

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Joseph F. Anderson, Senior 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 Defendant.

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AND
THE SOUTH CAROLINA INSURANCE ASSOCIATION**

Pursuant to Rule 213, SCACR, Property Casualty Insurers Association of America (“PCIAA”) and the South Carolina Insurance Association (“SCIA”) hereby move for leave of this Court to file a brief as *amici curiae* in the above-referenced matter. For the Court’s convenience, a copy of the *amici curiae* brief is enclosed herewith for contemporaneous, conditional filing. PCIAA and SCIA make this request for the following reasons:

1. PCIAA is composed of approximately 1,000 member companies, representing a broad cross-section of insurers across the United States. PCIAA members write more than \$220 billion in annual premiums, constituting approximately 35% of the nation’s property casualty insurance. Member companies write approximately 44% of the U.S. automobile insurance market, 30% of the homeowners market, 35% of the commercial property and casualty market,

and 37% of the private workers compensation market. PCIAA members write approximately 30.1% of the property casualty insurance market in South Carolina.

2. PCIAA is committed to promoting and protecting the viability of a competitive private insurance market for the benefit of consumers and insurers. To that end, PCIAA supports legislation and regulations that give consumers and insurers more choice and more flexibility in how insurance information is accessed, purchased, and serviced.

3. SCIA represents many of the leading property and casualty insurance companies that are writing business in South Carolina. SCIA has 42 Members and Associates, collectively representing more than 67% of the State's auto insurance market.

4. SCIA serves as the voice for the property and casualty industry in South Carolina and promotes consumer awareness on issues of importance. SCIA focuses on coordinating the insurance industry's advocacy, communication, research, and education efforts. SCIA promotes a competitive environment while seeking to further the understanding of the property/casualty insurance industry to regulators, lawmakers, consumers, and other interested groups.

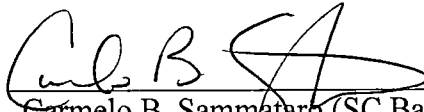
5. Insurance plays a critical role in our civil justice system. It is beneficial to the insurance market for both consumers and insurers to be able to underwrite, price, and purchase insurance policies that serve their needs and budgets while simultaneously satisfying South Carolina's minimum financial responsibility requirements. To that end, the law imposes certain requirements upon insurers to provide split minimum limits policies to cover distinct risks arising from bodily injury and property damage. *Pro rata* application of these distinct coverage limits is consistent with the statutory scheme enacted by the South Carolina General Assembly, comports with the public policy of this State, and will prevent disruption and rate increases in the South Carolina marketplace.

6. PCIAA and SCIA believe their submission of an *amici curiae* brief would be desirable and helpful to the Court. The brief will outline and analyze the issues from the perspective of the insurance industry and provide additional analysis of the policy considerations and potential ramifications of the Court's decision on the insurance market.

TURNER PADGET GRAHAM & LANEY P.A.

February 14, 2018

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INSURERS ASSOCIATION OF AMERICA AND
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STATEMENT OF ISSUES REPRESENTED FOR REVIEW

The issue presented is as set forth in the July 13, 2017 Order for Certification by the United States District Court for the District of South Carolina in the underlying federal court proceeding:

- I. 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 INTEREST

Property Casualty Insurers Association of America (“PCIAA”) is composed of approximately 1,000 member companies, representing a broad cross-section of insurers across the United States. PCIAA members write more than \$220 billion in annual premiums, constituting approximately 35% of the nation’s property casualty insurance. Member companies write approximately 44% of the United States automobile insurance market, 30% of the homeowners market, 35% of the commercial property and casualty market, and 37% of the private workers compensation market. PCIAA members write approximately 30.1% of the property casualty insurance market in South Carolina.

PCIAA is committed to promoting and protecting the viability of a competitive private insurance market for the benefit of consumers and insurers. To that end, PCIAA supports legislation and regulations that afford consumers and insurers more choice, flexibility, and certainty in how insurance is underwritten, purchased, and serviced.

