THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable D. Garrison Hill, Circuit Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia 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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I. Statement of the Issues on Appeal

1. Did the circuit court properly hold that Bardsley was entitled to underinsured property damage coverage when the parties agreed upon and consented to stipulated facts submitted to the circuit court which established that the amount of Respondent's claim exceeded the available property damage coverage of the at-fault driver?

2. Did the circuit court properly find that GEICO's "other insurance" clause could not be properly enforced to deny underinsured property damage coverage?

3. Did the circuit court properly find that the GEICO policy at issue with schedules and riders, when read as a whole, is ambiguous, contains conflicting terms and therefore must be liberally construed in favor of the insureds and strictly against GEICO in accord with the long established jurisprudence of this State?

4. Did the circuit court commit reversible error in expressing concern that the GEICO "other insurance" clause was inconsistent with the purpose and intent of the underinsured motorist statute in violation of public policy?

5. Did the circuit court properly hold that the Bardsleys' State Farm homeowner's policy was a collateral source from which GEICO could not benefit by denying coverage for the extensive property damage suffered by Respondent?

II. Statement of the Case

Francina A. Bardsley, Individually and as Personal Representative of the Estate of Frederic William Bardsley, III (*hereinafter* Respondent or Bardsley) filed a Complaint against the Defendants State Farm Fire & Casualty Insurance Co. (*hereinafter* State Farm), and Government Employee Insurance Company's (*hereinafter* Appellate or GEICO) on July 7, 2010, alleging causes of action arising out of GEICO's denial of coverage for property damage sustained by Bardsley. GEICO filed its Answer on July 13, 2010, denying coverage for property damage sustained by Respondent under its underinsured (*hereinafter* UIM) policy issued to the Bardsleys. Both parties filed Motions for Summary Judgment seeking the Court's determination of whether Bardsley was entitled to property damage coverage under the UIM policy.

The Court heard arguments on the parties' cross motions on October 27, 2011. Following the hearing, the Court issued an Order dated November 21, 2011 (*hereinafter* the Order) granting Bardsley's summary judgment motion and finding that the policy exclusion upon which GEICO relied in denying UIM coverage for property damage was ambiguous and subject to the collateral source rule. (Order at 3). In light of its findings, the Court held that the Bardsley was entitled to the $100,000 property damage UIM coverage under her GEICO policy. On December 1st GEICO filed a Motion for Reconsideration of the Court's November 21st Order. The circuit court denied GEICO's Motion for Reconsideration by Order dated December 13, 2011. This appeal followed.

III. Statement of the Facts

On August 25, 2009, John Ludwig drove a 2007 Masaerati owned by Systems Development Integration, Inc. (*hereinafter* SDI) through the home of Frederic and Francina Bardsley instantaneously killing Mr. Bardsley and causing significant damage to the home. (Stipulations of Fact No. 2-6). The vehicle driven by Ludwig was covered under two insurance policies – Auto Owners Insurance Company (*hereinafter* Auto Owners) with a One Million Dollar ($1,000,000.00) single occurrence policy limit and The Hartford Casualty Insurance Company with umbrella liability coverage of Two Million Dollars ($2,000,000.00). (Stipulations of Fact No. 7, 8). As personal representative of the Estate of Frederic Bardsley, the Respondent had a cause of action for wrongful death against Ludwig and SDI. Auto Owners offered to pay its policy limits in the amount of One Million Dollars ($1,000,000.00) to Bardsley for the benefit of the Estate of Frederic Bardsley in exchange for a covenant not to execute. (Stipulation of Fact No. 9). Likewise, The Hartford offered to pay the sum of Two Million Dollars ($2,000,000.00) in exchange for a covenant not to execute. (Stipulation of Fact No. 10). The Probate Court for Greenville County conducted a hearing and issued an Order Approving the Terms of the Settlement. (Stipulation of Fact No. 11). In that Order, the Probate Court expressly stated that the Three Million Dollar payment "is to be allocated 100% to the wrongful death claim as the parties stipulate there is no valid survival claim." (Probate Court Order Nov. 13, 2009 at 3 - 4). None of these settlement proceeds went to cover the property damage Respondent sustained as a result of Ludwig's actions. (Stipulation of Fact No. 25).

The Bardsleys also maintained personal insurance on their home and automobiles, both of which cover property damage in certain instances. State Farm issued a homeowners' policy to Frederic and Francina Bardsley, insuring their residence. (Stipulation of Fact No. 13). The Bardsleys paid the premiums on the State Farm homeowners' policy which provided $457,318.47 in coverage for damage to the residence, its contents, and loss of use expenses. (Stipulations of Fact No. 13, 19). Ludwig caused Eighty-Eight Thousand Two Hundred Thirty and 47/100 Dollars ($88,230.47) of damage to the residence; Twenty-Three Thousand Six Hundred Eighty-Four and 44/100 Dollars ($23,685.55) of damage to the contents of the home; and Twenty-Two Thousand Nine Hundred Fifty-Nine and 99/100 Dollars ($22,959.99) worth of loss of use and living expenses. (Stipulation of Fact No. 14). Thus, Respondent suffered a total of One Hundred Twenty-Seven Thousand Eight Hundred Thirteen and 49/100 Dollars ($127,813.49) of property damages. (Stipulation of Fact No. 14). State Farm paid the $127,813.49 initially to cover these expenses but asserted a right of subrogation against Ludwig and SDI and/or their insurers. The covenant not to execute provided that Respondent would resolve State Farm's subrogation claims out of the $3,000,000.00 settlement. (Stipulation of Fact No. 15). Due to the total exhaustion of the at-fault parties' insurance coverage, Mrs. Bardsley agreed to pay State Farm Ninety-Four Thousand Four Hundred Twenty-Four and 75/100 Dollars ($94,424.75) to finalize the settlement and appease State Farm's property damage subrogation claim against Ludwig and SDI. (Stipulation of Fact No. 15). Therefore, Bardsley did not receive coverage for the extensive property damage caused by Mr. Ludwig's reckless actions.

