

2005

# General Security Indemnity Co. of Arizona f/k/a Fulcrum Insurance Company v. Susan Rice Tipton d/b/a The Automobile Source: Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

GENERAL SECURITY INDEMNITY CO. OF  
ARIZONA, f/k/a FULCRUM INSURANCE  
COMPANY, an Arizona corporation,

Plaintiff and Appellee,

v.

SUSAN RICE TIPTON, d/b/a THE  
AUTOMOBILE SOURCE,

Defendant and Appellant.

CASE NO. 20050486-CA  
ORAL ARGUMENT REQUESTED

**BRIEF OF APPELLANT**

Appeal from a Judgment of Fifth Judicial District Court  
of Washington County, State of Utah  
Honorable Eric A. Ludlow

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**DEC 08 2005**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... 1

JURISDICTION ..... 2

ISSUES ON APPEAL ..... 2

DETERMINATIVE STATUTES AND RULES ..... 2

STATEMENT OF THE CASE ..... 3

Nature of the Case ..... 3

Course of Proceedings and Disposition in the Court Below ..... 3

Statement of Relevant Facts on Appeal ..... 4

SUMMARY OF ARGUMENT ..... 7

ARGUMENT ..... 7

A. .... 7

THE FULCRUM POLICY DID NOT COMPLY WITH U. C. A. §31A-22-302(1)(b)  
BECAUSE IT DID NOT CONTAIN ANY PROVISION FOR  
UNINSURED MOTORIST BODILY INJURY COVERAGE,  
NOR WAS THERE A VALID WAIVER UNDER §31A-22-305(4) ..... 7

B. .... 8

BECAUSE FULCRUM FAILED TO COMPLY WITH U. C. A. §31A-22-302(1)(b),  
IT CANNOT ARBITRARILY DECIDE TO PAY A LESSER COVERAGE  
LIMIT THAN THE THIRD-PARTY LIABILITY LIMITS  
..... 8

C. .... 9

THE TIPTON POLICY IS NOT AMBIGUOUS ON THE QUESTION OF  
UNINSURED MOTORIST BODILY INJURY COVERAGE  
..... 9

C. .... 11

THE TRIAL COURT’S CONCLUSIONS OF LAW ARE FLAWED AND  
NOT SUPPORTED BY EVIDENCE IN THE RECORD  
..... 11

D. .... 13

THE REMEDY FOR FAILING TO PROVIDE THE REQUIRED DISCLOSURE IS  
TO IMPLY COVERAGE AT THE BODILY INJURY LIMITS  
..... 13

CONCLUSION .....	14
CERTIFICATE OF SERVICE .....	16
ADDENDUM .....	17

**TABLE OF AUTHORITIES**

CASES

*Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4; 2003 Utah LEXIS 11 ..... 2

*Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68; 56 P.3d 529 ..... 2

*State v. Tooele County*, 2002 UT 8; 44 P.3d 680 ..... 2

*Wycalis v. Guardian Title*, 780 P.2d 821 (Utah App. 1989), cert. den. 789 P.2d 33 (Utah 1990) . . . 4

STATUTES:

U. C. A. §31A-22-302(1)(c) ..... 7

U. C. A. §31A-22-302(1)(d) ..... 8

U. C. A. §31A-22-305.5 (1999) ..... 8

U. C. A. §31A-22-305(3)(f)(i)(B) ..... 8

U.C.A. §31A-22-302(1)(b)(2000) ..... 2, 7, 8

U.C.A. §31A-22-305(3)(b)(2000) ..... 3, 8, 10

U.C.A. §31A-22-305(4)(a)(i)-(ii)(2000) ..... 3, 7, 10

U.C.A. §78-2a-3(2)(j)(2001) ..... 2

OTHER AUTHORITIES:

55 A.L.R.3d 216, “Construction of Statutory Provisions Governing Rejection Or Waiver Of Uninsured Motorist Coverage” ..... 14

Couch on Insurance 3d, §122.48, p.122-48 ..... 13

Couch on Insurance 3d, §122:46, p. 122-90 ..... 13

Couch on Insurance 3d, §122:46, p. 122-91 ..... 14

## **JURISDICTION**

The Utah Court of Appeals has jurisdiction in this matter pursuant to U.C.A. §78-2a-3(2)(j)(2001)(pour-over civil jurisdiction).

## **ISSUES ON APPEAL**

The following issue is presented on appeal:

Whether the District Court erred in granting Fulcrum Insurance summary judgment that it only owed Tipton \$65,000 in uninsured motorist benefits, despite U.C.A. §31A-22-305(3)(b)(2000) which requires policy limits equal to the bodily injury liability limits Tipton purchased, of \$300,000? The standard of review is *de novo*: The trial court's interpretation of a statute is reviewed *de novo*, as is the trial court's interpretation of a contract. *State v. Tooele County*, 2002 UT 8; 44 P.3d 680 (statutory interpretation reviewed as a matter of law); *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68; 56 P.3d 529 (reviews *de novo* trial court's interpretation of insurance contract in light of statutes). Also, summary judgment rulings are reviewed *de novo*. *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4; 2003 Utah LEXIS 11.

