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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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

Donald C. Coggins, Jr., United States District Court Judge

Appellate Case No. 2022-000887

Travelers Property Casualty Company of America, ...Plaintiff,

v.

Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., ... Defendant.

OPENING BRIEF

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> If a law enforcement officer stops a motorist on a public highway, and during that traffic stop directs the motorist to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card, is the motorist an "insured" for purposes of Underinsured Motorist Coverage when he is struck by a passing vehicle on the public highway while standing at the officer's vehicle?

STATEMENT OF THE CASE

Travelers Property Casualty Company of America ("Travelers") issued a multi-state commercial auto insurance policy to Terracon Consultants, Inc. (the "Policy"). (App. pp 008-46). By endorsement, the Policy includes underinsured motorist ("UIM") coverage for covered autos principally garaged in South Carolina (the "UIM Endorsement"). (App. pp 044-46).

On December 2, 2020, Nathaniel Hawthorne, Jr. ("Mr. Hawthorne" or "Decedent") was driving a truck insured under the Policy and principally garaged in South Carolina (the "Truck"). (App. pp 3, 49). Mr. Hawthorne was stopped by a state trooper and pulled into a center-turn lane. (Id.) During the traffic stop, Mr. Hawthorne walked from the Truck to the passenger side of the Trooper's vehicle. (App. 090, Video 11:05[1]).

[1] App. p 090 incorporates by reference dashboard camera footage obtained from the Trooper that initiated the traffic stop. References to this footage are cited as "Video MM:SS".

About fifteen minutes into the traffic stop, the Trooper—who was sitting in his patrol vehicle—asked the Decedent to locate the VIN number for the trailer attached to the Truck. (Video 14:30-15:45). The Decedent then walked from the Trooper's vehicle to the trailer. (Id.) The Decedent then walked back to the passenger side of the Trooper's vehicle. (Id.) The Decedent and the Trooper discussed the registration of the trailer and other matters for about a minute and forty-five seconds. (Video 15:45-17:30). Then, Allan Zack (the "Tortfeasor") crossed a double-yellow line and hit the Trooper's vehicle head on (the "Crash"). (Video 17:30). The Decedent, who was still standing at the Trooper's vehicle when the Crash happened, was killed. (App. pp 003, 049).

The Tortfeasor's liability insurer tendered their limits of $25,000.00. (App. pp 052-053). The Decedent's Estate (the "Estate") then made a claim for UIM benefits. (App. p 053). Travelers denied the claim because the Decedent was not occupying an insured vehicle at the time of the collision. Because he was not, the Estate is not an insured under the Policy's SC UIM Endorsement.

The Estate filed suit against the Tortfeasor. (App. pp 082-089). Travelers then filed its Complaint for Declaratory Judgment in the United States District Court for the District of South Carolina. (App. pp 001-046). Travelers requested a declaratory judgment that it has no obligation to provide UIM benefits and is not otherwise liable to the Estate for damages recoverable by the Estate in connection with the Crash. (App. pp 006-007).

The Estate answered and asserted its own counterclaim for declaratory judgment. (App. pp 047-058). Between November and December 2021, the parties fully briefed competing dispositive motions. (App. pp 065-172). This briefing focused exclusively on the dispositive issue of whether the Decedent was "occupying" the Truck at the time of the Crash as that term is defined by the SC UIM Endorsement. The Estate contended that the Decedent was "occupying" the Truck and thus an insured for purposes of the Policy's UIM coverage. Travelers contended that Decedent was not "occupying" the Truck and thus was not an insured.

In January 2022, the Estate moved to certify the question now before the Court. (App. pp 174-224). In its motion, the Estate raised for the first time an argument that Travelers had to provide UIM coverage to the Estate if the Decedent was an "insured" as that term is defined by S.C. Code § 38-77-30(7). (App. pp 180-181). The Estate argued that the Decedent was a permissive user and an insured under the statute whether or not he was "occupying" the Truck. (Id.) The Federal District Court granted the Estate's motion to certify and this Court accepted the above-certified question.

