

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

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Opinion No. 2011-UP-242 Filed May 24, 2011  
Withdrawn, Substituted and Re-filed June 23, 2011

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Joshua Bell ..... Petitioner,

v.

Progressive Direct Insurance Company ..... Respondent.

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**RETURN TO PETITION FOR WRIT  
OF CERTIORARI**

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J. R. Murphy, Esquire  
Ashley B. Stratton, Esquire  
MURPHY & GRANTLAND, P.A.  
4406-B Forest Drive  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorneys for Respondent

Other Counsel of Record:  
Gene M. Connell, Esquire  
Kelaher, Connell & Connor, P.C.  
P.O. Drawer 14547  
Surfside Beach, SC 29587  
Attorneys for Petitioner

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## QUESTIONS PRESENTED

- I) WHETHER PETITIONER'S REASONABLE EXPECTATIONS HAVE ANY BEARING ON THE INTERPRETATION OF THE POLICY.
- II) WHETHER PETITIONER QUALIFIES AS AN INSURED FOR UNDERINSURED MOTORIST COVERAGE UNDER THE POLICY ISSUED BY PROGRESSIVE TO SARAH SEVERN WHEN HE WAS NOT A NAMED INSURED.
- III) WHETHER PETITIONER QUALIFIES AS AN INSURED FOR UNDERINSURED MOTORIST COVERAGE UNDER THE POLICY ISSUED BY PROGRESSIVE TO SARAH SEVERN WHEN HE WAS NOT THE SPOUSE OF SARAH SEVERN.

## STATEMENT OF THE CASE

This appeal arises out of an insurance coverage dispute in which Petitioner Joshua Bell claims he is entitled to underinsured motorist ("UIM") coverage under a policy of insurance issued by Respondent Progressive Direct Insurance Company ("Progressive") to Petitioner's former girlfriend, Sarah Severn. In an Order filed January 9, 2008, the trial court granted summary judgment to Progressive based on the finding that Petitioner was not an "insured" under the Progressive policy and, therefore, not entitled to any UIM benefits under the policy. The Court of Appeals affirmed, holding that (1) listing Petitioner as a "household resident" on the declarations page of the policy did not entitle him to coverage when he was not a Class I insured, (2) Petitioner was not the common law husband of his former girlfriend, the named insured under the policy, Sarah Severn, (3) Petitioner was not a "relative" of Severn as that term is defined in the policy, and (4) the doctrine of reasonable expectations has not been adopted in South Carolina. Bell v. Progressive Direct Ins. Co., Op. No. 2011-UP-242 (S.C. Ct. of App. Filed May 24, 2011).

On May 31, 2006, Petitioner was a passenger in a vehicle owned by his employer which was involved in accident. Petitioner received the liability limits of the at-fault driver, but there was no UIM coverage on the company vehicle in which Petitioner was riding. Consequently,

Petitioner filed the instant suit seeking to recover UIM benefits under the Progressive policy covering a Honda CRV owned by his former girlfriend.

Progressive policy number 13507563-0 was issued to Sarah Severn with effective dates of November 4, 2005, to May 4, 2006. The policy listed Petitioner as a “driver and household resident”, but not as a “named insured”. (R<sup>1</sup>.p.52.) The policy provided UIM coverage for an “insured person”, which is defined as “you” or a “relative”. “You” is defined in the policy as a named insured or spouse if residing in the same household; “relative” is defined as a person related to the named insured by blood or marriage and also residing in the same household. (R.p.26.)

Petitioner was not a named insured nor did his being listed on the declarations page as a driver and/or household resident entitle him to UIM benefits as a named insured. Petitioner also asserts a common law marriage existed between himself and Ms. Severn. According to Petitioner, he and Ms. Severn had been engaged at various times, but had never married. (R.pp.102-109.) Although he resided with Ms. Severn and had given her an engagement ring, they never set a date to be married. (R.pp.103, 105-108.) Ms. Severn left Petitioner and South Carolina subsequent to the accident and, while she was residing without Petitioner in Maryland, the engagement was definitely broken off. (R.pp.103-105, 108.)

### **ARGUMENT**

#### **I) PETITIONER’S REASONABLE EXPECTATIONS HAVE NO BEARING ON THE INTERPRETATION OF THE POLICY.**

The rejection of the doctrine of reasonable expectations by South Carolina courts was

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<sup>1</sup> Respondents were not served a copy of the Appendix by Petitioner. Consequently, Respondents are only able to reference Record cites at this time.

fully explained<sup>2</sup> by the Court of Appeals in Allstate Insurance Co. v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989):

[Insured], during argument on the motion for summary judgment, urged that the court adopt the doctrine of reasonable expectations. This doctrine essentially is that “the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated these expectations.” The theory is based upon the proposition that the construction of the language of an insurance contract is not ordinarily controlled by the standards applicable to a contract negotiated at arms length between two parties on the same plane.

*This view has never been accepted by the Supreme Court of this State.* In South Carolina insurance policies are subject to the general rules of contract construction.

