IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative of the Estate of Jennifer Knight Poole.....Defendants.

OPENING BRIEF

J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Plaintiff

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative
of the Estate of Jennifer Knight Poole.....Defendants.

OPENING BRIEF

J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This insurance coverage action raises the question of how punitive damages awarded in a tort case must be applied to an insurer's contractual obligations under a statutorily-permitted split-limits insurance contract. Because this is a novel question of law and neither this Court nor any other court appears to have addressed the issue, the District Court *sua sponte* certified the question to this Court.

GEICO issued a policy of insurance to Jack and Jennifer Poole providing UIM coverage. The Policy is a split-limits policy, providing one set of limits for damage for bodily injuries and a second, separate limit for damage for property damage. Plaintiffs sustained catastrophic bodily injuries in an accident involving an underinsured, drunk motorist. However, their property damage was minimal, consisting of clothing and a piece of jewelry with a total approximate value of $1,250. GEICO tendered its UIM bodily injury limits, but not the UIM property damage limits.

The parties agree the potential un-apportioned punitive damages in a claim against the at-fault motorist would exceed any available policy limits. However, the parties also agree that, if a punitive damages award must be allocated proportionally based upon the amount of actual property damage and the amount of actual bodily injuries, then the punitive damages apportioned to property damages would never reach GEICO's UIM property damage coverage. Therefore, the certified question is placed squarely before the Court.

When a punitive damages award is applied to insurance coverage in a split-limits policy, the award must be allocated between bodily injury and property damages. As an initial matter, allocation comports with the statutory language defining "damages" to include actual and punitive damages and mandating minimum limits policies that provide one amount of coverage for damages "because of bodily injury" and a separate amount of coverage for damages "because of injury to

or destruction of property." S.C. Code Ann. § 38-77-140. Therefore, allocation comports not only with the Policy's structure of providing separate limits for bodily injury and property damage, but allocation also comports with the statutory insurance scheme on which the Policy is based.

Allocation is also necessary as a means of preventing an unconstitutional award of punitive damages. This Court and the United States Supreme Court have held that an award of punitive damages must bear a certain relationship with the amount of harm caused by the defendant. In other words, punitive damages must not be excessive in light of the amount of actual damages. This case serves as a perfect example. With actual property damages of only $1,250, a punitive damages award based upon the property damages would have to exceed thirty-nine times the actual property damages before reaching any of GEICO's UIM property damage coverage.[1] To reach the entire UIM property damage limits, the punitive damages award would have to be nearly eighty times the actual property damages. Such an award would not withstand constitutional scrutiny.

Lastly, allocation is required as a matter of public policy. Failure to allocate a punitive damages award would improperly convert a split-limits policy into a combined single limits policy, changing the contractual agreement between the parties. This effective reformation of the split-limits policy would result in substantially higher payouts on property damage claims and, in turn, higher premiums for drivers throughout the State of South Carolina. Put simply, allocation is necessary to remain true to the plain terms of the insurance policy and the South Carolina insurance statute.

[1] The liability carrier for the at-fault motorist carried $25,000 in liability property damage coverage, and the vehicle occupied by the Pooles at the time of the accident was insured by another insurer with $25,000 in UIM property damage coverage.

CERTIFIED QUESTION

Under South Carolina law, when an insured seeks coverage under an automobile insurance policy, must punitive damages be apportioned pro rata between those sustained for bodily injury and those sustained for property damage where the insurance policy is a split limits policy?

STATEMENT OF THE CASE

Government Employees Insurance Company (GEICO) issued an automobile insurance policy to Jack A. Poole and Jennifer Knight Poole providing liability and underinsured motorist (UIM) coverage (hereinafter "Policy").[2] (Stipulation, p. 1). The Policy includes separate limits depending on if damages result from bodily injury or if damages result from injury to or loss of property. This sort of coverage is typically referred to as a "split-limits" policy, and it is expressly authorized by South Carolina's insurance statutes. *See* S.C. Code Ann. § 38-77-140. The Policy provided UIM limits of $100,000 per person and $300,000 per accident for bodily injuries and $50,000 per accident for property damage. (Stipulation, p. 1).

On July 10, 2015, Jack Poole was operating a vehicle owned by Jennifer Poole's mother, Doris Knight with Jennifer Poole as a passenger when a vehicle operated by a drunk driver crossed the center line, causing a collision. (Stipulation, pp. 1-2). Jack sustained serious injuries in the accident, and Jennifer sustained catastrophic injuries that resulted in her death several days later.

