MARTINEAU KING

MK Legal Updates

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Serving the Carolinas

HAVE A CLAIM INVOLVING MULTIPLE UIM CLAIMANTS? THE LIMITS MIGHT NOT BE WHAT YOU THINK THEY ARE: ASSESSING *N.C. FARM BUREAU V. DANA*

Joe Fulton

The North Carolina Court of Appeals recently issued its decision in *N.C. Farm Bureau v. Dana*, a UIM case with multiple claimants. No. COA18-1056, 2019 N.C. App. LEXIS 706 (Ct. App. Aug. 20, 2019). The court reached what is, to say the least, a counterintuitive result. Here are the basics.

William Bronson drove his 1993 Cavalier left of center and hit Mr. and Mrs. Dana head-on. Mrs. Dana, the driver, was killed. A passenger in the Bronson vehicle was also injured, as was the driver of a third car that was struck by debris from the collision. Bronson had auto coverage with liability limits of $50,000/$100,000. Mr. Dana and Mrs. Dana's estate sought UIM benefits from their insurer, N.C. Farm Bureau, under a policy with UIM limits of $100,000/$300,000.

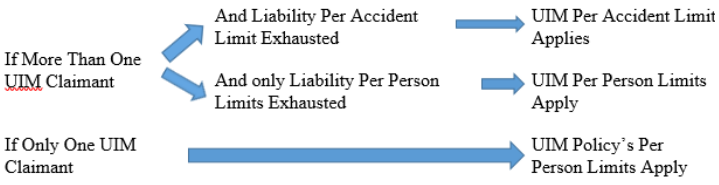
Mr. Dana and his wife's estate settled the liability claim for $32,000 and $43,750 respectively. The other two liability claimants received the balance of the $100,000 liability limits. N.C. Farm Bureau took a reasonable position: Mr. Dana and his wife's estate were both entitled to an amount equal to the per person UIM limit less a credit for the liability payments. The UIM claimants thought that, instead, they were collectively entitled to $200,000, equal to the per accident limits less the total payments made by the liability carrier. These positions are broken down as follows:

N.C. Farm Bureau		**UIM Claimants**	
Benefit to Mr. Dana		*Collective Benefit*	
Limit	$100,000	Limit	$300,000
Credit	-$32,000	Credit	-$100,000
UIM Benefit	$68,000	Total UIM Benefit	$200,000
Benefit to Mrs. Dana			
Limit	$100,000		
Credit	-$43,750		
UIM Benefit	$56,250		
Total UIM Benefit	$124,250		
Total Injury Compensation	**$200,000**		**$275,750**

The claimants argued that the result here was controlled by a case decided in N.C. Farm Bureau's favor back in 2000. *See N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178, 532 S.E.2d 846 (2000).

THE *GURLEY* DECISION

The Court's holding, as taken by the Court in *Dana*, can be illustrated as follows:



Gurley actually had the opposite of the situation in *Dana*. If the per accident limit applied, the claimants would collectively receive less than if the per person limit applied. These numbers broke down as follows:

N.C. Farm Bureau		UIM Claimants	
Collective Benefit		*Claimant 1*	
Limit	$100,000	Limit	$50,000
Credit	-$50,000	Credit	-$17,000
Total UIM Available	$50,000	UIM Available	$33,000
		Claimant 2	
		Limit	$50,000
		Credit	-$17,000
		UIM Available	$33,000
		Claimant 3	
		Limit	$50,000
		Credit	$-16,000
		UIM Available	$34,000
		Total UIM Available	$100,000
Total Injury Compensation	**$100,000**		**$150,000**

In both *Gurley* and *Dana*, the liability policies' per accident limits were exhausted. The difference was the number of claimants and the ratio between the per person and per accident limits. In *Dana*, there were only two UIM claimants and the 100/300 limits had a ratio of one to three. The claimants, therefore, would be better off with the $300,000 per accident limits than they would with two $100,000 per person limits. In *Gurley* there were three UIM claimants and the 50/100 limits had a ratio of one to two. The claimants would be better off with three $50,000 per person limits than they would with the $100,000 per accident limit.

