

**RECEIVED**

**Jan 20 2023**

**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.

---

REPLY BRIEF

---

Joseph W. Fulton  
SC Bar #104053  
Lee M. Thomas  
SC Bar #103034  
Martineau King PLLC  
PO Box 12151  
Rock Hill, SC 29731  
Attorneys for Plaintiff

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

REPLY ARGUMENT..... 1

I. THE UIM ENDORSEMENT DOES NOT VIOLATE ANY STATUTORY REQUIREMENT AND THE SCOPE OF TRAVELERS’ UIM OBLIGATION MUST BE DETERMINED ACCORDING TO THE TERMS OF THE UIM ENDORSEMENT. .... 1

    A. The Definitional Section of the Act Does Not By Itself Create Any Insurance Coverage Requirement. .... 2

    B. The Act Does Not Include a Requirement and Thus Does Not Express a Public Policy Requiring Insurers to Use the Same Definition of “Insured” for UIM Coverage and Liability Coverage. .... 5

    C. Even if the Legislature Has Limited the Rights of the Parties to Exclude A Designated Natural Personal From the Statutory Definition of “Insured,” It Does Not Change the Analysis Here Because the Act Does Not Require Insures to Provide Or Policyholders to Purchase UIM Coverage for All Statutorily Defined Insureds. .... 8

    D. The Illinois Court of Appeals Decision in *DeSaga* Was Based on Illinois Statutes That are Materially Distinguishable and Is Inconsistent With South Carolina’s Principles of Statutory Interpretation..... 10

    E. The General Assembly’s Choice to Specify That Mandatory Liability and UM Coverage Must Be Provided to Statutorily Defined Insureds But Not For UIM Coverage Is Not a Minor Drafting Inconsistency..... 13

II. ABSENT A STATUTORY VIOLATION, THE PLAIN LANGUAGE OF THE UIM ENDORSEMENT MUST BE APPLIED AS WRITTEN AND THE COURT SHOULD DECLINE TO CREATE NEW PUBLIC POLICY TO CHANGE THE RESULT. .... 15

    A. The *Kennedy* Decision Does Not Support the Proposition that this Court Can Refuse to Enforce the Unambiguous Plain Language of an Insurance Policy on the Sole Basis that the

Court Finds that Language to Be Unreasonable or Unconscionable. ....	16
B. Even if this Court Could Refuse to Enforce the Terms of the UIM Endorsement on Public Policy Grounds, the Theory that the Definition of Insured in the UIM Endorsement Would Induce a Person to Disobey a Law Enforcement Officer is Far Too Specious to Support Any Public Policy This Court Should Endorse.....	17
C. That this Case is Before the Court on a Certified Question Does Not Remove Those Restraints on the Judiciary That It Has Consistently Expounded in Cases Involving Insurance Contract Interpretation. ....	20
D. The Estate Concedes that the Decedent Was Not “Occupying” the Truck as that Term is Defined by the UIM Endorsement. Because the Term Must be Understood According to its Definition, the Estate Cannot Be An Insured Entitled to UIM Benefits.....	21
CONCLUSION.....	24

## TABLE OF AUTHORITIES

### CASES

<i>Allied Mut. Ins. Co. v. W. Nat'l Mut. Ins. Co.</i> , 552 N.W.2d 561 (Minn. 1996) .....	23
<i>Auto Owners Inc. Co. v. Rollison</i> , 378 S.C. 600, 663 S.E.2d 484 (2008) .....	3
<i>Auto-Owners Ins. Co. v. Above All Roofing, LLC</i> , 924 So. 2d 842 (Fla. Dist. Ct. App. 2006) .....	19
<i>B.L.G. Enters. v. First Fin. Ins. Co.</i> , 334 S.C. 529, 514 S.E.2d 327 (1999).....	21
<i>Bell v. Progressive Direct Ins. Co.</i> , 407 S.C. 565, 757 S.E.2d 399 (2014).....	19
<i>Brown v. Drake</i> , 275 S.C. 299, 270 S.E.2d 130 (1980).....	18
<i>Burgess v. Nationwide Mut. Ins. Co.</i> , 373 S.C. 37, 644 S.E.2d 40 (2007) .....	7, 8
<i>C.A.N. Enters., Inc. v. S.C. Health &amp; Human Servs. Fin. Com.</i> , 296 S.C. 373, 373 S.E.2d 584 (1988) .....	16, 21
<i>Carter v. Std. Fire Ins. Co.</i> , 406 S.C. 609, 753 S.E.2d 515 (2013).....	6, 7, 8
<i>Chavez v. Ariz. Sch. Risk Retention Tr., Inc.</i> , 227 Ariz. 327, 258 P.3d 145, (Ct. App. 2011) .....	4, 5
<i>Connelly v. Main St. Am. Grp.</i> , No. 28130, 2023 S.C. LEXIS 7 (Jan. 11, 2023) .....	12, 13, 20
<i>Cuevas v. State Farm Mut. Auto. Ins. Co.</i> , 2001-NMCA-038, 130 N.M. 539, 28 P.3d 527 (Ct. App. 2001).....	22
<i>Damico v. Lennar Carolinas, LLC</i> , 879 S.E.2d 746 (S.C. 2022) .....	17
<i>DeSaga v. W. Bend Mut. Ins. Co.</i> , 910 N.E.2d 159 (2009).....	10
<i>Gen. Accident Ins. Co. v. Olivier</i> , 574 A.2d 1240 (R.I. 1990).....	22
<i>Grier v. AMISUB of S.C., Inc.</i> , 397 S.C. 532, 725 S.E.2d 693 (2012) .....	12
<i>Ky. Farm Bureau Mut. Ins. Co. v. McKinney</i> , 831 S.W.2d 164 (Ky. 1992) .....	22
<i>Magee v. O'Neill</i> , 19 S.C. 170 (1883).....	18
<i>Nationwide Ins. Co. of Am. v. Knight</i> , 433 S.C. 371, 858 S.E.2d 633 (2021).....	2, 9, 15