## **DETERMINATIVE STATUTES AND RULES**

1. U.C.A. §31A-22-302(1)(b)(2000):

(1)(b) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirements of Section 41-12a-301 shall include:

...

(b) uninsured motorist coverage under Section 31A-22-305, unless affirmatively waived under Subsection 31A-22-305(4);

2. U.C.A. §31A-22-305(3)(b)(2000):

(3)(b) For new [automobile insurance] policies written on or after January 1, 2001, the limits of uninsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

- (i) waives the higher coverage;
- (ii) reasonably explains the purpose of uninsured motorist coverage; and
- (iii) discloses the additional premiums required to purchase uninsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

3. U.C.A. §31A-22-305(4)(a)(i)-(ii)(2000):

(4)(a) (i) Except as provided in Subsection (4)(b), the named insured may reject uninsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) This rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of uninsured motorist coverage.

## **STATEMENT OF THE CASE**

**1. Nature of the Case**

This is an appeal from summary judgment in favor of General Security Indemnity Co. Of Arizona f/k/a Fulcrum Insurance ("Fulcrum Insurance"), limiting its uninsured motorist bodily injury coverage to \$65,000.00.

**2. Course of Proceedings and Disposition in the Court Below**

Fulcrum Insurance sued Susan Tipton ("Tipton"), its insured, for declaratory relief to limit its underinsured motorist coverage to \$65,000.00. Cross-motions for summary judgment were filed, and the motion of Fulcrum Insurance was granted, and the motion of Tipton was denied.



### 3. Statement of Relevant Facts on Appeal<sup>1</sup>

#### Tipton's Facts:

On about February 6, 2001, Tipton applied for “garage” insurance through Dixie-Leavitt Agency. (R. 124). The application contains a line “Uninsured Motorists \_\_\_”. (Id.) The application also states that “[Tipton] have completed and signed a state form selecting or rejecting Uninsured Motorist Coverage”. (Id.) There is nothing further in the record regarding this application.

On June 25, 2001, Fulcrum Insurance actually sold Tipton an insurance policy that covered Tipton’s personal and business vehicles through June 25, 2002. (Memo in support of summary judgment, ¶3, R.23). This policy had automobile third-party bodily injury liability limits of \$300,000.00. (Id., ¶4; Policy Declarations, R. 92). The Declarations page states “Limit” for “Auto Only” is \$300,000.00. It also contains a line “UNINSURED/UNDERINSURED MOTORIST”, and under “Limit”, the Declarations page only states “SEPARATELY STATED IN THE ENDORSEMENT”. (Id.). The policy carried an endorsement for uninsured motorist property damage in the amount of \$65,000.00. (Id., ¶5). The policy contained no uninsured motorist bodily injury damage coverage whatsoever. (Id., ¶6). There was no “state form selecting or rejecting Uninsured Motorist Coverage” ever presented to, or signed by, Tipton. (Id.)

On November 19, 2001, Tipton was hit head-on by an uninsured motorist. (Id., ¶¶7-8). She made a claim for uninsured motorist bodily damages in the amount of her liability coverage limits, or

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<sup>1</sup> Tipton is entitled to have all facts in the record supporting her position accepted as true in defending Fulcrum’s cross-motion for summary judgment. *Wycalis v. Guardian Title*, 780 P.2d 821 (Utah App. 1989), cert. den. 789 P.2d 33 (Utah 1990). No opposing affidavits were filed by either party; the only materials submitted outside the pleadings and memoranda were documents from Fulcrum’s files, attached to its motion.

\$300,000.00. (Id., ¶9). Fulcrum Insurance denied that claim, and, instead, contended that there was only \$65,000.00 in uninsured motorist coverage available. (Id., R. 24, ¶¶10-11). Fulcrum Insurance brought this action for declaratory relief, to limit its liability for uninsured motorist bodily injury coverage to the amount it had issued for uninsured motorist property damage coverage, or \$65,000.00. (R. 3-5).

Trial Court's Facts:

The trial court entered "Findings of Fact and Conclusions of Law". (R. 165-170). The trial court's findings were lifted *verbatim* from the fact section of Fulcrum's cross-motion for summary judgment, with the exception of paragraphs 5, 8 and 12 which were omitted in their entirety. These facts, which presumably the trial court found as undisputed material facts, follow:

1. Plaintiff General Security Indemnity Company of Arizona, formerly known as Fulcrum Insurance Company (Fulcrum) is an insurance company doing business in the State of Utah, with its home office in New York, New York.
2. Defendant Tipton is a resident of Washington County, State of Utah.
3. Fulcrum issued a garage insurance policy to Susan Rice Tipton, policy number GP 1030987 effective from June 25, 2001 to June 25, 2002.
4. Tipton signed an application for insurance dated 2-6-01 applying for a garage policy with uninsured motorist (UM) coverage in the amount of \$65,000.00.
5. The insurance policy issued to Tipton by Fulcrum contained the endorsement Utah Uninsured Motorists Coverage - Property Damage. This endorsement provided for \$65,000.00 in uninsured motorists coverage for property damage.

