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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001510

Francine Steineman …… Respondent,

v.

Meridian Security Insurance Company ……. Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Does the wording of the subject insurance policy's duplicate payments provisions operate to exclude the named insured's recovery of uninsured motorist coverage or underinsured motorist coverage after she has recovered liability coverage under the policy?

II. If the answer to the above question is "yes," then do the duplicate payments provisions, so applied, violate public policy?

STATEMENT OF THE CASE

Respondent agrees with the "Procedural History" section of Appellant's Brief, with the exception of the relief requested by Appellant in the final paragraph thereof. Consequently, Respondent does not provide a separate Statement of the Case.

STANDARD OF REVIEW

Respondent does not disagree with the Standard of Review set forth in Appellant's Brief. However, Respondent adds that, because the material facts are undisputed by the parties, the only matters for this Court to resolve are questions of law. The Court employs a *de novo* standard of review to do so.

> "A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." *Auto Owners Ins. Co. v. Newman,* 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Id.* "Where the action presents a question of law ... this Court's review is plenary and without deference to the trial court." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.,*395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011).

Pulliam v. Travelers Indem. Co., 403 S.C. 332, 339, 743 S.E.2d 117, 121 (Ct. App. 2013).

Whether an insurance policy's language is ambiguous is a question of law. *Hutchinson v. Liberty Life Ins. Co.*, 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013). If the Court finds that any terms are ambiguous, it must liberally construe the ambiguity in favor of the insured. *Id*. In addition, the Court must also narrowly construe a policy's exclusionary terms in favor of coverage and for the benefit of the insured. *Id*.

ARGUMENTS

1. Facts

Respondent Francine Steineman ("Steineman") was the named insured on automobile insurance policy number ACS 0048016 ("the Policy") issued on November 1, 2017, by Appellant Meridian Security Insurance Company ("Meridian"). (R. p. 22, ¶ 6; p. 37). The Policy insured three vehicles (R. p. 22, ¶ 7; p. 37) and provided limits of $250,000 per person in bodily injury liability ("BI") coverage, $250,000 per person in uninsured motorists ("UM") coverage, and $250,000 per person in underinsured motorists ("UIM") coverage for each vehicle. (R. p. 22, ¶ 6; p. 37). The Policy also defined Steineman's spouse and other family members as "insureds." (R. pp. 39-40).

The Policy was in effect on January 22, 2018. (R. p. 37). On that date, Steineman was a passenger in her 2001 Ford Explorer, one of the vehicles insured under the Policy. (R. p. 24, ¶ 15; p. 37). Her husband, Eric Steineman, was driving the vehicle and was insured by the Policy. (R. pp. 24, ¶¶ 15, 22). The Steineman vehicle and a vehicle driven by Sarah Smith, an uninsured driver,[1] were involved in a collision ("the Collision"). (R. p. 24, ¶ 19; p. 25, ¶ 24).

[1] Although the Complaint only identifies the two drivers as "Mr. Steineman" and an "uninsured driver," it expressly references a tort action resulting from the Collision. (R. p. 25, ¶ 27). Therefore, the Circuit Court properly took judicial notice from the tort action that Steineman's husband is named Eric Steineman and the uninsured driver is named Sarah Smith. (R. p. 2, n.2). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007) (in analyzing a Rule 12(b)(6) motion to dismiss, a court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

Steineman continues to use the driver's actual names, in contrast to Meridian's description of Sarah Smith as an "Uninsured John Doe Driver." (Appellant's Brief, p. 5). Because "John Doe" has a unique meaning in the context of UM coverage as an unknown motorist (but Sarah Smith is known) and because a John Doe UM claim has additional procedural requirements (which do not apply to Steineman's UM claim against Sarah Smith), *see* S.C. CODE ANN. §§ 38-77-170 & -180 (1976, as amended), Meridian's terminology has the potential of mischaracterizing Steineman's UM claim.