GEICO issued an insurance policy to the Bardsleys that provides underinsured motorist (UIM) coverage in the amount of Three Hundred Thousand Dollars ($300,000.00) for what is described as "bodily injury" under the policy and One Hundred Thousand Dollars ($100,000.00) for what is described as "property damage" under the policy. (Stipulations of Fact No. 16, 17). GEICO paid Respondent the bodily injury limit of $300,000.000 under the UIM policy. (Stipulation of Fact No. 18). However, despite the fact that all of the available liability coverage of the at-fault driver had been exhausted, GEICO refused to tender the $100,000.00 for property damage under the policy.

IV. Legal Arguments and Authorities

A. Standard of Review

"In reviewing the grant of summary judgment an appellate court applies the same standard that governs the trial court under Rule 56, SCRCP." *Singleton v. Sherer*, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct. App. 2008). A court properly grants summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) SCRCP; *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008). In determining whether any triable issues of fact exist as would preclude summary judgment, the court must view the evidence and all reasonable inferences that may be drawn from it, in a light most favorable to the nonmoving party. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (2007). Finally, "[a] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Id* at 526.

In the present case the parties agreed to stipulated facts which were submitted to the court below thereby leaving only a question of law as to whether Respondents were entitled to the property damage coverage under their UIM policy with GEICO.

B. Argument & Authorities

1. The circuit court properly held that UIM property damage coverage was available to Bardsley under her GEICO policy.

a. The stipulated facts and exhibits submitted to the circuit court established that Bardsley's claim for property damage exceeded the available property damage coverage of the at-fault driver.

GEICO first argues that UIM property damage coverage does not apply under the circumstances due to the alleged lack of proof that there was insufficient liability coverage for such damage. GEICO asserts that "[i]n 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." (App. Br. at 6). Appellant argues that such evidence was lacking below and claims the circuit court erred because it "failed to undertake this evaluation." (App. Br. at 6). The court below did not err in awarding UIM property damage benefits as the stipulated facts established that Bardsley's property damage claim exceeded the at-fault parties' available coverage.

GEICO's argument is premised upon an alleged absence of factual evidence considered by the circuit court in reaching its holding. This ignores the fact that the parties worked together and jointly submitted stipulated facts with accompanying exhibits to the circuit court for the purposes of the summary judgment hearing. Those stipulated facts and exhibits specified: (1) the coverage available under each respective insurance policy; (2) the amount of property damage sustained by the Respondent; and (3) how the insurance proceeds received thus far were distributed to cover Bardsley's damages. (*See* Stipulation of Facts Nos. 12-14, 17, 25). Specifically, the stipulated facts and exhibits showed that Bardsley suffered $127,813.49 in property damages; (Stipulation of Fact No. 14); Ludwig, as the at-fault party, had a total of three million dollars in single occurrence coverage under his and SDI's respective policies with Auto Owner and the Hartford; (Stipulations of Fact No. 7, 8); and the entire three million of Ludwig's available coverage was paid in satisfaction of Respondent's wrongful death claim with none going

to cover the property damage sustained as a result of his actions. (Stipulation of Fact No. 25; *See also* Probate Court Order Nov. 13, 2009 at 3-4). Therefore, GEICO in conjunction with Bardsley provided the very information it claims the court lacked and failed to consider in reaching its decision. Interestingly, immediately following GEICO's assertion that the circuit court failed to undertake this evaluation because it lacked the necessary information, Appellant discusses the stipulated facts and accompanying exhibits that contain this very information. (App. Br. at 6-7).

GEICO's conclusion that "[t]he Circuit Court failed to undertake [the required] evaluation" is also unsupported by the record. (App. Br. at 6).[1] Appellant does not cite to any specific portion of the record, the Court's Order, or hearing transcript to support its position in this regard. The court's ruling awarding UIM property damage benefits to Bardsley is a clear indication that the circuit judge looked at the relevant facts and exhibits submitted by the parties and found Respondent's property damage exceeded the at-fault party's available coverage. In fact the Order expressly notes that "Ludwig had a total of $3,000,000.00 in liability insurance coverage" and "Bardsley settled the wrongful death claim with Auto Owners and the Hartford for $3,000,000.00 in available coverage despite the value of the wrongful death action exceeding the settlement amount." (Order at 5). Simply put, the record shows that the circuit court both had and considered the relevant facts in determining whether Bardsley was entitled to UIM property damage

[1] GEICO made essentially the same argument below in its Motion to Reconsider asserting that the circuit court "disregarded the methodology" for determining the amount of UIM damages to be awarded. (Def. Mot. Recon. at 1-2). GEICO argued then and now, without citation to any supporting authority mandating usage of this methodology, that the circuit court erred in not making specific findings as to the amount ofliability coverage available for the property damage and the value of the loss sustained. (Ap. Br. at 5-8; Def. Mot. Recon. 1).

benefits under the GEICO policy. Therefore the court below properly found Bardsley was entitled to her UIM property damage benefits.

b. There was insufficient property damage coverage under the circumstances as all of the at-fault party's available insurance coverage was paid in satisfaction of Respondent's wrongful death claim.

