

The Supreme Court of South Carolina

Francina A. Bardsley, as Personal Representative of the
Estate of Frederic William Bardsley, III, Respondent,

v.

Government Employees Insurance Company and State
Farm Fire & Casualty Insurance Company, Defendants,

Of whom Government Employees Insurance Company is
the Appellant.

Appellate Case No. 2012-206390

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward
the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

December 28, 2012

cc:

Carroll H. Roe, Jr.

David L. Moore, Jr.

William A. Coates

Joseph Owen Smith

The Honorable Jenny Kitchings

The South Carolina Court of Appeals

Francina A. Bardsley, as Personal Representative of the
Estate of Frederic William Bardsley, III, Respondent,

v.

Government Employees Insurance Company and State
Farm Fire & Casualty Insurance Company, Defendants,

Of whom Government Employees Insurance Company is
the Appellant.

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ORDER

Respondent filed a motion requesting the Court's permission to add a page to the record on appeal. Appellant has consented to the addition. Therefore, the motion is granted. Respondent is ordered to attach the additional page to the record on appeal within fifteen (15) days.

FOR THE COURT

BY

Jenny A. Kitching
CLERK

Columbia, South Carolina

FILED

11/13/12

cc:

Carroll H. Roe, Jr.

David L. Moore, Jr.

William A. Coates

Joseph Owen Smith

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 27 2012

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable D. Garrison Hill, Circuit Judge

SC Court of Appeals

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty
Insurance Company, ... Defendants.

of which
Government Employees Insurance Company is..... Appellant.

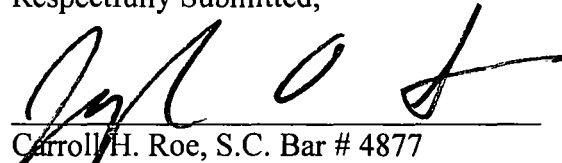
MOTION TO AMEND RECORD ON APPEAL

Respondent, Francia A. Bardsley, individually and as Personal Representative of the
Estate of Frederic William Bardsley, III ("Bardsley") submits the following Motion to
Amend the Record on Appeal on the following grounds:

1. Appellant served the Record on Appeal on September 6, 2012.
2. In the course of drafting its Final Brief, Respondent noticed a discrepancy in the
Record on Appeal.
3. Specifically, the document entitled Stipulations of Fact (R. pp. 46-51) included in the
Record on Appeal is not the final version submitted to and considered by the trial
court in reaching its decision.

4. The version of the Stipulations of Fact included in the Record on Appeal lacks all the stipulated facts included in the final version.
5. The trial court considered the final Stipulations of Fact in reaching its decision from which GEICO appeals.
6. Therefore, it is necessary to amend the Record on Appeal to include an additional page with the missing fact contained in the final Stipulations of Facts.
7. Respondent therefore proposes adding R. p. 51A, a copy of which is attached to this motion.
8. Counsel for the parties have discussed this motion and Appellant counsel consents to the proposed amendment.

Respectfully Submitted,



Carroll H. Roe, S.C. Bar # 4877

William A. Coates, S.C. Bar # 1289

Joseph O. Smith, S.C. Bar # 77475

ROE CASSIDY COATES & PRICE, P.A.

1052 North Church Street

Greenville, South Carolina 29601

(864) 349-2600

(864)-349-0303 fax

Attorneys for Respondent

September ^{25th}, 2012
Greenville, South Carolina

22. Upon the death of Frederic William Bardsley, III, title to the residence at 18 War Admiral Way, Greenville, South Carolina 29617 became vested in Francina A. Bardsley, who, by consent of counsel for the Defendants, is being added individually as a Plaintiff to this action without the necessity of formal amendment of the Summons and Complaint.

23. The GEICO policy provides that with respect to the underinsured property damage, its insurance will be excess over other valid and collectible insurance applicable to the damaged property.

24. This action concerns the availability of underinsured motorist coverage under the GEICO policy for damages to the Bardsley residence and personal property as a result of the vehicular accident of April 25, 2009. All underinsured motorist claims of the GEICO policy for bodily injury or arising under the Wrongful Death Statute have been resolved between Plaintiff and GEICO.

25. The Three Million and no/100 Dollars (\$3,000,000.00) in policy limits paid by Auto Owners and State Farm were distributed as follows:

Settlement of alleged State Farm subrogation lien - \$	94,424.75
Settlement of alleged lien of Michelle L. Parker (neighbor who sustained property damage to her garage door)	- 1,100.00
Attorney's fees and costs to Roe Cassidy Coates & Price PA	- 755,998.01
Brian William Bardsley (wrongful death beneficiary)	- 1,074,238.62
Francina A. Bardsley (wrongful death beneficiary)	- 1,074,238.62
TOTAL-----	\$3,000,000.00

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable D. Garrison Hill, Circuit Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III..... Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ... Defendants.

of which
Government Employees Insurance Company is..... Appellant.

PROOF OF SERVICE

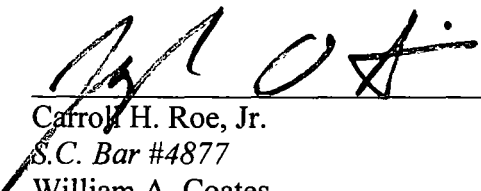
I hereby certify that a copy of the Consent Motion to Amend Record on Appeal was served on
counsel for the Appellant by placing a copy of same in the United States Mail with proper
postage affixed thereto and addressed as follows:

David L. Moore, Jr.
Nexsen Pruet
55 East Camperdown Way, Suite 400
Greenville, South Carolina 29601

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SEP 27 2012

SC Court of Appeals



Carroll H. Roe, Jr.

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September 25, 2012

Greenville, South Carolina



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September 25, 2012

Jenny Abbott Kitchings
SC Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Re: Francina A. Bardsley v. GEICO
Case No: 2010-CP-23-5493
RCCP 1687.0001

Dear Ms. Kitchings:

Enclosed please find Respondent, Francina A. Bardsley's, Motion to Amend the Record on Appeal in the above-referenced appeal. A check in the amount of \$25.00 is enclosed to cover the administrative expenses associated with this request.

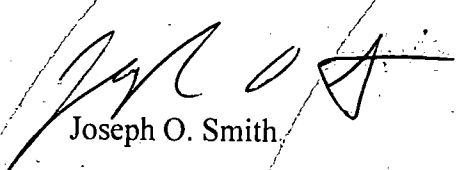
I have discussed the omissions in the record with opposing counsel and he has consented to the proposed amendment.

Should you have any questions regarding this matter, please contact me at your convenience.

With kind regards, I am

Very truly yours,

ROE CASSIDY COATES & PRICE, P.A.


Joseph O. Smith

cc: David L. Moore, Jr. w/ enclosures

RECEIVED
SEP 27 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleas of Greenville County, South Carolina

The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company,..... Defendants.

of which

Government Employees Insurance Company is..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

RECEIVED
AUG 14 2012
SC Court of Appeals

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Attorneys for Appellant
Government Employees Insurance Company

August 13, 2012
Greenville, South Carolina

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STATEMENT OF ISSUES

- I. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES FOR THE UNDERSIGNED PROPERTY CLAIM WHEN THERE WAS NO PROOF THAT THERE WAS INSUFFICIENT LIABILITY COVERAGE FOR PROPERTY DAMAGE.
- II. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES AGAINST GEICO FOR AN UNDERINSURED PROPERTY CLAIM, THE ERROR BEING THAT GEICO'S UNDERINSURED MOTORIST PROPERTY COVERAGE WAS SECONDARY AND EXCESS TO THE STATE FARM HOMEOWNERS INSURANCE COVERAGE BY VIRTUE OF GEICO'S "OTHER INSURANCE" CLAUSE.
- III. THE CIRCUIT COURT ERRED IN HOLDING THAT THE GEICO "OTHER INSURANCE" CLAUSE WAS AMBIGUOUS SINCE THERE WAS NO REASONABLE, CONFLICTING INTERPRETATION OF THAT CLAUSE WHICH WOULD GRANT RESPONDENT RECOVERY IN SPITE OF THE STATE FARM HOMEOWNERS COVERAGE.
- IV. GEICO'S "OTHER INSURANCE" CLAUSE DOES NOT CONSTITUTE AN EXCLUSION OF INSURANCE WHICH IS CONTRARY TO THE STATUTORY MANDATE THAT UNDERINSURED MOTOIST COVERAGE BE PROPERLY OFFERED.
- V. THE CIRCUIT CORUT ERRED IN RULING THAT PAYMENT UNDER THE STATE FARM HOMEOWNERS POLICY CONSTITUTED A COLLATERALSOURCE WHICH PRECLUDED APPLICATION OF GEICO'S "OTHER INSRUANCE" CLAUSE, THE ERROR BEING THAT THE COLLATERAL SOURCE RULE DID NOT APPLY WHERE GEICO NEITHER ACTED ON BEHALF OF THE TORTIOUS WRONGDOER NOR SOUGHT A REDUCTION IN HIS LIABILITY EXPOSURE.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES FOR THE UNDERINSURED PROPERTY CLAIM WHEN THERE WAS NO PROOF THAT THERE WAS INSUFFICIENT LIABILITY COVERAGE FOR PROPERTY DAMAGE

The Respondent argues that because she was not paid in full from the available liability insurance coverages for all losses sustained as a result of the April 25, 2009 accident, including losses for bodily injury and property damage, Ludwig was rendered underinsured, thereby obligating GEICO to pay her from its coverage for underinsured property damage. (Respondent's Brief p. 9) This argument ignores the fact that while the Respondent may not have been paid the full value of the wrongful death claim, that claim has been settled through the allocated payments made under the Ludwig liability coverages and the payment made under the GEICO underinsured motorist coverage for bodily injury. (See Covenant Not to Sue for liability carriers, GEICO policy release). Because only the issue to be resolved by this appeal is the applicability of the GEICO underinsured coverage for property damage (Stipulation of Fact 24), the alleged inadequacy of payment for the wrongful death claim is irrelevant.

Under the GEICO policy, the coverages for bodily injury and property damage are segregated. (GEICO declaration sheet). GEICO has paid in full its underinsured bodily injury coverage. If a claim exhausts the available bodily injury coverage, as was done by virtue of GEICO's payment of its underinsured bodily injury coverage, an insured may not then raid the available coverage for property damage. Yet, by arguing that she has not been paid fully for both her bodily injury and property damage claims, this essentially is what the Respondent now argues.

Respondent has further argued, in furtherance of her position that GEICO is required to pay its underinsured motorist property damage (hereinafter UIMPD) funds, that the Greenville County Probate Court in its Order of November 12, 2009, directed that the payments made by the liability insurers for John Ludwig were to be allocated fully to the wrongful death claim and not in payment of an property damage loss. (Respondent's Brief at pp. 7-8). Although the Probate Court Order did hold that the payments were to be allocated to the wrongful death claims, it went on to note that the allocation was to be fully made to the wrongful death action "as the parties stipulate that there is no valid survival claim". (Probate Court Order at p. 3). Accordingly, because there was no valid claim for survival, such as a claim for conscious pain and suffering, all proceeds would be paid to the wrongful death claim and none to any claim which might have been made under the survival statute. The clause relied upon simply did not discuss or deal with a claim for property damages.

The Probate Court, however, went on to recognize that State Farm Fire and Casualty Insurance Co. (hereinafter State Farm) had a subrogation claim for repairs made to the Bardsley residence. (Probate Court Order at p. 5). Pursuant to the terms of that Order, Respondent agreed to repay State Farm for that claim from the settlement proceeds paid by the liability carriers for John Ludwig. As a result, the Probate Court clearly made provisions for State Farm to be compensated for payments it made under the Bardsley homeowner's policy from the liability insurance available to John Ludwig. This repayment from the liability insurance proceeds was therefore made for property damage incurred by the respondent.

Notwithstanding, the fact that Probate Court specifically recognized State Farm's

subrogation claim for property damages, Respondent continues to argue that all liability insurance proceeds were paid for the wrongful death claim and no liability insurance proceeds were paid for property losses. (Respondent's Brief p. 3) This argument ignores the fact that both liability policies for John Ludwig provided coverage for bodily injury and property damage. (Auto Owners policy declaration sheet, Hartford Insurance Co. declaration sheet). Because State Farm, as the first party homeowners insurance carrier for the Respondent, made payment for the property damage the Respondent incurred as a result of the acts of John Ludwig, it had a right to step into the shoes of the Respondent and seek to recover from John Ludwig, as the at-fault tortfeasor, available liability coverage for property damage. See St. Paul-Mercury Indemin. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954); Calvert Fire Ins. Co. v. James, 236 S.C. 431, 114 S.E.2d 832 (1960). State Farm was ultimately paid for its subrogation interest. (Stipulation of Fact 15) This payment served to reduce the liability of John Ludwig for the property damage loss. As a result, since John Ludwig has been released and his liability policies exhausted, any additional recovery for property loss from first party coverage would require a computation of the reduction of the amount owed for property damage by virtue of the amount of the payment previously made under the Ludwig liability policies for property damages. See Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 403 S.E. 2d 662 (1991).

In order to properly determine the existence of an underinsured motorist property damage claim, the circuit court was required to determine the amount of coverage available (including the State Farm coverage), the amount of the loss incurred, the amount of offset available and whether there was any overage beyond the available

coverage to which underinsured motorist property damage coverage would be applicable. The circuit court failed to undertake this calculation. However, if it had done so, the calculation would have revealed that payment under the GEICO underinsured motorist property damage coverage was unnecessary.

The proper methodology of applying underinsured motorist coverage is set forth in Purvis v. State Farm Mut. Auto. Ins. Co., 304 SC 283, 403 SE2d 661 (1991). In discussing "excess underinsured motorist coverage", the approach ultimately adopted, the Court gave an example of how underinsured motorist coverage was to be applied. In that example, where the value of a damage claim was \$45,000, with \$15,000 available in liability coverage, the underinsured amount was \$30,000, or the difference between the actual damages and available liability coverage.

Using this example as a guide in this setting, a court must determine the value of the underlying loss and then subtract from that value the available liability coverage. If this exercise were to be undertaken, the value of the underlying property damage claim would appear to be the amount paid by State Farm. The amount paid for property damage loss would first be subtracted from that figure. Because State Farm provided the primary level of first party coverage, that coverage would then be applied to the difference. Because the State Farm subrogation claim as compromised and resolved, any claim for property damages against GEICO as the excess first party carrier must be offset by the full amount of the State Farm coverage. (See GEICO policy, UIM addendum, "other insurance" claims). By doing so, the claim for property damage loss is exhausted and there would be no underinsured motorist property damage claim. (See Stipulation of Fact 13 and 14; since State Farm paid a total of \$111,914.91 plus payment for loss of use

and State Farm had coverage limits of \$315,825 plus coverage for loss of use, its limits were not exhausted.) Only if the State Farm coverage were exhausted would the GEICO coverage, as excess first party property damage coverage, come into play. Because the State Farm coverage was not exhausted, the GEICO coverage was never implicated.

II. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES AGAINST GEICO FOR AN UNDERINSURED PROPERTY CLAIM, THE ERROR BEING THAT GEICO'S UNDERINSURED MOTORIST PROPERTY COVERAGE WAS SECONDARY AND EXCESS TO THE STATE FARM HOMEOWNERS INSURANCE COVERAGE BY VIRTUE OF GEICO'S "OTHER INSURANCE" CLAUSE

The GEICO policy issued to the respondent provides that "[w]ith respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property." (GEICO policy, underinsured motorist protection addendum). Based upon this language, the GEICO coverage would be excess to other valid and collectible insurance, which would include the State Farm coverage.

The Respondent contends that GEICO failed to properly present this issue for resolution by the Circuit Court and therefore for appellate consideration. She is simply wrong. It should first be noted that the Respondent acknowledges that GEICO properly raised the issue before the circuit court. She argues, however, that the circuit court did not rule on the issue and that GEICO did not subsequently reassert the issue in its Motion for Reconsideration.

However, the Order of November 21, 2011, specifically ruled upon GEICO's position that its coverage was excess to that of State Farm. On page 3 of that Order, the Circuit Court held:

In denying coverage, GEICO relied upon a provision contained in the UIM rider to its policy, which states that "[i]f none of an insured's vehicles is involved in the accident . . . [w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance

applicable to the damaged property." GEICO contends Bardsley's State Farm homeowners coverage for property damage constitutes "valid and collectible insurance applicable to the damaged property," and therefore must be exhausted before GEICO has to pay its \$100,000.00 of UIM property damage coverage. This Court disagrees

Clearly, GEICO raised the issue that its coverage was excess to the State Farm homeowners coverage and just as clearly, the Court ruled on the argument.

Moreover, the issue was in fact raised in arguments submitted to the Circuit Court in the Motion for Reconsideration. While the Respondent correctly notes that the Appellant initially raised four grounds for reconsideration, none of which was directed to the issue of whether the GEICO coverage was excess to the State Farm coverage (since that issue had already been raised and ruled upon), the Respondent neglects the discussion of whether the GEICO coverage was excess as set forth in GEICO's Reply Brief to Plaintiff's [Respondent's] Brief in Opposition to the Motion for Reconsideration. There, GEICO, in refuting the Respondent's position that the State Farm coverage constituted a collateral source which should not be considered in determining whether there was an underinsured property claim, noted that the Respondent was ignoring the hierarchy of insurance coverage. (GEICO Reply Memorandum at pp. 3-4). This hierarchy of coverage began with the available liability coverage and thereafter applied the available first party coverage (as supplied by State Farm) and then applied any available excess first party coverage (as supplied by GEICO). The argument went on to note that the allocation of first party coverage is typically accomplished through an "other insurance" clause. The applicable "other insurance" clauses provided that the State Farm policy was primary and the GEICO coverage was excess. Clearly, this argument placed

before the Circuit Court the issue of whether the GEICO underinsured coverage was excess to the homeowners insurance coverage provided by State Farm.

