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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative

of the Estate of Jennifer Knight Poole.....Defendants.

BRIEF OF RESPONDENT

November 7, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The underlying Declaratory Judgment action involving underinsured motorist coverage for both bodily injury and property damages raises a novel question regarding coverage of punitive damage awards as they apply to split-limits automobile insurance policies. The Honorable Joseph F. Anderson, Jr. set forth the certified question to address whether or not punitive damages should be allocated pro rata as to bodily injury and property damage.

On July 10, 2015, the Pooles were involved in a collision which resulted in serious and permanent injuries to Jack A. Poole and catastrophic injuries that led to the death of Jennifer Poole. Christopher Davis was driving under the influence when he crossed the center line and collided head on with the Pooles. Mr. Davis was insured by Victoria Insurance and Victoria paid their liability limits of coverage of Twenty-Five Thousand and 00/100 ($25,000.00) dollars on a covenant not to execute. At the time of the collision the Pooles were operating a vehicle owned by Doris Knight, the mother of Jennifer Poole, who was insured by Farm Bureau. Farm Bureau tendered their UIM limits of Twenty-Five Thousand and 00/100 ($25,000.00) dollars. The Pooles were insured by GEICO and GEICO has tendered the single policy limits of bodily injury underinsured motorist coverage in the amount of One Hundred Thousand and 00/100 ($100,000.00) dollars to Jack Poole, individually and a separate One Hundred Thousand and 00/100 ($100,000.00) dollars to Jack Poole as Personal Representative of the Estate of Jennifer Poole, for both the wrongful death and survival actions.

The parties have stipulated that the damages suffered by the Pooles exceed all of the available insurance coverage. While the vehicle driven by the Pooles at the time of the accident was totaled, as it did not belong to them, the property damage sustained by the Pooles was, by comparison, minimal, consisting only of clothing and jewelry. Therefore, the parties further

stipulated that if the punitive damage award must be apportioned based on the property damage loss incurred by the Pooles, then their claim would not reach the GEICO underinsured property damage coverage.

The Pooles strongly disagree with the interpretation of pro rata allocation as presented in GEICO's argument. South Carolina statutes are very clear that damages include punitive damages. S.C. Code Ann. §38-77-30(4) of the automobile insurance definitions defines damages as both actual and punitive damages. S.C. Code Ann. §38-77-710 regarding arbitrations of property damage liability claims also provides for an award of actual and punitive damages. However, GEICO relies on S.C. Code Ann. §38-77-140 setting forth separate minimum limits for damages because of bodily injury and property damage to establish that punitive awards should be allocated as either bodily injury or property damage. On the contrary, South Carolina law does not require this allocation within the South Carolina Code of Laws and it cannot be inferred this was the legislature's intent simply by looking at S.C. Code Ann. §38-77-140.

GEICO argues that pro rata allocation is necessary to prevent an unconstitutional award of punitive damages. This argument is fundamentally flawed as every case must be examined according to the specific facts of the matter. *BMW of North America, Inc. v. Gore* 517 U.S. 559, 116 S. Ct. 1589 (1996) and *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350 (1991), establish factors to be considered when examining whether an award of punitive damages is unconstitutional. These factors must be considered for all punitive damage awards and that will not change under a pro rata allocation system regardless of the manner of allocation.

As this Court has explained, punitive damages serve at least three important purposes: "punishment of the defendant's reckless, willful, wanton, or malicious conduct; deterrence of similar future conduct by the defendant or others; and compensation for the reckless or willful

invasion of the plaintiff's private rights." *Clark v. Cantrell*, 339 S.C. 369 (2000). Furthermore, "punitive damages, in addition to punishing the defendant and deterring similar conduct by the defendant and others, serve to vindicate the private rights of the plaintiff and they provide some measure of compensation to plaintiffs for the intentional violation of those rights that is separate and distinct from the usual measure of compensatory damages: ..." *O'Neill v. Smith*, 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010). Consequently, UIM carriers must offer coverage up to the limits of the insured's liability coverage, which covers both compensatory and punitive damages awarded against a tortfeasor. *Id.* However, where both bodily injury and property damage claims are presented, the jury makes such an award based on the willful invasion of that right, as opposed to the type of damage done, whether bodily injury or property damage, even if our courts are required to apply certain constitutional bounds on that punitive award.

