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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

David C. Norton, United States District Judge

Appellate Case No. 2021-001390

USAA Casualty Insurance Company,..... Plaintiff,

v.

Vincent J. Rafferty, Jr., as personal representative of the
Estate of Megan Walters Jenkins,..... Defendant.

OPENING BRIEF

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CERTIFIED QUESTION

- I. Under South Carolina law, may an auto insurer validly limit underinsured motorist property damage coverage to property damage to vehicles defined in the policy as “covered autos”?**

STATEMENT OF THE CASE

The terms of an insurance policy govern the scope of coverage, unless in conflict with statutory requirements. The policy at issue provides underinsured motorist (“UIM”) property damage coverage only for property damage to a “your covered auto.” Without a statutory basis, the policy cannot be reformed to include greater UIM property damage coverage than that for which the parties contracted. The answer to the certified question turns on whether South Carolina Code § 38-77-160 statutorily mandates underinsured motorist (“UIM”) property damage coverage. If not, then the UIM property damage provision is enforceable as written.

USAA Casualty Insurance Company (“USAA CIC”) filed this declaratory judgment action seeking a declaration that the policy it issued to Megan Jenkins does not provide UIM property damage coverage for her September 8, 2019 accident. (ECF No. 1). Under its UIM insuring agreement, the policy only provides UIM property damage coverage for property damage to “your covered auto.” (ECF No. 1-1, pp. 12, 22). On September 8, 2019, Megan Jenkins was riding her bicycle on the shoulder of US 78 when she was struck by a motor vehicle. (ECF No. 1 ¶ 8); (ECF No. 6 ¶ 7). It is undisputed that no “your covered auto” was involved in the September 8, 2019 accident. (ECF No. 1 ¶ 11); (ECF No. 6 ¶ 7); (ECF No. 10, p. 3). The parties agree that if the policy provision is enforceable, then the policy provides no UIM property damage coverage for the September 8, 2019 accident. (ECF No. 10, pp. 3-4).

On July 30, 2021, the Defendant filed a Motion to Certify. (ECF No. 8). On August 13, 2021, USAA CIC filed a Response to Defendant’s Motion to Certify. (ECF No. 9). The parties

had previously entered into a Stipulation and Agreement wherein they agreed not to object to certification of the issue in this case to this Court. (ECF No. 8-2, p. 2). By Order dated November 23, 2021, the District Court certified the above question to this Court. (ECF No. 10).

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. Here, those plain terms limit UIM property damage coverage to property damage to a “your covered auto.” Those terms are enforceable under South Carolina law.

I. Without a statutory premise to reform the insurance contract, the contract terms must be enforced as written.

Under South Carolina law, “[t]he 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). Therefore, without a statutory premise, a court does not have the right to reform the policy to include coverage for which parties did not contract.¹ As this 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

¹ 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.”).

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.

433 S.C. 371, 858 S.E.2d 633, 635 (2021). Therefore, the Court cannot reform the policy to include a larger scope of UIM property damage coverage than that for which the parties contracted unless a statutory code provision requires it. No South Carolina statutory code provision requires it.

II. South Carolina Code § 38-77-160 is limited to UIM bodily injury coverage and does not require a larger scope of UIM property damage coverage.

Defendant’s argument is premised on South Carolina Code § 38-77-160 requiring insurers to offer UIM property damage coverage equal in scope and limits to liability property damage coverage. (ECF No. 8, pp. 3-5 (“[O]ne could conclude Section 38-77-160 includes a mandate to offer UIMPD coverage....”). Likewise, the Court of Appeals’ *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). For Defendant’s reformation argument to succeed, South Carolina Code § 38-77-160 would have to mandate that insurers offer certain types of UIM property damage coverage. However, as this Court explained in *Bardsley*, § 38-77-160 does not even mandate that insurers offer UIM property damage coverage at all:

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).

Previously, in *State Farm Mut. Auto. Ins. Co. v. Horry*, this Court 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). According to this Court, 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 (emphasis added). Specifically, this 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. (emphasis in orig.). Therefore, this Court in *Bardsley* reiterated what it had previously explained: The definition of “underinsured motor vehicle” in 38-77-30 not only defines an underinsured motor vehicle but also UIM coverage and its scope. Such definition is limited to bodily injury coverage and does not include property damage coverage. S.C. Code § 38-77-30(15) (“Underinsured motor vehicle’ means a motor vehicle as defined in item (9) 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....” (emphasis added)). Thus, “UIM property damage coverage is not statutorily mandated,” and the parties are free to contract for their own terms with respect to this type of coverage. See *Bardsley*, 405 S.C. at 77, 747 S.E.2d at 441. Consequently, there is no statutory basis to require reformation of the UIM property damage provision.

III. The differences between the South Carolina uninsured motorist and underinsured motorist statutes further evidence legislative intent for UIM property damage coverage not to be statutorily mandated.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” *Id.* “We do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute's proper meaning.” *Fairfield Waverly, LLC v. Dorchester Cty. Assessor*, 432 S.C. 287, 292, 852 S.E.2d 739, 741–42 (Ct. App. 2020); *see South Carolina State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (“In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.”).

Both uninsured motorist (“UM”) coverage and UIM coverage are companion first-party coverages to third-party liability coverage. *See United Servs. Auto. Ass'n v. Pickens*, 434 S.C. 60, 63, 862 S.E.2d 442, 443 (2021) (recognizing “that UM was not sold as standalone coverage”); *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 459, 835 S.E.2d 538, 542 (Ct. App. 2019), *aff'd*, 433 S.C. 371, 858 S.E.2d 633 (2021) (recognizing that UIM coverage is “additional coverage” offered in conjunction with a liability policy). Under the UM statute – South Carolina Code § 38-77-150 – the General Assembly specifically stated that UM property damage coverage is required:

No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140. *The uninsured motorist provision also must provide for no less than twenty-five thousand dollars' coverage for injury to or destruction of the property*

of the insured in any one accident but may provide an exclusion of the first two hundred dollars of the loss or damage.