For purposes of personal auto policies issued in North Carolina, the Motor Vehicle Safety-Financial Responsibility Act of 1953 controls over the policy language except for coverage in excess of the statute's mandates. The Act provides the following with respect to the UIM limits of liability:

> [T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the *limit of underinsured motorist coverage applicable* to the motor vehicle involved in the accident.

N.C. Gen. Stat. § 20-279.21 (emphasis added). The *Gurley* court focused on whether whether the per person or per accident limit was the *applicable limit*. The answer to this question, it said, depends on two things: (1) the number of claimants and (2) whether the liability policy was exhausted on a per person or per accident basis. Its holding resolved this question as illustrated above.

THE *DANA* DECISION

The Court in *Dana* applied *Gurley* and agreed with the UIM claimants. It found that the applicable UIM limit was the per accident limit and not the per person limit. Because that was the applicable limit, the two claimants were entitled to a total of $200,000 of UIM benefits after the offset for the applicable liability coverage. The result was that the two UIM claimants are now collectively entitled to $275,750 (adding up the UIM benefit and the liability settlement).

One problem with the *Dana* decision is that it fails to give effect to the purpose of UIM coverage. UIM coverage exists to put the insured in the same position they would have been in if the tortfeasor had liability insurance with limits equal to the limits of the UIM coverage. This was part of the rationale the *Gurley* court used to justify its outcome and deny the claimants additional recovery. If the tortfeasor in *Dana* had liability limits equal to that of the UIM limits, 100/300, Mr. Dana and his wife's estate would both have received $100,000 from the tortfeasor. Because they received less than $100,000, the UIM carrier should be responsible for making up the difference as N.C. Farm Bureau agreed it was obligated to do. By finding instead that the per accident limit was the "applicable limit," the court awarded the UIM claimants $75,750 more than what they would have received had the liability and UIM limits been the same. This is contrary to the purpose of UIM coverage.

Further, the Act's language for determining the UIM limit does not call for the complicated analysis required by the *Gurley* decision. The "limit of [UIM] coverage applicable" is properly understood to mean the limit applicable to the particular claimant seeking UIM benefits. The per person and per accident limits operate together and not separately. The maximum applicable limit for any one claimant is the per person

limit. This limit is subject to the per accident limit in cases where there are multiple claimants. Assuming a policy with liability coverage of 50/100 and three or more claimants, each claimant would be entitled to receive a pro-rated portion of $100,000, but no more than $50,000 regardless of their damages. In other words, where they are multiple claimants, the limit applicable to any one claimant is still subject to both the per person and per accident limit.

Changes to the Financial Responsibility Act further erode the *Dana* court's reliance on *Gurley*. The *Gurley* court noted that its holding was consistent with other portions of the act. Specifically, the way the statute determined, at that time, whether a tortfeasor vehicle is an underinsured vehicle under the Financial Responsibility Act. The act defined "underinsured highway vehicle" to mean a vehicle covered by liability insurance with *limits* less than the applicable UIM limits. This provision was changed in 2003. That change added to this definition by including instances where the amount *actually paid* to a UIM claimant under a liability policy that is otherwise exhausted is less than the applicable UIM limits. Therefore, the *Gurley* court's rationale that the analysis of the two issues should parallel each other is no longer applicable. Reference to the liability limits is no longer necessary to determine whether a vehicle is underinsured.

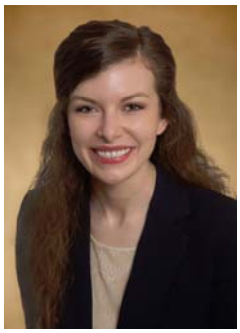
The *Dana* court apparently felt constrained by the holding in *Gurley*. It sided with the UIM claimant without much analysis other than its reference to that decision. In my view, the court missed an opportunity to appropriately limit the application of *Gurley* to the facts before that court. The court could have limited *Gurley* to hold only that the per accident limit of UIM coverage applies even if that means each individual UIM claimant ends up with less than what they would have received under the per person limits. This limitation could easily be justified by the subsequent change to the Financial Responsibility Act. Also, the *Gurley* court's dicta that the UIM "applicable limit" will *always* be the per accident limit where the liability policy's per accident limit is exhausted was not necessary to the *Gurley* decision.

