THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Case No: 14-CP-26-6382

Appellate Case No: 2015-001827

Erie Insurance Exchange ..... Respondent

v.

Government Employees Insurance Company, Mark Allison Scoggin and Angela Bennett Hill, Defendants,

Of Which, Government Employees Insurance Company is ..... Appellant

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INITIAL BRIEF OF RESPONDENT

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2. Did the Trial Court correctly rule that several relevant ambiguities in the GEICO policy exist and that such ambiguities must be construed against GEICO and in favor of its insured to find, rather than exclude, excess liability coverage?

3. Did the Trial Court Correctly Rule that GEICO's Policy violates public policy and South Carolina law by: (a) Using an Omnibus Clause and definitions provision to retract, limit or withdrew the coverage stated on the declarations page; and (b) By using a familial relationship to determine the extent to which an injured party can recover within the insured's policy coverage?

4. Did the Trial Court Correctly award attorney fees and costs?

STATEMENT OF THE FACTS

Mark Scoggin's decision to live with and care for his elderly mother, Mildred, cost him his insurance coverage. For their own, separate vehicles, Mark and Mildred both bought and paid for liability insurance coverage through Government Employees Insurance Company (GEICO). Both policies came with Declarations Sheets assuring Mark and Mildred that they had liability coverage. But when Mark was involved in an automobile accident while driving his mother's car, GEICO paid Mildred's coverage, but declined Mark's excess liability coverage, finding that he

was operating a car that not "owned" or "non-owned." Had Mark left his mother to fend for herself in her declining years, then GEICO would have paid the coverage that it declared Mark had, the same coverage that Mark bargained for, bought and relied upon.

This case arises from a motor vehicle accident that occurred on September 5, 2012 in Horry County involving vehicles driven by Angela Bennett Hill and Mark Scoggin. Ms. Hill filed a lawsuit against Mr. Scoggin, sounding in negligence and that action remains pending. (SEE: Stipulation of Facts, Hill lawsuit)

At the time of the accident Ms. Hill was driving a vehicle owned by Mauren Craig Hill which was insured by Ms. Angela Hill and her husband, Robert, with the Plaintiff, Erie Insurance Exchange. Mr. Scoggin owned a vehicle but at the time of the accident he was driving his late mother, Mildred Scoggin's vehicle because she had a seat set up for her dog in her car and Mark was going on a short trip to the post office to collect the mail. Mr. Scoggin testified that he "always" took the dog on short trips because otherwise it would "pitch a fit," but Mr. Scoggin did **not** testify that he always took his mother's car on short trips. He merely testified that he took her car on this trip because it was equipped with a seat for the dog. (SEE: Deposition of Mark Scoggin, pages 11-14) Nothing in the record establishes Mr. Scoggin's "regular" use of his mother's car as Mark Scoggin had his own car. Mr. Scoggin and his late mother resided in the same residence. Both Mildred Scoggin and Mark Scoggin carried liability insurance through GEICO. (SEE: Stipulation of Facts)

GEICO paid the liability coverage from the Mildred Scoggin policy but denied excess liability coverage under the Mark Scoggin policy. This declaratory judgment action by Erie followed, wherein Erie contends that GEICO provides applicable excess liability coverage under

the Mark Scoggin policy which would come before Erie's available underinsured coverage on the Hill policy.

I. VEHICLES AND COVERAGE AND PAYMENTS:

A. THE MILDRED SCOGGIN VEHICLE (2002 FORD TAURUS)

1. The late Mildred Scoggin owned this vehicle which was being driven by Defendant Mark Scoggin at the time of the underlying MVA on 9/5/2012.

2. Mildred Scoggin, who has since passed away, was Mark Scoggin's mother. Mildred and Mark Scogg*in re*sided in the same household.

3. GEICO insured this vehicle for coverage period 06/03/12-12/03/12 under Policy Number 0929-32-50-09, providing liability coverage of $50,000.00 per person and $100,000.00 per accident. (See: GEICO policy and Dec Sheet)

4. GEICO paid the Mildred Scoggin liability coverage of $50,000.00 to Angela Hill in exchange for a Covenant Not To Execute. (See: Covenant)

B. THE MARK SCOGGIN VEHICLE (2005 Chevrolet Colorado)

1. Defendant Mark Scoggin owned this vehicle at the time of the underlying MVA on 9/5/2012, but he was driving his mother, Mildred Scoggin's vehicle when he was involved in the accident with Defendant Hill.