Public policy is not violated by allowing injured parties to make a recovery for their damages, including actual and punitive. Public policy is not violated by deterring individuals from driving vehicles while they are under the influence of alcohol or drugs. Automobile insurance companies have been paying punitive damages out of property damage coverage for years. Insurance premiums are adjusted from time to time to reflect inflation, increased risks, and other factors. The likelihood of drastically increased premiums due to punitive damages being paid is highly unlikely. GEICO is in a position to provide statistical data to support their argument, yet they have failed to do so. In regards to the underlying Declaratory Judgment action, GEICO agrees that the potential punitive damage award far exceeds the available coverage. GEICO agrees that the available UIM coverage for property damage covers punitive damages. However, GEICO now asks to be permitted to rewrite not only its contract with the Pooles, but all contracts of insurance it has issued, in order to limit its exposure and deprive its insureds of that coverage.

CERTIFIED QUESTION

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

STATEMENT OF THE CASE

The Pooles are in agreement with the Statement of the case as presented by GEICO except that Jennifer Poole was the driver at the time of the collision and Jack Poole was the passenger.

ARGUMENT

The Pooles seek a punitive damage award due to the wanton, willful, and malicious behavior of the at fault driver, Christopher Davis, who was driving under the influence when he hit them head on. The Pooles are not attempting to convert the split-limits policy into a single limits policy as GEICO claims. Nor are they asking that a hospital bill be paid out of the property damage coverage, but are asking that their punitive damages claims be paid by any and all available coverage. S.C. Code Ann. §38-77-30(4) simply defines damages as both actual and punitive damages. Whereas the legislature obviously intended for individuals to recover punitive awards on both bodily injury and property damage claims, nowhere has the legislature defined punitive damages as bodily injury or property damage for the purposes of insurance coverage or otherwise. To do so would be absurd as it would ignore the purpose of punitive damages.

Awards of punitive damages do not need to be allocated in a pro rata share to protect due process or public policy. The American jury system is rooted in a process that began in medieval England and has been shaped over the course of American history. The shaping of the system with time places jurors in the best situation to make important decisions regarding legal matters.

Special verdict forms are used to distinguish actual and punitive damages. Public policy is violated when the intent of a jury's punitive damage award is not effectuated due to the apportionment between bodily injury and property damage. Measures to protect due process and prevent excessive punitive awards will need to be completed regardless of apportionment and therefore GEICO's due process argument fails.

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

The Pooles do not disagree with the supposition that punitive damages are a statutory creation, but strongly disagree with GEICO's interpretation of how to apply punitive damages to a split-limits policy. The fact that South Carolina law prescribes certain minimum limits for automobile liability insurance does not require that where both bodily injury and property damage are caused by the willful and reckless misconduct of a tortfeasor that any punitive damage award be allocated proportionally between the available bodily injury and property damage coverages. Rather, to do so would permit the carrier to impermissibly reduce the coverage afforded, and avoid the clear mandate of South Carolina Code Section 38-77-30(4) which defines the term "damages" to include both "actual and punitive damages." Regarding arbitrations of property damage liability claims, South Carolina Code Section 38-77-710 provides for an award of actual and punitive damages. Whereas the legislature obviously intended for individuals to recover punitive awards on both bodily injury and property damage claims, nowhere has the legislature defined punitive damages as bodily injury or property damage for the purposes of insurance coverage or otherwise. To do so would be absurd as it would ignore the purpose of punitive damages.

GEICO's reliance on S.C. Code Ann. §38-77-140 as evidence the legislature intended for punitive damages to be apportioned is misguided as no such intent is clearly defined within the statutes. Furthermore S.C. Code Ann. §38-77-20 says "this chapter is to be liberally construed in order to achieve its purposes." The purpose of Title 38 is clearly found in S.C. Code Ann. §38-77-10 which states "in order to effect a complete reform of automobile insurance and insurance practices in South Carolina, the purposes of this chapter are to provide: (1) that every automobile insurance risk which is insurable on the basis of the criteria established in this chapter is entitled to automobile insurance...". To narrowly construe South Carolina statutes as GEICO is attempting to do actually contradicts S.C. Code Ann. §38-77-10(1) by attempting to limit the amount of available coverage provided to insure for punitive damages.

