THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
In the Court of Common Pleas for the Sixteenth Judicial Circuit

The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001510

Francine Steineman.....Respondent,

v.

Meridian Security Insurance Company .....Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/RULES/REGULATIONS

OTHER SOURCES

STATEMENT OF ISSUES ON APPEAL

A. Did the trial court err in finding that the plain language of the subject policy's "nonduplication provisions" did not preclude payment of UIM and UM, where Meridian exhausted the limits of the liability coverage under that policy for Plaintiff's claim against her husband (an insured under her policy)?

SUGGESTED ANSWER: *Yes.*

B. Did the trial court err in finding that the subject nonduplication provisions violated South Carolina public policy and statutory policy?

SUGGESTED ANSWER: *Yes.*

C. Should this Court reject Plaintiff's arguments that the nonduplication provisions impermissibly transform UIM coverage into "reduction coverage"?

SUGGESTED ANSWER: *Yes.*

D. Plaintiff's Anticipated Argument That the Nonduplication Provisions Are Unenforceable Because Payments Under the Liability Coverage Offset UIM and UM Coverage Is Without Merit 38

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Procedural History

Plaintiff/Respondent Francine Steineman ("Steineman") commenced this lawsuit on July 28, 2020 in the Court of Common Pleas of York County, South Carolina, at Docket No. 2020-CP-46-02221. (*See generally* July 28, 2020 Pl.'s Compl.). Steineman's Complaint explained that she was seeking a declaration from the trial court as to the parties' rights with respect to a policy of automobile insurance, policy number ACS 0048016 ("Policy"), issued by Defendant/Appellant Meridian Security Insurance Company ("Meridian") to her, with an effective date of coverage from November 1, 2017 to November 1, 2018.[1] (*See id.* ¶ 3).

On September 1, 2020, Meridian removed this matter to the United States District Court for the District of South Carolina (Rock Hill Division). (*See* Sept. 1, 2020 Notice of Filing of Notice of Removal). While this case was pending in the District Court, Meridian filed its Answer and Counterclaims. (*See* Sept. 1, 2020 Answer and Counterclaim (Docket Entry # 6 in federal court)). In its Answer, Meridian denied that Steineman was entitled to the requested relief and requested "a declaration that, under the Policy language, it does not owe Plaintiff [Steineman] any UM or UIM benefits because it has already paid Plaintiff the maximum limits of the Liability benefits." (*See id.* ¶ 63). On September 3, 2021, the Honorable Mary Geiger Lewis entered a Memorandum Opinion and Order Granting Plaintiff's Motion to Remand, which remanded the case back to the Court of Common Pleas of York County, South Carolina. (*See* Sept. 3, 2021 Memorandum Opinion and Order Granting Plaintiff's Motion to Remand).

Following remand, on September 30, 2021, Plaintiff Steineman filed a Motion for Judgment on the Pleadings, asserting that she was entitled to judgment because the "pertinent facts are established by the allegations of the Complaint, exhibits thereto, and admissions in Defendant's Answer" and that, based upon those facts, the Policy did not allow Meridian to deny

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[1] Although Steineman's state court Complaint stated that a certified copy of the Policy was attached to the Complaint, it was apparently inadvertently omitted. This was rectified when Steineman filed those exhibits with the District Court. (*See* Federal Docket Entries ## 1-1, 29-1 and 29-2).

UIM or UM benefits to Plaintiff Steineman. (*See* Sept. 30, 2021 Pl.'s Mot. for J. on the Pldgs.). Subsequently, on October 4, 2021, Appellant Meridian filed its own Notice of Motion and Motion for Judgment on the Pleadings. (*See* Oct. 4, 2021 Def.'s Notice of Mot. and Mot. for J. on the Pldgs.). In its Motion, Meridian argued that, under "the plain and unambiguous language" of the Policy, it would "not be obligated to make duplicate payments for the same elements of loss under both: (a) the policy's liability coverage part; and (b) the policy's UM or UIM coverage part." (*See id.*, at 1). On October 13, 2021, Defendant Meridian filed its Memorandum in Support of Its Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Judgment on the Pleadings.

On June 3, 2022, the trial judge, the Honorable William A. McKinnon, entered an Order granting, in part, Steineman's motion for judgment on the pleadings and denying Meridian's motion, concluding: (a) that the Policy's nonduplication provisions did not preclude coverage for UIM or UM benefits; and (b) the nonduplication provisions violated public policy to the extent applied to UM coverage (but not as to UIM coverage). (*See* June 3, 2022 Order).

On June 13, 2022, Meridian filed a Motion for Reconsideration and to Alter or Amend Pursuant to Rule 59(e), requesting reconsideration in three respects:

> [F]irst, that the Court find that the subject insurance policy unambiguously distinguishes between "elements of loss" and the amount of damages; second, that the Court reconsider its interpretation of the term "duplicate payments"; and finally, that the Court find that the nonduplication provisions do not violate public policy with regard to voluntary uninsured motorist coverage.

(*See* June 13, 2022 Meridian's Motion for Reconsideration and to Alter or Amend Pursuant to Rule 59(e), at 1). On the same day, Steineman filed a Motion to Alter/Amend, asking "the Court to alter its ruling so as to state that public policy prohibits the reduction of underinsured motorist coverage as proposed by Defendant." (*See* June 13, 2022 Pl.'s Mot. to Alter/Amend, at 1).

The trial court conducted oral argument on all of the issues raised in the parties' respective motions to alter or amend. On September 27, 2022, Judge McKinnon entered an Order Denying Defendant's Motion to Reconsider, Alter, or Amend and Granting in Part

Plaintiff's Motion to Alter or Amend. (*See* Sept. 27, 2022 Order Denying Def.'s Mot. to Reconsider, Alter, or Amend and Granting in Part Pl.'s Mot. to Alter or Amend). In relevant part, that Order withdrew the public policy discussion from the June 3, 2022 Order and held:

> that South Carolina public policy renders void automobile insurance policy provisions that limit a victim who recovers one category of coverage (liability, UM, or UIM) from recovering another category, and also renders unenforceable an automobile insurance policy provision that offers a stated amount of a category of coverage (liability, UM, or UIM) in one provision of the policy and then in a subsequent provision effectively reducing that stated amount by redefin[]ing that category of coverage more narrowly than the relevant statutes do.

(*See id.*, at 6-7).

On October 25, 2022, Meridian filed a timely Notice of Appeal, seeking review of the Judge McKinnon's rulings on the parties' cross-motions for judgment on the pleadings. For the following reason, the Court should reverse and vacate the trial judge's grant of Plaintiff Steineman's Motion for Judgment on the Pleadings. Additionally, the Court should reverse the denial of Defendant Meridian's Motion for Judgment on the Pleadings and rule in its favor that Steineman may not receive UIM or UM benefits under the Policy or under South Carolina common law.

B. Factual Background

1. The Relevant Insurance Policy Provisions

Meridian issued Policy # ASC 0048016 to Named Insured Francine Steineman, which provided certain insurance coverage for the policy period November 1, 2017 through November 1, 2018 ("Policy"). (*See* Def.'s Ans. and Counterclaim ¶ 53). The Policy provided Plaintiff liability insurance coverage (Part A) with a limit of $250,000 per person, uninsured motorist ("UM") coverage (Part C) with a limit of $250,000 per person, and underinsured motorist ("UIM") coverage with a limit of $250,000 per person. (*See id.* ¶ 54).

The Policy — in its liability, UM and UIM coverage parts — contained "nonduplication" provisions prohibiting duplicate payments for the same elements of loss under different coverage parts:

- The Policy's South Carolina Underinsured Motorist Coverage contains a "nonduplication" provision stating that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A [Liability], Part C [Uninsured Motorist coverage] or Part D [Coverage for Damage to Your Auto] of this policy." (*See* Pl.'s Compl. Ex. A (Form SC0488 (07/15))).

- The Policy's South Carolina Uninsured Motorist Coverage form contains a similar "nonduplication" provision: "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part A of this policy [Liability]; 2. Any Underinsured Motorists coverage provided by this policy; or 3. Part D [Coverage for Damage to Your Auto] of this policy or any other similar coverage under any other policy." (*See* Pl.'s Compl. Ex. A (Form SC0465 (07/15))).

- The Policy's liability coverage provides that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part B [Medical Payments Coverage] or Part C of this Policy [Uninsured Motorist Coverage]; or [a]ny Underinsured Motorists Coverage provided by this Policy." (See Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 4))).

The UIM and UM coverage parts of the Policy additionally state that Meridian "will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible." (*See* Pl.'s Compl. Ex. A (Form SC0488 (07/15)); Pl.'s Compl. Ex. A (Form SC0465 (07/15))). Meridian contends that these nonduplication provisions are unambiguous because the Policy clearly differentiates between "elements of loss" and the amount of damages and because the provisions make sense if, and only if, they are read to prohibit duplication of the same elements of loss rather than the amount of damages. Meridian further contends that these provisions are valid because they apply to voluntary coverages and therefore do not contravene public policy.

