THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

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Case No. 2010-CP-23-5493

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Francina A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company, .....Defendants,

of which
Government Employees Insurance Company is .....Appellant.

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This appeal arises out of a dispute concerning the availability of underinsured motorist property damage coverage after the respondent Francina Bardsley had received liability and homeowners insurance payments for the same loss. The accident giving rise to the claim for property damage occurred on April 25, 2009 when John Ludwig drove a 2007 Maserati into the residence of Francina and Frederic William Bardsley.

After the respondent received liability and homeowners insurance proceeds for the property damage incurred as a result of the accident of April 25, 2009, she sought to recover underinsured motorist property damage from a policy issued by the appellant Government Employees Insurance Company (GEICO). Upon GEICO's denial of her claim, she filed a Complaint dated July 7, 2010, seeking damages under causes of action for breach of contract, breach of public policy and bad faith (Complaint). In its Answer of July 13, 2010, GEICO denied that respondent was entitled to underinsured property proceeds and has asserted that its coverage was excess to the homeowners insurance coverage provided by State Farm Fire & Casualty Insurance Company (State Farm) (Answer).

After stipulating to the relevant facts (Stipulations of Fact), the parties submitted the matter to the Circuit Court on cross-motions for summary judgment (Summary Judgment Motions). These motions were heard on October 27, 2011 before Judge Gary Hill (Transcript of Motion Hearing). In his Order of November 21, 2011, Judge Hill granted summary judgment to the respondent, finding that the GEICO policy was ambiguous and subject to the collateral source rule (Order of November 21, 2011). Based upon this Order, the respondent was awarded $100,000 in underinsured property damage benefits. After Judge Hill denied GEICO's Motion to Alter or Amend his Order on December 13, 2011 (Order of December 21, 2011), Notice of Appeal was timely served on January 6, 2012.

## STATEMENT OF FACTS

On April 25, 2009, a Maserati operated by John Ludwig crashed into a residence owned by Francina and Frederic William Bardsley (Stipulation of Fact No. 5). As a

result of that collision, Frederic William Bardsley sustained fatal injuries and the home he and his wife were occupying was damaged (Stipulation of Fact Nos. 3, 14). All claims related to the injuries sustained by Frederic William Bardsley and his death have been settled (Stipulation of Fact No. 24). Left unresolved, however, are the claims arising out of the damage to the residence.

The property damage claims arising out of the April 25, 2009 accident have been left unresolved due to a dispute concerning the availability of underinsured motorist property damage coverage. At the time of the accident, John Ludwig and his business SDI Networks were insured by Auto Owners Insurance Company (Auto Owners) and the Hartford Casualty Insurance Company (Hartford) for a total of three million dollars in single limits liability coverage (Stipulation of Fact Nos. 6, 7). In addition, the Bardsleys maintained homeowner's insurance coverage with State Farm (Stipulation of Fact No. 13) and underinsured motorist coverage with GEICO (Stipulation of Fact Nos. 16, 17).

Auto Owners and Hartford agreed to pay their policy limits of three million dollars in exchange for a Covenant Not to Execute against John Ludwig and SDI Networks (Stipulation of Fact Nos. 9, 10). State Farm also paid $88,230.47 for damage to the Bardsley residence and $23,684.44 for damages to the contents of that residence (Stipulation of Fact No. 14). Although the Hartford and Auto Owners policies were single limits policies and therefore did not separate coverage for bodily injury and property damage into distinct coverages, it was agreed that State Farm would be reimbursed $94,424.75 for its subrogation interest out of the liability settlement proceeds paid by Auto Owners and Hartford. In exchange for that payment, State Farm issued a

policy release (Stipulation of Fact No. 15, Order of November 13, 2009, State Farm Release).