2. GEICO insured Mark Scoggin's vehicle for coverage period 07/27/12-01/27/13 under Policy Number 4085-57-17-45, providing liability coverage of $25,000.00 per person and $50,000.00 per accident. (SEE: GEICO policy and Dec Sheet)

3. GEICO denied excess liability coverage under the Mark Scoggin policy, issuing a denial letter stating that coverage was denied because the vehicle Mr. Scoggin was driving at the time of the accident was "not considered as an owned or a non-owned vehicle." (See: Denial Letter)

C. THE ANGELA HILL VEHICLE (2011 Hyundai Elantra)

1. Mauren Craig Hill owned the Hyundai driven by Angela Hill at the time of this accident, 9/5/2012.

2. The Hill vehicle was insured by Erie Insurance Exchange for coverage period 05/11/12-05/11/13 under Policy Number Q05 1107128, providing stated uninsured/underinsured motorist coverage of $100,000.00 per person and $300,000.00 per accident. (SEE: Erie Policy and Dec Sheet)

3. The Hills are residents of North Carolina and the Erie policy is a North Carolina policy, so it is subject to North Carolina law as to underinsured carriers receiving credit for liability insurance payments rather than an offset as would be the case in South Carolina, meaning that the limits of Erie's underinsured coverage are reduced by its prior payment of $1,000.00 in medical payments coverage, by the $50,000.00 liability coverage paid under the Mildred Scoggin policy and should be reduced by an additional $25,000.00 in excess liability coverage under the Mark Scoggin policy, leaving $24,000.00 in potentially available coverage under the Erie policy. (SEE: Erie Policy and Dec Sheet)

4. The Erie policy, as a North Carolina policy, also potentially includes the right to arbitrate in Ms. Hill's home county in North Carolina.

II. THE APPLICABLE PROVISIONS OF THE GEICO POLICY:

1. The GEICO policy includes the following definitions (SEE: GEICO Policy and Amendment(s))

(a) "**Insured** means a person or organization described under PERSONS INSURED." (GEICO Policy; "Definitions" - #4)

(b) "**Relative** means a person who continuously lives in your household, and is related to you by blood, marriage, or adoption (including a ward or foster child.)" GEICO Policy Amendment; "Definitions" - #8)

(c) "**Non-owned auto** means a private passenger, farm, or utility auto or trailer not owned by or furnished for the regular use of either you or your relatives, except a temporary substitute auto. You or your relatives must be using the non-owned auto or trailer within the scope of permission given by its owner. A non-owned auto rented or leased for more than 30 days will be considered as furnished for regular use. (GEICO Policy Amendment; "Definitions" - #5)

(d) "**Owned auto** means: (a) a vehicle described in this policy for which a premium charge is shown for these coverages; (b) a **trailer** owned by you; (c) a **private passenger, farm** or **utility auto**, ownership of which **you** acquire during the policy period or for which **you** enter into a lease during the policy period for a term of six months or more, if: (i) it replaces an **owned auto** as defined in (a) above; or (ii) we insure all **private passenger, farm** and **utility autos** owned or leased by **you** on the date of the acquisition, and **you ask** us to add it to the policy no more than 30 days later; (GEICO Policy; "Definitions" - #6)

(e) **"Temporary substitute auto** means an automobile or **trailer,** not owned by **you,** temporarily used with the permission of the owner. This vehicle must be used as a substitute for the **owned auto** or **trailer** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. (GEICO Policy; "Definitions" - #9)

5. The omnibus clause of the GEICO policy states as follows:

LOSSES WE WILL PAY FOR YOU UNDER SECTION i

Under Section I, we will pay damages which an **insured** becomes legally obligated to pay because of:

1. **bodily injury,** sustained by a person; and
2. damage to or destruction of property; arising out of the ownership, maintenance or use of the **owned auto** or a **non-owned auto.**

We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claims or suit. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

(GEICO Policy; p. 4 of 15)

6. As to **excess coverage**, the GEICO policy states as follows: "Any insurance we provide for losses arising out of the ownership, maintenance or use of a vehicle **you** do not own shall be excess over any other valid and collectible insurance. (GEICO Policy; "Other Insurance")

STANDARD OF REVIEW:

Declaratory Judgment actions are neither legal nor equitable so the standard of review depends on the character of the underlying issues. Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 594 S.E.2d 511, 2004 S.C. App. LEXIS 42 (S.C. Ct. App. 2004) An action is at law if the purpose underlying the dispute is to determine coverage under an insurance policy. Horry County v. Ins. Reserve Fund, 244 SC 493, 544 SE2d 637 (Ct. App. 2001) citing (State Farm Mut. Auto Ins. Co. v. Calcutt, 340 SC 231, 530 SE2d 896 (Ct. App. 2000) However, in a case at equity, the appellate court may take its own view of the preponderance of the evidence. Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (S.C. 2011)

If an action at law is tried without a jury, an appellate court will only disturb a trial court's findings of fact if the court determines them to lack reasonably supporting evidence. Townes Assocs. Ltd. v. City of Greenville, 266 SC 81, 221 SE2d 773 (1976) However, in a case tried on stipulated facts, an appellate court can freely review whether the trial court properly applied the law to the stipulated facts. In Re Estate of Boynton, 355 SC 299, 584 SE2d 154 (Ct. App. 2003)

The Respondent contends that the instant case is something of a hybrid. Although it is an action tried on stipulated facts, the action is similar in nature to equitable indemnity, because GEICO's failure and refusal to defend after paying the Mildred Scoggin liability coverage exposed Respondent Erie to paying costs to defend and those for filing the instant action.

