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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.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	ii
Certified Question	1
Statement of the Case	1
Arguments	2
Conclusion	8

TABLE OF AUTHORITIES

CASES

Bardsley v. Government Emps. Ins. Co.,
405 S.C. 68, 747 S.E.2d 436 (2013)6, 7

Bower v. National Gen. Ins. Co.,
351 S.C. 112, 569 S.E.2d 313 (2002)6

Carter v. Standard Fire Ins. Co.,
406 S.C. 609, 753 S.E.2d 515 (2013)2, 7

Clinton v. West American Ins. Co.,
364 S.C. 113, 611 S.E.2d 521 (Ct. App. 2005).....5

Glasscock, Inc. v. United States Fid. & Guar. Co.,
348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....5, 6

Government Emps. Ins. Co. v. Poole,
424 S.C. 1, 817 S.E.2d 283 (2018)7

Mathis v. State Farm Mut. Auto. Ins. Co.,
315 S.C. 71, 431 S.E.2d 619 (Ct. App. 1993)5

Moody v. Dairyland Ins. Co.,
354 S.C. 28, 579 S.E.2d 527 (Ct. App. 2003)4

Nationwide Ins. Co. of Am. v. Knight,
433 S.C. 371, 858 S.E.2d 633 (2021)2, 7

Nationwide Mut. Ins. Co. v. Rhoden,
398 S.C. 393, 728 S.E.2d 477 (2012)2

Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker,
282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).....5

Progressive Cas. Ins. Co. v. Leachman,
362 S.C. 344, 608 S.E.2d 569 (2005)6

Ruppe v. Auto-Owners Ins. Co.,
329 S.C. 402, 496 S.E.2d 631 (1998)2

Russo v. Nationwide Mut. Ins. Co.,
334 S.C. 455, 513 S.E.2d 127 (Ct. App. 1999)5

<i>Traynum v. Scavens</i> , 416 S.C. 197, 786 S.E.2d 115 (2016).	4
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STATUTES

S.C. CODE ANN. § 38-73-470 (1976, as amended)	4
S.C. CODE ANN. § 38-77-30 (1976, as amended)	2, 3, 4
S.C. CODE ANN. § 38-77-140 (1976, as amended)	3, 4, 5, 6
S.C. CODE ANN. § 38-77-150 (1976, as amended)	3
S.C. CODE ANN. § 38-77-160 (1976, as amended)	3, 4, 5, 6
S.C. CODE ANN. § 38-77-350 (1976, as amended)	4

CERTIFIED QUESTION

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

This case arises out of Plaintiff USAA Casualty Insurance Company’s (“USAA CIC’s”) denial of a claim for underinsured motorist (“UIM”) property damage (“PD”) coverage by Defendant Vincent J. Rafferty, Jr. (“Rafferty”), as personal representative of the Estate of Megan Walters Jenkins.

Rafferty’s daughter Megan Walters Jenkins (“Jenkins”) was riding her bicycle when she was tragically struck and killed by an underinsured motorist, Lindsay Walters. (ECF No. 10, p. 3).¹ At the time of that collision, Jenkins was insured by USAA CIC under a South Carolina automobile policy (the “Policy”), which provided UIM PD coverage with limits of \$100,000 per accident. (ECF No. 10, p. 2). As a result, Rafferty made a claim for the Policy’s UIM PD coverage. USAA CIC denied the claim because Jenkins was on her bicycle when the collision occurred.

Despite its denial, USAA CIC agrees it should pay the Policy’s UIM PD coverage to Rafferty unless the Court holds that the Policy’s limitation of that coverage to “your covered auto” (the vehicle listed in the Policy) is valid and enforceable. (ECF No. 10, pp. 3-4). Specifically, the Policy states it provides UIM PD coverage only for “your covered auto,” a vehicle that was not involved in the collision, but no other property of the insured, Jenkins. (ECF No. 10, p. 3).

¹ Rule 244(b), SCACR, provides that “[t]he Supreme Court will not consider any documents or other evidentiary materials unless the certifying court has submitted those materials.” Here, it is unclear to Rafferty whether there are any such materials presented for this Court’s consideration because it does not appear this Court specifically requested materials from the certifying court. However, the District Court’s Order requesting certification references filings in that court by electronic filing (“ECF”) numbers, as does USAA CIC in its brief. Therefore, Rafferty also refers to matters in the District Court record by ECF numbers.