Although Sate Farm did not exhaust its coverage limits in making payment under its homeowner's policy, the respondent thereafter made an additional claim under the GEICO policy for underinsured motorist property damage coverage. GEICO took the position that there was ample liability coverage so as not to create a necessity of payment of its underinsured property coverage (Motion hearing transcript, pp. 14-17; GEICO Brief in Support of Motion for Summary Judgment; GEICO Reply Brief). In addition, GEICO relied upon its "other insurance" clause which provided that its underinsured motorist property damage coverage was excess to all other valid and collectible coverage. State Farm's homeowner coverage constituted other valid and collectible coverage. Id. The Circuit Court rejected GEICO's position, holding that its policy provisions were ambiguous and in violation of public policy (Order of November 21, 2011). It also held that the State Farm policy was a collateral source which GEICO could not utilize to lessen its obligations. After GEICO's Motion to Alter or Amend the Order directing payment of the available underinsured property coverage was denied, this appeal was timely filed.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES FOR AN UNDERINSURED PROPERTY CLAIM WHEN THERE WAS NO PROOF THAT THERE WAS INSUFFICIENT LIABILITY COVERAGE FOR PROPERTY DAMAGE.

In its Order of November 21, 2011, the Circuit Court awarded the Respondent $100,000 from GEICO based upon its underinsured motorist property damage coverage for that amount. In making that award, the Court failed to determine if there was insufficient liability coverage to pay for the incurred property damage loss. Because a loss is "underinsured" only when there is inadequate liability coverage for a loss, the Court erred in making its award without first determining the amount of liability coverage for property damage (Motion hearing transcript, pp. 14-17; GEICO Brief in Support of Motion for Summary Judgment; GEICO Reply Brief).

An "underinsured motor vehicle", as defined by section 38-77-30(15) of the South Carolina Code, does not reference property damage. Unfortunately, although the GEICO policy does provide underinsured motorist coverage for property damage, its definition of "underinsured motor vehicle" simply recites the statutory definition (GEICO policy, UIM endorsement). Because there is no definition of "underinsured" set forth in either the statutory scheme or the GEICO policy, the term is to be defined according to the usual understanding of that term's significance to the ordinary person. See Manufacturers and Merchants Mutual Insurance Company v. Harvey, 330 SC 152, 498 SE.2d 222 (Ct. App. 1998); State Farm Fire and Casualty Company v. Barrett, 340 SC 1, 530 SE.2d 132 (Ct. App. 2000). The Merriam-Webster Dictionary defines "underinsured" as not being sufficiently insured. By this definition, one who is "underinsured" would be insured, but inadequately. This is in accord with the explanation of "underinsured motorist coverage" given by the South Carolina Department of Insurance:

> Underinsured motorist coverage compensates you, or other persons insured under your automobile insurance policy,

> including passengers..., for amounts that you, or your passengers, may be legally entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle that is covered by some form of liability insurance, but that liability insurance coverage is not sufficient to fully compensate you for your damages.

SDI Form 2006

Using these definitions of "underinsured", a vehicle would be "underinsured" with regard to property damage when the liability insurance coverage for property damage is insufficient to fully compensate for those damages. In order to determine if a specific loss is greater than the available liability coverage for property damage, it becomes necessary to know the value of the loss and the amount of property damage liability insurance available.

The Circuit Court failed to undertake this evaluation. However, the amount of property damages sustained can be determined by reviewing the State Farm evaluation of that loss. Under the State Farm homeowners policy issued to the Bardsleys, the following coverages were available:

a) $180,500.00 for damages to the residence;

b) $135,375.00 for content damages;

c) Damages for actual costs of loss of use.

(Stipulation of Fact No. 13)

Payment was made by State Farm in the following:

a) $88,230.47 for damages to the Bardsley residence;

b) $23,684.44 for content damages sustained by the Bardsleys;

c) $22,959.99 (less $5,051.58 for depreciation) for loss of use and living expenses.

(Stipulation of Fact No. 14)

Because State Farm had a subrogation claim against John Ludwig and his insurers, it was reimbursed from the settlement proceeds paid by the liability insurers for John Ludwig (Stipulation of Fact No. 15).

