRE & BOWERS, PLLC
3203 Brassfield Road
Greensboro, NC 27410
Telephone: (336) 282-8848
Facsimile: (336) 282-8409
Electronic mail: jward@pckb-law.com

Counsel for NCAJ

CERTIFICATE OF SERVICE

The undersigned counsel for NCAJ hereby certifies that a copy of the foregoing brief is being served on all counsel involved in this case via prepaid first-class United States mail as well as electronic mail, as follows:

William F. Lipscomb
P.O. Box 83
Wilkesboro, NC 28697
bill@lipscomblawfirm.com

Counsel for Plaintiff

Walter M. Wood
Preston W. Lesley
280 South Mangum Street, Suite 400
Durham, NC 27701
wwood@farrin.com
plesley@farrin.com

Counsel for Defendant

This the 14th day of June, 2023.

/s/ Jon Ward
N.C. State Bar # 37122
PINTO COATES KYRE & BOWERS, PLLC
3203 Brassfield Road
Greensboro, NC 27410
Telephone: (336) 282-8848
Facsimile: (336) 282-8409
Electronic mail: jward@pckb-law.com

Counsel for NCAJ