Because South Carolina law does not require that optional statutory UIM coverage be provided to statutorily defined insureds, this Court should answer the certified question in the negative.

ARGUMENT

The SC UIM Endorsement defines who may receive benefits under that coverage pursuant to its definition of the term "insured." (App. p 044). That definition includes occupants of a covered auto and persons entitled to recovery because of bodily injury sustained by an occupant of a covered vehicle. (Id.) Thus, under the SC UIM Endorsement's language, the Decedent, and his Estate are only insured under the policy language if the Decedent was "occupying" the Truck at the time of the Crash. The term "occupying" is defined to mean "in, upon, getting in, on, out or off." (App. p 046).

Through discussions between counsel, the Estate has conceded that it does not intend to argue that the Decedent was "in, upon, getting in, on, out or off" of the Truck at the time of the Crash. Thus, the Decedent was not occupying the Truck and the Estate is not an insured under the language of the SC UIM Endorsement. Instead, the Estate contends that it is an insured because (1) it is insured under a statutory definition of the term "insured," and South Carolina's statutes require that the Travelers Policy provide UIM coverage to anyone within the statutory definition of the term "insured," or (2) it would be unreasonable and unconscionable to deny the Estate recovery of UIM benefits from Travelers.

Travelers concedes for purposes of this action that the Estate would be an insured for UIM coverage if the statutory definition were to apply. Thus, to answer the certified question, the Court need only resolve (1) whether the SC UIM

Endorsement is required by statute to provide UIM coverage to all statutorily defined insureds, and (2) whether Travelers must provide UIM benefits to the Estate because to deny such recovery would be unreasonable or unconscionable. The answer to both questions is "no." Thus, the certified question should be answered "no".

I. TRAVELERS IS NOT REQUIRED TO PROVIDE UIM COVERAGE TO STATUTORILY DEFINED INSUREDS BECAUSE THERE IS NO STATUTORY REQUIREMENT THAT IT DO SO.

The definitions section of the motor vehicle insurance statutes define "insured" to include "any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policies applies . . . or the personal representative of any of the above." § 38-77-30(7). This Court has at times noted the statutory definition of insured in connection with UIM coverage. But the issue presented here has never squarely come before it. *See, e.g. McAbee v. Nationwide Mut. Ins. Co.*, 249 S.C. 96, 99, 152 S.E.2d 731, 732-33 (1967) (applying policy's definition of insured and not the statutory definition to determine who was insured for UM coverage); *and Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 188-92, 174 S.E.2d 391, 393-95 (1970). Without the benefit of briefing on the subject, a majority of the Court in *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy* noted a concern about whether a definition of "insured" in a policy much like the definition here was valid given the statutory definition. 98 S.C. 604, 616-17, 730 S.E.2d 862, 868 (2012).

With the issue now before this Court, this Court should hold that auto insurance policies are not required to include UIM coverage for all "insureds" as that

term is set out in § 38-77-30(7). Thus, the definition of "insured" found in the SC UIM Endorsement controls. Because the Estate is not an insured under that definition, it is not entitled to recover UIM benefits from Travelers.

As a general rule, parties may contract as they see fit. *Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014). Insurance contracts are not an exception to this general rule. Insurers and policyholders "are generally free to contract for exclusions or limitations on coverage." *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021). Like other contracts, provisions of an insurance contract will not be enforced if they are "in contravention of public policy or some statutory inhibition." *Id.*

As for auto insurance, the source of public policy are statutes enacted by the General Assembly. *Id.* at 433 S.C. at 376, 858 S.E.2d at 635. Court's authority to decide whether an insurance policy provision violates public policy "is limited to determining whether the policy violates a statute." *Id.*

Under South Carolina's financial responsibility and motor vehicle insurance statutes, UIM coverage is optional. There is a requirement that automobile insurance carriers give the named insured the option to purchase supplemental UM and UIM coverage. *See* S.C. Code. §§ 38-77-160 (the "Optional UM/UIM Statute"), and 56-9-20(5) (defining "motor vehicle liability policy" for purposes of financial responsibility law to include only those that comply with certain statutes including the Optional UM/UIM Statute).