Steineman suffered serious bodily injuries in the Collision. (R. p. 24, ¶ 20). She alleges Eric Steineman and Sarah Smith were negligent, caused the Collision, and are therefore liable for her damages. (R. p. 24, ¶¶ 19, 22; p. 25, ¶ 24). Thus, she demanded that Meridian pay the limits of the Policy's $250,000 in BI coverage plus $750,000 in UIM coverage ($250,000 UIM limits stacked for three insured vehicles) because of Eric Steineman's negligence. (R. p. 24, ¶ 22). Steineman also demanded Meridian's payment of $750,000 in UM coverage ($250,000 UM limits stacked for three insured vehicles) due to Sarah Smith's negligence. (R. p. 25, ¶¶ 24-25).

Meridian refused to pay the full amounts demanded by Steineman. Instead, it tendered the Policy's $250,000 BI limits but denied Steineman's demands for UM and UIM coverages. (R. p. 25, ¶¶ 23, 26). Meridian's denial was based on exclusions included in the BI, UM, and UIM coverage sections of the Policy known (and hereinafter referred to) as "duplicate payments" provisions. (R. p. 25, ¶¶ 23, 26). Those provisions are worded similarly under each coverage and state that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under" BI, UM, and UIM coverages. (R. p. 25, ¶ 28 – p. 26, ¶ 31; pp. 42, 66, 69). The duplicate payments provisions of the UIM coverage also state: "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." (R. p. 69). The Policy does not define the terms "duplicate payments" and "elements of loss." (R. p. 26, ¶ 32).

Steineman alleges damages in excess of $1,000,000. (R. p. 24, ¶ 21). Her past and future medical expenses alone exceed $1,000,000. (R. p. 173, lines 5-7; p. 174, lines 14-18).

2. <u>The Policy's duplicate payments provisions do not exclude Steineman's recovery of UM or UIM coverage.</u>

The Circuit Court correctly concluded that the duplicate payments provisions of the Policy do not preclude Steineman's recovery of UM or UIM coverage under the Policy.

As the Circuit Court properly reasoned, the first step in analyzing Meridian's denial of coverage is to determine the meaning of the term "duplicate payments." Because the term is not defined by the Policy, it was appropriate for the Circuit Court to consider how that term is typically defined and has been applied in other legal contexts. *See, e.g., Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183, 763 S.E.2d 598, 602 (Ct. App. 2014) ("The court must give policy language its plain, ordinary, and popular meaning."). And, as the Circuit Court correctly found, the commonly understood definition of "duplicate" is an exact copy or double of something else. *See, e.g., State v. Hatfield*, 462 P.3d 330, 336 (Utah 2020); *Vaughn v. Michelin Tire Corp.*, 756 S.W.2d 548, 557 (Mo. App. 1988). Thus, the ordinary and plain meaning of "duplicate payment" is an identical payment or paying twice for the same thing.

Meridian advocates a different construction of the duplicate payments provisions. To accept that construction, the Court would have to find that the term "duplicate payments" has a different meaning than that set forth above. However, even if the term could have an alternative and similarly reasonable meaning, that would only create an ambiguity in the language of the exclusionary provisions. *Williams v. Government Emps. Ins. Co.*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (an insurance policy term is ambiguous if "it is capable of more than one meaning when viewed objectively"). Of course, as discussed above, the Court must construe all such ambiguities in favor of coverage.

The Circuit Court correctly observed that the term "duplicate payments" is different than simply "payments." This is important because Meridian's construction of the duplicate payments provisions would arguably be more plausible if those provisions did not use the word "duplicate" but only said "payments" (*i.e.*, "No one will be entitled to receive payments for the same elements of loss under this coverage and Part A of this policy."). But to equate "duplicate payments" with

"payments" in this context would violate the principle of insurance policy construction that requires the Court to give meaning to the language of the policy and not to ignore terms in a way that renders them meaningless. *See Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970). Rather, Meridian chose to include the term "duplicate" and its inclusion must mean something.

Simply put, the duplicate payments provisions, as the Circuit Court ruled, are intended to prevent a double recovery – a duplication – but not to prevent an insured from recovering fully for her damages, up to applicable policy limits.

