

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

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S.C. SUPREME COURT

Government Employees Insurance Company Plaintiff,

v.

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

BRIEF OF *AMICUS CURIAE*
THE SOUTH CAROLINA ASSOCIATION FOR JUSTICE

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INTRODUCTION

GEICO asks the Court to adopt an entirely new procedure to allocate punitive damage awards between bodily injury damages and property damages, the direct effect of which will be to reduce GEICO's obligation to satisfy punitive damages awards fully despite the fact that it writes insurance coverage that the Legislature clearly requires to cover all punitive damages arising out of bodily injuries and property damage. GEICO's proposal is not based upon any legislative framework but is a matter of its own creation, designed to promote GEICO's interests at the expense of the interests of others. If adopted, this procedure would not only impair litigants' substantive rights with regard to punitive damage awards but would also add to the burden of courts and parties via additional litigation, costs, and delays.

The Court should decline GEICO's invitation to create this new scheme. It should answer the certified question "no".

ARGUMENT

I. ALLOCATION OF PUNITIVE DAMAGES IS CONTRARY TO THE LEGISLATIVE INTENT BEHIND MANDATORY AUTOMOBILE INSURANCE AND VIOLATES THE PURPOSES OF PUNITIVE DAMAGES.

The South Carolina General Assembly expressly intended for insureds to obtain coverage for punitive damages arising out of collisions that cause property damage. GEICO's approach is inconsistent with that legislative intent and would deprive insureds of the coverage they purchased and are guaranteed by statute.

The Legislature mandates that insurers pay punitive damages arising out of collisions that cause property damage. *See* S.C. Code Ann. § 38-77-140(A) (Supp. 2010) (every automobile insurance policy must "contain[] a provision insuring the persons defined as insured against loss from the liability imposed by law for *damages* arising out of the ownership, maintenance, or use

of these motor vehicles” (emphasis added)); S.C. Code Ann. § 38-77-30(4) (2002) (“‘Damages’ includes both actual and punitive damages.”).¹ “The clear legislative indication is that all ‘damages,’ including actual and punitive damages, are recoverable under the pertinent insurance provisions.” *O’Neill v. Smith*, 388 S.C. 246, 251, 695 S.E.2d 531, 533 (2010). GEICO seeks to evade paying coverage required by the Legislature.

“[T]he stated purpose of the chapter on automobile insurance in Title 38 was to implement a complete reform of automobile insurance in order to, among other things, ... prevent the evasion of coverage provided for by that chapter.” *Williams v. Gov’t Emps. Ins. Co.*, 409 S.C. 586, 599, 762 S.E.2d 705, 712 (2014) (citing S.C. Code Ann. § 38-77-10 (2002)). Not only does the Legislature require minimum coverage limits, it also mandates that a liability insurance policy covering bodily injury or property damages, whatever its limits, cannot be limited or reduced by an insurer. See S.C. Code Ann. § 38-77-142(C) (2002) (“Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void.”); *Williams*, 409 S.C. at 604, 762 S.E.2d at 715 (“[O]nce the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage. Any other interpretation of section 38-77-142(C) would render the section useless, and the General Assembly is presumed not to perform useless acts.”).

Similarly, “[t]he purpose of the Motor Vehicle Financial Responsibility Act (MVFRA), contained in Title 56 of the South Carolina Code, is to give greater protection to those injured

¹ The legislative imperative on this issue is demonstrated by the fact that, immediately after this Court held the uninsured motorist statute did not cover punitive damages in *Laird vs. Nationwide Mut. Ins. Co.* 243 S. C. 388, 134 S. E.2d 206 (1964), the General Assembly amended 1962 S.C. Code of Laws § 46-750.31(4) (the predecessor of § 38-77-30(4)) to include its present wording. See 1964 Act No. 2064.

through the negligent operation of automobiles.” *Williams*, 409 S.C. at 599, 762 S.E.2d at 712. “Where a statute requires insurance for the benefit of the public, however, the insurer is not permitted to nullify its purposes through engrafting exceptions from liability as to uses which it was the evident purpose of the statute to cover.” *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984).

There is no statutory or other support for GEICO’s proposed pro rata apportionment of punitive damages between bodily injury and property damage. Rather, liability for damages — actual and punitive — is that which is “imposed by law.” S.C. Code Ann. § 38-77-140(A) (Supp. 2010); *see also S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 16-17, 382 S.E.2d 11, 13 (Ct. App. 1989) (holding the MVFRA “draws no distinction between intentional acts and negligent acts of the insured – if liability for damages is ‘imposed by law’ coverage must be provided”). A plaintiff’s claims for bodily injuries, property damages, and punitive damages arise from the same injury and are regarded as the same claim for purposes of setoff. *Smith v. Widener*, 397 S.C. 468, 472-73, 724 S.E.2d 188, 190-91 (Ct. App. 2012). There is no basis to treat them differently in the present context.