In contrast to the catastrophic bodily injuries, the accident caused minimal property damage. Jack and Jennifer did not own the vehicle. Their only property damage was a pair of overalls, a pair of work boots, and a ring. (Dep. of Jack Poole, 31:16-33:19). The total value of these three items was, at most, $1,250. (Dep. of Jack Poole, 32:17-33:9).

---

[2] On September 16, 2016, the parties entered into a Stipulation and Agreement ("Stipulation"). This Statement of the Case comes from the Stipulation.

The liability carrier for the at-fault motorist's vehicle tendered its liability limits. Farm Bureau issued a policy insuring Doris Knight's vehicle for UIM coverage in the amount of $25,000 per person for bodily injury and $25,000 per person for property damage. Farm Bureau tendered its UIM bodily injury limits – $25,000 to Jack individually and $25,000 to Jack as the personal representative of Jennifer's estate. GEICO then tendered the UIM bodily injury limits in the amount of $100,000 to Jack, individually, and another $100,000 to Jack as the personal representative of Jennifer's estate.

The issue in this case involves whether GEICO owes anything under the UIM property damage coverage. The parties agree that a punitive damages award in this case would exceed all of the available limits of UIM coverage. (Stipulation, p. 2). However, the parties also agree that, if a punitive damages award must be allocated on a pro rata basis between the amount of actual damages for bodily injury and actual damages for property damage, then the Pooles will not be entitled to any UIM property damage coverage from GEICO. This is because the property damages in this case are minimal while the bodily injuries are substantial.

Both parties filed cross-motions for summary judgment before the District Court. The District Court granted GEICO's motion in part and denied the Pooles' motion in part on a stacking question that is not before this Court. Then, finding no controlling case law on the apportionment question, the District Court certified the issue to this Court.

ARGUMENT

Despite the fact that the Pooles sustained very minimal property damage – the loss of a set of clothing and one piece of jewelry – they seek recovery of the full $50,000 limits of UIM property damage coverage because of the threat of a punitive damages award against the at-fault driver. The Pooles' GEICO Policy is a split-limits policy. It provides $100,000 per person for damages

resulting from bodily injury and $50,000 per accident for damages resulting from property damage. (Ex. A, Policy Excerpts, p. 7). The Declarations Page shows separate premiums charged for bodily injury and property damages. (*Id.*). However, the Pooles seek to use the threat of a punitive damages award to convert GEICO's split-limits policy into a combined single limits policy.

Any award of punitive damages must be allocated for three reasons: (1) South Carolina's statutory scheme specifically allows split-limits policies, and the GEICO Policy requires that any damages awarded must be applied to either bodily injury or property damages; (2) Constitutional due process limitations would prevent a punitive damages award solely based on the amount of the property damages that would ever reach the UIM property damage limits in this case; and (3) Public policy requires allocation of punitive damages to prevent an unnecessary increase in insurance premiums in the State of South Carolina and an impermissible rewriting of the insurance contract.

Allocation of punitive damages is a predictable, mathematical approach that allows claimants and insurers to evaluate a case. Property damages are generally easily calculated. A jury cannot award pain and suffering for property damages, and a jury is not allowed to guess at the value of property damages.[3] Therefore, there will generally be testimony or evidence in the record on which either the trial court or a subsequent court in a declaratory judgment action can easily determine the amount of property damages that were presented at trial. Any damages awarded that are not "property damage" will be damages because of bodily injuries.

---

[3] *Henry v. Southern Ry. Co.*, 93 S.C. 125, 75 S.E. 1018 (1912) (holding that mental anguish cannot be recovered in the absence of bodily injury); *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

No one would question whether a verdict for actual damages would have to be allocated under an insurance policy that provides separate bodily injury and property damage limits. If a plaintiff presented evidence at trial of both property damage and bodily injuries, then the actual damages would have to be allocated to determine what portion of the verdict fell within the policy's bodily injury limits and what portion fell within the policy's property damage limits. Once a verdict is reached for actual and punitive damages, allocating the punitive damages award is just as easy. The punitive award is distributed in proportion to the actual bodily injury damages and the actual property damages.[4]

Pro rata allocation is a predictable, simple approach that can be applied by the either the trial court or a court sitting in a declaratory judgment action with very limited analysis. Moreover, the calculation can be performed without delving into the jury's thoughts. Most importantly, the pro rata allocation stays true to the terms of the insurance policy and South Carolina law.

I. Insurance coverage for punitive damages is a statutory creation, and the coverage must be applied according to the statutory scheme.