2. Plaintiff Steineman's Injuries and Claims

Plaintiff claims that she was injured in an accident while a passenger in a 2001 Ford Explorer driven by her husband. (*See* Pl.'s Compl. ¶¶ 15-20). She alleges that "[a]s Mr. Steineman attempted the left turn, he failed to check the outside lane before entering it, and the driver in the outside lane was traveling too fast for conditions and collided into Mrs. Steineman's car." (*See id.* ¶ 19). In this lawsuit, Plaintiff alleges that she is entitled to UIM benefits under

the Policy because of her husband's negligence. Plaintiff further claims that the other driver who collided into her ("Uninsured John Doe Driver") "was [also] negligent in causing her damages, and because the [Uninsured John Doe D]river is uninsured, Mrs. Steineman is entitled to her UM coverage." (*See id.* ¶ 24). Plaintiff alleges that her damages from the accident exceed $1 million. (*See id.* ¶ 21).

Pursuant to her demand, Meridian paid to Plaintiff the limit of coverage under the Policy's Liability Coverage Part ($250,000) for her husband's alleged negligence as an insured under the Policy. (*See* Def.'s Ans. and Counterclaim ¶ 58). Plaintiff argues that she is also entitled to: (a) underinsured motions ("UIM") benefits of up to $750,000 ($250,000 limit x 3 vehicles) with regard to her husband's negligence; and (b) uninsured motorist ("UM") benefits of up to $750,000 ($250,000 limit x 3 vehicles) with regard to the negligence of Uninsured John Doe Driver. Meridian has alleged that, "[p]ursuant to the terms of the UM Coverage Part and the UIM Coverage Part, Defendant does not owe the Plaintiff any benefits under these coverage parts because such payments would be duplicative of what Defendant already paid under the Liability Coverage Part and, therefore, expressly excluded." (*See id.* ¶ 59).

ARGUMENT

A. Standard of Review

This is an appeal from the trial court's ruling on the parties' cross-motions for judgment on the pleadings (and ruling on cross-motions for reconsideration). When reviewing a grant of summary judgment or judgment on the pleadings, this Court must apply the same legal standards as the trial court. *See Ziegler v. Dorchester Cty.*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

A motion for judgment on the pleadings "is proper where the pleadings entitled the party to judgment without proof, as where they disclose all the facts, or where the pleadings present no issue of fact or where the pleadings, under other circumstances, present an immaterial issue." *See Wooten v. Standard Life and Cas. Ins. Co.*, 239 S.C. 243, 249, 122 S.E.2d 637, 640 (1961).

"All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006) (citation omitted). "On review of the motion, the court may not consider matters outside the pleadings." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). However, "a court may consider documents outside of the complaint if the complaint incorporates the documents by reference." *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 n.7, 539 S.E.2d 402, 410 n.7 (Ct. App. 2000).

B. The Trial Court Should Have Granted Appellant Meridian's Motion for Judgment on the Pleadings and Denied Steineman's Similar Motion Because the Policy's "Nonduplication Provisions" Preclude Payment of UIM and UM Benefits Where Liability Policy Limits Were Paid Under the Same Policy.

1. The Policy's Plain Nonduplication Language Precludes UIM or UM Benefits Coverage.

a. Policy Limits and Relevant Policy Provisions

The Policy includes the following Limits of Liability that are potentially applicable to this case:

COVERAGE	LIMITS OF LIABILITY	AU
A LIABILITY-BODILY INJURY	$ 250,000 EACH PERSON/ $ 500,000 EACH ACCIDENT	
A LIABILITY-PROPERTY DAMAGE	$ 100,000 EACH ACCIDENT	
C UNINSURED MOTORISTS BODILY INJURY	$ 250,000 EACH PERSON/ $ 500,000 EACH ACCIDENT	
PROPERTY DAMAGE	$ 100,000 EACH ACCIDENT	
C UNDERINSURED MOTORISTS BODILY INJURY	$ 250,000 EACH PERSON/ $ 500,000 EACH ACCIDENT	

i. Liability Coverage

Part A of the Policy includes the following insuring agreement for liability coverage under the Policy:

> We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.

(*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 2))). The liability coverage provisions of the Policy state that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part B [Medical Payments Coverage] or Part C of this Policy [Uninsured Motorist Coverage]; or [a]ny Underinsured Motorists Coverage provided by this Policy." (*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 4))).

ii. Underinsured Motorist ("UIM") Coverage

The insuring provision of the Policy's South Carolina Underinsured Motorist Coverage states in relevant part:

> We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle"[2] because of: 1. "Bodily

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2 An "underinsured motor vehicle" is defined as a "land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident in limits equal to or greater than the

injury" sustained by an "insured" and caused by an accident . . . . The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle".

(*See* Pl.'s Compl. Ex. A (Form SC0488 (07/15))). The Policy's South Carolina Underinsured Motorist Coverage form further defines "insured" as including "[y]ou[3] or any 'family member.'"[4] (*See id.*). The Policy also includes the following "nonduplication" provision in its South Carolina UIM coverage form:

> D. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A [Liability], Part C [Uninsured Motorist coverage] or Part D [Coverage for Damage to Your Auto] of this policy.
>
> E. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

(*See id.*).

iii. Uninsured Motorist ("UM") Coverage

The insuring provision of the Policy's South Carolina Uninsured Motorist Coverage states in relevant part:

> We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"[5] because of: 1. "Bodily

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minimum limit for liability specified by the South Carolina Financial Responsibility Act, but the limits of that bond or policy are not enough to pay the full amount the 'insured' is legally entitled to recover as damages." (*See* Pl.'s Compl. Ex. A (Form SC0488 (07/15))).

3 "You" is defined as "1. The 'named insured' shown in the Declarations; and 2. The spouse if a resident of the same household." (*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05))). The named insured on the Policy is Francine Steineman. (*See* Pl.'s Compl. Ex. A (Declarations)).

4 The Policy defines "family member" to mean "a person related to you by blood, marriage or adoption who is a resident of your household." (*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 1)).

5 An "uninsured motor vehicle" is defined as a "land motor vehicle or trailer of any type with regard to which:

> 1. To which neither: a. A liability bond or policy; nor b. Cash or securities deposited with the State Treasurer; applies at the time of the accident.
>
> 2. To which a liability bond or policy applies at the time of the accident. In this case its limit for liability must be less than the minimum limits specified by the South Carolina Financial Responsibility Act.
>
> 3. Which is a hit-and-run vehicle whose operator or owner cannot be identified . . . .

> injury" sustained by an "insured" and caused by an accident . . . . The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle".

(*See* Pl.'s Compl. Ex. A (Form SC0465 (07/15))). The Policy's South Carolina Uninsured Motorist Coverage form defines "insured" as including "[y]ou or any 'family member.'" (*See id.*). The Policy also includes the following "nonduplication" provision in its South Carolina Uninsured Motorist coverage form:

> D. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part A of this policy [Liability]; 2. Any Underinsured Motorists coverage provided by this policy; or 3. Part D [Coverage for Damage to Your Auto] of this policy or any other similar coverage under any other policy.
>
> E. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

(*See id.*).

b. <u>The Nonduplication Provisions Unambiguously Prohibit the Payment of UM and UIM Benefits to Plaintiff.</u>

"In the absence of ambiguity, the terms of an insurance policy . . . must be interpreted and enforced according to their plain and ordinary meaning." *See South Carolina Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). A policy term can be said to be ambiguous only when the language used is capable of two reasonable interpretations. *See Edens v. South Carolina Farm Bur. Mut. Ins. Co.*, 279 S.C. 377, 379, 308 S.E.2d 670, 671 (1983); *accord Hansen v. United Servs. Automobile Ass'n*, 350 S.C. 62, 67, 565 S.E.2d 114, 117 (Ct. App. 2002) (policy only ambiguous where term may fairly and reasonably be understood in more than one way).

The policy terms define an insurer's obligation under a policy of insurance; the Court may not use judicial construction to enlarge the insurer's obligations. *South Carolina Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471, 474 (Ct. App. 1990). When the parties' intention is clear

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(*See* Pl.'s Compl. Ex. A (Form SC0465 (07/15))).

from the policy language, the court has "no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). "Our courts must enforce, not write, contracts of insurance and must give policy language its plain, ordinary and popular meaning." *Helton v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 220, 222, 332 S.E.2d 776, 777 (Ct. App. 1985). "Written in the turgid vernacular typical of insurance policies, the language of the policy ... is stylistically inelegant but, when carefully read, unmistakable in its meaning." *Universal Underwriters Ins. Co. v. Metro. Prop. & Life Ins. Co.*, 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct. App. 1989)

The above-quoted nonduplication provisions plainly provide that Meridian will not be required to make "duplicate payments for the same elements of loss under" UIM/UM and liability coverage parts. The Policy also sets forth that Meridian "will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of person or organizations who may be legally responsible." These provisions preclude UIM and UM coverage, because Plaintiff seeks UIM/UM coverage for the same elements of loss paid under the liability coverage, *i.e.*, medical bills, lost earning capacity, pain and suffering, etc. because of any injuries she sustained in this accident. She claims the same medical bills, the same pain and suffering, and other identical elements of loss under her UIM/UM claim that she did when she settled for the policy's full liability coverage limit. This is the precise situation for which nonduplication provisions were created. Plaintiff would have the Court interpret these provisions as only prohibiting multiple recovery of the same amount of damages, rather than for the same *elements* of damages. Under Plaintiff's and the trial court's interpretation, the provisions would never apply.