USAA CIC filed suit in the United States District Court against Rafferty seeking a declaratory judgment that its denial was proper in light of the above limitation. (ECF No. 1, ¶¶ 16-20). Rafferty answered, asserting the limitation is inconsistent with South Carolina law and/or public policy and is therefore unenforceable and void. (ECF No. 6, ¶¶ 6, 9). The District Court certified the above question to this Court, finding it “raises an unsettled issue of state law.” (ECF No. 10, p. 7). This Court agreed to answer the certified question via Order dated January 12, 2022.

ARGUMENT

Automobile insurers such as USAA CIC must offer UIM coverage to their insureds. S.C. CODE ANN. § 38-77-160 (1976, as amended). Thus, UIM coverage is considered “statutorily required coverage.” *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 380-81, 858 S.E.2d 633, 638 (2021), *citing Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515, 519 (2013) (quoting *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404-05, 496 S.E.2d 631, 632 (1998)). As such, South Carolina law “unequivocally require[s] the insurer to provide coverage in an amount equal to the ... UIM coverage purchased on the vehicle involved in the accident.” *Carter*, 406 S.C. at 622, 753 S.E.2d at 522. Moreover, any policy limitation on UIM coverage that is not authorized by or consistent with governing statutes is invalid. *See, e.g., Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398-99, 728 S.E.2d 477, 480 (2012).

Various South Carolina statutes regarding automobile insurance address property damage but none provide that such coverage is or can be limited to a specific type of property damage. Rather, “damages” under the automobile insurance code is broadly defined to include all actual damages. S.C. CODE ANN. § 38-77-30(4) (1976, as amended). So, for example, liability PD insurance is required to cover an insured’s liability “because of injury to or destruction of property of others in any one accident” without any distinction between types of property damage or any

authorized limitation for damage to a specific type of property. S.C. CODE ANN. § 38-77-140(A)(3) (1976, as amended). Similarly, uninsured motorist (“UM”) PD insurance is required to provide coverage “for injury to or destruction of the property of the insured” without authorizing any distinction between different kinds of property. S.C. CODE ANN. § 38-77-150(A) (1976, as amended). It is therefore clear that, if PD coverage is required by insurance statutes, that coverage must apply to all classes of damaged property.

Thus, to answer the certified question, this Court need only determine whether UIM PD coverage is included within statutorily required coverage. If so, the limitation relied upon by USAA CIC is invalid and unenforceable.

While Section 38-77-160’s mandate to offer UIM coverage does not expressly list bodily injury (“BI”) or PD coverages, it is clear from its language and other insurance statutes that the Legislature intended UIM to include both BI and PD coverages, as is the case with liability and UM coverages.

That statute requires an offer of UIM 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.” S.C. CODE ANN. § 38-77-160 (1976, as amended). Section 38-77-160 uses the term “damages” but does not exclude PD; therefore, Section 38-77-30(4)’s definition of all “actual damages” governs such that PD is included in the term. Moreover, Section 38-77-160 refers to “liability limits,” again without distinguishing between BI and PD. As noted above, liability coverage limits under Section 38-77-140(A) include both BI and PD coverages. Consequently, the express language of the statute providing for UIM coverage indicates a legislative intent to include UIM PD coverage within the statutory mandate.

Additional legislative intent may be gleaned from S.C. CODE ANN. § 38-77-350 (1976, as amended). It provides a “safe harbor” method for insurers to satisfy their duty under Section 38-77-160 to make a meaningful offer of UIM coverage. *See Traynum v. Scavens*, 416 S.C. 197, 202, 786 S.E.2d 115, 118 (2016). While Section 38-77-350 does not expressly mention UIM BI or UIM PD coverages, subsection E of that statute again equates UIM coverages to required liability coverages, dictating that, if an insured fails to reject UIM coverage by properly completing, signing, and returning an offer form, “the insurer shall add on . . . underinsured motorist coverage[] with the same policy limits as the insured’s liability limits.” S.C. CODE ANN. § 38-77-350(E) (1976, as amended). Because liability PD coverage is mandated by Section 38-77-140(A), “the insured’s liability limits” that this statute requires insurers to match for UIM coverage necessarily includes PD coverage. In short, Section 38-77-350 also demonstrates the Legislature intended UIM coverage to include PD coverage.²