<i>Nationwide Mut. Fire Ins. Co. v. Walls</i> , 433 S.C. 206, 858 S.E.2d 150 (2021).....	4, 14
<i>Rau v. Liberty Mut. Inc. Co.</i> , 21 Wash. App. 326, 585 P.2d 157 (1978).....	22
<i>Reeves v. S.C. Mun. Ins. &amp; Risk Fin. Fund</i> , 434 S.C. 18, 862 S.E.2d 248 (2021).....	16, 21
<i>Roden v. Gen. Cas. Co.</i> , 2003 S.D. 130, 671 N.W.2d 622 (2003) .....	22
<i>Schulmeyer v. State Farm Fire &amp; Cas. Co.</i> , 353 S.C. 491, 579 S.E.2d 132 (2003).....	23
<i>Schultz v. Ill. Farmers Ins. Co.</i> , 901 N.E.2d 957 (2009).....	10
<i>Shaw v. Psychomedics Corp.</i> , 426 S.C. 194, 826 S.E.2d 281 (2019).....	20
<i>Sullivan Mgmt. v. Fireman's Fund Ins. Co.</i> , 879 S.E.2d 742 (S.C. 2022) .....	20
<i>Swarner v. Mut. Benefit Grp.</i> , 2013 PA Super 198, 72 A.3d 641 (Superior Ct. 2013).....	23
<i>Tata v. Nichols</i> , 848 S.W.2d 649 (Tenn. 1993).....	22
<i>Weeks v. New York Life Ins. Co.</i> , 128 S.C. 223, 122 S.E. 586 (1924).....	17, 18
<i>Williams v. Gov't Empl'es. Ins. Co.</i> , 409 S.C. 586, 762 S.E.2d 705 (2014) .....	14

**STATUTES**

215 Ill. Comp. Stat. § 5/143A-2 .....	10
S.C. Code § 38-77-140 .....	9, 11, 12
S.C. Code § 38-77-142 .....	4, 14
S.C. Code § 38-77-150 .....	3, 9
S.C. Code § 38-77-160 .....	7, 11, 12
S.C. Code § 38-77-340 .....	9
S.C. Code. § 38-77-30 .....	2, 3

## REPLY ARGUMENT

To be an insured under the SC UIM Endorsement on the insurance policy issued by Travelers to Terracon Consultants, Inc. (the “UIM Endorsement”), the Estate’s decedent (the “Decedent”) must have been “in, upon, getting in, on, out or off” of Terracon’s insured vehicle (the “Truck”). He was not. This requirement does not violate any applicable statute and must be enforced according to its plain language. Thus, Travelers has no obligation to provide underinsured motorist (“UIM”) benefits to the Estate and this Court should answer the certified question “No.”

In its Response Brief, the Estate asks this Court to read beyond the language of the Financial Responsibility Act (the “Act”) in order to impose on insurers a statutory obligation that does not exist. This Court cannot and should not take that step. The Estate further asks this Court to create a new public policy and go beyond the plain language of the UIM Endorsement despite conceding that there is no ambiguity in the relevant language. This also the Court cannot and should not do.

**I. THE UIM ENDORSEMENT DOES NOT VIOLATE ANY STATUTORY REQUIREMENT AND THE SCOPE OF TRAVELERS’ UIM OBLIGATION MUST BE DETERMINED ACCORDING TO THE TERMS OF THE UIM ENDORSEMENT.**

To avoid enforcement of the plain language of the UIM Endorsement’s definition of “insured,” the Estate must show that the definition violates a statute. *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375-76, 858 S.E.2d 633, 635

(2021). If it does not, courts must apply the plain language of the definition. *Id.* Here, no statute requires UIM coverage to be provided to all statutorily defined insureds. Because there is not, this Court must reject the Estate’s invitation to create one, enforce the contract as the parties have made it, and apply the plain language of the UIM Endorsement’s definition of “insured.” Under that definition, the Estate is not an insured. Thus, Travelers has no obligation to provide UIM benefits to the Estate.

A. The Definitional Section of the Act Does Not By Itself Create Any Insurance Coverage Requirement.

The statutory definition of “insured” is found in a separate definitional provision of the Act. S.C. Code. § 38-77-30 (the “Definitions Section”). This section begins, “As used in this chapter, unless the context requires otherwise . . .” and then lists defined terms including “insured.” *Id.* Nowhere in this section is there a requirement that insurance policies use this section’s definition of “insured.” Thus, using a different definition of “insured” cannot violate the Definitions Section. There is no such requirement in this section.