Although South Carolina appellate courts have not specifically considered the application of nonduplication provisions under these facts, persuasive authority applying South Carolina law supports Meridian's contention. In *Sibert v. State Auto. Mut. Ins. Co.*, No. 8:20-4000-HMH, 2021 U.S. Dist. LEXIS 149971 (D.S.C. Aug. 10, 2021), Judge Herlong granted summary

judgment to State Auto (a related company to Meridian), which made arguments essentially identical to those Meridian now makes. In *Sibert*, the injured claimant was a passenger in a vehicle driven by an insured. State Auto paid the claimant the full liability coverage limits. State Auto denied coverage for UIM benefits, citing nonduplication provisions identical to those here. The court granted State Auto summary judgment, holding that "the nonduplication provisions are unambiguous and plainly prohibit duplicate payments for the same elements of loss under the Policy's liability and UIM coverages." *See id.*, 2021 U.S. Dist. LEXIS 149971, at *6.

Another federal district judge held that a non-duplication provision unambiguously precludes UIM coverage where the same policy paid the same claimant liability limits for the same injury from the same accident. In *Diamond State Ins. Co. v. Estate of McNeal,* Civil Action No. 1:11-cv-02528-JMC, 2013 U.S. Dist. LEXIS 33092 (D.S.C. Mar. 11, 2013), McNeal was killed when Craven negligently operated a vehicle that was negligently entrusted to him. The vehicle was covered by Diamond State's Commercial Auto Garage Insurance Policy. That policy had the following coverage limits: (a) $300,000 for garage operations auto; (b) $300,000 for garage operations other than auto; and (c) $75,000 for UIM coverage. Diamond State contended that its coverage was limited to $300,000, while McNeal's estate claimed that it was $675,000. The court granted Diamond State summary judgment. The policy in *McNeal* stated that "[n]o one will be entitled to receive duplicate payments for the same elements of 'loss' under this Coverage Form and any Liability Coverage Form." The court held that the UIM endorsement "plainly limits duplicate payments for losses covered by other liability coverage. Therefore, the Policy does not provide UIM coverage." *See id.*, 2013 WL 934182, at *5. Because liability and UIM coverage compensated McNeal's estate for the "same elements of damages" (*i.e.*, damages recoverable in a personal injury tort suit), Diamond State was only obligated to pay under its liability coverage.

In light of the District of South Carolina's well-reasoned opinions in *Sibert* and *Diamond State*, the trial court should have granted Meridian's motion for judgment on the pleadings and

denied Plaintiff's motion, and should have declared that, because of the Policy's nonduplication provision, there is no UM or UIM coverage for Plaintiff's alleged injuries.

Courts in numerous other jurisdictions have upheld similar non-duplication provisions. *See Kearns v. Travelers Prop. Cas. Co. of Am.*, No. N16C-02-095 RRC, 2019 Del. Super. LEXIS 647, at *17-18 (Super. Ct. Nov. 1, 2019) ("[S]ince Travelers' non-duplication provision is enforceable, and Kearns recovered payments for medical bills, wages, and disfigurement, Kearns is not allowed to plead, prove and/or recover for these losses at trial against Travelers. However, benefits non-recoverable under workers' compensation insurance, such as pain and suffering, may be potentially recoverable under the Travelers policy, as acknowledged at oral argument by Travelers."); *Hanson v. Republic Ins. Co.*, 5 S.W.3d 324, 333 (Tex. App. 1999) ("We conclude that the trial court properly enforced the UM/UIM offset as a valid nonduplication of coverage provision and overrule point of error two.").

Similarly, the Minnesota Court of Appeals determined that nonduplication language unambiguously precludes uninsured motorist coverage:

> *The policy language referring to "duplicate payments" and "elements of loss" is not reasonably susceptible to multiple interpretations.* While neither phrase is defined in the policy, the plain language of the exclusion states that any UM coverage is precluded for an element of loss covered under the liability section of the policy. We will not strain to find ambiguity when the meaning is clear.

See Marchio v. W. Nat. Mut. Ins. Co., 747 N.W.2d 376, 380 (Minn. Ct. App. 2008) (emphasis added). The *Marchio* court noted that the insured's claims would also have been barred if the insured sought both liability and UIM coverage, as is the situation here. *See id.* at 382 (*citing Jensen v. United Fire and Cas. Co.*, 524 N.W.2d 536, 539 (Minn. Ct. App. 1994) (insured cannot convert first-party UIM coverage to third-party liability coverage under same policy)).

Provisions that preclude coverage under liability and UIM/UM coverage under the same policy for the same injured person are consistent with the purpose of UIM/UM coverage: to protect the *insured* from the negligence *of third-party drivers* (not to compensate for the named insured's negligence). *See Mercury Indem. Co. of Illinois v. Kim*, 358 Ill. App. 3d 1, 8, 830

N.E.2d 603, 609 (2005); *accord State Farm Mutual Automobile Insurance Co. v. Shahan*, 141 F.3d 819, 822 (8th Cir. 1998) ("The typically envisioned situation arises when the driver of one vehicle is injured due to the negligence of another driver. If the second driver's liability coverage is insufficient to compensate for the first driver's injuries, the first driver may recover under his own underinsured motor vehicle policy"); *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819, 823 (2003) ("We reiterate that the purpose of optional UIM coverage is to enable the insured to protect himself [or herself] if he [or she] chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured.... 'Other drivers' necessarily infers the **drivers of vehicles other than the vehicle owned and operated by the insured")** (emphasis added) (internal citations omitted); *Millers Casualty Insurance Co. of Texas v. Briggs*, 100 Wash.2d 1, 665 P.2d 891, 895 (1983) ("The owner of a vehicle purchases liability insurance to protect passengers in the vehicle from his negligent driving. He purchases underinsured motorist coverage to protect himself and others from damages caused by *another vehicle* which is underinsured") (emphasis added); *Liberty Mutual Insurance Co. v. Lund*, 403 Mass. 1006, 1007, 530 N.E.2d 166, 168 (1988) ("Underinsurance and uninsured motorist protection is not additional liability insurance but rather is 'limited personal accident insurance chiefly for the benefit of the named insured.").

In a related vein, courts have noted that allowing recovery under both liability and UM/UIM coverage under the same policy would undermine the purpose of UM/UIM statutes by making coverage prohibitively expensive. *Mercury Indem. Co. of Illinois v. Kim*, 358 Ill. App. 3d 1, 10, 830 N.E.2d 603, 611 (2005); *accord Kang v. State Farm Mutual Automobile Insurance Co.*, 72 Haw. 251, 261, 815 P.2d 1020, 1025 (1991) ("By invalidating the contested policy exclusion in this case, this court would, *in effect, eliminate the distinction between liability and underinsured motorist coverage and transform the inexpensive underinsured motorist coverage into the more expensive liability coverage.* Consequently, insurers would undoubtedly be compelled to increase the premiums for underinsured motorist coverage, thereby frustrating the legislative objective of optional protection at the least possible cost") (emphasis added); *Briggs*,

100 Wash.2d at 8, 665 P.2d at 895 ("This result [of dual recovery] would cause insurance companies to charge substantially more for underinsured motorist coverage in order to match the cost of that coverage with the presently more expensive liability coverage. This increase in cost would discourage consumers from purchasing underinsured coverage, an important protection presently available for a minimal cost").

The trial court's construction of the nonduplication provisions here ignores the Policy's plain language and focuses only on the *amount of damages,* rather than elements of loss (which is the language used in the Policy). Plaintiff has based her position, in part, on the fact that UIM coverage necessarily is not triggered until the *amount* of the injured person's damages (*i.e.,* compensable harm caused by the accident) exceeds the amount of liability coverage. By way of example, if there are $100,000 limits of liability and UIM coverage, the UIM coverage would never be triggered unless the injured party's overall damages exceed $100,000. The South Carolina statutory definition of "underinsured motor vehicle" is "a motor vehicle . . . as to which there is bodily injury liability insurance . . . and the amount of the insurance or bond is less than the amount of the insureds' *damages*). *See* S.C. Code § 38-77-30(15) (emphasis added). Because of this, Plaintiff would argue that the UIM and UM coverage would never duplicate the $100,000 liability coverage, since those coverages are only triggered *after* liability coverage is exhausted by the amount of damages (or there is no underlying liability insurance, in the case of UM coverage). The Court of Appeals of Indiana rejected this argument about the meaning of the term "elements of loss":

> Imre asserts "same elements of loss," contained within these provisions, is not defined by the Policy and the term can be construed to denote "same elements of damages" rather than the proposition that Gambill is not entitled to recover pursuant to both the uninsured and underinsured motorist provisions of the Policy. . . . This argument is unpersuasive. When the Policy references "damages" it explicitly uses the term "damages." The Policy uses the term "damages" on at least six separate occasions. Appellants' App. pp. 28-35. We must accept an interpretation of the contract language that harmonizes the provisions of the insurance contract rather than one which supports a conflicting version of the provisions. [Citation omitted.]