S.C. CODE ANN. § 38-73-470 (1976, as amended) should end any debate on this point. Addressing meaningful offers of UIM coverage, it states: “There is no requirement for an insurer or an agent to offer underinsured motorist coverage at limits less than the statutorily required bodily injury or property damage limits.” The explicit language of this statute clearly demonstrates the Legislature intended UIM coverage to include both BI and PD limits. *See Moody v. Dairyland Ins. Co.*, 354 S.C. 28, 31, 579 S.E.2d 527, 529 (Ct. App. 2003) (“The relevant statutory language in this section is unambiguous and conveys a clear and definite meaning . . .”). There would be no reason for the Legislature to establish an amount of UIM PD coverage below which insurers

² USAA CIC argues Section 38-77-30(15)’s definition of “underinsured motor vehicle” is evidence of legislative intent with respect to UIM coverage. (USAA CIC’s Brief, pp. 4, 7). That statute does not impose the statutory mandate on insurers – Section 38-77-160 does that. Moreover, the mention of UIM BI coverage in Section 38-77-30(15) does not negate the conclusion that a mandatory offer under Section 38-77-160 must include UIM PD coverage.

need not offer unless they are also required to offer UIM PD coverage above that amount. Stated differently, by not requiring insurers to offer UIM PD less than “statutorily required” limits the Legislature implied that they are required to offer UIM PD at and above those limits. *See Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554-55, 320 S.E.2d 458, 463 (Ct. App. 1984) (“A well-established rule of statutory construction is ‘expressio unius est exclusio alterius,’ which means that the enumeration of particular things excludes the idea of something else not mentioned. Under the rule, exceptions made in a statute give rise to a strong inference that no other exceptions were intended.” (citation omitted)).

The Court of Appeals has long interpreted Section 38-77-160 as requiring insurers to offer UIM PD coverage. Almost thirty years ago, it recognized:

On its face, the statute requires an offer of UIM insurance up to the limits of the insured’s liability coverage to provide coverage “in the event that damages are sustained.” The common understanding of the term “damages” includes property damage.

Mathis v. State Farm Mut. Auto. Ins. Co., 315 S.C. 71, 75, 431 S.E.2d 619, 621 (Ct. App. 1993).

It reiterated this conclusion in *Russo v. Nationwide Mut. Ins. Co.*, 334 S.C. 455, 513 S.E.2d 127 (Ct. App. 1999):

Despite section 38-77-160’s omission of the term “bodily injury,” the repeated references to liability coverage and liability limits convince us the term “damages” must be construed in accordance with the basic liability coverage statute, section 38-77-140.... We must read these statutes together. The term “damages” in section 38-77-160 means bodily injury or property damage because it references liability coverage....

Id. at 459, 513 S.E.2d at 129 (citation omitted); *accord Clinton v. West American Ins. Co.*, 364 S.C. 113, 122, 611 S.E.2d 521, 526 (Ct. App. 2005) (holding that a request for UIM coverage based only on “per person” and “per accident” BI limits was “not a complete coverage amount” because “[t]here is no amount listed for property damage.”).

More recently, in *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001), the Court of Appeals again addressed this topic in a context quite

similar to the present case. There, the insurer excluded from UIM PD coverage damages for loss of use of its insured's damaged property and argued the exclusion was permissible because it was not specifically prohibited by insurance statutes. The court cited language from Section 38-77-160 and rejected the insurer's argument that "'up to the limits of the insured liability coverage,' only applies to the dollar limit amounts and not to the types of coverage offered in the liability and UIM coverages." *Id.* at 83, 557 S.E.2d at 692. Instead, it concluded that the language of Section 38-77-160 equated UIM coverage with liability coverage as mandated by Section 38-77-140 such that an insurer providing UIM PD coverage is required to provide "the same *type* of coverage, not just the same dollar limit" as its liability coverage. *Id.* at 84, 557 S.E.2d at 693 (emphasis added).

Despite these several Court of Appeals decisions, this Court has only marginally touched on this topic in two cases.³

First, in *Bardsley v. Government Emps. Ins. Co.*, 405 S.C. 68, 747 S.E.2d 436 (2013), the Court first reversed a circuit court ruling that an "other insurance" clause in a policy's UIM PD coverage was ambiguous and thereafter rejected the insured's "additional sustaining ground" argument that the clause violated public policy because it conflicted with Section 38-77-160. The Court's rationale included the statement (with little additional analysis⁴) that "UIM property damage coverage is not statutorily mandated." *Id.* at 77, 747 S.E.2d at 441. Important to the

³ Although not directly involving an analysis of whether UIM PD coverage is within the scope of Section 38-77-160's mandate, this Court has on several occasions analyzed UIM offer forms approved by the Department of Insurance that included offers of UIM PD coverage. *See, e.g., Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 608 S.E.2d 569 (2005); *Bower v. National Gen. Ins. Co.*, 351 S.C. 112, 569 S.E.2d 313 (2002). In those cases, the Court did not suggest the insurers were not required to offer UIM PD coverage or that the approved forms did not need to include offers of UIM PD coverage.