ARGUMENT:

1. Did the Trial Court correctly rule that under South Carolina law, inclusive of the South Carolina Supreme Court's decision in Williams v. Gov't Emples. Ins. Co., 409 S.C. 586, 762 S.E.2d 705, 2014 S.C. LEXIS 361, 2014 WL 4087958 (S.C. 2014), that GEICO's policy provides excess coverage that precedes Erie's underinsured coverage?

Under the provisions of the GEICO policy issued to both Mildred and Mark Scoggin, the Omnibus or insuring clause covers only owned and non-owned vehicles. A vehicle is NOT non-owned if it is owned by a resident relative and furnished for an insured's regular use. Thus, under the identical GEICO policies, as to Mark Scoggin, his mother's car was either owned, non-owned or neither owned nor non-owned as to both accidents. GEICO's brief attempts to explain its confusing analysis, policy provisions and definitions by stating that Mildred Scoggin's vehicle was "owned" for purposes of the liability claim and that it was not "non-owned" for purposes of the excess liability claim. GEICO's explanation means that it has drafted its policy so that if a vehicle "owned" by a resident relative is used with permission by another resident relative there is no coverage unless the use is not "regular" - even if GEICO insures all vehicles in the household. If true, and this Court so holds, then Respondent contends that this is an additional ground for holding that GEICO's policy violates public policy because the carrier can and likely will almost always - as it has here - claim the use to be "regular." This leaves GEICO's insureds in the same position as the Respondent - wondering how the same vehicle wouldn't and shouldn't

qualify for the same coverage analysis under identical policies. Further, GEICO's explanation in its brief is that of course the Mildred Scoggin vehicle was owned - after all, it was her car. By this same explanation, the Mildred Scoggin vehicle was not owned by Mark Scoggin but it was used with permission, placing it squarely within the boundaries of excess liability coverage by the express wording of GEICO's policy. (SEE: GEICO policy, definitions) Further, the vehicle was titled to Mildred Scoggin, but it was not titled to the driver, Mark Scoggin, making it "owned" or "non-owned" or a vehicle he "did not own" - depending upon which part of its policy, interpretation and explanation GECO is relying upon at the time.

It is uncontested that Mildred and Mark Scoggin were mother and son, that they resided together, and that Mark Scoggin did not own his mother's car. Further, all parties agree that the terms and conditions of both GEICO policies (other than the separate Declarations Pages) covering the Mark and Mildred Scoggin vehicles were identical. (See: Stipulation of Facts) It is also uncontested that GEICO paid liability coverage under the Mildred Scoggin policy. (SEE: Stipulation of Facts). Then, GEICO denied excess liability coverage under Mark Scoggin's policy based upon its determination that as to Mark's policy, his mother's vehicle was neither "owned" nor "non-owned." (SEE: GEICO denial letter)

To a large extent, coverage in this case focuses upon the term "non-owned", which appears in the Omnibus or "insuring" clause of the GEICO policy and is defined in the policy but does not appear on the declarations page of the policy. (SEE: GEICO Policy and Mark Scoggin's Dec Page) According to GEICO's definition of "non-owned," a car not owned by a household member or not furnished for the regular use of another household member would be "non-owned." (SEE: ORDER Granting DJ)

GEICO contends that the Trial Court erred in not analyzing the coverages separately under each policy. In fact, it is GEICO that erred because coverage under Mr. Scoggin's policy should be evaluated based on GEICO's separate and distinct obligations to Mr. Scoggin's as to coverage written for him. Applicability of the coverage should not be granted or denied based upon whether the company also happened to provide coverage for a relative who resided with Mr. Scoggin. In this case, if Mr. Scoggin were driving his mother's car and she did not reside with him then GEICO would honor the coverage that its insured bargained for and bought.

In this case, with the same facts before it and based upon the same policy provisions, GEICO first paid liability coverage under the Mildred Scoggin policy and then denied excess liability coverage under the Mark Scoggin policy. If Mildred's car was neither "owned" nor "non-owned" for purposes of the Mark Scoggin policy, then the same analysis applied to the Mildred Scoggin policy. In this regard, the Trial Court's Order found as follows:

> GEICO paid liability coverage in exchange for a Covenant Not To Execute. Because Mark Scoggin did not own his mother's car, and he paid no premium for it, the liability coverage had to have been paid under the Mildred Scoggin policy for Mark Scoggin's use of that car as a "non-owned" auto. That car would still be a "Non-owned" vehicle for purposes of considering the excess liability coverage under the Mark Scoggin policy. GEICO stipulated that the Mildred Scoggin vehicle was a non-owned vehicle as to Mark Scoggin under the present facts by paying the liability coverage in exchange for a Covenant and in so doing, it stipulated that the Mildred Scoggin car was not available for Mark Scoggin's regular use. That car retains the same status when considering the Excess Coverage under the Mark Scoggin policy because the terms and conditions of the two policies have been stipulated to be identical.
>
> Hence, GEICO denied excess coverage under the Mark Scoggin policy on the grounds that the Mildred Scoggin vehicle was not a "non-owned" vehicle as to Mark Scoggin, despite the fact that it had reached the opposite conclusion in paying the liability coverage under the same facts and based upon the same policy terms and conditions. The Court finds that for purposes of Excess coverage under the Mark Scoggin policy, GEICO is bound by its determinations under the Mildred Scoggin policy.
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> (SEE: Order, p. 5-6)