> Because "same elements of loss" does not denote "same elements of damages," Imre has not advanced a plausible interpretation of "same elements of loss" to compete with the interpretation advanced by Lake States, and there is no ambiguity in the term. Rather, as the name "Limit of Liability Clause" suggests, the term "same elements of loss" within Section C of the Underinsured and Uninsured Motorist Clauses serves to denote that an insured may not recover under both the underinsured and uninsured provisions of the Policy.

See Imre v. Lake States Ins. Co., 803 N.E.2d 1126, 1130-31 (Ind. Ct. App. 2004).

The Policy's nonduplication provisions are directed only toward "elements of loss," not the amount of "damages." Plaintiff's argument conflates those concepts. The Policy uses the term "damages" multiple times (more than a dozen in the South Carolina UIM coverage part alone). For example, the UIM and UM insuring agreements state that Meridian will "pay *damages* which an 'insured' is legally entitled to recover." (*See* Pl.'s Compl. Ex. A (Form SC045 (07/15), at 1)); Pl.'s Compl. Ex. A (Form SC0488 (07/15), at 1))). Similarly, under the liability coverage, Meridian will "pay *damages* for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." (*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 2))). If Meridian meant to refer to "damages" in the nonduplication provisions, it would have said so; the fact that it chose *not* to demonstrates that "elements of loss" must mean something different from "damages."

Although the Policy does not define "damages," the South Carolina Supreme Court has stated that "[t]he plain, ordinary meaning of 'damages' is monies paid on an insured's loss." *See Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 638, 594 S.E.2d 455, 458 (2004). "Damages" has also been defined as "[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." https://thelawdictionary.org/damages/ (accessed July 15, 2021). Plaintiff's position focuses on *damages* under those definitions, not "elements of loss." She asks only whether the total amount of her "damages" exceeds the liability policy limit. Her interpretation would completely write the non-duplication provisions out of the Policy, since there could never be a

situation where UM or UIM coverage includes the same amount of damages as the liability coverage.

Meridian's Policy *only* uses the phrase "elements of loss" in its nonduplication provisions. Black's Law Dictionary defines "element" as "a basic principle or a fundamental part." https://thelawdictionary.org/element/ (accessed July 15, 2021). In this regard, the phrase "element of loss" must refer to categories or types of loss, rather than the total amount of damages to which an injured person ultimately might be entitled. The nonduplication provisions expressly preclude UM/UIM coverage where the policy has paid under its liability coverage for the *same type* of injuries for which Plaintiff seeks UM/UIM benefits.

Under Plaintiff's (and the trial court's) construction, the nonduplication provisions would *never* apply, since UIM/UM coverage is only triggered when underlying liability coverage is exhausted (*i.e.,* when injuries/damages exceed liability limits or there is no liability coverage). The Policy's inclusion of the nonduplication language suggests that there *must be* some situation where duplication could occur between liability and UIM/UM coverage; otherwise, the nonduplication language with regard to UIM/UM coverage would be superfluous. Liability, UIM, and UM coverages all reference each other in their respective nonduplication provisions:

> ***UIM Coverage "Nonduplication" Provision:*** "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A [Liability], Part C [Uninsured Motorist coverage] or Part D [Coverage for Damage to Your Auto] of this policy." (*See* Pl.'s Compl. Ex. A (Form SC0488 (07/15))).
>
> ***UM Coverage "Nonduplication" Provision:*** "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part A of this policy [Liability]; 2. Any Underinsured Motorists coverage provided by this policy; or 3. Part D [Coverage for Damage to Your Auto] of this policy or any other similar coverage under any other policy." (See Pl.'s Compl. Ex. A (Form SC0465 (07/15))).
>
> ***Liability Coverage "Nonduplication" Provision:*** "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and: 1. Part B [Medical Payments Coverage] or Part C of this Policy [Uninsured Motorist Coverage]; or [a]ny Underinsured Motorists Coverage provided by this Policy." (*See* Pl.'s Compl. Ex. A (Form PP0001 (01/05), at 4))).

Plaintiff's argument would render the nonduplication provisions "meaningless in contravention of the well-settled principles of contract law." *See Crenshaw v. Erskine Coll.*, 432 S.C. 1, 42, 850 S.E.2d 1, 22 (2020), *reh'g denied* (Nov. 30, 2020); *accord Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 344, 225 S.E.2d 344, 349 (1976) ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so. 43 Am. Jur. (2d) *Insurance* § 263 (1969)").

For the reasons set forth in detail above, the trial court should have denied Plaintiff's motion for judgment on the pleadings (and granted Meridian's motion), because Plaintiff is seeking payment for the same elements of loss for which she was paid under the liability coverage. The Policy expressly and unambiguously prohibits such duplicate payments.

C. The Nonduplication Provisions Do Not Violate Public Policy.

1. The Trial Court Erred in Its Conclusion That the Nonduplication Provisions Violate Public Policy as to Both UM and UIM Coverages.

In its original Order on the parties' cross-motions for judgment on the pleadings, Judge McKinnon concluded that applying the nonduplication provisions to UM coverage (with regard to Plaintiff's claims against Uninsured John Doe Driver) would violate public policy, for reasons that will be discussed in the next sections.[6] (See June 3, 2022 Order, at 7-9). However, he concluded that public policy did not preclude the application of the nonduplication provisions to UIM coverage. Plaintiff then filed a motion to alter or amend, which requested that the trial court also find that the nonduplications violated South Carolina public policy (for reasons that will be discussed in the following section). After hearing the parties' motions to alter or amend, the trial judge partially granted "Plaintiff's motion to alter or amend but for different reasons than

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[6] In its Motion for Reconsideration or to Alter or Amend, Meridian did not contest the June 3, 2022 Order's finding that the nonduplication provision should not apply to the extent of the statutory minimum requirement of $25,000 in UM coverage. However, Meridian did object to the that ruling as to any *voluntary* UM coverage purchased under S.C. Code § 38-77-160 (*i.e.*, UM coverage in excess of $25,000). In this appeal, Meridian's arguments that public policy does not bar applying the nonduplication provision to UM coverage only relates to *voluntary* UM coverage, not the mandated minimum UM coverage of $25,000.

those articulated in Plaintiff's written motion." (*See* Sep. 27, 2022 Order Den. Def.'s Mot. to Reconsider, Alter or Amend and Granting in Part Plaintiff's Motion to Alter or Amend, at 2).

Judge McKinnon began by stating that he was finding a violation of public policy with regard to UIM and voluntary UM coverage based on "the South Carolina Supreme Court's interpretation of S.C. Code § 38-77-142(A)-(C)." (*See id.*, at 4). South Carolina Code § 38-77-142 ("Section 142") provides, in relevant part:

> (A) No policy or contract of *bodily injury or property damage* liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of the vehicle . . . unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability for death or injury sustained or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the vehicle by the named insured or by any such person. . . .
>
> (B) No policy or contract of *bodily injury or property damage liability insurance* relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle . . . without an endorsement or provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy . . . .
>
> (C) Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks *to limit or reduce* the coverage *afforded by the provisions required by this section* is void.

See S.C. Code § 38-77-142(A)-(C) (emphasis added). Judge McKinnon, interpreting Section 142, wrote:

> [T]he relevant statutes define liability coverage to be coverage for injury to others caused by the insured driver's fault, UM coverage to be coverage for injury to any insured victim caused by an uninsured motorist's fault, and UIM coverage to be coverage for injury to any insured caused by an underinsured motorist's fault to the extent that injury exceeds the underinsured motorist's coverage. S.C. Code §§ 38-77-150[7] & 160.[8] The insurance company offered liability, UM, and

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7 South Carolina Code § 38-77-150 states, in relevant part:

> UIM coverage of $250,000 each for BI to a single person. An insured driver was partially at fault and is covered by the liability BI. An uninsured motorist was also at fault and is covered by the UM and UIM BI coverages. Defendant's attempt to prevent recovery under each category of coverage relied on a purported either/or provision, which if interpreted in the manner urged by Defendant would eliminate or reduce the face amount of coverage agreed upon in the insurance policy.

(*See id.*, at 5-6). For the reasons that follow, Judge McKinnon's reliance on Section 142 (and cases decided thereunder) was misplaced. Section 142 does not preclude the application of the nonduplication provisions to UIM or to voluntary UM coverage.

Section 142's plain language makes clear that it only applies to *liability* insurance coverage. "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation." *Strickland v. Strickland*,

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> 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, within limits which may be no less than the requirements of Section 38-77-140. The uninsured motorist provision also must provide for no less than twenty-five thousand dollars' coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of the loss or damage. The director or his designee may prescribe the form to be used in providing uninsured motorist coverage and when prescribed and promulgated no other form may be used.

[8] South Carolina Code § 38-77-160 states, in relevant part:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such 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.

375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007) (*citing Vaughan v. McLeod Reg'l Med. Ctr.*, 372 S.C. 505, 510, 642 S.E.2d 744, 747 (2007)). Judge McKinnon's reliance on Section 142 is erroneous because Meridian does not seek to limit liability coverage in any way.