WHAT ALL THIS MEANS

If the *Dana* decision is not further appealed, an insurer faced with a similar situation will have to either concede its holding or plan on a long fight through the N.C. Supreme Court. There is time for N.C. Farm Bureau to seek a rehearing at the Court of Appeals or to petition the N.C. Supreme Court for discretionary review. I hope that it will zealously pursue those opportunities. *Dana* is bad law that will significantly increase UIM exposure in multiple claimant cases if its holding is not reversed.

About the Author: Joe Fulton is a partner with Martineau King and focuses the majority of his practice on representing insurance companies in coverage disputes. Comments and feedback are welcome. Joe can be contacted by email at JFulton@MartineauKing.com.

Attorney Spotlight – Meagan L. Allen



Meagan joined Martineau King as an associate attorney in August of 2019 after completing a clerkship in South Carolina with the Honorable Steven H. John, the Chief Administrative Judge of General Sessions and Resident Judge of the Fifteenth Judicial Circuit. During her time with Judge John she experienced a number of high-profile criminal and civil trials and worked with attorneys from all over South Carolina. At MK, Meagan's practice focuses primarily on insurance defense, employment law, and commercial litigation.

Meagan is from a small town in South Carolina with a population of approximately 600 people. However, she enjoys the change of pace that Charlotte has to offer and likes attending local concerts and sporting events. Despite attending the University of South Carolina School of Law, Meagan is a dedicated fan of the Clemson Tigers and is looking forward to watching them win another national championship this year.

In her spare time, Meagan enjoys hiking, photography, and writing music. She was previously in a bluegrass band and plays a number of instruments. Meagan also enjoys spending time with her friends, family, and her only child – a miniature poodle named Lucy.

Meagan enjoys the challenges and fast pace of civil litigation and has quickly integrated herself into MK's supportive and collaborative atmosphere. For more information about Meagan and Martineau King, please visit our website.

Offers of Judgment: A Tool for Early Resolution

Lee M. Thomas.

Claim professionals and defense attorneys often review cases in which liability of the insured/client is beyond dispute. What is less clear, however, is the methodology (or lack thereof) utilized by plaintiff attorneys in calculating wildly exorbitant pre-suit or post-litigation demands. Plaintiff attorneys may argue the case is a "limits case" based solely upon minimal personal injuries or physical damage. In this situation, a useful but little known tool known as an "offer of judgment" can be used by defense attorneys to encourage a plaintiff to take a realistic view of their damages or risk certain consequences if the litigation proceeds.

NORTH CAROLINA – RULE 68

An offer of judgment is, in essence, a formal written offer to settle the case for a certain amount of money or property. In North Carolina, only a defendant may serve an offer of judgment (or any "party defending against a claim," i.e., a counterclaim). It must be served at least ten days before trial, but there is no bar to serving it upon receipt of a complaint (or any time after service of process is completed). The offer "allow[s] judgment to be taken against [the offeror] for the money or property or to the effect specified in [the] offer, with costs then accrued." N.C. Gen. Stat. 1A-1, Rule 68. The plaintiff then has ten days after service of the offer of judgment in which or he or she may serve "written notice that the offer is accepted." If the plaintiff does so, either party then files with the court the offer of judgment, and the written acceptance, and "thereupon the clerk shall enter judgment." If the plaintiff does not accept the offer of judgment within ten days of service (which is usually accomplished simply by ignoring it), the offer is "deemed withdrawn" and the offer cannot be used against the offeror (defendant) at trial. Pretty straightforward, right? You may be wondering, "How is this different from having the defense attorney extend an offer to the plaintiff's attorney in an e-mail or telephone call?"

Now for the good part: the consequences of non-acceptance. If the defendant *either* (a) prevails on a dispositive motion, such as summary judgment or judgment on the pleadings, (b) prevails at trial, or (c) loses at trial but the jury awards to the plaintiff less than, or equal to the amount of the offer of judgment, the defendant can recover all of his or her "costs incurred after the making of the offer." Let's look at an example.