GEICO argues that there was adequate property damage coverage under Ludwig's policies stating that "a review of the Auto Owners and Hartford policies reveals that there was underlying coverage for property damage." (App. Br. at 7). GEICO's position is contradicted by the fact that it paid Bardsley its UIM bodily injury coverage limits for the injuries (wrongful death) damages Respondent sustained as a result of the accident. As GEICO notes, both the Auto Owners and Hartford policies have single coverage limits, neither segregating coverages for bodily injury and property damage. (App. Br. at 7). Thus, GEICO's payment of UIM benefits for bodily injury damages is recognition that the at-fault party's available coverage was insufficient-not only to cover the bodily injury (wrongful death) damages but also inadequate to compensate Respondent for the property damage she has suffered as both policies contained single coverage limits which were exhausted by payment of the wrongful death claim.

This argument also ignores the plain language of the Probate Court's order that allocates the entire three million in available coverage under those policies to the settlement of Bardsley's wrongful death claim. (*See* Prob. Order Nov. 13, 2009 at 3-4)("This payment, subject to attorneys' fees and costs...is to be allocated 100% to the wrongful death claim."). GEICO contends that "[t]he 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." (App. Br. at 7). This is an assumption that is contradicted by Judge Faulkner's order and the accompanying covenants not to execute. The payment to State Farm in satisfaction of its subrogation claim was agreed to as part and partial of the settlement for the wrongful death claim and does not evidence the existence of adequate property damage coverage under at-fault parties' policies.

GEICO's position that Ludwig's policies provided adequate coverage for the property damage is further belied by the fact that the Bardsleys' owned their home as joint tenants with the right of survivorship, as reflected by the Deed submitted to the circuit court as an exhibit to the stipulation of facts. (*See* Stipulation of Fact No. 21; Exh. 9). Therefore, at the moment of Mr. Bardsley's death the home was immediately passed to Mrs. Bardsley as the sole owner. *Estate of Sherman ex rel. Maddock v. Estate of Herman ex. rel. Snodgrass*, 359 S.C. 407, 597 S.E.2d 850 (Ct. App. 2004); (Stipulation of Fact No. 6)(Mr. Bardsley died immediately upon impact.). With Ms. Bardsley as the sole owner, the home was not part of her husband's estate. The Probate Court's Order Approving Settlement awards the entire three million in coverage under the Auto Owners and Hartford policies "to the Petitioner for the benefit of the Estate of Frederic William Bardsley III." (Order Nov. 13, 2009 at 2-3; Amended Order Dec. 22, 2009 at 2-3). Francis A. Bardsley, as Personal Representative of the Estate of Frederick Bardsley was "the Petitioner" in the probate proceedings. Thus, all payments made by Ludwig's insurers went to the benefit of the estate and could not have gone to compensate Respondent for the extensive property damage caused to her home.

Therefore, the circuit court properly found that the circumstances warranted application of the GEICO UIM property damage coverage as all of the at-fault party's available coverage was insufficient to cover the property damage Bardsley sustained.

c. Consideration of Bardsley's State Farm coverage violates the collateral source rule.

Finally, GEICO argues that this is not a UIM property damage situation due to the Bardsleys' State Farm's homeowner policy providing sufficient property damage coverage. (App. Br. at 8). Appellant attempts to exclude coverage under the UIM policy by looking to sources wholly independent of the wrongdoer. As recognized by the circuit court, and argued below, UIM policies are subject to the collateral source rule and acceptance of GEICO's position effectively violates the doctrine. (*See* Order at 4-5; *See also infra* pgs. 22-25).

2. The circuit court properly held that GEICO's "other insurance" clause was unenforceable under the circumstances.

GEICO argues that the circuit court erred in awarding Bardsley her UIM property damage benefits because its coverage for such damage was secondary and excess to the Bardsley's State Farm policy. (App. Br. at 8-11). Appellant's argument aside, the issue is not properly before this court. While GEICO raised this argument during oral argument below, the circuit court did not make any ruling on it. It is a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *E.g., Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and

ruled upon by the trial court). Following the circuit court's issuance of the Order, GEICO filed a Motion for Reconsideration which was denied. (Order Dec. 13, 2011). GEICO's Motion for Reconsideration challenges the circuit court's rulings on four grounds – none of which alleged the court erred by not determining and holding GEICO's UIM coverage was secondary and excess to State Farm's. (*See* Mot. to Amend). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993); *see also* Rules 52(b) and 59(e), SCRCP. Therefore, without a ruling on the issue it is not properly before this court.