6. The insurance policy issued to Tipton by Fulcrum did not contain an endorsement indicating coverage for uninsured motorists coverage (UM) for bodily injury.
7. The policy that was issued to Tipton charged a premium specifically for the uninsured underinsured motorist coverage in the amount of \$60.
8. On or about November 19, 2001 Defendant Tipton was driving an automobile westbound on State Road 9 near Hurricane, Utah. Another vehicle, being driven eastbound by one Thomas Fischer, crossed the center line and collided with the vehicle being driven by Tipton.
9. Mr. Fischer's automobile insurance policy had lapsed prior to the collision.
10. Defendant Tipton has made a claim for uninsured motorists coverage against Fulcrum in the amount of \$300,000 for the injuries she sustained in the accident.

Trial Court's Conclusions of Law:

The trial court found that Fulcrum "abided by the requirements in Utah Code Anr. §31A-22-305" because the limit of \$65,000 was "the maximum available by the insurer under . . . Tipton's policy". (R. 167, ¶12). The trial court additionally found that Tipton's policy was ambiguous, because it contained no uninsured motorist bodily injury endorsement. (R. 167, ¶14). The trial court then concluded that the "extrinsic evidence in this case demonstrates that the parties intended for the UM limits to be \$65,000". (R. 168, ¶17). Therefore, because Fulcrum had already tendered the \$65,000, the trial court concluded that "Fulcrum has . . . fully satisfied its obligations under the policy." The trial court then granted summary judgment in favor of Fulcrum.

## **SUMMARY OF ARGUMENT**

There was no dispute that Fulcrum failed to comply with U.C.A. §31A-22-305(4), when it failed to present Tipton with a written explanation of the purposes of uninsured motorist coverage, the liability amounts she could purchase, and the premiums associated with those amounts. Despite this failure, the trial court improperly decided that the Tipton intended to buy \$65,000 based upon a four-month old application, disregarding the absence of any waiver to comply with the statute. This approach disregards the statutory consequences of failing to obtain a waiver: 1) uninsured motorist benefits in the amount of Tipton's bodily injury limits, or \$300,000; or 2) the maximum Tipton could have purchased from Fulcrum for uninsured motorist coverage. The case should be remanded with instructions to enter judgment in favor of Tipton in the amount of \$300,000, less the \$65,000 previously tendered by Fulcrum.

## **ARGUMENT**

### **A.**

**THE FULCRUM POLICY DID NOT COMPLY WITH U. C. A. §31A-22-302(1)(b)  
BECAUSE IT DID NOT CONTAIN ANY PROVISION FOR  
UNINSURED MOTORIST BODILY INJURY COVERAGE,  
NOR WAS THERE A VALID WAIVER UNDER §31A-22-305(4)**

U. C. A. §31A-22-302(1)(b) is crystal clear: "every policy" sold to comply with Utah law "shall include" uninsured motorist coverage, "unless affirmatively waived under Subsection 31A-22-305(4)". There is no dispute that the Fulcrum policy did not include any bodily injury coverage for uninsured motorists whatsoever. In fact, it did not include any provision at all for underinsured motorist benefits, as required by U. C. A. §31A-22-302(1)(c), despite properly including an

endorsement for the personal injury protection benefits required by U. C. A. §31A-22-302(1)(d). The endorsement for uninsured motorist property damage coverage that was included is not required by statute. See U. C. A. §31A-22-305.5 (1999). The Fulcrum policy did not comply with the statute because it did not include uninsured motorist benefits.

There is likewise no dispute that there was no waiver of that statutory requirement pursuant to U. C. A. §31A-22-305(4). Subsection 4 allows a consumer to choose not to purchase uninsured motorist coverage, provided that there has been “a reasonable explanation of the purpose of uninsured motorist coverage”. U. C. A. §31A-22-305(4)(a)(ii). Further, U. C. A. §31A-22-305(3)(f)(i)(B) requires a presentation of “the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured’s motor vehicle policy”. The Legislature was obviously concerned that insurance consumers understand clearly what the purpose of uninsured motorist insurance is, and the relatively nominal cost associated with it, before deciding whether to purchase it, or what coverage limits to purchase. There is no evidence that a statutory waiver was ever presented to Tipton or signed by her. If there had been, presumably Fulcrum would have tendered it to the trial court.

The Fulcrum policy completely failed to comply with the statutory coverage, nor did it obtain a statutory coverage waiver.

B.

BECAUSE FULCRUM FAILED TO COMPLY WITH U. C. A. §31A-22-302(1)(b), IT CANNOT ARBITRARILY DECIDE TO PAY A LESSER COVERAGE LIMIT THAN THE THIRD-PARTY LIABILITY LIMITS

Fulcrum implicitly acknowledges that its failure to comply with U. C. A. §31A-22-302(1)(b)

requires it to provide uninsured motorist bodily injury coverage. However, it arbitrarily chooses the uninsured motorist property damage limit of \$65,000 as the applicable limit. But the statute is clear: the coverage limit must be either the third-party bodily injury limits, here \$300,000, or the “maximum uninsured motorist coverage limits available by the insurer under the insured’s motor vehicle policy”. The trial court simply assumed that the \$65,000 limit which was the maximum available for uninsured motorist property damage was the maximum available for uninsured bodily injury. This assumption does not bear scrutiny. The reality is that there was NO maximum available for uninsured motorist bodily injury under the Tipton policy. There was NO coverage at all for bodily injury from an uninsured motorist. In the absence of any coverage at all for bodily injury by uninsured motorists under the insured’s policy, the only other statutory limit is the third-party bodily injury limit of \$300,000.