The Circuit Court's construction of how the duplicate payments provisions operate to prevent a double recovery is consistent with and necessary to the manner in which UM and UIM coverages are typically applied. This fact is further evidence that its ruling is correct.

The Circuit Court's conclusion is probably most easily appreciated with respect to UIM coverage. The Policy's UIM endorsement includes the following insuring agreement:

> We will pay damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of:
>
> 1. "Bodily injury" sustained by an "insured" and caused by an accident….

(R. p. 68).

There is no dispute Steineman is an insured under the Policy. The Policy defines "underinsured motor vehicle" as follows:

> "Underinsured motor vehicle" means 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 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.

(R. p. 68).

It is noteworthy that nothing in this insuring agreement or definition limits an insured's ability to recover *all* damages caused by an underinsured motorist, without regard to any payment made on behalf of that motorist.[2] In other words, absent other limiting provisions, the Policy permits an insured to recover UIM benefits for all damages caused by an underinsured driver, even if she has received that driver's BI coverage limits and UIM benefits duplicate the BI payment.

The duplicate payments provisions provide the only language in the Policy's UIM endorsement that supports a damages offset for BI coverage received. The language of those provisions demonstrates clearly that they are intended to provide Meridian, as UIM carrier, with a credit for the amounts paid or payable by the at-fault motorist's BI insurer, even if that insurer is Meridian under the Policy – that is, they prevent a double recovery. They state:

> **D.** No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part **A**[3] … 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.
> . . .
> **G.** We will reduce the "insured's" total damages by any amount available to that "insured", under any bodily injury liability bonds or policies applicable to the "underinsured motor vehicle", that such "insured" did not recover as a result of a settlement between that "insured" and the insurer of an "underinsured motor vehicle".[4] However, any reduction of the "insured's" total damages will not reduce the limit of liability for this coverage.

(R. p. 69).

If the Court were to find that these provisions do not provide Meridian with a credit for BI coverage paid or payable to a UIM insured, then Meridian has no basis on which to claim that

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[2] Under the "Limits of Liability" section of the UIM endorsement, the Policy separately caps the insured's maximum recovery based on the UIM coverage limits stated in its declarations. (R. p. 68).

[3] Part A of the Policy is the BI coverage. (R. p. 40).

[4] A reduction in damages for the amount of BI coverage available, even if it was not all paid, was authorized by *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

credit and, under the UIM endorsement's insuring agreement, Steineman could claim she is entitled to recover all of her damages under the UIM coverage despite the fact that she has also received $250,000.00 in BI coverage. This would be an absurd result and further demonstrates that Meridian intended the phrase to prevent a double recovery, as the Circuit Court found.

Moreover, accepting Meridian's construction of these provisions would yield an even more unreasonable result. The language used in items D and E is the same except that D refers to payments under the Policy, whereas E refers to payments on behalf of the at-fault motorist from another source. But, if the Court were to accept Meridian's interpretation, *an insured could never collect UIM coverage under the Policy after accepting BI coverage on behalf of an at-fault motorist* – even if the BI coverage was paid by another insurer – because that payment would be considered a payment for the same "elements of loss" under item E. This would render the Policy's UIM coverage totally illusory; therefore, the Court should reject Meridian's construction. *See S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) ("the literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory.'").

Finally, to take the application of Meridian's construction to its logical (but most absurd) extreme, Steineman would be better off in that scenario if she were to reject the BI coverage altogether and proceed only against UIM coverage with respect to her claim against Eric Steineman. That is because, under item G quoted above, she could obtain a judgment for damages, reduce her damages by $250,000.00 (representing the available but uncollected BI coverage) and still recover all UIM coverage under the Policy, up to coverage limits (*i.e.*, $750,000.00). UIM limits would not be decreased per item G, which expressly states that the existence of BI coverage

"will not reduce the limit of liability for this coverage." Clearly, this not an outcome intended by the parties, nor was it the intent of the Legislature in enacting the UIM coverage statutes.

To the contrary, the phrase "will not reduce the limit of liability for this coverage" in item G is further proof that the duplicate payments provisions were simply intended to trigger UIM coverage at the point BI coverage limits end – not to exclude or to reduce UIM coverage.

