

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-40-03734

Omni Insurance Group,

Appellant,

v.

La'Rissa Tidwell, and Bristol  
West Insurance Company

Respondents.

NOTICE OF APPEAL

Omni Insurance Group appeals the Order of the Honorable DeAndrea G. Benjamin dated March 20, 2012. Appellant received written notice of entry of this order on March 22, 2012. 2000.

April 17, 2012



Douglas E. Leadbitter  
Douglas E. Leadbitter, LLC  
Post Office Box 945  
Blythewood, South Carolina 29016  
803.348.4429 Telephone  
803.333.0364 Facsimile  
Attorney for Appellant Omni Insurance Group

**RECEIVED**

APR 18 2012

**SC Court of Appeals**

Other Counsel of Record:

Melissa Mosier  
McWhirter, Bellinger & Associates, P.A.  
119 East Main Street  
Lexington, South Carolina 29017  
803.359.5523 Telephone  
Attorney for Respondent Tidwell

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Attorney for Respondent Bristol West

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2011-CP-40-03734

Omni Insurance Group,

Appellant,

v.


La'Rissa Tidwell and Bristol  
West Insurance Company,

Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents La'Rissa Tidwell and Bristol West Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2012, addressed to the attorneys of record, Melissa Mosier, McWhirter, Bellinger & Associates, P.A., 119 East Main Street, Lexington, SC 29017; and Charles O. Williams, McAngus Goudelock & Courie, LLC Post Office Box 12519, Columbia SC 29211-2519

April 17, 2012



\_\_\_\_\_  
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Attorney for Appellant Omni Insurance Group

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APR 18 2012

**SC Court of Appeals**

# Douglas E. Leadbitter, LLC

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Douglas E. Leadbitter  
Attorney At Law

April 17, 2012

The Honorable Tanya A. Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Omni Insurance Group v. La'Rissa Tidwell  
Civil Action No. 2011-CP-40-3734  
Appeal

Dear Ms. Gee:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondents;
- (2) A copy of the Order which is to be challenged on appeal;
- (3) A filing fee check in the amount of \$100.00;
- (4) An extra copy of the Notice of Appeal and Proof of Service with SASE to receive a clocked copy back.

If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

  
Douglas E. Leadbitter

DEL

Enclosures

cc:

Melissa Mosier, McWhirter, Bellinger & Associates, P.A., 119 East Main Street, W/ENCL  
Lexington, SC 29017 (w/enclosures)

Charles O. Williams, McAngus Goudelock & Courie, LLC Post Office Box 12519,  
Columbia SC 29211-2519 (w/enclosures)

APR 18 2012  
SC Court of Appeals



COLUMBIA SC 2912

TUE 17 APR 2012



Douglas E. Leadbitter  
Douglas E. Leadbitter, LLC  
Office Box 945  
Mythwood, South Carolina 29016

The Honorable Tanya A. Gee  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2011CP4003734

Omni Insurance Group

Larissa Tidwell

Bristol West Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (vol. No. suit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE PUBLIC INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 20 March 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Douglas Edward Leadbitter

Melissa Garcia Mosier

Charles O Williams III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court

*Jeanette W. McBride*

APR 18 2012

RICHLAND COUNTY  
FILED  
2012 MAR 20 AM 09:43  
JEANETTE W. MCBRIDE  
C. C. P. & C. S.