Uninsured (UM) and UIM coverage are statutory creations. *See Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964) ("Uninsured motorist insurance is of recent origin. It is a new type of automobile insurance which came into being by legislative enactment . . . ."). Originally, South Carolina's insurance statutes did not require coverage for punitive damages. *Id.* Like the current version of the statute, the version of the statute at issue in *Laird* required insurers to provide UM coverage to pay insureds "all sums which he shall be legally entitled to recover as

[4] The pro rata approach requires multiplying the punitive damages award based on the proportion of bodily injury or property damages to the overall actual damages verdict. For example, if a jury awards $5,000 for property damages, $495,000 for bodily injury and $100,000 in punitive damages, the punitive damages award would be split between the policy's bodily injury and property damages limits in the amount of $99,000 to the bodily injury claim and $1,000 to the property damage claim. ((5,000/500,000) x 100,000 = 1,000).

damages from the owner or operator of an uninsured motor vehicle." *Id.* at 393, 134 S.E.2d at 208 (quoting S.C. Code 46-750.13). After the Supreme Court's holding in *Laird*, the General Assembly amended the statutory definition of the word "damages" to include "actual and punitive damages." S.C. Code § 38-77-30(4); *See also State Farm Mut. Auto. Ins. Co. v. Daughdrill*, 769 F.2d 1070 (5th Cir. 1985) (discussing legislative history and holding that the South Carolina legislature, not the courts, broadened the language). Therefore, the requirement that an automobile insurance policy provide coverage for punitive damages is grounded in the language of the statute.

The Policy's split-limit coverage conforms to the plain language of South Carolina's insurance statute, which mandates policies with minimum amounts of liability coverage of at least $25,000 per person and $50,000 per accident for bodily injury, and $25,000 per accident for property damage. S.C. Code Ann. § 38-77-140. Therefore, the Policy follows the approach allowed by the statute of splitting limits between damages for bodily injuries and damages for property damage.

The fact that the policy is a split-limits policy is undisputed. Moreover, the fact that South Carolina law permits split-limits policies is unassailable. Coverage for punitive damages must be applied in accordance with a statutory scheme that expressly allows split-limits policies. There is only one way to do so: Any award of punitive damages must be allocated according to the actual bodily injury and property damages. A reading of both the insurance statute and the policy support this conclusion.

South Carolina Code Section 38-77-30(4) defines the term "damages" to include "actual and punitive damages." This statutory definition must be read into the statutes when the General Assembly uses the word "damages." Therefore, the minimum limits statute provides in pertinent part:

> (A) An automobile insurance policy may not be issued or delivered in this State . . . unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for [***actual and punitive damages***] . . . as follows:
> (1) twenty-five thousand dollars ***because of bodily injury*** to one person in any one accident and, subject to the limit for one person;
> (2) fifty thousand dollars ***because of bodily injury*** to two or more persons in any one accident; and
> (3) twenty-five thousand dollars ***because of injury to or destruction of property*** in any one accident . . . .

S.C. Code Ann. § 38-77-140 (emphasis added). Reading the statute to include the definition of "damages" – as it must be read – South Carolina requires an automobile liability policy to provide at least $25,000 per person limits for actual and punitive damages awarded because of bodily injury and $25,00 for actual and punitive damages awarded because of property damage. The statute expressly permits – and assumes – the policy will have separate limits for these two types of "damages."

The statutory definition of "damages" also must be read into the term "damages" in the Policy. *See Laird*, 243 S.C. at 395, 134 S.E.2d at 209 ("Under our law, all statutes relating to the insurance contract are parts of the contract.") (citation omitted). When that is done, the Policy generally follows the statutory language:

> Under this Coverage we will pay [actual and punitive damages] for ***bodily injury*** and ***property damage*** caused by an accident . . . .

(Policy Excerpts, p. 40). The policy Declarations Page states the limits of coverage are $100,00/$300,00 for "Underinsured Motorist Bodily Injury Each Person/Each Occurrence" and $50,000 for "Property Damage." (Policy Excerpts, p. 7). Therefore, GEICO agrees to "pay [actual and punitive damages]" in the amount of $100,000 "for bodily injury." Likewise, GEICO agrees to "pay [actual and punitive damages]" in the amount of $50,000 "for . . . property damage." The contract comports with and follows the structure established by the General Assembly.

South Carolina's insurance statute expressly permits split-limits policies. Therefore, when the statute requires that the term "damages" be construed to include punitive damages, that statutory requirement must be read in context. To do so, awards of punitive damages must be properly applied in the split-limits context. The only way to do so while staying true to the terms of the policy is to allocate punitive damages awards proportionally based on the underlying damages.

II. Apportionment of a punitive damages award on a pro rata basis is necessary to faithfully apply the terms of the insurance contract.