Paula Plaintiff files suit against Dave Defendant for injuries arising out of a minor automobile accident. Paula's attorney made a pre-suit demand on Dave's carrier for $50,000. Dave's defense attorney thinks the damages, realistically, are closer to $15,000. Dave's defense attorney serves an offer of judgment of $15,000 upon Paula's attorney. Paula's attorney ignores the offer. The parties engage in two years of costly discovery, and Dave incurs $2,000 in costs (e.g., court reporters, transcripts, mediation, etc.). The case proceeds to trial, and the jury finds in Paula's favor, but awards her only $12,000 in damages. This is less than the $15,000 offer of judgment that Dave's defense attorney served. Therefore, Dave is entitled to recover $2,000 in defense costs. As a practical matter, this may be applied as a set-off from the judgment (i.e., $12,000 in damages - $2,000 in costs payable to Dave = $10,000 judgment).

SOUTH CAROLINA – RULE 68

In South Carolina, "any party" may file and serve an offer of judgment – even a plaintiff. In contrast with North Carolina, the offer of judgment is served on the plaintiff *and* filed with the clerk. Additionally, instead of only a ten-day window to accept, the plaintiff has twenty days to accept it. If the plaintiff decides to accept the offer, the mechanics of the rule are the same as in North Carolina. But if a plaintiff rejects the offer, the consequences of non-acceptance are more severe. Let's use Paula Plaintiff and Dave Defendant as an example. If Dave prevails on a dispositive motion or at trial, or the jury awards Paula less than the amount of the offer of judgment, Dave can recover "all administrative, filing, or other court costs from the date of the offer until the entry of the judgment" plus "a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment." Rule 68, SCRCP.

This is important advantage. A plaintiff's refusal of the offer may cost her interest in the end. Remember the offer of judgment was $15,000, the parties litigated for two years, and let's assume the jury awards Paula $12,000. Dave is entitled to a reduction from the $12,000 of 8% interest. Paula's judgment will be reduced by $1,920, for a total of $10,080 (Interest = Principal x Interest Rate x Time / $12,000 x 8% x 2 years = $1,920 interest). This represents a 16% reduction of the judgment. No doubt a plaintiff who waits years for a judgment will not be thrilled when the

judge reduces it by several thousand dollars as a penalty for not accepting the earlier offer.

SUMMARY

Dealing with an unrealistic plaintiff or plaintiff's attorney is a common situation in litigation. By using the offer of judgment, however, defense attorneys can encourage early resolution by forcing a plaintiff to do the math and weigh the consequences of litigating a case in the face of a reasonable offer of judgment.

About the Author: Lee Thomas is an associate with Martineau King and focuses his practice on construction litigation and serious personal injury defense. Comments and feedback are welcome.

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VISIT OUR NEW FIRM BLOG!

Martineau King has started a firm blog which can be found on our website under the "Resources" tab. The blog will be updated frequently and include useful content including our newsletter articles, timely updates on cases of interest to insurance professionals, and other useful information.

Security Guards and Company Police in Premises Liability Cases

S. Mark Henkle

Premises liability comes in all shapes and sizes. More and more, private companies and landlords are employing private security to provide some measure of protection, but their activities can sometimes lead to liability claims. At its core, private security can take two different forms: typical security guards (like the yellow shirts between the crowd and stage at a concert) and company police (like campus police at a university). To put it simply, company police are essentially sworn law enforcement officers with similar authority and security guards are not. In negligence cases, these two groups present unique risks for any of your insureds that employ them.

SECURITY GUARDS

The leading North Carolina case discussing the duty of care owed by security companies to third parties is *Cassell v. Collins*. In *Cassell*, a plaintiff was attacked while visiting a tenant in an apartment complex. There, the North Carolina Supreme Court rejected that the security company owed a duty to keep third parties safe or free from injury. 344 N.C. 160 (1993) (stating that "we cannot conclude that the mere act of providing a security guard imposed . . . any duty to prevent Collins from criminally assaulting plaintiff.") In fact, the contract between the security company and property owner lacked language requiring the guard to protect the tenants or their social guests from attack. *Id.* at 163-164. Without such a provision, the Court concluded that the mere act of providing a security guard *did not impose any duty* to prevent the plaintiff from being criminally assaulted. *Id.* at 164-66.