John Ludwig was provided liability insurance by Auto Owners Insurance Company in the amount of $1 million and $2 million in umbrella liability coverage through the Hartford Insurance Company (Stipulation of Fact Nos. 7, 8). Both liability policies provided combined single limits in coverage and as a result did not segregate the coverages for bodily injury and property damage. However, a review of the Auto Owners and Hartford policies reveals that there was underlying coverage for property damage (Auto Owners' policy declaration sheet, Hartford Insurance's policy declaration sheet). The repayment of State Farm on its subrogation interest out of the liability insurance settlement proceeds would also reveal that some portion of that liability coverage was attributable to property damage coverage. The fact that $94,424.75 was paid to State Farm to settle its property damages subrogation claim would establish that there was at least $94,424.75 in property damage liability coverage. The fact that the Respondent agreed to be responsible for repaying State Farm's subrogation interest out of the liability insurance proceeds, that the total of the liability insurance coverage ($3 million) was more than ample to pay for State Farm's subrogation interest ($127,813.49)

and that State Farm agreed to settle for a lesser amount in full satisfaction of its subrogation claim would indicate that Respondent's property damage was paid in full and that the underlying liability coverage was sufficient to fully compensate for property damage.

If there was no inadequacy of property damage liability coverage, an underinsured claim would not exist and GEICO's coverage would not apply.

Moreover, because State Farm provided coverage which was excess to that provided by GEICO and because State Farm did not exhaust its coverage, there was more than ample coverage for property damage through the liability carriers and State Farm's homeowners insurance coverage. As a result, if the term "underinsured" is defined to mean one who is insured, but inadequately, the Respondent would not have been underinsured.

**II. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES AGAINST GEICO FOR AN UNDERINSURED PROPERTY CLAIM, THE ERROR BEING THAT GEICO'S UNDERINSURED MOTORIST PROPERTY COVERAGE WAS SECONDARY AND EXCESS TO THE STATE FARM HOMEOWNERS INSURANCE COVERAGE BY VIRTUE OF GEICO'S "OTHER INSURANCE" CLAUSE.**

Both the State Farm and GEICO policies provided the Bardsleys with first party insurance coverage for property damage losses, which would include the loss sustained to their residence on April 25, 2009. South Carolina recognizes that its courts are to interpret the relevant insurance policy language to ascertain whether the policies are intended to provide primary or secondary coverage. South Carolina Insurance Company

v. Fidelity & Guaranty Insurance Underwriters, Inc., 327 SC 207, 489 SE.2d 200 (1997); Blanding v. Long Beach Mortgage Company, 379 SC 206, 665 SE.2d 608 (2010).

Insurance companies typically indicate whether they intend to provide primary or secondary coverage through the use of "other insurance" clauses. Id. "Other insurance" clauses are intended to apportion an insured loss between insurers when two or more insurers provide coverage for the same risk and interest for the benefit of the same insured for the same period of time. South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., supra.

The State Farm policy provides as follows:

> Other Insurance: If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

State Farm policy at p. 13.

This type of coverage has been designated as "pro rata". Id.

The GEICO policy provides in pertinent part as follows:

> With respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property.

(Emphasis added).

GEICO policy at p. 3 of A-347 (12-02).

This type of coverage has been designated as "excess". Id. Because the State Farm and GEICO policies cover the same risk and the same property for the same insured for the same time period, a determination must be made as to how to apportion the coverages. Without question, the State Farm coverage constituted valid and collectible coverage since State Farm in fact made payment under the Bardsley homeowner's policy (Stipulation of Fact No. 14). Courts which have adopted the majority view have generally reconciled the "pro rata" clause and the "excess clause" by interpreting the policy containing the excess clause as providing secondary coverage. See, e.g., American Interinsurance Exchange v. Commercial Union Assurance Company, 605 F. 2d 731 (4th Cir. 1979)(applying South Carolina law); International Bus. Mach. Corp. v. Liberty Mutual Fire Insurance Company, 303 F. 3d 419 (2nd Cir. 2002); P.L. Karter Agency, Inc. v. Continental Casualty Company, 341 F. 2d 519 (6th Cir. 1976); State Farm Mutual Auto Insurance Company v. American Casualty Company, 433 F. 2.d. 1007 (8th Cir. 1970); Ryder Truck Rental, Inc. v. Schapiro & Whitehouse, Inc., 259 Md. 354, 269 A.2.d. 826 (1970); see generally, Ostrager, B.R. and Newman, T.R., Insurance Coverage Disputes (13th Ed.). Under this majority view, the excess insurer is generally liable for a loss only to the extent that the value of an insured's claim exceeds the limits of the policy containing the pro rata clause. Jones v. Medox, Inc., 430 A. 2d. 488 (D.C. 1981). As noted by the court in Jones:

> [T]he standard phrase "other valid and collectible insurance" means other valid and collectible primary insurance. It follows, then, that the policy containing the pro rata clause is other valid and collectible primary

> insurance that triggers application of the excess clause in the second policy. The excess clause in the second policy therefore is given full effect and that carrier is liable only for loss after the primary insurer has paid up to its policy limits.

