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SC Court of Appeals

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

Nationwide Affinity Insurance Company of America, ...Appellant.

v.

Andrew Green, ... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

The South Carolina Supreme Court has previously held that underinsured motorist ("UIM") property damage coverage is not statutorily mandated, specifically explaining that South Carolina Code § 38-77-160's UIM coverage requirement is limited to bodily injury UIM coverage. *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 77, 747 S.E.2d 436, 441 (2013). In direct conflict with the Supreme Court's prior explanation, Respondent argues that "[n]othing in this statute limits recovery only to bodily injury coverage…." (Respondent's Br. p. 4). Rather than recognizing this conflict, Respondent repeatedly refers to a South Carolina Court of Appeals case issued prior to the South Carolina Supreme Court's decision in *Bardsley*. As this Court is aware, South Carolina Supreme Court decisions are binding precedents for all lower courts. 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."); *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."). Therefore, Respondent's argument that the *Glasscock* Court of Appeals decision should control over the *Bardsley* Supreme Court decision is without merit.

Without a statutory basis for reformation, South Carolina courts are limited to applying the plain terms of the insurance contract. Under those terms, Respondent is not entitled to any UIM property damage coverage for the October 19, 2018 accident. He did not suffer any "property damage" as that term is defined in the policy's UIM endorsement. Therefore, the Circuit Court's decision should be reversed, and judgment should be entered in favor of Nationwide.

I. The *Bardsley* decision is controlling in this matter.

Respondent's sole argument is premised on South Carolina Code § 38-77-160 requiring UIM property damage coverage equal in scope and limits to liability property damage coverage. (Respondent's Br. pp. 6-10). Likewise, the *Glasscock* decision had the same premise. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 84, 557 S.E.2d 689, 693 (Ct. App. 2001) ("'[U]p to the limits of the insured liability coverage" as contained in § 38–77–160 as requiring the insurer to provide the same type of coverage, not just the same dollar limit" of UIM property damage coverage). In *Bardsley*, the South Carolina Supreme Court entirely undermined this premise:

> 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) (2002). **Thus, UIM property damage coverage is not statutorily mandated....**

405 S.C. at 77, 747 S.E.2d at 441 (emphasis added).[1]

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[1] Previously, in 1991, the South Carolina Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Horry*, recognized that the legislature had never previously defined "underinsured motor vehicle" but then did so in South Carolina Code § 38-77-30. 304 S.C. 165, 168, 403 S.E.2d 318, 319 (1991). Through the statutory definition of "underinsured motor vehicle" the legislature consciously chose to "define the scope and nature of UIM coverage". *Id.* at 169, 403 S.E.2d at 320. Specifically, the Court stated:

> We therefore reject the respondents' assertion that § 38-77-30(14) addresses only the definition of an UIM *vehicle*, and did not change the law as to UIM *coverage*. We could agree with this contention only if we completely ignore the plain language of § 38-77-30(14) and its companion, § 38-73-1105....While §§ 38-77-30(14) and 38-73-1105 do not expressly define UIM "coverage," it is obvious that the sole purpose of the statutes is to redefine such coverage by changing the definition of UIM vehicle....

Id. Therefore, the Supreme Court in *Bardsley* reiterated what it had previously explained: The definition of "underinsured motor vehicle" in 38-77-30 not only defines an UIM vehicle but also UIM coverage and its scope. Such definition is limited to bodily injury coverage. S.C. Code § 38-77-30(15).

Respondent's attempt to factually distinguish *Bardsley* blatantly ignores the statutory interpretation the South Carolina Supreme Court gave for § 38-77-160. That statutory interpretation eviscerates the very statutory basis upon which Respondent's argument and the *Glasscock* decision are premised. *See* (Respondent's Br. pp. 7-9).

Without this statutory premise, the Court does not have the right to reform the policy to include coverage for which the parties did not contract. *See Pennell v. Foster*, 338 S.C. 9, 18, 524 S.E.2d 630, 634 (Ct. App. 1999) ("The terms of the policy govern the scope of coverage, unless in conflict with statutory requirements.").[2] As the South Carolina Supreme Court in *Nationwide Ins. Co. of Am. v. Knight* recently explained:

> To be clear, however, this Court has no authority to invalidate an automobile insurance policy provision simply because we believe it is inconsistent with our own notion of "public policy." *See Burns*, 297 S.C. at 523, 377 S.E.2d at 570 (rejecting a challenge to the validity of an exclusion in an automobile insurance policy, and stating, "It is the responsibility of this Court to construe statutes; we have no power to legislate"); *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989) ("Once the Legislature has made that choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."). Rather, the General Assembly establishes the public policy relating to automobile insurance and enacts statutes to let the public and the courts know what that policy is. When an insured challenges a policy provision on the ground the provision violates public policy, the Court's authority is limited to determining whether the policy provision violates a statute.

