

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.

REPLY BRIEF

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REPLY ARGUMENT

The USAA Casualty Insurance Company (“USAA CIC”) policy at issue provides underinsured motorist (“UIM”) property damage coverage only for property damage to a “your covered auto.” The Defendant is seeking to have the policy reformed to include greater UIM coverage. As this Court recently stated in *Nationwide Ins. Co. of Am. v. Knight*:

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.

433 S.C. 371, 858 S.E.2d 633, 635 (2021). Thus, answering the certified question begins and ends with the interpretation of South Carolina Code § 38-77-160. Only if this statute requires UIM property damage coverage to be offered may the policy be reformed to include greater UIM coverage. If this statute applies only to UIM bodily injury coverage, then the policy terms must be enforced as written.

I. This Court got it right in *Bardsley v. Government Emps. Ins. Co.*, 405 S.C. 68, 747 S.E.2d 436 (2013).

The *Bardsley* interpretation is the only interpretation consistent with the rules of statutory construction. In *Bardsley*, the Court looked at South Carolina Code § 38-77-160 and said:

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, 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 441.¹ As this Court found, South Carolina Code § 38-77-160 only requires UIM bodily injury coverage to be offered. The statute does not address UIM property damage coverage.

“Statutorily required coverage is that which is required to be offered or provided.” *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404–05, 496 S.E.2d 631, 632 (1998).² Thus, in *Bardsley*, by calling UIM property damage coverage “not statutorily mandated”, this Court necessarily concluded that South Carolina Code § 38-77-160 did not require this coverage to be offered. *See Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515, 519 (2013) (decided same year as *Bardsley* and stating “statutorily required coverage is that which is required to be offered or provided”). “[T]he parties are free to choose their terms regarding voluntary coverage that is not governed by statute.” *Ruppe*, 329 S.C. at 406, 496 S.E.2d at 633.

The General Assembly has not changed South Carolina Code § 38-77-160 since this Court’s interpretation in *Bardsley*. This Court’s interpretation comports with the legislative intent and the rules of statutory construction. *See Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012) (“The construction of a statute is a judicial function and responsibility.”).

¹ Thus, contrary to the allegation in Defendant’s Brief, this Court in *Bardsley* engaged in greater statutory analysis than prior Court of Appeals decisions, looking not only at § 38-77-160 but also taking into account the subsequent statutory definition of “underinsured motor vehicle.” *See* (Def.’s Br. p. 6 n.4).

² *See also Knight*, 433 S.C. at 380, 858 S.E.2d at 638 (same); *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 179, 700 S.E.2d 283, 287 (Ct. App. 2010) (same).

A. Read in context with the General Assembly’s definition of “underinsured motor vehicle,” section 38-77-160 does not address UIM property damage coverage.

One of the primary rules of statutory construction is that statutes must be read in context. *See Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (“[T]he 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.”) (quoting *South Carolina State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)); *Anderson*, 397 S.C. at 556, 725 S.E.2d at 707 (same). South Carolina Code § 38-77-160 is South Carolina’s underinsured motorist coverage statute. Consequently, how the General Assembly defines “underinsured motor vehicle” necessarily informs how this statute is interpreted. In defining “underinsured motor vehicle,” the General Assembly specifically defines it in terms of only the available bodily injury liability coverage, with no reference to property damage coverage:

“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.

S.C. Code § 38-77-30(15) (emphasis added).

In a single footnote in his Brief, Defendant addresses the General Assembly’s definition of “underinsured motor vehicle,” suggesting the Court should just ignore it. (Def.’s Br. p. 4 n.1). However, an “underinsured motor vehicle” is the very trigger necessary for this coverage to be applicable. *See Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 178, 594 S.E.2d 511, 522 (Ct. App. 2004). Without an “underinsured motor vehicle,” there is no underinsured motorist coverage.

As this Court previously recognized, this statutory definition of “underinsured motor vehicle” does not just define a UIM vehicle but also the “scope of UIM coverage.” *State Farm*

Mut. Auto. Ins. Co. v. Horry, 304 S.C. 165, 168–69, 403 S.E.2d 318, 319–20 (1991). This Court has repeatedly viewed the statutory definition of “underinsured motor vehicle” as defining “the scope and nature of UIM coverage.” *See, e.g., Horry*, 304 S.C. at 169, 403 S.E.2d at 320; *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 288, 403 S.E.2d 662, 665 (Ct. App. 1991) (“The General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts and should prevail. The language of the statutory definition [of underinsured motor vehicle] clearly indicates the intent of the legislature was to change underinsured motorist coverage in this State....”) (citation omitted); *Bardsley*, 405 S.C. at 77, 747 S.E.2d at 441. Therefore, the statutory definition of “underinsured motor vehicle” must be taken into account when interpreting the scope of UIM coverage under § 38-77-160, and it cannot just be disregarded as Defendant suggests. As this Court recognized in *Bardsley*, taking this statutory definition into account leads to the logical conclusion that the § 38-77-160 statutorily mandated UIM coverage is UIM bodily injury coverage only.