Despite the lack of any statutory or other guidance recommending it, GEICO contends that there is only one way to comply with the statutory requirement for minimum limits, and that one way is to proportionally allocate punitive damages between bodily injury and property damage coverage. Respectfully, the Pooles submit there is only one way to apply the statutory scheme: Where bodily injury has been caused by the willful, wanton and reckless conduct of a tortfeasor as will support an award of punitive damages, those damages should be covered up to the limits of the available coverage; where property damage has been caused by the willful, wanton and reckless conduct of a tortfeasor as will support an award of punitive damages, those damages should be covered up to the limits of the available coverage; and where both bodily injury and property damages have been caused by the willful, wanton and reckless conduct of the tortfeasor such as will support an award of punitive damages, both actual and punitive damages should be covered up to the limits of all of the available coverage. Clearly, by the terms of the contract, the amounts available to cover the actual bodily injury and property damages will be limited by that

purchased, but as both bodily injury and property damage coverages include punitive damages, the award of punitive damages should be covered up to the limits of the policy. This simplistic approach honors both South Carolina's statutes and the terms of the contract.

The legislative intent to protect drivers and passengers in South Carolina in automobile collisions is uncontradicted. S.C. Code Ann. §38-77-140 requires drivers to have liability and uninsured coverage. This code section lays out the minimum amounts of coverage drivers are required to purchase to be legally insured in South Carolina. The legislature was thoughtful and specific in identifying the minimum requirements necessary to protect individuals. The legislature obviously thought uninsured and underinsured were so important that S.C. Code Ann. §38-77-350 lists requirements that must be made by insurers to insureds to make certain that insureds are aware that they may purchase additional coverage to protect themselves from harm. If the insurer fails to properly complete the form, then the insured is automatically provided uninsured and underinsured coverage up to their limits of liability coverage to ensure they are fully protected. It is absurd to reason that the legislature put such great importance on individuals being insured and fully protected from harm, only to then reduce that coverage by apportioning punitive damages on a pro rata basis between bodily injury and property damage. *Black's Law Dictionary* defines punitive damages as "damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit. Punitive damages, which are intended to punish and thereby deter blameworthy conduct..." Nowhere are punitive damages defined in relation to either bodily injury or property damage because clearly that is not the purpose or measure of punitive damages.

South Carolina case law supports the Pooles' position that when legislative intent is clear, as it is here, it is not the Court's place to change the intent of the statute. Clearly the legislature intended for individuals on the roadways of South Carolina to be insured and protected.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

GEICO is asking the Court to add terms to the statutory language to suit its purpose of financial gain and not the stated purpose of the legislature, which is to protect South Carolinians on our roadways. GEICO argues that their interpretation of apportionment is the only way to stay true to the terms of the split-limits policy. However, it is settled law that when the contract language is clear and unambiguous, "the language alone determines the contract's force and effect and courts must construe it according to its plain, ordinary, and popular meaning." *Gray v State Farm Auto Ins. Co.,* 327 S.C. 646, 650, 491 S.E.2d 272, 274 (Ct. App. 1997). GEICO wrote the policy that is the basis for the underlying Declaratory Judgment action and now they expect the Court to contort South Carolina statutes to their benefit so that they do not have to pay monies on claims for which they are legally and contractually bound to pay. The only way to stay true to the

intent of the lawmakers of South Carolina is to reject GEICO's argument and allow punitive damages to be paid from any and all available coverages.

II. Apportionment of punitive damages award on a pro rata basis is not necessary to faithfully apply the terms of the insurance contract.

GEICO argues that awards of punitive damages must be apportioned between bodily injury and property damage in order to comply with the policy. GEICO wrote the policy that insured the Pooles in the underlying case and are bound by its terms.