The Optional UM/UIM Statute expresses South Carolina's public policy that insurers must offer UIM coverage to their named insureds. The Optional UM/UIM Statute requires this offer of UIM coverage as follows:

> Automobile insurance . . . carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage. Benefits paid pursuant to this section are not subject to subrogation and assignment.

Nowhere in this statute has the General Assembly expressed any requirement that insurers provide UIM coverage to statutorily defined insureds. Because it does not, the policy's definition of "insured" controls – not the statutory definition. *See* § 56-9-20(5)(d) ("motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the [required coverage] and the excess or additional coverage shall not be subject to the provision of [the Financial Responsibility Act]").

A. <u>As This Court Recently Held in *Nationwide v. Knight*, The Optional UM/UIM Statute Does Not Prohibit the Insurer and Named Insured From Deciding Who Should Be Insured Under the Policy.</u>

The Optional UM/UIM Statute was recently addressed by this Court in *Knight*. 433 S.C. at 380-81, 858 S.E.2d at 638. There, Mrs. Knight purchased an auto policy from Nationwide. *Id.* at 373, 858 S.E.2d at 634-35. The policy included an

endorsement that voided all coverage while her husband was operating any vehicle. *Id.* Mr. Knight was killed in a motorcycle accident and his estate sought UIM benefits. *Id.*

Writing for the Court, Justice Few first addressed the applicability of § 38-77-340 (the "Named Driver Exclusion Statute"). *Id.* at 378-80, 858 S.E.2d at 636-37. The Named Driver Exclusion Statute provides that an insurer and named insured may, by endorsement, agree that "such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name." § 38-77-340.

Mr. Knight's estate argued that the Named Driver Exclusion Statute only authorized the exclusion of a named driver when they were operating a vehicle insured under the policy. *Id.* at 380, 858 S.E.2d at 637. Thus, the estate argued the exclusion of Mr. Knight was void as to his operation of any other vehicle like the motorcycle. *Id.* In the same vein, the estate argued that the Named Driver Exclusion Statute only authorized such an exclusion for liability coverage—not UIM. *Id.*

This Court answered these two arguments by deferring to the general rule that, with no statutory expression of public policy that limits such right, the parties to the contract have the right "to contract for coverage or to exclude coverage." *Id.* In other words, Nationwide and Mrs. Knight had the right to exclude coverage for Mr. Knight whether or not they were authorized by statute to do so.

Mr. Knight's estate also argued that the named driver exclusion in the policy violated the Optional UM/UIM Statute. *Id.* at 380-82, 858 S.E.2d at 638. In response, this Court reaffirmed its prior holdings that UIM coverage is not mandatory coverage. *Id.* While it must be offered, "an insured can choose whether or not to purchase it." *Id.* To take that choice away from the named insured by a narrow application of the Named Driver Exclusion Statute only to liability coverage "would be illogical." *Id.* Thus, the exclusion did not violate the Optional UM/UIM Statute.

This Court's decision is *Knight* controls the result here. *Knight* establishes that the Optional UM/UIM Statute does not preclude an insurer and policyholder from deciding that particular persons are not insureds under a policy. The Court made it clear that the result did not depend on the applicability of the Named Driver Exclusion Statute. *Id.* at 375-78, 858 S.E.2d at 635-36. Instead, whether or not the Named Driver Exclusion Statute applies, the inherent right of the parties to contract as they saw fit (absent any statutory violation) permitted the exclusion. *Id.* at 371, 380, 858 S.E.2d at 637.

Travelers and Terracon Consultants contracted for Travelers to provide UIM coverage with respect to vehicles principally garaged in South Carolina. The SC UIM Endorsement sets out the terms of this agreement. Like the insurer and policyholder in *Knight*, the parties agreed that the policy would not cover all statutory insureds. In *Knight*, they agreed on the exclusion of a particular person. Travelers and Terracon agreed on a definition of "insured" that was more limited than the statutory

definition. In both cases, the result is the same. These agreements do not violate the Optional UM/UIM Statute because that statute does not mandate UIM coverage for statutorily defined insureds. Thus, the terms of the parties' agreement must be enforced and the Estate is not entitled to recover UIM benefits from Travelers.