S.C. Code § 38-77-150(A) (emphasis added). As shown above, in the UM statute the General Assembly included a specific sentence addressing the scope and limits of UM property damage coverage.

In contrast, the UIM statute – South Carolina Code § 38-77-160 – contains no sentence specifically addressing UIM property damage coverage. All the General Assembly stated about UIM coverage was:

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 an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

S.C. Code Ann. § 38-77-160. Unlike the UM statute, there is no provision concerning UIM property damage limits or scope of coverage. *See Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 (explaining “*expression unis est exclusio alterius*” canon of statutory construction that “to express or include one thing implies the exclusion of another” and stating “enumeration weakens it as to things not expressed”); *see also Berkeley Cty. Sch. Dist. v. South Carolina Dep't of Revenue*, 383 S.C. 334, 348, 679 S.E.2d 913, 920 (2009) (“The court has no right to add the words they omitted, nor to interpolate them ‘on conceits of symmetry and policy.’” (quoting *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951))).

A side-by-side comparison of the General Assembly’s definitions of “uninsured motor vehicle” and “underinsured motor vehicle” further undermines Defendant’s argument that UIM property damage coverage is statutorily mandated coverage:

“Uninsured motor vehicle”	“Underinsured motor vehicle”
<p data-bbox="215 262 812 331">“Uninsured motor vehicle” means a motor vehicle as defined in item (9) as to which:</p> <p data-bbox="261 369 812 548">(a) There is not bodily injury liability insurance and property damage liability insurance both at least in the amounts specified in Section 38-77-140;</p> <p data-bbox="215 625 812 657">S.C. Code § 38-77-30(14)(a) (emphasis added).</p>	<p data-bbox="841 262 1429 548">“Underinsured motor vehicle” means a motor vehicle as defined in item (9) 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.</p> <p data-bbox="841 625 1429 657">S.C. Code § 38-77-30(15) (emphasis added).</p>

These definitions appear directly above and below one another in South Carolina Code § 38-77-30(14)-(15). Like the UM and UIM statutes, the UM definition includes specific enumeration of property damage coverage, and the UIM definition does not. As shown by the UM statute and its definition, the General Assembly knew how to specifically require inclusion of property damage coverage. As shown by the UIM statute and its definition, the General Assembly chose not to require inclusion of property damage coverage for UIM coverage.

IV. The General Assembly’s decision to mandate liability property damage coverage but not UIM property damage coverage is rooted in practicality.

South Carolina Code § 38-77-140 requires auto insurers to provide liability coverage for damages “because of injury to or destruction of property of others.” S.C. Code § 38-77-140(A)(3). As a practical reality, when someone using an auto causes injury to or destruction of property of others, that insured tortfeasor generally has no other insurance to pay for such damages other than an auto insurance policy. Other types of insurance (homeowners insurance, renters insurance, commercial general liability insurance, etc.) generally contain a liability coverage exclusion for damages arising out of the ownership, maintenance or use of an auto. On the other hand, when an insured’s own belongings or real property are damaged by an at-fault motorist, the insured can

generally contract for first-party property insurance to cover such damages (homeowners insurance, renters insurance, commercial property insurance, cell phone replacement insurance, etc.).² The *Bardsley* case is a perfect example of this principle.

In *Bardsley*, an at-fault motorist drove his vehicle into the insured's home, causing damage to the home, damage to the home's contents, and loss of use damages. 405 S.C. at 74, 747 S.E.2d at 439. The homeowners sought property damage coverage under their homeowners policy and UIM property damage coverage under their auto policy. *Id.* at 73, 747 S.E.2d at 439. The homeowners policy paid for the property damage to the home, and the auto policy provided no UIM property damage coverage for such loss. *Id.* at 82, 747 S.E.2d at 443. This Court stated: "So long as any damage to a home would be covered by some insurance, there is no harm in UIM property damage coverage not applying." *Id.* at 78, 747 S.E.2d at 441. It appears that both this Court and the General Assembly appreciate the above-described practical realities associated with UIM property damage coverage. Since insureds can generally contract for first-party property insurance to cover property damages to their own property, UIM property damage coverage is not as necessary as other types of auto insurance coverage. These practical realities further support the General Assembly's decision not to make UIM property damage coverage statutorily mandated.

CONCLUSION

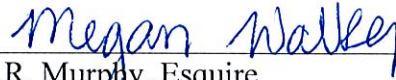
For the above-stated reasons, the Court should answer "Yes" to the certified question. UIM property damage coverage is not statutorily mandated in South Carolina. There is no statute requiring insurers to offer a certain scope of UIM property damage coverage. Therefore, coverage

² Moreover, apart from the insured vehicle which can be protected with comprehensive/collision coverage, an insured would rarely have property loss in an auto accident in excess of \$25,000. For UIM coverage to be triggered in the first place, at least \$25,000 of minimum limits liability property damage coverage had to be available. Thus, in general, there is less need for UIM property damage coverage as compared to other auto insurance coverages.

for UIM property damage is controlled by the plain terms of the insurance contract, and the policy provision at issue is enforceable.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in blue ink that reads "Megan Walker". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE

I, Megan Walker, Esquire, attorney for Plaintiff, certify that the Plaintiff's
Opening Brief complies with the South Carolina Supreme Court Order of August 13,
2007 and Rule 211 of the South Carolina Appellate Court Rules.

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