The South Carolina Insurance Association (“SCIA”) represents many of the leading property and casualty insurance companies that are writing business in South Carolina. SCIA has 42 Members and Associates, collectively representing more than 67% of the State’s auto

insurance market.

SCIA serves as the voice for the property and casualty industry in South Carolina and promotes consumer awareness on issues of importance. SCIA focuses on coordinating the insurance industry's advocacy, communication, research, and education efforts. SCIA promotes a competitive environment while seeking to further the understanding of the property/casualty insurance industry to regulators, lawmakers, consumers, and other interested groups.

This appeal involves a certified question addressing whether, under a split limits automobile insurance policy, underinsured ("UIM") property damage coverage must be made available to satisfy a potential award of punitive damages primarily due to bodily injuries incurred and where the insured's property damages are minimal. To answer the District Court's certified question in the negative overlooks the plain reading of the statutory provision authorizing split limits policies in this State, disregards careful underwriting and rate setting decisions developed in reliance on S.C. Code Ann. § 38-77-140, and, as a result, would negatively impact the market for South Carolina rate payers and insurers doing business in this State.

PCIAA and SCIA submit this *amici curiae* brief to provide the Court with perspective from the insurance industry, as well as additional analysis of the policy considerations and potential ramifications of the Court's decision for the South Carolina insurance market.

STATEMENT OF THE CASE

The Order for Certification and the extensive briefing provided by the parties to this appeal have adequately stated the stipulated facts and procedural posture of the case. Rather than re-stating the facts as they are known to PCIAA and SCIA, these *amici* instead adopt by reference the Statement of the Case and supporting arguments that have been submitted by

Plaintiff Government Employees Insurance Company in its Opening and Reply Briefs.

ARGUMENT

This case presents the question¹ of whether South Carolina law requires apportionment of punitive damages under a split limits policy authorized and governed by South Carolina law. More to the point, this Court must decide whether South Carolina law and public policy require insureds to exhaust property damage policy limits in order to satisfy a punitive damages award where, as here, property damage is minimal and personal injuries are substantial. In light of South Carolina's statutory scheme, and consistent with sound policy considerations, PICAA and SCIA join in GEICO's arguments urging the Court to respond to the certified question in the affirmative.

I. AN AFFIRMATIVE RESPONSE TO THE CERTIFIED QUESTION COMPORTS WITH SOUTH CAROLINA'S STATUTORY SCHEME AND THE INSURANCE CONTRACT AT ISSUE.

GEICO advances three key points that guide analysis of the certified question presented. First, South Carolina's statutory scheme specifically authorizes split-limits insurance policies with separate and distinct minimum limits for property damage and personal injuries arising out of the use of a motor vehicle. Second, the statutory definition of "damages" encompasses both actual and punitive damages. Third, reading these statutory requirements in harmony, as the Court is required to do, the split limits coverage provided to Defendant and authorized by S.C. Code Ann. § 38-77-140 should be construed to provide separate and distinct coverage for actual and punitive damages arising out of and relating to physical injury to any one person in any one accident, physical injury to two or more persons in any one accident, or because of injury to or

¹ PICAA and SCIA are unaware of any South Carolina authority addressing *pro rata* apportionment of punitive damages in the context of split limits policies.

destruction of property in any one accident. (Pl.'s Opening Br., pp. 6-8) (citations omitted) Logically, punitive damages must be allocated proportionally based on the cause of the underlying damages and not, as Defendant suggests, to afford a substantially higher single limit of coverage available to satisfy any damages irrespective of whether they are attributable to physical injury versus property damages. To hold otherwise subverts any plain reading of the statute or the insurance contract at issue and conflates two separate and distinct categories of risk (property damages versus physical injury) that the legislature intended to treat separately when it authorized minimum coverage, split limits policies pursuant to Section 38-77-140.