GEICO's brief contends that the company must analyze coverage separately under each policy. It contends that although it then analyzes Mark Scoggin's coverage based upon the fact that he resided with a resident relative also insured by GEICO. As to analysis and coverage determination, GEICO cannot, in accord with South Carolina law and public policy, contradict its first coverage determination by reaching the opposite conclusion in the second in a case where the policies contain the same provision and the only difference is that two related GEICO insureds reside in the same household. Here, by paying the liability coverage under the Mildred Scoggin policy, GEICO stipulated that Mark Scoggin's use of his mother's vehicle on the occasion of this accident, was a covered loss under its policy with Mildred Scoggin. GEICO cannot then, in accord with law and public policy, reach the opposite decision under the same facts and the same policy provisions as to the Mark Scoggin policy.

In fact, GEICO's "excess liability" policy provision makes the case stronger for coverage under the Mark Scoggin policy. As to excess coverage, the GEICO policy states as follows: "Any insurance we provide for losses arising out of the ownership, maintenance or use of a vehicle **you** do not own shall be excess over any other valid and collectible insurance. (GEICO Policy; "Other Insurance") In this regard, the Trial Court's Order states as follows:

> The Excess Clause does not use the "owned" and "non-owned" criteria, but rather, uses common, ordinary language that is not defined in the policy; to wit, .in pertinent part, it says that "Insurance for losses arising out of the use of a vehicle you do not own shall be excess." (GEICO Policy; "Other Insurance") It uses the undefined phrase "use of a vehicle you do not own" rather than employing the policy's "owned" and "non-owned" terminology which is defined.
>
> South Carolina law holds that when terms are not defined in a policy, an interpreting Court should define them "according to the usual understanding of the term's significance to the ordinary person." S.C. Farm Bureau Mut. Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610, 2009 S.C. LEXIS 6 (S.C. 2009) Mark Scoggin did not own his mother's vehicle and he was using it by driving it at the

time of the subject accident. Thus, the Court finds that the Excess Liability Cause would provide coverage for the subject accident.

(SEE: Order, p. 6)

Appellant GEICO's brief attempts to parse this language by claiming that the phrase "any insurance we provide" controls the clause. This is an attempt to bring the definitions clauses into the excess clause, and asks the Court to consider the anti-insured "non-owned" definition in lieu of the plain language of the excess clause. South Carolina law holds otherwise, as did the Trial Court. The correct consideration of the phrase in this case is that "any insurance we provide" includes the liability coverage found to exist under the Mildred Scoggin policy. The clause says that losses arising out of the use of "a vehicle you do not own" are excess loss coverage. And South Carolina law says that plain language is interpreted in a plain manner. Here, that interpretation means that excess liability insurance applies to this loss.

This loss is also covered because there is no applicable exclusion. The GEICO policy includes a definition for "non-owned" auto but that is not part of the exclusions for using a vehicle provided for regular use owned by a family member so there is no exclusion that takes away coverage. GEICO's reliance on the definition for non-owned autos has no applicability in this case because that exclusion applies only while carrying persons employed or otherwise engaged in the auto business; Regular use is not noted in the exclusions or the Amendment and it doesn't refer to regular use or using another vehicle owned by family member.

One of the key's to GEICO's denial is whether the Mildred Scoggin vehicle was furnished for Mark's regular use. "Under a liability policy excluding coverage where an automobile involved in an accident was "furnished for regular use" to the insured, the term may be used in the sense of time, steady as opposed to occasional; or in the sense of type of use, usual as against

unusual. Hartford Acc. & Indem Co. v. Hiland, 7 Cir., 349 F. (2d) 376." Aetna Casualty & Surety Co. v. Sessions, 260 SC 150, 194 SE2d 844 (1973). Here, Mr. Scoggin owned a vehicle but was driving his late mother's vehicle because she had a seat set up for him in her car and he was going on a short trip to the post office to collect the mail. Mr. Scoggin testified that he "always" took the dog on short trips because otherwise it would "pitch a fit," but Mr. Scoggin did **not** testify that he always took his mother's car on short trips. He merely testified that he took her car on this trip because it was equipped with a seat for the dog. (SEE: Deposition of Mark Scoggin, pages 11-14)

The "regular use" exclusion is intended to prevent an insured from purchasing one policy as to one automobile and be covered without qualification for all vehicles available for his use. Aetna Casualty & Surety Co. v. Sessions, *supra.* In this case, there were two vehicles in the household of Mildred and Mark Scoggin and both were insured by GEICO such that GEICO regularly collected a premium for both vehicles.