B. Read in context with the statutes concerning its companion coverages, section 38-77-160 does not address UIM property damage coverage.

Liability coverage, uninsured motorist (“UM”) and UIM coverage are all companion coverages the General Assembly addressed in Chapter 77 of Title 38. An insured cannot have UM coverage without having liability coverage and cannot have UIM coverage without also having both liability and UM coverage. Therefore, these related statutes should be read together. The liability coverage statute and UM coverage statute both specifically require that the coverage provided must include property damage coverage:

Liability Statute: “twenty-five thousand dollars because of injury to or destruction of property of others in any one accident”

UM Statute: “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....”

S.C. Code §§ 38-77-140(A)(3), 38-77-150. Unlike these statutes, the UIM statute contains no specific provision providing for UIM property damage coverage. *See* S.C. Code § 38-77-160. If the General Assembly intended the UIM statute to also address property damage coverage, why did it not draft the UIM statute like the liability or UM statutes? Under the rules of statutory construction, the General Assembly’s lack of enumeration of property damage coverage in the UIM statute evidences a contrary intent. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (With respect to statutory construction, “enumeration weakens it as to things not expressed.”); *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (same); *Nelson v. Ozmint*, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding that where one related statute specifically included an early release provision and another did not “by omitting such language from the provision at issue, the legislature intended to” not allow for early release but require those convicted to serve full sentence).

Furthermore, the General Assembly’s definition of “uninsured motor vehicle” is defined in terms of both bodily injury coverage and property damage coverage:

“Uninsured motor vehicle” means a motor vehicle as defined in item (9) as to which: (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....

S.C. Code § 38-77-30(14) (emphasis added). In contrast, the General Assembly’s definition of “underinsured motor vehicle” is only defined in terms of “bodily injury liability insurance.” S.C. Code § 38-77-30(15). If the General Assembly intended for UM and UIM coverage to have the same scope of coverage, then they would have been defined the same way. The fact that they are not suggests this was not the Legislature’s intent. *See Smith v. Tiffany*, 419 S.C. 548, 556, 799

S.E.2d 479, 483 (2017) (stating Court was unwilling to accept assumption that “legislature’s use of differing terms...was not deliberate”).

Moreover, UM property damage coverage and UIM property damage coverage are both first-party property damage coverages. When the General Assembly mandated first-party UM property coverage, it did so with several specific statutory limitations on such coverage. *See, e.g.*, S.C. Code § 38-77-150 (providing for an exclusion for the first two hundred dollars of the property loss or damage); S.C. Code § 38-77-210 (“The uninsured motorist provision need not insure any liability for property damages for which loss a policyholder has been compensated by insurance or otherwise.”). There are no such statutory limits for first-party UIM property coverage, which Defendant alleges is statutorily mandated to be offered. This is further evidence that the General Assembly did not intend UIM property damage coverage to be statutorily-mandated coverage.

I. Defendant’s statutory construction arguments ignore the most relevant statutes and focus on less relevant statutes.

As all parties acknowledge, the UIM statute itself does not expressly say anything about property damage coverage. *See* (Def.’s Br. p. 3 (Section 38-77-160’s mandate to offer UIM coverage does not expressly list...PD coverages....”). Therefore, the parties have focused on other statutes to determine the legislative intent behind South Carolina Code § 38-77-160. As demonstrated above and in its Brief, USAA CIC has focused its analysis on the statutory definition of “underinsured motor vehicle” and the General Assembly’s specific enumeration of property damage coverage in UIM’s companion coverage statutes, specifically the liability coverage statute and UM coverage statute. Defendant’s Brief ignores these statutes. Defendant’s only statutory construction arguments center on: (1) South Carolina Code § 38-77-30(4); (2) South Carolina Code § 38-77-350; and (3) South Carolina Code § 38-73-470. (Def.’s Br. pp. 3-5).

With respect to South Carolina Code § 38-77-30(4), this is the general definition of “damages.” S.C. Code § 38-77-30(4). Defendant focuses in on this definition including property damage while ignoring the more specific definition of “underinsured motor vehicle” that is confined to “bodily injury.” See S.C. Code § 38-77-30(15). This is contrary to the rules of statutory construction. See *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (“Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.”); *Wooten ex rel. Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (“A specific statutory provision prevails over a more general one.”); *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (same). Thus, the more specific statutory definition found in South Carolina Code § 38-77-30(15) must prevail over the more general one in South Carolina Code § 38-77-30(4).