B. The Only Court To Consider the Precise Issue Addressed Here Agreed that the Optional UM/UIM Statute Does Not Mandate Coverage for Statutory Insureds.

The South Carolina Federal District Court has addressed the precise issue presented here under strikingly similar facts. *McWhite v. Ace Am. Ins. Co.*, Civil Action No. 4:07-cv-01551-RBH, 2010 U.S. Dist. LEXIS 25044, at *14-22 (D.S.C. Mar. 16, 2010); *aff'd on oth'r grounds*, 412 F. App'x 584 (4th Cir. 2011). There, an underinsured motorist hit the plaintiff who was putting out warning triangles behind his tractor-trailer. 2010 U.S. Dist. LEXIS at *1. He sought UIM coverage under his employer's auto policy. *Id.* at *2. That policy had a similar definition to the Traveler's SC UIM Endorsement. *Id.* at *15. The Court held that the plaintiff was not an insured under the policy language because he was not occupying an insured vehicle at the time of the collision. *Id.* at *22.

The plaintiff argued that the policy had to be reformed to provide statutorily defined insureds with UIM coverage under the Optional UM/UIM Statute because UIM coverage had not been effectively rejected. *Id.* at *17-18. Judge Harwell rejected this argument. *Id.* He held that even if the plaintiff were entitled to reformation because of an ineffective rejection of UIM coverage, the Optional UM/UIM statute

would not entitle the plaintiff to UIM coverage. *Id.* He reasoned that because "UIM is voluntary and insurers are not subject to any statutory requirements regarding who is required to be included as an insured," even if the policy were reformed to include UIM coverage it would not be reformed to incorporate the statutory definition of "insured." *Id.*

C. The Statute Cannot Be Reasonably Interpreted To Require Optional UM/UIM Coverage to Apply to All Statutorily Defined "Insureds."

Although the Optional UM/UIM Statute uses the word "insured" several times, none of these instances could be reasonably interpreted in context to conclude that the Optional UM/UIM Statute requires UIM coverage to be provided to statutorily defined insureds.

(1) The Statute Only Requires an Offer of Coverage to the Named Insureds and Not Other Statutory Insureds.

The first sentence of the Optional UM/UIM Statute relative to UIM coverage requires insurers to offer UIM coverage as follows:

> [Automobile insurance] carriers shall also offer, **at the option of the insured**, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

§ 38-77-160 (emphasis added).

A preamble to the definitions found in § 36-77-30 provides that those terms have the meanings given when used in Chapter 77 "unless the context requires

otherwise." Here, the context requires otherwise. The use of the term "insured" here must be understood to mean the named insured.

If "at the option of the insured" meant at the option of statutorily defined "insureds," it would create absurd results. It would mean that (1) resident-relatives of the policyholder, (2) permissive users, (3) guest in the policyholders' vehicles, and (4) personal representatives of any of these **would hold an option** to decide whether the policyholder's insurance policy included UIM benefits. These four categories of statutorily defined "insureds" are indeterminate. At the time a policy is issued, when the offer of coverage is required, there is no way to identify all the persons who are or may be within one or more of these categories.

Application of the statutory definition of "insured" to the use of the term here "would lead to a result so plainly absurd that it could not possibly have been intended by the General Assembly . . .." *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). Thus, the statutory definition of "insured" cannot be applied here.

Further, only the named insured or someone acting on their behalf can reject the offer of UIM. *See* § 38-77-350. In *Allstate Ins. Co. v. Estate of Hancock*, our court of appeals rejected an insurer's argument that a rejection of UIM coverage by the named insured's spouse was effective. 345 S.C. 81, 85, 545 S.E.2d 845, 847 (Ct. App. 2001). The Court commented that an interpretation of the statutes that allowed for UIM offers to be rejected by "mere insureds," rather than the named insured, would

be absurd. *Id.* at 87, 545 S.E.2d at 848. Thus, the reference to the "insured" here must refer only to the named insured and not other statutorily defined insureds.