That is not to say that the statutes have no requirement that insurance policies cover statutorily defined insureds for certain coverages. For mandatory liability and UM coverage, the General Assembly has seen fit to require that those coverages apply to persons within the statutory definition of “insured.” The provision requiring liability coverage states that the coverage must insure “the persons defined as insured [.]” S.C. Code § 38-77-140(A). The provision requiring UM coverage states

that the coverage must “pay the insured.” In both cases, the statute uses the statutorily defined term “insured” to say who must be insured by that coverage.

That is not the case with § 38-77-160 (the “Optional UM/UIM Statute”). This statute says that UIM coverage must be offered, “at the option of the insured,” but nowhere does it say who must be insured by that coverage. For the reasons stated in Section I.(C.) of Travelers’ Opening Brief, the Optional UM/UIM Statute cannot reasonably be understood otherwise.

The Estate cites a footnote in *Auto Owners Inc. Co. v. Rollison* for the proposition that the statutory definition of “insured” controls over a conflicting definition in the policy. (Response Br. p 8). As addressed above and in Travelers’ Opening Brief, this is not a correct statement of the law. *Rollison* considered whether UM, not UIM, coverage applied. 378 S.C. 600, 606, 663 S.E.2d 484, 486-87 (2008). The Court determined that the applicable UM statute required insurers to provide coverage to statutorily defined “insureds.” *Id.* at 613 n.5, 663 S.E.2d at 490. That said, the Definitions Section is not what produces this result. Instead, it is the UM Statute.

The UM Statute requires that coverage be provided to statutorily defined insureds. *See* S.C. Code § 38-77-150(A) (requiring UM coverage “undertaking to pay the insured”); and S.C. Code § 38-77-30 (defining certain terms “as used in this chapter, unless the context requires otherwise”). Thus, the statutory definition applies. This is not the case with UIM coverage because the Optional UM/UIM

Statute does not say that UIM coverage has to be provided to “insureds.” For this reason, *Rollison* does not control or inform the outcome here.

Next, the Estate cites a footnote in *Kennedy* and a “hornbook principle” to support the same proposition. (Response Br. pp 9-10). As the Estate acknowledges, whether the statutory definition applied was not before the *Kennedy* Court. (Response Br. p 9). The language cited by the Estate was made without the benefit of briefing on the issue. The Estate then references a “hornbook principle” requiring policies to use the statutory definition without citing to any hornbook or any other source. The undersigned it not aware of any such principle.

It is true that courts will reform insurance policies that violate a statutory requirement to comply with that requirement. *See, e.g. Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 214-15, 858 S.E.2d 150, 154-55 (2021) (invalidating step-down exclusion that violated the requirements of § 38-77-142(C)). It is not true that insurers must use statutory definitions in their policies simply because they are defined in the statute. There must be some provision that requires insurers to use that definition. As for the Optional UM/UIM Statute, there is no such requirement.

The *Chavez* decision from the Arizona Court of Appeals noted in *Kennedy* and cited by the Estate construed an Arizona statute that is readily distinguishable from South Carolina’s statute. The Arizona UIM statutes required that UIM coverage be offered to “all persons insured under the policy.” *Chavez v. Ariz. Sch. Risk Retention Tr., Inc.*, 227 Ariz. 327, 328-29, 258 P.3d 145, 146-47 (Ct. App. 2011). Another

statutory provision required the policy to insure “persons using the motor vehicle . . . with the express or implied permission of the named insured[.]” *Id.* In other words, it required the policy to cover permissive users. Thus, the policy’s more narrow definition of “insured” for purposes of UIM coverage violated an applicable statutory requirement and the Court required that the insurer provide coverage to permissive users.

Unlike Arizona’s UIM statute, the SC Optional UM/UIM Statute does not require that UIM coverage insure “all persons insured under the policy” or indeed any particular person or group. That the Arizona’s statute did have such a requirement was the basis for the *Chavez* Court’s conclusion. Its analysis is, therefore, not applicable here.

B. The Act Does Not Include a Requirement and Thus Does Not Express a Public Policy Requiring Insurers to Use the Same Definition of “Insured” for UIM Coverage and Liability Coverage.

The Optional UM/UIM Statute does not require that any particular group of persons be insured for UIM. Neither does it require insurers to extend UIM coverage to persons covered by the policy’s liability coverage. These requirements simply do not exist in the statute.

Yet the Estate insists that the Act expresses a public policy prohibiting defining “insured” differently for UIM coverage than other coverages under the policy. To support this argument it cites this Court’s decision in *Carter v. Std. Fire Ins. Co.* However, *Carter* does not address this issue in any way. In fact, the claimant in *Carter*

was within the policy's definition of "insured" as a resident relative of the named insured. 406 S.C. 609, 612, 753 S.E.2d 515, 516 (2013).