If the Legislature meant to apportion punitive damages, it would have written the statute to require apportionment. It did not. “Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a determination whether the 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*, 409 S.C. at 599, 762 S.E.2d at 712. Apportionment of punitive damages between types of injury would permit an insurer to avoid payment of liability for damages imposed by law, thus violating statutory law and public policy.

Indeed, in addressing the same argument by an insurer, the federal court in *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F. Supp. 931 (D.S.C. 1971) rejected a proposed pro rata apportionment of punitive damages between bodily injury damages and property damages for these very reasons. The *Hamilton* court reasoned that such an approach would be contrary to the requirements of South Carolina insurance statutes which require coverage for liability “for damages arising out of ownership, maintenance, or use of motor vehicles.” *Id.* at 935 (also noting the liability insurance policy “was sufficiently broad to cover liability for punitive damages, as such damages are included in the ‘sums’ which the insured is legally obligated to pay as damages because of bodily injuries (property damage) within the meaning of the policy.”) (citing *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965)). Additionally, it noted there was “no authority” to support a pro rata apportionment of punitive damages. *Hamilton*, 326 F. Supp. at 936. As discussed above, this Court should also reject GEICO’s proposal for the same reasons.

GEICO’s argument also violates the purposes of punitive damages. “[P]unitive damages, in addition to punishing the defendant and deterring similar conduct by the defendant and others, serve to vindicate the private rights of the plaintiff and they provide some measure of compensation to plaintiffs for the intentional violation of those rights that is separate and distinct from the usual measure of compensatory damages.” *O’Neill v. Smith*, 388 S.C. at 252, 695 S.E.2d at 534. Punitive damages are based on the defendant’s conduct. GEICO’s argument would change the focus of punitive damages in automobile insurance cases from the defendant’s conduct to the harm caused by the conduct. This is contrary to statutory and case law. Section 15-32-520(E) of the South Carolina Code (Supp. 2012) lists eleven categories of evidence a jury may consider in determining the amount of punitive damages. None of the categories include the type of harm caused. Seven of the categories refer to the defendant’s “conduct”. S.C. Code Ann.

§ 15-32-520(E)(4)-(6), (8)-(11). Moreover, GEICO would also deprive insureds from recovering punitive damages as “vindication of the injured party’s private rights.” *O’Neill*, 388 S.C. at 255, 695 S.E.2d at 535 (stating such vindication is part of the “central purpose of UIM coverage [] to protect the injured party”). Mandating allocation of punitive damages in automobile insurance cases would effectively rewrite the punitive damages statute. The only rationale GEICO offers for doing so has nothing to do with the wrongful conduct of the wrongdoer, its insured’s interest in protection against liability up to the policy limits purchased (in the liability insurance context), its insured’s interest in being fully compensated up to the policy limits purchased (in the UM and UIM contexts), or the injured party’s interest in vindicating his rights; rather, it is based exclusively on GEICO’s own interest in reducing its contractual exposure to pay damages.²

Finally, GEICO incorrectly argues that a punitive damages award that is more than ten times the actual damages violates its constitutional rights as a matter of law. Our courts have affirmed numerous verdicts with punitive damages that exceed ten times the actual damages, including a case involving only economic damages. *See Hundley v. Rite Aid of S.C.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000) (affirming a jury verdict for \$20,000 actual damages and \$1,000,000 punitive damages, 200 times the actual damages, where the court found the award “reflective of the potential harm in this case and in future cases involving similar conduct” of

² GEICO, of course, is not explicit in its desire to reduce its monetary liability but instead seeks to promote this agenda under the guise of a threat to increase premiums, implicit in which is the idea that GEICO may pay more than it anticipated for punitive damage awards unless the Court adopts its self-serving proposal. This premise is questionable, at best, in light of the fact that automobile insurers have been required to insure against punitive damages for over 50 years and undoubtedly underwrite policies with this in mind. *Cf.* S.C. Dept. of Insurance Bulletin No. 6-77, 1977 WL 363355 (1977) (“The issue here for the approval of the policy forms is whether or not they meet the legal requirements of the State of South Carolina. Based on the Court cases concerning this subject in South Carolina and the single expression of legislative intent in the automobile field, we find that such filings do not meet said legal requirements, in that it appears to be against the public policy of the State to exclude punitive and exemplary damages from the coverage of liability insurance policies.”).

misfilled prescriptions); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) (affirming a default judgment award of \$8,605.08 actual damages and \$200,000 punitive damages, 23.24 times the actual damages, in a case involving economic damages due to an unauthorized credit card charge); *Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) (affirming a jury verdict for \$5,000 actual damages, reduced by the court to \$2,500, and \$87,500 punitive damages, 17.5 times the actual damages, in a case arising out of a motor vehicle accident).

