

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. 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.

REPLY BRIEF

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

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P.O. Box 6648
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(803) 782-4100
Attorney for Plaintiff

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INTRODUCTION

The Pooles argue that they are not attempting to convert a split-limits policy into a single limits policy. Respectfully, that is exactly what they seek to do. By their own admission, the Pooles suffered no more than \$1,250 in property damages. However, they seek recovery of \$100,000 in combined property damage coverages. The only purported justification for such an enormous disparity between their actual property damages and the amount they seek to recover is the fact that a jury in a tort case would award punitive damages, and the Pooles demand “that their punitive damages claims be paid by any and all available coverage.” (Brief of Resp. p. 4). However, the property damages of only \$1,250 would never justify a punitive damages award of \$98,750. Instead, the only way that such a significant punitive damages award could be justified is by referring to the extent of the Pooles’ bodily injury damages and allowing those damages to be compensated out of the limits dedicated to property damages.

The policy – in compliance with South Carolina’s insurance statutes – provides two sets of limits, one for bodily injuries and one for property damage. Therefore, only those punitive damages that are awarded because of property damage should be paid under the property damage coverage, and only those punitive damages that are awarded because of bodily injuries should be paid under the bodily injury coverage. Any other rule converts the split-limits policy into a single-limits policy.

ARGUMENT

The question before this Court, although novel, is relatively simple. When determining what amount of a punitive damages award resulting from an accident causing both bodily injury and property damages is owed under a split-limits policy, must the award be allocated just like courts have done with verdicts of actual damages? While the Pooles argue tort law theories for

awarding punitive damages against a tortfeasor, this case is not about what punitive damages could be awarded against the at-fault motorist. Both sides agree that a jury would award substantial punitive damages against the at-fault motorist.¹ Rather, the question before the Court is one of contract law addressing what part of that punitive damages award is covered under the insurance policy and what part is not. While the Pooles contend that GEICO seeks to rewrite the policy to allocate punitive damages *as* either bodily injury or property damages, GEICO actually asks the Court to allocate punitive damages *between* the two contractual limits of coverage – bodily injury or property damage.

The policy is a split-limits policy, providing separate amounts of coverage for those damages owed because of bodily injury and those damages owed because of property damage. The question before the Court is whether, as a matter of contract law, a punitive damages award must be apportioned when a party contractually agrees to pay up to a certain amount for damages because of bodily injuries and a separate amount for damages because of property damage. If so, both parties here agree the portion of any punitive damages award that would be attributable to property damages would be insufficient to trigger coverage under the GEICO policy.² Because the Pooles chose to purchase a split-limits policy with one set of limits and corresponding premium for bodily injuries and a separate limit and corresponding premium for property damage, allocation is necessary to enforce the contract between the parties.

¹ ECF No. 11, p. 2 (“[T]he parties stipulate that the potential punitive damages in this case exceed the amount of all available property damage coverage . . .”).

² ECF No. 11, p. 4 (“[S]hould it be judicially declared that punitive damages are to be allocated on a pro rata basis between the amount of actual damages for bodily injury and property damage, then GEICO will not pay any property damage underinsured motorist coverage to the Defendant.”).

Although tort law does not require a jury to allocate a punitive damages award between property damages and bodily injury damages, this is no different from the long-recognized contract rule for actual damages allocation. A jury is not required to award separate damage amounts for bodily injuries and property damages. Nonetheless, no one contends an insurer is required to use property damage limits to pay for actual bodily injury damages, or vice versa. The obligations owed under a policy of insurance are governed by contract law, not tort law. Therefore, the question before this Court is not whether a tort award of punitive damages against the wrongdoer must be apportioned as to the wrongdoer. Rather, the question is what portion of that punitive damages award must be paid by the insurance company under the policy. That question must be answered by looking to the contract and South Carolina's insurance statutes – both of which support GEICO's position.

I. Because the General Assembly chose to mandate two types of insurance limits – bodily injury and property damage – tort damages must be attributed to one or the other of those two limits.