Likewise, in *Hoisington v. TZ Winston-Salem Assocs.*, the North Carolina Court of Appeals held that there was no duty arising out of the contract between the security company and the property owner to protect those employed in the shopping center. 133 N.C. App. 485, 489-90 (1999). There, the employee was severely assaulted on the premises while the security company had an employee on patrol. The Court looked at the contract language specifying the security company's scope of work as "vehicular and foot patrol of property maintaining high visibility" and to "act as a deterrent against theft, vandalism and criminal activities." *Id.* at 487. Notably, North Carolina law strictly construes contracts against a party trying to enforce third-party beneficiary rights. Thus the Court in *Hoisington* concluded that the Plaintiff failed to establish a third-party beneficiary claim.

Courts will look to the contractual language between the property owner and the security company in assessing the question of duty. If the contract merely states that it is for "security services" or that the security company is to "maintain visibility as a deterrent," courts will likely not find a duty owed or a breach of that duty. Of course, the facts of every case are different and the analysis of each case depends on its facts.

COMPANY POLICE

The liability of a company police officer may be at issue in premises liability cases. In North Carolina, company police officers are governed by statute. Un-

der N.C. Gen. Stat. § 74E-6, company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors while in the performance of their duties.

Pursuant to N.C. Gen. Stat. §15A-401(d):

> A law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary: (a) To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

The Supreme Court in *Graham v. Conner* held "that all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard[.]" 490 U.S. at 395. The "reasonableness" of a particular use of force must be judged from the perspective of a **reasonable officer** on the scene, rather than with the 20/20 vision of hindsight. *Id.* In analyzing reasonableness, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Id.* Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. *State v. Anderson*, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Company police officer are held to the same standards as other law enforcement officers. When attempting to arrest or stop a crime in progress, they are given a wide latitude to use force so long as the use of force is reasonable. Courts will look at the proportionality of the force used and the context in which it arises. Of course, the facts of every case are different and the analysis of each case depends on its facts.

About the Author: Mark Henkle is an associate with Martineau King and focuses his practice on serious personal injury defense, premises liability, and construction litigation. Comments and feedback are welcome.

Mark can be contacted by email at MHenkle@MartineauKing.com.

Firm News!

Martineau King Welcomes New Associate

Martineau King is pleased to welcome David Mohrmann to the firm as a new associate attorney. David brings a wealth of experience as a construction manager for a Louisiana real estate developer and will focus his practice on construction defect and personal injury defense. For more information about David, please see his biography on our website.

Fuller Accepted to South Carolina Bar

Associate Attorney Steve Fuller was recently accepted for membership in the South Carolina Bar. He was sworn in on October 2nd. Steve is also admitted in Massachusetts and North Carolina. Steve's South Carolina admission will help Martineau King fulfill its mission to serve our clients' needs across the Carolinas.

MK Attends NAMWOLF Annual Conference

Associate Attorney Sharon Suh recently returned from a trip out to California for the annual conference of the National Association of Minority and Women Owned Law Firms. Martineau King is a proud member of NAMWOLF.

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Experienced legal advisors dedicated to your business

Martineau King is a Martindale-Hubbell Preeminent AV rated litigation defense firm dedicated to representing businesses throughout the southeast. Our clients range from individuals and small businesses to large international corporations and municipalities. We offer the personal attention that characterizes a small practice with the broad expertise and capabilities of a large firm.

At Martineau King PLLC we will be your advisors as well as your litigators. Our commitment is to nurture long-term partnerships with our clients.

We understand that going to court is not the only option. We will efficiently and thoroughly examine each case to determine the best course of action for you. If that means going to court then we are the recognized, experienced, and aggressive litigators you need representing you. Our involvement lets your opponents know you mean business.

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