

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2021-000243

RECEIVED

May 07 2021

SC Court of Appeals

Nationwide Affinity Insurance Company of America,Appellant.

v.

Andrew Green, Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. **Since underinsured motorist property damage coverage is not statutorily mandated in this State, the Circuit Court erred by failing to apply the plain terms of the Nationwide policy, which limit underinsured motorist property damage coverage to damage to a covered automobile.**

STATEMENT OF THE CASE

This case involves a dispute over whether underinsured motorist (“UIM”) property damage coverage is mandated by South Carolina’s insurance statutes. Nationwide Affinity Insurance Company of America (“Nationwide”) issued an auto policy to the Respondent’s mother. The policy restricts UIM property damage coverage to injury to or destruction of a covered automobile. Respondent Andrew Green was injured in an October 19, 2018 accident while he was a pedestrian. Because there was no damage to a covered automobile, under the terms of the Nationwide policy Respondent was not entitled to any UIM property damage coverage. In accordance with the policy terms, Nationwide offered its UIM bodily injury limits to Respondent. However, Respondent made a UIM property damage claim for the accident.

As a result, Nationwide filed this declaratory action on April 6, 2020 seeking a declaration that its policy provides no UIM property damage coverage to Respondent because there was no damage to a covered automobile. (Compl.). In his Answer, Respondent admitted that the October 19, 2018 accident resulted in no damage to a covered automobile. (Answer ¶¶ 14-19). Therefore, Nationwide filed a Motion for Judgment on the Pleadings and supporting Memorandum. (Mot. for J. on the Pleadings); (Mem. in Support of Mot. for J. on the Pleadings). In its Memorandum, Nationwide argued that the terms of the policy govern the scope of coverage unless in conflict with statutory requirements. The South Carolina Supreme Court stated in *Bardsley v. Government Employees Ins. Co.* that UIM property damage coverage is not statutorily mandated. (Mem. in Support of Mot. for J. on the Pleadings, pp. 1, 3-6). Respondent filed a Response in Opposition

arguing that the policy's UIM property damage provision was in violation of South Carolina law. On January 25, 2021, the Circuit Court held a hearing on Nationwide's Motion for Judgment on the Pleadings. (Feb. 1, 2021 Order). On February 1, 2021, the Circuit Court entered an Order in favor of Respondent and against Nationwide. (*Id.*). The Order reformed the Nationwide policy to provide UIM property damage coverage for damage to or loss of use of any tangible property. (*Id.*). On February 18, 2021, the Circuit Court entered an Order amending its previous February 1, 2021 Order to state that the prior Order ends the case. (Feb. 18, 2021 Order). This appeal followed with the Notice of Appeal being served on March 2, 2021. (Notice of Appeal).

SUMMARY OF THE ARGUMENT

This case involves a dispute over whether UIM property damage coverage is statutorily mandated in South Carolina. It is not. Under South Carolina law, "UIM property damage coverage is not statutorily mandated." *Bardsley v. Government Employees Ins. Co.*, 405 S.C. 68, 77, 747 S.E.2d 436, 441 (2013). Therefore, coverage for UIM property damage is controlled by the plain terms of the insurance contract. The contract here limits UIM property damage coverage to injury to or destruction of a covered automobile. Therefore, Respondent – who was injured as a pedestrian – is not entitled to any UIM property damage coverage under the Nationwide insurance policy.

This case solely concerns UIM property damage coverage. Consequently, the Circuit Court erred by disregarding this Supreme Court's decision in *Bardsley* dealing with UIM property damage coverage. Based on the Supreme Court's interpretation that the language of South Carolina Code § 38-77-160 is limited to UIM bodily injury coverage, the Court in *Bardsley* stated that UIM property damage coverage is not statutorily mandated. 405 S.C. at 77, 747 S.E.2d at 441. Discounting *Bardsley*, the Circuit Court held that a prior Court of Appeals' decision, which

interpreted § 38-77-160 to apply to UIM property damage coverage, was controlling.¹ (Feb. 1, 2021 Order (stating that “*Glasscock* [v. *U.S. Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)] is controlling”). Based on this prior Court of Appeals’ decision, the Circuit Court refused to apply the plain terms of the Nationwide Policy and instead rewrote the policy to provide greater UIM property damage coverage. Given the Supreme Court’s subsequent decision in *Bardsley*, the Circuit Court erred in finding *Glasscock* controlling, and the Circuit Court’s decision should be reversed.

