THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2013-000857

Omni Insurance Company,

Appellant,

v.

Cary Glenn Ryals, Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

South Carolina Cases:

Other Authorities:

QUESTIONS PRESENTED

1) Whether Appellant's provision limiting underinsured motorist coverage is void?

2) Whether the insured failed to cooperate with Appellant?

STATEMENT OF THE CASE

1. Procedural History

Respondent filed a personal injury action on July 13, 2010, against Appellant's insured for injuries he sustained in a motor vehicle collision on or about May 25, 2009. That action was stayed on September 30, 2011, by consent of the parties pending the resolution of a declaratory judgment action to determine whether Respondent would be allowed to recover under the underinsured motorist provision of Appellant's policy. Appellant filed the declaratory judgment action on February 24, 2011, in Richland County, and the case was subsequently transferred to Charleston County on January 19, 2012. Respondent timely filed an answer and counterclaim on March 26, 2012. Appellant timely filed its reply on April 30, 2012. Thereafter, both parties filed for summary judgment.

The summary judgment hearing was scheduled in the Charleston County Court of Common Pleas before R. Markley Dennis, Jr., Resident Circuit Judge, presiding, on October 25, 2012. On December 12, 2012, Judge Dennis granted Respondent's motion for summary judgment. Appellant filed its motion for reconsideration on December 31, 2012, which was denied by Judge Dennis on March 15, 2013. Notice of this appeal was filed on April 15, 2013. The only issues before the Court of Appeals are: 1) whether Appellant's policy provision limiting underinsured motorist ("UIM") coverage is void; and, 2) whether Appellant's insured failed to cooperate with Appellant. The relevant facts are as follows below.

2. Relevant Facts

On or about May 25, 2009, Respondent was a guest passenger in a motor vehicle that was involved in a one car collision owned and operated by Appellant's insured. (Respondent's Answer & Counterclaim, p.4, paragraph 43; Appellant's Reply to Counterclaim, p.1, paragraph 3). As a result of the collision, Respondent suffered bodily injuries and his total medical bills are in excess of $63,000.00. (Respondent's Memorandum in Support of Summary Judgment, p.3). The "Declarations" page for Appellant's insured establishes that the insured selected $25,000.00 for bodily injury liability coverage per person and $25,000.00 for UIM bodily injury coverage per person. (Exhibit A to Appellant's Complaint). Appellant subsequently tendered its bodily injury coverage limits of $25,000.00 to Respondent in exchange for a covenant not to execute. (Appellant's Complaint, p.4, paragraph 19). Thereafter, Respondent demanded that Appellant tender its UIM limits of $25,000.00. (Appellant's Complaint, p.4, paragraph 20). Appellant declined payment of the $25,000.00 in UIM coverage alleging that it had a policy provision limiting UIM coverage and that their insured breached his duties under the Policy as he never provided notice to Appellant of the accident. (Appellant's Complaint p.5, paragraph 29; p.3, paragraph 12). Specifically, Appellant asserts that the following provisions from its policy limit UIM coverage to Respondent:

PART A-Liability Coverage, Limit of Liability, B.2:

> No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and ... any Underinsured Motorist Coverage provided by this policy.

PART C2-Underinsured Motorist Coverage, Limit of Liability, D.:

> No one will be entitled to receive duplicate payments for the same elements of loss under this [UIM] coverage and Part A [Liability Coverage] … of this policy.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP.") (citation omitted).

ARGUMENT

I. This Court's decision in *Bratcher v. National Grange Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) is controlling.

At the heart of this declaratory judgment action is the underinsured motorist statute. The statute provides that automobile carriers must offer underinsured motorist coverage "[i]n the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute." S.C. Code Ann. § 38-77-160.