The General Assembly established the minimum requirements for a South Carolina personal automobile insurance policy in section 38-77-140, which requires split limits of at least \$25,000 per person for bodily injuries and \$25,000 for property damage.³ Section 38-77-30(4) defines “damages” to mean “actual and punitive” damages. Therefore, section 38-77-140 says

³ Defendants cite to a series of statutes that have nothing to do with the issue in this case. They cite § 38-77-710, which addresses property damage arbitrations and says nothing as to what an insurance policy may or may not cover. Likewise, they cite § 38-77-20, but that provision merely states that chapter 77 of Title 38 “is to be liberally construed in order to achieve its purposes.” They then cite § 38-77-10, which states that one of the purposes of the chapter is “that every automobile insurance risk which is insurable on the basis of the criteria established in this chapter is entitled to automobile insurance.” The stated purpose in § 38-77-10 says nothing about the question at issue in this case. In contrast, § 38-77-140 establishes separate limits of coverage a policy must provide, and § 38-77-30(4) provides a definition that must be read into § 38-77-140. When read together, these two provisions are not only applicable, but they support GEICO's position.

that a policy must, at a minimum, insure “the persons defined as insured against loss from liability imposed by law for [*actual and punitive*] *damages* . . . subject to limits . . . as follows: (1) twenty-five thousand dollars *because of bodily injury* to one person in any one accident . . . and (2) twenty-five thousand dollars *because of injury to or destruction of property* of others in any one accident.” S.C. Code Ann. § 38-77-140 (emphasis added). Not surprisingly, the General Assembly does not require a separate limit for punitive damages, because punitive damages are included in the two separate limits.

Following the statutory structure, GEICO sold – and the insureds chose to purchase – a split-limits policy rather than paying a higher premium for a combined single-limits policy. The policy states, “The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting in any one accident.” [ECF No. 1-1, p. 19]. Therefore, the limit of liability directs the insured’s attention to the declarations page, which plainly states separate limits of coverage for bodily injury and property damage, with different corresponding premiums:

<u>Coverages^a</u>	<u>Limits and/or Deductibles</u>	<u>Vehicle 1</u>	<u>Vehicle 2</u>
Bodily Injury Liability			
Each Person/Each Occurrence	\$100,000/\$300,000	\$114.20	\$114.20
Property Damage Liability	\$50,000	\$82.80	\$73.30
Uninsured Motorists Bodily Injury			
Each Person/Each Occurrence	\$100,000/\$300,000	\$16.00	\$21.90
Property Damage	\$50,000	\$5.10	\$5.10
Underinsured Motorist Bodily Injury	\$100,000/\$300,000	\$58.40	\$86.40
Each Person/Each Occurrence			
Property Damage	\$50,000	\$2.00	\$2.00

[ECF No. 16-1, p. 8].

The statute defines the word “damages” to mean “actual and punitive damages.” S.C. Code Ann. § 38-77-30(4). Therefore, when the policy provides a \$100,000 limit for bodily injury “damages,” the policy provides \$100,000 for “actual and punitive” damages because of bodily

injury. Likewise, when the policy provides a separate \$50,000 limit of coverage for property damage “damages,” it is providing a separate limit for “actual and punitive” damages because of property damage.

Looking at the grant of coverage in the “Losses We Pay” section of the UIM coverage form, GEICO states that it will “pay *damages* for *bodily injury* and *property damage* caused by an accident . . .” [ECF No. 16-1, p. 41] (emphasis added). The policy defines “bodily injury” as “bodily injury to a person, including resulting sickness, disease or death.” [ECF No. 16-1, p. 26]. “Property damage” is defined as “damage or destruction of an insured’s property.” [ECF No. 16-1, p. 41]. Again, by limiting the bodily injury damages that GEICO will pay to \$100,000, GEICO has limited its obligation to \$100,000 for actual and punitive damages for “bodily injury to a person, including resulting sickness, disease or death.” By providing a separate limit for property damages, GEICO has limited its obligation for actual and punitive damage for “damage or destruction of an insured’s property” to a separate \$50,000 limit. Therefore, the policy mirrors the statutory structure.

South Carolina’s insurance statute expressly permits split-limits policies. Therefore, when the statute requires that the term “damages” be construed to include punitive damages, that statutory requirement must be read in context. *See Burns v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 520, 522; 377 S.E.2d 569, 570 (1989) (“The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature. In ascertaining this intent, statutes which are part of the same Act must be read together.”) (citations omitted). To do so, awards of punitive damages must be properly applied in the split-limits context. Like the statute, the GEICO policy does not provide a separate limit for punitive damages. Rather, there is one limit for damages because of bodily injuries and a separate limit for damages because of property damage.