Instead, *Carter* is an example of what happens when a policy provision DOES conflict with a statutory requirement. In *Carter*, a UIM claimant was injured in a wreck while he was a passenger in a Dodge Charger he owned with his Mother. *Id.* at 611-13, 753 S.E.2d at 516-17. The Charger was insured by Allstate. *Id.* The UIM claimant was also an insured under a separate policy issued to his parents by Standard Fire. *Id.* After Allstate paid UIM benefits under their policy, the UIM claimant sought benefits from his parents' policy. *Id.*

Standard Fire denied coverage claiming applicability of an "owned-vehicle" exclusion. *Id.* This exclusion precluded UIM coverage for a person injured in a vehicle owned by the named insured or a family member of the named insured but not insured by Standard Fire. *Id.* The UIM Claimant argued that this exclusion violated the Optional UM/UIM Statute's requirement that he be permitted to stack the UIM coverage under his parent's policy with his own UIM coverage from Allstate. *Id.*

This Court agreed. The basis for its decision was that the Optional UM/UIM Statute required that once someone was an insured for UIM coverage, the UIM insurer had to provide coverage up to the amount of coverage the insured had on the vehicle involved in the accident. *Id.* at 616, 753 S.E.2d at 518. The UIM claimant had UIM coverage on the Charger. *Id.* at 611-13, 753 S.E.2d at 516-17. He was an insured under the Standard Fire policy issued to his parents. *Id.* Thus, Standard Fire had to

provide UIM coverage which the claimant could stack on top of the coverage on his Charger.

*Carter* applies the correct rule. Insurance policies are subject to the statutory requirements imposed on them. The Optional UM/UIM Statute includes a stacking provision that provides:

**If, however, an insured or named insured is protected by . . . underinsured motorist coverage . . . , 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.**

S.C. Code § 38-77-160 (emphasis added). This stacking provision imposes a coverage requirement. There is a condition on this required coverage. The condition is that the insured or named insured must be protected by UIM coverage in the first place. In other words, once someone is an insured for UIM coverage, the insured must be allowed to stack that coverage as long as there was UIM coverage on the vehicle involved in the accident. The owned-vehicle exclusion at issue in *Carter* violated this requirement and that is why the Court refused to enforce the exclusion. 406 S.C. at 616, 753 S.E.2d at 518.

The *Carter* decision made its holding clear by contrasting its result with the result in a similar case decided several years before. *Carter*, 406 S.C. at 618-22, 753 S.E.2d at 519-22 (citing *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 39-43, 644 S.E.2d 40, 41-43 (2007)). *Burgess* also involved an owned-vehicle exclusion to UIM coverage. 373 S.C. at 39-40, 644 S.E.2d at 41-42. The claimant argued that the

exclusion was invalid because it violated the Optional UM/UIM Statute. *Id.* This Court held that the exclusion did not violate the statute. *Id.* at 41-42, 644 S.E.2d at 43. As a result, the exclusion was enforceable. *Carter* explained that its decision not to enforce the exclusion was consistent with *Burgess* because *Burgess* did not involve stacking. 406 S.C. 609, 621, 753 S.E.2d 515, 521. Because it did not involve stacking, the Optional UM/UIM Statute’s stacking requirement did not apply. *Id.* Thus, the decision in *Carter* did not rest on any prohibition against the insurer limiting who was insured for UIM coverage. It was based on the Court’s determination that once someone was an insured for UIM coverage as defined by the policy, the Optional UM/UIM Statute prohibited an exclusion that would preclude the claimant’s ability to stack that coverage over other available UIM coverage.

Travelers’ argument is not just that the parties to an insurance contract can choose for themselves who is insured for UIM coverage because UIM coverage is optional. It is that the parties can choose for themselves who is insured for UIM coverage because there is no statutory requirement for who must be insured.

C. Even if the Legislature Has Limited the Rights of the Parties to Exclude A Designated Natural Personal From the Statutory Definition of “Insured,” It Does Not Change the Analysis Here Because the Act Does Not Require Insures to Provide Or Policyholders to Purchase UIM Coverage for All Statutorily Defined Insureds.

As this Court recently reiterated in *Knight*, “the power to exclude coverage in an insurance policy derives not from any statute, but from the right all parties have to contract for or to exclude coverage.” *Knight*, 433 S.C. at 380, 858 S.E.2d at 637.

Despite this principle, the Estate argues that deviation from the statutory definition of “insured” for purposes of Optional UM/UIM Statute can only happen pursuant to S.C. Code § 38-77-340 (the “Named Driver Exclusion Statute”). (Response Br. pp 15-17).

This argument assumes that UIM coverage is required for statutorily defined insureds. The Named Driver Exclusion Statute authorizes insurers and policyholders to agree to exclude a particular named person from the definition of “insured.” S.C. Code § 38-77-340. For purposes of mandatory liability and UM coverage, this provision has significant consequences. By their respective statutes, those coverages must be provided to statutorily defined “insureds.” *See* S.C. Code §§ 38-77-140 & 38-77-150. It has no consequences for UIM coverage. That is because there is no requirement that UIM coverage be provided to statutorily defined insureds.