(2) The Statute Contemplates that UIM Coverage May Cover Only the Named Insured.

The next sentence of the Optional UM/UIM Statute contemplates that a policy may provide coverage to an "insured" **or** a "named insured" as follows:

> **If, however, an insured or named insured** is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident.

§ 38-77-160 (emphasis added). The statutory definition of "insured" includes the "named insured." § 38-77-30(7). Thus, the statute reflects the General Assembly's anticipation that UIM coverage offered and selected under the Optional UM/UIM Statute may **or may not** insure persons other than the named insured subject to the agreement of the parties to the contract.

(3) Distinctions Between the Language Used for Mandatory Liability and UM Coverage Clarifies that the General Assembly Did Not Intend to Require UIM Coverage for All Statutorily Defined Insureds.

The statutory provisions governing mandatory liability and UM coverage are clear: these coverages must apply to "insureds" as that term is defined by § 37-77-30(7). Section 38-77-140(A) provides for mandatory liability coverage and says who must be an insured as follows:

> An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered

> by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used in this State, unless it contains a provision **insuring the persons defined as insured** against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada . . ..

(emphasis added). The emphasized clause above expressly provides that "persons defined as insured" have to be insureds for purposes of liability coverage. Rather than suggesting anything to the contrary, the context requires reference to the statutory definition of insured.

Section 38-77-150(A) provides for mandatory uninsured motorist (UM) coverage and likewise says who must be an insured as follows:

> No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, **undertaking to pay the insured** all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . ..

(emphasis added). Again, the emphasized clause here provides that insurers must provide mandatory UM coverage to the "insured." The term "insured" as used here is appropriately understood to reflect the statutory definition found in § 33-77-30(7). Unlike the use of that term in the Optional UM/UIM Statute, there is no reason to do otherwise.

The structure of these two provisions is the same. It first provides that insurers cannot issue subject policies unless certain conditions are met. It then lays out the conditions. The conditions in both instances are that the policy must include (1) a coverage (either liability or UM), (2) which insures statutorily defined insureds, and

(3) has certain limits. If the General Assembly intended to require that optional UM and UIM coverage apply to all statutorily defined insureds, one would expect the Optional UM/UIM Statute to follow the same structure. That might look like this:

> [Automobile insurance] carriers shall also offer, at the option of the insured, underinsured motorist coverage **[insuring the persons defined as insured *or* undertaking to pay insureds]** up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

§ 36-77-160 (alternations appearing in brackets and bold text). The Optional UM/UIM Statute does not look like that. Instead, it says that insurers (1) must offer a coverage, (2) to the insured who, as addressed above must mean the named insured, (3) in certain amounts. This Court cannot "add the words [the Legislature] omitted, nor [] interpolate them 'on conceits of symmetry of policy.'" *Kinard v. Moore*, 220 S.C. 376, 389, 68 S.E.2d 321, 325 (1951).

The General Assembly knew how to require that certain coverages apply to all statutorily defined insureds. It chose not to do so in the Optional UM/UIM Statute. Because it chose not to, there is no basis to find that the General Assembly intended to include this requirement.

D. The Insurance Statutes Reflect Legislative Public Policy to Require Coverage for Statutorily Defined Insureds Only For Mandatory Coverages While Giving Policyholders Flexibility to Decide Whom To Insure for Optional Coverages.

The goals of the mandatory liability and UM coverages are simple. They are there to protect persons injured in auto accidents up to the minimum limits. To this

end, these mandatory coverages incorporate the broad statutory definition of "insured." By setting what are relatively modest minimum limits, the General Assembly balanced the costs of auto insurance with the benefit of the protection it affords and made a choice. That choice required that statutorily defined "insureds" have liability and UM protection of $25,000 per person and $50,000 per accident for bodily injury and $25,000 per accident for property damage. *See* S.C. Code § 38-77-140.