Defendant acknowledges that South Carolina Code § 38-77-350 does not even mention UIM bodily injury or property damage coverages. (Def.’s Br. p. 4). However, he then begins crafting a circular reasoning argument based on this statute. He points to § 38-77-350(E), which requires insurers to add on UIM coverage when an insured fails to return an offer form. (*Id.*). Defendant argues that this statute’s use of the phrase “insured’s liability limits” means South Carolina Code § 38-77-160 addresses UIM property damage coverage. (*Id.*) South Carolina Code § 38-77-160 also uses the phrase “liability limits,” but it too does not specify which liability limits. This could mean either: (1) the insured’s “each person” and “each accident” bodily injury liability limits; or (2) the insured’s “each person” and “each accident” bodily injury liability limits and

“each accident” property damage liability limits. As explained above, the statutory definition of “underinsured motor vehicle” suggests that this phrase in both statutes means only the “each person” and “each accident” bodily injury liability limits. Defendant only reaches the conclusion that he draws by presupposing that this phrase includes property damage liability limits. In *Butler v. Unisun Ins. Co.*, this Court specifically stated that § 38-77-350 does “not modify the requirements of section 38-77-160 as to what coverage must be offered by insurers.” 323 S.C. 402, 407, 475 S.E.2d 758, 760 (1996).

Defendant also cites to South Carolina Code § 38-73-470 as the statute that “should end any debate on this point.” (Def.’s Br. p. 4). That statute is entitled “Disposition of uninsured motorist premium” and states in its entirety:

Two dollars of the yearly premium for uninsured motorist coverage is directed to be paid to the South Carolina Department of Motor Vehicles to be allocated in the manner provided in Section 56-10-552 on a quarterly basis. Interest earned by the “Uninsured Fund” must be retained by that fund. 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.

S.C. Code § 38-73-470. The last sentence was added in 1997 and addresses an insurer not being required to offer UIM coverage at limits less than the statutorily required liability limits. *Moody v. Dairyland Ins. Co.*, 354 S.C. 28, 31 n.3, 579 S.E.2d 527, 529 n.3 (Ct. App. 2003). Through a series of mental gymnastics Defendant argues that this statute means South Carolina Code § 38-77-160 requires UIM property damage coverage to be offered. (Def.’s Br. pp. 4-5). As *Moody*, the very case Defendant cites, points out this statute was enacted in response to several prior cases that held South Carolina Code § 38-77-160 “mandates an insurer to offer UIM coverage in amounts less than the statutory minimum limits.” *Id.* at 31, 579 S.E.2d at 529. To read this statute as anything more than that is a strained interpretation of this statute. Nothing in § 38-73-470 mandates that insurers offer UIM property damage coverage.

II. Defendant's non-statutory construction arguments are irrelevant and without merit.

Defendant's Brief cites to various Court of Appeals cases to argue that insurers are required to offer UIM property damage coverage. (Def.'s Br. pp. 5-6). As expressly set forth in *Knight*, those courts' own notions of public policy are irrelevant to whether this policy should be reformed to include greater coverage than that for which the parties contracted. 433 S.C. 371, 858 S.E.2d at 635. The only relevant inquiry is whether South Carolina Code § 38-77-160 statutorily requires UIM property damage coverage. As explained above, this Court got it right in *Bardsley*. South Carolina Code § 38-77-160 only mandates an offer of UIM bodily injury coverage. This is the sole interpretation that comports with the rules of statutory construction.

In its Brief, USAA CIC gave some reasoning why the Legislature may have chosen to not require insurers to offer UIM property damage coverage, specifically because the property that would be covered by such coverage could be insured in other ways. In his Brief, Defendant attempts to undermine this argument by pointing out that the premium for UIM property damage coverage was higher than the premium for UM property damage coverage. (Def.'s Br. p. 8). Although outside the record before the Court. Defendant's argument fails to take into account the actuarial variables behind such premiums. The vast majority of drivers on the road are insured drivers. Consequently, an insured is much more likely to get hit by an underinsured driver rather than an uninsured driver. As a result, insurers end up paying claims under UIM coverage more often than under UM coverage, such that premiums for UIM coverage would naturally be higher than the premiums for UM coverage. The fact remains that property other than the insured auto could be covered by UIM property damage coverage can be insured in other ways and with at least \$25,000 of liability coverage for an at fault motorist – making UIM property damage coverage less necessary than other coverages.

CONCLUSION

For the above-stated reasons and those set forth in USAA CIC's Brief, 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 for UIM property damage is controlled by the plain terms of the insurance contract, and the policy provision at issue is enforceable.

Respectfully submitted,

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