The appellate courts of this State and its sister states have provided ample guidance with regard to interpretation of the statute and insurance contract at issue. “The cardinal rule of statutory construction is that [the Court is] to ascertain and effectuate the actual intent of the legislature.” *Burns v. State Farm Mut. Aut. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) (citations omitted). In determining legislative intent, ‘words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.’ *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (citations omitted). Finally, “[a] statute must receive a practical and reasonable interpretation consistent with the ‘design’ of the legislature.” *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002).

In like fashion, “[i]nsurance policies are subject to general rules of contract construction.” *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000) (citing *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327 (1999)). Further, “[a]n insurer’s obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction.” *Id.* (citing *MGC Management of*

Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 520 S.E.2d 820 (Ct. Ap. 1999)).

The stated declaration of purpose for Chapter 77 of Title 28 (Automobile Insurance) includes the establishment of minimum financial responsibility requirements for motor vehicles operated in South Carolina. S.C. Code Ann. § 38-77-10(2). In furtherance of that stated purpose, the General Assembly has created a statutory scheme that includes the prohibition that a policy of insurance may not be issued or delivered in South Carolina unless it provides “minimum” coverage applicable to damages stemming from *two* distinct types of loss: physical injury and property damage². In construing this statutory scheme, this Court has observed that “[i]n the context of automobile insurance, a person or corporation in South Carolina is required to provide proof of financial responsibility for potential accidents in order to legally operate a motor vehicle. Such financial responsibility may consist of an insurance policy or surety bond with the required or optional coverages.” *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 416-417, 618 S.E.2d 909, 916 (2005) (citing S.C. Code Ann. §§ 38-77-140, -150, and -160 (establishing requirements of mandatory insurance limits, mandatory uninsured motorist coverage, and requiring automobile insurers to offer additional uninsured and underinsured motorist coverage, respectively)).

Further, the court of appeals has declined to expand the definition of “underinsured vehicle” provided by statute. *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 177, 594 S.E.2d 511, 522 (Ct. App. 2004) (“Section 38-77-30(15) . . . defines *underinsured* motor vehicle

² “Damages” includes “both actual and punitive damages.” S.C. Code Ann. § 38-77-30(4). “Property damage” is not defined, but “bodily injury” includes death resulting from bodily injury. S.C. Code Ann. § 38-77-30(3). It necessarily follows that “physical injury” must be limited to injury to an insured’s life or limb and nothing else.

as: [A] motor vehicle as to which there is ***bodily injury liability insurance*** or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds' damages.") (emphasis added); *see also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 n. 6 (reiterating definition of "underinsured motor vehicle" and noting that an "uninsured motor vehicle" is one as to which, among other things, "there is not bodily injury liability insurance **and** property damage liability insurance both at least in amounts specified in Section 38-77-140").

Our courts repeatedly have declined to expand minimum coverage beyond what is required by statute or bargained for between the parties to the insurance contract. For example, in *Stewart*, the court rejected the insureds' claim that their automobile insurance carrier, State Farm, was required provide separate "per person" coverage for wife's loss of consortium claim as a separate and distinct claim pursuant to S.C. Code Ann. § 38-77-140. *Id.*, 341 S.C. at 157, 533 S.E.2d at 604. In rejecting that position, the court observed: "[t]he fact the amount of liability insurance selected by State Farm's insured may not be adequate to pay the full amount of both types of injuries is a repercussion of the choice made by the insured, not any contravention of South Carolina law or public policy." *Id.*, 341 S.C. at 159, 533 S.E.2d at 605. This holding comports with the general rule that "[i]t is not the province of the courts to construe contracts broader than the parties have elected to make them or to award benefits where none was intended." *Id.*, 341 S.C. at 151, 533 S.E.2d at 151 (citing *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463 (1942)).