To the contrary, it is undisputed that Meridian has paid Plaintiff the full liability coverage limit. Plaintiff does not argue that Meridian has failed to provide *liability* coverage that it should have. Rather, because the Policy has exhausted its liability coverage limit, Plaintiff seeks coverage under *UM and UIM* coverage parts. Section 142 does not regulate, in any way, UIM or voluntary UM coverage. In fact, it does not even mention UIM or UM coverage. It does not express any intention to regulate UIM or UM coverage. Section 142, by its own terms, only concerns a "policy or contract of bodily injury or property damage liability insurance." *See* S.C. Code § 38-77-142(A) & (B). Moreover, Section 142 *only* prohibits a policy provision "which purports or seeks to limit or reduce the coverage *afforded by the provisions required by this section.*" *See* S.C. Code § 38-77-142(C) (emphasis added). The only provisions required "by this section" are those providing third-party *liability* coverage. Plaintiff does not argue that the nonduplication provisions "purport[] or seek[] to limit or reduce" *liability coverage.* By its plain language, Section 142 does not apply or state any public policy with regard to UIM and voluntary UM coverage.

Judge McKinnon based his finding of a violation of public policy under Section 142 on the Supreme Court's opinions in *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014), and *Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 858 S.E.2d 150 (2021). These cases are inapposite and, in fact, support Meridian's argument that Section 142 does *not* apply to the issues raised here, which only involve UIM and voluntary UM coverage.

In *Williams*, a married couple (the Murrys) purchased a GEICO automobile insurance policy on which they were the only named insureds. That policy provided liability insurance with limits of $100,000 per person and $300,000 per accident for bodily injury. The Murrys were the sole occupants of their vehicle when it was struck by a train, killing both of them. It is unknown who was driving at the time of the accident. However, since both were insureds, the

accident resulted in bodily injury to an insured, irrespective of which insured was driving. The GEICO policy included the following provision:

> We will not defend any suit for damage if one or more of the exclusions listed below applies. We do not provide liability coverage, under Exclusions 1, 2, 3 and 8, in excess of the minimum limits of liability required by South Carolina law. We do not provide any liability coverage for the remaining Exclusions.
>
> 1. Bodily injury to any insured or any relative of an insured residing in his household is not covered.

See Williams, 409 S.C. at 592, 762 S.E.2d at 708. "The above language is often referred to as a family 'step-down provision' as it operates to 'step down,' or reduce, coverage for injured family members from the original policy limit, which was $100,000 here, to the statutory minimum limit required by law during the policy period, which was $15,000." *See id.*

The representatives of the Murrys' estates sued GEICO, seeking payment of the full $100,000 policy limits notwithstanding the "step down" provision. The trial court found that the "step down" provision was effective to reduce liability coverage to $15,000 and that the provision did not violate Section 142. On appeal, the Supreme Court held that the "step down" provision was invalid, in violation of South Carolina public policy as embodied in Section 142:

> In viewing the plain wording of section 38-77-142, we find subsections (A) and (B) require a policy for liability insurance to contain a provision insuring the named insureds and permissive users against liability for damage incurred "within the coverage of the policy." Subsection (B) additionally contains a provision regarding notice that states the mere failure to turn over a motion or complaint will not void coverage. Finally, subsection (C) provides that no policy provision may limit or *reduce* the coverage required by *this section*, which refers to section 38-77-142, or else it is void.

> We think it is significant that section 38-77-142 provides insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability coverage in the policy below the amount provided *in this section*, meaning section 38-77-142. Thus, it is the face amount of the coverage that is relevant under section 38-77-142, not the statutory minimum limits of liability coverage set forth in section 38-77-140, which are not even mentioned in the statute. In contrast to the circuit court's interpretation, we believe the General Assembly could have simply stated coverage may not be reduced below the statutory minimum limits and/or below the amount provided in section 38-77-140, if that was its intent. However, it did not do so. Here, the circuit court has

> engrafted an additional restriction into section 38-77-142 that was not included by the General Assembly by determining coverage may be reduced to the statutory minimum, in direct contravention to the explicit language of section 38-77-142(C) that coverage may not be reduced below the coverage in the policy.

See id., 409 S.C. at 603, 762 S.E.2d at 714 (emphasis in original).

Williams is readily distinguishable because it involved a "step down" provision in a *liability* policy. The nonduplication provisions at issue are not "step downs" in the first instance. More importantly, however, the instant case is distinguishable because *Williams* does not analyze UIM/UM coverage and does not suggest that its holding should be extended to those coverages. The *Williams* Court relied heavily on subsection (C) of Section 142, which prohibits certain policy provisions and limitations. In its analysis, the Court actually emphasized the importance of subsection (C) expressly applying to the coverage created "in this section," because GEICO was arguing that Section 142 applied to prohibit limitations of coverage below the statutory liability coverage minimum of S.C. Code §38-77-140. The Court rejected that construction and limited Section 142, under its plain language, to coverage under Section 142 (*i.e.,* liability coverage of any limit). The *Williams* Court's analysis is entirely consistent with Meridian's reading of the plain meaning of Section 142.

Judge McKinnon also relied on *Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 858 S.E.2d 150 (2021). In *Walls*, Sharmin Walls, Randi Harper, and Christopher Timms were passengers in a vehicle owned by Walls and driven by Korey Mayfield. The accident followed a high-speed chase, in which Mayfield tried to elude the Highway Patrol. After law enforcement called off the chase, Mayfield continued to speed in Walls' vehicle, resulting in an accident in which Timms died, while Walls, Harper, and Mayfield sustained serious injuries. Walls' automobile was insured through her Nationwide policy, which included liability and UM (but not UIM) coverage with $100,000/$300,000 limits. Walls' liability coverage contained the following "step down" provision reducing policy limits in certain circumstances (emphasis added):

> This coverage does not apply, *with regard to any amounts above the minimum limits* required by the South Carolina Financial Responsibility Law as of the date of the loss, to . . . Bodily injury or property damage caused by . . . anyone else

while operating your auto: (1) while committing a felony; or (2) while fleeing a law enforcement officer.

See id., 433 S.C. at 209, 858 S.E.2d at 151. Relying on this "step down" provision, Nationwide only paid $50,000 in total to the injured passengers, the statutory minimum for liability coverage under S.C. Code § 38-77-140 — rather than the $100,000/$300,000 liability coverage limits in the policy.

Nationwide filed a declaratory judgment action, seeking a declaration that its maximum liability coverage was $50,000 under the "step down" provision. The circuit court disagreed with Nationwide and found the "step down" provision to be unconscionable and void. Two days after the circuit court's decision, the Supreme Court issued its opinion in *Williams* (discussed in detail above). In light of *Williams*' invalidation of a similar "step down" provision in a liability policy, the circuit court denied Nationwide's Rule 59 motion.

Not surprisingly, the South Carolina Supreme Court held that Nationwide's felony and flight-from-law-enforcement "step down" provision violated Section 142(C). Like the *Williams* Court, the *Walls* Court concluded that the Section 142(C) prohibition of restrictions on liability coverage applied to any coverage issued under Section 142(A) or (B). As the *Walls* Court wrote, "subsections (A) and (B) provide required provisions for liability insurance policies, and once the insurer places the required provisions in the policy with the agreed-upon limits of coverage, any attempt by the insurer to reduce the coverage afforded by the provisions is void pursuant to subsection (C)." *See id.*, 433 S.C. at 213, 858 S.E.2d at 153-54.

Once again, like *Williams*, *Walls* is readily distinguishable because its holding is limited to invalidating a provision "stepping down" *liability* coverage. *Walls* does not analyze, discuss, or mention whether Section 142(C) could invalidate a nonduplication provision in a UIM or voluntary UM policy. It does not support Judge McKinnon's conclusion that Policy's nonduplication provisions violate public policy.

For the foregoing reasons, the trial judge erred in holding that the nonduplications provisions violate public policy embodied in Section 142 (and cases decided thereunder).

Therefore, the Court should reverse Judge McKinnon's orders and find that the nonduplication provisions do not violate public policy.

2. Plaintiff's Anticipated Public Policy Argument Is Also Without Merit.

As discussed above, Judge McKinnon's public policy ruling as to both UM and UIM coverage is premised upon a different approach from the one that Plaintiff argued in her motion to alter or amend. Additionally, it was a different ground from what Judge McKinnon had originally set forth as to UM coverage. In any event, in this appeal, Plaintiff will likely argue that, even if Judge McKinnon's public policy argument in his order on the parties' motions to alter or amend was incorrect, the nonduplication provisions violate other public policy interests.

For example, in her motion for judgment on the pleadings, Plaintiff argued that Meridian's "position would have the effect of eliminating statutorily mandated UM coverage as well as UM and UIM coverages Defendant was statutorily required to offer, it is contrary to public policy and must fail." (*See* Pl.'s Oct. 4, 2021 Mot. for J. on Pldgs., at 1). In support, Plaintiff cited *Bratcher v. National Grange Mut. Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (1987), *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984), and *Ferguson v. State Farm Mut. Auto Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973). For the following reasons, the nonduplication provisions do not violate South Carolina public policy under that authority.

South Carolina law requires that all policies of automobile insurance include mandatory minimum UM coverage of $25,000/$50,000. *See* S.C. Code §§ 38-77-140(A)(1)-(2) & -150(A). The statute further permits (and required that insurers *offer* up to the limits of liability coverage) the issuance of policies containing *optional, voluntary* UIM coverage and *optional, voluntary* "additional" UM coverage (above the mandatory minimums):

> Automobile insurance carriers shall offer, *at the option of the insured*, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such 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.