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2011CP4003734

Omni Insurance Group

Larissa Tidwell, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRCP;  Rule 41(a), SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRCP;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

JEANETTE W. BRIDGE  
20 FEB 1 PM 1:16  
FOR AND COUNTY  
FILED

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : Defendant's summary judgment motion is granted. Parties consented to motion to Intervene

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge W/B

Judge Code 2161

Date 01/19/2012

For Clerk of Court Office Use Only

This judgment was entered on the 2 day of Feb, 20 12 and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Feb, 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. Bridge

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 BRISTOL WEST INSURANCE )  
 COMPANY, )  
 )  
 Intervening Plaintiff, )  
 )  
 IN RE: )  
 )  
 OMNI INSURANCE GROUP, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LA'RISSA TIDWELL, )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-3734

**ORDER GRANTING INTERVENING  
 PLAINTIFF BRISTOL WEST  
 INSURANCE COMPANY'S MOTION  
 FOR SUMMARY JUDGMENT AND  
 DEFENDANT LA'RISSA TIDWELL'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

RICHLAND COUNTY  
 FILED  
 2012 MAR 20 AM 8:29  
 KEANETTE W. McBRIDE  
 C.C.P. & G.S.

This matter comes before the Court pursuant to Summary Judgment Motion filed by Intervening Plaintiff Bristol West Insurance Company ("Bristol") and Defendant La'Rissa Tidwell ("Tidwell"). A hearing was held on January 18, 2012, in Richland County. Charles O. Williams, III, Esquire, appeared on behalf of Bristol. Melissa Mosier, Esquire, appeared on behalf of Tidwell. Douglas Leadbitter, Esquire, appeared on behalf of Plaintiff Omni Insurance Group ("Omni").

FACTS

Omni originally filed a Declaratory Judgment action against Tidwell pursuant to the Uniform Declaratory Judgment Act, South Carolina Code Ann. § 15-53-10, *et seq.*, on or about June 8, 2011. Bristol moved to intervene on or about August 17, 2011. A Consent Order allowing Bristol to intervene was entered into by the parties on or about August 22, 2011. Bristol filed its Summons and Intervener's Complaint on or about September 29, 2011. Shortly

thereafter, Omni filed an Answer to Bristol's Complaint on or about October 26, 2011. Defendant Tidwell filed an Answer to Bristol's Complaint on or about October 17, 2011. Tidwell had previously filed an Answer to Omni's Complaint on or about August 25, 2011.

The facts in this case are not in dispute. Omni insured a vehicle owned by Wendy C. Williams bearing Policy No. 3501704 ("Policy"). This policy had liability coverage of \$25,000.00 and underinsured motorist coverage of \$25,000.00. On or about April 2, 2010, the Williams vehicle, while being operated by Ajaranesh S. Williams, was involved in an accident. Defendant Tidwell was a passenger in said vehicle and was injured in that accident. Tidwell made a claim against Ajaranesh S. Williams, the operator of the vehicle. Tidwell alleged that she suffered in excess of \$23,878.50 worth of damages in that accident. Omni tendered its liability limits of \$25,000.00 to Tidwell in exchange for a Covenant Not to Execute. Tidwell then sought to pursue underinsured ("UIM") benefits on the Omni policy. The parties to this action agree that Tidwell is not a relative or resident of the Williams family and there is no familial relationship between Tidwell and Wendy C. Williams or any other named insureds on the Williams policy. The parties further agree that Tidwell is a permissive user and insured under the policy, and a Class II insured under South Carolina statutory law.

Omni filed a Declaratory Judgment action asking the Court to enforce policy provisions that would not allow Tidwell to collect both liability and UIM benefits under the Omni policy, despite the fact that Tidwell is an insured under the policy and a Class II insured under South Carolina law. Bristol and Tidwell have asserted that Tidwell is entitled to UIM coverage under this policy because of her status as an insured under the policy, and as a Class II insured under South Carolina law. Omni asserts that the subject policy contains valid and enforceable provisions in the policy that allow Omni to limit the underinsured coverage. Omni asserts that

the underinsured limitation provisions prohibit Tidwell from asserting a claim for her damages against the Omni policy underinsured provisions. Omni asserts that since underinsured coverage is not mandatory that it is permissible for Omni to limit underinsured coverage in the policy. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) ("UIM coverage is entirely voluntary."); *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 92, 644 S.E.2d 62, 63-64 (2007) ("the mandatory nature of this [UM] coverage distinguishes it from the voluntary UIM coverage"); *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 153, 311, S.E.2d 723, 725-26 (1984) ("the language of the statute clearly indicates underinsured motorist coverage is optional coverage"); *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 71-72, 310 S.E.2d 814, 816 (1983) ("underinsured motorist coverage is not required but must be offered to the insured"); *Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) ("UIM coverage is voluntary"); *State Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 170 (4th Cir. S.C. 2009) (under South Carolina law, UIM coverage is not mandatory).