If this court finds the issue is properly before it, GEICO's argument still fails. Appellant's argument relies upon a provision contained in the UIM amendment which states that "[i]f none of an insured's motor vehicles is involved in the accident...[w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance applicable to the damaged property." (*See* GEICO Policy at 3). GEICO takes the position that State Farm's homeowner coverage for property damage constitutes "valid and collectable insurance applicable to the damaged property" and therefore must be exhausted before it will pay out the $100,000 in UIM property coverage. (App. Br. at 11). GEICO's position under the current circumstances is both contrary to the legislative purpose/intent of UIM coverage and precluded by application of the collateral source rule.

S.C. Code Ann. § 38-77-30(15) defines "underinsured motor vehicle" as "a motor vehicle 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 insureds' damages." The GEICO policy defines the term in a nearly identical manner as "a motor vehicle on which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least the minimum required by law, but the amount of the insurance or bond (a) is less than the amount off the insured's damages or (b) has been reduced by payments to persons other than an insured injured in the accident to an amount which is less than the amount of the insured's damages." (*See* GEICO Policy at 1). Thus, under both the statutory and policy definitions, it is undisputed that Ludwig is "underinsured" in this instance, making the GEICO UIM coverage available to the Bardsleys.[2] GEICO's refusal to pay out the $100,000 is based upon the policy provisions noted above; however the collateral source rule precludes application of those provisions in the manner advocated by the Appellant. (*See infra* pgs. 22-26).

3. The circuit court properly found that the GEICO policy at issue with schedules and riders, when read as a whole, is ambiguous, contains conflicting terms and must be liberally construed in favor of the insureds and strictly against GEICO.

GEICO contends that the trial court erred in holding that the policy was ambiguous due to the alleged absence of any reasonable, conflicting interpretation which would grant Respondent recovery in spite of the State Farm homeowner's coverage. (App. Br. at 11-14). Appellant asserts that a court must specifically set forth how a

[2] As noted above, GEICO has already paid Bardsley the UIM bodily injury limits under the policy, which under the circumstances, is a clear recognition that Ludwig and/or SDI is underinsured in this instance. *See supra* pgs. 9-10.

provision or policy may be reasonably understood in more than one way in order to deem it ambiguous. (App. Br. at 12). The circuit court was not required to undertake this task and the proceedings below sufficiently established the basis for its finding that the GEICO policy was ambiguous.

Insurance policies are subject to the general rules of contract construction. *Century Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 335, 358 (2002). "If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "The rules of contract construction require exclusionary clauses to be narrowly interpreted." *Id.* at 527 *citing Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 337 (1967). 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." *Yarborough v. Phoenix Mut. Life Ins. Co.,* 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). However, an insurance contract which is "in any respect ambiguous or capable of two meanings must be construed in favor of the insured." *Beaufort County Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011), reh'g denied (May 25, 2011), cert. dismissed (Dec. 20, 2011)(internal citation omitted); *See also Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460, 461 (1990)(The terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer).

First, GEICO takes issue with the Court's finding that its policy exclusion is ambiguous. Appellant argues that the definition of "ambiguous contract" requires a court

to both identify the ambiguous provision and expressly state how that particular language is capable of more than one reasonable interpretation. (App. Br. at 12; Def. Mot. Recon. at 3). GEICO argued below that the circuit court failed to identify what part of the policy it considered ambiguous. (*See* Def. Mot. Recon. at 3). Contrary to the Appellant's assertion, the circuit court did in fact identify the policy language it considered ambiguous. Specifically, at the outset of its substantive discussion, the circuit court recognized that in denying coverage GEICO relied upon "a provision contained in the UIM rider to its policy, which states '[i]f none of an insured's vehicles is involved in the accident...[w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance applicable to the damaged property.'" (Order at 3). The Court then found that "[t]he UIM exclusion upon which GEICO relies in this instance is ambiguous." (Order at 5). Therefore the Court not only recognized the provision it considered ambiguous, it actually quoted it at the outset of its substantive discussion in the Order.

On appeal GEICO argues that a Court must specify how a particular term or provision is susceptible of more than one reasonable interpretation to properly make a finding that the term or provision is ambiguous. (App. Br. at 11-12; Def. Mot. Recon. at 3). Such a specific determination is not required for the court to find a policy provision ambiguous. GEICO's assertion ignores the simple fact that the parties stipulated to the facts considered by the court. The circuit court had, read, and evaluated the language of the policy at issue. It found the UIM exclusion to be ambiguous without explicitly stating it was susceptible to more than one reasonable interpretation. (Order at 5). GEICO seemingly argues that the circuit court's finding on this issue should be nullified because

it did not expressly state that the language could be interpreted in more than one way by a reasonable person or how such differing interpretations were possible. There is no requirement in statutory or common law that mandates courts must make this express statement or explanation. The circuit court's finding that the language is ambiguous is a consequence of it determining that it may be subject to more than one reasonable interpretation. It is unnecessary for the circuit court to spell this out in the Order. GEICO's UIM exclusion provision is ambiguous on its face. It states that its UIM coverage "shall be in excess over other valid and collectible insurance." There is nothing within the policy that defines or offers any clarification as to what "other valid and collectable insurance" means, encompasses, or entails. The circuit court recognized that the exclusion as worded is subject to more than one reasonable interpretation, and thus the ambiguity must be resolved in Respondent's favor. (Order at 5).