Therefore, when faced with an award of punitive damages, the parties – or the Court – must determine what part of those punitive damages are damages “because of bodily injury” and what part is damages “because of injury to or destruction of property.” S.C. Code Ann. § 38-77-140(A). The only way to do so while staying true to the terms of the policy is to allocate punitive damages awards proportionally based on the amount of actual underlying damages.⁴

II. If constitutional due process limitations would limit the amount of punitive damages a tortfeasor could owe for damages because of property damage, then those limitations should certainly apply to an insurer providing separate limits of coverage for property damage.

Defendants’ argument proves GEICO’s point. Defendants contend that a punitive damage award of \$250,000 “would obviously not be grossly excessive” in this case. (Brief of Resp. p. 15). However, the property damages in this case are, at most, \$1,250 – consisting of a pair of boots, a pair of overalls and a ring. As the United States Supreme Court held in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Thus, based upon the property damages sustained by the Pooles, a punitive damages award of \$250,000 would be grossly excessive. In fact, an award equal to the at-fault motorist’s liability limits of \$25,000 would be excessive. Therefore, a punitive damages award based solely on the property damage –

⁴ As discussed in GEICO’s principal brief, allocation on a pro rata basis is a default rule, much like the time-on-the-risk approach adopted by this Court in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 65, 717 S.E.2d 589, 602 (2011). The Pooles concede that, if an allocation is required, allocation would result in no recovery of UIM property damage. Therefore, resort to an allocation method is not necessary in this particular case. In situations where the parties aren’t able to reach such an agreement, they could ask a jury via special interrogatories to conduct the apportionment. The apportionment method is a default when those two options fail – much like the time-on-the-risk analysis is a default rule when it is otherwise not possible for the parties to determine what portion of progressive property damage took place during a particular policy period.

i.e., damages “because of” property damages – would never reach the UIM coverage of the GEICO policy in this case.

To overcome the constitutional problem, the Pooles must resort to the extent of their *bodily injury* damages as a means to justify a large punitive damages award. In other words, the Pooles rely upon the extent of their *bodily injuries* to support a punitive damages award that they want GEICO to pay under its *property damage* coverage. Put simply, the Defendants seek to convert an otherwise non-existent property damage UIM claim into a payment of the full \$50,000 in property damage UIM coverage by bootstrapping their property damage claim to their bodily injuries. Doing so ignores the split-limits nature of the policy.

While constitutional limitations would not prevent a substantial punitive damages award against the tortfeasor here *because he caused significant bodily injuries*, those limitations demonstrate that the overwhelming majority of any punitive damages award would not constitute damages “because of injury to or destruction of property of others.” S.C. Code Ann. § 38-77-140(A)(3). Tort law may not split damages between bodily injury and property damages, but the insurance contract – pursuant to South Carolina statute – does. Thus, application of the constitutional due process limitations serves to show the extensive punitive damages award a jury could have awarded the Pooles in a suit against the at-fault motorist is not for property damages, but rather for bodily injuries.

The facts of this case provide a prime example of the problem with the Pooles’ position. The Pooles were operating a vehicle they did not own. Assuming arguendo that the vehicle was worth \$1,250, then the Pooles and the car owner would have suffered exactly the same amount of actual property damages. However, because the car owner suffered no bodily injuries, the owner of the car could recover no more than roughly nine times the amount of her actual damages –

\$11,259 – in punitive damages. Therefore, the most the car owner could recover is \$12,509 (actual plus punitive damages). In contrast, the Pooles – who suffered the same amount of property damages – argue they should recover substantially more under the property damage limits. The only distinguishing factor between the two claimants would be the fact that one suffered bodily injuries and the other did not. It strains reason to argue that the additional amount of recovery to the Pooles should be attributed to the “property damage” limits when a person who suffered the same amount of property damages would not be entitled to the same recovery.

Without allocation, an insurer is forced to pay twice for serious bodily injuries. First, the insurer – like GEICO here – pays for serious bodily injuries under the bodily injury limits. Next, claimants – like the Pooles here – use the extent of the bodily injuries as the justification for a large punitive damages award. Then, relying upon the punitive damages that were able to withstand constitutional scrutiny because of the extensive bodily injury damages, the claimants demand the property damage limits. If the only way to justify a punitive damages award that would reach into the property damage limits is by looking to the extent of the bodily injuries – not the property damage – then those punitive damages should not be allocated to the property damage limits.