If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the insurer and the insured, a condition or stipulation not contemplated by the parties. A reviewing court should not rewrite or “torture the meaning of policy language” to achieve a result never intended by the parties.

Mangum, 299 S.C. at 231, 383 S.E.2d at 466-67 (emphasis added).

Even if the recognition of the rejection of the doctrine in Mangum is considered dicta, the fact remains that the doctrine has never been adopted in South Carolina and should not be adopted now. The Court of Appeals cited a number of decisions recognizing the rejection of the doctrine of reasonable expectations by South Carolina courts including Mangum, 299 S.C. 226, 383 S.E.2d 464, Ex parte: United Services Automobile Association, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005), and Gambrell v. Travelers Insurance Co., 280 S.C. 69, 310 S.E.2d 814 (1983)<sup>3</sup>. Most recently, the Court of Appeals held: “The doctrine of reasonable expectations ... has been rejected in South Carolina.” United Servs., 365 S.C. at 54, 614 S.E.2d at 654.

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<sup>2</sup> Petitioner contends that the Court failed to address the doctrine because it was not preserved for review. This is a misstatement of the case. As evidenced by the cited portion of the opinion, the Court fully addressed the doctrine.

<sup>3</sup> Gambrell was cited by the Court of Appeals for the longstanding rule that “[i]nsurance policies are subject to general rules of contract construction.” Gambrell, 280 S.C. at 71, 310 S.E.2d at 816. Therefore, it is unclear why Petitioner devotes an entire argument to the Gambrell case when rules of construction cited therein are widely accepted in South Carolina case law. Accordingly, Progressive declines to address Petitioner’s Issue #4.

Accordingly, federal district courts sitting in diversity and charged with applying South Carolina law have consistently recognized South Carolina's rejection of the doctrine. See Bankers Ins. Co. v. Prezzy, 2009 WL 3459189 \*1 (D.S.C.) (citing United Servs., 365 S.C. at 54, 614 S.E.2d at 654; Mangum, 299 S.C. at 231-32, 383 S.E.2d at 466-67) ("South Carolina courts have continuously refused to incorporate the doctrine of reasonable expectations into South Carolina insurance law."); Southern Land and Golf Co. Ltd. v. Harleystville Mut. Ins. Co., 2006 WL 2443340 \*8 (D.S.C.) ("The parties' mutual expectations of coverage are not a basis for estoppels ... South Carolina has not adopted the doctrine of 'reasonable expectations.'"); NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC, 2010 WL 146482 \*5 (D.S.C.) ("South Carolina does not follow the doctrine of reasonable expectations.").

The rejection of the doctrine of reasonable expectations is well-recognized in case law. In addition, as the Court of Appeals held, the rejection of the doctrine is in concert with the general rules of contract construction. Applying longstanding rules of contract construction interpretation, it is clear that Petitioner's expectation of coverage has no bearing on an otherwise unambiguous policy. The terms on the declaration page, "driver" and "household resident", are not ambiguous and therefore, the reasonable expectations doctrine would not help Petitioner even if it had not already been rejected in South Carolina. Petitioner's argument, therefore, is without merit and his Petition for Certiorari should be denied.

**II) PETITIONER DOES NOT QUALIFY AS AN INSURED FOR UNDERINSURED MOTORIST COVERAGE UNDER THE POLICY ISSUED BY PROGRESSIVE TO SARAH SEVERN WHEN HE WAS NOT A NAMED INSURED.**

Petitioner's entitlement to underinsured motorist ("UIM") coverage for the injuries he sustained in the accident of March 30, 2006, is dependent upon whether he qualifies as an "insured person" as defined in the policy set forth as follows:

## ADDITIONAL DEFINITIONS

When used in this Part III:

1. “**Insured person**” and “**insured persons**” mean:
  - a. **You** or a **relative**;
  - b. any person **occupying a covered vehicle**; and...
  
11. “**Relative**” means a person residing in the same household as **you**, and related to **you** by blood, marriage or adoption,  
...
  
14. “**You**” and “**Your**” mean:
  - a. a person or persons shown as a named insured on the **Declarations Page**; and
  - b. the spouse of a named insured if residing in the same household.

(R.pp.26, 32.)

The Court of Appeals correctly relied on Ex parte: United Services Automobile Association, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005), to hold that Petitioner’s status as per the declaration page is not dispositive of whether he is a named insured. The fact that Petitioner was listed as a “driver” and “household resident” on the declaration page does not make him the named insured such that he would be entitled to UIM coverage under the policy issued to Sarah Severn. According to United Services, the lack of a definition in the policy for “household resident” does not mean Petitioner qualifies as a named insured. As recognized by the Court of Appeals in its Order, United Services is squarely on point with this case. Specifically, UIM coverage is afforded to “insured persons” and the policy defines “insured persons” for purposes of UIM while occupying a non-owned auto as “**you** or a **relative**.” (R.p.32.) The policy further defines “**you**” as the person “shown as a named insured on the **Declarations Page**; and the spouse of a named insured if residing in the same household.” (R.p.26.) “**Relative**” is defined as “a person residing in the same household as **you**, and related to **you** by blood, marriage, or adoption.” (R.p.26.) Thus, the exact reasoning of United Services applies:

[E]ven though [“driver”] is not defined in the policy, the policy is not ambiguous. Where a term is not defined in a policy, it is to be defined according to the usual understanding of the term’s significance to the ordinary person ... [T]he policy defines “you” and “your” as “the ‘named insured’ shown in the declarations.” The only person listed in the “Named Insured” box on the declarations page was [Severn]. Thus, we see no ambiguity.

