

IN THE STATE OF SOUTH CAROLINA **RECEIVED**
IN THE COURT OF APPEALS **Aug 26 2021**

SC 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 BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. In South Carolina, does the underinsured motorist statute mandating an offer of coverage “up to the limits” of liability coverage permit an insurer to sell UIM coverage insuring less than the liability limits without offering a conforming policy?**

STATEMENT OF THE CASE

On October 19, 2018, Respondent Andrew Green (hereinafter “Respondent” or “Green”) was lawfully walking home from school along the side of Third Loop Road in Florence, South Carolina, when Harold Carraway, traveling west on Third Loop Road, drove left of center, went off the left side of the roadway and struck Green and a friend. As a result of this collision, Green was gravely injured, incurring over \$175,000.00 in medical bills. (R. pp. 8-13).

The admitted at-fault driver, Harold Carraway, had mandatory minimum liability limits with State Farm providing \$25,000.00 per person in liability bodily injury coverage, and \$25,000.00 in liability property damage coverage. Those policy limits – both bodily injury coverage and property damage coverage – were tendered and exhausted prior to any litigation, when State Farm accepted Green’s Offer of Compromise and complied with the terms therein. (R. pp. 11).

Green’s mother, who he lived with, had a policy of insurance with Nationwide. Nationwide issued Green’s mother a policy that contained underinsured motorist (“UIM”) coverage purporting to protect her and/or her resident relatives, including her son Mr. Green, in the event either were injured or damaged in a collision where the at-fault driver was not adequately insured. (R. pp. 15-85).

This appeal stems from a declaratory judgment action brought by Nationwide Affinity Insurance Company of America (hereinafter “Appellant” or “Nationwide”) to determine whether insurance companies can totally exclude underinsured motorist property damage (“UIM PD”) coverage when their insured is injured as a pedestrian, as Green was. (R. pp. 9-13).

Nationwide’s argument is simple. It claims that because their UIM endorsement narrowly re-defined “property damage” in a way that excluded coverage for any recovery other than “injury to or destruction of your covered auto,” it is excluded. (R. pp. 60). However, South Carolina law does not permit the same. Importantly, Nationwide acknowledges this by defining “property damage” differently and in line with South Carolina law in the liability endorsement of the same policy. (R. pp. 26). Nevertheless, Nationwide’s argument is, effectively, that had Mr. Green been physically in a vehicle and not walking, he would be afforded full coverage under the Nationwide policy. But because he was a pedestrian, he is only entitled to the bodily injury limits – amounting to half the coverage his mother paid for.

STANDARD OF REVIEW

The standard of review in a declaratory action is determined by the underlying issues. *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). “When the purpose of the underlying dispute is to determine if coverage exists under an insurance policy, the action is one at law.” *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012); *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct.App.2004) (citation omitted). In an action at law, tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, “[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.” *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003) (citation omitted).

ARGUMENT

UIM coverage follows the individual rather than the vehicle. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007); *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 399, 728 S.E.2d 477, 480 (2012). To quote the *Rhoden* Court – “Such a long and established precedent must be followed faithfully again here.” *Id.*

Underinsured coverage is defined in S.C. Code Ann. § 38-77-160 as providing coverage “in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist.” It continues, “[i]f none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.” S.C. Code Ann. § 38-77-160. The statute does not include language limiting coverage to only the bodily injury portion of the UIM coverage, but instead, applies to all types including the property damage at issue here. “The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). “In interpreting a statute, the court will give words their plain and ordinary meaning [] and will not resort to forced construction that would limit or expand the statute.” *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011); *Citizens for Quality Rural Living, Inc. v. Greenville Cty. Plan. Comm'n*, 426 S.C. 97, 105, 825 S.E.2d 721, 725 (Ct. App. 2019), *reh'g denied* (Apr. 18, 2019).

S.C. Code Ann. § 38-77-140 provides, “An automobile insurance policy may not be issued ... unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages ... with respect to each motor vehicle, as follows: (3) twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.”