The problem in this case arises when the tort award of actual and punitive damages runs against the contractual limitations of the policy. In tort law, damages do not have to be allocated between bodily injury and property damage. The two compose one cause of action. *See e.g.*, *Holcombe v. Garland & Denwiddie*, 162 S.C. 379, 160 S.E. 881 (1931) (holding that a single wrongful or negligent act that injures both a person and his property gives rise to a single cause of action). However, an action for recovery of UIM benefits is one in contract, not tort. *See e.g.*, *Laird*, 243 S.C. at 394, 134 S.E.2d at 209 (holding that an action to recover under UM benefits is on *ex contractu* and that policy defenses may be raised by the insurance company). Although an insured may obtain a tort-judgment against the at-fault motorist that does not allocate punitive damages – or even actual damages – between property damage and bodily injury, the obligations of the insurer are governed by the contract, not tort. Here, as is typical in automobile insurance policies issued in South Carolina, the policy has separate limits for damages resulting from bodily injury and damages resulting from property damage. Therefore, to recover under the policy, the insured must show what portion of the damages award falls within the policy's terms, i.e., what

portion of the punitive damages award is for bodily injuries and what portion is for property damage.[5]

Likewise, in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), this Court addressed the problem of general damages verdicts that undoubtedly consist of both covered and non-covered damages. In *Crossman*, damages occurred over multiple years, but the insurance policy at issue only provided coverage for damages that occurred during its policy period. Therefore, some of the damages were not covered under the policy. The insured sought to apply the entire general verdict to a single policy because the verdict did not allocate between damages that took place during the policy period and damages that did not. However, this Court rejected this approach, and instead, held the general verdict had to be allocated based on the time during which the damages took place, assigning "each triggered insurer a pro rata portion of the loss based on the insurer's time on the risk." *Id.* at 63, 395 S.C. at 601. In reaching its conclusion, this Court emphasized the importance of giving effect to the language of the insuring agreement. *Id.* at 61, 717 S.E.2d at 601 (adopting the "interpretation that give[s] effect to each part of the insuring agreement rather than focusing solely on" specific terms).

The same rule applies here. Damages in excess of the policy limits are not covered under the plain terms of the policy. Therefore, an award of damages (actual and punitive) for bodily injury is only covered up to the bodily injury policy limits. Likewise, an award of damages (actual

[5] Here, the parties have already stipulated that the Defendants will not recover any UIM coverage under the property damage limits if punitive damages must be allocated between bodily injury and property damages. (ECF No. 11, p. 4) ("Moreover, should it be judicially declared that punitive damages are to be allocated on a pro rata basis between the amount of actual damages for bodily injury and property damage, then GEICO will not pay any property damage underinsured motorist coverage to the Defendant.").

and punitive) for property damage is only covered up to the property damage policy limits. Therefore, either the jury in the underlying action or the court in the subsequent coverage action must allocate a general award of punitive damages between the underlying bodily injury and property damages – just as it would do on a general verdict for actual damages where the plaintiff presented evidence of property damage and evidence of bodily injury damages.

In addition to comporting with the terms of the insurance policy, a pro rata allocation method is also similar to the time-on-the-risk approach adopted by this Court in *Crossman Communities* in another sense: it is an appropriate default rule. In *Crossman Communities*, this Court acknowledged that its formula "was not a perfect estimate of the loss attributable to each insurer's time on the risk. Rather, it is a *default rule* that assumes the damage occurred in equal portions during each year that it progressed." *Id.* at 65, 717 S.E.2d at 602 (emphasis in original). Here, apportionment most likely falls in the insured's favor. In those cases where a jury awards punitive damages based solely on property damages, that award is likely to be much lower than in cases where a person has catastrophic bodily injuries. Therefore, if anything, an allocation based upon the actual bodily injury damages and actual property damages ***favors*** the insured, but nonetheless serves as an appropriate default rule.

The pro rata allocation is also similar to the time-on-the-risk approach adopted by this Court in *Crossman Communities* because it is a simple mathematical formula. In the time-on-the-risk approach, "[t]he basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed." *Id.* The resulting fraction is then multiplied by the total damages awarded against the policyholder for the progressive injury. *Id.* Likewise here, the formula consists of a numerator representing the amount of property damages presented to the jury and a denominator

representing the total damages awarded. That fraction is then multiplied by the amount of punitive damages, resulting in the total amount of punitive damages that would be allocated to property damage coverage. For example, suppose the following hypothetical. A plaintiff presents evidence at trial of property damage totaling $10,000 and a jury awards a total judgment for actual damages against the at-fault motorist of $1,000,000. The jury also awards punitive damages in the amount of an additional $500,000. Following the allocation formula, the property damages constitute 1% of the overall actual damages, leaving the remaining 99% allocated to bodily injury damages.[6] Therefore, $5,000 of the punitive damages award would be applied to property damage limits and the remaining $495,000 of punitive damages would be applied to the bodily injury limits.