Because there was NO “maximum uninsured motorist coverage limits available by the insurer under the insured’s motor vehicle policy”, the only applicable limit was \$300,000.

### C.

#### THE TIPTON POLICY IS NOT AMBIGUOUS ON THE QUESTION OF UNINSURED MOTORIST BODILY INJURY COVERAGE

Fulcrum and the trial court attempted to finesse the fact that there is no “maximum uninsured motorist coverage limits available” under the policy by declaring the policy to be ambiguous, and then resorting to extrinsic evidence to determine that the parties intended \$65,000. This is wrong: the policy is not ambiguous. It unambiguously does NOT contain any coverage at all for bodily injury from uninsured motorists. It unambiguously DOES provide coverage for property damage from uninsured motorists. There is no ambiguity whatsoever in the policy itself.

There is ambiguity in the Declarations page. The Declarations page has a section for

“Uninsured/underinsured Motorists”, but it does not specify whether it refers to bodily injury, property damage or both. The limits are “separately stated in the endorsement”, but, of course, there is no endorsement at all for bodily injury, just for property damage. The trial court did not specify exactly what, in its view, the ambiguity was, but this ambiguity in the Declarations is sufficient to invoke the usual rule that insurance contracts are construed most strongly against the drafter, here, Fulcrum. Accordingly, if there was ambiguity, Tipton should have benefitted, not been penalized.

And even if the extrinsic evidence showed that the parties intended to purchase \$65,000 in uninsured motorist coverage, that does not solve the problem. The problem the Legislature sought to solve was that of insurance consumers simply buying or rejecting uninsured motorist coverage by signing whatever was pushed in front of them by their agent. The legislative solution was to require a detailed disclosure of the purposes of uninsured motorist coverage and the costs associated with it, so that the insurance consumer, not the agent, knowingly and voluntarily makes the choice. Without compliance with U. C. A. §31A-22-305(4)(a)(ii) and U. C. A. §31A-22-305(3)(f)(i)(B), Tipton was deprived of the meaningful choice the Legislature sought to give her. Because Fulcrum deprived Tipton of that choice, it cannot now try to hold her to the bargain it claims she did, or would have made, in the absence of the statutory disclosures.

C.

THE TRIAL COURT'S CONCLUSIONS OF LAW ARE FLAWED AND  
NOT SUPPORTED BY EVIDENCE IN THE RECORD

The trial court's conclusions are flawed or unsupported by any evidence in the record in several key instances:

Conclusion No. 12:

The trial court concluded in No. 12 that Fulcrum "abided the requirements in Utah Code Anr. §31A-22-305" because it tendered \$65,000, "the maximum available under Tipton's policy". Of course, there was NO bodily injury coverage for uninsured motorists under Tipton's policy, so the maximum available under her policy was zero. But the relevant question that the trial court confused is how much is available for purchase by Tipton, not how much is actually written into the policy. The statute recognizes that some insurers only sell bodily injury coverage from uninsured motorists in limits less than the maximum available for purchase for third-party liability protection. In that instance, if there is no statutory waiver, the insurer must provide the maximum available FOR PURCHASE by the insured, not the maximum actually sold to the insured. If that were not the case, the insurer could get away with providing whatever is actually in the policy. In Tipton's case, that amount was actually zero.

The whole thrust of the statute is to allow insurance consumers maximum information and choice, and to penalize insurers who fail to provide that, by requiring them to pay the insured according to the maximum amount of liability coverage that the insured actually purchased, or could have purchased, had the proper disclosures been made. Fulcrum's argument would circumvent the legislative penalty by allowing insurers to provide much less. There was no evidence that \$65,000 was



the most uninsured motorist coverage that Tipton could have purchased. There was no evidence of the maximum amount that Tipton could have purchased from Fulcrum. Without that evidence, the trial court's conclusion

Conclusion No. 14:

The trial court erred in concluding that the policy is ambiguous. It unambiguously provides NO coverage for bodily injury from uninsured motorists. Thus, the trial court erred in concluding that Fulcrum should pay anything less than the liability limits actually purchased by Tipton of \$300,000.

Conclusion No. 17:

Here, the trial court is in essence reforming the contract. There was no evidence from either Tipton or the agent who sold the policy in front of the trial court. The application for insurance does not unambiguously reveal an intent to purchase \$65,000 of coverage for bodily injury from uninsured motorists. And in the absence of the statutory waiver, there is even less reason to conclude that the parties intended to set the limits at any particular amount.

Conclusion No. 19:

The trial court concluded that Tipton should not get an insurance benefit she did not pay for. However, the Legislature has placed the burden of compliance and the penalty for non-compliance on the insurer, not the insured. The statutory penalty for non-compliance with the waiver requirements is for the insurer to provide coverage not paid for, in the amount of the bodily injury liability limits or the maximum amount of uninsured motorist insurance that the insured could have purchased. It is not up to the trial court to interpose its own view of fairness over that of the Legislature.