The second problem with the Estate’s argument is that it assumes that changing the scope of who is insured for UIM coverage requires statutory authorization. It does not. The claimant in *Knight* argued that a named driver exclusion could not be enforced as to UIM benefits because the Named Driver Exclusion Statute did not apply to UIM coverage. 433 S.C. at 380, 858 S.E.2d at 637. This Court answered that argument by saying it did not matter whether the named driver exclusion statute applied to UIM coverage. *Id.* Regardless of whether it applied, there was no statutory prohibition on excluding a particular person from UIM coverage. *Id.* As expressed in *Knight*, it does not matter whether the Named

Driver Exclusion Statute authorizes a policy to limit the applicability of UIM coverage to persons who are “on, upon, getting in, on or off” of an insured vehicle. What matters is whether there is a prohibition against that limitation. There is no such prohibition. Thus, the policy language must be applied as written.

D. The Illinois Court of Appeals Decision in *DeSaga* Was Based on Illinois Statutes That are Materially Distinguishable and Is Inconsistent With South Carolina’s Principles of Statutory Interpretation.

The Estate tries to analogize *DeSaga*, a decision from the Illinois Third District Court of Appeals, to support its argument that an insurance policy must define “insured” the same for UIM coverage as it does for liability coverage. (Response Br. p 18-19). The Illinois financial responsibility statutes require UM coverage to be offered “in an amount equal to” the liability coverage. 215 Ill. Comp. Stat. § 5/143A-2(1). The UIM coverage, in turn, must be provided “in an amount equal to” the UM coverage. § 5/143A-2(4).

*DeSaga* relied on another decision of the Illinois Court of Appeals which held that “in an amount equal to” meant that liability, UM, and UIM coverages had to be equal in their scope of coverage. *DeSaga v. W. Bend Mut. Ins. Co.*, 910 N.E.2d 159, 166-67 (Ill. Ct. App. 2009) (citing *Schultz v. Ill. Farmers Ins. Co.*, 901 N.E.2d 957, 962-63 (Ill. Ct. App. 2009)). Thus, once a policy defines who is insured for liability coverage, UM and UIM coverage available under that policy must apply to those same insureds. *Schultz*, 901 N.E.2d at 963.

The Illinois statutes are different from the South Carolina statutes. Rather than require UIM coverage “in an amount equal to” the UM coverage, the South Carolina statute requires *optional* UIM coverage to be *offered* “up to the limits of the insured liability coverage.” S.C. Code § 38-77-160. The phrase “up to the limits of” is more specific than “in an amount equal to.” The limits of an insurance policy are well understood to mean the maximum amount of an insurer’s obligation for a particular coverage. The limits are independent of the scope of coverage offered which is defined by other terms, conditions, and exclusions. This can be seen in the structure of S.C. Code § 38-77-140 which first sets out the scope of the required coverage and then provides that the coverage is subject to the specified “limits”:

**(A) 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, **subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows:****

- (1) twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person;**
- (2) fifty thousand dollars because of bodily injury to two or more persons in any one accident; and**
- (3) twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.**

(Emphasis added). When S.C. Code § 38-77-160 references the “limits of the insured liability coverage” is it referencing the dollar value of the limitations on an insurer’s

coverage obligation just as that term is used in the bolded language above in Section 38-77-140. For these reasons, the phrase “up to the limits of the insured liability coverage” cannot reasonably be understood to require anything other than an offer of UIM coverage with limits equal to the liability limits. It cannot be understood to mean that anything about the scope of coverage must be the same as the scope of liability coverage. Thus, even if this Court might agree with the *DeSaga* Court’s analysis, that analysis does not create the same result here.

Besides the distinction in the statutory language, the *DeSaga* decision’s analysis conflicts with South Carolina’s principles of statutory interpretation. The Court looks first to the plain language of the statute. The “words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Connelly v. Main St. Am. Grp.*, No. 28130, 2023 S.C. LEXIS 7, at \*9 (Jan. 11, 2023). The Court only looks beyond the plain language “when applying the words literally leads to a result *so patently absurd* that the General Assembly could not have intended it[.]” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (emphasis added).

The plain language of the Optional UM/UIM Statute is clear. UIM coverage must be offered “up to the **limits** of the insured liability coverage.” S.C. Code § 36-77-160 (emphasis added). Nothing in this statute says anything about who UIM coverage must insure if it is purchased. There is nothing patently absurd about an application of the Optional UM/UIM Statute that allows the insurer and named insured to decide

who will be insured for that coverage. Thus, the Court should apply the plain language of the UIM Endorsement and should not apply the holding from *DeSaga* to this case.

E. The General Assembly’s Choice to Specify That Mandatory Liability and UM Coverage Must Be Provided to Statutorily Defined Insureds But Not For UIM Coverage Is Not a Minor Drafting Inconsistency.

As discussed above and in Travelers’ Opening Brief, there is no statutory requirement that UIM coverage be extended to statutorily defined “insureds.” The plain language of the statutes support this position. Further support is found in the distinction between the structure of the mandatory liability and UM provisions—which specify that statutorily defined insureds must be covered—and the Optional UM/UIM Statute—which does not. (*See* Opening Br. pp 12-15).

This is no minor drafting inconsistency. In this Court’s very recent decision in *Connelly v. Main St. Am. Group*, it noted that the General Assembly’s choice to include a provision in one statute but not in a related statute is significant to show that a different result was intended. No. 28130, 2023 S.C. LEXIS 7, at \*22 (Jan. 11, 2023). The difference between these two statutes is significant. It signifies the intent of the General Assembly to permit the policyholder and insurer to agree among themselves who would be insured for UIM coverage.