GEICO contends that the Trial Court reached its decision without examining, considering and interpreting the policy provisions and definitions "under each policy." The Court did, in fact, give due and proper consideration to the policies as a whole, but the Court did not write or re-write the GEICO policies which contained identical terms, conditions, definitions and provisions in all pertinent aspects. The Trial Court's due and proper consideration did not require the Court to imagine that the status of the vehicle operated in this accident somehow changed from one policy to the other, although none of the facts or policy provisions changed.

The Trial Court gave all necessary consideration to the policy provisions, definitions, terms and conditions, but it appears that GEICO failed to do so, deciding that it could pay one

liability policy and then deny coverage under the same policy written for Mark Scoggin based on some internal sliding scale application of the terms owned, non-owned and ignoring the term "you do not own" as expressly stated in the excess clause. GEICO's opinion is that it is proper to deny coverage and avoid its obligation to Mark Scoggin because he happened to reside with his mother, although South Carolina law and public policy indicate otherwise. After its due and proper consideration, the Trial Court held that GEICO's excess liability coverage applied to this loss. This Court should uphold the Trial Court's ruling.

2. Did the Trial Court correctly rule that several relevant ambiguities in the GEICO policy exist and that such ambiguities must be construed against GEICO and in favor of its insured to find, rather than exclude, excess liability coverage?

As to liability coverage and excess liability coverage, the provisions of the GEICO policy are ambiguous as to other policy provisions and particularly, as to the coverage declared to exist and on the Declarations Page. Those ambiguities include but are not limited to the following;

1. The Declarations Page for the Mark Scoggin policy states as follows: "This is a description of your coverage." It also states that Coverage applies where a premium or $0.00 is shown for a vehicle." Despite the fact that the described coverage included $25,000.00/$50,000.00 in bodily injury and UM coverage, and included comprehensive and collision coverages, provisions of the policy, and the policy definitions of "owned," "non-owned," and "relative", are such that GEICO has determined the policy provides no coverage to Mark Scoggin for the present loss; and;

2. The policy definition of "owned" auto conflicts with the Declarations Page certifying coverage of $25,000.00/$50,000.00 to Mark Scoggin for this loss; and

3. The policy provision as to "Losses We Will Pay For You Under Section I" provides that the Policy covers on bodily injury liability arising out of the "ownership, maintenance or use" of an owned or non-owned auto. The "Other Insurance" provision does not use the defined terms of owned or

non-owned but instead provides that bodily injury coverage for a vehicle "you do not own" shall be excess. Given this ambiguity, as to this accident, the more liberal provision should control and - in the alternative - the policy declares that bodily injury coverage for an accident that occurred while Mark Scoggin operated a vehicle that he did not own would be excess; and

4. The policy defines a "temporary substitute auto" as an "owned" vehicle but it would be a vehicle "you do not own" for purposes of the excess clause; and

5. The policy defines a "non-owned auto" as one not owned by or furnished for the regular use of either you (Mark Scoggin) or a relative (Mildred Scoggin) other than a "temporary substitute auto" but the "Other Insurance"/Excess provision references a "non-owned auto" as "a vehicle you do not own; and

6. The policy provides that "you and your relatives" are insureds with regard to "an owned auto" but the policy definitions do not define a resident relatives' car as an "owned" or a "non-owned" auto and then it restricts bodily injury liability coverage to losses arising out of the use, maintenance or ownership of an "owned" or "non-owned" vehicle.

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)." Williams v. GEICO, *supra*

As to the ambiguities alleged, the Court's Order found as follows:

After review, the Court finds that the provisions of the GEICO policy are ambiguous. The relevant ambiguities are:

1. The Declarations Page for the Mark Scoggin policy states as follows: "This is a description of your coverage." It also states that Coverage applies where a premium or $0.00 is shown for a vehicle." Despite the fact that the described coverage included $25,000.00/$50,000.00 in bodily injury and UM coverage, and included comprehensive and collision coverages, provisions of the policy, and the policy definitions of "owned," "non-owned," and "relative", are such that GEICO has determined the policy provides no coverage to Mark Scoggin for the present loss; and;

2. The policy definition of "owned" auto conflicts with the Declarations Page certifying coverage of $25,000.00/$50,000.00 to Mark Scoggin for this loss; and

3. The policy provision as to "Losses We Will Pay For You Under Section I" provides that the Policy covers bodily injury liability arising out of the "ownership, maintenance or use" of an owned or non-owned auto. The "Other Insurance" provision does not use the defined terms of owned or non-owned but instead provides that bodily injury coverage for a vehicle "you do not own" shall be excess. Given this ambiguity, as to this accident, the more liberal provision should control and - in the alternative - the policy declares that bodily injury coverage for an accident that occurred while Mark Scoggin operated a vehicle that he did not own would be excess; and

4. The policy defines a "temporary substitute auto" as an "owned" vehicle but it would be a vehicle "you do not own" for purposes of the excess clause; and

5. The policy defines a "non-owned auto" as one not owned by or furnished for the regular use of either you (Mark Scoggin) or a relative (Mildred Scoggin) other than a "temporary substitute auto" but the "Other Insurance"/Excess provision references a "non-owned auto" as "a vehicle you do not own; and

Because the GEICO policy is ambiguous in the pertinent particulars noted above, this Court finds that it must be construed against GEICO and in favor of the insured to find that excess liability coverage for the subject MVA exists.