Because State Farm's coverage is primary and GEICO's secondary, State Farm's coverage must be exhausted before GEICO would make any payment. However, State Farm had $180,500.00 in policy limits for residence coverage and paid only $88,230.47. Likewise, it has $135,375.00 in policy limits for contents coverage and only paid $23,684.44. Since State Farm was not required to pay its policy limits, GEICO's underinsured property coverage as excess coverage, was not impacted. Accordingly, it was error to direct that GEICO make any payment under its coverage for underinsured property.

**III. THE CIRCUIT COURT ERRED IN HOLDING THAT THE GEICO "OTHER INSURANCE" CLAUSE WAS AMBIGUOUS SINCE THERE WAS NO REASONABLE, CONFLICTING INTERPRETATION OF THAT CLAUSE WHICH WOULD GRANT RESPONDENT RECOVERY IN SPITE OF THE STATE FARM HOMEOWNERS COVERAGE.**

The Bardsley GEICO policy provides that coverage for underinsured property damage is excess to "other valid and collectible insurance" (GEICO policy p. 3 of A-347 (12-02)). The Circuit Court in its Order of November 21, 2011 held that this provision was ambiguous and must be construed against GEICO.

In order for an insurance policy to be considered ambiguous, there must be a showing that it is capable of being reasonably understood in more than one way. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004); Goldston v. State Farm Mutual Insurance Company, 38 S.C. 157, 594 S.E.2d 54 (Ct. App. 2004). The Circuit Court in its Order of November 21, 2011 failed to set forth how the GEICO policy provision was subject to more than on reasonable interpretation.

Respondent has argued that the failure of the GEICO policy to define what constitutes "other valid and collectible insurance" creates an ambiguity. However, not every term within an insurance policy requires a definition. Where there is an absence of a definition, the term is to be defined according to the usual understanding of its significance to an ordinary person. USAA Property and Casualty Company v. Rowland, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993); Manufacturers and Merchants Mutual Insurance Company v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998). The clause "valid and collectible insurance" has been interpreted to exclude invalid or illegal insurance, such as insurance which is voidable for misrepresentation, insurance which is uncollectable because the insurer is insolvent, insurance which was issued without the presence of an insurable interest in the property, and insurance which never came into effect because certain pre-conditions for coverage were not met. See Couch on Insurance, § 219.9 (3d Ed., 2010). None of these possible scenarios which would make a policy illegal or invalid apply to this situation. In fact, State Farm paid under its policy and then was reimbursed for its payment based upon its subrogation interest, indicating it was valid and collectible insurance (Stipulation of Fact Nos. 14, 15). Moreover, as noted

in Jones v. Medox, Inc., supra, "valid and collectible insurance" is a standard phrase which refers to collectible primary coverage.

The Circuit Court, in its Order of November 21, 2011, also noted that an insurance provision may not exclude coverage mandated by statute. Since statutory mandates are to be read into a policy, any provision which contradicted the statutory mandate would create an ambiguity. However, there is no statutory mandate requiring underinsured motorist property damages. Section 38-77-30 (15) defines "underinsured motor vehicle" as:

> a motor vehicle as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insured's damages.

This definition should be contrasted with the definition of "uninsured motor vehicle" set forth in section 38-77-30 (14):

> "Uninsured motor vehicle" means a motor vehicle as to which:
>
> (a) there is not bodily injury liability insurance and property damage insurance both at least in the amount specified in Section 38-77-140...

(Emphasis added.)

The contrast between the two definitions reveals that the legislature intentionally limited underinsured coverage to bodily injury. As a result the GEICO provision for

underinsured property damage coverage is a creature of contract. Because the underinsured property damage coverage was not mandated by statute, limitations within the GEICO policy are not in contradiction of statute. As a result there is no ambiguity.