In contrast to allocation, the Pooles would have an insurance company pay the full amount of punitive damages under the property damage limit despite the fact that they suffered almost no property damage. Taken to its logical conclusion, the Pooles' contention would require an insurance company to pay its full property damage policy limits in a case with significant punitive damages even when the claimant sustains no property damage at all. Such a result would eviscerate the split limits nature of the policy. The Supreme Court of Mississippi rejected such an outcome in *Old Security Casualty Insurance Company v. Clemmer*, 455 So.2d 781 (Miss. 1984). In *Clemmer*, a husband was following his wife in a separate car when the car driven by the wife was sideswiped by another driver. The husband was not injured in the accident, but he owned the car his wife was operating. Therefore, he and his wife filed an action against the at-fault driver in which his wife sought recovery for her bodily injuries and the husband sought recovery for

[6] Because a jury cannot award pain and suffering for property damages, it will be easy to determine from the trial transcript what amount of property damages were presented to the jury. In cases where there is no special verdict form separating property damages and bodily injury damages, the court can presume that the jury awarded all of the property damages presented at trial.

property damage. The jury awarded the wife $20,000 in compensatory damages and $10,000 to the husband for property damage. The jury also awarded a collective punitive damages award to both the husband and wife in the amount of $50,000. *Id.* at 781-82.

The carrier provided liability limits of $10,000 per person and $20,000 per accident for bodily injuries and $5,000 per accident for property damage. The husband argued he should recover the second $10,000 per person limits under the bodily injury portion of the policy because of the punitive damages award. *Id.* at 782. The trial court agreed and ordered the insurer to pay the full combined limits of $20,000 for bodily injuries and $5,000 for property damage. On appeal, the Supreme Court reversed, holding "the extent or limit of that liability for punitive damages is governed by the agreement of the parties as reflected by the actual language in the policy of insurance." *Id.* at 783. Because the policy language relating to the per occurrence bodily injury limits addressed damages "because of bodily injury," the award of punitive damages on the husband's property damage claim did not entitle him to collect under the bodily injury limits. *Id.*

If an insurer must pay for punitive damages, it is because the punitive damages are damages "because of" bodily injury or property damages. Therefore, punitive damages awards must be allocated between the "bodily injury" or "property damages" that give rise to the punitive awards. As the Supreme Court of Mississippi held in *Clemmer*, an award of punitive damages cannot be applied to the insurance policy's coverage without consideration of the underlying damages that give rise to and justify the punitive award. The only way to comport with this rule when a claim involves both bodily injury and property damage is to allocate the punitive award accordingly.

III. Failure to allocate punitive damages would result in requiring a UIM insurer to pay for damages that would not withstand scrutiny under the constitution.

Where a state requires insurance companies to insure against punitive damages and also provides for split-limit policies, punitive damages must be allocated between bodily injury

damages and property damages to ensure compliance with federal and state due process limitations. The United States Supreme Court has recognized the need to place certain restrictions on punitive damage awards so they conform to the procedural and constitutional limitations of the Due Process Clause of the Fourteenth Amendment. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limits on these awards.... To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."). In light of this fact, the Supreme Court in *BMW of North America, Inc. v. Gore* set forth three guideposts for courts to consider when reviewing punitive damage awards. 517 U.S. 559, 574-584 (1996). One such guidepost – which is critical in this case – is the ratio of the punitive damage award to the compensatory damage award. *Id.* at 580. This Court has also held that court must "consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

In *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991), the Supreme Court held that a punitive damage award of "more than 4 times the amount of the compensatory damages" might be "close to the line" of constitutional impropriety. In *Campbell*, the Supreme Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. 408, 425 (2003). Both the Supreme Court of the United States and this Court have also observed that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." *Mitchell*, 385 S.C. at 592, 686 S.E.2d at 187 (quoting *Campbell*, 538 U.S. at 425).