United Servs., 365 S.C. at 55-56, 614 S.E.2d at 654-55 (citations omitted and “driver” substituted for “operator” and “Severn” substituted for “Washnok”).

Considering the direct application of United Services to the instant case, Petitioner’s argument that the failure of the policy to define “household resident” renders it ambiguous is without merit<sup>4</sup>. Therefore, his Petition for Certiorari should be denied.

**III) PETITIONER DOES NOT QUALIFY AS AN INSURED FOR UNDERINSURED MOTORIST COVERAGE UNDER THE POLICY ISSUED BY PROGRESSIVE TO SARAH SEVERN WHEN HE WAS NOT THE SPOUSE OF SARAH SEVERN.**

The Court of Appeals also correctly held that Petitioner was not the common law husband of Sarah Severn and that cohabitation alone is insufficient to create a common law marriage. Petitioner argued for the first time in his Petition for Rehearing and argues again in his Petition for Certiorari that “the law should be changed when society changes the rules of how people decide to live together.” (Petition for Rehearing p.2.) This argument was not presented to or ruled upon by the trial court and, therefore, is not properly before this Court. See, Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 598 S.E.2d 712 (2004) (it is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court).

Although Petitioner cites various facts to support his claim he was the common law husband of Sarah Severn, such as bill payment, engagement proposals and the like, he fails to recognize that mere cohabitation does not entitle him to the same rights he would have were he

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<sup>4</sup> Because Petitioner’s ambiguity argument in Issue #5 of its Petition is fully addressed in both Petitioner’s Issue #2 and Progressive’s response thereto, Progressive will not separately address Issue #5.

actually married to Severn. Regardless of cultural trends and nontraditional lifestyle choices, the law does not recognize cohabitating individuals and married couples equally.

The recognition of marriage is a threshold determination in a variety of legal contexts. A court cannot address an alleged spouse's claim for property distribution in divorce or probate proceedings without first determining whether a marriage exists. Nor can the Workers' Compensation Commission or Social Security Administration address the substantive issues of awarding spousal benefits without a preliminary showing of marriage.

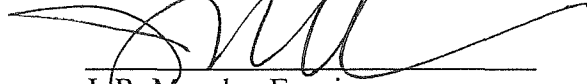
Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. Rev. 555 (2007). Therefore, limiting insurance coverage to the named insured, spouse, and resident relatives is entirely consistent both with modern law and with American citizens' expectations of coverage.

Further, as this Court has stated, "The difference between marriage and concubinage ... rests in the intent of the cohabiting parties; the physical and temporal accompaniments of the cohabitation may be the same in both cases, but the intent in the two cases is widely apart always." Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978). Indeed, the "accompaniments of the cohabitation" in this case – co-signing the apartment lease, payment of the bills by Petitioner, having a child together, etc. – look the same as in marriage. However, as this Court noted, intent is the key, and intent is precisely what the Court of Appeals found to be the determining factor in holding Petitioner was not the common law husband of Severn: "The only inference to be drawn ... is that the couple did not have a present **intent** to be married but instead a future intent to be married." Bell, Op. No. 2011-UP-242. Because there was not even a scintilla of evidence that Petitioner and Severn intended to be married and considering cohabitation alone is insufficient to create a common law marriage, Petitioner's Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, Progressive respectfully requests this Court deny  
Petitioner's Petition for Certiorari.

Respectfully Submitted,



J. R. Murphy, Esquire  
Ashley B. Stratton, Esquire  
MURPHY & GRANTLAND, P.A.  
4406-B Forest Drive  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorneys for Respondent

Columbia, South Carolina  
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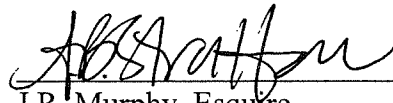
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**PROOF OF SESRVICE**

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I certify that I have served the Return to Petition for Writ of Certiorari on Petitioner, Joshua Bell, by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2011, addressed to his attorney of record, Gene M. Connell, Esquire, P.O. Drawer 14547, Surfside Beach, SC 29587.

Respectfully submitted,



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J.R. Murphy, Esquire  
Ashley B. Stratton, Esquire  
Murphy & Grantland, P.A.  
P.O. Box 6648  
Columbia, SC 29260  
(803) 782-4100  
Attorney for Respondent

Columbia, South Carolina