The function of an appellate court is to correct any errors which a trial or hearing court might have made in ruling on the issues presented to it. If a party does not present an issue for the trial or hearing court to rule upon, there can be no error for the appellate court to overturn. See South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008). In this instance, however, it is clear that GEICO raised the issue that its coverage was excess to that of State Farm and that issue was ruled upon by the Circuit Court. In addition, the issue was again presented in the briefs supporting the Motion for Reconsideration. As a result, Respondent's position that the issue is not properly before this Court is ill-founded.

Respondent goes on to argue that GEICO's position is contrary to the legislative purpose of the underinsured motorist statute and is precluded by application of the collateral source rule. The purpose of underinsured coverage is to protect an insured against a loss that is not otherwise covered by available liability coverage. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005). In this instance, the property loss not covered by liability coverage is subject to two types of first party coverage. Pursuant to the terms and conditions of the policies provided by those first party carriers, State Farm was to provide the first level of coverage and GEICO was to provide for any excess. (See State Farm policy at p. 14, GEICO policy UIM addendum at p. 3). Using this approach, the Respondent has more than adequate property damage coverage. The Respondent claims, however, that on the whole she has not been fully

indemnified for the loss from this accident. In so arguing, the Respondent combines both her injury and property losses. In order to make up for the alleged shortfall regarding her injury loss, the Respondent is attempting to obtain a greater payment for her property loss. This attempted shift of insurance proceeds is improper in light of the fact that the GEICO coverage separates injury and property coverage. (GEICO policy, declaration sheet). Moreover, the Respondent has now been paid in full for her injury loss as demonstrated by the Covenants not to Execute entered into with the liability carriers for the at-fault party and the policy release entered into with GEICO.

Respondent also argues that the application of the collateral source rule precludes GEICO from arguing that its coverage is excess to that provided by State Farm. Although argued in full below, the Respondent's attempt to use the collateral source rule is inappropriate in this setting since the collateral source rule requires not only the existence of a collateral source, but also the attempted use of that collateral source to benefit the wrongdoer. Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989). In this instance, there is no benefit to John Ludwig by properly adhering to the hierarchy of insurance coverage pertinent to this case and therefore the collateral source rule is inapplicable.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT THE GEICO "OTHER INSURANCE" CLAUSE WAS AMBIGUOUS SINCE THERE WAS NO REASONABLE, CONFLICTING INTERPRETATION OF THAT CLAUSE WHICH WOULD GRANT RESPONDENT RECOVERY IN SPITE OF THE STATE FARM HOMEOWNERS COVERAGE.

The Respondent contends that the Circuit Court was not required to give a basis for its determination that the GEICO policy provisions were ambiguous and therefore those provisions should be construed against GEICO in favor of the Respondent.

The GEICO policy provides that it is excess to other valid and collectible insurance. (GEICO policy, UIM addendum, p. 3) As noted previously, this is a standard phrase which refers to collectible primary coverage. Jones v. Medlor, Inc., 430 A.2d 488 (DC 1981). The State Farm policy constitutes collectible primary coverage, as shown by the policy provisions of that insurer (compared to the GEICO policy provisions) and the actual payment for property damage under that policy.

The Circuit Court ruling nonetheless holds the GEICO policy provision ambiguous, apparently accepting the argument that it has the effect of nullifying a statutory mandate for UIM coverage. Even if we assume that section 38-77-160 is applicable to underinsured motorist property damage coverage, that statute only requires that a proper offer of UIM coverage be made. That mandate was met by GEICO as demonstrated by the fact that underinsured motorist coverage for underinsured bodily injury and UIMPD coverage existed under the Bardsley policy. (See GEICO policy, declaration sheet). If the Circuit Court is holding that the excess coverage provision found in the GEICO policy serves to negate the underinsured motorist coverage for bodily injury coverage in contradiction to S.C. Code Ann. § 38-77-160, the Court would be incorrect in that assessment since the excess coverage provision does not serve to negate the available UIMPD coverage but serves to direct when it is available (after the available primary coverage provided by State Farm).

If the statutory language is not negated, there would be no ambiguity since the statutory language and policy language can co-exist in harmony. The argument that the GEICO excess clause serves to preclude all UIMPD coverage is simply fallacious since the UIMPD coverage provided by GEICO would be available in instances where there

was damage to one's vehicle in an accident involving an underinsured motor vehicle or damage to other property not typically covered under a homeowner's policy (see the State Farm provision regarding "property not covered", p. 4, State Farm policy). Because the UIMPD coverage does, in fact, provide coverage under circumstances where there is either no other coverage or insufficient coverage, it cannot be plausibly argued that it has been negated from existence as a result of the "excess insurance" clause. Because a legitimate purpose does exist for the UIMPD coverage beyond the limitation established by the "excess insurance" clause, there is no ambiguity regarding that clause as might exist if the provision contradicted a statutory mandate. See Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984) (insurers have a right to limit their liability or impose whatever conditions they desire, provided they are not in contravention of a statutory inhibition or public policy).

In the absence of a contradiction to a statutory mandate, there is no "ambiguity" since the clause in question does not otherwise give rise to a reasonable alternative understanding which conflicted with the existence of coverage.

The Respondent goes on to argue, however, that an ambiguity exists since other, non-relevant portions of the GEICO policy may be ambiguous. The purpose of the ambiguity rule is to aid a court in interpreting an insurance policy. Where a policy provision can be interpreted in more than one way, the court will follow that interpretation which is most beneficial to the insured. See South Carolina Budget & Control Bd. v. Prince, 304 S.C. 241, 403 S.E.2d 643 (1991). However, to make such a decision, there must be a policy provision which is in controversy and which effects whether there is coverage or not. Pursuant to Respondent's argument, a finding of any

ambiguity in a policy, whether or not it has an effect on the issue in controversy, is sufficient to allow a court to find in favor of an insured even if the provision in question is clear and readily interpreted. In this case, the Respondent relies upon a policy provision which provides that there is no property damage coverage if the insured has been compensated "by insurance or otherwise." GEICO did not rely upon this provision in determining that UIMPD coverage was not available for this claim. (Transcript of Motion Hearing, pp. 30-31). Instead, GEICO relied upon the "other insurance" clause of its UIM endorsement, which provides in part that "[w]ith respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property." (GEICO policy, UIM endorsement, p. 3).

The provision excluding property damage coverage may be ambiguous because it conflicts with the statutory mandate that UIM coverage be offered (coverage excluded is the equivalent of no coverage). As a result, that clause would be interpreted to provide UIM coverage in compliance with the statutory mandate to offer (and the assumption that the offer is accepted). Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d (2005) (failure to comply with statutory mandate will result in policy being reformed to provide UIM coverage up to policy limits). However, even if UIMPD is available under that policy interpretation, that availability of UIMPD coverage has no effect on the "other insurance" clause. That clause does not serve to exclude UIMPD coverage. Instead, it simply provides that while UIMPD coverage is available, it is excess to other valid and collectible property damage coverage which is also available and serves to protect an insured. As a result, if the Respondent were able to demonstrate a loss in excess of the State Farm homeowner's coverage, then GEICO's UIMPD coverage would come into

play. Because the exclusion clause does not have an effect on the "other insurance" clause, any ambiguity which exists with regard to the exclusion has no effect on the "other insurance" clause so as to preclude the operation of the contractual hierarchy of coverage.

Respondent nonetheless argues that the Circuit Court may simply rule that a policy is ambiguous without providing an alternative interpretation which conflicts with whether coverage exists or not. To adhere to this approach is to countenance a ruling which ignores the appellate holdings regarding what constitutes an "ambiguity". See Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004); Goldstein v. State Farm Mut. Ins. Co., 38 S.C. 157, 594 S.E.2d 54 (Ct. App. 2004). A court, acting with discretion, is required to exercise deliberation and judgment, which includes the examination of facts and the use of reason in reaching conclusions, which may result in two or more different decisions depending upon the facts circumstances and law. See Blalock v. Johnson, 18 S.C. 40, 185 S.E. 51 (1936); Taut v. Purchase, 278 Ga. App. 666, 629 S.E.2d 551 (2006). An abuse of discretion occurs when a court's ruling is based either upon an error of law or a mistake of fact which has no evidentiary support. Thermal Insulation Co, Inc. v. Town & Campus, Inc., 271 SC 478, 248 SE2d 311 (1978). Here the circuit court was controlled both by an error of law (what constitutes an ambiguity) and a mistake of fact (whether there was a reasonable alternative interpretation which contradicted the existence of coverage). Based upon this abuse of discretion by the Circuit Court, an error exists which requires reversal.

IV. GEICO'S "OTHER INSURANCE" CLAUSE DOES NOT CONSTITUTE AN EXCLUSION OF INSURANCE WHICH IS CONTRARY TO THE STATUTORY MANDATE THAT UNDERINSURED MOTORIST COVERAGE BE PROPERLY OFFERED.

The Respondent argues as an additional sustaining ground that the GEICO "other insurance" provision which provides that its UIMPD coverage is excess to all other valid and collectible coverage is contrary to public policy. The Circuit Court held that "GEICO's UIM rider may also contravene public policy since any exclusions inconsistent with the UIM statute are void." (Order of November 21, 2011 at 5) While acknowledging that the Circuit Court did not actually rule on this issue, the Respondent argues that the Court's concern is another basis for upholding the ruling inasmuch as GEICO's policy provisions defeat the UIM coverage provisions by allowing GEICO to benefit from State Farm's coverage. (Respondent's Brief at 22). This argument ignores the fact that the GEICO UIMPD coverage was never excluded and, in fact, the "other insurance" clause does not constitute an exclusion. Instead, the GEICO UIM coverage continued to exist even in light of the State Farm coverage. As has been noted previously, the GEICO UIMPD coverage was to be paid upon the exhaustion of other like coverage, such as that provided by State Farm. While the availability of other like coverage makes it less likely that the GEICO UIMPD coverage would be paid for losses involving a home, the coverage does in general provide protection for those losses excluded from homeowner's coverage or caused to other property, such as a motor vehicle. Given the fact that the total premium for the GEICO UIMPD coverage was \$2.20 (GEICO policy declaration sheet), the limitation on when the coverage would be applicable does not appear to be so egregious as to violate public policy.

V. THE CIRCUIT COURT ERRED IN RULING THAT PAYMENT UNDER THE STATE FARM HOMEOWNERS POLICY CONSTITUTED A COLLATERAL SOURCE WHICH PRECLUDED APPLICATION OF GEICO'S "OTHER INSURANCE" CLAUSE, THE ERROR BEING THAT THE COLLATERAL SOURCE RULE DID NOT APPLY WHERE GEICO

**NEITHER ACTED ON BEHALF OF THE TORTIOUS WRONGDOER
NOR SOUGHT A REDUCTION IN HIS LIABILITY EXPOSURE.**

The Respondent has argued that the collateral source rule bars GEICO from benefitting from any payment made to her through her State Farm policy. This argument ignores the longstanding South Carolina law on the application of the collateral source rule and demonstrates a fundamental misunderstanding of the interrelationships of various types of insurance coverage.

In her brief, the Respondent quotes the opinion rendered in Ratterni v. Grainger, 298 SC 276, 379 SE2d 890) (1989) to the effect that "South Carolina has long followed the collateral source rule that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of damages owed . . ." The quote, however, is selective in nature and omits the conclusion of the statement to the effect that the compensation received from an independent source should not be deducted from the damages owed "by the wrongdoer to the injured party." The omission is critical to whether Respondent's position that all that is required in the application of the collateral source rule is the existence of a source of compensation independent of the wrongdoer. This position confuses what constitutes a collateral source with how the collateral source rule is to be applied. Clearly, the State Farm policy is a collateral source since it provides a fund which was not created or paid for by John Ludwig or any entity acting on his behalf. However, application of the collateral source rule requires not only the existence of a collateral source but also the attempted use of the proceeds of that collateral source to reduce the liability of the wrongdoer. See Rattenni v. Grainger, supra. It is clear that GEICO was not acting on behalf of John Ludwig and any payment made by State Farm did not act to reduce the liability exposure of John Ludwig.

Instead, John Ludwig, through his liability insurers, made a general payment of \$3 Million and in consideration of that payment on his behalf, John Ludwig was released. (See Stipulations of Fact 9, 10, and 12). Based upon this release, John Ludwig liability was compromised and he had no further damage exposure which might be reduced.

The coverages provided by State Farm and GEICO constitute first party coverage, which is provided to compensate an insured for damages he has sustained rather than indemnify other parties for damages they have sustained as a result of the insured's tortious activities. Where payment is made by a first party insurer to its insured, that insurer normally has a right of subrogation against any party which has caused harm to its insured and for which payment was made by the insurer. See St. Paul-Mercury Indemn. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954); Calvert Fire Ins. Co. v. James, 236 S.C. 481, 114 S.E.2d 832 (1960). In this case, State Farm made payments to the Respondent for property damages caused by John Ludwig. The liability coverage for John Ludwig provided coverage for both bodily injury and property damage. As a result, State Farm had a subrogation claim against the liability insurance proceeds provided for John Ludwig arising out of the payments it made under the Bardsley homeowners policy. That claim for property damages caused by John Ludwig was ultimately paid from the liability insurance proceeds available for John Ludwig, satisfying the State Farm subrogation claim. Despite Respondent's protests to the contrary, this payment to State Farm constituted payment for property damage suffered by the Respondent as a result of the acts of John Ludwig.

The UIMPD coverage provided by GEICO was, pursuant to the contractual language of both the State Farm and GEICO policies, excess to the similar coverage

provided by State Farm. Consequently, GEICO's coverage is not available until the State Farm coverage has been exhausted. Based upon the payments made by State Farm and the amount of coverage available to the Respondent under its policy, the policy limits of the State Farm policy were not exhausted. As a result, GEICO's coverage was simply never reached. It is not a matter if GEICO having benefitted from the State Farm coverage. State Farm's payment did not reduce the amount of coverage available under the GEICO policy. Nor is it a matter of payment serving to reduce John Ludwig's liability exposure. John Ludwig has already been released. Instead, it is simply a matter that under the hierarchy of available coverage, the GEICO coverage for UIMPD was never reached because the State Farm policy was never exhausted.

In summary, the application of the collateral source rule in this situation would serve to ignore the policy provisions of both the State Farm and GEICO policy even though John Ludwig has been completely released of all liability and would not benefit from the implementation of GEICO's "other insurance" clause. Instead, the appropriate resolution of this matter requires a logical determination of when the various insurance coverages available to pay for the property loss sustained by the Respondent should be made. Through a logical application of these insurance provisions, it is clear that the Respondent had sufficient coverage to pay for her property loss before the GEICO policy was to be considered. Property damage coverage was available under the liability policies for John Ludwig. If those coverages, as allocated by the parties having an interest in those coverages, proved insufficient to fully compensate for the property losses sustained, any insufficiency should have first been paid under the State Farm policy, and, if that coverage could not cover the full insufficiency, then the GEICO policy was to

make up the difference (up to its policy limits). Because the limits of the State Farm policy were not exhausted, payment by GEICO was not available.

CONCLUSION

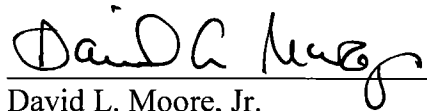
The crux of the Respondent's argument relies upon the application of the collateral source rule. If that rule is inapplicable, then a determination must be made as to whether the GEICO underinsured motorist coverage is reached. The collateral source rule requires both the presence of a collateral source and the attempted use of that fund to the benefit of the wrongdoer. The Respondent attempts to extend the application of the collateral source rule by asserting that proof of the existence of a collateral source is all that is needed. This approach disregards the very purpose of the collateral source rule (preventing a wrongdoer from benefitting from a fund for which he has not contributed) and opens the door to havoc with regard to the application of first party additional or excess coverage. Under the Respondent's approach additional or excess first party insurance coverage could never be protected by the buffer of existing primary first party coverage but would always be required to be paid, thereby granting the insured a windfall over and above the actual value of the damages incurred. This would result in either a decrease in the availability of first party additional or excess coverage or a large increase in premiums charged. Neither possibility would be good for the consuming public.

If the collateral source rule is inapplicable, then GEICO's UIMPD coverage is only available after all liability coverage and the State Farm homeowner's coverage has been exhausted. Notwithstanding Respondent's arguments to the contrary, monies were paid from the liability policies to indirectly satisfy the Respondent's claims for property damage losses. If those payments proved insufficient, then the Respondent had recourse

to any additional amounts available under the State Farm homeowner's policy. Based upon its "other insurance" clause, GEICO would have the next line of coverage. This provision does not, as argued by the Respondent, serve to preclude the application of GEICO's coverage. Instead, it only directs when it is available. Because the liability insurance policies and the State Farm homeowner's insurance policy were more than adequate to cover the property loss sustained by the Respondent, GEICO's coverage should never have come into play.

In light of this application of the hierarchy of insurance coverage, the Circuit Court award of \$100,000 in underinsured motorist benefits to the Respondent should be reversed.

Respectfully submitted,



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Greenville South Carolina
August 13, 2012

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AUG 14 2012

Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleas of Greenville County, South Carolina

The Honorable D. Garrison Hill, Circuit Court Judge

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AUG 14 2012

Case No. 2010-CP-23-5493

Case Tracking Number 2012-206390

SC Court of Appeals

Francia A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company,..... Defendants.

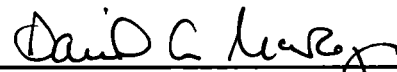
of which

Government Employees Insurance Company is..... Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Initial Reply Brief of Appellant complies with South Carolina Supreme Court's August 13, 2007 Order.

August 13, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appeal from the Court of Common Pleas of Greenville County, South Carolina

SC Court of Appeals

The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

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v.

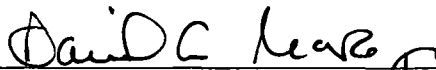
Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company,..... Defendants.

of which
Government Employees Insurance Company is..... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing Initial Reply Brief of appellant on Francia A. Bardsley by depositing a copy of same in the United States Mail, postage prepaid, addressed to her attorneys of record, Carroll H. Roe, Jr., William A. Coates and Joseph O. Smith, Roe Cassidy Coates & Price, PA, P.O. Box 10529, Greenville, South Carolina 29602.