Certainly, the provision at issue is subject to more than one reasonable interpretation - a fact most obviously evidenced by the existence of this litigation. GEICO contends that the "other valid and collectible insurance" language encompasses Bardsley's State Farm homeowner's policy. On the other hand, Respondent's position is that the "other valid and collectible insurance" language cannot include the State Farm policy as doing so would violate the collateral source rule. Thus, while the circuit court did not spell out exactly how the particular language at issue is subject to more than one reasonable interpretation, it is undisputable that the language is so susceptible.

On brief, GEICO attempts to define "other valid and collectible insurance" in an effort to demonstrate the provision's lack of ambiguity. Appellant's method and support for defining the term however further illustrates its uncertain meaning. GEICO does not

cite any controlling authority whatsoever in its attempt to define the term but rather relies on a general secondary source and the federal court for the District of Columbia. (*See* App. Br. at 12-13). This *post hoc* attempt to define the policy language at issue further shows illustrates its inherit ambiguity.

In addition, GEICO's argument ignores the conflicting policy provisions addressed during oral arguments. The Court and counsel for GEICO discussed ambiguity and particular conflicting provisions contained in the GEICO policy. Specifically, the circuit court sought clarification as to what provisions GEICO was relying upon in denying coverage:

> THE COURT: So are you relying on this exclusion number four as well, Mr. Moore, that there's no coverage for property damage if the insured has been compensated by insurance or otherwise?
>
> MR. MOORE: On page 2?
>
> THE COURT: Yes sir.
>
> MR. MOORE: Left-hand column, no, sir.
>
> THE COURT: Why not?
>
> MR. MOORE: Because I just don't think it's a good provision.
>
> THE COURT: All right. Well, what's the difference between that and the one you are relying on?
>
> MR. MOORE: That particular provision says there's no property damage coverage if the insured has been compensated by insurance or otherwise...That would mean that if – let's say he had coverage or damage that exceeded what was provided by State Farm, there would simply be no coverage anyway. I don't believe that's the case.
>
> And, quite frankly, I believe that, under those circumstances, there might be an ambiguity.

> Because they do provide for coverage when you have an underinsured situation as they defined.

Trans. at 30-31.

These conflicting provisions create an ambiguity within the policy, which was discussed and recognized by the circuit court.

> THE COURT: I think the Bardsleys paid for underinsured motorist coverage, which was defined in the policy for property damage very plainly on Page 1 of the Amendment. And then if you read Pages 2 and 3, there are exceptions, some of which I understand you're not relying on, but, nonetheless, they create an ambiguity, which has to be construed in favor of the insured.

Trans. at 32-33. As properly recognized by the circuit court, the GEICO policy had ambiguous, conflicting terms and provisions that required the court to construe it in favor of the insured by providing UIM property damage coverage.

GEICO also argues that UIM coverage for property damage is a creation of contract, not statutory law, making it subject only to the terms and conditions of the agreement. (App. Br. at 13-14; Def. Mot. Recon. at 3). Appellant's position is based upon the statutory definition of "underinsured motor vehicle" which GEICO claims does not include coverage for property damage. (App. Br. at 13-14; Def. Mot. Recon. at 3). S.C. Code Ann. § 38-77-30(15) defines "underinsured motor vehicle" as "a motor vehicle 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 *insureds' damages*." (emphasis added). Contrary to GEICO's assertions, this definition does include UIM coverage for property damage. Under this definition the availability of coverage is measured by comparing the bodily injury liability coverage on the vehicle with the "insured's damages." The comparison is not to the "insured's damages arising out of bodily injury"

or the "insured's property damages." Therefore, the "insured's damages" include both bodily injury and property damages. The GEICO policy defines the term in a nearly identical manner as § 38-77-140 stating "a motor vehicle on which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least the minimum required by law, but the amount of the insurance or bond (a) is less than the amount off the insured's damages or (b) has been reduced by payments to persons other than an insured injured in the accident to an amount which is less than the amount of the *insured's damages*." (emphasis added). GEICO's own definition of "underinsured motor vehicle" likewise includes property damage.

Therefore, the circuit court properly held that the GEICO policy at issue, when read as a whole, is ambiguous, contains conflicting terms and therefore must be construed against the insurer, and its finding in this regards does not constitute reversible error.

4. The circuit court properly expressed concern that GEICO's UIM rider may contravene public policy.

Appellant claims the circuit court held that GEICO's UIM rider violated public policy. (App. Br. at 14-17; Def. Mot. Recon. at 3-4). However, the circuit court did not hold that the GEICO UIM rider contravened public policy. The Order states that "GEICO's UIM rider *may also* contravene public policy since any exclusions inconsistent with the UIM statute are void." (Order at 5)(emphasis added). Nowhere in the Order did the circuit court actually rule or hold that the rider did in fact violate public policy. The wording of the Order on this issue is an expression of concern that the UIM rider may run afoul of public policy, not a determination that it actually does. In absence of a ruling on the issue it is not properly reserved for appeal and may not be grounds for reversal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724

(2000)(It is a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); *E.g., Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court). While the circuit court did not make a ruling on the public policy issue, Respondent contends that it is an additional sustaining ground for upholding the lower court's action. *I'On* at 418("Under the present rules, a respondent-the 'winner' in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); *See* Rules 220(c) and 208(b)(2) SCACR.