Omni further argues that the underinsured coverage limitation provisions of the policy do not violate S.C. Code Ann. § 38-77-160 or any other statutory provision. *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 153, 311 S.E.2d 723, 726 (1984).

Last, Omni argues that the underinsured coverage limitations do not offend public policy. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41-42, 644 S.E.2d 40, 43 (2007).

The parties stipulate that if Omni's UIM coverage applies to Tidwell, then Bristol's UIM coverage would be secondary to Omni's primary UIM coverage.

## STANDARD OF REVIEW

Summary Judgment is proper when there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Rule 56(c), South Carolina Rules of Civil Procedure (2008); *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). A court may construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). However, the opposing party may not rest upon the mere allegations or denials, but must respond with specific facts showing a genuine issue of material fact. *Id.*

## DISCUSSION

The facts in this case are not in dispute among the parties. The matter before the Court involves an issue of law. The movants, Bristol and Tidwell, assert that Tidwell, as an admitted insured under the policy and a Class II insured under South Carolina statutory law, is entitled to UIM benefits under the policy.

Omni, on the other hand, argues its policy contains a provision that limits Tidwell's ability to obtain UIM coverage.

### A. Policy Language

Omni cites two provisions in its policy that Omni believes restrict Tidwell's ability to obtain UIM coverage. The first provision reads:

No one will be entitled to receive duplicate payments from the same elements of loss under this [Liability] coverage and . . . any Underinsured Motorist Coverage provided by this policy.

Part A-Liability Coverage, Limit of Liability, B.2 Page 13.

The second provision reads:

No one will be entitled to receive duplicate payments for the same elements of loss under this [UIM] coverage and Part A [Liability Coverage] . . . of this policy.

Part C(2)-Underinsured Motorist Coverage, Limit of Liability, D, Page 34.

Omni asserts this policy language restricts a Class II insured's ability to collect UIM benefits. Omni asserts that only Class I insureds can collect UIM benefits under its policy. Omni cites *Burgess v. Nationwide Mutual Ins. Co.*, 373 S.C. 37, 644 S.E.2d 42 (2007).

In *Burgess*, the named plaintiff was injured while operating his motorcycle. Burgess had not purchased UIM coverage on the motorcycle. However, he did have three other vehicles at home, each of which had \$25,000.00 in UIM coverage. The carrier for those automobiles, Nationwide, argued that an exclusion in its policy did not allow Burgess to collect UIM benefits when he was operating a vehicle that he owned, but that was not listed in the Nationwide policy. Our Supreme Court ultimately agreed and denied that Burgess was entitled to UIM coverage under his Nationwide policy. The Court further noted that UIM coverage is entirely voluntary and permits insureds, at their option, to purchase insurance for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insured's damages. *Burgess*, 373 S.C. at 42, 644 S.E.2d at 40.

Notably, Nationwide's exclusion restricted Burgess' recovery of UIM proceeds solely in a situation where Burgess operated a vehicle he owned and operated without UIM, and had UIM coverage on other vehicles not involved in the accident. (Policy language in *Burgess* limited UIM to the "lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.")). This court finds *Burgess* is not applicable to the facts before it today.

Specifically, *Burgess* did not restrict a Class II insured from collecting liability and UIM proceeds from the same accident.