August 13, 2012



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The South Carolina Court of Appeals

Francina A. Bardsley, as Personal Representative of the
Estate of Frederic William Bardsley, III, Respondent,

v.

Government Employees Insurance Company and State
Farm Fire & Casualty Insurance Company, Defendants,

Of whom Government Employees Insurance Company is
Appellant.

Appellate Case No. 2012-206390

The Honorable D. Garrison Hill
Greenville County
Trial Court Case No. 2010CP2305493

ORDER

The time for serving and filing the appellant's initial reply brief is hereby extended
until August 29, 2012.

FOR THE COURT

BY Jenny A. Kitching
CLERK

Columbia, South Carolina

FILED

Enter 8/14/12

cc:

Carroll H. Roe, Jr.

David L. Moore, Jr.

William A. Coates

Joseph Owen Smith



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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August 14, 2012

Mr. Joseph Owen Smith
PO Box 10529
Greenville SC 29603

Re: Bardsley, Francina v. Gov. Employees
Appellate Case No. 2012-206390

Dear Counsel:

The following order has been endorsed on your request for an extension to serve and file the respondent's initial brief in the above matter.

"Granted.

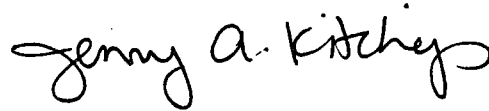
FOR THE COURT

By s/ Jenny Abbott Kitchings
CLERK

August 14, 2012."

Please be advised the respondent's initial brief and designation of matter have been received and are accepted as filed.

Very truly yours,

A handwritten signature in cursive script that reads "Jenny A. Kitchey".

CLERK

cc: Carroll H. Roe, Jr.
David L. Moore, Jr.
William A. Coates

NEXSEN | PRUET

Lisa M. Ledbetter
Paralegal

July 19, 2012

Jenny Abbott Kitchings
SC Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

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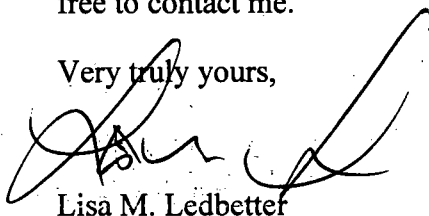
**Re: Francina A. Bardsley, Respondent v. Government Employees
Insurance Company, et al
Case No.: 2010-CP-23-5493**

Dear Ms. Kitchings:

Please be advised that David Moore is no longer with Love, Thornton, Arnold & Thomason. Mr. Moore is now practicing with Nexsen Pruet, LLC. Mr. Moore's information has updated this information on the AIS system as required by the Supreme Court Order number 2011-10-17-01. Mr. Moore's South Carolina Bar number is 4050. Please revise this information in your system.

Should you have any questions or if you need anything further, please feel free to contact me.

Very truly yours,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Common Pleas of Greenville County, South Carolina

The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

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JUL 30 2012

SC Court of Appeals

Francia A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III,.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company.....Defendants.

of which
Government Employees Insurance Company is Appellant.

REQUEST FOR EXTENSION OF TIME

The Appellant Government Employees Insurance Company requests that the South Carolina Court of Appeals grant it a thirty (30) day extension of time in which to file its Initial Reply Brief. See Rule 263(a), SCAR. In support of this motion, the Appellant would state as follows:

1. Appellant's counsel filed this Appeal on January 9, 2012.
2. The Initial Brief of the Appellant was filed on May 18, 2012.
3. The Initial Brief of the Respondent was filed on July 17, 2012.
4. Pursuant to Rule 208, SCACR, the Initial Reply Brief in this matter is due on July 30, 2012.

10

5. In the past several weeks, counsel for the Appellant's heavy case load has required his attendance at numerous proceedings, including mediations and motion hearings, many of which have been out of town. Additional time is therefore needed in order to prepare the Reply Brief that is properly researched and argued. Accordingly, the Appellant would request an extension of thirty (30) days for the filing of its Initial Reply Brief in this matter.
6. If this motion is granted, Appellant's Initial Reply Brief would be due on August 29, 2012.
7. This is the Appellant's first extension request. The undersigned counsel certifies that this extension request is made in good faith and not for the purposes of delay.
- For the reasons set forth above, the Appellant requests a thirty (30) day extension of time in which to file its Reply Brief.

Respectfully submitted,

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July 27, 2012
Greenville, SC

Attorneys for Appellant
Government Employees Insurance Company

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Common Pleas of Greenville County, South Carolina

The Honorable D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III, ... Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company Defendants.

of which

Government Employees Insurance Company is Appellant.

PROOF OF SERVICE

I, David L. Moore, Jr., of Nexsen Pruet, LLC, Attorneys for the Defendants/Appellant, do hereby certify that I served the Request Extension of Time to File Initial Reply Brief on Roe Cassidy Coates & Price, PA, addressed to Carroll H. Roe, Jr., William A. Coates, and Joseph O. Smith, Attorneys for Respondent, by depositing the same in the United States Mail this 27th day of July, with first class postage prepaid as follows:

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William A. Coates, Esquire
Joseph O. Smith, Esquire
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(864) 370-2211
Attorneys for Appellant

NEXSEN | PRUET

July 27, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
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David L. Moore, Jr.
Special Counsel
Admitted in SC

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JUL 30 2012

SC Court of Appeals

Re: *Francia A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III, Respondent, v. Government Employees Insurance Company and State Farm Fire & Casualty Insurance Company, Defendants of which Government Employees Insurance Company is Appellant*
Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Dear Ms. Kitchings:

Enclosed please find the original and three (3) copies of Government Employees Insurance Company's Request Extension of Time to file its Initial Reply Brief and Proof of Service together with a check in the amount of \$25.00 representing the filing fee. Please file the originals and return the filed, stamped copies in the enclosed, self-addressed envelope.

By way of a copy of this letter, and as further evidenced by the accompanying Proof of Service, opposing counsel is being served. Thank you for your assistance in this matter.

Sincerely yours,

David Moore
by *LE*

David L. Moore, Jr.

DLM/bc

Enclosures

cc: Carroll H. Roe, Jr., Esquire w/encls.
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable D. Garrison Hill, Circuit Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

Francia A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty
Insurance Company, ... Defendants.

of which
Government Employees Insurance Company is..... Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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I. Statement of the Issues on Appeal

1. Did the circuit court properly hold that Bardsley was entitled to underinsured property damage coverage when the parties agreed upon and consented to stipulated facts submitted to the circuit court which established that the amount of Respondent's claim exceeded the available property damage coverage of the at-fault driver?
2. Did the circuit court properly find that GEICO's "other insurance" clause could not be properly enforced to deny underinsured property damage coverage?
3. Did the circuit court properly find that the GEICO policy at issue with schedules and riders, when read as a whole, is ambiguous, contains conflicting terms and therefore must be liberally construed in favor of the insureds and strictly against GEICO in accord with the long established jurisprudence of this State?
4. Did the circuit court commit reversible error in expressing concern that the GEICO "other insurance" clause was inconsistent with the purpose and intent of the underinsured motorist statute in violation of public policy?
5. Did the circuit court properly hold that the Bardsleys' State Farm homeowner's policy was a collateral source from which GEICO could not benefit by denying coverage for the extensive property damage suffered by Respondent?

II. Statement of the Case

Francina A. Bardsley, Individually and as Personal Representative of the Estate of Frederic William Bardsley, III (*hereinafter* Respondent or Bardsley) filed a Complaint against the Defendants State Farm Fire & Casualty Insurance Co. (*hereinafter* State Farm), and Government Employee Insurance Company's (*hereinafter* Appellate or GEICO) on July 7, 2010, alleging causes of action arising out of GEICO's denial of coverage for property damage sustained by Bardsley. GEICO filed its Answer on July 13, 2010, denying coverage for property damage sustained by Respondent under its underinsured (*hereinafter* UIM) policy issued to the Bardsleys. Both parties filed Motions for Summary Judgment seeking the Court's determination of whether Bardsley was entitled to property damage coverage under the UIM policy.

The Court heard arguments on the parties' cross motions on October 27, 2011. Following the hearing, the Court issued an Order dated November 21, 2011 (*hereinafter* the Order) granting Bardsley's summary judgment motion and finding that the policy exclusion upon which GEICO relied in denying UIM coverage for property damage was ambiguous and subject to the collateral source rule. (Order at 3). In light of its findings, the Court held that the Bardsley was entitled to the \$100,000 property damage UIM coverage under her GEICO policy. On December 1st GEICO filed a Motion for Reconsideration of the Court's November 21st Order. The circuit court denied GEICO's Motion for Reconsideration by Order dated December 13, 2011. This appeal followed.

III. Statement of the Facts

On August 25, 2009, John Ludwig drove a 2007 Maserati owned by Systems Development Integration, Inc. (*hereinafter* SDI) through the home of Frederic and Francina Bardsley instantaneously killing Mr. Bardsley and causing significant damage to the home. (Stipulations of Fact No. 2-6). The vehicle driven by Ludwig was covered under two insurance policies – Auto Owners Insurance Company (*hereinafter* Auto Owners) with a One Million Dollar (\$1,000,000.00) single occurrence policy limit and The Hartford Casualty Insurance Company with umbrella liability coverage of Two Million Dollars (\$2,000,000.00). (Stipulations of Fact No. 7, 8). As personal representative of the Estate of Frederic Bardsley, the Respondent had a cause of action for wrongful death against Ludwig and SDI. Auto Owners offered to pay its policy limits in the amount of One Million Dollars (\$1,000,000.00) to Bardsley for the benefit of the Estate of Frederic Bardsley in exchange for a covenant not to execute. (Stipulation of Fact No. 9). Likewise, The Hartford offered to pay the sum of Two Million Dollars (\$2,000,000.00) in exchange for a covenant not to execute. (Stipulation of Fact No. 10). The Probate Court for Greenville County conducted a hearing and issued an Order Approving the Terms of the Settlement. (Stipulation of Fact No. 11). In that Order, the Probate Court expressly stated that the Three Million Dollar payment “is to be allocated 100% to the wrongful death claim as the parties stipulate there is no valid survival claim.” (Probate Court Order Nov. 13, 2009 at 3 - 4). None of these settlement proceeds went to cover the property damage Respondent sustained as a result of Ludwig’s actions. (Stipulation of Fact No. 25).

The Bardsleys also maintained personal insurance on their home and automobiles, both of which cover property damage in certain instances. State Farm issued a homeowners' policy to Frederic and Francina Bardsley, insuring their residence. (Stipulation of Fact No. 13). The Bardsleys paid the premiums on the State Farm homeowners' policy which provided \$457,318.47 in coverage for damage to the residence, its contents, and loss of use expenses. (Stipulations of Fact No. 13, 19). Ludwig caused Eighty-Eight Thousand Two Hundred Thirty and 47/100 Dollars (\$88,230.47) of damage to the residence; Twenty-Three Thousand Six Hundred Eighty-Four and 44/100 Dollars (\$23,685.55) of damage to the contents of the home; and Twenty-Two Thousand Nine Hundred Fifty-Nine and 99/100 Dollars (\$22,959.99) worth of loss of use and living expenses. (Stipulation of Fact No. 14). Thus, Respondent suffered a total of One Hundred Twenty-Seven Thousand Eight Hundred Thirteen and 49/100 Dollars (\$127,813.49) of property damages. (Stipulation of Fact No. 14). State Farm paid the \$127,813.49 initially to cover these expenses but asserted a right of subrogation against Ludwig and SDI and/or their insurers. The covenant not to execute provided that Respondent would resolve State Farm's subrogation claims out of the \$3,000,000.00 settlement. (Stipulation of Fact No. 15). Due to the total exhaustion of the at-fault parties' insurance coverage, Mrs. Bardsley agreed to pay State Farm Ninety-Four Thousand Four Hundred Twenty-Four and 75/100 Dollars (\$94,424.75) to finalize the settlement and appease State Farm's property damage subrogation claim against Ludwig and SDI. (Stipulation of Fact No. 15). Therefore, Bardsley did not receive coverage for the extensive property damage caused by Mr. Ludwig's reckless actions.

GEICO issued an insurance policy to the Bardsleys that provides underinsured motorist (UIM) coverage in the amount of Three Hundred Thousand Dollars (\$300,000.00) for what is described as “bodily injury” under the policy and One Hundred Thousand Dollars (\$100,000.00) for what is described as “property damage” under the policy. (Stipulations of Fact No. 16, 17). GEICO paid Respondent the bodily injury limit of \$300,000.000 under the UIM policy. (Stipulation of Fact No. 18). However, despite the fact that all of the available liability coverage of the at-fault driver had been exhausted, GEICO refused to tender the \$100,000.00 for property damage under the policy.

IV. Legal Arguments and Authorities

A. Standard of Review

“In reviewing the grant of summary judgment an appellate court applies the same standard that governs the trial court under Rule 56, SCRCP.” *Singleton v. Sherer*, 377 S.C. 185, 196, 659 S.E.2d 196, 202 (Ct. App. 2008). A court properly grants summary judgment when the record reveals that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) SCRCP; *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008). In determining whether any triable issues of fact exist as would preclude summary judgment, the court must view the evidence and all reasonable inferences that may be drawn from it, in a light most favorable to the nonmoving party. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (2007). Finally, “[a] party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of [his] pleadings,’ but rather must ‘set forth specific facts showing that there is a genuine issue for trial.’” *Id* at 526.

In the present case the parties agreed to stipulated facts which were submitted to the court below thereby leaving only a question of law as to whether Respondents were entitled to the property damage coverage under their UIM policy with GEICO.

B. Argument & Authorities

- 1. The circuit court properly held that UIM property damage coverage was available to Bardsley under her GEICO policy.**
 - a. The stipulated facts and exhibits submitted to the circuit court established that Bardsley’s claim for property damage exceeded the available property damage coverage of the at-fault driver.**

GEICO first argues that UIM property damage coverage does not apply under the circumstances due to the alleged lack of proof that there was insufficient liability coverage for such damage. GEICO asserts that “[i]n order to determine if a specific loss is greater than the available liability coverage for property damage, it becomes necessary to know the value of the loss and the amount of property damage liability insurance available.” (App. Br. at 6). Appellant argues that such evidence was lacking below and claims the circuit court erred because it “failed to undertake this evaluation.” (App. Br. at 6). The court below did not err in awarding UIM property damage benefits as the stipulated facts established that Bardsley’s property damage claim exceeded the at-fault parties’ available coverage.

GEICO’s argument is premised upon an alleged absence of factual evidence considered by the circuit court in reaching its holding. This ignores the fact that the parties worked together and jointly submitted stipulated facts with accompanying exhibits to the circuit court for the purposes of the summary judgment hearing. Those stipulated facts and exhibits specified: (1) the coverage available under each respective insurance policy; (2) the amount of property damage sustained by the Respondent; and (3) how the insurance proceeds received thus far were distributed to cover Bardsley’s damages. (*See* Stipulation of Facts Nos. 12-14, 17, 25). Specifically, the stipulated facts and exhibits showed that Bardsley suffered \$127,813.49 in property damages; (Stipulation of Fact No. 14); Ludwig, as the at-fault party, had a total of three million dollars in single occurrence coverage under his and SDI’s respective policies with Auto Owner and the Hartford; (Stipulations of Fact No. 7, 8); and the entire three million of Ludwig’s available coverage was paid in satisfaction of Respondent’s wrongful death claim with none going

to cover the property damage sustained as a result of his actions. (Stipulation of Fact No. 25; *See also* Probate Court Order Nov. 13, 2009 at 3-4). Therefore, GEICO in conjunction with Bardsley provided the very information it claims the court lacked and failed to consider in reaching its decision. Interestingly, immediately following GEICO's assertion that the circuit court failed to undertake this evaluation because it lacked the necessary information, Appellant discusses the stipulated facts and accompanying exhibits that contain this very information. (App. Br. at 6-7).

GEICO's conclusion that "[t]he Circuit Court failed to undertake [the required] evaluation" is also unsupported by the record. (App. Br. at 6).¹ Appellant does not cite to any specific portion of the record, the Court's Order, or hearing transcript to support its position in this regard. The court's ruling awarding UIM property damage benefits to Bardsley is a clear indication that the circuit judge looked at the relevant facts and exhibits submitted by the parties and found Respondent's property damage exceeded the at-fault party's available coverage. In fact the Order expressly notes that "Ludwig had a total of \$3,000,000.00 in liability insurance coverage" and "Bardsley settled the wrongful death claim with Auto Owners and the Hartford for \$3,000,000.00 in available coverage despite the value of the wrongful death action exceeding the settlement amount." (Order at 5). Simply put, the record shows that the circuit court both had and considered the relevant facts in determining whether Bardsley was entitled to UIM property damage

¹ GEICO made essentially the same argument below in its Motion to Reconsider asserting that the circuit court "disregarded the methodology" for determining the amount of UIM damages to be awarded. (Def. Mot. Recon. at 1-2). GEICO argued then and now, without citation to any supporting authority mandating usage of this methodology, that the circuit court erred in not making specific findings as to the amount of liability coverage available for the property damage and the value of the loss sustained. (Ap. Br. at 5-8; Def. Mot. Recon. 1).

benefits under the GEICO policy. Therefore the court below properly found Bardsley was entitled to her UIM property damage benefits.

- b. There was insufficient property damage coverage under the circumstances as all of the at-fault party's available insurance coverage was paid in satisfaction of Respondent's wrongful death claim.**

GEICO argues that there was adequate property damage coverage under Ludwig's policies stating that "a review of the Auto Owners and Hartford policies reveals that there was underlying coverage for property damage." (App. Br. at 7). GEICO's position is contradicted by the fact that it paid Bardsley its UIM bodily injury coverage limits for the injuries (wrongful death) damages Respondent sustained as a result of the accident. As GEICO notes, both the Auto Owners and Hartford policies have single coverage limits, neither segregating coverages for bodily injury and property damage. (App. Br. at 7). Thus, GEICO's payment of UIM benefits for bodily injury damages is recognition that the at-fault party's available coverage was insufficient-not only to cover the bodily injury (wrongful death) damages but also inadequate to compensate Respondent for the property damage she has suffered as both policies contained single coverage limits which were exhausted by payment of the wrongful death claim.