> *An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (citation omitted). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citation omitted). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning. Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977) (citation omitted). Canal Ins. Co. v. Nat'l House Movers, LLC Appellate Case No. 2014-000150 Opinion No. 5353 (S.C. App., 2015).*

GEICO drafted the policy, but failed to define punitive damages or how they should be paid. Yet, now when it would benefit them, GEICO attempts to take away coverage from insureds by changing the contract language and asking the Court to rewrite the contract of insurance to apportion punitive damages between bodily injury and property damage.

GEICO attempts to argue *Crossmann Communities of North Carolina, Inc. v Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) as a basis for allocation. *Crossmann* did not deal with an automobile insurance policy, but rather a commercial general liability policy. It is not a reasonable comparison given the completely different facts to compare the two. *Crossmann* dealt with apportioning a pro rata share of damages between different insurers based on coverage periods. "The court found the standard CGL policy require[s] that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 769 S.E.2d 453 (S.C. App., 2015). GEICO's attempt to compare Crossmann with the current matter is further proof that there is no law to support their theory of apportionment in automobile insurance cases dealing with punitive damages. Notably, the Court pointed out why such a pro rata scheme is not needed when dealing with automobile accidents.

> *Most liability policies are designed to respond to losses, such as automobile accidents, which occur instantaneously. Losses of this nature are relatively easy to identify because damages are both immediate and finite, and can be measured quite simply against the limits of the policy or policies in effect on the date of the accident. Id., 395 S.C. 40, 64, 717 S.E.2d 589, 601 (2011) (quoting Boston Gas Co., 910 N.E.2d at 301 (quoting William R. Hickman & Mary R. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L.Rev. 291, 292 (1990)).*

GEICO's proposed pro rata scheme is a solution in search of a problem, when the actual and punitive damages caused by a motor vehicle accident can simply be measured against the limits of the policy. The goal of vindicating the rights of the injured party and deterring similar conduct is

a separate concept from bodily injury or property damage and therefore should not be treated as such by apportioning punitive damages.

Furthermore, allocation does not favor the insured, but rather the insurer. Punitive damages, "in addition to punishing the defendant and deterring similar conduct by the defendant and others, serve to vindicate the private rights of the plaintiff and they provide some measure of compensation to plaintiffs for the intentional violation of those rights that is separate and distinct from the usual measure of compensatory damages." *O'Neill v. Smith*, 388 S.C. 246 (2010). If punitive damages are distinct from the usual measure of compensatory damages treating them like compensatory damages due to a split-limits policy is contradictory to the meaning and purpose of punitive damages and we have failed to adequately punish the defendant, or more importantly, to protect the injured party.

The Supreme Court of South Carolina held that UIM coverage applies to punitive damage awards even when a covenant not to execute has been signed in *O'Neill v. Smith*, 388 S.C. 246 (2010). Just as liability insurance companies are responsible for the wrongdoing of their insured, including punitive damages, UIM carriers also bear the responsibility of paying punitive damages by way of the contract they have with their insured.

> *Under South Carolina law, carriers must offer UIM coverage up to the limits of the insured's liability coverage. Plaintiffs accepted this offer and paid the corresponding premiums for coverage and are entitled to this contractual benefit. State Farm set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy. O'Neill v. Smith*, 388 S.C. 246 (2010).

The Pooles purchased UIM coverage from GEICO, damages per South Carolina Statutes include punitive damages, and UIM carriers are responsible for punitive damage awards. GEICO attempts to argue that allocation is necessary to conform to the terms of the GEICO policy, but does not provide policy language as proof thereof. The GEICO policy does not include specific provisions for the allocation of punitive damages and they cannot attempt to write them in now because the policy contains split-limits coverage. "Terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *McCraken v. Government Employees Ins. Co.,* 284 S.C. 66, 325 S.E.2d 62 (1985).

GEICO further relies on a Mississippi case, *Old Security Casualty Insurance Company v Clemmer*, 455 So.2d 781 (Miss. 1984), which is distinguishable from the Poole's case. *Old Security Casualty* did not deal with apportionment or distinguishing punitive damages as to bodily injury or property damages. The issue before the Supreme Court of Mississippi dealt with the specific language in the Clemmer's policy. Essentially because only Mrs. Clemmer was involved in the collision, the Clemmers were limited by their specific policy language to the limits of bodily injury per one person. The issue before the Supreme Court of Mississippi in *Old Security Casualty* was "whether an award of punitive damages to a second person (the husband) invokes the "per occurrence" limit for all damages arising from bodily injuries to "two or more persons as a result of any one occurrence?" The Pooles do not contend, and have not contended, that they are entitled to collect property damage coverage even if there has been no property damage. This case is clearly distinguishable and should not be relied on as a reason to apportion punitive damages based on bodily injury or property damage.