See S.C. Code § 38-77-160 (emphasis added). Nothing in this statute prohibits or invalidates the nonduplication provisions in connection with such voluntary and optional coverage. For the reasons discussed below, the Court should conclude that the nonduplications provisions at issue do not violate public policy.

a. *Bratcher* Does Not Support Plaintiff's Arguments.

***i.* *Bratcher* and Section 38-77-160 Do Not Prohibit These Nonduplication Provisions.**

Plaintiff has relied on *Bratcher v. National Grange Mut. Ins. Co.*, 356 S.E.2d 151, 292 S.C. 330 (Ct. App. 1987), wherein Franklin Bratcher was injured while riding in a car owned and driven by his father, who was at fault. The insurance policy provided liability and UIM coverage in the amount of $50,000. The policy provided that an "'underinsured motor vehicle' does not include any vehicle or equipment . . . [o]wned by or furnished or available for the regular use of you [father] or any family member." *See id.*, 292 S.C. at 331, 356 S.E.2d at 152. The insurer settled the son's claim under the policy's liability coverage but denied his claim for UIM benefits. The Court of Appeals considered whether the exclusion of owned or regularly used vehicles from the definition of "underinsured motor vehicle" violated South Carolina statute. The Court of Appeals noted that "'where an insurance policy is issued pursuant to a statute which authorizes an exception to the coverage, all other exceptions are excluded.'" *See id.* (*quoting McDonald v. State Farm Mut. Auto. Ins. Co.*, 287 S.C. 40, 44, 336 S.E.2d 492, 494 (Ct. App. 1985)). Specifically, the court concluded that former South Carolina Code § 56-9-831 "authorizes insurance carriers to restrict the amount of underinsured motorist coverage to the limits of the liability coverage but does not authorize any other restriction on the underinsured motorist

coverage."[9] *See id.*, 292 S.C. at 332, 356 S.E.2d at 152 (*citing Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983) ("The only restriction recognized by the statute is that an insured may not have a greater amount of underinsured motorist coverage than he has liability coverage.")). The court held, without analysis (and without even discussing the text of Section 56-9-831), "that the exception from coverage which National Grange included in its policy is invalid." *See id.*, 292 S.C. at 332-33, 356 S.E.2d at 152.

This Court should not extend *Bratcher* (and Section 38-77-160) to preclude parties from agreeing to a nonduplication provision, because the *Bratcher* court did not address nonduplication clauses and did not express any intention to do so.[10] The Court should not extend *Bratcher* to prevent the parties, in the context of optional and voluntary UIM and additional UM coverage, from *ever* voluntarily agreeing to *any* coverage limitation (aside from a limitation to the amount of liability coverage).[11] *Bratcher* did not address or consider the provisions at issue here and, as a result, does not require invalidation of those provisions.

A decision from the District of South Carolina – *Sibert v. State Auto*, which is cited above -- is on all fours with this case and instructs that *Bratcher* does not invalidate the nonduplication provisions at issue:

> In *Bratcher*, the South Carolina Court of Appeals held invalid a provision of an automobile insurance policy excluding vehicles owned by the insured from the policy's definition of an UIM vehicle. [Citation omitted.] The court held that the exclusion was invalid because it was not specifically authorized by statute. *See id.* However, *Bratcher* did not consider the specific issue in the case at bar. Additionally, following *Bratcher*, the South Carolina Court of Appeals and South Carolina Supreme Court have found other policy limitations and exclusions regarding UIM coverage do not violate South Carolina public policy and are valid

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9 *Bratcher* interpreted the former UIM statute, Section 56-9-831. The current version of that statute appears at S.C. Code § 38-77-160.

10 Extending *Bratcher* would be inconsistent with S.C. Code § 38-77-160, which does not expressly prohibit limitations on UIM coverage. Instead, that statute only requires a meaningful *offer* of UIM coverage and additional UM coverage above the statutory minimum.

11 The "overwhelming majority of our sister states that have considered the issue" have rejected the *Bratcher* approach. *See Mercury Indem. Co. of Ill. v. Kim*, 358 Ill. App. 3d 1, 6, 830 N.E.2d 603, 608 (2005) (collecting cases).

> under section 38-77-160. . . . Plaintiff has failed to point to any South Carolina law finding that nonduplication provisions are invalid. Further, after review, the court finds the Policy's nonduplication provisions do not violate section 38-77-160. Therefore, the court finds the Policy's nonduplication provisions are valid.

See Sibert v. State Auto. Mut. Ins. Co., No. 8:20-4000-HMH, 2021 U.S. Dist. LEXIS 149971, at *9 (D.S.C. Aug. 10, 2021).

While South Carolina appellate courts have not specifically analyzed the enforceability of nonduplication clauses in optional UIM and UM coverage under Section 38-77-160, they have ruled post-*Bratcher* — consistent with *Sibert* — that coverage limitations are, in fact, enforceable. Several subsequent courts have refused to apply Section 38-77-160 to invalidate coverage limitations, suggesting that Plaintiff's requested blanket application of *Bratcher* is inconsistent with the statute. For example, in *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007), Burgess was injured on his motorcycle, which was insured by Alpha. Burgess' damages exceeded the at-fault driver's coverage, but he had no UIM coverage on the motorcycle. He did have Nationwide UIM coverage on three other vehicles he owned. Nationwide denied the UIM claim, relying on the following provision:

> If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall . . . be excess if the involved vehicle is not your auto described on this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.

The trial court agreed with Burgess that Nationwide was obligated to pay UIM benefits under one of the policies insuring his other vehicles, and the Court of Appeals concluded that this provision violated S.C. Code § 38–77–160.[12]

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12 The Court of Appeals focused on the following sentences in S.C. Code § 38-77-160: "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." The Court of Appeals concluded that the provision violated Section 38-77-160:

> Nowhere in the statute is there language that limits basic UIM coverage to an insured vehicle. To the contrary, the statute plainly allows coverage when none of the insured's

The South Carolina Supreme Court reversed, holding that this provision was valid:

> Neither § 38-77-160 nor our prior decisions decide the issue presented here: Is public policy offended by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy? We find it is not. UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages. Essentially, the insured is buying insurance coverage for situations, as where he is a passenger in another's vehicle or is a pedestrian, where he cannot otherwise insure himself. When, however, the insured is driving his own vehicle, he has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so when insuring his motorcycle. . . .
>
> We hold that public policy is not offended by an automobile insurance policy provision which limits the portability of basic "at-home" UIM coverage when the insured has a vehicle involved in the accident. *Compare State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (endorsement providing for set-off of workers' compensation benefits for UIM valid where UM set-off is not, because UIM coverage is voluntary).

See id., 373 S.C. at 41-42, 644 S.E.2d at 43. Thus, the South Carolina Supreme Court determined that Section 38-77-160 does not prohibit a provision limiting the portability of UIM coverage.

Further, in *State Farm Mutual v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000), *overruled on other grds. by Sweetser v. South Carolina Dep't of Ins. Res. Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010), the South Carolina Court of Appeals held that a setoff provision did not violate Section 38-77-160:

> [N]othing in section 38–77–160, which provides for UIM policies, conflicts with the setoff provision in Calcutt's policy. . . . [S]ection 38–77–160 does not prohibit a setoff provision, regardless of whether the employer or the employee

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> vehicles is involved in the accident. To say that the legislative intent was to exclude basic UIM coverage if an insured's vehicle is involved in an accident but include coverage when none of the insured's vehicles is involved in an accident is absurd, absent specific language to that effect. . . . The manifest purpose of section 38-77-160 is to provide coverage in the event that the insured sustains damages in excess of the liability limits carried by the at fault motorist.

See Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 204–05, 603 S.E.2d 861, 866 (Ct. App. 2004), *rev'd*, 373 S.C. 37, 644 S.E.2d 40 (2007).

> purchased the UIM policy. Therefore, State Farm's setoff provision does not conflict with our insurance laws.

See id., 340 S.C. at 234-34, 530 S.E.2d at 897-98; *accord Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994) (enforcing policy provision stating that "[a]ny amount payable under this insurance shall be reduced by . . . [a]ll sums paid or payable under any workers' compensation, disability benefits or similar law."); *Brand v. Allstate Ins. Co.*, 2018 S.C. App. Unpub. LEXIS 49, at *1-*2 (Ct. App. Jan. 31, 2018) ("Allstate had the right to offset employee-purchased UIM coverage with paid workers' compensation benefits."). The offset provisions that courts have upheld post-*Bratcher* all operate much like the subject nonduplication provisions. As a result, these cases strongly validate those non-duplication provision.

The South Carolina Supreme Court has recently again refused to adopt *Bratcher*'s "heavy-handed"[13] construction of Section 38-77-160. In *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 858 S.E.2d 633 (2021), the Supreme Court held that a provision excluding the named insured's husband from *all* coverages of the policy by an endorsement stating that "all coverages in your policy are not in effect while Danny Knight is operating any motor vehicle" was enforceable. *See id.*, 858 S.E.2d at 638 ("Knight also argues the policy provision violates section 38-77-160 of the South Carolina Code (2015) because it excludes statutorily required UIM coverage. We disagree on this point as well."). While *Knight* did not involve a nonduplication provision, it does confirm that the Supreme Court would likely not apply Section 38-77-160 in the blanket manner that Plaintiff proposes under *Bratcher*, invalidating each and every limitation on UIM or extra UM coverage aside from restricting the maximum amount of such coverage to the amount of liability coverage.