In the absence of an ambiguity, the terms of an insurance policy are to be interpreted and enforced according to their plain and ordinary meaning. Holmes v. McKay, 334 S.C. 433, 513 S.E.2d 851 (Ct. App. 1999). An insurance policy and its provisions define and fix the relations between the parties to that contract and furnish the measure of each party's respective rights and obligations. Boyle Road & Bridge Company v. American Employers' Insurance Company, 195 S.C. 397, 11 S.E.2d 438 (1940). The Bardsley GEICO policy clearly and unambiguously provided that it was to be excess to other viable coverage applicable to the same loss (GEICO policy at p. 3 of A-347 (12-02)). The State Farm homeowners coverage provided other valid and enforceable insurance as seen by the fact payment was made by State Farm. Because its policy limits were not exhausted, the conditions for payment of GEICO's excess coverage have not been met.

**IV. THE CIRCUIT COURT ERRED IN HOLDING THAT GEICO'S "OTHER INSURANCE" PROVISIONS WERE VIOLATIVE OF PUBLIC POLICY SINCE GEICO'S COVERAGE FOR UNDERINSURED PROPERTY DAMAGES WAS CREATED BY CONTRACT AND NOT BY STATUTE.**

In its Order of November 21, 2011, the Circuit Court held that GEICO's provision making its underinsured property coverage excess to other valid and collectible coverage was void as violative of public policy. The Court reasoned that "any exclusions inconsistent with the UIM statute are void."

Section 38-77-160 of the S.C. Code provides that underinsured motorist coverage is to be offered by all automobile insurance carriers. Although underinsured motorist coverage must be offered, the coverage itself is not mandated since it can be rejected by an insured.

In general, insurance policy terms may be held unenforceable if they are seen as contrary to statutory commands, legislative intent, the purpose underlying a statute or widely held norms regarding the operation of insurance. Stempel, J.W., Stempel on Insurance Contracts (3d. Ed. 2006) § 4.10[F]. Where a policy provision is perceived as being inconsistent with a state policy seeking to encourage adequate protection for drivers, it may be held unenforceable as violative of public policy. Id.; see Kline v. Farmers Insurance Exchange, 277 Neb. 874, 766 N.W.2d 118 (2009). However, in the absence of a statutory provision to the contrary, an insurance company may limit its liability and impose restrictions and limitations on its contractual obligations which are not inconsistent with public policy. B.L.G. Enterprises, Inc. v. First Financial Insurance Company, 328 S.C. 374, 491 S.E.2d 695 (Ct. App. 1997).

The amount offered by GEICO and accepted by the Bardsleys complies with the directive of section 38-77-160. However, section 38-77-160 only requires an offer of "underinsured motorist coverage", which is a defined term. Section 38-77-30 (15) defines an "underinsured motor vehicle" to be a motor vehicle as to which there is bodily injury liability insurance which meets the statutory mandate but is less than the amount of injuries sustained. This definition, unlike the definition of an "uninsured motor vehicle" set forth in section 38-77-30 (14), makes no reference to property damage liability insurance. As a result, underinsured property damage coverage is not statutorily

mandated. Consequently, there is no public policy mandate for underinsured property damage based upon statutory command, legislative intent or underlying statutory purpose.

The only other possible basis for a public policy mandate for underinsured property damage coverage would be through the existence of a widely held norm concerning insurance coverage. See Stempel on Insurance Contracts, supra. The central purpose of the underinsured motorist statute is to provide coverage when an injured party's damages exceed the liability limits of the at-fault driver. Floyd v. Nationwide Mutual Insurance Company, 367 S.C. 253, 626 S.E.2d 6 (2005). Although the underinsured property damage coverage provided by GEICO is voluntary and therefore subject to the restriction and limitations placed within its policy, the desire to have an insured have available additional insurance coverage for an underinsured event is met by the GEICO coverage. The provision which provides that GEICO's coverage is excess to that provide by State Farm does not preclude coverage for the respondent. It simply provides a means by which a hierarchy of coverage can be established.

This hierarchy of coverage, whereby GEICO's coverage is secondary to that provided by State Farm, is consistent with GEICO's right to limit and restrict its coverage. The respondent would still have access to this coverage even though the policy provision provides it is excess. Moreover, because there is other insurance coverage, the policy of providing an insured with additional coverage where a wrongdoer has insufficient coverage is met.