Surely, if the legislature had intended for UIM property damage coverage to not be required to be offered and provided up to the limits of the liability property damage coverage, as it is with liability bodily injury coverage – including on the policy at issue – they could have written such an exclusion into the statute.

Green would show that he suffered “injury to or destruction of” his personal property, and that such damages exceed the liability limits maintained by the at-fault driver. Nationwide’s limiting language is violative of South Carolina’s insurance code, case law and public policy and cannot be enforced.

A. UIM Endorsement Violative of South Carolina Law and Damage to “Your Covered Auto” not Dispositive of UIM Coverage.

Nationwide claims that Green is precluded from claiming property damage coverage as a result of the collision that is the subject of this litigation. Specifically, Nationwide claims that the UIM PD Endorsement only extends to damage to “your covered auto” and, since Green was not occupying “your covered auto” at the time of the collision, he is not entitled to collect from his UIM PD coverage.

i. UIM Endorsement Must Mirror Liability Endorsement.

S.C. Code Ann. § 38-77-30 defines “Insured” as the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, *while in a motor vehicle or otherwise.*” (*emphasis added*). It is striking that our law contemplates this very situation, yet this issue is still being litigated. If the insured’s vehicle is not involved in the collision, coverage is available to the extent of coverage on any one of the vehicles with the excess or underinsured coverage. S.C. Code Ann. § 38-77-160. Nothing in this statute limits recovery to only bodily injury coverage, and this Court should not rewrite the statute to do so now.

S.C. Code Ann. § 38–77–160 further requires insurers to offer underinsured motorist coverage **up to the limits of the insured's liability coverage**: “Automobile insurance carriers shall 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 an at-fault insured or underinsured motorist...” “Up to the limits of” does not apply only to the dollar amount. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 83, 557 S.E.2d 689, 693 (Ct. App. 2001). “Because underinsured motorist coverage is intended to provide coverage where the at-fault driver's liability coverage is insufficient, **we conclude the legislature intended for underinsured motorist coverage to provide the same type of coverage as liability coverage** [I]t is logical to conclude underinsured motorist coverage should provide the same spectrum of coverage as liability coverage.” *Id.*

UIM coverage is not statutorily mandated, however, when it IS sold, it MUST mirror the liability coverage. UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations exactly like this – where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover their damages. Essentially, a driver is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) (“[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is ‘personal and portable.’”).

Nationwide’s Policy initially defines “property damage” as:

H. “Property damage” means physical injury to, destruction of or loss of use of tangible property.

(R. pp. 26).

However, “property damage” is conflictingly defined later in the UIM section of the policy, as:

“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”.

(R. pp. 60).

Nationwide hangs its hat on this narrow definition contained in the UIM endorsement. However, this definition is not in concert with the definition of “property damage” as defined earlier in the policy. “[C]onflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) citing *State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 145, 850 S.E.2d 633, 639 (Ct. App. 2020), *reh'g denied* (Dec. 1, 2020).

The conflicting definition in the UIM endorsement is also not in concert with S.C. Code Ann. § 38–77–160 as it is certainly not “**up to the limits of**” the insured's liability coverage. This Court interpreted (and reformed) a very similar policy in *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.* 348 S.C. 76, 557 S.E.2d 689 (S.C. Ct. App. 2001) finding, “it is logical to conclude underinsured motorist coverage should provide the same spectrum of coverage as liability coverage.” *Id.*

In *Glasscock*, an insured brought action against automobile insurer for declaratory judgment that “property damage” under the UIM coverage included loss of use. The language of the endorsements defining “property damage” under the liability and UIM sections of the policy were different (and read exactly as they do in the instant case). The liability endorsement read: “‘Property damage’ means damage to or loss of use of tangible property.” The UIM endorsement

read: “‘Property damage’ as used in this endorsement means injury to or destruction of your covered ‘auto.’” *Id.* at 76, 690.