With respect to UM coverage, the Policy's UM endorsement includes a similar insuring agreement and definitions. (R. p. 64). It also includes similar duplicate payments provisions. (R. p. 66). For the same reasons discussed above, these are intended to prevent a double recovery by an insured, which could otherwise potentially happen in a situation with multiple at-fault drivers (such as Steineman's tort claims) or where an at-fault driver has BI coverage but its limits are less than those mandated by South Carolina law. *See, e.g., Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 544, 370 S.E.2d 85, 88 (1988) ("The tortfeasor's insurance coverage in this case was not legally sufficient under South Carolina law and, therefore, the uninsured motorist provision applied.").

In summary, the Circuit Court correctly applied the term "duplicate payments" in accord with its ordinarily understood sense, Meridian's alternate interpretation of the term at best creates an ambiguity that the Court should nevertheless resolve in favor of coverage, and the results of applying Meridian's interpretation of the duplicate payments provisions demonstrate that its construction could not have been what the parties intended. This Court should therefore affirm the ruling of the Circuit Court that the duplicate payments provisions do not bar Steineman's claims for UM and UIM coverage under the Policy.

3. Even if the duplicate payments provisions were applied as contended by Meridian, they would violate public policy as established by South Carolina insurance statutes.

a. Public policy generally.

The Circuit Court correctly ruled that, if the duplicate payments provisions were applied to exclude UM or UIM coverage for Steineman's claims, they would violate public policy. As a result, the provisions would be void and unenforceable if one were to give them the effect advocated by Meridian. For the following reasons, the Circuit Court's conclusion was correct.

> As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition. While parties are generally permitted to contract as they see fit, freedom of contract is not absolute and coverage that is required by law may not be omitted. Statutes governing an insurance contract are part of the contract as a matter of law, and to the extent a policy provision conflicts with an applicable statute, the provision is invalid.

Williams v. Government Emps. Ins. Co., 409 S.C. at 598, 762 S.E.2d at 712.

The express language of the Policy's UM and UIM coverages recognizes this principle. Each coverage endorsement contains the following: "This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law." (R. pp. 67, 70).

Indeed, Meridian does not dispute this concept insofar as it applies to minimum limits UM coverage. (Appellant's Brief, p. 18, n.6). Instead, Meridian argues the Circuit Court erred in applying public policy principles to additional UM coverage and to UIM coverage.[5]

[5] The Circuit Court cited S.C. CODE ANN. § 38-77-142 (1976, as amended) in support of its conclusion that additional UM coverage limits and UIM coverage limits cannot be reduced without violating this State's public policy. Because the Circuit Court's reasoning with respect to minimum limits UM coverage applies equally to additional UM coverage and to UIM coverage, Steineman addresses the law applicable to the minimum limits UM coverage ruling first (*see* Rule 220(c), SCACR) and discusses Section 38-77-142 thereafter.

b. Statutorily required coverages.

At the heart of Meridian's argument regarding additional UM coverage and UIM coverage is its reliance upon a flawed distinction between "mandatory" coverages and "voluntary" coverages. (Appellant's Brief, pp. 25-26). Viewing different automobile coverages from the perspective of an insured, Meridian argues that any coverage an insured is legally required to carry on her policy (*i.e.*, minimum limits BI and UM) is "mandatory" but any other coverage an insured may add (including what Meridian characterizes as "optional" coverage) is "voluntary."

To the contrary, the Supreme Court has made it clear that the relevant distinction in the automobile insurance context is between "statutorily required" coverages and other coverages. In making this distinction, the court has focused on the viewpoint of the insurer, not the insured.

As a result, Meridian's rationale is based on the faulty premise that mandatory and statutorily required coverages are the same. Although statutorily required coverages include mandatory coverages (those an insured must have), they also include coverages insurers are mandated by statute to offer and, when chosen by an insured, to provide. Stated differently, from an insurer's perspective, it is required by statute to include the latter type of coverages in a policy. In that sense, they are treated the same as mandatory coverages. Contrary to Meridian's position, this kind of "optional" coverage is not voluntary coverage but is statutorily required coverage.