It is clear that damages include actual and punitive damages. Actual damages are apportioned by their nature as either bodily injury or property damage. The South Carolina

Supreme Court has clearly distinguished the difference between compensatory damages and punitive damages. "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore* 517 U.S. at 568, 116 S.Ct. 1589. The goal of vindicating the rights of the injured party and deterring similar conduct is a separate concept from bodily injury or property damage and therefore should not be treated as such by apportioning punitive damages. Apportioning punitive damages would violate the very definition of punitive damages and therefore, in accordance with the insurance contract, GEICO's argument is fatally flawed.

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

Awards of punitive damages and whether they are excessive must be considered on a case by case basis. Apportioning the punitive damages on a pro rata basis does not change the scrutiny a punitive damage award must undergo. This Court previously held that the court must "consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell v Fortis Ins. Co.,* 385 SC 570, 686 S.E.2d. 176, (S.C 2009). The Court used the term harm, not bodily injury or property damage when referring to a punitive damage award. It can be inferred that the total harm should be considered when determining if the amount of punitive damages is reasonable and that punitive damage awards should be recoverable from all available coverage. Those guidelines are not lessened by requiring GEICO to pay that punitive award up to the limits of it policy.[1]

[1] GEICO's reference to *Carroway v., Johnson*, 245 S.C.200, 139 S.E.2d 908 (1965) for the proposition that there can be no meaningful review of the punitive damage ratio without allocating punitive damages between bodily injury and property damage is misleading. *Carroway* decided that since the punitive damages were "because of bodily injury," they were covered by the bodily injury portion of the policy. There was no mention of ratios or even property damage.

The Court can continue to meaningfully review punitive damage awards just as it has done for many years. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, the Court stated:

> *[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident... It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.*

Allocation based on actual bodily injury and actual property damages does not solve the problem of an improper ratio between actual and punitive damages. As for GEICO's argument that they did not commit the wrongdoing that gave rise to the punitive damages award and therefore should be protected by way of apportionment, the Court in *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (S.C., 2010) stated:

> *Moreover, we hold that punitive damage awards, even though not paid directly by the tortfeasor because of the covenant, continue to serve several public policy aims; specifically, deterring similar conduct by the tortfeasor and others, as well as vindicating the private rights of the injured plaintiff. These purposes are fulfilled even if a specific defendant is not financially punished by imposition of an award.*

The purpose of punitive damages is not fulfilled by allowing insurance companies to reduce the amount of punitive damages they must pay by allocating them on a pro rata basis. Moreover, GEICO's complaint that an at-fault driver may be constitutionally protected from paying more than ten times the amount of property damage he caused, but that it, as the insurer would not be so protected, is again misplaced. Even GEICO does not contest that the at-fault driver in the underlying case caused significant property damage as well as severe and permanent injuries to Jack Poole and catastrophic injuries resulting in the death of Jennifer Poole. The case at bar is about coverage for those damages and injuries, not the ratio of punitive damages to the extraordinary actual and compensatory damages suffered by the Pooles. The Pooles would be entitled to recover significant awards for both compensatory and punitive damages against the at-fault driver. GEICO is required only to pay those damages up to the limits of the policy.[2]

IV. Public policy is violated by requiring punitive damages to be apportioned on a pro rata share between bodily injury and property damage.

The Pooles suffered actual and punitive damages far beyond all of the automobile insurance coverage on the liability policy, Ms. Knight's underinsured policy, and their GEICO underinsured policy. To allow GEICO to reduce what they statutorily and contractually owe the Pooles would violate public policy. Excerpts from *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (S.C., 2010) shed light on the importance of punitive damages being fairly paid to insureds in the furtherance of South Carolina's public policy.