The Court found that “property damage” in the UIM coverage had to include loss of use since the liability coverage defined “property damage” to include loss of use, and, thus, **the UIM coverage definition of “property damage” as limited to injury to or destruction of the named insured’s “covered auto” was invalid as it was not “up to the limits of” the liability coverage.** *Id.* 76, 692. As such, the policy was reformed.

In the present case, Judge Brown correctly applied South Carolina law and reformed the Nationwide policy – re-defining “property damage” in the UIM endorsement to mirror the liability endorsement. [Order]. Appellant’s instant appeal should be denied as the limitation imposed by the UIM Endorsement is not in concert with the (1) definition of property damage in the liability coverage portion of the Policy; (2) S.C. Code Ann. § 38–77–160, et al. or (3) *Glasscock*.

ii. *Bardsley* is not relevant here.

Nationwide contends that the dispute here mirrors the dispute over UIM property damage coverage in *Bardsley v. Gov’t Employees Ins. Co.*, 405 S.C. 68, 747 S.E.2d 436 (2013) and that *Bardsley* ‘effectively overturned’ *Glasscock*. Nationwide is mistaken on both counts.

In *Bardsley*, a speeding car smashed into the home of the Bardsleys killing Mr. Bardsley instantly. The tortfeasor was insured with \$1 million in automobile liability coverage and \$2 million in umbrella coverage. *Id.* at 72. The Bardsleys had a homeowners’ insurance policy through State Farm covering damage to their home with available limits of \$457,318.47. *Id.* at 73. The Bardsleys also had a UIM policy with GEICO. The UIM policy provided: “With respect to property damage, this insurance shall be excess over other valid and collectible insurance applicable to the damaged property.” *Id.* at 73, 438.

Critically, the tortfeasors' insurance paid the \$3 million in liability coverage and pursuant to the Court Order approving the settlement that was "to be allocated 100% to the wrongful death claim as the parties stipulate there is no valid survival claim." *Id.* at 73. No amount was allocated to the property damage to the Bardsleys' home.

State Farm, the Bardsleys' homeowners' insurance company, paid \$127,813.49 of its \$457,318.47 limit for the damage to the Bardsleys' home. *Id.* at 73.

GEICO, the Bardsleys' UIM carrier, paid its \$300,000 in UIM bodily injury limits, but refused to pay the \$100,000 in UIM property damage limits, arguing that all other insurance had not been exhausted (while the driver's liability policy had tendered its full limits that amount was allocated entirely to the wrongful death claim, and the homeowner's policy tendered only a portion of its limits for the property damage) and as such, there was no UIM property damage coverage available. *Id.* at 74. Essentially, because State Farm had paid the entirety of the Bardsleys' property damage claim, its limits were not exhausted. Since that policy was primary to the GEICO UIM policy, nothing further was owed as there was no underinsured claim.

Here, as distinguished from *Bardsley*, all other insurance coverage has been exhausted. Liability bodily injury and property damage coverage has been tendered in full. Nationwide's UIM bodily injury limits have been tendered in full. The ONLY remaining coverage is the UIM property damage limits. And the tortfeasor still owes Mr. Green for his damages. The only similarity the *Bardsley* case has to the case at hand is that it reinforces that the purpose of additional UIM coverage – to protect insureds from this very situation – a grave injury when the at fault driver is not adequately insured.

Nationwide argues that *Bardsley* “effectively overruled” *Glasscock*. This is simply not true. There is no negative treatment of *Glasscock* and there is no mention of *Glasscock* in *Bardsley*. The two cases are based upon two entirely different set of facts and issues.

Here, we have analogous conflicting policy definitions of “property damage” as were invalidated in *Glasscock*. This Court should follow precedent, apply *Glasscock* as the trial court did, and find that the statute mandating an offer of UIM coverage “up to the limits” of the liability coverage requires the insurer to provide the same type of coverage, not just the same dollar limit.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Court **AFFIRM** the lower court’s Order reforming the Nationwide UIM Policy.

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