The plain language of the underinsured motorist statute contains two important components. First, that underinsured motorist coverage protects an insured against insufficient liability limits carried by an at fault insured or an underinsured driver. Second, the underinsured motorist statute does not differentiate between a Class I or a Class II insured's ability to seek and collect underinsured motorist benefits. *Id.*

Omni's policy language at issue in this case provides that "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A [liability coverage], Part B, Part C1 or Part D of this policy." In other words, **no one, not even the named insured**, would be entitled to recover UIM benefits according to their policy. (emphasis added).

Bratcher v. National Grange Ins. Co., 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) is on all fours with the present case. Franklin Bratcher was a passenger in his father, Welton Bratcher's vehicle. Franklin Bratcher was seriously injured in a wreck and his father was determined to be at fault. Franklin Bratcher sought to obtain the liability limits in the amount of $50,000.00 and UIM benefits in the same amount from his

father's at-fault vehicle in which he was a passenger. National Grange filed a declaratory judgment action disputing the applicability of the UIM benefits as to Franklin Bratcher, arguing that a policy provision excluded vehicles owned by Welton Bratcher from the definition of an underinsured motor vehicle. This Court noted that the then-underinsured motorist statute, § 56-9-831, authorized "insurance carriers to restrict the amount of underinsured motorist coverage to the limits of liability coverage **but does not** authorize any other restrictions on the underinsured motorist coverage. *Id.* at 332 (citations omitted) (emphasis added). In so holding, this Court permitted a passenger to collect both liability and underinsured motorist coverage. This is exactly what Respondent is attempting to do in this case.

Bratcher did not address whether the passenger was a Class I or a Class II insured, and it did not have to because the underinsured motorist statute provided that all insured's — Class I and Class II — are entitled to the underinsured motorist coverage from the car they are driving or in which they are a passenger. Notably, the underinsured motorist statute relied on in *Bratcher* has been recodified verbatim. Therefore, the *Bratcher* decision readily translates to the present case.

In reaching its conclusion, this Court observed that "[i]n the interpretation of statutes our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature. We must do this based upon the words of the statutes themselves. To do otherwise is to legislate, not interpret. The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts." *Bratcher*, 292 S.C. at 333, 356 S.E.2d at 153.

For these reasons, this Court's holding in *Bratcher*, based upon the same underinsured motorist statute at issue here, controls the outcome.

A. Underinsured motorist coverage is not subject to unilateral limitation by insurance policies.

Appellant argues that the Circuit Court erred in granting Respondent's motion for summary judgment because underinsured motorist coverage is voluntary and since there is no express proscription against it, automobile insurers may impose further limitations on underinsured motorist coverage. Appellant cites *Burgess v. Nationwide Mut. Ins. Co.*, 373 SC. 37, 644 S.E.2d 40 (2007). *Burgess* is inapposite to the case at hand. *Burgess* specifically deals with a Class I insured's ability to reach an at-home vehicle with underinsured motorist coverage when he chooses to drive an owned vehicle without underinsured motorist coverage. *Id.* at 41, 644 S.E.2d at 42. Moreover, in *Burgess*, the policy limiting provision comports with Section 38-77-160. The named plaintiff, Burgess, was injured while operating his motorcycle. He chose not to purchase underinsured motorist coverage for his motorcycle. Burgess had three vehicles at home, each carrying $25,000 in underinsured motorist coverage. Burgess' automobile insurance carrier argued that Burgess could not collect underinsured motorist benefits from the three at-home vehicles under the policy because he was not driving a vehicle with underinsured motorist coverage at the time of the wreck. Burgess argued that limiting the portability of underinsured motorist coverage offended public policy. The South Carolina Supreme Court agreed with the automobile insurance carrier, observing that Burgess chose to forego underinsured motorist coverage on his motorcycle and therefore should not be permitted to seek coverage from an at-home vehicle with the desired coverage. *Id.*

at 41-42, 644 S.E.2d at 4. To find in favor of portability under these circumstances, the Court opined, would encourage insured's to purchase underinsured motorist coverage on only one vehicle, yet claim coverage as to all vehicles. *Id.* at 42, 644 S.E.2d at 4.