This argument also ignores the plain language of the Probate Court's order that allocates the entire three million in available coverage under those policies to the settlement of Bardsley's wrongful death claim. (*See* Prob. Order Nov. 13, 2009 at 3-4)("This payment, subject to attorneys' fees and costs...is to be allocated 100% to the wrongful death claim."). GEICO contends that "[t]he repayment of State Farm on its subrogation interest out of the liability insurance settlement proceeds would also reveal that some portion of that liability coverage was attributable to property damage

coverage.” (App. Br. at 7). This is an assumption that is contradicted by Judge Faulkner’s order and the accompanying covenants not to execute. The payment to State Farm in satisfaction of its subrogation claim was agreed to as part and partial of the settlement for the wrongful death claim and does not evidence the existence of adequate property damage coverage under at-fault parties’ policies.

GEICO’s position that Ludwig’s policies provided adequate coverage for the property damage is further belied by the fact that the Bardsleys’ owned their home as joint tenants with the right of survivorship, as reflected by the Deed submitted to the circuit court as an exhibit to the stipulation of facts. (See Stipulation of Fact No. 21; Exh. 9). Therefore, at the moment of Mr. Bardsley’s death the home was immediately passed to Mrs. Bardsley as the sole owner. *Estate of Sherman ex rel. Maddock v. Estate of Herman ex rel. Snodgrass*, 359 S.C. 407, 597 S.E.2d 850 (Ct. App. 2004); (Stipulation of Fact No. 6)(Mr. Bardsley died immediately upon impact.). With Ms. Bardsley as the sole owner, the home was not part of her husband’s estate. The Probate Court’s Order Approving Settlement awards the entire three million in coverage under the Auto Owners and Hartford policies “to the Petitioner for the benefit of the Estate of Frederic William Bardsley III.” (Order Nov. 13, 2009 at 2-3; Amended Order Dec. 22, 2009 at 2-3). Francis A. Bardsley, as Personal Representative of the Estate of Frederick Bardsley was “the Petitioner” in the probate proceedings. Thus, all payments made by Ludwig’s insurers went to the benefit of the estate and could not have gone to compensate Respondent for the extensive property damage caused to her home.

Therefore, the circuit court properly found that the circumstances warranted application of the GEICO UIM property damage coverage as all of the at-fault party's available coverage was insufficient to cover the property damage Bardsley sustained.

c. Consideration of Bardsley's State Farm coverage violates the collateral source rule.

Finally, GEICO argues that this is not a UIM property damage situation due to the Bardsleys' State Farm's homeowner policy providing sufficient property damage coverage. (App. Br. at 8). Appellant attempts to exclude coverage under the UIM policy by looking to sources wholly independent of the wrongdoer. As recognized by the circuit court, and argued below, UIM policies are subject to the collateral source rule and acceptance of GEICO's position effectively violates the doctrine. (*See* Order at 4-5; *See also infra* pgs. 22-25).

2. The circuit court properly held that GEICO's "other insurance" clause was unenforceable under the circumstances.

GEICO argues that the circuit court erred in awarding Bardsley her UIM property damage benefits because its coverage for such damage was secondary and excess to the Bardsley's State Farm policy. (App. Br. at 8-11). Appellant's argument aside, the issue is not properly before this court. While GEICO raised this argument during oral argument below, the circuit court did not make any ruling on it. It is a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *E.g., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and

ruled upon by the trial court). Following the circuit court's issuance of the Order, GEICO filed a Motion for Reconsideration which was denied. (Order Dec. 13, 2011). GEICO's Motion for Reconsideration challenges the circuit court's rulings on four grounds – none of which alleged the court erred by not determining and holding GEICO's UIM coverage was secondary and excess to State Farm's. (*See* Mot. to Amend). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *see also* Rules 52(b) and 59(e), SCRCP. Therefore, without a ruling on the issue it is not properly before this court.

If this court finds the issue is properly before it, GEICO's argument still fails. Appellant's argument relies upon a provision contained in the UIM amendment which states that "[i]f none of an insured's motor vehicles is involved in the accident...[w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance applicable to the damaged property." (*See* GEICO Policy at 3). GEICO takes the position that State Farm's homeowner coverage for property damage constitutes "valid and collectable insurance applicable to the damaged property" and therefore must be exhausted before it will pay out the \$100,000 in UIM property coverage. (App. Br. at 11). GEICO's position under the current circumstances is both contrary to the legislative purpose/intent of UIM coverage and precluded by application of the collateral source rule.

S.C. Code Ann. § 38-77-30(15) defines “underinsured motor vehicle” as “a motor vehicle 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.” The GEICO policy defines the term in a nearly identical manner as “a motor vehicle on which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least the minimum required by law, but the amount of the insurance or bond (a) is less than the amount off the insured’s damages or (b) has been reduced by payments to persons other than an insured injured in the accident to an amount which is less than the amount of the insured’s damages.” (See GEICO Policy at 1). Thus, under both the statutory and policy definitions, it is undisputed that Ludwig is “underinsured” in this instance, making the GEICO UIM coverage available to the Bardsleys.² GEICO’s refusal to pay out the \$100,000 is based upon the policy provisions noted above; however the collateral source rule precludes application of those provisions in the manner advocated by the Appellant. (See *infra* pgs. 22-26).

3. **The circuit court properly found that the GEICO policy at issue with schedules and riders, when read as a whole, is ambiguous, contains conflicting terms and must be liberally construed in favor of the insureds and strictly against GEICO.**

GEICO contends that the trial court erred in holding that the policy was ambiguous due to the alleged absence of any reasonable, conflicting interpretation which would grant Respondent recovery in spite of the State Farm homeowner’s coverage. (App. Br. at 11-14). Appellant asserts that a court must specifically set forth how a

² As noted above, GEICO has already paid Bardsley the UIM bodily injury limits under the policy, which under the circumstances, is a clear recognition that Ludwig and/or SDI is underinsured in this instance. See *supra* pgs. 9-10.

provision or policy may be reasonably understood in more than one way in order to deem it ambiguous. (App. Br. at 12). The circuit court was not required to undertake this task and the proceedings below sufficiently established the basis for its finding that the GEICO policy was ambiguous.

Insurance policies are subject to the general rules of contract construction. *Century Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 335, 358 (2002). “If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). “The rules of contract construction require exclusionary clauses to be narrowly interpreted.” *Id.* at 527 citing *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 337 (1967). An insurance contract is read as a whole document so that “one may not, by pointing out a single sentence or clause, create an ambiguity.” *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). However, an insurance contract which is “in any respect ambiguous or capable of two meanings must be construed in favor of the insured.” *Beaufort County Sch. Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011), reh'g denied (May 25, 2011), cert. dismissed (Dec. 20, 2011)(internal citation omitted); *See also Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460, 461 (1990)(The terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer).

First, GEICO takes issue with the Court's finding that its policy exclusion is ambiguous. Appellant argues that the definition of “ambiguous contract” requires a court

to both identify the ambiguous provision and expressly state how that particular language is capable of more than one reasonable interpretation. (App. Br. at 12; Def. Mot. Recon. at 3). GEICO argued below that the circuit court failed to identify what part of the policy it considered ambiguous. (*See* Def. Mot. Recon. at 3). Contrary to the Appellant's assertion, the circuit court did in fact identify the policy language it considered ambiguous. Specifically, at the outset of its substantive discussion, the circuit court recognized that in denying coverage GEICO relied upon "a provision contained in the UIM rider to its policy, which states '[i]f none of an insured's vehicles is involved in the accident...[w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance applicable to the damaged property.'" (Order at 3). The Court then found that "[t]he UIM exclusion upon which GEICO relies in this instance is ambiguous." (Order at 5). Therefore the Court not only recognized the provision it considered ambiguous, it actually quoted it at the outset of its substantive discussion in the Order.

On appeal GEICO argues that a Court must specify how a particular term or provision is susceptible of more than one reasonable interpretation to properly make a finding that the term or provision is ambiguous. (App. Br. at 11-12; Def. Mot. Recon. at 3). Such a specific determination is not required for the court to find a policy provision ambiguous. GEICO's assertion ignores the simple fact that the parties stipulated to the facts considered by the court. The circuit court had, read, and evaluated the language of the policy at issue. It found the UIM exclusion to be ambiguous without explicitly stating it was susceptible to more than one reasonable interpretation. (Order at 5). GEICO seemingly argues that the circuit court's finding on this issue should be nullified because

it did not expressly state that the language could be interpreted in more than one way by a reasonable person or how such differing interpretations were possible. There is no requirement in statutory or common law that mandates courts must make this express statement or explanation. The circuit court's finding that the language is ambiguous is a consequence of it determining that it may be subject to more than one reasonable interpretation. It is unnecessary for the circuit court to spell this out in the Order. GEICO's UIM exclusion provision is ambiguous on its face. It states that its UIM coverage "shall be in excess over other valid and collectible insurance." There is nothing within the policy that defines or offers any clarification as to what "other valid and collectible insurance" means, encompasses, or entails. The circuit court recognized that the exclusion as worded is subject to more than one reasonable interpretation, and thus the ambiguity must be resolved in Respondent's favor. (Order at 5).

Certainly, the provision at issue is subject to more than one reasonable interpretation - a fact most obviously evidenced by the existence of this litigation. GEICO contends that the "other valid and collectible insurance" language encompasses Bardsley's State Farm homeowner's policy. On the other hand, Respondent's position is that the "other valid and collectible insurance" language cannot include the State Farm policy as doing so would violate the collateral source rule. Thus, while the circuit court did not spell out exactly how the particular language at issue is subject to more than one reasonable interpretation, it is undisputable that the language is so susceptible.

On brief, GEICO attempts to define "other valid and collectible insurance" in an effort to demonstrate the provision's lack of ambiguity. Appellant's method and support for defining the term however further illustrates its uncertain meaning. GEICO does not

cite any controlling authority whatsoever in its attempt to define the term but rather relies on a general secondary source and the federal court for the District of Columbia. (*See* App. Br. at 12-13). This *post hoc* attempt to define the policy language at issue further shows illustrates its inherent ambiguity.

In addition, GEICO's argument ignores the conflicting policy provisions addressed during oral arguments. The Court and counsel for GEICO discussed ambiguity and particular conflicting provisions contained in the GEICO policy. Specifically, the circuit court sought clarification as to what provisions GEICO was relying upon in denying coverage:

THE COURT: So are you relying on this exclusion number four as well, Mr. Moore, that there's no coverage for property damage if the insured has been compensated by insurance or otherwise?

MR. MOORE: On page 2?

THE COURT: Yes sir.

MR. MOORE: Left-hand column, no, sir.

THE COURT: Why not?

MR. MOORE: Because I just don't think it's a good provision.

THE COURT: All right. Well, what's the difference between that and the one you are relying on?

MR. MOORE: That particular provision says there's no property damage coverage if the insured has been compensated by insurance or otherwise... That would mean that if – let's say he had coverage or damage that exceeded what was provided by State Farm, there would simply be no coverage anyway. I don't believe that's the case.

And, quite frankly, I believe that, under those circumstances, there might be an ambiguity.

Because they do provide for coverage when you have an underinsured situation as they defined.

Trans. at 30-31.

These conflicting provisions create an ambiguity within the policy, which was discussed and recognized by the circuit court.

THE COURT: I think the Bardsleys paid for underinsured motorist coverage, which was defined in the policy for property damage very plainly on Page 1 of the Amendment. And then if you read Pages 2 and 3, there are exceptions, some of which I understand you're not relying on, but, nonetheless, they create an ambiguity, which has to be construed in favor of the insured.

Trans. at 32-33. As properly recognized by the circuit court, the GEICO policy had ambiguous, conflicting terms and provisions that required the court to construe it in favor of the insured by providing UIM property damage coverage.

GEICO also argues that UIM coverage for property damage is a creation of contract, not statutory law, making it subject only to the terms and conditions of the agreement. (App. Br. at 13-14; Def. Mot. Recon. at 3). Appellant's position is based upon the statutory definition of "underinsured motor vehicle" which GEICO claims does not include coverage for property damage. (App. Br. at 13-14; Def. Mot. Recon. at 3). S.C. Code Ann. § 38-77-30(15) defines "underinsured motor vehicle" as "a motor vehicle 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). Contrary to GEICO's assertions, this definition does include UIM coverage for property damage. Under this definition the availability of coverage is measured by comparing the bodily injury liability coverage on the vehicle with the "insured's damages." The comparison is not to the "insured's damages arising out of bodily injury"

or the “insured’s property damages.” Therefore, the “insured’s damages” include both bodily injury and property damages. The GEICO policy defines the term in a nearly identical manner as § 38-77-140 stating “a motor vehicle on which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least the minimum required by law, but the amount of the insurance or bond (a) is less than the amount off the insured’s damages or (b) has been reduced by payments to persons other than an insured injured in the accident to an amount which is less than the amount of the *insured’s damages*.” (emphasis added). GEICO’s own definition of “underinsured motor vehicle” likewise includes property damage.

Therefore, the circuit court properly held that the GEICO policy at issue, when read as a whole, is ambiguous, contains conflicting terms and therefore must be construed against the insurer, and its finding in this regards does not constitute reversible error.

4. The circuit court properly expressed concern that GEICO’s UIM rider may contravene public policy.

Appellant claims the circuit court held that GEICO’s UIM rider violated public policy. (App. Br. at 14-17; Def. Mot. Recon. at 3-4). However, the circuit court did not hold that the GEICO UIM rider contravened public policy. The Order states that “GEICO’s UIM rider *may also* contravene public policy since any exclusions inconsistent with the UIM statute are void.” (Order at 5)(emphasis added). Nowhere in the Order did the circuit court actually rule or hold that the rider did in fact violate public policy. The wording of the Order on this issue is an expression of concern that the UIM rider may run afoul of public policy, not a determination that it actually does. In absence of a ruling on the issue it is not properly reserved for appeal and may not be grounds for reversal. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724

(2000)(It is a “long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); *E.g., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court). While the circuit court did not make a ruling on the public policy issue, Respondent contends that it is an additional sustaining ground for upholding the lower court’s action. *I’On* at 418(“Under the present rules, a respondent-the ‘winner’ in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.”); *See* Rules 220(c) and 208(b)(2) SCACR.

On brief, Appellant argues that in absence of a statutory mandate requiring UIM coverage for property damage, there can be no violation of public policy. (App. Br. at 15-16; Def. Mot. Recon. at 3). GEICO’s position finds no support in either statutory or case law.

The circuit court expressed concern that GEICO’s UIM rider may violate public policy as it was inconsistent with the UIM statute. (Order at 5). The legislative intent, or purpose of UIM coverage under S.C. Code Ann. § 38-77-160 has been thoroughly addressed by the courts. “The central purpose of the underinsured motorist (UIM) statute is to provide coverage when the injured party’s damages exceed the liability limits of the at-fault motorist.” *Floyd v. Nationwide Mut. Ins.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005); *McAlister v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 113, 390 S.E.2d 383 (Ct. App. 1990)(The statutory purpose of underinsured coverage is to provide coverage in the

event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist.); *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 310 S.E.2d 814 (1983)(The purpose of former § 56-9-831 [now § 38-77-160] is to provide insurance coverage where the insured party's damages exceed the liability limits of the at-fault motorist.).

In the present case, the at fault driver, Ludwig, had a total of \$3 million in liability coverage under the Auto Owners and Hartford policies. Bardsley settled with Auto Owners and Hartford for the entire \$3 million in available coverage despite the value of the case exceeding this amount. (*See* Order at 5 fn1)(Circuit court noted that an experienced practitioner submitted an affidavit to the court in which he opined that the value of Bardsley's wrongful death claim was in excess of \$3.5 million. Notably, Appellant does not take issue with this evaluation.). As the Probate Court's Order Approving Settlement shows, all of this money went to Bardsleys' wrongful death claim, and therefore constitutes payment for body injuries/personal damages, not property damage.³ Ms. Bardsleys' property damage therefore was not covered by Ludwig's available insurance, making him an underinsured motorist for all intents and purposes. The clear and express purpose of UIM coverage is to make up for this shortfall. GEICO is attempting to avoid paying the \$100,000 in UIM coverage provided under the Bardsleys' policy, even though her damages exceed the at-fault motorist's coverage, a position and outcome that contravenes the purpose of such coverage. GEICO petitions

³ As noted above, Bardsley did initially receive money from her homeowners insurance to cover the property damage resulting from the incident. However, in order to comply with the covenant not to execute and address State Farm's alleged subrogation claim against the settlement proceeds, Mrs. Bardsley repaid State Farm the money it initially tendered to cover her property damage, less attorneys' fees and other costs unrelated to the property damage itself.

the Court to allow it to benefit from their insured's other insurance policy, a contract to which they are a stranger.

GEICO's position thus contravenes sound public policy. *See* 43 Am. Jur. 2d Insurance § 285("An insurance policy that contains provisions that defeat coverage for which the insurer has received valuable consideration is against public policy.") It is not in the public interest for an insurer to be able to benefit from their insured's other insurance when the insureds are not the at-fault party. It is in the public interest to require and/or encourage people to maintain adequate (or more than merely minimal) insurance on their largest investments- their homes and vehicles. GEICO is attempting to receive a benefit from the premiums the Bardsleys paid to State Farm for homeowner's coverage; however, if they had failed to make their payments, causing the homeowner insurance to lapse, GEICO would simply pay out the \$100,000 in UIM coverage for property damage. Allowing GEICO to avoid its liability for coverage in this manner provides a disincentive for the public to maintain additional insurance to cover certain property from adverse events. Maintaining more than adequate insurance on one's home and vehicles should be encouraged and rewarded, rather than punished as GEICO is attempting to do. In addition, allowing GEICO to deny coverage in this instance would create a potentially harmful precedent in which an injured party's own insurers would have an incentive to construct policies in a manner which would make them liable only for amounts not covered by any insurance whatsoever, without regard to whether it derives from the at-fault or injured party.