Similarly guided by the rules of statutory and contract construction, the court in *Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 459, 513 S.E.2d 127, 129 (Ct. App. 1999), also

concluded respondent was not authorized by statute to recover UIM benefits for loss of consortium separate and apart from his wife's recovery for bodily injury damages. The court rejected respondent's contention that by including "damages" in the UIM statute (S.C. Code 38-77-160) versus the more limited term "damages . . . because of bodily injury" used in § 38-77-140, the legislature intended to afford broader uninsured motorist coverage that would extend to his loss of consortium claim. *Russo*, 334 S.C. at 128, 513 S.E.2d at 458. In so doing, the court was convinced that notwithstanding the omission of "bodily injury" in § 38-77-160, "the repeated references to liability coverage and liability limits convince us the term 'damages' must be construed in accordance with the basic liability coverage statute, section 38-77-140, which focuses on bodily injury damages." *Id.* To broaden the term as urged by respondent, the court concluded, would impermissibly broaden available minimum limits coverage in contravention of legislative intent. *Id.*, 334 S.C. at 129, 513 S.E.2d at 459 ("The term 'damages' in section 38-77-160 means bodily injury *or* property damage because it references liability coverage, which in turn explicitly limits coverage to bodily injury. Such construction accords with the statute's declared purpose.").

While it is true this Court has yet to determine whether punitive damages must be apportioned on a *pro rata* basis between property damage and personal injury coverage under a split limits policy, the historical statutory scheme reveals a clear legislative intent to maintain the separate and distinct nature of coverage for bodily injury on the one hand and property damage on the other. Indeed, our courts have recognized the distinction between these two types of coverage and required a causal connection in order to recover under each. *See, e.g., Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) (addressing causation requirement in separate claims for physical injury and property damage, finding causation

existed only in connection with the property damage claim).

South Carolina's history of respecting the distinction between split limits coverage for bodily injury and property damage also comports with decisions from other jurisdictions. For example, in *Fred Loya Insurance Company v. Swiech*, ___ P.3d ___, 2017 WL 6018070 (N.M. Ct.App. Dec. 4, 2017), the insured sustained property damage only but claimed his bodily injury coverage should be used to satisfy an award of punitive damages where the punitive award exceeded his available property damage coverage. The court disagreed, noting that "[e]ven where punitive damages are appropriate, any damage award must be within the policy limitations, and the insurer cannot be liable for punitive damages in excess of the coverage limits for the type of damages actually sustained by the insured." *Id.*, 2017 WL 6018070 at * 6 (internal citations and quotations omitted). *See also Flynn v. Allstate Ins. Co.*, 268 Ga.App. 222, 601 S.E.2d 739 (Ct.App. 2004) (insured who sustained only property damage could not recover under the bodily injury provision of insurance policy); *Virginia Farm Bureau Mut. Ins. Co.*, 247 Va. 172, 440 S.E.2d 898 (1994) (finding error where trial court permitted parents to recover under property damage provisions of UM policy for medical expenses and loss of services claims); *Napier v. Banks*, 9 Ohio App. 2d 265, 269, 224 N.E.2d 158, 161 (Ct. App. 1967) ("[W]e believe there can be no question that the coverage for property damage and that for personal or bodily injury are completely separate and distinct. Common understanding and long established practice confirm this interpretation.")

Existing authority and logical analysis militate in favor of the Court's affirmative response to the certified question. By enacting Section 38-77-140, the General Assembly clearly meant to require insurers protect the public by affording minimum limits coverage for two distinct types of loss. It necessarily follows that permitting insureds to invade property damage

policy limits to satisfy an award of punitive damages, where bodily injury is the overwhelming type of loss sustained and property damages losses are minimal or non-existent, would disrupt a carefully constructive statutory scheme and disregard persuasive authority on this issue. For these reasons, the Court should respond affirmatively to the certified question before it.