In the context of a statutorily authorized split-limits insurance policy, there can be no meaningful court review of the ratio of punitive damages to compensatory damages without allocating which punitive damages are "because of bodily injury" and which punitive damages are because of "property damage." *See Carroway v. Johnson*, 245 S.C. 200, 205, 139 S.E.2d 908, 910 (1965) (punitive damages were "because of bodily injury" within the meaning of the policy). The facts of this case provide a perfect example. Here, the bodily injury damages greatly exceed the combined limits of the at-fault driver's liability limits and GEICO's UIM limits for bodily injury coverage. In contrast, the property damages are minimal and would not even exceed the at-fault motorist's $25,000 in liability limits. Therefore, constitutional limitations under *Campbell* and *Haslip* would permit drastically different punitive damages awards based on damages "because of property damage" and damages "because of bodily injury." The bodily injury damages would justify a very large punitive damages award. In contrast, the property damages would only justify a relatively small punitive damages award. Assuming the award could not generally exceed ten times the claimants' actual property damages, a punitive damages award based solely on the property damages in this case would not exceed $13,750 – far less than the minimum liability limits of $25,000.[7]

Allocation based upon the actual bodily injury and actual property damages solves the problem of an improper ratio between actual and punitive damages. Because punitive damages are allocated proportionally based upon actual damages, any punitive damages award that

[7] Jack Poole testified he lost a pair of overalls, a pair of work boots, and his wife's ring in the accident. (Ex. C, Excerpts of Dep. of Jack Poole, 31:16-33:9). He estimated the combined value of these three items to be $1,250. Thus, then ten-to-one award for punitive damages would be no more than $12,500. ($1,250 time 10 = $12,500). Therefore, to ensure a constitutionally valid award, GEICO's maximum property damage exposure should be limited to $13,750.00, which is far less than the limits demanded by the Pooles. ($1,250 in compensatory and $12,500 in punitive).

withstands constitutional scrutiny in its entirety (based upon the combined property and bodily injury damages) will likewise withstand constitutional scrutiny when applied individually to property damage limits or bodily injury limits. Therefore, allocation serves as an appropriate safeguard against an unconstitutionally high punitive damages award.

If GEICO is required to pay for an award of punitive damages, then those payments must comport with the structure of the policy and the constitutional limitations. GEICO did not commit the wrongful conduct giving rise to the punitive damages award. It would seem an odd perversion of justice if constitutional limitations would prevent the at-fault driver from being required to pay more than ten times the amount of property damages he caused, but not extend the same basic protections to the company that is being forced to pay for another's misconduct. Therefore, constitutional limitations confirm that any award of punitive damages must be allocated between an award of actual damages for bodily injury and property damages.[8]

IV. Public policy requires allocation because failure to allocate would improperly convert split-limits policies into combined single limit policies resulting in a rewriting of the insurance contract and increased insurance premiums for South Carolina motorists.

Although the Pooles suffered minimal property damage in the accident, they demand the full limits of the GEICO property damage UIM coverage because of the potential punitive damages exposure. Demands like this have become increasingly common in South Carolina over the past

[8] The parties have already stipulated that the Pooles will not recover any UIM coverage under the property damage limits if punitive damages must be allocated between bodily injury and property damages. (ECF No. 11, p. 4). The at-fault motorist's insurance provided for liability property damage limits of $25,000 and Doris Knight's policy provided UIM property damage policy limits of $25,000. (*Id.*). Therefore, the property damages in this case – actual and punitive – would have to exceed $50,000 before any of GEICO's coverage would apply. With actual property damages of $1,250, this would require a punitive damages award exceeding thirty-nine times the actual property damages before GEICO would owe any UIM property damage coverage.

several years. As discussed above, South Carolina not only permits coverage for punitive damages but mandates such coverage up to the minimum limits. *See* S.C. Code §§ 38-77-30(4), 38-77-140(A). However, South Carolina also expressly permits split-limits policies, and it does not require a separate limit for punitive damages awards. Therefore, the punitive damages must fit into the statutorily-permitted split-limits policies. No South Carolina appellate court has addressed how a punitive damage award that encompasses claims for both bodily injury and property damage should be allocated under a split-limits policy.[9] This issue has significant impact on the insurance market in South Carolina.

A. Failure to allocate damages will increase liability, UM, and UIM property damage premiums for South Carolina insureds.