Because S.C. CODE ANN. § 38-77-160 (1976, as amended) requires insurers to offer both additional UM coverage and UIM coverage (and, when selected by the insured, to provide those coverages), they are considered statutorily required coverages. *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 380-81, 858 S.E.2d 633, 638 (2021) ("UIM coverage is statutorily required coverage because it must be offered."). Importantly, as is the case with mandatory coverages such as basic UM coverage, all statutorily required coverages must comply with State insurance statutes.

c. UM coverage.

UM coverage in this State is controlled by statute so that any inconsistent policy provisions are void. *Southern Farm Bureau Cas. Ins. Co. v. Fulton*, 244 S.C. 559, 564-65, 137 S.E.2d 769, 771 (1964). Specifically, as the South Carolina Supreme Court noted, almost 50 years ago:

> The general rule is that *an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations* through "other insurance," excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) *or other insured motorist coverage*. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance.

Ferguson v. State Farm Mut. Auto. Ins. Co., 261 S.C. 96, 101-02, 198 S.E.2d 522, 525 (1973), *quoting Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968) (emphasis added).

Minimum limits UM coverage in South Carolina is mandated by S.C. CODE ANN. § 38-77-150(A) (1976, as amended), which states that a policy providing UM coverage shall:

> 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 [S.C. CODE] Section 38-77-140 [*i.e.*, mandatory minimum BI limits].

Additional UM coverage is required coverage under S.C. CODE ANN. § 38-77-160 (1976, as amended), which does not change the above description of the nature of coverage.[6] In other words, once an insured purchases additional UM coverage, that coverage must pay the insured's damages up to the UM coverage limits. *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (1985) ("The obligation of the insurer under the terms of [Section 38-77-150] is to pay an insured all sums which he is legally entitled to recover from the tortfeasor up to the limit of insurance provided.").

[6] By using the phrase "within limits that may be no less than" minimum limits, Section 38-77-150(A) clearly intends for its requirements to apply to UM coverage whether in minimum limits or higher.

Therefore, the public policy of this State as established by insurance statutes is for both basic limits UM coverage and additional UM coverage to pay the amount of the insured's recoverable damages against an uninsured motorist, up to coverage limits, unless an exclusion is otherwise authorized by statute. *See, e.g.*, S.C. CODE ANN. §§ 38-77-210 & -220 (1976, as amended) (authorizing specific coverage exclusions).

The duplicate payments provisions of the Policy are not authorized by statute. Rather, they conflict with the policy of allowing an insured to recover damages up to UM coverage limits.

As noted above, the Supreme Court directly addressed this conclusion in *Ferguson*, in which it expressly held that UM coverage may not be limited or reduced because of other recoverable insurance, including "other insured motorist coverage" (*i.e.*, BI coverage). 261 S.C. at 102, 198 S.E.2d at 525. In summary, because the same public policies apply to minimum limits UM coverage and additional UM coverage, the result that Meridian concedes with respect to minimum limits UM coverage also applies to the additional UM coverage afforded by the Policy.

Here, if Steineman demonstrates she is legally entitled to recover damages from Sarah Smith, an admitted uninsured motorist, the Policy must by law provide UM coverage for the amount she is entitled to recover, *within the UM coverage's limits*. Applying the duplicate payments provisions of the Policy as urged by Meridian would have the effect of defeating this statutorily required coverage and would instead allow Meridian to limit its liability under the Policy's UM coverage – contrary to the rule set forth in *Ferguson* – to an amount less than the Policy's UM limits. Hence, application of the duplicate payments provisions to exclude any UM coverage under the Policy would be contrary to public policy.

This result is also clear when one considers a simple illustration. If Steineman were unable to establish her right to recover damages against Eric Steineman for any reason (*e.g.*, dismissal or

defense verdict) but the tort action were to proceed to a judgment in her favor against Sarah Smith only, there would be no valid basis under South Carolina law for Meridian to refuse to pay UM benefits for the net amount recoverable.[7] Steineman would have established she was legally entitled to recover damages against Sarah Smith, which is all Section 38-77-150(A) requires. Any denial of UM coverage under that scenario would be directly contrary to the statutory requirements and therefore void. The result should be no different in the present case simply because Eric Steineman is a co-defendant in the tort action.