Omni asserts the *Burgess*' reasoning should be expanded such that it restricts a Class II insured, such as Tidwell, from receiving both liability and UIM benefits for the same accident. However, the restrictive language cited by Omni does not distinguish between recovery of liability and UIM benefits for Class I and Class II insureds. That language simply reads that "no one" will be entitled to receive "duplicate payments" from the same elements of loss under liability coverage and underinsured coverage. Therefore, the language cited by Omni indicates that no one could ever recover both liability and UIM benefits, neither Class I nor Class II insureds.

Additionally, the definitions within Omni's policy do not define "duplicate payments." Bristol and Tidwell both assert the facts of this case will not result in a windfall to Tidwell such that she will be paid twice for the same damages. Omni will receive a setoff for liability benefits they previously tendered to Tidwell. Omni will only pay UIM proceeds to Defendant Tidwell if a fact-finder determines Tidwell's damages exceed \$25,000.00. An award in excess of \$25,000.00 would not require a "duplicate payment" from Omni, but would merely attempt to make Tidwell whole.

This Court rejects Omni's assertion that the policy language it cites allows for a named Class I insured to recover both liability and UIM benefits, but limits a Class II insured/permissive user to only liability coverage. Simply put, the restrictive language cited by Omni does not say that.

Notably, Part C(2)(a), (b) - Underinsured Motorist Coverage, Omni's policy states:

A. We will pay damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle . . .

B. Insured as used in this part means:

1. You, an insured driver or any family member.
2. Any other person occupying your covered auto up to the minimum limits of liability specified by the South Carolina Financial Responsibility Act.

Part C(2)(a), (b) p. 29.

In the present case, there is no issue regarding Tidwell's permissive use of this vehicle. She is clearly defined as an insured under Part B(2) under the Underinsured Motorist Coverage provision within Omni's policy. Finally, Omni's Underinsured Motorist Coverage contains a provision titled "Conformity to Statute" which states:

This part is intended to be in full conformity with South Carolina insurance laws. If any provision of this part conflicts with that law, it is changed to comply with the law.

Underinsured Motorist Coverage—Conformity to Statute p. 36

Movants Bristol and Tidwell cite *Bratcher v. National Grange Ins. Co.*, 292 S.C. 330, 356 S.E.2d, 151 (Ct.App. 1987), to assert that an insured can collect both liability and UIM benefits arising out of the same accident. Notably, in *Bratcher*, Franklin Bratcher rode as a passenger in a vehicle driven by his father, Welton Bratcher. Franklin Bratcher was seriously injured in that accident. In that accident, Franklin Bratcher sought to obtain liability limits of \$50,000.00, in addition to UIM benefits in the same amount. The carrier, National Grange, denied Franklin Bratcher's claim for UIM benefits. National Grange attempted to argue that a policy provision excluded vehicles owned by Welton Bratcher from the definition of an underinsured motor vehicle. The trial court observed that § 56-9-831, Code of Laws of South Carolina 1976, required an insurer to provide coverage for damages sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist. The Court of Appeals noted that Section 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 other underinsured motorist coverage. *Bratcher*, 292 S.C. at 332-33, 356 S.E.2d at 152-53. (emphasis added). The Court went on, "For these reasons, we hold that the exception from coverage which National Grange included in its policy is invalid." *Id.*

Omni concedes that the "no one" policy language cited above is too restrictive because it would limit the ability of a Class I insured to collect liability and underinsured coverages in the same accident. Omni further concedes that the policy language should be reformed but only to the extent to comply with the holding of *Bratcher v. National Grange Ins. Co.*, 292 S.C. 330, 356 S.E.2d, 151 (Ct. App. 1987). Omni argues that reforming the policy to include all insureds (including Class II insureds) reforms the policy too far. Omni argues that it is permissible for the Court to reform the policy in accordance with *Bratcher* without invalidating and voiding the Omni policy underinsured limitation language completely. In support for this argument, Omni cites *Kay v. State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 562 S.E.2d 676, 678 (Ct. App. 2002) as standing for the proposition that it is permissible for the Court to reform the policy. The Court in *Kay* found the insurer's limitation void and inserted statutory language. This Court finds that *Kay* properly applied only allows the Court to void policy language that is inconsistent with the UIM statute and insert statutory language in its place. Omni has not pointed to any statutory language that could be inserted to support their argument and this Court finds none. This Court disagrees with Omni's interpretation and application of *Bratcher* and *Kay* and finds Omni's arguments as to policy reformation unpersuasive.