Other courts applying South Carolina law suggest that Plaintiff proposes an unwarranted extension of *Bratcher*. For example, in *Rowzie v. Allstate Insurance Company*, 556 F.3d 165

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13 *See Kang v. State Farm Mut. Auto. Ins. Co.*, 72 Haw. 251, 258, 815 P.2d 1020, 1023 (1991) ("We cannot accept the rationale of the Court of Appeals of South Carolina. In Hawaii, the legislative history of the underinsured motorist statute gives no indication of any legislative intent that the statute be implemented in such a heavy-handed manner.").

(4th Cir. 2009), after accidents with underinsured motorists, plaintiffs received benefit payments under the PIP/MedPay coverages. Plaintiff sought UIM benefits under the same polices, and Allstate claimed that it was entitled to reduce the amount payable as UIM benefits by the amounts previously paid as PIP/MedPay benefits under the following provision, which operated just like a non-duplication provision: "[UIM] damages payable will be reduced by ... all amounts payable under . . . Medical Expense Benefits Coverage of this policy, or any similar automobile medical payments coverage." Plaintiff argued that this provision violated South Carolina Code §§ 38-77-144[14] and 38-77-160[15]. The Fourth Circuit agreed with Judge Norton's grant of summary judgment to Allstate, finding that the provision did not violate these statutes.

> Under South Carolina law, UIM coverage is not mandatory and must be paid only up to the amount of damages incurred by the injured driver. . . . The district court reasoned that, because Plaintiffs received UIM benefits up to a level that — when combined with their PIP/MedPay benefits — compensated them for their entire loss, they received all of the "rights" to coverage to which they were entitled, both under the terms of Allstate's policy and under South Carolina law. The district court, therefore, concluded that Allstate's policy does not create a subrogation or assignment of Plaintiffs' UIM benefits, and does not violate § 38-77-160. We agree with the district court.

See id., 556 F.3d at 170-71; *accord Koulpasis v. State Farm Fire & Cas. Co.*, 2021 U.S. Dist. LEXIS 22336, at *14 (D.S.C. Feb. 5, 2021) (enforcing plain language where "UIM exclusion[16] prohibits UIM coverage on an owned vehicle that is not insured for UIM coverage"); *Siron v. Allstate Fire & Cas. Ins. Co.*, 225 F. Supp. 3d 574, 580 (D.S.C. 2016) ("The Court adopts the *Rowzie* court's rationale, as detailed above, in concluding the South Carolina Supreme Court would likely hold that a provision authorizing the offset of UIM benefits payable under a

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14 That statute stated: "If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff." S.C. Code § 38–77–144.

15 Specifically, they argued that the provision violated S.C. Code § 38-77-160: "Benefits paid pursuant to this section are not subject to subrogation and assignment."

16 The relevant provision excluded UIM coverage for "bodily injury sustained" while occupying a motor vehicle owned by the insured claimant or family member "which is not insured for this [UIM] coverage."

personal automobile insurance policy by MedPay benefits issued is enforceable under South Carolina law."); *Diamond State Ins. Co. v. Estate of McNeal*, Civil Action No. 1:11-cv-02528-JMC, 2013 U.S. Dist. LEXIS 33092, at *13 (D.S.C. Mar. 11, 2013) ("Under South Carolina law, an insured may be contractually prohibited from claiming UIM policy benefits by valid policy provision."). While the South Carolina courts have not considered the legality of nonduplication clauses in UIM coverage, they found similar offset provisions to be enforceable.

These cases confirm that the Court should not broadly extend *Bratcher*, because Section 38-77-160 does not expressly prohibit limitations on UIM coverage; rather, it only requires that insurers offer UIM coverage. Plaintiff can cite to no authority supporting that the legislature intended a statute mandating the *offer of optional* UIM or (excess) UM coverage to invalidate *all* contractual limitations on optional UIM and UM coverage.

Therefore, for the foregoing reasons, the Court should reject Plaintiff's reliance on *Bratcher* and reverse the grant of Plaintiff's motion for judgment on the pleadings. Additionally, the Court should reverse the denial of Defendant Meridian's motion for judgment on the pleadings and should grant the relief requested by Meridian.

ii. The Cases Cited by *Bratcher* Do Not Support Its Conclusions.

Plaintiff's misplaced reliance on *Bratcher* is confirmed by examining the cases that the *Bratcher* court cited. First, *Bratcher* relied heavily on *Gambrell* to support the proposition that former South Carolina Code § 56-9-831 (now amended at Section 38-77-160) prohibits all restrictions on UIM coverage, except for a limitation to the amount of liability coverage. *Gambrell* does not stand for such a proposition. The *Gambrell* Court considered only whether, under Section 56-9-831, a claimant could recover under UIM coverage where the limit of the at-fault motorist's liability coverage was higher than the UIM coverage. The Court concluded only that Section 56-9-831 did not preclude UIM coverage under those circumstances:

> We must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary and popular meaning. We should not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties. [Citation omitted].

> With these rules in mind, we conclude the purpose of S.C. Code Ann. § 56-9-831 (1982 Supp.) is to provide coverage where the injured party's damages exceed the liability limits of the at fault motorist. The only restriction recognized by the statute is that an insured may not have a greater amount of underinsured motorist coverage than he has liability coverage. There is no requirement that the insured's underinsured motorist coverage limits must exceed the liability limits of the at fault motorist. . . .
>
> To adopt the insured's argument that underinsured coverage is only intended to offer protection in the event damages are caused by out of state vehicles whose coverage does not meet the statutory minimum would negate the theory of uninsured motorist coverage.
>
> One buys uninsured motorist coverage to protect himself in case an at fault driver has no liability coverage or has less liability coverage than required by statutes. . . . [O]ptional underinsured coverage would always be over and above either the at fault driver's liability coverage or over and above the policyholder's own uninsured motorist coverage. This is the protection provided for the additional premium paid for the underinsured motorist coverage.

See id., 580 S.C. at 71, 310 S.E.2d at 816. The Court only considered whether the predecessor to Section 38-77-160 precluded UIM coverage where the at-fault driver's liability limits exceeded the UIM limits. The Court concluded that UIM coverage could be triggered irrespective of the amount of the at-fault driver's liability coverage (so long as it was less than the amount of the injured person's damages). Nothing in *Gambrell* suggests (as Plaintiff and *Bratcher* suggest) that Section 38-77-160 is a blanket prohibition of limitations on UIM (or extra UM) coverage.

The Court of Appeals in *Bratcher* also relied on *McDonald v. State Farm Mut. Auto. Ins. Co.*, 287 S.C. 40, 336 S.E.2d 492 (Ct. App. 1985), for the proposition that when a policy is issued pursuant to a statute authorizing an exception to coverage, "all other exceptions are excluded." In *McDonald*, the Court of Appeals considered:

- Former S.C. Code § 56-11-110, which required that policies provide minimum benefits at the insured's option, including benefits for medical expenses and loss of earnings up to $1,000 per person for "the named insured and members of his family residing in his household, Except such persons as may be specifically excluded in accordance with law, injured in any motor vehicle accident . . . ." The authorized exclusions were set forth in S.C. Code § 56-11-170, for an insured who:
    - (a) intentionally causes the accident resulting in the injury; or

- (b) is injured while operating or voluntarily riding in a vehicle known by him to be stolen; or
- (c) is injured while in the commission of a felony or while in violation of Section 56-5-750;
- (d) with respect to motorcycles, economic loss benefits required under Section 56-11-110 may be excluded or may be offered with deductions, options or with specific exclusions.

- Former S.C. Code § 56-11-120 required that no application for insurance be taken unless Section 56-11-110 benefits were offered "with alternative benefit levels, at the option of such insured, of $1500, $2000, $2500 or $5000."

McDonald did not purchase optional coverage for benefits on the policy covering the car involved in the accident, but had such coverage under a policy issued on another vehicle. The policy excluded coverage for injuries to the McDonalds while occupying a vehicle one of them owned.[17] The Court of Appeals concluded that this exclusion was invalid.

> It is equally clear that the exclusion is invalid under the Act. Section 56-11-110 allows exclusions from the coverage it requires only for "such persons as may be specifically excluded in accordance with law." Section 56-11-170 sets out four authorized exclusions. None of these exclusions is applicable under the facts of this case. The policy issued by State Farm lists the exclusions authorized by this section and then attempts to further limit its coverage by adding several unauthorized exclusions including the exclusion in issue.

See id., 287 S.C. at 43, 336 S.E.2d at 494. In *McDonald*, unlike the instant case, the Court of Appeals interpreted a statute containing specific statutorily-allowed exclusions; in particular, the legislature detailed four permissible exclusions. Section 38-77-160 does not enumerate *any* coverage exclusions. It merely requires that insurers *offer* optional UIM coverage, up to the amount of liability coverage.[18] Unlike the statutes in *McDonald*, Section 38-77-160 does not

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[17] The Court noted that, but for this exclusion, "it is clear that . . . they would be entitled to collect the benefits which they seek under both the terms of the policy issued on the Chevrolet and the requirements of the Act." *See id.*, 287 S.C. at 43, 336 S.E.2d at 494.