III. The Pooles are advocating for a destruction of the distinction between bodily injury limits and property damage limits within the policy.

Taken to its logical conclusion, the Pooles are asking this Court to ignore separate limits of insurance coverage when punitive damages are awarded. They contend, “[W]here 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.” (Brief of Resp. p. 6). Respectfully, the facts of this case reveal what they are actually arguing is that, in cases with punitive damages, the fact of whether there is property damage is of no import. As long as there

is some evidence of even the most minimal property damage, the Pooles argue the punitive damages award should be paid under the property damage limits.

As an initial matter, part of the above-quoted statement is inconsistent with the position the Pooles themselves have taken in this case. They argue that, as long as damages are awarded and the case involves both bodily injury and property damages, then “**both** actual and punitive damages should be covered up to the limits of all of the available coverage.” (Brief of Resp. p. 6). However, the Pooles have never before contended in this case that an actual damages award should be covered up to the limits of “all available coverage.” Certainly, a jury in this case would award actual bodily injury damages that greatly exceed the available policy limits. However, the property damages are only \$1,250. No one would reasonably argue that the insurance company is required to pay its full property damage limits merely because the combined property damages and bodily injuries exceed the available limits. That simply is not, and has never been, the law. Nonetheless, the Pooles contend that punitive damages change this elementary rule because a jury is not required to allocate punitive damages between actual bodily injury damages and actual property damages. However, a jury is not required to award separate damages for actual bodily injury and property damages. Rather, the jury is only required to issue a general verdict. *See Holcombe v. Garland & Denwiddie*, 162 S.C. 379, 160 S.E. 881 (1931) (holding that a single wrongful or negligent act that injures both a person and his property gives rise to a single cause of action). Nonetheless, this Court recognizes that juries can be asked to allocate verdicts for coverage purposes. *See e.g., Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 342, 803 S.E.2d 288, 300 (2017) (holding that insurer had an obligation to inform insured of need for allocated verdict between covered and non-covered damages). Thus, even if punitive damages – as a matter of tort

law – are not separated between bodily injury and property damages, they must be when determining what amount is owed under split-limits of insurance coverage.

The Pooles' argue that the existence of minor property damages in this case justifies a full recovery of the punitive damages award under the property damage portion of the policy. The absurdity of their argument is borne out by its logical extreme. Suppose the GEICO policy provided \$1,000,000 in property damage limits rather than only \$50,000. Also, suppose that instead of suffering \$1,250 in property damages, the only property damage the Pooles could present is the loss of a pair of sunglasses worth ten dollars. Under their theory, the loss of the sunglasses constitutes "property damage." Therefore, if a jury awarded substantial punitive damages because of the severity of the Pooles' *bodily injuries*, the full \$1,000,000 in *property damage* limits would be owed under the policy. The language on the declarations page stating the \$1,000,000 limit is for "property damage" is of absolutely no import to the Pooles. Although their actual "property damages" would only equal ten dollars they would use the punitive award to recover over one hundred thousand times that amount.

While the above-stated hypothetical reveals the absurdity of the result that the Pooles seek, the facts of this case are only slightly less extreme than the hypothetical. The Pooles suffered property damage of no more than \$1,250. However, GEICO is the *excess* UIM insurer. A \$25,000 property damage liability limit and a \$25,000 property damage UIM limit are situated ahead of GEICO's coverage. Therefore, after recovering GEICO's \$50,000 in property damage UIM limits,

the Pooles would have recovered a total of \$100,000 in *property damage* limits even though they only suffered \$1,250 in actual property damages – a factor of 80:1.⁵

The Pooles’ resort to this Court’s decision in *O’Neil v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010), does not lend them any support. That case dealt with whether public policy prohibited a plaintiff from asking a jury to award punitive damages against an at-fault motorist when the plaintiff has already executed a covenant not to execute that protects the at-fault motorist from any personal responsibility for the judgment. GEICO does not make any such contention here. In fact, GEICO has already stipulated that a jury would award punitive damages *despite* the fact that the Pooles have executed a covenant not to execute protecting the at-fault motorist. GEICO also stipulates that punitive damages are covered under the policy. Rather, GEICO merely contends that the policy limits set out the maximum amount of damages for which GEICO may be legally responsible – a fact that this Court recognized in *O’Neil*: “In either scenario, the defendant is essentially judgment-proof, and the UIM carrier would be responsible for responding to any deficit, *up to the UIM policy limits.*” *Id.* at 255 n.3, 695 S.E.2d at 535 n.3 (emphasis added).