STATEMENT OF FACTS

The facts of the case are undisputed.

A. The vehicle versus pedestrian collision.

On October 19, 2018, Respondent was a pedestrian when he was struck by a motor vehicle operated by Harold Carraway in or near Florence, South Carolina. (Compl. ¶ 8); (Answer ¶ 8). As a result, Respondent filed a lawsuit against Carraway and has alleged that Carraway ran off the road, striking Respondent. (Compl. ¶¶ 9-10); (Answer ¶¶ 9-10). As a pedestrian, Respondent did not have a motor vehicle involved in the collision. (Compl. ¶ 11); (Answer ¶ 11).

After Carraway’s liability carrier tendered its liability limits, Respondent presented a claim to Nationwide for UIM bodily injury and property damage coverage. (Compl. ¶¶ 12-13); (Answer ¶¶ 12-13). Nationwide has offered its UIM bodily injury limits. (Compl. ¶ 14); (Answer ¶ 14).

¹ The *Glasscock* case held that pursuant to the language in South Carolina Code § 38-77-160 insurance policies are required to include the same scope of UIM property damage coverage as the policies’ liability property damage coverage. If this were the State requirement, then – in contradiction of *Bardsley* and for all practical purposes – UIM property damage would be statutorily mandated because liability property damage coverage is. *See* S.C. Code § 38-77-140. An insurer would have to offer the same scope of UIM property damage coverage as the policy’s liability property damage coverage.

B. The Policy.

Nationwide issued an insurance policy to Shameika Clark, which included UIM limits of \$25,000 per person for “bodily injury” and \$25,000 each occurrence for “property damage.” The Policy provides in pertinent part:

UNDERINSURED MOTORISTS COVERAGE – SOUTH
CAROLINA

We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of:

1. "Bodily injury" sustained by an "insured" and caused by an auto accident; and
2. "Property damage" caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle".

"Insured" as used in this endorsement means:

1. You or any "family member".
2. Any other person "occupying" "your covered auto".
3. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.

(Compl. ¶¶ 5-6); (Ans. ¶¶ 5-6); (Policy, UIM Form, p. 1).² Thus, the Policy only provides UIM coverage for “bodily injury” and “property damage” caused by an auto accident.

“Property damage” means “injury to or destruction of ‘your covered auto’”:

"Property damage" as used in this endorsement means injury to or destruction of "your covered auto". However, "property damage" does not include damage to property owned by the "insured" while contained in "your covered auto".

² A complete, certified copy of the Policy was attached as Exhibit A to the Complaint. Respondent has admitted to the authenticity of the Policy. (Answer ¶ 5).

(Policy, UIM Form, p. 1). Therefore, UIM property damage coverage is limited under the terms of the Policy to damage to “your covered auto.” Respondent admits no damage occurred to a “your covered auto.” (Answer ¶ 11).

STANDARD OF REVIEW

“A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Lee v. University of South Carolina*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) (citation omitted). “Because the construction of a clear and unambiguous contract is a matter of law for the court, [appellate courts] review the trial court’s findings of law *de novo*.” *Id.* (citing *Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 520, 252 S.E.2d 889, 891 (1979)) “Whether a particular provision in an insurance policy violates the public policy of the state is a question of law that is reviewed *de novo* by an appellate court.” *Cothran v. State Farm Mut. Auto. Ins. Co.*, 421 S.C. 562, 572, 808 S.E.2d 824, 830 (Ct. App. 2017), *rev'd on other grounds*, 427 S.C. 545, 831 S.E.2d 919 (2019) (citation omitted).