D.

THE REMEDY FOR FAILING TO PROVIDE THE REQUIRED DISCLOSURE  
IS TO IMPLY COVERAGE AT THE BODILY INJURY LIMITS

The statute clearly provides that, unless there is a waiver, the policy limit for uninsured motorist coverage is less of 1) “the limits of the insured’s motor vehicle liability coverage” OR 2) “the maximum uninsured motorist coverage limits available by the insurer”. We know that the limit under 1) above is \$300,000.00. There is no evidence in the record on what the “maximum . . . available by the insurer” was, under 2). Therefore, the proper remedy is to imply coverage at the bodily injury limit of \$300,000 under a theory of implied reformation of the policy. Choosing any other approach (such as implying it at the statutory minimum of \$25,000) rewards an insurer who chooses not to comply, as Fulcrum did. See Couch on Insurance 3d, §122:46, p. 122-90:

If an insurer does not offer uninsured motorist coverage in an automobile liability or motor vehicle liability policy, and, as a result, the insured does not reject such coverage, the uninsured motorist statute creates such coverage in the policy by operation of law.

The trial court and Fulcrum seem to have assumed as much, that the absence of a valid rejection impliedly created uninsured motorist coverage.

The next question is what limits of coverage the impliedly reformed policy would have. The Utah statute, again, provides two options, the bodily injury limit amount or the maximum the insured could have purchased anyway. Other states seem to follow this approach, though each state’s statutes are somewhat idiosyncratic. See Couch on Insurance 3d, §122.48, p.122-48:

Pursuant to statute, an insurer was required to provide uninsured motorist coverage in an amount equal to its liability coverage, even though the policy called for a lesser amount of uninsured motorist coverage, where the insurer did not validly waive the statutory right.

That would apply directly to Tipton, who, according to the trial court, purchased lesser coverage under the policy without a valid waiver of her statutory right. Couch also states regarding underinsured motorist coverage, an analogous situation:

Where underinsured motorist coverage is implied by law as a result of the insurer's inadequate offer or rejection form for underinsured motorist coverage, the amount to be employed by law is properly limited to the amount of bodily injury liability coverage which the insured actually had, rather than the maximum amount of bodily injury coverage which he or she could have potentially purchased, and rather than the lower statutory minimum amounts of underinsured motorist coverage.

Couch on Insurance 3d, §122:46, p. 122-91. See also a less helpful but large collection of cases at 55 A.L.R.3d 216, "Construction of Statutory Provisions Governing Rejection Or Waiver Of Uninsured Motorist Coverage".

Under any theory, the evidence supports only one result: uninsured motorist coverage for Tipton in the amount of \$300,000.

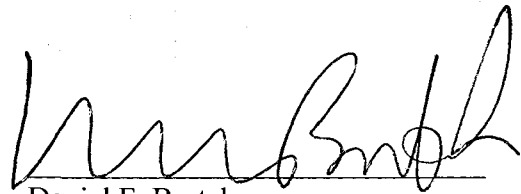
### **CONCLUSION**

Utah's legislature has recognized that uninsured motorist coverage is vital to the well-being of drivers in Utah. This is why insurers have been required by statute to make a detailed offer of uninsured motorist coverage to insurance consumers, with a reasonable explanation of the benefits of such coverage, and the costs. The statute provides that, if there is no valid, written rejection of the coverage, there is an statutorily implied coverage for uninsured motorist benefits. The limits are the lesser of the bodily injury limits purchased by the insured, or the maximum uninsured motorist benefits that the insured could have purchased.

The trial court erred when it accepted Fulcrum's argument that the "maximum . . . available insurance" referred, not to the maximum amount the insured could have purchased, but the maximum

amount actually purchased. This re-defines the statute to mean only that the insured gets what the insured bought. This approach stands the statute on its head. Tipton should get what the Legislature intended: the maximum amount, measured by her bodily injury limits of \$300,000, in the complete absence of evidence that only a lesser amount could have been purchased.

DATED THIS 8<sup>th</sup> day of December, 2005.

A handwritten signature in black ink, appearing to read 'Daniel F. Bertch', written over a horizontal line.

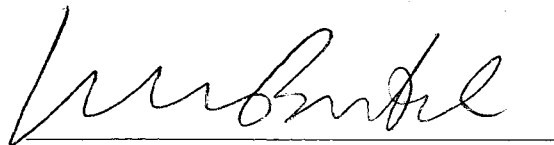
Daniel F. Bertch  
Kevin K. Robson

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8 day of December, 2005, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

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Attorneys for Appellants



A handwritten signature in cursive script, likely of the certifier, is written over a horizontal line.