Based on these grounds, the Court should affirm the Circuit Court's ruling that the duplicate payments provisions violate public policy when applied to the Policy's additional UM coverage.

d. UIM coverage.

The same public policy principles apply with respect to UIM coverage. Our Supreme Court has explained:

> "*[UIM] coverage is controlled by and subject to our [UIM] act, and any insurance policy provisions inconsistent therewith are void,* and the relevant statutory provisions prevail as if embodied in the policy."
> …
> Generally, "[s]tatutorily required coverage is that which is required to be offered or provided." …
>
> While true…, we have stated that *UIM is not mandatory coverage* in the sense that an insured chooses to purchase excess UIM coverage on a vehicle and a specified amount is not required by statute, we have held *it is a statutorily required coverage* in the sense it is required to be offered.

Carter v. Standard Fire Ins. Co., 406 S.C. 609, 615-16, 621-22, 753 S.E.2d 515, 518-19, 521-22 (2014) (citations omitted; emphasis added).

Accordingly, in *Carter*, the Supreme Court held that an exclusion of UIM coverage for an insured while occupying an owned vehicle not insured under the policy was unenforceable because

[7] Steineman does not dispute that the verdict would be reduced by the amount of BI coverage paid.

it was contrary to public policy, as established by S.C. CODE ANN. § 38-77-160 (1976, as amended) and interpreted by this Court in *Nakatsu v. Encompass Indem. Co.,* 390 S.C. 172, 178, 700 S.E.2d 283, 287 (Ct. App. 2010). The court explained that public policy thusly: "Our precedents, read in the context of section 38-77-160, unequivocally require the insurer to provide coverage in an amount equal to the excess UIM coverage purchased on the vehicle involved in the accident." *Carter*, 406 S.C. at 622, 753 S.E.2d at 522.

UIM coverage is required coverage under S.C. CODE ANN. § 38-77-160 (1976, as amended), which states that a policy providing UIM coverage shall:

> provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist ….

The Supreme Court has construed this statutory definition to mean that UIM coverage provides a recovery "additional to any recovery from the at-fault motorist, total recovery not to exceed the damages sustained." *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 154, 311 S.E.2d 723, 726 (1984). Consistent with this conclusion, the *Garris* court rejected the insurers' argument that UIM coverage can be reduced by the amount of BI coverage paid and instead held that this would be contrary to public policy as established by insurance statutes. *Id.*; *see also Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 219, 442 S.E.2d 587, 588-89 (1994) (describing *Garris* as "holding it is contrary to public policy to offset amount insured can recover under underinsured motorist coverage by amount received from at-fault motorist.").

Thus, as is the case with UM coverage, the public policy of this State, as established by insurance statutes, is for UIM coverage to pay the amount of the insured's recoverable damages against an underinsured motorist, up to UIM coverage limits, unless an exclusion to that coverage is otherwise authorized by statute. *See Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398-99,

728 S.E.2d 477, 480 (2012) (a policy limitation on UIM coverage that is not authorized by or consistent with governing statutes is invalid).

The duplicate payments provisions of the Policy are not authorized by statute. Rather, they conflict with the public policy of allowing an insured to recover damages up to UIM coverage limits. They also conflict with the public policy against the reduction of UIM coverage limits by the amount of available BI coverage.

This Court addressed the identical issue in *Bratcher v National Grange Mut. Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987). There, like Steineman, the claimant was a passenger in at-fault vehicle; as such, he was an insured under the policy covering the vehicle. He recovered BI coverage from the vehicle's driver and then made a claim for UIM coverage under the same policy covering the vehicle. The insurer denied coverage based on a policy provision. This Court rejected the insurer's argument and instead held "that the exception from coverage which National Grange included in its policy is invalid" because it was not authorized by South Carolina insurance statutes. *Id*. at 332-33, 356 S.E.2d at 152. In doing so, the Court expressly rejected one of the same arguments Meridian makes in the present case (*see* Appellant's Brief, p. 14) – that allowing recovery of both BI coverage and UIM coverage under the same policy would "effectively transform underinsured motorist coverage into liability coverage." *Id*. at 333, 356 S.E.2d at 153.