ARGUMENT

“The terms of the policy govern the scope of coverage, unless in conflict with statutory requirements.” *Pennell v. Foster*, 338 S.C. 9, 18, 524 S.E.2d 630, 634 (Ct. App. 1999).³ Thus, the plain language of the Nationwide Policy limiting UIM property damage coverage to damage to “your covered auto” applies unless the language conflicts with statutory requirements. It does not.

I. The UIM property damage restriction in the Nationwide Policy does not conflict with any statutory requirement and must be applied as written.

South Carolina Code § 38-77-160 sets forth UIM coverage automobile insurers must offer:

³ See also *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 536, 514 S.E.2d 327, 330 (1999) (“[I]nsurers have the right to limit their liability...provided they are not in contravention of public policy or a statutory prohibition.”).

Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by the at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. . . .

S.C. Code § 38-77-160. Read in a vacuum, one might assume that this statutory provision includes UIM bodily injury and UIM property damage coverage. However, the General Assembly chose to limit the definition of “underinsured motor vehicle” to one “as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds’ damages.” S.C. Code § 38-77-30(15) (emphasis added). Therefore, when the statute requires an offer of UIM coverage, that statutory requirement is limited to UIM bodily injury coverage.

The South Carolina Supreme Court addressed this very statutory question in *Bardsley*. That case, like the case here, involved a dispute over the recovery of UIM property damage coverage under a policy of automobile insurance. The policy included an offsetting provision, which the insured claimed was “void as a matter of public policy because [it was] contrary to the legislative intent of the UIM statute, Section 38-77-160 of the South Carolina Code.” 405 S.C. at 77, 747 S.E.2d at 440-441. The Supreme Court rejected that contention because South Carolina Code § 38-77-160 does not apply to UIM property damage coverage:

Section 38-77-160 requires that an insurer “offer ... underinsured motorist coverage....” An “underinsured motor vehicle” is statutorily defined as “a motor vehicle as to which there is bodily injury insurance liability ... 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 ... is less than the amount of the insureds’ damages.” S.C. Code § 38-77-30(15) (200). **Thus, UIM property damage coverage is not statutorily mandated**, and the “other insurance” provision does not conflict with the public policy expressed in section 38-77-160.

Id. at 77, 747 S.E.2d at 441 (emphasis added). Therefore, an insurer is not required to offer UIM property damage coverage, and any UIM property damage coverage provided by the insurer is purely voluntary.

When addressing insurance coverage that is not controlled by statute, the Court must construe the policy terms in accordance with their plain and unambiguous meaning. *See Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993). “Parties to a contract of insurance have the right to make their own contract. It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage.” *Id.* at 473, 438 S.E.2d at 277 (citations omitted). “If the language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Id.* (citation omitted). “The court is without authority to alter a contract by construction or to make a new contract for the parties.” *Id.* (citation omitted).

In his Answer, Respondent admits that the Policy limits the definition of “property damage” in the UIM coverage part to damage to “your covered auto,” and he admits that “there was no damage to ‘your covered auto’ . . .” (Answer ¶¶ 14-19). His sole defense is his contention that the restriction of coverage to “your covered auto” violates South Carolina law. (Answer ¶ 19). This is the same argument raised by the insured in *Bardsley*, which the South Carolina Supreme Court previously rejected. Therefore, Nationwide is entitled to a declaration that its policy does not provide UIM property damage coverage for the October 19, 2018 accident.

As this Court has repeatedly stated: “‘We cannot read into an insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include.’” *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) (quoting *Barkley v. International Mut. Ins. Co.*, 227 S.C. 38, 45, 86 S.E.2d 602, 605 (1955)). Here, the insurer is not “required by law” to provide UIM property

damage coverage and the parties to the insurance contract “clearly and plainly have failed to include” such coverage for damages other than damage to a covered auto. Nevertheless, “under the guise of public policy,” the Circuit Court read into the Nationwide insurance contract “provisions which are not required by law and which the parties thereto clearly and plainly[] failed to include.” Therefore, the Circuit Court’s Order reforming the policy to include such provisions must be reversed.