ADDENDUM

A

APPLICATION FOR INSURANCE - 2/06/01



APPLICATION FOR GARAGE POLICY

APPLICANT INFORMATION:

Policy Period Desired: From 6-25-01 To 6-25-02
Registered Business Name: Susana Rice Tipton dba The Automobile Source
Billing Address: 3420 Mulberry Dr, Salt Lake City, UT 84770
County: Iron State: UT Zip Code: 84720 Phone: (435) 703-1120
Years in Business: 3 Years Management Experience: 3 Business Entity: Individual
Describe your Operations: Used car sales
Locations where you conduct Garage Operations: 496 N. 200 W. Cedar City, UT 2

UNDERWRITING INFORMATION:

All Owners, Employees, Spouses & Children Furnished Autos (Attach list, if necessary)

Table with columns: Name, Date of Birth, Driver License Number, State of License, Furnished Auto? Yes or No, Past 3 Yrs. Number of Accidents, Past 3 Yrs. Number of Citations, Job Description and/or Relationship. Row 1: Susana R. Tipton, 7-12-56, 9352404, UT, Yes, 0, 0, Owner.

Files

- 1. Where do you purchase vehicles? Las Vegas Manheim Auto Auction
2. Who drives or tows vehicles to your lot? owner
3. How many times per year do you drive-away more than 300 miles from point of purchase? none
4. How many vehicles do you sell per year? 20-30 How many of those are on consignment? 3
5. What is your normal radius of operation? Southern Utah
6. What is your sales mix?

- a. cars, sport utility, pickups, vans 100%
b. motorhomes 0%
c. travel trailers, mobile homes 0%
d. trucks, tractors, semi-trailers 0%
e. salvage parts 0%
f. other 0%

- 7. Describe lot security and key controls fenced lot -
8. How many dealer plates do you have? 3
9. Do you repossess vehicles? No
10. Do you sell "salvage titled" vehicles? No
11. Do you always ride along on test drives? No

Services

1. What percentage of your work is:

Table with 4 columns: Body/Paint, Muffler, Sound System, Window Tint; Tune up, Radiator, Tires, Other; Transmission, Wheel Alignment, Upholstery, Describe; Brakes, Oil & Lube, Wash/Detail.

2. Do you sell gasoline or LPG? If yes, how many gallons?

3. Do you install trailer hitches? NO
4. Do you have a spray paint booth? NO If yes, Is it U/L approved? \_\_\_\_\_ Is it ventilated? \_\_\_\_\_
5. Do you recap tires or sell recapped tires? NO
6. Do you tow for hire?  Yes  No If yes, explain \_\_\_\_\_
7. Describe lot security and key controls \_\_\_\_\_

**Prior Carrier And Loss History for 3 Years**

Current Carrier Fulcom-TGA Policy Period 6-25-00/01 Policy Premium \_\_\_\_\_  
 Prior Carrier W. Heritage-TGA Policy Period 6-25-99/00 Policy Premium \_\_\_\_\_  
 Prior Carrier W. Heritage-TGA Policy Period 12-15-98/6-1-99 Policy Premium \_\_\_\_\_

Date of Loss	Amount	Description of Loss
		<u>None</u>

**COVERAGE REQUESTED:**

- Garage Liability \$ 300K each accident, \$ 300K aggregate, Deductible \$ 250
- Garagekeepers \$ \_\_\_\_\_ per location SCL \$ \_\_\_\_\_ deductible Collision \$ \_\_\_\_\_ deductible
- Dealers Physical Damage \$ 30,000 per location total SCL \$ \_\_\_\_\_ deductible Collision \$ \_\_\_\_\_ deductible
- Premises Medical Payments \$1,000
- Scheduled Vehicles SCL \$ \_\_\_\_\_ deductible Collision \$ \_\_\_\_\_ deductible

Veh. No.	Year	Make	Body Type	V.I.N.	ACV

Veh. No.	GVW	Radius	Use	Loss Payee

- Fire Legal Liability \$50,000
- Uninsured Motorist \$ 65,000
- Personal Injury Protection \$ 3,000
- Buybacks  Transit Limit \$ \_\_\_\_\_  Driveway Radius \_\_\_\_\_  Value per Auto \$ \_\_\_\_\_

Remarks: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

I understand that misrepresentation or omission of material facts will be cause for cancellation and may void coverage.

I have completed and signed a state form selecting or rejecting Uninsured Motorist Coverage.

Signature of Applicant Dwight Supton Date 2-6-01  
 Agency Name and Agent's Signature Dixie Leavitt Agency Date \_\_\_\_\_



**B**  
DECLARATIONS PAGE - 6/25/02

Policy Number **AGP 0301553**

# Western Heritage Insurance Company

AGP 0296196

6263 N. Scottsdale Road, Suite 240 - P O. Box 5100 - Scottsdale, Arizona 85281-5100 RENEWAL OF NUMBER

## GARAGE POLICY DECLARATIONS

PAGE 1 of 2

REG	RATING	U/W	PROD	FILE

**ITEM ONE-**

**NAMED INSURED AND MAILING ADDRESS**

SUSAN RICE TIPTON  
 DBA: THE AUTOMOBILE SOURCE  
 511 NORTH 200 WEST  
 CEDAR CITY, UTAH 84720

AGENT AND MAILING ADDRESS - AGENCY NO: 43001  
 TRANSWESTERN GENERAL AGENCY  
 SALT LAKE CITY, UTAH

POLICY PERIOD: From 6-25-99 To 6-25-00 at 12:01 A.M. Standard Time at your mailing address shown above

Form of Business:  Individual  Partnership  Corporation  L.L.C.  Other \_\_\_\_\_

Business Description: USED CAR DEALER

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

**ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS:** This policy provides only those coverages identified by entry of a PREMIUM and by entry of the applicable COVERED "AUTO" DESIGNATION SYMBOL in the columns below (numerical symbols are defined in Section 1 of the Garage Coverage Form). Entry of a covered "auto" symbol next to Liability provides coverage for "garage operations" Page 2 of 2 of our GARAGE POLICY DECLARATIONS replaces the AUTO DEALERS SUPPLEMENTARY SCHEDULE and the NON-DEALERS AND TRAILER DEALERS SUPPLEMENTARY SCHEDULE referred to in the GARAGE COVERAGE FORM.