Finally, as noted in the Order the circuit court expressed concern that the UIM rider may contravene public policy in light of the fact that South Carolina is a stated

value policy state - there would be “virtually no situation where GEICO would ever have to pay its UIM coverage on any residence on which homeowners insurance has been placed since these type [of] policies most often are stated value policies and the policy limits would never be exhausted.” (Order at 5). The court’s concern in this regard is legitimate. In circumstances such as the present, where a vehicle runs into a home causing property damage, the homeowner’s policy would cover the value of any such damage no matter how extensive. Therefore, the application of the policy provision as advocated by GEICO renders the coverage useless in these situations, as was noted in the arguments below. (*See Trans.* at 7, 28-29). Appellant has argued that the circumstances of this case are exceedingly rare, with most UIM property damage cases having to deal with damage to vehicles rather than homes. (*See Trans.* at 17). While there is likely a larger number of the latter, it is not uncommon for damage to be caused to a home by a vehicle. The rarity of the present circumstances stems from the grave and severe bodily injury that was sustained by the homeowner and his family. On brief, GEICO asserts that “[t]here are many situations where other valid insurance coverage would not be available and the GEICO underinsured property coverage would be applicable.” App. Br. at 17. Tellingly, Appellant fails to give a single example of such a scenario.

Therefore, the circuit court’s noted concern that GEICO’s position may run afoul of public policy was legitimate and as a practical matter does not constitute any reversible error.

5. The circuit court properly held that the Bardsleys' State Farm homeowner's policy was a collateral source from which GEICO could not benefit by denying coverage for the extensive property damage.

The collateral source rule has been applied liberally in this State, oftentimes to insurance proceeds. *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); *Rattenni v. Grainger*, 298 S.C. 276, 278, 379 S.E.2d 890 (1989). In fact, it has been specifically held that the collateral source rule applies to UIM benefits. *Putsaver v. Gooden*, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002); *See also Rattenni*, 298 S.C. 276, 379 S.E.2d 890 (UIM proceeds are subject to the collateral source rule. Thus, the rule precluded setoff of UIM proceeds against a jury's damages award where the benefits received were from the injured party's own UIM policy for which she paid the premiums.). South Carolina has long followed the collateral source rule "that compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of the damages owed...." *Rattenni* 298 S.C. at 277, 379 S.E.2d at 890. "The *only requirement* for qualification as a collateral source is that the source be wholly independent of the wrongdoer." *Citizens & S. Nat'l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (emphasis added). A source is wholly independent of the wrongdoer "when the wrongdoer has not contributed to it." *Id* at 92, 318. A third party cannot take advantage of payments or services rendered by a collateral source for an injured person's benefit, irrespective of whether the source is an insurance company. *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993).

Under the circumstances, the Bardsleys' State Farm coverage constitutes a collateral source, as it derives from a source "wholly independent of the wrongdoer" to

which the injured party, not the wrongdoer, contributed. The Bardsleys' obtained and paid the premiums on the State Farm homeowners' insurance to insure their home against damages. Ludwig, SDI and their insurers had nothing to do with the State Farm policy. Also, no one questions that Ludwig is the wrongdoer in the present action. As noted above, his insurance (Auto Owners and Hartford) agreed to pay out their policy limits, all of which went to settle Respondent's wrongful death claim. Therefore the State Farm policy cannot be characterized as anything but a collateral source to which UIM benefits are subject. In denying coverage for property damage under the Bardsleys' UIM policy, GEICO attempts to avoid liability by reliance upon a collateral source and receive the benefit of a contract to which they are a stranger. GEICO is not and cannot be a third party beneficiary of the Bardsleys' State Farm insurance policy. GEICO asks the Court to look beyond the assets of the at-fault party and into those of the injured party. The collateral source doctrine precludes such a consideration. Therefore, the circuit court properly found that application of the exclusionary policy provision as advocated by GEICO violates the collateral source rule.

On brief, GEICO argues that the collateral source rule does not apply under the circumstances. (App. Br. at 18-25). It contends that the doctrine only applies where the source is wholly independent of the wrongdoer *and* the at-fault party is seeking reduction or offset of its liability. (App. Br. at 18). Appellant argues that since it does not represent the at-fault party in this case nor seek to reduce his liability, the circuit court erred in applying the doctrine. App. Br. at 18. GEICO is attempting to impute an additional condition on application of the collateral source rule -- that the wrongdoer must be seeking to reduce its liability. This is simply not a condition precedent to the

application of the doctrine. The South Carolina Supreme Court long ago recognized that “[t]he *only requirement* for qualification as a collateral source is that the source be wholly independent of the wrongdoer.” *Citizens & S. Nat’l Bank v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)(emphasis added). As noted above, this requirement has been met and the State Farm policy constitutes a collateral source.

GEICO also argues that the circuit court’s application of the collateral source rule contravenes the purpose of the doctrine, by providing Bardsley with “a windfall payment in excess of the property damages she actually sustained.” (App. Br. at 25). GEICO is mistaken in this regard. Bardsley will not receive any windfall by GEICO’s payment of her UIM property damage coverage. As noted above, all of Ludwig’s available three million in coverage went to the payment of Respondent’s wrongful death claims. (*See supra* pgs. 2-5). Bardsley did initially receive money from her State Farm homeowners insurance to cover the property damage resulting from the incident. However, in order to comply with the covenant not to execute and address State Farm’s subrogation claim, Mrs. Bardsley repaid her insurer State Farm the money it initially tendered to cover the property damage, less attorneys’ fees and other costs unrelated to the property damage itself. Therefore, Bardsley did not retain any money compensating her for the \$127,813.49 in property damage she suffered as a result of Ludwig’s actions. (Stipulation of Fact No. 14). In light of the circumstances, GEICO’s payment of the UIM property damage coverage would not afford her a windfall. On the contrary, the \$100,000 in coverage does not completely cover the full extent of the property damage suffered.

Finally, the GEICO UIM policy language cannot abrogate the doctrine. The South Carolina Supreme Court has affirmed that UIM insurance is subject to the collateral source rule. *Putsaver*, 350 S.C. at 414, 566 S.E.2d 199; *Rattenni*, 298 S.C. 276, 379 S.E.2d 890. Following amendments to S.C. Code Ann. § 38-77-160 in which the General Assembly added language to the UIM statute that made UIM benefits not subject to subrogation and assignment, the issue of whether this also precluded application of the collateral source rule to such benefits was addressed. Abiding by the statutory construction maxim that “the inclusion of some is to the exclusion of others,” the Court held that the General Assembly’s amendment to the UIM statute prohibiting subrogation and assignment of UIM benefits did not by implication limit or prohibit the applicability of the collateral source doctrine to this class of insurance. *See Putsaver*, 350 S.C. at 414, 566 S.E.2d at 201 (“We decline to carve out an exception to the collateral source rule for UIM coverage by implication based upon the amendment forbidding subrogation or assignment.”). “Had the General Assembly intended to abrogate the collateral source rule in regard to this particular class of insurance proceeds, it would have done so.” *Id* at 141 *citing Rattenni*, 298 S.C. at 278, 379 S.E.2d at 891. Therefore, the policy language relied upon by GEICO to deny coverage does not and cannot abrogate the application of the collateral source rule and allowing Appellant to refuse payment for property damage coverage due to the Bardsleys’ State Farm policy violates the doctrine.

Thus, the circuit court properly held that the collateral source rule applied to preclude GEICO from denying coverage based upon the Bardsleys’ State Farm homeowner policy as it was derived from a source wholly independent of the wrongdoer. (Order at 4-6).

V. Conclusion

Taken in a light most favorable to the Appellant, the circuit court's holdings and rulings in its November 21, 2011 Order were justified and proper under the facts and circumstances.

The stipulated facts and exhibits submitted to the court wholly supported its finding that the Respondent's claims for property damage exceeded the available coverage of the at-fault driver. The stipulated facts and accompanying exhibits specified (1) the coverage available under each respective insurance policy; (2) the amount of property damage sustained by the Respondent; and (3) how the insurance proceeds received thus far were distributed to cover Bardsley's damages. Therefore, the circuit court's finding in this regard is wholly supported by the record and does not constitute reversible error.

The circuit court also properly found that GEICO's "other insurance" clause could not be properly enforced to deny Bardsley underinsured property damage coverage as it was ambiguous and doing so violated the collateral source rule.

The court below also properly held that GEICO's policy, when read as a whole, is ambiguous, contains conflicting terms and therefore must be liberally construed in favor of Bardsley as the insured by affording her coverage. The circuit court did not have to specially set forth how a particular provision or the policy may be reasonably understood in more than one way in order to find it ambiguous. Nevertheless, the proceedings below sufficiently established the basis for the circuit court's finding that the policy contained conflicting terms and was ambiguous. GEICO advocates for the enforcement of an exclusion provision that Appellant itself has recognized conflicts with another exclusion

provision within the policy. An insurer may not benefit from a conflicts and ambiguities of its own creation. Therefore, the circuit court's finding in this regard is supported by the record and does not constitute reversible error.

It was also proper for the court below to express concern that the GEICO "other insurance" clause was inconsistent with public policy. As the court rightly recognized South Carolina is a stated value policy state and in circumstances such as the present, where a vehicle runs into a home causing property damage, the homeowner's policy would cover the value of any such damage no matter how extensive. Therefore, the application of the policy provision as advocated by GEICO renders the coverage useless in these situations, as was noted in the arguments below. An insurance policy that contains provisions that defeat coverage for which the insurer has received valuable consideration is against public policy. Likewise, application of the policy as advocated by Appellant is contrary to the intent and purpose of the UIM statute which is to provide coverage in the event damages are sustained in excess of the liability limits carried by the at-fault driver. Therefore, the circuit court's noted concern that GEICO's position may run afoul of public policy was legitimate and as a practical matter does not constitute any reversible error.

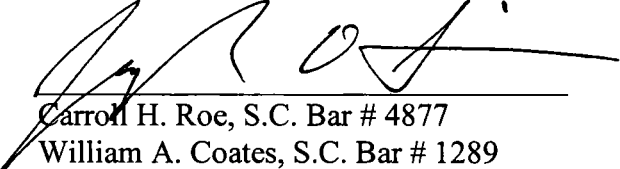
Finally, the circuit court properly held that the Bardsley's State Farm homeowner policy constituted a collateral source. The collateral source rule has been applied liberally in this State, oftentimes to insurance proceeds. In fact, the South Carolina Supreme Court has specifically held that the collateral source rule applied to UIM benefits. The only requirement for qualification as a collateral source is that the source be wholly independent of the wrongdoer. It is undisputed that the Bardsleys' State Farm

homeowner policy is a source wholly independent of the wrongdoer in this case and therefore the court below properly held that the doctrine applied to preclude Appellant from deriving a benefit from it. Appellant's attempt to impute an additional condition to qualification as a collateral source is directly contradicted by controlling case law. Furthermore, the circuit court's holding does not contravene the purpose of the doctrine by affording Bardsley a windfall. Respondent has not retained any compensation for the extensive property damage she suffered as a result of Ludwig's actions, which the record reflects totals some \$127,813.49. Therefore, GEICO's payment of the \$100,000 in UIM property damage coverage will not afford Bardsley a windfall as her property damages exceed the coverage limit.

In sum, the circuit court's award of the GEICO UIM property damage benefits to Bardsley was appropriate under the circumstances.

For the reasons set forth above, the Circuit Court's Order of November 21, 2011 should be affirmed.

Respectfully Submitted,



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Attorneys for Respondent

July 17th, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable D. Garrison Hill, Circuit Judge

Case No. 2010-CP-23-5493
Case Tracking Number 2012-206390

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MAR 18 2012

SC Court of Appeals

Francia A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ... Defendants.

of which

Government Employees Insurance Company is..... Appellant.

DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL

1. Orders

- a. Order of November 21, 2011
- b. Order of December 13, 2011
- c. Order Approving Settlement November 13, 2009
- d. Amended Order Approving Settlement December 22, 2009
- e. Order Approving Settlement March 11, 2010

2. Pleadings

- a. Complaint
- b. Answer
- c. Stipulations of Fact
- d. Respondent's Motion for Summary Judgment
- e. Appellant's Motion for Summary Judgment
- f. Respondent's Brief in Support of Motion for Summary Judgment
- g. Appellant's Brief in Support of Motion for Summary Judgment
- h. Respondent's Brief in Opposition to Appellant's Motion for Summary Judgment
- i. Appellant's Brief in Opposition to Respondent's Motion for Summary Judgment

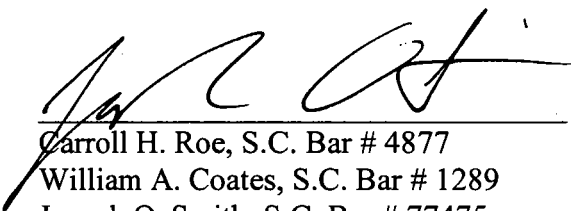
- j. Appellant's Reply Memorandum to Respondent's Brief in Opposition to Appellant's Motion for Summary Judgment
- k. Appellant's Motion for Reconsideration
- l. Respondent's Memorandum in Opposition to Motion for Reconsideration
- m. Appellant's Memorandum in Reply to Respondent's Memorandum in Opposition to Motion for Reconsideration

3. Transcript of Motion Arguments October 27, 2011..

4. Exhibits

- a. Auto Owners Policy
- b. Hartford Insurance Company Policy
- c. Covenant Not to Execute
- d. State Farm Homeowner Policy
- e. Receipt and Mutual Release Agreement October 5, 2010
- f. GEICO Policy
- g. Deed
- h. Affidavit of Thomas W. Traxler

I certify that this designation contains no matter which is irrelevant to this appeal.



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July 17th, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
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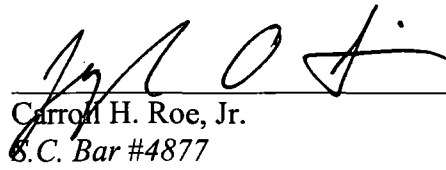
Government Employees Insurance Company is..... Appellant.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the Initial Brief of the Respondent and
Respondent's Designation of Matter to be Included in the Record on Appeal were served on
counsel for the Appellant by placing a copy of same in the United States Mail with proper
postage affixed thereto and addressed as follows:

David L. Moore, Jr.
Nexsen Pruet
55 East Camperdown Way, Suite 400
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JUL 18 2012
SC Court of Appeals



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July 17, 2012

Greenville, South Carolina

July 17, 2012

Via Federal Express and Facsimile

Jenny Abbott Kitchings
1015 Sumter Street
Columbia, South Carolina 29201

Re: Francina A. Bardsley v. GEICO
Case No: 2010-CP-23-5493
Case Tracking No: 2012-206390
RCCP 1687.0001

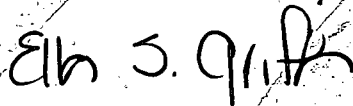
Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of Respondent's Initial Brief and Designation of Matter in the above-referenced matter. Also enclosed is the proof of service of same. We would appreciate your return of the filed copy in the stamped, self-addressed envelope provided herein. Thank you.

With kind regards, I am

Very truly yours,

ROE CASSIDY COATES & PRICE


Ellen S. Griffin
Paralegal for Joseph O. Smith

Enclosures: (as stated above)

cc: David L. Moore, Jr. with enclosures
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SC Court of Appeals



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June 11, 2012

Jenny Abbott Kitchings
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RECEIVED
JUN 13 2012
SC Court of Appeals

Re: **Francina A. Bardsley v. GEICO**
Case No: 2010-CP-23-5493
RCCP 1687.0001

Dear Ms. Kitchings:

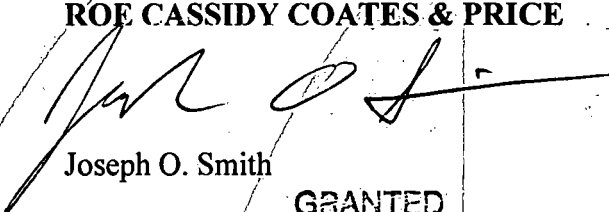
We represent the Respondent, Francina A. Bardsley, in the above-referenced appeal. Our initial brief and designation of matter is currently scheduled for filing on or about June 18, 2012. I respectfully request a thirty (30) day extension of the filing deadline for our initial brief and designation of matter.

A check in the amount of \$25.00 is enclosed to cover the administrative expenses associated with this request. By copy of this correspondence, I am notifying David L. Moore, Jr., counsel for the Appellant, of this extension request. If you have any questions regarding this matter, please contact me at your convenience.

With kind regards, I am

Very truly yours,

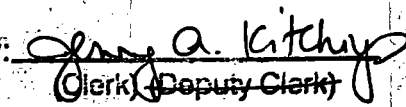
ROE CASSIDY COATES & PRICE


Joseph O. Smith

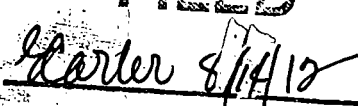
GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

Enclosure: (as stated above)

cc: David A. Moore

By: 
(Clerk/Deputy Clerk)

FILED


Harter 8/14/12

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

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Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ...Defendants,

of which

Government Employees Insurance Company is Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN AWARDING DAMAGES FOR AN UNDERINSURED PROPERTY CLAIM WHEN THERE WAS NO EVIDENCE THAT THE VALUE OF THE CLAIM WAS GREATER THAN THE AVAILABLE LIABILITY COVERAGE?
2. DID THE CIRCUIT COURT ERR IN AWARDING DAMAGES FOR AN UNDERINSURED PROPERTY CLAIM WHEN THE AVAILABLE UNDERINSURED MOTORIST PROPERTY COVERAGE WAS SECONDARY AND EXCESS TO THE AVAILABLE HOMEOWNER'S INSURANCE COVERAGE WHICH WAS ADEQUATE TO COVER THE INCURRED LOSS?
3. DID THE CIRCUIT COURT ERR IN HOLDING AMBIGUOUS THE GEICO POLICY PROVISION THAT ITS UNDERINSURED PROPERTY DAMAGE COVERAGE WAS EXCESS TO OTHER VALID AND COLLECTIBLE COVERAGE IN THE ABSENCE OF ANY REASONABLE ALTERNATIVE INTERPRETATION OF THAT PROVISION WHICH MADE COVERAGE AVAILABLE NOTWITHSTANDING THE EXISTENCE OF APPLICABLE HOMEOWNERS COVERAGE?
4. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE GEICO "OTHER INSURANCE" CLAUSE VIOLATED PUBLIC POLICY SINCE THE GEICO UNDERINSURED PROPERTY COVERAGE WAS CREATED BY CONTRACT AND NOT STATUTORILY MANDATED?
5. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE STATE FARM HOMEOWNERS COVERAGE WAS A COLLATERAL SOURCE WHICH DID NOT SERVE TO REDUCE GEICO'S UNDERINSURED PROPERTY COVERAGE, WHERE GEICO NEITHER ACTED ON BEHALF OF THE TORTIOUS WRONGDOER NOR SOUGHT A REDUCTION IN HIS LIABILITY EXPOSURE?