The fact that South Carolina has a stated value policy statute does not act to create a public policy requiring that the existence of homeowner's insurance coverage be

ignored. There are many situations where other valid insurance coverage would not be available and the GEICO underinsured property coverage would be applicable. Likewise, there are numerous situations where the coverage would not be available because an underinsured claim does not exist. To hold that GEICO must provide uninsured property damage coverage whenever there is damage to a residence through the use of an underinsured vehicle ignores the legitimate limitations on the offered contractual coverage. Moreover, the existence of limitations of contractual coverages does not equate with excluding the coverage even though a premium has been paid for it. There are numerous specific scenarios where UIM coverage would not apply. The most obvious is where the liability coverage is adequate for the loss sustained. Simply because specific circumstances exist where UIM coverage would not be applicable does not rule out other scenarios where UIM would be applicable and for which a premium would be changed. Accordingly, respondent's argument that she paid a premium for UIM property damage coverage and that coverage is unavailable for damage to a residence ignores the fact that UIM coverage is still available and valuable under different factual circumstances. Moreover, to allow coverage under both the GEICO policy and the State Farm policy allows a recovery in excess of the value of the property loss in violation of the objective of the stated value policy statute. See Hunt v. General Insurance Company of America, 227 S.C. 125, 87 S.E.2d 34 (1955).

Because there is no statutorily based public policy which has been violated and because the respondent has received full payment for her property loss, there is no basis for determining that the GEICO "other insurance" provision is void as violative of public policy.

## V. THE CIRCUIT COURT ERRED IN RULING THAT PAYMENT UNDER THE STATE FARM HOMEOWNERS POLICY CONSTITUTED A COLLATERAL SOURCE WHICH PRECLUDED APPLICATION OF GEICO'S "OTHER INSURANCE" CLAUSE, THE ERROR BEING THAT THE COLLATERAL SOURCE RULE DID NOT APPLY WHERE GEICO NEITHER ACTED ON BEHALF OF THE TORTIOUS WRONGDOER NOR SOUGHT A REDUCTION IN HIS LIABILITY EXPOSURE.

The Circuit Court, in its Order of November 21, 2011 held that "the exclusionary provisions contained in GEICO's UIM rider are violative of the collateral source rule and cannot be involved by GEICO to avoid its contractual UIM liability for property damage." However, the collateral source is applicable only where a wrongdoer seeks to take credit for payments made to an injured party which originate from sources independent of the tortious wrongdoer. Putsaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). Even though the Plaintiff received payments from State Farm, GEICO does not seek credit for the State Farm payment to reduce John Ludwig's liability exposure. The Circuit Court's ruling confuses GEICO's position as a first party coverage provider with that of a third party coverage provider.

The underinsured motorist coverage provided to the Bardsleys by GEICO constituted first party coverage. See, e.g., Maryland Auto Insurance Fund v. Baxter, 186 Md. App. 147, 973 A.2d 243 (2009); Weston Reid, LLC v. American Insurance Group, Inc., 94 Cal. Rptr. 3d 748 (2009); Buzzard v. Farmers Insurance Company, Inc., 824 P. 2d 1105 (Okl. 1991). First party coverage, as opposed to third party coverage, applies to coverage for losses which arise under one's own policy. Third party coverage, on the

other hand, applies to coverages relevant to claims made by those who are strangers to the policy. See Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 SE.2d 612 (2002).

If an insurer makes payment under third party coverage, that payment serves to reduce or eliminate the damages exposure of the insured defendant. Accordingly, by way of example, if an insured defendant had $100,000 in liability exposure, his third party liability insurance payment for $30,000 would reduce his exposure to $70,000 upon payment to the plaintiff. However, not every payment to a plaintiff serves to reduce the insured defendant's liability exposure. Under the collateral source rule, an insured defendant cannot take credit for payments made to a plaintiff if that payment was made by an independent source, unconnected to the insured defendant. As a result, the insured defendant may not claim credit for payments made by under first party coverage to a plaintiff. Using the above example, where the plaintiff, in addition to receiving a payment of $30,000 from the liability carrier for the defendant, also received $20,000 under the first party coverage provided by his homeowners insurance carrier, there would be no further reduction of the defendant's liability exposure. It would remain at $70,000, rather than being reduced further to $50,000.