[2] For arguments sake, if the Defendants' compensatory damages were each valued at Two Hundred Fifty Thousand and 00/100 ($250,000.00) dollars, then a punitive damage award of Two Hundred Fifty Thousand and 00/100 ($250,000.00) dollars would obviously not be grossly excessive. As there is less than Seven Hundred Fifty Thousand and 00/100 ($750,000.00) dollars coverage total between all the policies and coverages, any argument regarding unconstitutionality of the award has no merit in this matter.

The question certified to this Court asks whether it would violate South Carolina's public policy for a plaintiff to seek an award of punitive damages in a tort action after signing a covenant not to execute against a defendant. We answer in the negative, holding it does not violate public policy because punitive damages serve additional purposes beyond merely punishing a specific individual, and the public policy as expressed in S.C.Code Ann. § 38-77-30(4) (2002) is to compensate the injured insured, not his insurer, and requires only that damages exceed the liability insurance limits of an at-fault motorist.

The central purpose of UIM coverage is to protect the injured party, and vindication of the injured party's private rights is an integral part of that purpose, above and beyond the punishment of a specific individual. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist.").

A. Failure to allocate damages will not dramatically increase property damage premiums for South Carolina insureds.

Public policy is not violated by allowing injured parties to make a recovery for their damages, including actual and punitive, to the extent they are covered and it would in no way rewrite the insurance contract into a single limit policy. Automobile insurance companies are currently paying punitive damages awards on claims out of both bodily injury and property damage coverages. GEICO is in a position to assess risk, yet they have failed to provide the Court with an estimate of the premium increase they claim will inevitably occur. If underinsured coverage on

the property damage coverage of a 100/300/50 is only $2.00 per vehicle as is stated in GEICO's opening brief, then even if these premiums doubled, tripled, or quadrupled, the effect on the underinsured property damage premium in this scenario would still be minimal. GEICO is not concerned with premium increases to insureds, they are concerned with increasing their revenue by reducing the claims for which they are legally responsible.

Just as liability insurance companies are responsible for the wrongdoing of their insured, including punitive damages, UIM carriers also bear the responsibility of paying punitive damages the insured is entitled to recover by way of the contract they have with their insured.

> *Under South Carolina law, carriers must offer UIM coverage up to the limits of the insured's liability coverage. Plaintiffs accepted this offer and paid the corresponding premiums for coverage and are entitled to this contractual benefit. State Farm set its premiums with the knowledge that they are liable for compensatory and punitive damages under the insurance contract, and it cannot now be heard to complain that the delivery of benefits under the contract would thwart public policy. O'Neill v. Smith*, 388 S.C. 246 (2010).

Neither is there any evidence allowing insureds to recover for punitive damages to the full extent of the applicable coverage would have any significant impact on premiums or the marketplace. As GEICO points out, demands like this have been made and have become increasingly common in South Carolina over the past several years. Yet, GEICO has offered no evidence it has impacted rates. Furthermore, despite being fully aware of these demands, GEICO has not made any change in the language of its policy to address it. Therefore, the allocation GEICO proposes would actually rewrite the policy to narrow the coverage the parties agreed to, not to broaden it.

B. Allocating punitive damages works as an impermissible rewriting of the terms of the insurance contract.

Within the Pooles' policy, the "Protection Against Underinsured Motorist Coverage Amendment" written by GEICO defines "Losses We Pay" as:

> Under this Coverage we will pay damages for **bodily injury** and **property damage** caused by an accident which the insured is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** arising out of the ownership, maintenance or use of that **motor vehicle**.