Above that minimum coverage, the General Assembly again balanced the costs of auto insurance with the benefit of its protection and made a different choice. That choice had two parts. For liability coverage, the General Assembly decided nothing further was required. For UM and UIM coverage, the General Assembly decided that policyholders should be given flexibility and a chance to do their own cost/benefit analysis. In other words, to decide for themselves.

What § 36-77-160 is concerned with is that *policyholders*, who are the ones that will be buying and paying for the coverage, have flexibility and the option to purchase additional UM and UIM coverage to protect themselves if they want it and think it is worth the costs. The Optional UM/UIM Statute promotes this goal in several ways.

Under § 38-77-350, insurers are required to give their policyholders a brief explanation of the optional coverages. They are also required to offer the policyholders optional UM and UIM coverage "**in any amount** up to the insured's liability coverage . . .." *Bower v. Nat'l Gen. Ins. Co.*, 351 S.C. 112, 118-19, 569 S.E.2d

313, 316 (2002) (offer of coverage was ineffective where it failed to inform policyholder that he could purchase optional UM and UIM coverage in any amount up to the liability limits) (emphasis in original) (internal quotations and citations omitted); *see also Progressive Cas. Ins. Co. v. Leachman*, 362 S.C. 344, 351, 608 S.E.2d 569, 573 (2005) ("[I]nsurer must offer policyholder all of the coverage amounts the insurer is authorized to sell by the Department of Insurance.") Along with the available limits, Insurers also have to provide the range of premiums for the limits to show the policyholder what the costs would be. § 38-77-350(A)(2).

By not requiring policyholders to buy optional coverage for everyone within the broad statutory definition of "insured," the South Carolina General Assembly furthers its policy goal of providing policyholders with flexibility. *See Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 263, 626 S.E.2d 6, 12 (2005) (statute's goal is to enable the policyholder "to make an informed decision of which type and amount of coverage will best suit their needs.") The policyholders can choose whether to purchase additional UM and optional UIM. The policyholder can choose how much coverage they want. The policyholder can choose whom they want to be included as an insured under the policy.

In three of the last four legislative sessions, bills have been introduced that would require auto insurance policies to provide UIM coverage for statutorily defined "insureds" on the same footing as mandatory UM coverage. *See* H.B. 4771, 124th Sess. (S.C. 2022); S. 16, 122nd Sess. (S.C. 2017); *and* S. 871, 121st Sess. (S.C. 2015). That

the General Assembly has considered but not passed legislation that would have made UIM coverage mandatory supports the conclusion that the legislative intent of the Optional UM/UIM Statute is to provide insureds with flexibility and options. *See generally Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 433 S.C. 47, 54, 855 S.E.2d 325, 329 (Ct. App. 2021) (General Assembly's consideration of unenacted legislation that would have expanded application of State Action Statute to administrative proceedings supported the view that administrative proceedings were not types of civil actions the General Assembly intended to be within its scope).

Besides finding no support in the plain language of the statute, an interpretation of the Optional UM/UIM Statute that would require coverage for all statutory insureds takes away flexibility and choices from policyholders like Terracon. This is contrary to the public policy goals and intent of the General Assembly. For that reason, the Court should not interpret the UM/UIM Statute to include that requirement.

II. THE SC UIM ENDORSEMENT'S DEFINITION OF "INSURED" IS NOT UNREASONABLE AND UNCONSCIONABLE AND THE ROLE OF THIS COURT IS TO ENFORCE ITS PLAIN LANGUAGE.

Travelers anticipates the Estate will argue that although the Decedent is not an insured under the language of the SC UIM Endorsement, it is still an insured because to find otherwise would be "unreasonable and unconscionable." More specifically, Travelers expects that the Estate will rely on this Court's 2012 decision in *Kennedy*.