Burgess does not support Appellant's public policy argument. Section 38-77-160 permits limitation on the portability of underinsured coverage as to Class I insured's. Moreover, the public policy of encouraging the purchase of underinsured motorist coverage as expressed in *Burgess* is a nonissue in the present case because there is underinsured motorist coverage on the vehicle in which Respondent was a passenger.

As evidenced by the limitation on stacking within § 38-77-160, the legislature could have easily limited the applicability of underinsured motorist benefits to Class 1 insured's, but it chose not to do so. "[I]nsurers have the right to limit their liability and impose whatever conditions they desire upon an insured, provided they are not in contravention of . . . public policy." *United Servs. Auto. Ass'n v. Markosky*, 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000). Appellant argues that there is no public policy reason to protect guest passengers from at fault insured or underinsured drivers. However, Appellant's limiting provision violates public policy because it conflicts with § 38-77-30(15). *See Standard v. Shine*, 278 S.C. 337, 340, 295 S.E.2d 786, 788 (1982) ("Where no conflict with common law exists, however, this Court will not substitute its view of public policy for that of the legislature")). To remove any doubt as to what constitutes an underinsured motor vehicle, § 38-77-30(15) defines the term "underinsured motor vehicle" and affords underinsured coverage to all insured's without regard to their status as Class I or Class II insured's. If the Legislature sought to treat Class II insured's

differently from Class I insured's insofar as their ability to collect underinsured motorist benefits, it could have easily done so within the statute. As previously mentioned, the legislature has treated Class I and Class II insured's differently when it comes to stacking, and therefore could have easily limited the applicability of underinsured motorist coverage altogether to Class I insured's had it chosen to do so.

In sum, the case law and public policy of this State, as expressed in the underinsured motorist statute and the definition of an underinsured motor vehicle, provides that any insured may collect underinsured motorist coverage. According to § 38-77-30(7), the term "insured" includes both Class I and Class II. Therefore, Appellant's limiting provision violates the case law and public policy as expressed in §§ 38-77-30(15) and 38-77-160.

B. The legislature has subsequently embraced *Bratcher* by re-codifying the underinsured motorist statute and by defining an underinsured motor vehicle to include both Class I and Class II insured's.

Omni urges that *Bratcher v. National Grange Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) has been abrogated. The underinsured motorist statute this Court construed in *Bratcher* was re-codified verbatim in the current underinsured motorist statute. 1987 Act No. 155. The legislature then amended what is now S.C. Code Ann. § 38-77-160 (1987) in 1989 and again in 1994 without limiting or overruling *Bratcher*. 1989 Act No. 148 § 21; 1994 Act No. 461 § 7. The legislatures had an opportunity to change the underinsured motorist statute in reaction to the *Bratcher* decision, but they did not.

Throughout this same time, the legislature modified or overruled other judicial decisions constructing the underinsured motorist statute. The Supreme Court, for example, held in 1987 that the statutorily-required offer of underinsured motorist coverage must be meaningful. The legislature responded by enacting a presumption that an offer is meaningful if the companies use a certain form. *See Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 261-62, 626 S.E.2d 6, 11-12 (2005) (describing the history of S.C Code Ann. § 38-77-350 (1989)).

The legislature from 1987-1989 also overruled two South Carolina Supreme Court decisions by enacting legislation that permitted insurance companies to reduce or eliminate underinsured motorist coverage by the amount of liability coverage available from the at-fault motorist. *See State Farm Mut. Ins. Co. v. Horry*, 304 S.C. 165, 167-69, 403 S.E.2d 318, 319-320 (1991) (explaining the history of S.C. Code Ann. § 38- 77-30(15)).

The legislature could have similarly overruled or limited *Bratcher* by authorizing Appellant's exclusion in whole or in part but it did not. Instead, the legislature solidified the holding in *Bratcher* when it defined an underinsured motor vehicle as "a motor vehicle as to which there is bodily injury liability insurance . . . and the amount of the insurance or bond is less than the amount of the insureds' damages." § 38-77-30(15) (emphasis added). This definition went into effect on October 1, 1989, and has been the law of this State ever since. *Bratcher* is, therefore, well-settled and, according to the legislature, consonant with public policy.