The coverages provided by both State Farm and GEICO to the Bardsleys constitute first party coverage. Under the collateral source rule, John Ludwig could not make a claim that payments made by either State Farm or GEICO serve to reduce his liability exposure.

However, the Circuit Court Order of November 21, 2011 turns this analysis on its head by directing attention to GEICO, a first party insurer, rather than John Ludwig, the

actual wrongdoer. The purpose of the collateral source rule of preventing a defendant wrongdoer from benefitting from payments made to a plaintiff from sources not acting on behalf of the defendant is not met by this ruling. See Putsaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). GEICO did not act on behalf of or represent the interests of John Ludwig. Instead, as a first party insurer providing underinsured motorist coverage, it provided benefits for the Bardsleys. See Floyd v. Nationwide Mutual Insurance Company, 367 S.C. 253, 626 S.E.2d 6 (2005).

The collateral source rule simply does not apply under the circumstances of this case because GEICO does not see a reduction in John Ludwig's liability exposure through the payments by State Farm. Instead, GEICO simply seeks the proper allocation of coverage responsibility. Where there are multiple insurers who provide coverage for the same loss, the hierarchy of responsibility is often determined by resort to "other insurance" clauses of the respective policies. South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997).

There are four policies which are applicable to the Bardsley claims:

1) Auto Owners Insurance Company

   $1 million liability;

2) The Hartford Casualty Company

   $2 million umbrella;

3) State Farm Fire & Casualty Insurance Company

   $457,318.47 homeowner's coverage;

4) GEICO

   $100,000 underinsured motorist property damage coverage

The Auto Owners and Hartford coverages are third party coverages under which John Ludwig was an insured. Payment would typically be paid by the liability carriers first since first party carriers would normally have a right of subrogation against that coverage for any first party payments made. See Shumpert v. Time Insurance Company, 329 S.C. 605, 496 S.E.2d 653 (Ct. App. 1998). State Farm in fact recovered its payment by way of subrogation against the settlement proceeds paid to the respondent by Auto Owners and the Hartford (Stipulation of Fact No. 14; November 13, 2009 Order). As between State Farm and GEICO, the priority of coverage is controlled by a consideration of their respective "other insurance" clauses. The State Farm policy provides for a pro rata distribution of proceeds while the GEICO policy provides that its coverage is excess. When resolving conflicts between pro rata and excess clauses, the majority of courts have held that the policy containing the excess clause provides secondary coverage. See American Interinsurance Exhange v. Commercial Union Assurance Company, 605 F.2d 731 (4th Cir. 1979) (applying South Carolina law); see generally, Ostrager, B. R. and Newman, T. R., Insurance Coverage Disputes (13th Ed.). As a result, the excess insurer is generally liable only to the extent that the pro rata insurer has inadequate coverage. According to this approach, GEICO would not be obligated to pay under its underinsured motorist property damage coverage since the State Farm coverage was not exhausted. In fact, the right of subrogation as exercised by State Farm is typically unavailable unless the insured (the respondent) has been made whole. See generally, Stempel, J.W., Stempel on Insurance Contracts § 11.01 (3d Ed.) (2012 Supplement); see also, South Carolina National Bank v. Lake City State Bank, 251 S.C. 500, 164 S.E.2d 103 (1968). This would indicate that because State Farm was paid on its subrogation rights that the

claims for property damages sustained had been fully paid. If fully paid, GEICO's coverage for underinsured property damages was not called into play.

Moreover, the payment by State Farm had no effect on the total exposure for liability of John Ludwig. A Covenant Not to Execute was entered into upon payment of the liability coverages of Auto Owners and the Hartford Insurance (Hartford Covenant Not to Execute). Pursuant to the terms of this Covenant Not to Execute, John Ludwig had no further personal liability. The only reservation set forth in the Covenant Not to Execute was the right to pursue additional liability and underinsured coverage. Even if an additional recovery was made for purposes of obtaining additional insurance benefits, that recovery would be limited to those insurers and not John Ludwig. Since John Ludwig and his company had no further personal exposure, payment by State Farm could not be utilized to reduce the defendant's liability exposure. Since there was no reduction in John Ludwig's personal exposure, there would be no purpose in applying the collateral source rule.