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[2] *See also Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 437 S.E.2d 142, 144 (Ct. App. 1993) ("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." (citation omitted)); *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."); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989) ("Insurers have the right to limit their liability provided they do not contravene a statutory provision or public policy."); *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993) ("The court is without authority to alter a contract by construction or to make a new contract for the parties.").

433 S.C. 371, 858 S.E.2d 633, 634 (2021). Therefore, the Court cannot reform the policy to include a larger scope of UIM coverage than that for which the parties contracted unless § 38-77-160 requires it, which it does not according to Supreme Court's interpretation in *Bardsley*.

Because UIM property damage coverage is purely voluntary coverage, the parties are free to include terms they could not otherwise include with statutorily mandated coverage. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 61, 496 S.E.2d 875, 883 (Ct. App. 1998) (holding policy provision prohibiting stacking was enforceable because "liability coverage for non-owned vehicles is *not* statutorily required coverage and the parties are free to choose their own terms regarding this voluntary coverage" (emphasis is orig.)); *Howell v. United States Fid. & Guar. Ins. Co.*, 370 S.C. 505, 510, 636 S.E.2d 626, 628 (2006) ("[B]ecause liability coverage for non-owned and hired vehicles is not statutorily required in this state, an insurer providing this type of voluntary coverage need not comply with § 38–77–160."); *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 61, 437 S.E.2d 43, 45 (1993) ("Insurance companies may prohibit the stacking of non-mandatory coverage."). Therefore, the policy's "property damage" definition is acceptable and not in conflict with any statutory provision.

II. Because UIM property damage coverage is purely voluntary coverage, the Court must apply the plain terms of the Nationwide policy.

"It is not the province of the courts to construe contracts broader than the parties have elected to make them or to award benefits where none was intended." *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000). Applying the plain terms of the Nationwide policy, no UIM property damage coverage is available to Respondent for the October 19, 2018 accident. Under the UIM section of the policy, "property damage" is defined as: "injury to or destruction of 'your covered auto.'" (Policy, UIM Endorsement, R. p. 60). Respondent admits no damage occurred to a "your covered auto." (Answer, R. p. 66 ¶ 11).

Although the UIM endorsement contains a different definition of "property damage" from the general policy definition, contrary to Respondent's argument, this is not a "conflicting term" to be "construed liberally in favor of the insured." *See* (Respondent's Br. pp. 5-6). South Carolina courts have longed recognized that an endorsement's provisions control over more general policy terms. *See, e.g., McIntosh v. Whieldon*, 205 S.C. 119, 30 S.E.2d 851, 854 (1944) (holding that claimant's reliance on "provision contained in general terms of the policy" was misplaced because the "endorsement provides otherwise and under well established principles supersedes any inconsistent provision contained in the general terms of the policy and in case of conflict, the endorsement controls"); *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 538, 514 S.E.2d 327, 332 (1999) ("While an endorsement is not to be construed more broadly than the fair import of its terms considered in connection with the whole of the policy, when endorsement modifies, qualifies, or restricts the terms of the original policy, the endorsement controls." (citation omitted)). Therefore, under basic insurance contract interpretation principles, the "property damage" definition contained in the UIM endorsement applies to UIM coverage without any conflict. Applying that plain definition, Respondent is not entitled to any UIM property damage coverage for the October 19, 2018 accident.

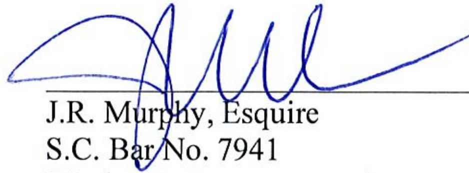
CONCLUSION

For the above-stated reasons and those set forth in Nationwide's Brief, the Circuit Court's holding should be reversed. South Carolina courts are required to have a statutory basis for reforming an insurance contract to include greater coverage than that for which the parties contracted. After the Supreme Court's explanation of South Carolina Code § 38-77-160 in *Bardsley*, the Circuit Court was without any statutory basis for reforming the Nationwide policy. As a result, the policy has to be applied according to its plain terms, which do not provide any

UIM property damage coverage to Respondent for the October 19, 2018 accident. Therefore, the Circuit Court's judgment should be reversed, and judgment should be entered in favor of Nationwide.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Appellant, certify that the Final Reply of Appellant complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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v.

Andrew Green, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on Andrew Green by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2021, addressed to:

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