Kennedy involved an underinsured motorist who lost control of his car after an accident and careened through a parking lot, hitting a bystander. 398 S.C. at 607, 730 S.E.2d at 863. When this first accident happened, the bystander was standing in the parking lot with his hand on his employer's truck. *Id.* at 609, 730 S.E.2d at 864. The underinsured vehicle raced across the parking lot, heading towards the bystander. *Id.* at 607, 730 S.E.2d at 863. Just as the underinsured vehicle was about to hit him, the bystander tried to jump out of the way. *Id.* In this process and just before he was struck, the bystander lost his physical contact with his employer's truck. *Id.*

The bystander sought UIM coverage under an auto policy issued to his employer. *Id.* For this coverage, the term "insured" included persons "having actual physical contact with [an insured auto] while . . . upon . . . it." *Id.* at 611, 730 S.E.2d at 865. The bystander argued that he was an insured because he was "upon" his employer's truck and had physical contact with it until he jumped out of the way to avoid being struck. *Id.* The employer's insurance carrier argued that the bystander was not "upon" the employer's truck because he was not in physical contact with it when he was struck. *Id.* Thus, the question before the Court was whether the bystander met the physical contact requirement and was therefore an insured. It was a question of interpretation of the physical contact requirement.

This Court began its analysis by noting that an auto accident does not happen in an instant. *Id.* at 611-13, 730 S.E.2d at 865-66. Instead, there is an "unfolding of

events surrounding the accident." *Id.* The Court then noted the case of *McAbee* which held that a claimant pinned between the tortfeasor's vehicle and his employer's vehicle was "upon" the employer's vehicle. *Id.* (citing *McAbee v. Nationwide Mut. Ins. Co.*, 249 S.C. 96, 100, 152 S.E.2d 731, 732-33 (1967)). In *McAbee*, it was not clear whether the claimant had been in physical contact with his employer's vehicle when he was struck or if the contact occurred only after the impact. *See Kennedy*, 398 S.C. at 612 n.1, 730 S.E.2d at 865. Thus, the *Kennedy* Court reasoned, an interpretation of the definition of the "insured" must consider the "temporal continuum" of the accident. *Id.* at 611-13, 730 S.E.2d at 865-66. The temporal continuum includes "the events immediately surrounding the initial impact and the point in which that the last injury was inflicted." *Id.*

As applied to the facts in *Kennedy*, the bystander had physical contact with the insured vehicle during the temporal continuum of the accident. The claimant only lost that physical contact when he "saw the approaching danger and attempted to flee before immediately being struck . . .." *Id.* at 613, 730 S.E.2d at 866. Thus, he met the policy's physical contact requirement.

As further support for this conclusion, the Court held that it would be "unreasonable and unconscionable to interpret" the physical contact requirement "to require a party who had physical contact with a vehicle to maintain that contact under circumstances that might result in catastrophic injury." *Id.* at 616-17, 730

S.E.2d at 867-68. There are three important points about the application of the *Kennedy* Court's analysis to this case.

A. *Kennedy* is Factually Distinct from This Case.

The Decedent here was not in physical contact with the insured vehicle at anytime during the temporal continuum of the accident. When struck, he had been standing at the passenger side of the Trooper's vehicle for nearly two minutes. (Video 15:45-17:30). He had no physical contact with the insured vehicle during that whole time. (Id.) His contact with the insured vehicle ended well before the Tortfeasor's vehicle came into view. (Id.) The Tortfeasor's vehicle did not cause the Decedent to lose his contact with the insured vehicle. The Decedent did not contact the insured vehicle after the Crash. None of the circumstances that led the *Kennedy* Court to the conclusion that it would be "unreasonable and unconscionable" to enforce the provision as suggested by the insurer are present here.

B. *Kennedy's* Discussion of Reasonableness and Unconscionability Was In Service to Its Interpretation of Policy Language and *Kennedy* Does Not Support a Proposition That This Court Can Ignore the Plain Language of a Contract on This Basis Alone.