While Meridian here seeks to support its denial of coverage based upon different policy language than that in *Bratcher*, it cannot achieve a result contrary to public policy simply by wording the Policy differently. Because the effect of applying the duplicate payments provisions would be the same and would also violate the public policy of this State, the Policy's language should make no difference in the Court's analysis.

A further statement of this State's public policy regarding UIM coverage can be gleaned from S.C. CODE ANN. § 38-73-1105 (1976, as amended). That statute addresses the limited circumstances under which an insurer can define UIM coverage as "reduction coverage" as opposed to "excess coverage." As explained in *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 403 S.E.2d 662 (Ct. App. 1991):

> "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.

Id. at 285, 403 S.E.2d at 664; *see also State Farm Mut. Auto. Ins. Co. v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991).

Because language that has the effect of making UIM coverage operate as reduction coverage is contrary to the language of Section 38-77-160 requiring UIM "coverage in the event that damages are sustained in excess of the liability limits," insurers may only employ a reduction coverage definition in their policies if they satisfy the following strict conditions set forth in Section 38-73-1105:

> The [reduction coverage] definition of "underinsured motor vehicle" … may not be used by an insurer unless the insurer reduces his rate for underinsured motorist coverage by an amount determined appropriate by the director or his designee and refunds any such premium that the director or his designee determines is necessary to correspond with the new definition. An insurer may not use the definition in its settlement negotiations unless the insurer has filed and the director or his designee has approved an endorsement to its contract. If an insurer uses the new definition in its negotiations with a person before having the contract endorsed it is an unfair claims practice and, in addition, is bad faith

entitling the injured person to reasonable attorney fees, punitive damages, and all actual damages.[8]

Simply put, this statute – particularly when considered in light of the language of Section 38-77-160 – demonstrates that South Carolina has a public policy against reduction UIM coverage. However, if the Court were to accept Meridian's position, the effect would be to transform the Policy's UIM coverage into reduction coverage by reducing its UIM coverage based on the BI coverage received by Steineman.[9] In fact, the result would be even worse than typical reduction coverage because Meridian would be able to reduce $750,000 in UIM coverage to zero because of a $250,000 BI payment. That outcome would be contrary to the public policy of this State as established by Section 38-73-1105.

Based upon the language of the implicated statutes and the public policy derived therefrom – and for the reasons discussed in *Garris* and *Bratcher* – the Court should affirm the Circuit Court's ruling that Meridian's denial of UIM coverage based upon Steineman's receipt of BI coverage under the Policy is contrary to public policy and therefore void.

e. Section 38-77-142.

The Circuit Court's ruling that the duplicate payments provisions, if applied to additional UM coverage and UIM coverage as contended by Meridian, would violate the public policy of this State was based on S.C. CODE ANN. § 38-77-142 (1976, as amended) and *Williams v. Government Emps. Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014). (R. pp. 4-6). As noted above, there are other

[8] Meridian does not claim it has qualified under this statute to use a reduction coverage definition. Nothing in the Policy indicates Meridian has satisfied the statutory conditions; instead, its UIM endorsement does not use the "reduction coverage" definition. (R. p. 68).

[9] And, as noted above, applying Meridian's construction of the duplicate payments provision would eliminate an insured's ability to recover UIM even when BI coverage is paid under a separate policy covering the at-fault motorist because the BI payment would be for the same "elements of loss."

public policy bases that support the Circuit Court's ruling on this issue and serve as grounds upon which this Court can affirm that ruling under Rule 220(c), SCACR.

However, if the Court deems it necessary to address the grounds cited by the Circuit Court it should nevertheless affirm its ruling.