STATEMENT OF THE CASE

This appeal arises out of a dispute concerning the availability of underinsured motorist property damage coverage after the respondent Francina Bardsley had received liability and homeowners insurance payments for the same loss. The accident giving rise to the claim for property damage occurred on April 25, 2009 when John Ludwig drove a 2007 Maserati into the residence of Francina and Frederic William Bardsley.

After the respondent received liability and homeowners insurance proceeds for the property damage incurred as a result of the accident of April 25, 2009, she sought to recover underinsured motorist property damage from a policy issued by the appellant Government Employees Insurance Company (GEICO). Upon GEICO's denial of her claim, she filed a Complaint dated July 7, 2010, seeking damages under causes of action for breach of contract, breach of public policy and bad faith (Complaint). In its Answer of July 13, 2010, GEICO denied that respondent was entitled to underinsured property proceeds and has asserted that its coverage was excess to the homeowners insurance coverage provided by State Farm Fire & Casualty Insurance Company (State Farm) (Answer).

After stipulating to the relevant facts (Stipulations of Fact), the parties submitted the matter to the Circuit Court on cross-motions for summary judgment (Summary Judgment Motions). These motions were heard on October 27, 2011 before Judge Gary Hill (Transcript of Motion Hearing). In his Order of November 21, 2011, Judge Hill granted summary judgment to the respondent, finding that the GEICO policy was ambiguous and subject to the collateral source rule (Order of November 21, 2011). Based upon this Order, the respondent was awarded \$100,000 in underinsured property damage benefits. After Judge Hill denied GEICO's Motion to Alter or Amend his Order on December 13, 2011 (Order of December 21, 2011), Notice of Appeal was timely served on January 6, 2012.

STATEMENT OF FACTS

On April 25, 2009, a Maserati operated by John Ludwig crashed into a residence owned by Francina and Frederic William Bardsley (Stipulation of Fact No. 5). As a

result of that collision, Frederic William Bardsley sustained fatal injuries and the home he and his wife were occupying was damaged (Stipulation of Fact Nos. 3, 14). All claims related to the injuries sustained by Frederic William Bardsley and his death have been settled (Stipulation of Fact No. 24). Left unresolved, however, are the claims arising out of the damage to the residence.

The property damage claims arising out of the April 25, 2009 accident have been left unresolved due to a dispute concerning the availability of underinsured motorist property damage coverage. At the time of the accident, John Ludwig and his business SDI Networks were insured by Auto Owners Insurance Company (Auto Owners) and the Hartford Casualty Insurance Company (Hartford) for a total of three million dollars in single limits liability coverage (Stipulation of Fact Nos. 6, 7). In addition, the Bardsleys maintained homeowner's insurance coverage with State Farm (Stipulation of Fact No. 13) and underinsured motorist coverage with GEICO (Stipulation of Fact Nos. 16, 17).

Auto Owners and Hartford agreed to pay their policy limits of three million dollars in exchange for a Covenant Not to Execute against John Ludwig and SDI Networks (Stipulation of Fact Nos. 9, 10). State Farm also paid \$88,230.47 for damage to the Bardsley residence and \$23,684.44 for damages to the contents of that residence (Stipulation of Fact No. 14). Although the Hartford and Auto Owners policies were single limits policies and therefore did not separate coverage for bodily injury and property damage into distinct coverages, it was agreed that State Farm would be reimbursed \$94,424.75 for its subrogation interest out of the liability settlement proceeds paid by Auto Owners and Hartford. In exchange for that payment, State Farm issued a

policy release (Stipulation of Fact No. 15, Order of November 13, 2009, State Farm Release).

Although Sate Farm did not exhaust its coverage limits in making payment under its homeowner's policy, the respondent thereafter made an additional claim under the GEICO policy for underinsured motorist property damage coverage. GEICO took the position that there was ample liability coverage so as not to create a necessity of payment of its underinsured property coverage (Motion hearing transcript, pp. 14-17; GEICO Brief in Support of Motion for Summary Judgment; GEICO Reply Brief). In addition, GEICO relied upon its "other insurance" clause which provided that its underinsured motorist property damage coverage was excess to all other valid and collectible coverage. State Farm's homeowner coverage constituted other valid and collectible coverage. Id. The Circuit Court rejected GEICO's position, holding that its policy provisions were ambiguous and in violation of public policy (Order of November 21, 2011). It also held that the State Farm policy was a collateral source which GEICO could not utilize to lessen its obligations. After GEICO's Motion to Alter or Amend the Order directing payment of the available underinsured property coverage was denied, this appeal was timely filed.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES FOR AN UNDERINSURED PROPERTY CLAIM WHEN THERE WAS NO PROOF THAT THERE WAS INSUFFICIENT LIABILITY COVERAGE FOR PROPERTY DAMAGE.

In its Order of November 21, 2011, the Circuit Court awarded the Respondent \$100,000 from GEICO based upon its underinsured motorist property damage coverage for that amount. In making that award, the Court failed to determine if there was insufficient liability coverage to pay for the incurred property damage loss. Because a loss is “underinsured” only when there is inadequate liability coverage for a loss, the Court erred in making its award without first determining the amount of liability coverage for property damage (Motion hearing transcript, pp. 14-17; GEICO Brief in Support of Motion for Summary Judgment; GEICO Reply Brief).

An “underinsured motor vehicle”, as defined by section 38-77-30(15) of the South Carolina Code, does not reference property damage. Unfortunately, although the GEICO policy does provide underinsured motorist coverage for property damage, its definition of “underinsured motor vehicle” simply recites the statutory definition (GEICO policy, UIM endorsement). Because there is no definition of “underinsured” set forth in either the statutory scheme or the GEICO policy, the term is to be defined according to the usual understanding of that term’s significance to the ordinary person. See Manufacturers and Merchants Mutual Insurance Company v. Harvey, 330 SC 152, 498 SE.2d 222 (Ct. App. 1998); State Farm Fire and Casualty Company v. Barrett, 340 SC 1, 530 SE.2d 132 (Ct. App. 2000). The Merriam-Webster Dictionary defines “underinsured” as not being sufficiently insured. By this definition, one who is “underinsured” would be insured, but inadequately. This is in accord with the explanation of “underinsured motorist coverage” given by the South Carolina Department of Insurance:

Underinsured motorist coverage compensates you, or other persons insured under your automobile insurance policy,

including passengers..., for amounts that you, or your passengers, may be legally entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle that is covered by some form of liability insurance, but that liability insurance coverage is not sufficient to fully compensate you for your damages.

SDI Form 2006

Using these definitions of “underinsured”, a vehicle would be “underinsured” with regard to property damage when the liability insurance coverage for property damage is insufficient to fully compensate for those damages. In order to determine if a specific loss is greater than the available liability coverage for property damage, it becomes necessary to know the value of the loss and the amount of property damage liability insurance available.

The Circuit Court failed to undertake this evaluation. However, the amount of property damages sustained can be determined by reviewing the State Farm evaluation of that loss. Under the State Farm homeowners policy issued to the Bardsleys, the following coverages were available:

- a) \$180,500.00 for damages to the residence;
- b) \$135,375.00 for content damages;
- c) Damages for actual costs of loss of use.

(Stipulation of Fact No. 13)

Payment was made by State Farm in the following:

- a) \$88,230.47 for damages to the Bardsley residence;
- b) \$23,684.44 for content damages sustained by the Bardsleys;
- c) \$22,959.99 (less \$5,051.58 for depreciation) for loss of use and living expenses.

(Stipulation of Fact No. 14)

Because State Farm had a subrogation claim against John Ludwig and his insurers, it was reimbursed from the settlement proceeds paid by the liability insurers for John Ludwig (Stipulation of Fact No. 15).

John Ludwig was provided liability insurance by Auto Owners Insurance Company in the amount of \$1 million and \$2 million in umbrella liability coverage through the Hartford Insurance Company (Stipulation of Fact Nos. 7, 8). Both liability policies provided combined single limits in coverage and as a result did not segregate the coverages for bodily injury and property damage. However, a review of the Auto Owners and Hartford policies reveals that there was underlying coverage for property damage (Auto Owners' policy declaration sheet, Hartford Insurance's policy declaration sheet). The repayment of State Farm on its subrogation interest out of the liability insurance settlement proceeds would also reveal that some portion of that liability coverage was attributable to property damage coverage. The fact that \$94,424.75 was paid to State Farm to settle its property damages subrogation claim would establish that there was at least \$94,424.75 in property damage liability coverage. The fact that the Respondent agreed to be responsible for repaying State Farm's subrogation interest out of the liability insurance proceeds, that the total of the liability insurance coverage (\$3 million) was more than ample to pay for State Farm's subrogation interest (\$127,813.49)

and that State Farm agreed to settle for a lesser amount in full satisfaction of its subrogation claim would indicate that Respondent's property damage was paid in full and that the underlying liability coverage was sufficient to fully compensate for property damage.

If there was no inadequacy of property damage liability coverage, an underinsured claim would not exist and GEICO's coverage would not apply.

Moreover, because State Farm provided coverage which was excess to that provided by GEICO and because State Farm did not exhaust its coverage, there was more than ample coverage for property damage through the liability carriers and State Farm's homeowners insurance coverage. As a result, if the term "underinsured" is defined to mean one who is insured, but inadequately, the Respondent would not have been underinsured.

II. THE CIRCUIT COURT ERRED IN AWARDING DAMAGES AGAINST GEICO FOR AN UNDERINSURED PROPERTY CLAIM, THE ERROR BEING THAT GEICO'S UNDERINSURED MOTORIST PROPERTY COVERAGE WAS SECONDARY AND EXCESS TO THE STATE FARM HOMEOWNERS INSURANCE COVERAGE BY VIRTUE OF GEICO'S "OTHER INSURANCE" CLAUSE.

Both the State Farm and GEICO policies provided the Bardsleys with first party insurance coverage for property damage losses, which would include the loss sustained to their residence on April 25, 2009. South Carolina recognizes that its courts are to interpret the relevant insurance policy language to ascertain whether the policies are intended to provide primary or secondary coverage. South Carolina Insurance Company

v. Fidelity & Guaranty Insurance Underwriters, Inc., 327 SC 207, 489 SE.2d 200 (1997);
Blanding v. Long Beach Mortgage Company, 379 SC 206, 665 SE.2d 608 (2010).

Insurance companies typically indicate whether they intend to provide primary or secondary coverage through the use of “other insurance” clauses. Id. “Other insurance” clauses are intended to apportion an insured loss between insurers when two or more insurers provide coverage for the same risk and interest for the benefit of the same insured for the same period of time. South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., supra.

The State Farm policy provides as follows:

Other Insurance: If a loss covered by this policy is also covered by other insurance, we will pay only our share of the loss. Our share is the proportion of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

State Farm policy at p. 13.

This type of coverage has been designated as “pro rata”. Id.

The GEICO policy provides in pertinent part as follows:

With respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property.

(Emphasis added).

GEICO policy at p. 3 of A-347 (12-02).

This type of coverage has been designated as “excess”. Id. Because the State Farm and GEICO policies cover the same risk and the same property for the same insured for the same time period, a determination must be made as to how to apportion the coverages. Without question, the State Farm coverage constituted valid and collectible coverage since State Farm in fact made payment under the Bardsley homeowner’s policy (Stipulation of Fact No. 14). Courts which have adopted the majority view have generally reconciled the “pro rata” clause and the “excess clause” by interpreting the policy containing the excess clause as providing secondary coverage. See, e.g., American Interinsurance Exchange v. Commercial Union Assurance Company, 605 F. 2d 731 (4th Cir. 1979)(applying South Carolina law); International Bus. Mach. Corp. v. Liberty Mutual Fire Insurance Company, 303 F. 3d 419 (2nd Cir. 2002); P.L. Karter Agency, Inc. v. Continental Casualty Company, 341 F. 2d 519 (6th Cir. 1976); State Farm Mutual Auto Insurance Company v. American Casualty Company, 433 F. 2d 1007 (8th Cir. 1970); Ryder Truck Rental, Inc. v. Schapiro & Whitehouse, Inc., 259 Md. 354, 269 A.2d 826 (1970); see generally, Ostrager, B.R. and Newman, T.R., Insurance Coverage Disputes (13th Ed.). Under this majority view, the excess insurer is generally liable for a loss only to the extent that the value of an insured’s claim exceeds the limits of the policy containing the pro rata clause. Jones v. Medox, Inc., 430 A. 2d 488 (D.C. 1981). As noted by the court in Jones:

[T]he standard phrase “other valid and collectible insurance” means other valid and collectible primary insurance. It follows, then, that the policy containing the pro rata clause is other valid and collectible primary

insurance that triggers application of the excess clause in the second policy. The excess clause in the second policy therefore is given full effect and that carrier is liable only for loss after the primary insurer has paid up to its policy limits.

Because State Farm's coverage is primary and GEICO's secondary, State Farm's coverage must be exhausted before GEICO would make any payment. However, State Farm had \$180,500.00 in policy limits for residence coverage and paid only \$88,230.47. Likewise, it has \$135,375.00 in policy limits for contents coverage and only paid \$23,684.44. Since State Farm was not required to pay its policy limits, GEICO's underinsured property coverage as excess coverage, was not impacted. Accordingly, it was error to direct that GEICO make any payment under its coverage for underinsured property.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT THE GEICO "OTHER INSURANCE" CLAUSE WAS AMBIGUOUS SINCE THERE WAS NO REASONABLE, CONFLICTING INTERPRETATION OF THAT CLAUSE WHICH WOULD GRANT RESPONDENT RECOVERY IN SPITE OF THE STATE FARM HOMEOWNERS COVERAGE.

The Bardsley GEICO policy provides that coverage for underinsured property damage is excess to "other valid and collectible insurance" (GEICO policy p. 3 of A-347 (12-02)). The Circuit Court in its Order of November 21, 2011 held that this provision was ambiguous and must be construed against GEICO.

In order for an insurance policy to be considered ambiguous, there must be a showing that it is capable of being reasonably understood in more than one way. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004); Goldston v. State Farm Mutual Insurance Company, 38 S.C. 157, 594 S.E.2d 54 (Ct. App. 2004). The Circuit Court in its Order of November 21, 2011 failed to set forth how the GEICO policy provision was subject to more than one reasonable interpretation.

Respondent has argued that the failure of the GEICO policy to define what constitutes “other valid and collectible insurance” creates an ambiguity. However, not every term within an insurance policy requires a definition. Where there is an absence of a definition, the term is to be defined according to the usual understanding of its significance to an ordinary person. USAA Property and Casualty Company v. Rowland, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993); Manufacturers and Merchants Mutual Insurance Company v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998). The clause “valid and collectible insurance” has been interpreted to exclude invalid or illegal insurance, such as insurance which is voidable for misrepresentation, insurance which is uncollectable because the insurer is insolvent, insurance which was issued without the presence of an insurable interest in the property, and insurance which never came into effect because certain pre-conditions for coverage were not met. See Couch on Insurance, § 219.9 (3d Ed., 2010). None of these possible scenarios which would make a policy illegal or invalid apply to this situation. In fact, State Farm paid under its policy and then was reimbursed for its payment based upon its subrogation interest, indicating it was valid and collectible insurance (Stipulation of Fact Nos. 14, 15). Moreover, as noted

in Jones v. Medox, Inc., supra, “valid and collectible insurance” is a standard phrase which refers to collectible primary coverage.

The Circuit Court, in its Order of November 21, 2011, also noted that an insurance provision may not exclude coverage mandated by statute. Since statutory mandates are to be read into a policy, any provision which contradicted the statutory mandate would create an ambiguity. However, there is no statutory mandate requiring underinsured motorist property damages. Section 38-77-30 (15) defines “underinsured motor vehicle” 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 insured’s damages.

This definition should be contrasted with the definition of “uninsured motor vehicle” set forth in section 38-77-30 (14):

“Uninsured motor vehicle” means a motor vehicle as to which:

(a) there is not bodily injury liability insurance and property damage insurance both at least in the amount specified in Section 38-77-140...

(Emphasis added.)

The contrast between the two definitions reveals that the legislature intentionally limited underinsured coverage to bodily injury. As a result the GEICO provision for

underinsured property damage coverage is a creature of contract. Because the underinsured property damage coverage was not mandated by statute, limitations within the GEICO policy are not in contradiction of statute. As a result there is no ambiguity.

In the absence of an ambiguity, the terms of an insurance policy are to be interpreted and enforced according to their plain and ordinary meaning. Holmes v. McKay, 334 S.C. 433, 513 S.E.2d 851 (Ct. App. 1999). An insurance policy and its provisions define and fix the relations between the parties to that contract and furnish the measure of each party's respective rights and obligations. Boyle Road & Bridge Company v. American Employers' Insurance Company, 195 S.C. 397, 11 S.E.2d 438 (1940). The Bardsley GEICO policy clearly and unambiguously provided that it was to be excess to other viable coverage applicable to the same loss (GEICO policy at p. 3 of A-347 (12-02)). The State Farm homeowners coverage provided other valid and enforceable insurance as seen by the fact payment was made by State Farm. Because its policy limits were not exhausted, the conditions for payment of GEICO's excess coverage have not been met.