GARAGE COVERAGE		COVERED "AUTOS"	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS			PREMIUM
			Each "Accident" "Garage Operations"		Aggregate "Garage Operations"	
			"Auto" Only	Other Than "Auto" Only	Other Than "Auto" Only	
LIABILITY INSURANCE		22	\$ 300,000	\$ 300,000	\$ 600,000	\$ 530.
GARAGE KEEPERS INSURANCE	SPECIFIED CAUSES OF LOSS		SEE LIMITS OF INSURANCE The insured on this policy does not hold a certificate of authority to do business in Utah and thus is not fully subject to regulation by the Utah Insurance Commissioner. This policy receives no protection from any of the guaranty associations created under Chapter 28, Title 31A, Insurance Code, Utah. <b>INSURANCE PAGE 2 OF 2</b>			
	COMPREHENSIVE COVERAGE					
	COLLISION COVERAGE					
PHYSICAL DAMAGE INSURANCE	SPECIFIED CAUSES OF LOSS		SEE LIMITS OF INSURANCE The insured on this policy does not hold a certificate of authority to do business in Utah and thus is not fully subject to regulation by the Utah Insurance Commissioner. This policy receives no protection from any of the guaranty associations created under Chapter 28, Title 31A, Insurance Code, Utah. <b>INSURANCE PAGE 2 OF 2</b>			
	COMPREHENSIVE COVERAGE					
	COLLISION COVERAGE					
MEDICAL PAYMENTS COVERAGE			1,000.			\$ 50.
UNINSURED/UNDERINSURED MOTORIST		26	SEPARATELY STATED IN THE ENDORSEMENT			\$ 50.
PERSONAL INJURY PROTECTION			SEPARATELY STATED IN THE ENDORSEMENT			\$
FIRE LEGAL LIABILITY			SEPARATELY STATED IN THE ENDORSEMENT			\$
COMMERCIAL PROPERTY COVERAGE			SEPARATELY STATED IN THE COVERAGE PART DECLARATIONS			\$
SEE SCHEDULE OF FORMS AND ENDORSEMENTS CONTAINED IN THIS POLICY AT ITS INCEPTION PER FORM WHI 26-0310(12-97) ATTACHED						Total
25% MINIMUM EARNED PREMIUM/NO FLAT CANCELLATION						Policy Fee
PRODUCER: DIXIE LEAVITT <b>U0562</b>						State Tax
FILED & UNDERWRITTEN BY: TRANSWESTERN GENERAL AGENCY						STAMP FEE
						Total Advance Premium
						\$ 750.00MP
						\$ 100.00
						\$ 36.13
						\$ 2.13
						\$ 888.26

Countersignature Date 8-25-99n1

Authorized Representative Kedney Slutz

WHI 26-0305 (12/97) White - Insured Green - Company Yellow - Agent Pink - Producer Goldenrod - Memorandum

C

“UTAH UNINSURED MOTORISTS COVERAGE - PROPERTY DAMAGE” ENDORSEMENT

POLICY NUMBER: AGP 0301553

COMMERCIAL AUTO  
CA 21 62 03 99

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## UTAH UNINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Utah, this endorsement modifies insurance provided under the following:

- BUSINESS AUTO COVERAGE FORM
- GARAGE COVERAGE FORM
- MOTOR CARRIER COVERAGE FORM
- TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement Effective: 6-25-99	Countersigned By  (Authorized Representative)
Named Insured: THE AUTOMOBILE SOURCE	

### SCHEDULE

LIMIT OF INSURANCE	
\$ 65,000	Each "Accident"

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

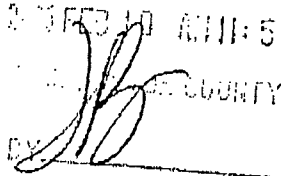
#### A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle"
2. We will pay only after all liability bonds or policies have been exhausted by judgments or payments.
3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

#### B. Who Is An Insured

1. You.
2. If you are an individual, any "family member".
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto", except your customers, if your business is shown in the Declarations as a rental company. However, if the customer of a rental company has no policy of motor vehicle insurance, they are "insured", but only up to \$65,000 for each "accident", which is the minimum combined single limit of liability specified by UTAH CODE ANN. Section 31A-22-304. This supersedes any provision to the contrary. If the auto is a temporary substitute, the covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

**D**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

CLERK  
JUDICIAL DISTRICT  
30 FEB 10 AM 11:51  
WASHINGTON COUNTY  
BY: 

TIM DALTON DUNN, #0936  
PAUL J. SIMONSON, #7987  
DUNN & DUNN, P.C.  
505 East 200 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84102  
Telephone: (801) 521-6677  
Facsimile (801) 521-9998

Attorney for General Security Indemnity  
Company of Arizona

**IN THE FIFTH JUDICIAL DISTRICT COURT**

**IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

GENERAL SECURITY INDEMNITY  
COMPANY OF ARIZONA, formerly known  
as FULCRUM INSURANCE COMPANY, an  
Arizona corporation,

Plaintiff,

vs.