C. Even if this Court restricts the holding in *Bratcher* to Class I insured's, Appellant's limiting provision still fails.

Appellant asks this Court to limit *Bratcher's* holding to Class I insured's and maintains that there is a justification for treating Class I insured's differently from Class II insured's with regard to an insured's ability to collect both liability and underinsured motorist coverage. The practical effect of narrowing the holding in *Bratcher*, as Appellant desires, is that only Class I insured's could collect both liability and underinsured motorist benefits - Class II insured's could not.

Even if the Court accepts Appellant's argument to restrict the holding in *Bratcher* to Class I insured's, Appellant's policy is still unenforceable because it's policy, as written, means that "no one" - not even a Class I insured - may recover both liability and underinsured motorist benefits. Therefore, according to Appellant's policy, even Christopher Constine, the named insured, is unable to collect the benefits he purchased.

Like the automobile insurance carrier in *Bratcher*, Appellant is attempting to circumvent its responsibility to fulfill its obligations under the policy it drafted by relying on an overly-broad policy limitation. Because the policy limitation is in irreconcilable conflict with South Carolina's automobile insurance laws, the Circuit Court properly voided the limiting provision.

II. Respondent is not seeking duplicate payments under Appellant's policy.

There is no risk of double recovery here because Appellant's responsibility to pay UIM benefits to Respondent will only result if a factfinder determines that Respondent's damages exceed $25,000. Appellant is entitled to a setoff as to the $25,000 liability limits it has already paid. Further, Ryals is not seeking duplicative payments as his

specials are in excess of $63,000.00 and the liability limits that have been tendered are only $25,000.00. Thus, the payments are not duplicative as there is more than $38,000.00 in specials that are outstanding.

III. Appellant's Insured has not breached his obligations under the Policy.

Appellant asserts that its insured did not properly notify Appellant of the accident and that its insured sought to mitigate his criminal liability by essentially signing a false affidavit. Appellant asserts that as a result of its insured's noncooperation, it has no duty to provide UIM coverage to Respondent. However, as noted by the Circuit Court:

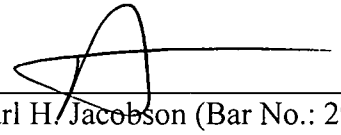
> Omni participated in the initial tendering of the liability limits and is present and represented by counsel at this hearing, which was brought on by Omni's filing for a declaratory judgment. Further, the underlying tort action has been temporarily postponed pending the outcome of this hearing, thus giving Omni the opportunity to appear and defend in the underlying tort action. Therefore, Omni's contention that its insured breached the policy provision is unsubstantiated.

(Defendant's Order Granting Summary Judgment, p. 3, paragraph 8). While Appellant alleges its insured has filed a false affidavit, he has not been indicted for filing a false statement. The allegation by Appellant is nothing other than unsubstantiated speculation, at best. Further, whether Respondent's injuries were proximately caused by the motor vehicle wreck will ultimately be a question for the jury. *See Small v. Pioneer Machinery, Inc.,* 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1987) ("Ordinarily, the question of proximate cause is one of fact for the jury . . . .")).

CONCLUSION

For all the reasons above-stated, Respondent respectfully urges this Court to sustain the grant of summary judgment in favor of Respondent and dismiss this appeal.

Respectfully submitted,



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December 16, 2013

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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

In addition to those matters proposed by Appellant, Respondent proposes the following be included in the Record on Appeal:

1. Respondent's Memorandum in Response to Appellant's Motion to Reconsider

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matter on J. Drayton Hastie, III, and The Honorable Jenny Abbott Kitchings by depositing a copy of it in the United States Mail, postage prepaid, on December 16, 2013.

December 16, 2013

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