II. GEICO'S PROPOSED NEW PROCEDURES WOULD HAVE FAR-REACHING IMPLICATIONS THAT WOULD ADVERSELY IMPACT JUDICIAL ECONOMY AND RAISE BARRIERS TO JUSTICE FOR LITIGANTS IN CONTRAVENTION OF PUBLIC POLICY.

GEICO contends that this issue can be easily resolved by requiring courts to engage in new procedures and determinations, a burden to which they are not currently subject. It proposes that the trial court or a subsequent court in a declaratory judgment action look to the testimony and evidence in the record to determine the amount of property damage and then engage in an apportionment of any punitive damage award based upon a mathematical formula wherein the court assigns an amount to a fraction according to its share of the whole.

While the present case arises in the context of UIM coverage, the Court's decision will equally apply to cases involving liability and UM coverages. This broad application will magnify the effect of the Court's ruling. The majority of cases pending in the Court of Common Pleas arise out of motor vehicle collisions that involve both property damage and statutory violations, allowing for the potential recovery of punitive damages. If the Court adopts the procedures proposed by GEICO, the new process will have profound and far reaching effects that will adversely impact judicial economy and raise barriers to justice for litigants.

GEICO's proposed new procedures would adversely impact judicial economy by increasing the burden and involvement of the courts. They would extend the life of a case by days or weeks if the trial court is making this apportionment determination and by years if it is another court in a subsequent declaratory judgment action. These new procedures could require the involvement of separate trial courts, venues, and jurisdictions. This process would also increase the burden on appellate courts, as at least some of the trial court determinations would be appealed.

Adopting GEICO's proposed new procedures would also have an adverse impact on judicial economy by increasing the work burden of trial courts. Courts would have to delve into a trial record, including the trial transcript and exhibits, to enable them to perform a complex mathematical calculation that is subject to error and appeal. The proposed procedures would encourage the intervention of insurance companies into motor vehicle collision cases, which may inject the issue of insurance into the proceedings, to delay proceedings further by adding another party to the action, and often to operate against the best interests of insureds.

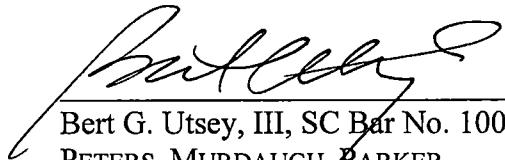
The proposed new procedures would also adversely impact litigants, both plaintiffs and defendants, by raising barriers along the road to justice. Requiring trial courts or subsequent courts in a declaratory judgment action to engage in a post-trial examination of the trial record and application of a mathematical formula would increase the time and effort required of litigants to bring a case to conclusion. These new procedures would limit the strategic choices available to counsel in prosecuting or defending the case. For example, a plaintiff may now choose to offer his opinion about property value rather than proof from other sources. GEICO's proposal would arguably require litigants to submit other evidence of the value of their property damage and would improperly dictate the manner in which they present their case at trial,

potentially in violation of their constitutional right to due process. Similarly, courts may be required to divine juries' intentions in general verdicts for actual damages when there is conflicting evidence on property damages. The proposed procedures would have the practical effect of placing litigants in the unfair position of settling their cases for less than fair value or enduring a new procedural process, which will be accompanied by increased costs and delays in resolution of cases.

CONCLUSION

For the foregoing reasons, SCAJ respectfully requests that the Court answer the certified question in the negative.

Respectfully submitted,



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December 28, 2017
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On behalf of the South Carolina Association
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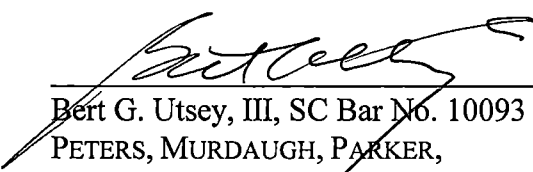
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.


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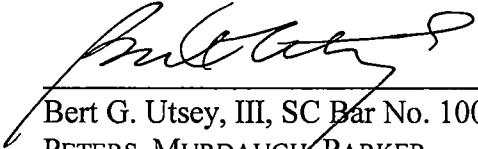
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PROOF OF SERVICE

I certify that I have served the AMICUS CURIAE BRIEF BY THE SOUTH CAROLINA ASSOCIATION FOR JUSTICE on all parties herein by depositing a copy of it in the United States Mail, postage prepaid, on December 28, 2017, addressed to the attorneys of record as follows:

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