On brief, Appellant argues that in absence of a statutory mandate requiring UIM coverage for property damage, there can be no violation of public policy. (App. Br. at 15-16; Def. Mot. Recon. at 3). GEICO's position finds no support in either statutory or case law.

The circuit court expressed concern that GEICO's UIM rider may violate public policy as it was inconsistent with the UIM statute. (Order at 5). The legislative intent, or purpose of UIM coverage under S.C. Code Ann. § 38-77-160 has been thoroughly addressed by the courts. "The central purpose of the underinsured motorist (UIM) statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist." *Floyd v. Nationwide Mut. Ins.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005); *McAlister v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 113, 390 S.E.2d 383 (Ct. App. 1990)(The statutory purpose of underinsured coverage is to provide coverage in the

event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist.); *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 310 S.E.2d 814 (1983)(The purpose of former § 56-9-831 [now § 38-77-160] is to provide insurance coverage where the insured party's damages exceed the liability limits of the at-fault motorist.).

In the present case, the at fault driver, Ludwig, had a total of $3 million in liability coverage under the Auto Owners and Hartford policies. Bardsley settled with Auto Owners and Hartford for the entire $3 million in available coverage despite the value of the case exceeding this amount. (*See* Order at 5 fn1)(Circuit court noted that an experienced practitioner submitted an affidavit to the court in which he opined that the value of Bardsley's wrongful death claim was in excess of $3.5 million. Notably, Appellant does not take issue with this evaluation.). As the Probate Court's Order Approving Settlement shows, all of this money went to Bardsleys' wrongful death claim, and therefore constitutes payment for body injuries/personal damages, not property damage.[3] Ms. Bardsleys' property damage therefore was not covered by Ludwig's available insurance, making him an underinsured motorist for all intents and purposes. The clear and express purpose of UIM coverage is to make up for this shortfall. GEICO is attempting to avoid paying the $100,000 in UIM coverage provided under the Bardsleys' policy, even though her damages exceed the at-fault motorist's coverage, a position and outcome that contravenes the purpose of such coverage. GEICO petitions

[3] As noted above, Bardsley did initially receive money from her homeowners insurance to cover the property damage resulting from the incident. However, in order to comply with the covenant not to execute and address State Farm's alleged subrogation claim against the settlement proceeds, Mrs. Bardsley repaid State Farm the money it initially tendered to cover her property damage, less attorneys' fees and other costs unrelated to the property damage itself.

the Court to allow it to benefit from their insured's other insurance policy, a contract to which they are a stranger.

GEICO's position thus contravenes sound public policy. *See* 43 Am. Jur. 2d Insurance § 285("An insurance policy that contains provisions that defeat coverage for which the insurer has received valuable consideration is against public policy.") It is not in the public interest for an insurer to be able to benefit from their insured's other insurance when the insureds are not the at-fault party. It is in the public interest to require and/or encourage people to maintain adequate (or more than merely minimal) insurance on their largest investments- their homes and vehicles. GEICO is attempting to receive a benefit from the premiums the Bardsleys paid to State Farm for homeowner's coverage; however, if they had failed to make their payments, causing the homeowner insurance to lapse, GEICO would simply pay out the $100,000 in UIM coverage for property damage. Allowing GEICO to avoid its liability for coverage in this manner provides a disincentive for the public to maintain additional insurance to cover certain property from adverse events. Maintaining more than adequate insurance on one's home and vehicles should be encouraged and rewarded, rather than punished as GEICO is attempting to do. In addition, allowing GEICO to deny coverage in this instance would create a potentially harmful precedent in which an injured party's own insurers would have an incentive to construct policies in a manner which would make them liable only for amounts not covered by any insurance whatsoever, without regard to whether it derives from the at-fault or injured party.

Finally, as noted in the Order the circuit court expressed concern that the UIM rider may contravene public policy in light of the fact that South Carolina is a stated

value policy state - there would be "virtually no situation where GEICO would ever have to pay its UIM coverage on any residence on which homeowners insurance has been placed since these type [of] policies most often are stated value policies and the policy limits would never be exhausted." (Order at 5). The court's concern in this regard is legitimate. In circumstances such as the present, where a vehicle runs into a home causing property damage, the homeowner's policy would cover the value of any such damage no matter how extensive. Therefore, the application of the policy provision as advocated by GEICO renders the coverage useless in these situations, as was noted in the arguments below. (*See* Trans. at 7, 28-29). Appellant has argued that the circumstances of this case are exceedingly rare, with most UIM property damage cases having to deal with damage to vehicles rather than homes. (*See* Trans. at 17). While there is likely a larger number of the latter, it is not uncommon for damage to be caused to a home by a vehicle. The rarity of the present circumstances stems from the grave and severe bodily injury that was sustained by the homeowner and his family. On brief, GEICO asserts that "[t]here are many situations where other valid insurance coverage would not be available and the GEICO underinsured property coverage would be applicable." App. Br. at 17. Tellingly, Appellant fails to give a single example of such a scenario.