IV. THE CIRCUIT COURT ERRED IN HOLDING THAT GEICO'S "OTHER INSURANCE" PROVISIONS WERE VIOLATIVE OF PUBLIC POLICY SINCE GEICO'S COVERAGE FOR UNDERINSURED PROPERTY DAMAGES WAS CREATED BY CONTRACT AND NOT BY STATUTE.

In its Order of November 21, 2011, the Circuit Court held that GEICO's provision making its underinsured property coverage excess to other valid and collectible coverage was void as violative of public policy. The Court reasoned that "any exclusions inconsistent with the UIM statute are void."

Section 38-77-160 of the S.C. Code provides that underinsured motorist coverage is to be offered by all automobile insurance carriers. Although underinsured motorist coverage must be offered, the coverage itself is not mandated since it can be rejected by an insured.

In general, insurance policy terms may be held unenforceable if they are seen as contrary to statutory commands, legislative intent, the purpose underlying a statute or widely held norms regarding the operation of insurance. Stempel, J.W., Stempel on Insurance Contracts (3d. Ed. 2006) § 4.10[F]. Where a policy provision is perceived as being inconsistent with a state policy seeking to encourage adequate protection for drivers, it may be held unenforceable as violative of public policy. *Id.*; see Kline v. Farmers Insurance Exchange, 277 Neb. 874, 766 N.W.2d 118 (2009). However, in the absence of a statutory provision to the contrary, an insurance company may limit its liability and impose restrictions and limitations on its contractual obligations which are not inconsistent with public policy. B.L.G. Enterprises, Inc. v. First Financial Insurance Company, 328 S.C. 374, 491 S.E.2d 695 (Ct. App. 1997).

The amount offered by GEICO and accepted by the Bardsleys complies with the directive of section 38-77-160. However, section 38-77-160 only requires an offer of “underinsured motorist coverage”, which is a defined term. Section 38-77-30 (15) defines an “underinsured motor vehicle” to be a motor vehicle as to which there is bodily injury liability insurance which meets the statutory mandate but is less than the amount of injuries sustained. This definition, unlike the definition of an “uninsured motor vehicle” set forth in section 38-77-30 (14), makes no reference to property damage liability insurance. As a result, underinsured property damage coverage is not statutorily

mandated. Consequently, there is no public policy mandate for underinsured property damage based upon statutory command, legislative intent or underlying statutory purpose.

The only other possible basis for a public policy mandate for underinsured property damage coverage would be through the existence of a widely held norm concerning insurance coverage. See Stempel on Insurance Contracts, *supra*. The central purpose of the underinsured motorist statute is to provide coverage when an injured party's damages exceed the liability limits of the at-fault driver. Floyd v. Nationwide Mutual Insurance Company, 367 S.C. 253, 626 S.E.2d 6 (2005). Although the underinsured property damage coverage provided by GEICO is voluntary and therefore subject to the restriction and limitations placed within its policy, the desire to have an insured have available additional insurance coverage for an underinsured event is met by the GEICO coverage. The provision which provides that GEICO's coverage is excess to that provided by State Farm does not preclude coverage for the respondent. It simply provides a means by which a hierarchy of coverage can be established.

This hierarchy of coverage, whereby GEICO's coverage is secondary to that provided by State Farm, is consistent with GEICO's right to limit and restrict its coverage. The respondent would still have access to this coverage even though the policy provision provides it is excess. Moreover, because there is other insurance coverage, the policy of providing an insured with additional coverage where a wrongdoer has insufficient coverage is met.

The fact that South Carolina has a stated value policy statute does not act to create a public policy requiring that the existence of homeowner's insurance coverage be

ignored. There are many situations where other valid insurance coverage would not be available and the GEICO underinsured property coverage would be applicable. Likewise, there are numerous situations where the coverage would not be available because an underinsured claim does not exist. To hold that GEICO must provide uninsured property damage coverage whenever there is damage to a residence through the use of an underinsured vehicle ignores the legitimate limitations on the offered contractual coverage. Moreover, the existence of limitations of contractual coverages does not equate with excluding the coverage even though a premium has been paid for it. There are numerous specific scenarios where UIM coverage would not apply. The most obvious is where the liability coverage is adequate for the loss sustained. Simply because specific circumstances exist where UIM coverage would not be applicable does not rule out other scenarios where UIM would be applicable and for which a premium would be changed. Accordingly, respondent's argument that she paid a premium for UIM property damage coverage and that coverage is unavailable for damage to a residence ignores the fact that UIM coverage is still available and valuable under different factual circumstances. Moreover, to allow coverage under both the GEICO policy and the State Farm policy allows a recovery in excess of the value of the property loss in violation of the objective of the stated value policy statute. See Hunt v. General Insurance Company of America, 227 S.C. 125, 87 S.E.2d 34 (1955).

Because there is no statutorily based public policy which has been violated and because the respondent has received full payment for her property loss, there is no basis for determining that the GEICO "other insurance" provision is void as violative of public policy.

V. THE CIRCUIT COURT ERRED IN RULING THAT PAYMENT UNDER THE STATE FARM HOMEOWNERS POLICY CONSTITUTED A COLLATERAL SOURCE WHICH PRECLUDED APPLICATION OF GEICO'S "OTHER INSURANCE" CLAUSE, THE ERROR BEING THAT THE COLLATERAL SOURCE RULE DID NOT APPLY WHERE GEICO NEITHER ACTED ON BEHALF OF THE TORTIOUS WRONGDOER NOR SOUGHT A REDUCTION IN HIS LIABILITY EXPOSURE.

The Circuit Court, in its Order of November 21, 2011 held that "the exclusionary provisions contained in GEICO's UIM rider are violative of the collateral source rule and cannot be involved by GEICO to avoid its contractual UIM liability for property damage." However, the collateral source is applicable only where a wrongdoer seeks to take credit for payments made to an injured party which originate from sources independent of the tortious wrongdoer. Putsaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). Even though the Plaintiff received payments from State Farm, GEICO does not seek credit for the State Farm payment to reduce John Ludwig's liability exposure. The Circuit Court's ruling confuses GEICO's position as a first party coverage provider with that of a third party coverage provider.

The underinsured motorist coverage provided to the Bardsleys by GEICO constituted first party coverage. See, e.g., Maryland Auto Insurance Fund v. Baxter, 186 Md. App. 147, 973 A.2d 243 (2009); Weston Reid, LLC v. American Insurance Group, Inc., 94 Cal. Rptr. 3d 748 (2009); Buzzard v. Farmers Insurance Company, Inc., 824 P. 2d 1105 (Okla. 1991). First party coverage, as opposed to third party coverage, applies to coverage for losses which arise under one's own policy. Third party coverage, on the

other hand, applies to coverages relevant to claims made by those who are strangers to the policy. See Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 SE.2d 612 (2002).

If an insurer makes payment under third party coverage, that payment serves to reduce or eliminate the damages exposure of the insured defendant. Accordingly, by way of example, if an insured defendant had \$100,000 in liability exposure, his third party liability insurance payment for \$30,000 would reduce his exposure to \$70,000 upon payment to the plaintiff. However, not every payment to a plaintiff serves to reduce the insured defendant's liability exposure. Under the collateral source rule, an insured defendant cannot take credit for payments made to a plaintiff if that payment was made by an independent source, unconnected to the insured defendant. As a result, the insured defendant may not claim credit for payments made by under first party coverage to a plaintiff. Using the above example, where the plaintiff, in addition to receiving a payment of \$30,000 from the liability carrier for the defendant, also received \$20,000 under the first party coverage provided by his homeowners insurance carrier, there would be no further reduction of the defendant's liability exposure. It would remain at \$70,000, rather than being reduced further to \$50,000.

The coverages provided by both State Farm and GEICO to the Bardsleys constitute first party coverage. Under the collateral source rule, John Ludwig could not make a claim that payments made by either State Farm or GEICO serve to reduce his liability exposure.

However, the Circuit Court Order of November 21, 2011 turns this analysis on its head by directing attention to GEICO, a first party insurer, rather than John Ludwig, the

actual wrongdoer. The purpose of the collateral source rule of preventing a defendant wrongdoer from benefitting from payments made to a plaintiff from sources not acting on behalf of the defendant is not met by this ruling. See Putsaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). GEICO did not act on behalf of or represent the interests of John Ludwig. Instead, as a first party insurer providing underinsured motorist coverage, it provided benefits for the Bardsleys. See Floyd v. Nationwide Mutual Insurance Company, 367 S.C. 253, 626 S.E.2d 6 (2005).

The collateral source rule simply does not apply under the circumstances of this case because GEICO does not see a reduction in John Ludwig's liability exposure through the payments by State Farm. Instead, GEICO simply seeks the proper allocation of coverage responsibility. Where there are multiple insurers who provide coverage for the same loss, the hierarchy of responsibility is often determined by resort to "other insurance" clauses of the respective policies. South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., 327 S.C. 207, 489 S.E.2d 200 (1997).

There are four policies which are applicable to the Bardsley claims:

- 1) Auto Owners Insurance Company
\$1 million liability;
- 2) The Hartford Casualty Company
\$2 million umbrella;
- 3) State Farm Fire & Casualty Insurance Company
\$457,318.47 homeowner's coverage;
- 4) GEICO
\$100,000 underinsured motorist property damage coverage

The Auto Owners and Hartford coverages are third party coverages under which John Ludwig was an insured. Payment would typically be paid by the liability carriers first since first party carriers would normally have a right of subrogation against that coverage for any first party payments made. See Shumpert v. Time Insurance Company, 329 S.C. 605, 496 S.E.2d 653 (Ct. App. 1998). State Farm in fact recovered its payment by way of subrogation against the settlement proceeds paid to the respondent by Auto Owners and the Hartford (Stipulation of Fact No. 14; November 13, 2009 Order). As between State Farm and GEICO, the priority of coverage is controlled by a consideration of their respective “other insurance” clauses. The State Farm policy provides for a pro rata distribution of proceeds while the GEICO policy provides that its coverage is excess. When resolving conflicts between pro rata and excess clauses, the majority of courts have held that the policy containing the excess clause provides secondary coverage. See American Interinsurance Exchange v. Commercial Union Assurance Company, 605 F.2d 731 (4th Cir. 1979) (applying South Carolina law); see generally, Ostrager, B. R. and Newman, T. R., Insurance Coverage Disputes (13th Ed.). As a result, the excess insurer is generally liable only to the extent that the pro rata insurer has inadequate coverage. According to this approach, GEICO would not be obligated to pay under its underinsured motorist property damage coverage since the State Farm coverage was not exhausted. In fact, the right of subrogation as exercised by State Farm is typically unavailable unless the insured (the respondent) has been made whole. See generally, Stempel, J.W., Stempel on Insurance Contracts § 11.01 (3d Ed.) (2012 Supplement); see also, South Carolina National Bank v. Lake City State Bank, 251 S.C. 500, 164 S.E.2d 103 (1968). This would indicate that because State Farm was paid on its subrogation rights that the

claims for property damages sustained had been fully paid. If fully paid, GEICO's coverage for underinsured property damages was not called into play.

Moreover, the payment by State Farm had no effect on the total exposure for liability of John Ludwig. A Covenant Not to Execute was entered into upon payment of the liability coverages of Auto Owners and the Hartford Insurance (Hartford Covenant Not to Execute). Pursuant to the terms of this Covenant Not to Execute, John Ludwig had no further personal liability. The only reservation set forth in the Covenant Not to Execute was the right to pursue additional liability and underinsured coverage. Even if an additional recovery was made for purposes of obtaining additional insurance benefits, that recovery would be limited to those insurers and not John Ludwig. Since John Ludwig and his company had no further personal exposure, payment by State Farm could not be utilized to reduce the defendant's liability exposure. Since there was no reduction in John Ludwig's personal exposure, there would be no purpose in applying the collateral source rule.

One of the better explanations of the operation of the collateral source rule is set forth in 22 Am. Jur. 2d, Damages § 566, which provides as follows:

In tort cases, the plaintiff may receive benefits from a third-party who is in no way connected with the defendant, and receipt of these benefits from the source collateral to the defendant has the effect of lessening the financial losses which the plaintiff would otherwise have suffered. Thus, if the basic goal of tort law is only that of compensating plaintiff for his losses, evidence of these benefits should be

admitted to reduce the total damages assessed against the defendant. At the same time, reducing recovery by the amount of benefits received by the plaintiff would be, according to most courts, granting a “windfall” to the defendant by allowing him a credit for the reasonable value of those benefits. Such a credit would result in benefits being effectively directed to the tortfeasor and from the intended party – the injured plaintiff. If there must be a windfall, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrong doing. Thus, the courts generally have held that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer...Thus, while a plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, the collateral source rule allows a plaintiff further recovery under certain circumstances even though he has suffered no loss.

The special circumstances which would give rise to the application of the collateral source rule do not exist in this instance. Payment by State Farm could not serve to reduce his or his company's exposure since they no longer had any personal exposure for damages. Moreover, GEICO did not seek a reduction in the responsibility of the

defendants for the losses sustained. It did not act for or represent either of the defendants. It merely sought a proper allocation of responsibility among the various insurers for the Bardsley loss. When that proper allocation of responsibility is made, GEICO has no exposure for an underinsured property loss.

To apply the collateral source rule to first party insurers as the Circuit Court has done in this case would have the effect of obliterating the distinction between primary and secondary coverages, a distinction which South Carolina courts have recognized. See South Carolina Insurance Company v. Fidelity & Guaranty Insurance Underwriters, Inc., supra. Since a primary first party insurer would be an independent source of benefits, payment by it under the Circuit Court's approach, would not act to preclude further payment by an excess first party insurer, even though the insured's loss has been paid in full. For example, where a primary underinsured motorist carrier has paid \$10,000 of a \$35,000 loss (after the liability carrier paid \$25,000), under the Circuit Court ruling, the \$10,000 payment would not preclude further payment by an excess underinsured motorist carrier since that offset would be precluded by the collateral source rule. In general, however, an excess insurer is only liable to the extent that the covered portions of a judgment or settlement exceed the primary insurance. Windt, A.D., Insurance Claim and Disputes, § 6:45 (5th Ed.).

The application of the collateral source rule requires a court to weigh the goal of making a plaintiff whole for his losses without making a profit or receiving a windfall (see Am. Jur. 2d, Damages § 27) against the potential windfall a defendant would receive if he were granted credit for payments made to the plaintiff out of funds for which the plaintiff has paid. When consideration of these goals is given in this case, the fact that

there has been no windfall for the defendants mitigates against allowing the respondent to receive a windfall payment in excess of the property damages she has actually sustained. Instead the goal of making the respondent whole without overpaying her for her loss should prevail.

CONCLUSION

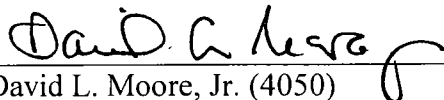
The Circuit Court erred in ruling that GEICO was required to pay \$100,00 under the underinsured property provisions of the Bardsley policy in several respects:

- 1) It failed to determine if there were insufficient liability insurance proceeds so as to make the property damage claim one which was underinsured;
- 2) It failed to consider the policy provisions which made the underinsured property damage coverage excess to the available and adequate homeowner's coverage;
- 3) The GEICO policy was not ambiguous since no reasonable alternative interpretation existed which would make coverage available notwithstanding the existence of applicable homeowner's insurance;
- 4) The GEICO "other insurance" provision did not violate public policy since the underinsured motorist provision was created by contract and not statutorily mandated; and
- 5) The collateral source doctrine was inapplicable since GEICO did not seek to reduce John Ludwig's liability

exposure but instead simply sought a proper allocation of coverage responsibility.

To adhere to the Circuit Court ruling would have the effect of allowing recovery over and beyond the actual loss notwithstanding the attempts to contractually control the potential exposure. Since there is no statute mandating the issuance of underinsured motorist coverage, resolution of the hierarchy of coverage has been left to policy language. Where the wrongdoer does not benefit from a reduction in his liability exposure and there is no true reduction in the available coverage for an injured party, a party should not be permitted to recovery a greater amount than the value of his injury or the available coverage. The Circuit Court Order of November 21, 2011 allows a recovery greater than the loss sustained contrary to the general rule that a Plaintiff's recovery is to be limited to those damages which make him whole. In light of this, the Order should be reversed.

May 17, 2012


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Attorney for Appellant

Other Counsel of Record:

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William A. Coates
SC Bar No. 1289
Roe Cassidy Coates & Price, PA
Post Office Box 10529
Greenville, SC 29603

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas.

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

Francina A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ...Defendants,

of which

Government Employees Insurance Company is Appellant.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

David L. Moore, Jr.
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Attorney for Appellant

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MAY 18 2012
SC Court of Appeals

Appellant proposes the following to be included in the Record on Appeal:

1. Orders

-Order of November 21, 2011

-Order of December 13, 2011

-Amended Order Approving Settlement (November 13, 2009)

-Order Approving Settlement (March 11, 2010)

2. Pleadings

-Complaint

-Answer

-Stipulations of Fact

-Respondent's Motion for Summary Judgment

-Appellant's Motion for Summary Judgment

-Respondent's Brief in Support of Motion for Summary Judgment

-Appellant's Brief in Support of Motion for Summary Judgment

-Respondent's Brief in Opposition to Appellant's Motion for Summary Judgment

-Appellant's Brief in Opposition to Respondent's Motion for Summary Judgment

-Appellant's Reply Memorandum to Respondent's Brief in Opposition to

Appellant's Motion for Summary Judgment

-Appellant's Motion for Reconsideration

-Appellant's Memorandum in Support of Motion for Reconsideration

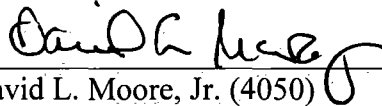
-Respondent's Memorandum in Opposition to Motion for Reconsideration

-Appellant's Memorandum in Reply to Respondent's Memorandum in Opposition
to Motion for Reconsideration

3. Transcripts of Motion Arguments
4. Exhibits
 - Auto Owners policy
 - Hartford Insurance Company policy
 - GEICO policy
 - Covenant Not to Execute (GEICO)
 - Release (State Farm)
 - Covenant Not to Execute (Hartford, State Farm)

I certify that this designation contains no matter which is irrelevant to this appeal.