In effect, claimants are utilizing the threat of punitive damages in an attempt to convert a split-limits policy into a combined single limits policy. However, the Policy provides separate limits and premiums for these distinct types of damages. In fact, when an insurer seeks rate approvals from the South Carolina Department of Insurance, the Department of Insurance approves separate rates for bodily injury liability coverage and property damage liability limits. *See e.g.*, S.C. Dep't of Ins. Bulletin 2013-02 (Requiring insurers to submit sample rate information to the Department of Insurance, including "For the personal auto sample rates, . . . bodily injury (BI), property damage (PD), uninsured motorist bodily injury (UMBIA) and uninsured motorist

[9] The United States District Court for the District of South Carolina rejected an insurer's request to allocate a punitive damages award in *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F. Supp. 931 (D.S.C. 1971). The *Hamilton* decision has not been cited by any other court on the issue of punitive damages since it was entered over forty-five years ago. More importantly, the District Court in *Hamilton* did not address the constitutional due process limitations on punitive damages awards or the fact that South Carolina allows split-limit policies by statute. In fact, the United States Supreme Court decisions in *BMW*, *Campbell*, and *Haslip* did not exist when the District Court reached its decision in *Hamilton*. The District Court in *Hamilton* did not rely on any case law or other authority in reaching its decision. Because the law surrounding punitive damages awards and the requirement that damages be allocated according to what is covered under a policy have developed since the District Court's holding in *Hamilton*, that case is not persuasive here.

property damage (UMPD) coverages."). Therefore, property damage liability and bodily injury liability are treated differently at every level, from regulatory approval of rates to the adjustment of a claim.

Notably, in the UIM context, property damage premiums are significantly lower than bodily injury premiums because it is rare for an insured to sustain property damages that exceeds the mandatory minimum liability limits of $25,000. For example, in the GEICO Policy the UIM bodily injury coverage with limits of $100,000 per person and $300,00 per accident cost $58.40 for one vehicle and $86.40 for the other vehicle. In contrast, the UIM limit for damages because of property damage was only $2.00 per vehicle – less than 4% of the bodily injury premiums.

Failure to protect this distinction will ultimately result in higher insurance premiums. Insurers will be forced to include the higher punitive damages payouts in the actuarial data for property damage losses. As a result, forcing insurers to pay awards under the property damage limits for punitive damages awards that can only be supported by the bodily injuries in a case will raise the costs of property damage coverage in South Carolina, affecting insureds throughout the State.

B. Failure to allocate punitive damages works an impermissible rewriting of the terms of the insurance contract.

Failure to allocate punitive damages awards also works to rewrite the policy – something this Court has held is prohibitted: "Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citation omitted). Mandating punitive damage coverage but failing to allocate based on the amount of actual damages for bodily injury and property damage with a split-limits policy rewrites the policy to provide broader coverage than the parties have agreed to. When the parties

contract for a split-limits policy, they contract for separate limits of coverage for bodily injury and property damage.

Alternatively, the parties could contract for a combined single limit policy where there is one single limit, which is the maximum amount the insurer will pay for all claims resulting from one accident.[10] A combined single limit policy is normally more expensive for the consumer because the insurer carries a higher risk that it will be required to pay out its entire limits. For example, if the insurer provides combined single limits of $75,000 per accident, it may be required to pay its full limits in an accident with no property damages if the bodily injury damages equal or exceed $75,000. Likewise, the insurer may have to pay its full limits if the property damages equal or exceed $75,000 even if no one was injured in the accident. In contrast, in a split-limits policy, carrier will only have to pay its combined $75,000 limits if there are at least two individuals who each sustain at least $25,000 in bodily injuries and there is property damage of at least $25,000. Therefore, the likelihood of an insurer having to pay its full $75,000 limits in a combined single limits policy is much higher and results in a higher corresponding premium.

Failure to allocate punitive damages gives the insured the benefit of a combined single limit policy where the parties only contracted for a split-limit policy – an impermissible rewriting of the policy.

C. Where a state requires punitive damage coverage, its failure to allocate will place an undue burden on the parties to an insurance contract.

The Supreme Court has recognized that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that

[10] Policy limits may be stated as a "combined single limit for all injuries and property damage occurring in a single 'accident.'" 1 Auto. Liability Ins. 4th § 2:19 Bodily injury liability limits—Damages recoverable; "per person" and "per accident"—Single or multiple accidents (2016).

will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574; *see Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (recognizing that punitive damages are penal in nature and imposed as a punishment and deterrence). In the instance of UIM coverage, the company paying for the bad actor's conduct does not represent the bad actor and did not contract with the bad actor, so there is no deterrent effect and there is a heightened need to receive fair notice of the penalty a state may impose.[11] *See Roman v. Terrell*, 195 Ga. App. 219, 222, 393 S.E.2d 83, 86 (1990) (quoting *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 362 (Me. 1982) ("[a]llowing punitive damages to be awarded against an insurance company can serve no deterrent function because the wrongdoer is not the person paying the damages.... In actual fact, of course, ... the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the [tortfeasor].").