Therefore, the contract itself requires GEICO to pay damages, which South Carolina has defined as actual and punitive, which the insured is entitled to recover. GEICO is fully capable of outlining not only pro rata apportionment in its policy, but also distinctions between bodily injury and property damage UIM coverage, which it did regarding "Other Insurance."[3] Yet, there is no such language regarding pro rata apportionment of punitive damages between bodily injury and property damages. In fact, punitive damages are only referred to on one occasion, and not within the underinsured motorist amendment.[4] Thus, as the Pooles are legally entitled to recover punitive

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[3] Section 6. Other Insurance states:

> ...
>
> Except as provided above, if the **insured** has other similar **bodily injury** insurance available to him and applicable to the accident, the damages for **bodily injury** will be deemed not to exceed the higher of the applicable limits of liability of this insurance and the other insurance. If the **insured** has other insurance against a loss covered by the Uninsured Motorists provisions of this policy, we will not be liable for more than our pro rata share of the total coverage available.
>
> With respect to **property damage**, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property.
>
> We will not be liable for a greater proportion of any loss under this coverage than its limit of liability bears to the sum of the applicable limits of liability of this and all such other insurance.

[4] Exclusion No. 17 of the liability portion of the policy states "We do not cover punitive or exemplary damages recovered or potentially recoverable from any **insured** arising from the use or abuse of alcohol, medication or drugs."

damages for bodily injury and property damage, the policy itself requires GEICO to pay punitive damages to be paid from any and all available coverages.

C. There is no undue burden on the parties to an insurance contract when the punitive damages are not allocated.

GEICO, as all insurance companies do, drafted the policy contract to which their insureds are bound. GEICO set the premiums based on risk assessments and history. GEICO and other insurance companies have the upper hand in the insurer/insured relationship. Yet, when it would benefits their revenue, GEICO argues to add requirements on how punitive damages are paid to insureds who paid premiums to protect themselves from underinsured drivers. GEICO predicts how often and how much an insurer will have to pay based on industry experience and statistical data maintained by the South Carolina Department of Insurance. The Court answering the Certified Question in the negative does not change GEICO's, or any other insurance company's, ability to assess risk.

GEICO argues the threat of *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933) forces insurance companies to pay property damage limits on cases with little or no property damage. If a punitive damage award would justify the paying of all the insurer's coverage, both bodily injury and property damage, this only seems fair. Punitive damages are intended to protect and vindicate the harmed, punish the wrong-doer, and deter others. If insurance companies are allowed to reduce the amount of available coverage for punitive damages, only the insurance companies benefit. Individuals who are harmed by willful, reckless, and wanton behavior are the ones who will be deprived. Applying GEICO's theory of apportionment on a pro rata basis would flip the purpose of punitive damages on its head, reward insurers, and punish innocent victims of reckless behavior.

CONCLUSION

For all of the above reasons the Court should answer the certified question "NO". To do otherwise would require adding language to the policy and twisting the intent of the legislature to protect South Carolinians on our roadways. The clear and unambiguous terms of the policy require GEICO pay its property damage UIM limits to the Pooles without a pro rata allocation of punitive damages where the coverage applies and the insured is entitled to punitive damages. To the extent there is any ambiguity, it should be interpreted in favor of the insured, as GEICO drafted the policy. Neither would any public policy or constitutional ground weigh in favor of limiting the available coverage by such apportionment. Courts can continue to evaluate the procedural and substantive constitutional limitations on punitive awards as they have done for years under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). The contract between the parties is only changed if it is expanded to require punitive damages to be allocated. Furthermore, GEICO has failed to provide any actual proof that premiums would increase if the change they are seeking is not implemented. Public policy would be violated under GEICO's proposal as a pro rata allocation of punitive damages between bodily injury and property damage hurts the insured and rewards the insurer.

Respectfully submitted,

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November 7, 2017

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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

Joseph F. Anderson, United States District Judge

Appellate Case No. 2017-001540

Government Employees Insurance Company.....Plaintiff,

v.

Jack A. Poole, individually and as Personal Representative

of the Estate of Jennifer Knight Poole.....Defendants.

CERTIFICATE OF COUNSEL

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

November 7, 2017

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CERTIFICATE OF HAND DELIVERY

I, Angela Christy Tyner, Attorney for Maxwell Law Firm, counsel for the Defendants, do hereby certify that I have hand delivered the documents hereinafter specified on the attorney(s) hereinafter named:

DOCUMENT(S) SERVED

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1) Brief of Respondent

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November 7, 2017

RE: **Government Employees Insurance Co. Company, v. Jack A. Poole, Ind. & as P.R. of the estate of Jennifer Poole**
Case No.: 3:16-cv-01934-JFA; 2017-001540