(SEE: Order, p. 10)

Ambiguities in a policy are strictly construed against the carrier. Diamond State Ins. Co. v. Homestead Indus., Inc., *supra* The Respondent also contends that the structure of this policy is inherently ambiguous because it uses the Omnibus clause and policy definitions to create exclusions that are not listed in the policy. An insured looking to see what was and wasn't

excluded would read the exclusions and rely upon existing exclusions being listed. An insured has and should have the right to rely upon the exclusions listed in the policy, and he shouldn't have to attend law school to have the skills to interpret what unlisted exclusions may also exist.

This Court should uphold the Trial Court in ruling that the GEICO policy is ambiguous and that those ambiguities interpreted against the carrier lead to the conclusion that excess coverage exists to apply to the subject loss.

3. Did the Trial Court Correctly Rule that GEICO's Policy violates public policy and South Carolina law by: (a) Using an Omnibus Clause and definitions provision to retract, limit or withdrew the coverage stated on the declarations page; and (b) By using a familial relationship to determine the extent to which an injured party can recover within the insured's policy coverage?

Public policy considerations encompass those expressed in state law but also include those from a Court's determination of whether a particular agreement "is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." Williams v. GEICO, *supra*, citing County Preferred Insurance Co. v. Whitehead, 979 NE2d 35, 365 Ill. Dec. 669 (Il. 2012) In the present case, the Respondent contends that GEICO's subject policy violates public policy in several respects.

Here, GEICO uses the familial relationship between Mark and Mildred Scoggin to limit the policy coverage available to Mark Scoggin. This violates South Carolina law and public policy; to wit - "To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious and violative of public policy." Williams v. GEICO, *supra*

Further, although Excess Coverage is not subject to the provisions of the "Motor Vehicle Financial Responsibility Act" (Chapter 9, Title 56, SC Code Ann.) or its public policy considerations, it is subject to the state's insurance laws, specifically including the requirements

of §38-77-142 that policy provisions cannot reduce the face amount of coverage stated in the Declarations and the GEICO policy at issue, or GEICO's interpretation of the policy, violates South Carolina law and public policy. Williams v. GEICO In this respect, the SC Supreme Court has stated as follows:

> We disagree with the position taken by the concurrence/dissent that section 56-9-20(5)(d) of the MVFRA somehow serves to thwart the application of section 38-77-142(C) because the Murrays purchased coverage over the statutory minimum limits. This assertion rests on the premise that "excess" coverage is not part of the insurance policy that is subject to the MVFRA and, consequently, its public policy considerations. See S.C. Code Ann. § 56-9-20(5)(d) (2006) (stating "excess or additional coverage shall not be subject to the provisions of this chapter," and "the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this article [Article 1 of Chapter 9]"). However, by its express terms, section 56-9-20(5)(d) limits its reach to the provisions in the MVFRA. Id. (stating excess coverage "shall not be subject to the provisions of this chapter," i.e, Chapter 9 of Title 56); see id. § 56-9-10 ("This chapter [Chapter 9 of Title 56] may be cited as the 'Motor Vehicle Financial Responsibility Act.'"). As a result, section 56-9-20(5)(d) has no bearing on the application of other motor vehicle laws, such as section 38-77-142, or the related consideration of our state's public policy. See generally id. § 56-9-100 ("This chapter [Chapter 9 of Title 56] shall in no respect be considered a repeal of any other provision contained in this Title or the motor vehicle laws of this State but shall be considered as supplemental and cumulative thereto.").
>
> Williams v. GEICO, *supra*

Additionally, GEICO's use of the omnibus clause and policy definitions to limit coverage declared to exist by the policy's declarations page is contrary to South Carolina law and public policy. By using drafting tricks to hide an unlisted exclusion, GEICO declares liability coverage of 25/50 to exist and then it retracts that coverage. An insured is left believing that he has this coverage, and an injured party is left believing that she can rely upon the benefit of that coverage.