One of the better explanations of the operation of the collateral source rule is set forth in 22 Am. Jur. 2d, Damages § 566, which provides as follows:

> In tort cases, the plaintiff may receive benefits from a third-party who is in no way connected with the defendant, and receipt of these benefits from the source collateral to the defendant has the effect of lessening the financial losses which the plaintiff would otherwise have suffered. Thus, if the basic goal of tort law is only that of compensating plaintiff for his losses, evidence of these benefits should be

> admitted to reduce the total damages assessed against the defendant. At the same time, reducing recovery by the amount of benefits received by the plaintiff would be, according to most courts, granting a "windfall" to the defendant by allowing him a credit for the reasonable value of those benefits. Such a credit would result in benefits being effectively directed to the tortfeasor and from the intended party – the injured plaintiff. If there must be a windfall, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrong doing. Thus, the courts generally have held that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer...Thus, while a plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, the collateral source rule allows a plaintiff further recovery under certain circumstances even though he has suffered no loss.

The special circumstances which would give rise to the application of the collateral source rule do no exist in this instance. Payment by State Farm could not serve to reduce his or his company's exposure since they no longer had any personal exposure for damages. Moreover, GEICO did not seek a reduction in the responsibility of the

defendants for the losses sustained. It did not act for or represent either of the defendants. It merely sought a proper allocation of responsibility among the various insurers for the Bardsley loss. When that proper allocation of responsibility is made, GEICO has no exposure for an underinsured property loss.

To apply the collateral source rule to first party insurers as the Circuit Court has done in this case would have the effect of obliterating the distinction between primary and secondary coverages, a distinction which South Carolina courts have recognized. See South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., supra. Since a primary first party insurer would be an independent source of benefits, payment by it under the Circuit Court's approach, would not act to preclude further payment by an excess first party insurer, even though the insured's loss has been paid in full. For example, where a primary underinsured motorist carrier has paid $10,000 of a $35,000 loss (after the liability carrier paid $25,000), under the Circuit Court ruling, the $10,000 payment would not preclude further payment by an excess underinsured motorist carrier since that offset would be precluded by the collateral source rule. In general, however, an excess insurer is only liable to the extent that the covered portions of a judgment or settlement exceed the primary insurance. Windt, A.D., Insurance Claim and Disputes, § 6:45 (5th Ed.).

The application of the collateral source rule requires a court to weigh the goal of making a plaintiff whole for his losses without making a profit or receiving a windfall (see Am. Jur. 2d, Damages § 27) against the potential windfall a defendant would receive if he were granted credit for payments made to the plaintiff out of funds for which the plaintiff has paid. When consideration of these goals is given in this case, the fact that

there has been no windfall for the defendants mitigates against allowing the respondent to receive a windfall payment in excess of the property damages she has actually sustained. Instead the goal of making the respondent whole without overpaying her for her loss should prevail.

## CONCLUSION

The Circuit Court erred in ruling that GEICO was required to pay $100,00 under the underinsured property provisions of the Bardsley policy in several respects:

1) It failed to determine if there were insufficient liability insurance proceeds so as to make the property damage claim one which was underinsured;

2) It failed to consider the policy provisions which made the underinsured property damage coverage excess to the available and adequate homeowner's coverage;

3) The GEICO policy was not ambiguous since no reasonable alternative interpretation existed which would make coverage available notwithstanding the existence of applicable homeowner's insurance;

4) The GEICO "other insurance" provision did not violate public policy since the underinsured motorist provision was created by contract and not statutorily mandated; and

5) The collateral source doctrine was inapplicable since GEICO did not seek to reduce John Ludwig's liability

exposure but instead simply sought a proper allocation of coverage responsibility.

To adhere to the Circuit Court ruling would have the effect of allowing recovery over and beyond the actual loss notwithstanding the attempts to contractually control the potential exposure. Since there is no statute mandating the issuance of underinsured motorist coverage, resolution of the hierarchy of coverage has been left to policy language. Where the wrongdoer does not benefit from a reduction in his liability exposure and there is no true reduction in the available coverage for an injured party, a party should not be permitted to recovery a greater amount than the value of his injury or the available coverage. The Circuit Court Order of November 21, 2011 allows a recovery greater than the loss sustained contrary to the general rule that a Plaintiff's recovery is to be limited to those damages which make him whole. In light of this, the Order should be reversed.

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