II. SOUND POLICY CONSIDERATIONS SUPPORT AN AFFIRMATIVE RESPONSE TO THE CERTIFIED QUESTION BEFORE THE COURT.

The crux of the controversy in this appeal is whether the existing statutory scheme requires a fair and equitable *pro rata* allocation of punitive damages under a split limits policy. As addressed in the preceding section, *amici* and their members believe that it does. PCIAA and SCIA also believe that *pro rata* allocation of punitive damages is consistent with South Carolina public policy, which mandates that carriers offer automobile insurance with split limits/minimum limits to South Carolina drivers in order to satisfy minimum financial responsibility requirements. From a practical perspective, a negative response to the certified question will have a significant impact on the ability of South Carolina consumers to select and purchase affordable split limits coverage by making that coverage less available and more expensive. These real-world policy considerations further militate in favor of this Court answering the certified question in the affirmative.

This Court has recognized that the South Carolina General Assembly “contemplated how automobile insurance is actually marketed” in South Carolina when it enacted certain provisions of the insurance code. *Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 603, 762 S.E.2d 705, 714 (2014). Certainly, the General Assembly also considered that fairness and stability in South Carolina’s insurance marketplace also depend upon a carrier’s ability to assess and price risk appropriately and without fear that insureds or the courts will

attempt to reform insurance contracts to insure risks not contemplated at the commencement of the coverage period. See *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citations omitted).

As noted in GEICO's Opening Brief, the South Carolina Department of Insurance reviews and approves sample rate information including automobile insurance rates for bodily injury coverage, property damage coverage, uninsured motorist coverage for bodily injury, and uninsured motorist coverage for property damage. (Pl.'s Opening Br., pp. 17-18). These distinct coverages are treated and priced differently, typically resulting in lower premiums for split limits policies and lower premiums for property damage in comparison to physical injury. This is borne out by the pricing associated with the policy at issue here, where property damage coverage was less than 4% of the bodily injury premiums. (*Id.*, p. 18) This disparity in rates is a clear indication that underwriting concerns appropriately account for the risk of physical injury versus the risk for property damage, and these same underwriting considerations enable carriers to price their products accordingly. Conversely, to accept Defendant's argument rejects the bright line distinction between bodily injury and property damages coverage and will inevitably put upward pressure on rates to account for the increased frequency and severity of claims not previously accounted for by the contracting parties.

A negative response to the certified question disregards the distinction between bodily injury and property damage coverage and permits insureds unilaterally to convert split limits into single limits coverage without the necessary premium consideration. Such a sea change threatens to overturn sound underwriting considerations that historically have dictated informed decision-making under the current statutory scheme. By mandating *pro rata* distribution of punitive damages, the Court's decision is much less likely to disrupt the marketplace or to place

any additional cost burden on consumers who otherwise will be forced to pay higher rates for coverage. Additionally, an affirmative response to the certified question will maintain the current bright line distinction between bodily injury and property damage coverages and foster certainty, predictability, and choice for South Carolina consumers.

A decision requiring pro rate allocation comports with sound underwriting and pricing practices and serves the South Carolina marketplace by reducing uncertainty, mitigating upward pressure on rates, and ensuring available, affordable coverage. For all of these reasons, the Court should respond affirmatively to the certified question before it.

CONCLUSION

Pro rata allocation of punitive damages between property damage and bodily injury insurance coverage is consistent with South Carolina's statutory scheme, as well as judicial precedent from this and other states. Further, *pro rata* allocation best serves South Carolina's public policy interests by ensuring a stable insurance market, lower premiums, and compliance with minimum financial responsibility requirements. Accordingly, the Property Casualty Insurers Association of America and the South Carolina Insurance Association support GEICO in requesting an affirmative response to the certified question on appeal.

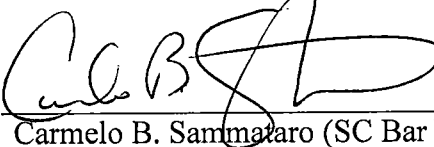
(Signature page to follow.)

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY P.A.

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PROOF OF SERVICE

I certify this 14th day of February 2018 that I have served a copy of MOTION FOR
LEAVE TO FILE BRIEF OF AMICI CURIAE PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA AND THE SOUTH CAROLINA INSURANCE
ASSOCIATION upon other counsel of record, by mailing same, postage prepaid in the United
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