The *Kennedy* Court did not hold that it had the authority to require the insurer to pay UIM benefits because the Court thought the physical contact requirement was unreasonable and unconscionable. Instead, the Court found support for application of its "temporal continuum" analysis by its determination that to hold otherwise would lead to unreasonable and unconscionable results.

Generally, it is the duty of South Carolina courts to enforce contracts as they are written "regardless of its wisdom or folly." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 25, 850 S.E.2d 1, 13 (2020). Even insurers "have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *Knight*, 433 S.C. at 375-78, 858 S.E.2d at 635-36 (internal citations and quotations omitted). With respect to insurance contracts, the applicable statutes are the only relevant source of public policy. *Id.* For the reasons stated in Section I. above, the SC UIM Endorsement's definition of "insured" does not violate any applicable statute.

It is true that Courts can refuse to enforce a contract on grounds of unconscionability. Yet they can only do so where (1) there is an "absence of meaningful choice on the part of one-party" and (2) there are "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013). To support a finding of absence of meaningful choice, "the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Id.* at 145, 739 S.E.2d at 884-85.

According to its website, the named insured here, Terracon Consultants is a nationwide engineering firm with more than 5,000 employees in more than 175

locations. *See* https://www.terracon.com/about/ (last visited October 31, 2022). There is no evidence on the record here that would support a finding that there was an "extreme inequality of bargaining power." Further, the definition of "insured" is simply a reasonable choice about who will and who will not be entitled to recover UIM benefits under the SC UIM Endorsement. A broader definition of "insured" would increase the risk assumed by the insurer, thereby increasing the cost of that insurance. A more narrow definition lessens the risk assumed by the insurer, thereby lessening the cost for the consumer. The decision here of where to draw that line cannot be said to be "so oppressive that no reasonable person would make them and no fair and honest person would accept them."

C. Unlike the Claimant in *Kennedy*, the Estate Does Not and Could Not Reasonably Argue that the Decedent was Occupying an Insured Vehicle At the Time of the Collision.

The claimant in *Kennedy* argued that he was "occupying" his employer's vehicle when he was injured and was thus an insured for UIM coverage under his employer's policy. 398 S.C. at 611, 730 S.E.2d at 865. The Court interpreted the applicable policy provisions and agreed.

Here, there can be no reasonable dispute that the Decedent was not "occupying" his employer's vehicle. The policy defines "occupying" to mean "in, upon, getting in, on, out or off." (App. p 046). The decedent was not in the insured vehicle because he was standing on the roadway next to the Trooper's vehicle when he was struck. (Video 15:45-17:30). Neither was he "getting in, on, out or off" of the insured

vehicle because, again, he was standing next to the Trooper's vehicle having a conversation. *Id.* In proceedings before the District Court, the Estate conceded that he was not "upon" the insured vehicle. (App. p 144). In discussions between counsel, the Estate has further conceded that it does not intend to argue that the Decedent was either "in, upon, getting in, on out or off" the insured vehicle. Thus, unlike in *Kennedy*, there is no dispute here about how the policy language at issue applies to determine whether the Decedent is an insured for UIM coverage under the SC UIM Endorsement. Under the policy language, he was not "occupying" an insured vehicle. Thus, he is not an insured.

The *Kennedy* Court did not and could not have ignored the policy language before it on the sole basis that it found this language "unreasonable and unconscionable." Instead, its analysis was an interpretation of the policy language. It agreed with the claimant's proffered interpretation. So it found that the claimant was an insured under the policy. Here, there is not and could not be any reasonable dispute about the application of the plain language of the policy. This Court should enforce that plain language of the contract between Travelers and Terracon Consultants, Inc. and hold that the Estate is not an insured for UIM coverage under the SC UIM Endorsement.

CONCLUSION

South Carolina law does not require insurers to provide optional UIM coverage to all statutorily defined "insureds." Because there is no such requirement, the applicable policy language determines who is an insured. As the Estate concedes, under that policy language, a motorist like the Decedent who has gotten out of and walked away from his motor vehicle during a traffic stop is not an insured. For these reasons, this Court should answer the certified question, "No."

Respectfully Submitted,

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