[18] This is logical from a policy perspective, as it discourages people from buying extravagant UIM policies to protect themselves, while purchasing only minimal liability coverage for the protection of people injured through their fault.

enumerate specific exclusions of coverage that would suggest the legislature was seeking to exhaust all possible exclusions or limitations.

b. *Garris* and *Ferguson* Do Not Support Plaintiff's Public Policy Argument.

Meridian can also distinguish the *Garris* and *Ferguson* cases that Plaintiff has cited in her motion for judgment on the pleadings. Those cases do not support Plaintiff's broad contention that the nonduplication provisions violate public policy. To the contrary, these cases stand for limited propositions that are not implicated here.

In *Garris*, the Supreme Court held only that: (a) "underinsured motorist coverage is optional coverage provided by an insurance carrier in the event damages are sustained by the insured in excess of the at-fault driver's liability coverage, recovery therefrom being additional to any recovery from the at-fault motorist, total recovery not to exceed the damages sustained"; (b) "underinsured motorist coverage in any amount up to the insured's liability coverage must be offered to a policyholder"; and (c) stacking of UIM coverage was not proper for Class II insureds. *See Garris*, 280 S.C. at 151-56, 311 S.E.2d at 725-27. These holdings have nothing to do with the issues before the court: *i.e.,* whether a contractual nonduplication provision is enforceable. *Garris* did not make any ruling that would support that the nonduplication provisions are unenforceable.

In *Ferguson*, the Supreme Court considered whether a provision in a UM policy offsetting coverage by any amounts received under any workers' compensation law was enforceable in South Carolina. In that case, the UM carrier provided the then-mandatory minimum of $10,000 per person coverage. The Court concluded that provision was unenforceable because:

> The public policy declared by our uninsured motorist statute imposes an obligation on insurers to provide protection to their insureds against loss caused by wrongful conduct of an uninsured motorist, and any limiting language in an insurance contract which had the effect of providing less protection than made obligatory by the statutes is contrary to public policy and is of no force and effect. . . . The general rule supported by the majority of the decided cases is that an

> uninsured motorist endorsement provision for the reduction of payments by amounts received by the insured under any workmen's compensation law has been held void or invalid and unenforceable, on the ground that such provision reduced the effective coverage below that required by the statute and was contrary to public policy. . . . It is our conclusion that the appellant's liability under the uninsured motorist endorsement is contractual in nature and arises after the liability of the uninsured motorist has been established and is not subject to reduction by the amounts received by the respondent here under the Workmen's Compensation Law for the reason that such provision places a limitation upon the requirement of the statute and conflicts with the terms thereof.

See Ferguson, 261 S.C. at 100-03, 198 S.E.2d at 524-25. The UM coverage at issue in *Ferguson*, by definition, included elements of loss (such as pain and suffering) that were not covered by the workers' compensation payment. As a result, the Court simply held that the insurance company was required to provide the minimum level of required UM coverage, under circumstances where the workers' compensation payments could not have compensated the Plaintiff for all elements of loss, since many of those elements are not recoverable under South Carolina's workers' compensation laws. This case is distinguishable in that the coverage under which Plaintiff seeks coverage is *optional* UIM and excess UM coverage. In any event, *Ferguson* did not consider a duplication provision that simply provides that the insurer shall not be required to pay for elements of loss that it has already paid *under the same policy.*

For the foregoing reasons, *Garris* and *Ferguson* do not support Plaintiff's argument that the nonduplication provisions are unenforceable for violating public policy.

D. <u>Contrary to Plaintiff's Anticipated Argument, the Duplication Provisions Do Not Impermissibly Transform the UIM Coverage into "Reduction Coverage"</u>

Plaintiff has argued that the "application of the [nonduplication] provision[s] to the policy's UIM coverage would have the effect of transforming that coverage into 'reduction coverage' as opposed to 'excess coverage' in contravention of South Carolina law." (*See* Pl.'s Mot. for J. on Pldgs., at 1-2 (*citing State Farm Mut. Auto. Ins. Co. v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991); *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 403 S.E.2d 662 (Ct. App. 1990); S.C. Code § 38-73-1105; S.C. Code § 38-77-30 (14) & (15)). For the following reasons, Plaintiff's argument is misplaced, and she was not entitled to Judgment on the Pleadings.

The Court of Appeals compared "excess" and "reduction" UIM coverage thirty years ago:

> "Excess" underinsured motorist coverage provides benefits to an insured under his own policy any time the at fault driver's liability coverage is less than the amount of the claimant's actual damages. The claimant is entitled to benefits equal to the difference between his actual damages and the at fault driver's limits up to the claimant's own underinsured motorist limits. . . . "Reduction" underinsured motorist coverage provides benefits to an insured under his own policy only when the claimant's underinsured motorist coverage is greater than the at fault driver's liability coverage because the amount of recovery from the claimant's underinsured motorist coverage is reduced by the amount of recovery from the at fault motorist.

See Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 285, 403 S.E.2d 662, 664 (Ct. App. 1991) (finding that under then-existing statutes[19] South Carolina was "reduction" coverage state). The legislature now defines an "underinsured motor vehicle" as a vehicle "as to which there is bodily injury liability insurance or a bond applicable at the time of the accident . . . and the amount of the insurance or bond is less than the amount of the insureds' damages." See S.C. Code § 38-77-30. South Carolina is now an "excess" state. *See State Farm Mut. Auto. Ins. Co. v. Horry*, 304 S.C. 165, 169, 403 S.E.2d 318, 320 (1991) (finding that *Purvis* "contains a well written and comprehensive review of how this state moved from being an 'excess' coverage state . . . to a 'reduction' coverage state . . and then back to an 'excess' coverage state.'").

However, whether South Carolina is a "reduction" or an "excess" state has no bearing on the enforceability of the nonduplication provisions. That inquiry deals only with the limited question of whether the level of UIM coverage was required to exceed liability coverage limits.

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[19] Specifically, the statute defined an "underinsured motor vehicle" as one to which liability insurance coverage was "(a) less than the limit of underinsured motorist coverage under the insured's policy; or (b) has been reduced by payments to persons, other than the insured, injured in the accident to an amount less than the limit for underinsured motorist coverage under the insured's policy." *See* S.C. Code § 38-77-30(14) (pre-1989 version). Statutes further provided that this definition could "not be used by an insurer unless the insurer reduces his rate for [UIM] coverage by an amount determined appropriate by the Commissioner and refunds any such premium that the Commissioner determines is necessary to correspond with the new definition." *See* S.C. Code § 38-77-1105 (pre-1989 version). "In 1989 § 38-77-30(14) was amended to provide: 'Underinsured motor vehicle' means a motor vehicle as to which there is bodily injury liability insurance . . . less than the amount of the insured's damages." *See Horry*, 304 S.C. at 170, 403 S.E.2d at 320 (1991).

Nothing in this authority concerns the question presented here. The law simply has not ruled that nonduplication provisions are illegal and unenforceable.

For the foregoing reasons, the distinction between "reduction" and "excess" views of UIM coverage does not support Plaintiff's argument that the nonduplication provisions are invalid. Therefore, Judge McKinnon should have denied Plaintiff's Motion for Judgment on the Pleadings and granted Meridian's Motion for Judgment on the Pleadings.

E. Plaintiff's Anticipated Argument That the Nonduplication Provisions Are Unenforceable Because Payments Under the Liability Coverage Offset UIM and UM Coverage Is Without Merit

Plaintiff also argued in the trial court that "because Defendants are entitled to an offset against any damages award for liability coverage previously paid and Plaintiff's UM and UIM claims are for damages after application of that offset, the duplicate payments provision of the policy simply does not apply to the present claims." (*See* Pl.'s Mot. J. on Pldgs., at 2 (*citing Argonaut Great Cent. Ins. Co. v. Casey,* 701 F.3d 829 (8th Cir. 2012); *Lock v. American Family Ins. Co.*, 12 Wash. App. 2d 905, 460 P.3d 683 (2020); *GEICO v. Sherlock*, 140 A.D.3d 872, 32 N.Y.S.3d 635 (2016); *Fischer v. Midwest Security Ins. Co.*, 268 Wis. 2d 519, 673 N.W.2d 297 (2003)).

However, this argument does not address the issue here. Irrespective of whether there might be offset rights in some circumstances, the issue here is whether the nonduplication provisions preclude UIM and UM coverage. As set forth above, the plain language of the policies is clear that Plaintiff is seeking payments for the same "elements of loss" under the UIM and UM policies that Meridian already paid her under the liability coverage. Plaintiff has cited to no South Carolina authority invalidating those provisions. As a result, the Policy is unambiguous that Meridian is not required to pay Plaintiff any UIM or UM benefits here.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the trial court's grant of judgment on the pleadings to Respondent Steineman and should reverse the denial of Meridian's motion.

February 22, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
In the Court of Common Pleas for the Sixteenth Judicial Circuit

The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001510

Francine Steineman.....Respondent,

v.

Meridian Security Insurance Company .....Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the above-referenced Respondent and all other parties by email and by depositing a copy of it in the United States Mail, postage prepaid, on February 22, 2023, addressed to her attorneys of record:

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