As to the public policy issue, the Court's ruling states as follows:

> Further, the Policy's Declarations Page declares that Mark Scoggins is insured for bodily injury liability coverage of $25,000.00/$50,0000.00. §38-77-142 of the SC Code requires that "insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability coverage in the policy below the declared or "face amount" of the coverage. Williams v. GEICO, *supra.* "Once the face amount of coverage is agreed upon, it (the insurer) may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage," Williams v. GEICO, *supra.*
>
> Despite the foregoing, after agreeing to provide Mark Scoggin with coverage of $25,000.00/$50,000.00, GEICO uses carefully crafted policy definitions and the Omnibus Clause of its policy, together with the familial relationship between Mark and Mildred Scoggin to limit the policy coverage available to Mark Scoggin. This violates South Carolina law and public policy; to wit - "To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious and violative of public policy." Williams v. GEICO, *supra,*
>
> (SEE: Order, page 11)

The Declarations Page on the Mark Scoggin Policy states that "this is a description of your coverage" and that "coverage applies where a premium or $0.00 is shown for a vehicle." It shows a premium of $80.80 for bodily injury liability coverage of $25,000/$50,000. (SEE: Dec Page _ Mark Scoggin Policy) Allowing this coverage to be declared and then retracted violates Public Policy, whether it is retracted by misleading policy drafting, policy definitions, the Omnibus Clause, or the family relationship between Mark Scoggin and his Mother. In particular, using the family relationship as a basis for coverage or exclusion violates public policy. This was specifically discussed in the Williams v. Geico decision, as follows:

> In Lewis, the court acknowledged that neither Kentucky's state constitution nor its statutes addressed family exclusions, so it would turn to its court decisions to determine the state's public policy. Id. at 836. The court stated it has long been recognized that, where there is no legislative prohibition on a certain character of agreement, before a court is authorized to declare it void "it must appear that such an agreement or contract has a tendency to injure the public or is against the public good, or is contrary to sound policy . . . ." Id. at 835 (citation omitted). The

court observed that, "[w]ith the erosion of the immunities provided by the doctrines of interspousal and parental immunity, insurance companies sought to protect their interests by inserting family exclusions into their insurance contracts." Id. at 832. Over the years, the purported justification for those rules, the possibility of fraud and collusion, was determined to no longer justify the hardships imposed by these rules. Id. The court found the family exclusion "prevents a specific class of innocent victims from receiving adequate financial protection" and is based entirely on the person's status. Id. "Without documentation or factual basis, every member of this excluded class is labeled high risk and branded as being more likely to engage in collusion and fraud." Id. The court concluded, "To uphold the family exclusion would result in perpetuating socially destructive inequities." Id. at 833.

Family exclusions are injurious to a substantial segment of the citizens of our Commonwealth. They deny injured persons the ability to rely upon the insurance coverage purchased by the policyholder. As a result, seriously injured accident victims will suffer financial hardship if family exclusion clauses are validated. Almost every member of the public is potentially a member of this excluded class. The exclusion is overly broad, based upon surmise, and against the public good.

It is time for us to take the next logical step . . . . Thus, we hold that family exclusion provisions in liability insurance contracts violate the public policy of this Commonwealth and are unenforceable.

Williams v. GEICO, *supra* quoting Lewis v. West American Insurance Co., 927 SW2d 829, 9 Ky. L. Summary 22 (Ky. 1996)

Provisions contrary to public policy are void *ab initio,* legally considered never to have existed and are therefore unenforceable by the Courts. Williams v. Geico, *supra*, citing 16 Richard A. Lord, *Williston on Contracts*, Sec. 49:12 (4th Ed. 2000) When Courts find insurance provisions void as against public policy, they decline to give effect to those provisions in the appeals before them. Williams v. Geico, *supra*, citing Lewis v. W. Am. Ins. Co., 927 S.W.2d 829, 836, 43 9 Ky. L. Summary 22 (Ky. 1996); Watters v. Dairyland Ins. Co., 50 Ohio App. 2d 106, 361 N.E.2d 1068 (Ohio Ct. App. 1976); Ryan v. Knoller, 695 A.2d 990 (R.I. 1997).

This Court should uphold the Trial Court

4. Did the Trial Court Correctly award attorney fees and costs?

The Trial Court awarded the Respondent, Plaintiff in the present Declaratory Judgment Action, attorney fees and costs. Respondent Erie Insurance Exchange, had to bring this action because GEICO unreasonably refused to pay under Mark Scoggin's excess liability coverage. GEICO, despite this Court's prior ruling finding Excess Coverage, has continued to fail and refuse to defend its insured, and has instead entered an alleged and tentative or arbitrary agreement to pay the coverage to the Plaintiff - if it loses the DJ action. This continues to leave Mr. Scoggin without counsel, save for the UI carrier stepping into his shoes.

"A declaratory judgment action is like a chameleon. Its color is determined by its background, *i.e.*, the underlying action." *See* Jacobs v. Service Merchandise Co., 297 S.C. 123, 375 S.E. (2d) 1 (Ct. App. 1988) (Noisette v. Ismail, 299 S.C. 243, 246, 384 S.E.2d 310, 312, 1989 S.C. App. LEXIS 114, *3 (S.C. Ct. App. 1989) A DJ is a statutory action and will be considered a case at law unless the cause of action and the relief sought are equitable. In the latter case it will be considered equitable. *Id.* Here, the relief sought was more by way of equitable indemnity and the DJ is therefore, a matter of equity. The relief sought was a matter of equitable indemnity because GEICO's failure and refusal to defend its insured forced the Plaintiff to step into the shoes of GEICO's insured. Erie was only forced to assume the defense because of GEICO's failure to honor its obligations. Had GEICO honored its obligation then Erie would not be defending. The duty to defend is GEICO's and in fulfilling it, the Plaintiff is performing GEICO's duty and therefore, the Plaintiff, Erie, as a matter of equity, is entitled to attorney's fees and costs.