The Estate cites this Court’s decisions in *Williams* and *Walls* to try to discount the effect of this distinction between the mandatory liability and UM statutes and the Optional UM/UIM Statute. (Response pp 21-22). Both cases invalidated step-

down exclusions that would reduce the applicable limit of liability to minimum limits if the exclusion applied. *See Walls*, 433 S.C. at 214, 858 S.E.2d at 154; *and Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 608, 762 S.E.2d 705, 717 (2014). Both cases relied on S.C. Code § 38-77-142. *Walls*, 433 S.C. at 212-14, 858 S.E.2d at 153-54; *Williams*, 409 S.C. at 603-04, 762 S.E.2d at 714-15. As understood by a majority of the Court in those cases, that statute prohibits insurers from reducing the limits of liability for a covered claim below what would otherwise apply. *Id.* Because of that statutory prohibition, the step-down exclusions were not enforceable.

Thus, like this Court's decision in *Carter* (*See Section (I.) (B.) supra*), *Williams* and *Walls* applied the correct rule: Where an insurance policy violates a statutory requirement, that policy will be amended to comply with the statute. These decisions do not, as the Estate contends, reflect a determination by this Court that the statutory definition of insured must be applied without regard to whether the General Assembly has enacted such a requirement through an applicable statute.

Because the Optional UM/UIM Statute does not require that UIM coverage apply to all statutorily defined insureds, insurers, and policyholders are provided the flexibility to decide for themselves. This flexibility serves a clear public policy goal—to balance the costs of mandatory insurance with the desire to protect victims of motor vehicle accidents. Whether the appropriate balance has been struck is, as the Estate says, a political argument and not a legal one. (Response Br. p 17). Because it is a

political argument, what weight to give to each of those considerations is a decision for the General Assembly – not this Court.

**II. ABSENT A STATUTORY VIOLATION, THE PLAIN LANGUAGE OF THE UIM ENDORSEMENT MUST BE APPLIED AS WRITTEN AND THE COURT SHOULD DECLINE TO CREATE NEW PUBLIC POLICY TO CHANGE THE RESULT.**

As recently reaffirmed by this Court in *Knight*, the authority of this Court to refused to enforce policy provisions on the grounds of public policy are expressly limited to a determination of whether that provision violates an applicable statute. 433 S.C. at 376, 858 S.E.2d at 635. For the reasons discussed above and in Travelers’ Opening Brief, the policy provision at issue here does not violate any applicable statute. Because it does not, it necessarily follows that the insurance policy provision does not violate any applicable public policy. Because it does not, this Court must apply the plain language of the UIM Endorsement.

The Estate has conceded that the Decedent was not “in, upon, getting in, on, out or off” of the Truck. (Response Br. 31). Travelers agrees with the Estate that “[t]his concession merely states the obvious[.]” (*Id.*) Still, the Estate argues that this Court should ignore the UIM Endorsement’s definition of the term “occupying” to find that the Decedent was occupying the Truck.

This the Court cannot do. When a term is defined in a contract and that definition is free from ambiguity, courts must construe the defined term according to its definition. See *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 24, 862

S.E.2d 248, 251 (2021); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Com.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). Here, as the Estate concedes, it is obvious that the Decedent was not “in, upon, getting in, on, out or off” of the Truck at the time of the crash. Thus, there is no ambiguity and this Court is bound to apply the UIM Endorsement’s definition of “occupying” to find that the Decedent was not occupying the Truck. Because he was not, the Estate is not entitled to recover UIM benefits from Travelers.

A. The *Kennedy* Decision Does Not Support the Proposition that this Court Can Refuse to Enforce the Unambiguous Plain Language of an Insurance Policy on the Sole Basis that the Court Finds that Language to Be Unreasonable or Unconscionable.

Let there be no mistake. The Decedent’s death was tragic. That the at-fault driver carried only the minimum liability coverage the General Assembly has found fit to require can only make it more so. However, for the reasons stated in Section II. of Travelers’ Opening Brief, this Court’s *Kennedy* decision did not abandon long standing principles of contract interpretation or the principles applied to determine whether to refuse to enforce a contract provision for unconscionability. Under those principles, the UIM Endorsement must be enforced as written.

The Estate also cites to *Damico v. Lennar Carolinas, LLC* for the proposition that a Court can refuse to enforce a provision it finds unconscionable without also finding that there was an absence of meaningful choice. (Response Br. pp 29-30). *Damico* held no such thing. Four paragraphs below the language quoted by the Estate in its brief, the *Damico* court acknowledged, “unconscionability requires a finding of

a lack of meaningful choice *coupled with* unreasonably oppressive terms.” 879 S.E.2d 746, 756 (S.C. 2022) (emphasis in original). The undersigned is aware of no decision where this Court has found a provision in a contract unenforceable solely because the provision was unreasonably oppressive without also finding a lack of meaningful choice. The Estate has not argued that there was a lack of meaningful choice.

B. Even if this Court Could Refuse to Enforce the Terms of the UIM Endorsement on Public Policy Grounds, the Theory that the Definition of Insured in the UIM Endorsement Would Induce a Person to Disobey a Law Enforcement Officer is Far Too Specious to Support Any Public Policy This Court Should Endorse.