II. The South Carolina Supreme Court’s decision in *Bardsley* is controlling over the Court of Appeals’ prior decision in *Glasscock*.

According to its February 1, 2021 Order, the Circuit Court found “that *Glasscock* is controlling.” (Feb. 1, 2021 Order). Before the South Carolina Supreme Court rendered its decision in *Bardsley*, this Court held that UIM property damage coverage could not be limited to damage to “your covered auto” but had to include loss of use damages where the policy’s liability coverage included loss of use damages. *See Glasscock, Inc.*, 348 S.C. at 84, 557 S.E.2d at 692. In that case, this Court relied on an interpretation of § 38-77-160 that included UIM property damage as part of the statutory language.

In *Glasscock*, this Court stated that the “**up to the limits** of the insured liability coverage” language in South Carolina Code § 38-77-160 requires the insurer to provide the same scope of UIM property damage coverage as liability property damage coverage. *Id.* at 83–84, 557 S.E.2d at 693 (emphasis in orig.). Thereafter, the South Carolina Supreme Court in *Bardsley* interpreted the language of § 38-77-160 to only be applicable to UIM bodily injury coverage and stated that “UIM property damage coverage is not statutorily mandated.” *Bardsley*, 405 S.C. at 77, 747 S.E.2d at 441. Therefore, the South Carolina Supreme Court’s holding in *Bardsley* – as a ruling from the State’s highest court on this statutory interpretation question – is controlling, and *Glasscock* has been effectively overruled. *See, e.g.*, S.C. Const. Art. V, § 9 (“The decisions of the Supreme Court

shall bind the Court of Appeals as precedents.”); *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (“Of course, the decisions of the Supreme Court bind this Court as precedents.”); *Freeman v. Freeman*, 323 S.C. 95, 105, 473 S.E.2d 467, 473 (Ct. App. 1996) (“We, of course, are bound by the decisions of the South Carolina Supreme Court.”); *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012), *aff’d as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014) (“[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court.”).⁴

CONCLUSION

For the above-stated reasons, the Circuit Court’s holding should be reversed, and the Policy should be applied according to its plain terms. The Nationwide Policy limits UIM property damage coverage to injury to or destruction of a “your covered auto.” Respondent was a pedestrian when he was struck by a vehicle operated by Harold Carraway. As such, he admits that there was no injury to or destruction of a “your covered auto.” Thus, he is not entitled to any UIM property damage coverage under the plain terms of the Policy.

Under South Carolina law, UIM property damage coverage is not statutorily mandated. *See Bardsley*, 405 S.C. at 77, 747 S.E.2d at 441. Therefore, any UIM property damage coverage is purely voluntary and must be construed according to the language in the insurance Policy. Because the Policy limits UIM property damage coverage to injury to or destruction of a “your covered auto,” Respondent’s admission there was no such damage is dispositive. Nationwide is entitled to

⁴ *See also Gantt v. State*, 354 S.C. 183, 188 n.6, 580 S.E.2d 133, 136 n.6 (2003) (recognizing that subsequent Supreme Court decision “effectively overruled” holding in prior case); *Brown v. State*, 423 S.C. 56, 59, 814 S.E.2d 146, 147 (2018) (recognizing that subsequent Supreme Court decision “effectively overruled” part of prior decision).

a declaration in its favor that the Policy does not provide UIM property damage coverage for the October 19, 2018 accident.

Respectfully submitted,

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CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Appellant, certify that the Initial Brief of Appellant and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

May 7, 2021



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I certify that I have served the Initial Brief of Appellant on Andrew Green by depositing a copy of it in the United States Mail, postage prepaid, on May 7, 2021, addressed to:

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