⁴ Significantly, the Court did not cite any of the Court of Appeals' decisions on this topic nor did it engage in the statutory analyses employed in those decisions.

Court's reasoning was the fact that the clause did not deprive the insured of any coverage she purchased but only defined the priorities between multiple policies applicable to the loss. *Id.* at 77-78, 747 S.E.2d at 441.

Five years later, in *Government Emps. Ins. Co. v. Poole*, 424 S.C. 1, 817 S.E.2d 283 (2018), the Court addressed a certified question related to the recoverability of punitive damages under UIM BI and UIM PD coverages. In doing so, it noted that both BI and PD are within the statutory definition of "damages," *id.* at 6, 817 S.E.2d at 286, and concluded "the UIM statute ... does [not] indicate that bodily injury and property damage must be analyzed separately before determining whether UIM coverage is triggered." *Id.* at 5, 817 S.E.2d at 286.

Bardsley should not dictate the outcome in the present action for several reasons. For one, its holding was dependent on other considerations listed in the opinion and not simply its isolated comment about the nature of UIM PD coverage.⁵ Unlike the situation there, if the Court were to adopt USAA CIC's position in this case, the insured would be deprived of coverage she purchased. More importantly, *Bardsley*'s reasoning is suspect in light of the Court's subsequent acknowledgment in both *Carter v. Standard Fire Ins. Co.*, 406 S.C. at 616, 753 S.E.2d at 519, and *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. at 380-81, 858 S.E.2d at 638, that UIM coverage is considered "statutorily required coverage" and its holding in *Carter* that South Carolina law "unequivocally require[s] the insurer to provide coverage in an amount equal to the ... UIM coverage purchased on the vehicle involved in the accident." *Carter*, 406 S.C. at 622, 753 S.E.2d at 522. Finally, *Poole*'s reliance upon provisions of the insurance code to support its holding implies that UIM PD is statutorily required coverage subject to applicable insurance statutes.

⁵ Notably, the "not statutorily mandated" portion of the *Bardsley* opinion has never been cited by another case.

USAA CIC separately attempts to support its position by arguing the “practical reality” that an insured may purchase first-party PD coverage for property other than insured vehicles somehow sheds light on the Legislature’s intent with respect to UIM PD coverage. (USAA CIC’s Brief, pp. 7-8). This argument, of course, should not overcome clear legislative intent as discussed above. Plus, if it were accurate, then one would expect the cost of UIM PD coverage to be less than that of UM PD coverage (a first-party PD coverage that USAA CIC acknowledges covers property other than insured vehicles) because the insurer’s risk would be narrowly limited to a specific vehicle or vehicles. This expectation would be particularly valid when one considers UIM PD coverage (unlike UM PD coverage) is offset by a tortfeasor’s liability PD coverage and thereby further minimizes the insurer’s exposure.

However, the Policy itself contradicts this conclusion. Not only did USAA CIC offer UIM PD coverage to Jenkins but, when she purchased that coverage, USAA CIC charged her almost twice the premium amount it charged for UM PD coverage even though it also covered her “covered auto” for comprehensive and collision coverage. (ECF No. 1-1, p. 1). In short, USAA CIC’s actions are inconsistent with its current position both with respect to offering UIM PD coverage and with respect to its “practical reality” argument.

CONCLUSION

UIM coverage is statutorily required coverage because insurers must offer it (and provide it when an insured accepts the offer). The mandate to offer includes UIM PD coverage in amounts equal to minimum limits liability PD coverage, up to the liability PD limits purchased. By statute, UIM coverage applies to an insured’s damages – including property damages – that exceed liability coverage. There is no statutory basis for an insurer to limit UIM PD coverage to a specific type

of property. Therefore, the Policy's limitation of UIM PD coverage to covered autos is inconsistent with South Carolina insurance statutes, unenforceable, and void.

For the above reasons, Rafferty requests that the Court answer the certified question "No."

Respectfully submitted,

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CERTIFICATE

The undersigned certified that this Brief complies with Rule 211(b), SCACR.

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