Requiring punitive damages coverage without providing for allocation prevents the parties to an insurance contract from effectively ordering their behavior and effectively contracting. *See Haslip*, 499 U.S. at 59 ("Indeed, the point of due process – of the law in general – is to allow citizens to order their behavior."). Insurance, as an industry, works based on its ability to predict how often and how much the insurer is going to have to pay out to those covered by its policies.[12]

---

[11] GEICO does not suggest that the requirement of allocating a punitive damages award should only be applied in the UM or UIM context. The same allocation is required under the liability portion of a split-limits policy.

[12] *See* South Carolina Department of Insurance, Property & Casualty, http://www.doi.sc.gov/432/Property-Casualty (last visited March 15, 2017) (requiring auto insurers to submit actuarial exhibits with their rate filings). Regina Austin, The Insurance Classification Controversy, 131 U. Pa. L. Rev. 517, 519 (1983) ("Insurance is sold by corporate concerns that claim to employ statistical techniques by which they turn the risk of individually unpredictable events into fixed premiums...").

There is an inherent unease between this business model and "the stark unpredictability of punitive awards." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499, 128 S. Ct. 2605, 2625 (2008) ("the spread is great [between high and low individual punitive damage awards], and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories"). But a court's failure to allocate punitive damages based upon actual bodily injury damages and property damages greatly exacerbates this unpredictability.

The basic unfairness of this uncertainty is multiplied by South Carolina's *Tyger River* doctrine in the context of liability insurance. Under the *Tyger River* doctrine, liability insurers may be liable to their insureds for the full amount of any excess verdict where they have unreasonably refused a plaintiff's demand within the policy limits. *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Uncertainty as to whether a potential punitive damages award will be allocated between bodily injury and property damages for purposes of the insurance contract allows plaintiffs to use the threat of an excess judgment to force insurers to pay property damage limits for cases with little or no property damage.

In cases like the one here with serious bodily injuries and the potential for large punitive damages, claimants often condition their demands on a combined payout of both bodily injury and property damage limits. Even though the actual property damages are miniscule, the claimants argue that the bodily injuries will support a massive punitive damages award. Even though the carrier tenders its bodily injury limits, claimants will reject the tender unless the carrier also tenders its property damage limits. Therefore, the insurer is forced to either offer all of its limits – including its property damage limits – or risk being proved wrong after the fact and facing a judgment that far exceeds its combined policy limits. The judgment would exceed the policy limits because of the extent of the bodily injuries – the limits of which the carrier already offered – not

the property damages. Nonetheless, the risk to the insurer of being proved wrong and subjecting its insured to an excess judgment is paralyzing.

The combination of the *Tyger River* doctrine and uncertainty in this area means the insurance company will always have to pay full property damage policy limits even in those cases with miniscule property damages. Otherwise, the company risks an excess-verdict. This interferes with the parties' contractual expectations. Moreover, because a large punitive damages award would not withstand constitutional scrutiny if the only damages in the case were the miniscule property damages, the insurer is being forced to tender property damage payments that far exceed what is actually owed. Allocation of a punitive damages award is the simple answer to all of these problems, and more importantly it is the only approach that comports with both the split-limits nature of the policy and the language of the South Carolina insurance statutes.

CONCLUSION

For the above-stated reasons, this Court should answer "Yes" to the certified question. The Policy itself provides separate limits for damages due to bodily injury and damages due to property damage. The insurance statutes specifically permit split-limits policies, and allocation of a punitive damages award comports with the statutory scheme. Furthermore, allocation is the only means of ensuring that an insurer's obligations to pay a punitive damages award comport with constitutional due process limitations on the ratio between actual damages and punitive damages.

Allocation is also necessary to protect the contractual agreement between the parties. When an insured chooses a split-limits policy, the insured receives the benefit of a lower premium. Failure to allocate converts the policy into a more expensive combined single limits policy. If punitive damages are not allocated, then the cost of insurance policies for South Carolina insureds will increase.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

J.R. Murphy, Esquire
S.C. Bar # 7941
Wesley B. Sawyer, Esquire
S.C. Bar # 100229
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

Columbia, South Carolina
October 9, 2017

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative of the Estate of Jennifer Knight Poole.....Defendants.

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Plaintiff, certify that the Plaintiff's Opening Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Plaintiff

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative of the Estate of Jennifer Knight Poole.....Defendants.

PROOF OF SERVICE

I certify that I have served the Opening Brief on Jack A. Poole, Individually and as Personal Representative of the Estate of Jennifer Knight Poole by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2017 2003, addressed to his attorney of record, A. Christy Tyner, Esquire and Ronald A. Maxwell, Esquire, Maxwell Law Firm, P.C., Post Office Box 1115, Aiken, SC 29802.

J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Plaintiff