Admittedly, Section 38-77-142 speaks in terms of "insurance covering liability." Steineman submits the Court could interpret this broadly to include not just BI coverage but also insurance (such as UM and UIM coverages) that applies when another's liability is established (here, Eric Steineman and Sarah Smith). If it were to do so, the Circuit Court's reliance on this statute would be unassailable.

Even if not, the rationale applied by the Supreme Court in *Williams* applies equally to the requirements of Sections 38-77-150 and -160. As discussed above, these statutes require an insurer to provide UM and UIM benefits for recoverable damages up to the coverage limits. The *Williams* court's holding that "within the coverage of the policy" as used in Section 38-77-142 means the amount of the coverage limits reflected by the "face" or declarations page of a policy, 409 S.C. at 604, 762 S.E.2d at 715, should apply with equal force to the Legislature's choice of the terms "within limits no less than" in Section 38-77-150 and "up to the limits" and "to the extent of coverage" in Section 38-77-160.

4. <u>The District Court cases cited by Meridian are not binding and are distinguishable.</u>

As a final matter on this topic, Steineman deems it necessary to address two federal court rulings Meridian cites in support of its position. (Appellant's Brief, pp. 11-12). Each case represents a single trial court judge construing South Carolina law in an effort to predict how a South Carolina state appellate court would rule. Neither case is binding precedent on this Court any more than the Circuit Court's rulings in this case bind the Court.

Diamond State Ins. Co. v. McNeal, 2013 U.S. Dist. LEXIS 33092 (D.S.C. 2013), without any real analysis, cited duplicate payments language from the insurance policy at issue to "find[] that the Policy does not provide for UIM coverage where the Policy liability limits are applicable." *Id*. at *12. The judge there did not address any contrary arguments or any public policy issues except to state generally that a valid policy provision can bar a claim for UIM benefits. *Id*. at *13. There is nothing persuasive about the *Diamond States* case because it contains no real rationale.

In *Sibert v. State Auto. Mut. Auto. Ins. Co.*, 2021 U.S. Dist. LEXIS 1499971 (D.S.C. 2021), the insured made none of the above arguments regarding construction of the duplicate payments provisions but instead conceded those provisions were unambiguous. *Id*. at *6. In addition, the insured in that case made only limited arguments regarding public policy. Thus, the arguments before the Circuit Court in this case – and now before this Court – were substantially different.

The court in *Sibert* rejected all public policy arguments based on the conclusion that "Section 38-77-160 does not support Plaintiff's argument because it does not prohibit contractual limitations on UIM coverage." *Id*. at *9. That ruling flies in the face of South Carolina Supreme Court precedent applying public policy as divined from the language of Section 38-77-160. *See, e.g., Carter v. Standard Fire Ins. Co.*, 406 S.C. at 622, 753 S.E.2d at 522 ("Our precedents, read in the context of section 38-77-160, unequivocally require the insurer to provide coverage in an amount equal to the excess UIM coverage purchased on the vehicle involved in the accident."); *Garris v. Cincinnati Ins. Co.*, 280 S.C. at 154, 311 S.E.2d at 726; *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. at 398-99, 728 S.E.2d at 480 (a policy limitation on UIM coverage that is not authorized by or consistent with governing statutes is invalid). As the South Carolina Supreme Court unequivocally stated in *Williamson v. U.S. Fire Ins. Co.*, while describing the *Garris* decision, "**it is contrary to public policy to offset [the] amount [an] insured can recover under**

underinsured motorist coverage by [the] amount received from [an] at-fault motorist." *Williamson*, 314 S.C. at 219, 442 S.E.2d at 588-89 (emphasis added).

Lastly, *Sibert* relied upon *Diamond State* in support of its holding. For reasons discussed above, the Court should not accept *Diamond State* (or any case relying upon it) as persuasive.

CONCLUSION

For the reasons discussed above, Steineman respectfully asks this Court to affirm the rulings of the Circuit Court.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001510

Francine Steineman …… Respondent,

v.

Meridian Security Insurance Company …… Appellant.

CERTIFICATE OF COUNSEL

I certify that the BRIEF OF RESPONDENT complies with Rule 211(b) SCACR.

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