May 17, 2012


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

Francina A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ...Defendants,

of which

Government Employees Insurance Company is Appellant.

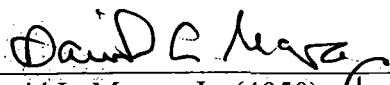
CERTIFICATION

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Attorney for Appellant

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MAY 18 2012
SC Court of Appeals

Counsel certifies that the Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to this appeal.

May 17, 2012


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

Francina A. Bardsley, individually and as Personal Representative of the Estate of
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Government Employees Insurance Company and State Farm Fire & Casualty Insurance
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of which

Government Employees Insurance Company is Appellant.

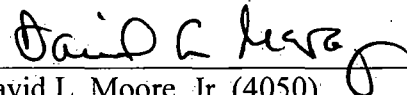
CERTIFICATE OF SERVICE

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Attorney for Appellant

I hereby certify that a true and correct copy of Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, along with a Certificate of Service were served upon counsel by placing a copy of same in the United States Mail with proper postage affixed thereto addressed as follows:

Carroll H. Roe, Jr.
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SC Bar No. 1289
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May 17, 2012


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B. O. THOMASON, JR.
1926-1993

May 17, 2012

Jenny Abbott Kitchings
SC Court of Appeals Clerk of Court
PO Box 11629
Columbia, SC 29211

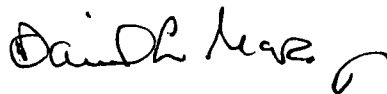
**Re: Francina A. Bardsley, Respondent v. Government Employees
Insurance Company, et al
Case No.: 2010-CP-23-5493
LTAT File No.: 09.0731**

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellant's Initial Brief, Designation of Matter, Certification of Designation of Matter, and a Certificate of Service regarding the above matter. Please file the original with your office and return to me in the enclosed self-addressed stamped envelope a clocked copy.

Sincerely yours,

LOVE, THORNTON, ARNOLD & THOMASON, PA

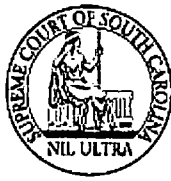


David L. Moore, Jr.

DLMJr/aat
Enclosures

cc: Carroll H. Roe, Jr.
Mona Cole

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SC Court of Appeals



The Supreme Court of South Carolina

(Francina A. Bardsley
(
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TITLE OF (V. 2010CP2305493
CASE (
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(
(Government Employee Insurance Commpany, et al.,
(
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Notice

Upon request and for good cause shown, Hollie Jenkins, Court Reporter, is hereby granted an extension up to and including May 06, 2012 to prepare and deliver the Transcript of Record in the above case.

Desiree Allen

Court Services Manager

South Carolina Court Administration

Columbia, South Carolina
03/27/2012

cc: Mr. David L. Moore, Jr., Esq.
Hollie Jenkins



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 26, 2012

David L. Moore, Jr., Esquire
Love, Thornton, Arnold
& Thomason
P O Box 10045
Greenville, SC 29603

Re: Bardsley, Francina v. Gov. Employees
Case Tracking#: 2012206390

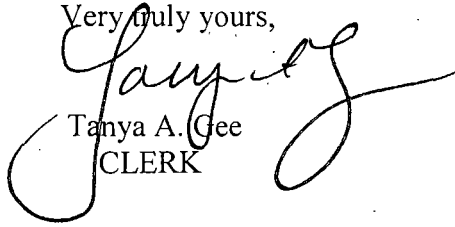
Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within 10 days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



Tanya A. Gee
CLERK

TAG/ec

cc: Carroll H. Roe, Jr.
The Honorable Paul B. Wickensimer

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B. O. THOMASON, JR.
1926-1993

January 6, 2012

Hollie Jenkins
Post Office Box 16506
Greenville, SC 29606

**Re: Francina A. Bardsley, individually and as Personal Representative of
the Estate of Frederic William Bardsley, III, Respondent,
v.
Government Employees Insurance Company and State Farm Fire &
Casualty Insurance Company, Defendants,
of whom
Government Employees Insurance Company is Appellant.
Case No.: 2010-CP-23-5493
RCCP File No.: 1687.0001
LTAT File No.: 09.0731**

Dear Ms. Jenkins:

On October 27, 2011, the above case was tried before the Honorable D. Garrison Hill, Circuit Court Judge, in Greenville County. It is my understanding that you were the court reporter for this case.

I would request that you provide me with a complete transcription of the motion arguments for this proceeding.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Thank you for your assistance in this matter.

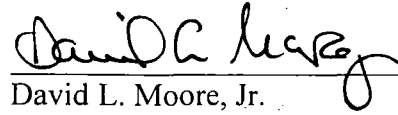
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SC Court of Appeals

Hollie Jenkins
January 6, 2012
Page 2 of 2

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Moore, Jr.", written over a horizontal line.

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Post Office Box 10045 - FS
Greenville, SC 29603
(864) 242-6360
Attorney for Appellant

DLM/lml
Enclosures

cc: Carroll H. Roe, Jr.
South Carolina Court of Appeals
South Carolina Court Administration
Mona Cole

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

Francina A. Bardsley, individually and as Personal Representative of the Estate of
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v.

Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ...Defendants,
of whom

Government Employees Insurance Company is Appellant

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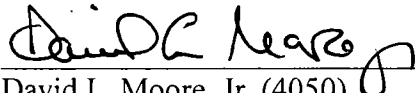
JAN 09 2012

SC Court of Appeals

NOTICE OF APPEAL

Government Employees Insurance Company appeals the order of Judge D. Garrison Hill dated November 21, 2011 and received on November 23, 2011 and the Order denying Respondent Government Employees Insurance Company's Motion to Alter or Amend dated December 13, 2011 and received on that same date.

January 6, 2012


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Attorney for Appellant

Other Counsel of Record:

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-5493

Francina A. Bardsley, individually and as Personal Representative of the Estate of
Frederic William Bardsley, III.....Respondent,

v.

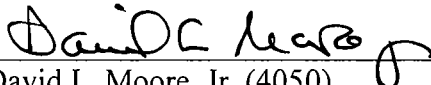
Government Employees Insurance Company and State Farm Fire & Casualty Insurance
Company, ...Defendants,
of whom

Government Employees Insurance Company is Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Francina A. Bardsley, by depositing a copy of it in the United States Mail, postage prepaid, on January 6, 2012, addressed to her attorney of record, Carroll H. Roe, Jr., Post Office Box 10529, Greenville, South Carolina 29603.

January 6, 2012



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Attorney for Appellant

Other Counsel of Record:

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1907-1998

H. O. THOMASON, JR.
1926-1993

January 6, 2012

Tanya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

**Re: Francina A. Bardsley, as Personal Representative of the Estate of
Frederic William Bardsley, III v. GEICO
Case No.: 2010-CP-23-5493
RCCP File No.: 1687.0001
LTAT File No.: 09.0731**

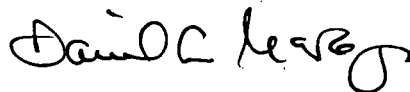
Dear Ms. Gee:

Please find enclosed an original and three copies of a Notice of Appeal with which we are now serving upon Pete Roe, the attorney for the Respondent in this matter and also filing with the Clerk of Court for Greenville County. Pursuant to Rule 203 of the Appellate Court Rules, I am also enclosing a copy of the Proof of Service upon Pete Roe as attorney for the Respondent, a copy of the Orders which are being challenged on appeal and our filing fee for this matter. Please file the original of the Notice of Appeal with your office and return it to me in the enclosed self-addressed stamped envelope three clocked copies.

Thank you so much for your help.

Sincerely yours,

LOVE, THORNTON, ARNOLD & THOMASON, PA



David L. Moore, Jr.

DLM/lml
Enclosures

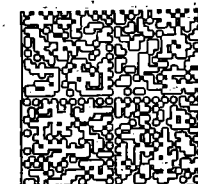
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SC Court of Appeals

Tanya Gee
January 6, 2012
Page 2 of 2

cc: Carroll H. Roe, Jr.
Mona Cole



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GREENVILLE, SOUTH CAROLINA 29603

TO:

Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP235493

Francina A. Bardsley, as
Personal Representative of
the Estate of Frederic
William Bardsley, III

Government Employees
Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow)

☒ Statement of Judgment by the Court:

Defendant's Motion to Alter or Amend this Court's November 21, 2011 Order granting underinsured motorist coverage in the amount of \$100,000 to Plaintiff is respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Man / in

Circuit Court Judge

2138

Judge Code

12/12/2011

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Carol H. Roe, Jr.
Roe Cassidy Coates & Price, P.A.
P.O. Box 10529
Greenville, SC 29603

David L. Moore
Love, Thornton, Arnold & Thomason, P.A.
P.O. Box 10045
Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP2305493

NOV 21 PM 3:40

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER

Francina A Bardsley vs. Government Employees Insurance Company

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a),
SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this 21st day of November, 2011.

Court Reporter: _____

PRESIDING JUDGE - D Garrison Hill

This judgment was entered on the 21st day of November, 2011, and a copy mailed first class this 21st day of November, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Carroll H. Roe Jr. Roe Cassidy Coates & Price, PA
P.O. Box 10529 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

David L Jr Moore Love Thornton Arnold &
Thomason, PA P.O. Box 10045 Greenville, SC 29603

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) Civil Action No. 2010-CP-23-5493

Francina A. Bardsley, as Per-)
sonal Representative of the)
Estate of Frederic William)
Bardsley, III,)

- vs -)

Government Employees In-)
surance Company and State)
Farm Fire & Casualty Insur-)
ance Company,)

Defendants.)

O R D E R

FILED-COURT OF COMMON PLEAS
GREENVILLE, SC
NOV 21 PM 3:40

This matter was before the Court on cross Motions for Summary Judgment filed by the Plaintiff, Francina A. Bardsley, individually and as Personal Representative of the Estate of Frederic William Bardsley, III (hereinafter "Bardsley" or "Plaintiff") and Government Employees Insurance Company (hereinafter "GEICO"). The record for the Court's consideration in ruling upon these cross Motions for Summary Judgment consisted of the following: 1) 25 Stipulations of Fact; 2) 9 Exhibits attached to the Stipulations of Fact; 3) Affidavit of Thomas W. Traxler, Esquire; 4) Plaintiff's Brief in support of her Motion; 5) Defendant's Brief in support of its Motion and its Reply in opposition to Plaintiff's Motion. These Motions were argued on October 27, 2011.

SUMMARY OF STIPULATED FACTS

This case was spawned from an April 25, 2009 accident when Frederic William Bardsley, III received fatal injuries when struck by a 2007 Maserati owned by Systems Development Integration, d/b/a SDI Network (hereinafter "SDI"), and driven by John Gilbert Ludwig, Jr. (hereinafter "Ludwig"). After leaving a wedding reception,

Ludwig was driving the Maserati at an estimated speed in excess of 85 miles per hour when the vehicle left the roadway, became airborne, entered the rear of the Bardsley residence approximately 10 feet above ground level and then struck Frederic William Bardsley, III, resulting in his immediate death. SDI's Maserati driven by Ludwig was covered by two automobile liability insurance policies—Auto Owners Insurance Company ("Auto Owners") with a single occurrence policy limit of \$1,000,000.00 and The Hartford Casualty Insurance Company ("The Hartford") with a \$2,000,000.00 umbrella coverage limit. Auto Owners and The Hartford paid their respective policy limits to Plaintiff in exchange for a Covenant Not to Execute. The Greenville County Probate Court conducted a hearing and issued its Orders approving the settlements between Plaintiff, Auto Owners and The Hartford.

Plaintiff and her late husband also maintained personal insurance on their automobiles and residence. State Farm Fire & Casualty Insurance Company ("State Farm") provided homeowners coverage for the Bardsley residence. As a result of the accident, State Farm paid to Plaintiff \$127,813.49 for damages to the home and its contents plus an additional sum for loss of use and living expenses, but subject to a \$1,000.00 deductible.

GEICO issued to Plaintiff and the decedent an automobile liability insurance policy that included underinsured motorist ("UIM") coverage in the amount of \$300,000.00 for bodily injury and \$100,000.00 for property damage. Plaintiff and GEICO settled the UIM bodily injury claim for the policy limits of \$300,000.00. The UIM settlement was also approved by the Greenville County Probate Court.

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This action concerns the availability of GEICO's \$100,000.00 UIM property damage coverage resulting from the accident of April 25, 2009. In her Complaint, Bardsley asserts several causes of action arising out of GEICO's denial of UIM property damage coverage. GEICO filed an Answer denying coverage based upon exclusions contained in the UIM rider to its policy.

Summary judgment is appropriate when the record reveals "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law". Rule 56(c) of the South Carolina Rules of Civil Procedure, M&M Group, Inc. v. Holmes, 379 S.C. 468, 666 S.E.2d 262 (Ct.App. 2008). Bardsley and GEICO have agreed there is no genuine issue as to any material fact and thus leaving for the Court to determine as a matter of law if Plaintiff is entitled to the UIM property damage coverage under the applicable UIM provisions of GEICO's policy.

DISCUSSION

In denying coverage, GEICO relied upon a provision contained in the UIM rider to its policy, which states that "[i]f none of an insured's vehicles is involved in the accident. . . [w]ith respect to property damage, this insurance shall be in excess over other valid and collectible insurance applicable to the damaged property". GEICO contends Bardsley's State Farm homeowners coverage for property damage constitutes "valid and collectible insurance applicable to the damaged property" and therefore must be exhausted before GEICO has to pay its \$100,000.00 of UIM property damage coverage. This Court disagrees and concludes that GEICO's policy defense is subject to the collateral source rule and furthermore, its policy is ambiguous.

South Carolina has long followed and liberally applied the collateral source rule that "compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of the damage owed. . . ." Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); Rattenni v. Grainger, 298 S.C. 276, 278, 379 S.E.2d 890 (1989). In fact, it has been specifically held that the collateral source rule applies to UIM benefits. Putnaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002), see also Rattenni, 298 S.C. 276, 379 S.E.2d 890. A source is wholly independent of the wrongdoer "when the wrongdoer has not contributed to it". Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). A third party cannot take advantage of the payment of services rendered by a collateral source for an insured's benefit, irrespective of whether the source is an insurance company. Johnson v. Aiken Auto Parts, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993).

The State Farm homeowners coverage provided to Bardsley was a collateral source, since it was derived from a source "wholly independent of the wrongdoer" to which Plaintiff, and not Ludwig or SDI or GEICO, contributed. Plaintiff paid the premium on the State Farm policy to insure her home against damages. Auto Owners and Hartford agreed to pay their policy limits, all of which was allocated to the wrongful death claim as approved by the Greenville County Probate Court. The exclusionary provisions contained in GEICO's UIM rider are violative of the collateral source rule and cannot be invoked by GEICO to avoid its contractual UIM liability for property damage.

The Court considered and rejected GEICO'S argument that Bardsley made a profit and received a double recovery/windfall by collecting on the State Farm policy. Ludwig/SDI had a total of \$3,000,000.00 in liability insurance coverage. Bardsley settled the wrongful death claim with Auto Owners and The Hartford for \$3,000,000.00 in available coverage despite the value of the wrongful death action exceeding the settlement amount.¹

GEICO's policy with schedules and riders ("Exhibit 7"), when read as a whole, is ambiguous and contains conflicting terms. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insureds and strictly against the insurer. South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy, 390 S.C. 125, 780 S.E.2d 258 (Ct. App. 2010). It is also well established that insurance policy provisions cannot exclude coverage provided by law. O'Neill v. Smith, 388 S.C. 246, S.E.2d 531 (2010). An insurer is not permitted to nullify the legislative purpose and intent of a statute. USA v. Markosky, 340 S.C. 223, 530 S.E.2d 660 (2000). The UIM exclusion upon which GEICO relies in this instance is ambiguous and must be construed against GEICO and for the benefit of Bardsley in favor of UIM coverage for damage to the residence.

GEICO's UIM rider may also contravene public policy since any exclusions inconsistent with the UIM statute are void. Plaintiff correctly pointed out there is virtually no situation where GEICO would ever have to pay its UIM coverage on any residence on which homeowners insurance has been placed since these type policies most often are stated value policies and the policy limits would never be exhausted.

¹ See Affidavit of Thomas W. Traxler, Esquire, in which he opined the value of the wrongful death case was in excess of \$3.5M.

Finally, Bardsley asserts GEICO's refusal to pay UIM property damage benefits constitutes bad faith. After careful consideration of the record, GEICO's Motion for Summary Judgment on this cause of action is granted since there was some reasonable basis for not paying Plaintiff's UIM claim. Under South Carolina law, an insured cannot be liable for bad faith or refusal to pay proceeds if there exists an objectively reasonable basis for denying the insured's claim. Brown v. State Farm Mutual Insurance Company, 275 S.C. 276, 269 S.E.2d 769 (1980) and Hansel, et al. v. USAA, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002).

CONCLUSION

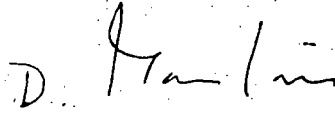
Ludwig/SDI were at fault and were underinsured for this accident and therefore, GEICO's UIM coverage for bodily injury and property damage is the next applicable insurance. Albeit with ambiguous and conflicting terms, GEICO's UIM property damage exclusion is subject to the collateral source rule but its denial of coverage does not rise to the level of bad faith.

NOW, THEREFORE, based upon the record and since there are no material issues of fact, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- 1) Plaintiff is awarded judgment against GEICO in the amount of \$100,000.00 plus costs and expenses as allowed by law for the UIM property damage coverage available to her under the GEICO policy in effect at the time of the April 25, 2009 accident;

2). Plaintiff's cause of action against GEICO for bad faith for refusing to pay UIM property damage coverage under the terms of the policy is denied and dismissed with prejudice; and

IT IS SO ORDERED.



D. Garrison Hill – Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

November 21, 2011