Application of the pro rata approach will never result in an insured recovering less than an appropriate amount of the punitive damages award from the property damages limits. Because the punitive damages are apportioned on a ratio under the pro rata approach, the claimant will always recover a portion of the punitive damages award from the property damage coverage in an amount

⁵ The fact of whether the Pooles recovered the property damage limits from the at-fault motorist or the primary UIM insurer is not in the record. However, the Pooles would not be legally entitled to GEICO’s \$50,000 UIM property damage limits unless they were first legally entitled to the \$25,000 in property damage liability limits and the \$25,000 in primary UIM property damage limits.

that is commensurate with the relative extent of his or her actual property damages.⁶ Therefore, the pro rata allocation does not cause the insured to receive any less than he or she is entitled to under the insurance contract. Rather, it serves to make sure that the insured is not receiving more than he or she is entitled to under the split-limits policy.

The separate limits for bodily injury and property damage must be honored, and the Pooles cannot use a punitive damages award as a method of converting property damage coverage into bodily injury coverage. By statute, GEICO is permitted to establish separate limits for damages caused by bodily injuries and damages caused by property damage. The Pooles purchased a split-limits policy, paying only \$2.00 per car for the UIM property damage coverage – a tiny fraction of what they paid for their UIM bodily injury coverage.⁷ Now, they want to ignore the split-limits nature of the policy and the premium they paid for those split limits so they can recover substantial property damage coverage for damages that are unquestionably “because of bodily injury,” not property damage. Such a result ignores the policy’s separate limits, the statutory scheme, and the constitutional limitations on punitive damages awards. Therefore, a punitive damages award must be apportioned pro rata based upon the amount of the actual bodily injury damages and the actual property damages.

⁶ For example, if actual property damages are \$10,000, bodily injuries are \$90,000, and the punitive damages award is \$200,000, then the ratio for the punitive damages compared to the aggregate actual damages is 2:1. Likewise, when the apportionment formula is applied to establish the amount that should be attributed to property damage, \$20,000 of the punitive damages are allocated to the property damage, resulting in a ratio of 2:1. (((\$10,000 actual property damages/\$100,000 total actual damages)*\$200,000 punitive damages = \$20,000 punitive property damages).

⁷ The Pooles paid \$58.40 for UIM bodily injury coverage for one vehicle and \$86.40 for UIM bodily injury coverage on a second vehicle.

CONCLUSION

For the above-stated reasons and those stated in GEICO's principal brief, this Court should answer "Yes" to the certified question. The insurance statutes specifically permit split-limits policies, and allocation of a punitive damages award comports with the statutory scheme. Allocation is also necessary to protect the contractual agreement between the parties. When an insured chooses a split-limits policy, the insured receives the benefit of a lower premium. Failure to allocate unilaterally converts the policy into a more expensive combined single-limits policy.

Allocation is also necessary as a matter of constitutional due process limitations and common sense. The pro rata allocation approach will never prevent a claimant from recovering punitive property damages when he or she has suffered actual property damages. But, it will ensure that the insured gets paid under the property damage limits for only those amounts of punitive damages that are "because of injury to or destruction of property."

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire

S.C. Bar # 7941

Wesley B. Sawyer, Esquire

S.C. Bar # 100229

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Respondent

Columbia, South Carolina
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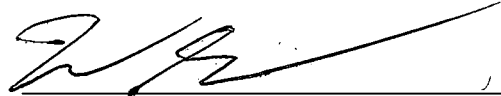
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CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Plaintiff, certify that the Plaintiff's Reply Brief complies with the South Carolina Supreme Court Order of November 17, 2017 and Rule 211(b) of the South Carolina Court Rules.



J.R. Murphy, Esquire
S.C. Bar No. 7941
Wesley B. Sawyer, Esquire
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PROOF OF SERVICE

I certify that I have served the Reply Brief on Jack A. Poole, Individually and as Personal Representative of the Estate of Jennifer Knight Poole by depositing a copy of it in the United States Mail, postage prepaid, on November 17, 2017, addressed to his attorney of record, A. Christy Tyner, Esquire and Ronald A. Maxwell, Esquire, Maxwell Law Firm, P.C., Post Office Box 1115, Aiken, SC 29802.



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