In *Weeks v. New York Life Ins. Co.*, this Court considered whether a life insurance carrier had to pay benefits even though the death of the life assured occurred by execution after his conviction for murder. 128 S.C. 223, 225, 122 S.E. 586, 587 (1924). The insurer argued that the Court should do so because otherwise the contract tended to promote crime and therefore violated public policy. *Id.*

In considering this question, the Court was rightfully skeptical that the presence of such an exclusion would diminish the volume of crime. *Id.* at 231, 122 S.E. 586, 588-89. The Court stated that the notion “would seem clearly to trench upon the fanciful and speculative.” *Id.* The Court then quoted the Illinois Supreme Court when considering the same issues and finding that “[t]his contention seems to border closely on the absurd.” *Id.*

The notion espoused by the Estate that persons occupying insured vehicles may be induced to disobey law enforcement to maintain their UIM coverage is just as

absurd. It assumes that a person directed to get out of their car would consider the effect of compliance on their insurance coverage. It also assumes that upon that consideration, a reasonable person would choose to disobey the officer. These suggestions “clearly trench upon the fanciful and speculative.”

The *Weeks* Court quoted with approval the following from an 1883 decision of this Court:

It is the duty of the Legislature to make laws and of the Court to expound them, \* \* \* the subjects in which the Court undertakes to make the law by mere declaration [of public policy] should not be increased in number without the clearest reasons and the most pressing necessity.

*Id.* at 227, 122 S.E. 586, 587 (quoting *Magee v. O'Neill*, 19 S.C. 170, 185 (1883)) (alterations in original). In *Magee*, the Court upheld a conditional devise in a will. The condition was that the beneficiary must have been “educated in some Roman Catholic female seminary or school, and [be] reared as a Roman Catholic in the communion and faith of her deceased father, the said Arthur Magee[.]” 19 S.C. at 178. More recently, this Court applied the same principle to uphold a conditional devise to the testator’s children. The condition was that any child “awarded to his present wife, or raised by her after 1 year of age” would only get one dollar instead of an equal share. *Brown v. Drake*, 275 S.C. 299, 300-03, 270 S.E.2d 130, 131-32 (1980).

Like this Court’s decisions in *Weeks*, *Magee*, and most recently *Drake*, this Court should reject the Estate’s invitation to create public policy. The Estate’s proposed justification—that the occupancy requirement encourages motorists to

disobey law enforcement—is speculative at best. This is not a case in which the public policy proposed by the Estate is supported by “the clearest reasons and the most pressing necessity.” Thus, the Court cannot invade the province of the legislature to create a public policy and overrule the plain language of the UIM Endorsement.

One Florida appellate court has considered and rejected this exact argument. After an accident, a claimant got out of his vehicle to exchange information with another driver. *Auto-Owners Ins. Co. v. Above All Roofing, LLC*, 924 So. 2d 842, 843 (Fla. Dist. Ct. App. 2006). He was then struck by a passing motorist. *Id.* Florida law required the claimant to exchange information with and render aid to the other driver. *Id.* at 847-48. The claimant argued that denying him coverage would conflict with the public policy expressed by the statutory requirement to stop, exchange information, and render aid. *Id.*

The Court rejected this argument acknowledging that Florida had rejected the doctrine of reasonable expectations. *Id.* The Court further held that whether to extend coverage in this circumstance on public policy grounds was a decision not for the Court to decide. *Id.* Instead, it was a decision for the legislature. *Id.*

South Carolina has likewise rejected the doctrine of “reasonable expectations” absent any ambiguity about whether coverage applies. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 578-79, 757 S.E.2d 399, 406 (2014). In *Connelly v. Main St. Am. Grp.*, this Court recently noted, “If it is advisable that the statute be changed, it is within the province of the legislature to do so.” No. 28130, 2023 S.C. LEXIS 7, at

\*23. As it did long ago in *Weeks* and most recently in *Connelly*, this Court should likewise defer the public policy question argued by the Estate here to the General Assembly.

C. That this Case is Before the Court on a Certified Question Does Not Remove Those Restraints on the Judiciary That It Has Consistently Expounded in Cases Involving Insurance Contract Interpretation.

This Court recently clarified that the standard of review in answering a certified question “depends on the context of the case.” *Sullivan Mgmt. v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 743 (S.C. 2022). In cases involving the interpretation of an insurance policy, the Court is to “ascertain[] the intent of the parties based on the language used in the policy.” *Id.*

The Estate argues that this Court is “free to construe ‘occupying’ to include” the Decedent because, on a certified question, the Court “is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state as well as the Court’s sense of law, justice, and right.” (Response Br. 23) (quoting *Shaw v. Psychomedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019)). If *Shaw* and prior opinions citing this standard of review could be misunderstood to say that this Court can ignore the plain language of a contract when answering a certified question, *Sullivan Mgmt.* clarified that misunderstanding. Instead, the issue before the Court is subject to the ordinary principles of contract interpretation, the first of which is that the language of the

contract controls its meaning absent any ambiguity. *See B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

D. The Estate Concedes that the Decedent Was Not “Occupying” the Truck as that Term is Defined by the UIM Endorsement. Because the Term Must be Understood According to its Definition, the Estate Cannot Be An Insured Entitled to UIM Benefits.