Under §38-59-40, attorney's fees and costs are, therefore, justified in this matter and were properly awarded by the Court.

CONCLUSION:

GEICO attempts to cast a magic spell with its policy. The same vehicle that is "owned" for purposes of one policy is not "non-owned" for purposes of the same policy carried by resident relatives. Mildred owned her car because it was registered to her and insured by her. Yet, although it was not registered to Mark Scoggin and not insured by him, GEICO says it was not a vehicle non-owned by Mark Scoggin AND it was not a vehicle Mark Scoggin "did not own" for purposes of the excess clause. Between one coverage decision and the other, did GEICO change the car into something incapable of being owned or non-owned, something like the sky or sunshine? It was either owned or non-owned as to Mark Scoggin.

The fact is that GEICO decided the loss was covered under the Mildred Scoggin policy, and the same decision should apply to the identical Mark Scoggin policy. If the same decision doesn't apply, it is because GEICO reached the decision that Mark Scoggin's use of his mother's car was "regular use" - although Mark Scoggin gave no testimony to support that finding. And the issue of "regular" use only arises in resident relative cases, based upon policy considerations that don't arise when there are two (2) vehicles in a household both insured by the same carrier under identical policies with each insured paying for the coverage.

GEICO was paid for both household coverages in this case, issuing identical policies and giving Mark Scoggin a Declarations Page showing a premium paid for coverage of 25/50 and promising him that "This is a description of your coverage" and that "Coverage applies where a premium or $0.00 is shown for a vehicle." GEICO's policy promised that Mark Scoggin had excess coverage when operating a vehicle he "did not own." Despite all of this, GEICO denied

excess liability coverage under Mark Scoggin's policy, refused to pay or to defend, and ultimately entered into an agreement with the liability Plaintiff that it would pay the coverage if it lost this action.

The subject GEICO policies are crafted to exclude coverage by resorting to definitions and the Omnibus clause, although those exclusions are not listed in the policy. This is a drafting tactic to deliberately mislead its insureds, who would naturally look for an exclusion in that clause. The policy is ambiguous and violates public policy for a number of reasons, including retracting coverage based on family relationships and retracting coverage promised in its Declarations Page.

The GEICO policy does cover the subject loss, either by its terms or because of policy ambiguities which must be construed against the carrier. If the policy does not cover the loss, then it violates public policy and is void, *ab initio.* In either case, this Court should uphold the Trial Court's finding that excess liability coverage exists under the Mark Scoggin policy and that given the priorities of coverage in South Carolina, the GEICO coverage precedes the Erie Coverage.

Respectfully Submitted,

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Attorney For: Respondent

Dated: February 11, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Paul M. Burch, Circuit Court Judge

Case No: 14-CP-26-6382

Appellate Case No: 2015-001827

Erie Insurance Exchange ..... Respondent

v.

Government Employees Insurance Company, Mark Allison Scoggin and Angela Bennett Hill, Defendants,

Of Which, Government Employees Insurance Company is ..... Appellant

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PROOF OF SERVICE

I certify that I have served the INITIAL DESIGNATION OF RESPONDENT with the attached RULE 209 CERTIFICATION and the INITIAL BRIEF OF RESPONDENT in the stated matter on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on February 11, 2016 upon counsel at the addresses noted below:

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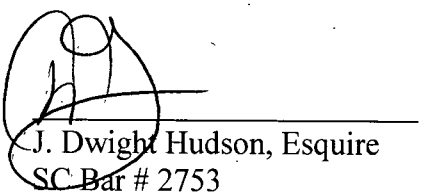

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February 11, 2016

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Erie Insurance Exchange, Respondent v. Government Employees Insurance Company, Appellant (Appellate Case No: 2015-001827)

Dear Ms. Kitchings:

Enclosed herein are an original and a copy of the following:

- Proof of Service
- Respondent's Initial Designation Of Matter to Be Included In Record On Appeal, including Rule 209 Certificate of Counsel affixed thereto
- Initial Brief of Respondent

Please file the originals and return a "clocked" copy of each in the enclosed SASE.

By copy of this letter, and by the enclosed Proof of Service, I hereby serve the same upon Respondent's counsel.

Thanking the Court for its consideration, and with best regards, I remain

J. Dwight Hudson, Esq.
Hudson Law Offices

JDH: mag
Enclosure(s): as stated
cc: Robert T. King, Esq.
Edward A. Love, Esq.
Ian D. Maguire, Esq.

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