In the present case, Tidwell and Omni assert the Williams' vehicle is underinsured. By the admission of all parties, Tidwell is an insured under the policy, albeit a Class II insured.

Notably, *Bratcher* makes no distinction between Class I and Class II insureds<sup>1</sup>. *Bratcher* held that an insured could collect liability and UIM benefits arising out of the same accident. *See also Concrete Services, Inc. and Mickle v. USF&G Co.*, 331 S.C. 506, 498 S.E.2d 865 (1998). (In determining whether or not a Plaintiff was a Class I or Class II insured, the court noted that while a Class II insured could not stack multiple vehicles on a policy, a Class II insured was entitled to one layer of UIM coverage on the vehicle involved in the accident.)

In its underinsured motorist coverage policy, Omni states, “We will pay damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle . . .” Omni Policy p. 29. Omni defines a permissive user as an insured under its policy, specifically under its underinsured motorist coverage provision. South Carolina Code Ann. § 38-77-160 (2011) describes a carrier’s duty when writing underinsured motorist coverage. The second sentence of that statute says such carrier “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** for underinsured motorist . . .” (emphasis added).

In the present case, Tidwell is an insured under the policy. Ajaranesh Williams is an at-fault, underinsured driver. Tidwell is, therefore, entitled to underinsured coverage under the policy if a fact-finder determines her damages exceed \$25,000.00

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<sup>1</sup> *Bratcher* is a 1987 case. Bristol and Tidwell note that *Bratcher* did not distinguish between Class I and Class II insureds in holding that an insured could collect both liability and UIM benefits. Further, movants note the distinction between Class I and Class II insureds was discussed in *Garris v. Cincinatti Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984). *Garris* cited *Davidson v. Eastern Fire & Casualty Ins. Co.* 244 S.C. 472, 141 S.E.2d 135 (1965) which also discussed Class I and Class II insureds. Therefore, movants assert the *Bratcher* court was fully aware of the distinctions between Class I and Class II insureds and did not hold that only Class I insureds were allowed to collect both liability and UIM benefits.

CONCLUSIONS OF LAW

Based on the above findings, I find and conclude the following as a matter of law:

Pursuant to S.C. Code Ann. § 56-9-831 (the predecessor UIM statute which his largely consistent with the current UIM statute), § 38-77-160, and § 38-77-30(7), La'Rissa Tidwell was an insured under the Omni policy and a Class II insured and permissive user of the vehicle at the time of the accident. As an insured under the policy, and a Class II insured, pursuant to South Carolina statutory law, Tidwell is entitled to underinsured motorist coverage under Omni Policy No. 3501704.

The Court finds the policy provisions advanced by Omni to restrict UIM benefits to La'Rissa Tidwell in this action are invalid as a matter of law. The Court finds the Omni provisions that seek to prevent an insured, Class I or Class II, from recovering both liability and UIM benefits arising out of the same accident, are void as a matter of law. The Court finds these restrictions exceed that which is allowed by statute in South Carolina, and as a result, are invalid. Based upon these conclusions of law, as stated above, it is hereby **ORDERED** that Defendant La'Rissa Tidwell and Intervening Plaintiff Bristol West Insurance's Motions for Summary Judgment are **GRANTED** as a matter of law.



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DeAndrea G. Benjamin  
Presiding Judge, Fifth Judicial Circuit

March 15, 2012