SUSAN RICE TIPTON, dba THE  
AUTOMOBILE SOURCE,

Defendant.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND ORDER**

Civil No.: 030501440

Judge: Eric A. Ludlow

The above-entitled matter came on for hearing on the parties' cross-motions for summary judgment on January 3, 2005 before the Honorable Eric Ludlow. The Plaintiff General Security Indemnity Company was represented by Paul Simonson. The Defendant appeared in person and

was represented by Samuel Adams. The COURT, being fully advised, makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Plaintiff General Security Indemnity Company of Arizona, formerly known as Fulcrum Insurance Company (Fulcrum) is an insurance company doing business in the State of Utah, with its home office located in New York, New York.
2. Defendant Tipton is a resident of Washington County, State of Utah.
3. Fulcrum issued a garage insurance policy to Susan Rice Tipton, policy number GP 1030987 effective from June 25, 2001 to June 25, 2002.
4. Tipton signed an application for insurance dated 2-6-01 applying for a garage policy with uninsured motorist (UM) coverage in the amount of \$65,000.00.
5. The insurance policy issued to Tipton by Fulcrum contained the endorsement Utah Uninsured Motorists Coverage – Property Damage. This endorsement provided for \$65,000.00 in uninsured motorists coverage for property damage.
6. The insurance policy issued to Tipton by Fulcrum did not contain an endorsement indicating coverage for uninsured motorists coverage (UM) for bodily injury.
7. The policy that was issued to Tipton charged a premium specifically for the uninsured/underinsured motorist coverage in the amount of \$60.

8. On or about November 19, 2001 Defendant Tipton was driving an automobile westbound on State Road 9 near Hurricane, Utah. Another vehicle, being driven eastbound by one Thomas Fischer, crossed the center line and collided with the vehicle being driven by Tipton.

9. Mr. Fischer's automobile insurance policy had lapsed prior to the collision.

10. Defendant Tipton has made a claim for uninsured motorists coverage against Fulcrum in the amount of \$300,000 for the injuries she sustained in the accident.

#### CONCLUSIONS OF LAW

11. The Court has jurisdiction over both the parties and the subject matter in this action.

12. The Court's findings support that Fulcrum abided by the requirements in Utah Code Ann. § 31A-22-305 because the statute allows for UM coverage to be the same as the liability coverage or UM coverage to be the maximum available by the insurer under the insured's motor vehicle policy. The maximum available under Tipton's policy was \$65,000.00.

13. The Court's findings support that the Application for Garage Policy states: "I have completed and signed a state form selecting or rejecting Uninsured Motorist Coverage."

14. The parties have stated, and the Court concludes, that the insurance policy is ambiguous because of the omitted uninsured motorist bodily injury endorsement.

15. The Court concludes that Utah case law interprets insurance policies under the general rules of contract construction. *See Holmes Development, LLC v. Cook*, 48 P.3d 895 (Utah 2002).



16. The Court concludes that Utah case law allows for the admission of extrinsic evidence when a contract is ambiguous. *See Peterson v. Sunrider Corp.*, 48 P.3d 918 (Utah 2002).

17. The Court's findings support that the extrinsic evidence in this case demonstrates that the parties intended for the UM limits to be \$65,000.00.

18. The Court concludes that the UM limits for bodily injury are \$65,000.00.

19. The Court concludes that the Defendant should not receive more benefits under the policy than she did not contract for and for which she did not pay.

20. The Court concludes that the Plaintiff Fulcrum has fully paid the \$65,000.00 UM limits and fully satisfied its obligations under the policy.

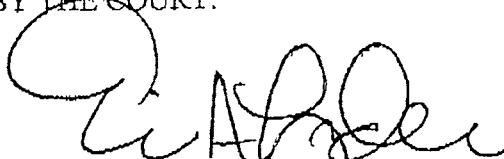
#### ORDER

With the Court having read and considered all submitted memoranda and having heard oral argument from both parties, the COURT being fully advised, HEREBY MAKES THE FOLLOWING ORDER:

21. The Court grants Plaintiff Fulcrum's Cross-Motion for Summary Judgment.
22. The Court denies Defendant Tipton's Motion for Summary Judgment.
23. Each party shall bear its own costs and attorney's fees.

Dated this 8<sup>th</sup> day of February, 2005

BY THE COURT:




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Honorable Eric A. Ludlow

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER was mailed, postage prepaid, this 12<sup>th</sup> day of January 2005 to the following:

Samuel Adams  
SIEGFRIED & JENSEN  
5664 South Green Street  
Murray, Utah 84123

  
Secretary