Therefore, the circuit court's noted concern that GEICO's position may run afoul of public policy was legitimate and as a practical matter does not constitute any reversible error.

5. **The circuit court properly held that the Bardsleys' State Farm homeowner's policy was a collateral source from which GEICO could not benefit by denying coverage for the extensive property damage.**

The collateral source rule has been applied liberally in this State, oftentimes to insurance proceeds. *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); *Rattenni v. Grainger*, 298 S.C. 276, 278, 379 S.E.2d 890 (1989). In fact, it has been specifically held that the collateral source rule applies to UIM benefits. *Putsaver v. Gooden*, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002); *See also Rattenni*, 298 S.C. 276, 379 S.E.2d 890(UIM proceeds are subject to the collateral source rule. Thus, the rule precluded setoff of UIM proceeds against a jury's damages award where the benefits received were from the injured party's own UIM policy for which she paid the premiums.). South Carolina has long followed the collateral source rule "that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of the damages owed...." *Rattenni* 298 S.C. at 277, 379 S.E.2d at 890. "The *only requirement* for qualification as a collateral source is that the source be wholly independent of the wrongdoer." *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)(emphasis added). A source is wholly independent of the wrongdoer "when the wrongdoer has not contributed to it." *Id* at 92, 318. A third party cannot take advantage of payments or services rendered by a collateral source for an injured person's benefit, irrespective of whether the source is an insurance company. *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993).

Under the circumstances, the Bardsleys' State Farm coverage constitutes a collateral source, as it derives from a source "wholly independent of the wrongdoer" to

which the injured party, not the wrongdoer, contributed. The Bardsleys' obtained and paid the premiums on the State Farm homeowners' insurance to insure their home against damages. Ludwig, SDI and their insurers had nothing to do with the State Farm policy. Also, no one questions that Ludwig is the wrongdoer in the present action. As noted above, his insurance (Auto Owners and Hartford) agreed to pay out their policy limits, all of which went to settle Respondent's wrongful death claim. Therefore the State Farm policy cannot be characterized as anything but a collateral source to which UIM benefits are subject. In denying coverage for property damage under the Bardsleys' UIM policy, GEICO attempts to avoid liability by reliance upon a collateral source and receive the benefit of a contract to which they are a stranger. GEICO is not and cannot be a third party beneficiary of the Bardsleys' State Farm insurance policy. GEICO asks the Court to look beyond the assets of the at-fault party and into those of the injured party. The collateral source doctrine precludes such a consideration. Therefore, the circuit court properly found that application of the exclusionary policy provision as advocated by GEICO violates the collateral source rule.

On brief, GEICO argues that the collateral source rule does not apply under the circumstances. (App. Br. at 18-25). It contends that the doctrine only applies where the source is wholly independent of the wrongdoer *and* the at-fault party is seeking reduction or offset of its liability. (App. Br. at 18). Appellant argues that since it does not represent the at-fault party in this case nor seek to reduce his liability, the circuit court erred in applying the doctrine. App. Br. at 18. GEICO is attempting to impute an additional condition on application of the collateral source rule – that the wrongdoer must be seeking to reduce its liability. This is simply not a condition precedent to the

application of the doctrine. The South Carolina Supreme Court long ago recognized that "[t]he *only requirement* for qualification as a collateral source is that the source be wholly independent of the wrongdoer." *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)(emphasis added). As noted above, this requirement has been met and the State Farm policy constitutes a collateral source.

GEICO also argues that the circuit court's application of the collateral source rule contravenes the purpose of the doctrine, by providing Bardsley with "a windfall payment in excess of the property damages she actually sustained." (App. Br. at 25). GEICO is mistaken in this regard. Bardsley will not receive any windfall by GEICO's payment of her UIM property damage coverage. As noted above, all of Ludwig's available three million in coverage went to the payment of Respondent's wrongful death claims. (*See supra* pgs. 2-5). Bardsley did initially receive money from her State Farm homeowners insurance to cover the property damage resulting from the incident. However, in order to comply with the covenant not to execute and address State Farm's subrogation claim, Mrs. Bardsley repaid her insurer State Farm the money it initially tendered to cover the property damage, less attorneys' fees and other costs unrelated to the property damage itself. Therefore, Bardsley did not retain any money compensating her for the $127,813.49 in property damage she suffered as a result of Ludwig's actions. (Stipulation of Fact No. 14). In light of the circumstances, GEICO's payment of the UIM property damage coverage would not afford her a windfall. On the contrary, the $100,000 in coverage does not completely cover the full extent of the property damage suffered.