The Estate argues that although the Decedent was not within the Policy’s definition of “occupying,” this Court should still find that he was occupying the Truck. (Response Br. 31-32). It argues the Court should construe the term “occupying” to be synonymous with “using” and apply the “reasonable connection test.” (Response Br. 32-33).

This conflicts with fundamental principles of contract interpretation. When a term is defined in a contract and that definition is free from ambiguity, courts must construe the defined terms according to its definition. *See Reeves*, 434 S.C. at 24, 862 S.E.2d at 251 (“[A court] is not permitted to use [its] intuitive definition of a term defined in an insurance policy.”); *see also C.A.N. Enters., Inc.*, 296 S.C. at 378, 373 S.E.2d at 587 (“[W]here the parties define the words or terms which they propose using, the contract will be interpreted according to such definition if free from ambiguity.”)

Those cases cited by the Estate in support of its argument that the Court should apply the “reasonable connection test” to determine that the Decedent was “occupying” the Truck can be divided into several categories. The first are cases that

did not interpret this policy language at all but interpreted statutory language defining “insured.” That was the case in *Rau v. Liberty Mut. Inc. Co.*, which was, as the Estate says, where this test originated. 21 Wash. App. 326, 331, 585 P.2d 157, 160 (1978); *see also* (Response Br. p 34). One of the cases construed a materially different definition of “insured.” *See Cuevas v. State Farm Mut. Auto. Ins. Co.*, 2001-NMCA-038, ¶ 4, 130 N.M. 539, 540, 28 P.3d 527, 528 (Ct. App. 2001) (construing a definition of “insured” that included “any other person while occupying . . . your car . . . [when the] vehicle [is] used within the scope of the consent.” (alterations in original)).

Other cases first determined that the definition was ambiguous as applied to the facts of the case before applying the reasonable connection test. *See, e.g. Tata v. Nichols*, 848 S.W.2d 649, 651 (Tenn. 1993); *and Roden v. Gen. Cas. Co.*, 2003 S.D. 130, ¶¶ 9-14, 671 N.W.2d 622, 625-26 (2003). The Estate does not argue that the phrase “on, upon, getting in, out or off” is ambiguous. (Response Br. pp 31-32) (conceding that the Dashcam Video makes it obvious that the Decedent was not “on, upon, getting in, out or off” the Truck).

Finally, some of these courts just did not address or chose to ignore the language of the policy. *See, e.g. Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 169-70 (Ky. 1992) (Leibson, J., dissenting); *Gen. Accident Ins. Co. v. Olivier*, 574 A.2d 1240, 1241-42 (R.I. 1990); *Utica Mut. Ins. Co. v. Contrisciane*, 504 Pa. 328, 334-36, 473 A.2d 1005, 1008-09 (1984); *but see Swarner v. Mut. Benefit Grp.*,

2013 PA Super 198, 72 A.3d 641, 650 (Superior Ct. 2013) (declining to apply the *Utica Mut. Ins. Co.* test where the plain meaning of “occupying” was not ambiguous).

The Minnesota Supreme Court has taken a more principled approach. Minnesota’s Supreme Court reversed a lower court’s decision that construed the term “occupying” to mean, similar to the test proposed by the Estate, within “a reasonable geographic perimeter around a vehicle or a continuing relationship between a vehicle and the claimant.” *Allied Mut. Ins. Co. v. W. Nat’l Mut. Ins. Co.*, 552 N.W.2d 561, 563 (Minn. 1996). The Court held instead, “The policy definition is plain and straightforward and affords no excuse for creating some recondite definition which can be molded to fit whatever conclusion is convenient. Consequently, we are constrained to adhere to the policy definition.” *Id.*

Here, the Travelers Policy defines “occupying” to mean “in, upon, getting in, on, out or off.” As conceded by the Estate, the Dash Cam Video makes obvious that the Decedent was not “in, upon, getting in, on, out or off” of the Truck. (Response Br. pp 31-32). Thus, there is no ambiguity in the definition as applied here and this definition must be applied to find that the Decedent was not occupying the Truck. Because he was not occupying the Truck, his Estate is not insured for UIM benefits under the Policy. To do otherwise would be to violate this Court’s admonition that it will not “rewrite or torture the meaning of the policy to extend coverage.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

## CONCLUSION

There is no statutory requirement for insurers to provide UIM coverage to all statutorily defined insureds. The parties agree that the Decedent is not an insured within the plain language of the Policy's applicable definition of "insured." There is no basis to ignore the plain language of the Policy and, therefore, because the Decedent is not an insured under that plain language, the Estate is not entitled to recover UIM benefits from Travelers. For the above-stated reasons and those set forth in Travelers' Opening Brief, the Court should answer the certified question, "No."

Respectfully Submitted,

MARTINEAU KING PLLC

/s/ Joseph W. Fulton \_\_\_\_\_  
Joseph W. Fulton (SC Bar No. 104053)  
Lee M. Thomas (SC Bar No. 103034)  
PO Box 12151  
Rock Hill, SC 29731  
(803) 298-8030  
Attorneys for Plaintiff

Rock Hill, South Carolina  
January 20, 2023