Finally, the GEICO UIM policy language cannot abrogate the doctrine. The South Carolina Supreme Court has affirmed that UIM insurance is subject to the collateral source rule. *Putsaver*, 350 S.C. at 414, 566 S.E.2d 199; *Rattenni*, 298 S.C. 276, 379 S.E.2d 890. Following amendments to S.C. Code Ann. § 38-77-160 in which the General Assembly added language to the UIM statute that made UIM benefits not subject to subrogation and assignment, the issue of whether this also precluded application of the collateral source rule to such benefits was addressed. Abiding by the statutory construction maxim that "the inclusion of some is to the exclusion of others," the Court held that the General Assembly's amendment to the UIM statute prohibiting subrogation and assignment of UIM benefits did not by implication limit or prohibit the applicability of the collateral source doctrine to this class of insurance. *See Putsaver*, 350 S.C. at 414, 566 S.E.2d at 201("We decline to carve out an exception to the collateral source rule for UIM coverage by implication based upon the amendment forbidding subrogation or assignment."). "Had the General Assembly intended to abrogate the collateral source rule in regard to this particular class of insurance proceeds, it would have done so." *Id* at 141 *citing Rattenni*, 298 S.C. at 278, 379 S.E.2d at 891. Therefore, the policy language relied upon by GEICO to deny coverage does not and cannot abrogate the application of the collateral source rule and allowing Appellant to refuse payment for property damage coverage due to the Bardsleys' State Farm policy violates the doctrine.

Thus, the circuit court properly held that the collateral source rule applied to preclude GEICO from denying coverage based upon the Bardsleys' State Farm homeowner policy as it was derived from a source wholly independent of the wrongdoer. (Order at 4-6).

V. Conclusion

Taken in a light most favorable to the Appellant, the circuit court's holdings and rulings in its November 21, 2011 Order were justified and proper under the facts and circumstances.

The stipulated facts and exhibits submitted to the court wholly supported its finding that that the Respondent's claims for property damage exceeded the available coverage of the at-fault driver. The stipulated facts and accompanying exhibits specified (1) the coverage available under each respective insurance policy; (2) the amount of property damage sustained by the Respondent; and (3) how the insurance proceeds received thus far were distributed to cover Bardsley's damages. Therefore, the circuit court's finding in this regard is wholly supported by the record and does not constitute reversible error.

The circuit court also properly found that GEICO's "other insurance" clause could not be properly enforced to deny Bardsley underinsured property damage coverage as it was ambiguous and doing so violated the collateral source rule.

The court below also properly held that GEICO's policy, when read as a whole, is ambiguous, contains conflicting terms and therefore must be liberally construed in favor of Bardsley as the insured by affording her coverage. The circuit court did not have to specially set forth how a particular provision or the policy may be reasonably understood in more than one way in order to find it ambiguous. Nevertheless, the proceedings below sufficiently established the basis for the circuit court's finding that the policy contained conflicting terms and was ambiguous. GEICO advocates for the enforcement of an exclusion provision that Appellant itself has recognized conflicts with another exclusion

provision within the policy. An insurer may not benefit from a conflicts and ambiguities of its own creation. Therefore, the circuit court's finding in this regard is supported by the record and does not constitute reversible error.

It was also proper for the court below to express concern that the GEICO "other insurance" clause was inconsistent with public policy. As the court rightly recognized South Carolina is a stated value policy state and in circumstances such as the present, where a vehicle runs into a home causing property damage, the homeowner's policy would cover the value of any such damage no matter how extensive. Therefore, the application of the policy provision as advocated by GEICO renders the coverage useless in these situations, as was noted in the arguments below. An insurance policy that contains provisions that defeat coverage for which the insurer has received valuable consideration is against public policy. Likewise, application of the policy as advocated by Appellant is contrary to the intent and purpose of the UIM statute which is to provide coverage in the event damages are sustained in excess of the liability limits carried by the at-fault driver. Therefore, the circuit court's noted concern that GEICO's position may run afoul of public policy was legitimate and as a practical matter does not constitute any reversible error.

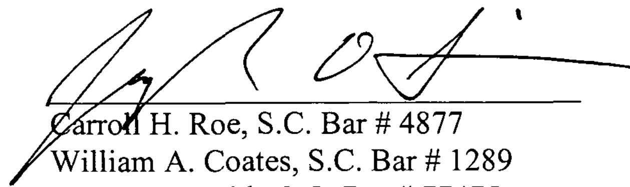
Finally, the circuit court properly held that the Bardsley's State Farm homeowner policy constituted a collateral source. The collateral source rule has been applied liberally in this State, oftentimes to insurance proceeds. In fact, the South Carolina Supreme Court has specifically held that the collateral source rule applied to UIM benefits. The only requirement for qualification as a collateral source is that the source be wholly independent of the wrongdoer. It is undisputed that the Bardsleys' State Farm

homeowner policy is a source wholly independent of the wrongdoer in this case and therefore the court below property held that the doctrine applied to preclude Appellant from deriving a benefit from it. Appellant's attempt to impute an additional condition to qualification as a collateral source is directly contradicted by controlling case law. Furthermore, the circuit court's holding does not contravene the purpose of the doctrine by affording Bardsley a windfall. Respondent has not retained any compensation for the extensive property damage she suffered as a result of Ludwig's actions, which the record reflects totals some $127,813.49. Therefore, GEICO's payment of the $100,000 in UIM property damage coverage will not afford Bardsley a windfall as her property damages exceed the coverage limit.

In sum, the circuit court's award of the GEICO UIM property damage benefits to Bardsley was appropriate under the circumstances.

For the reasons set forth above, the Circuit Court's Order of November 21, 2011 should be affirmed.

Respectfully Submitted,



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