

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY
COURT OF COMMON PLEAS
HONORABLE J. MARK HAYES, II CIRCUIT COURT JUDGE

Appellate Case No. 2013-000912

Omni Insurance Company Appellant,

v.

Christopher Wright Respondent.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN CONSTRUING THE POLICY IN A MANNER THAT RESULTS IN AN IMPOSSIBLE CIRCUMSTANCE?

- II. IN THE CONTEXT OF RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, IN WHICH ALL ALLEGATIONS IN THE PLEADINGS ARE DEEMED TRUE, DID THE CIRCUIT COURT ERR IN REFUSING TO CONSIDER APPELLANT'S ALTERNATE SUSTAINING GROUND FOR DENYING VOLUNTARY UIM COVERAGE DUE TO FRAUD?

- III. DID THE CIRCUIT COURT ERR IN FAILING TO ENFORCE THE POLICY'S PROVISIONS LIMITING UIM COVERAGE?

STATEMENT OF THE CASE

This appeal involves a declaratory judgment action filed on June 15, 2011, by Appellant Omni Insurance Company ("Omni") regarding whether or not Christopher Wright, a third party passenger claimant ("Claimant"), is entitled to *both* mandatory liability coverage and voluntary underinsured motorist ("UIM") coverage under a policy issued to Anthony Barron¹ where the policy limits the ability of a third party claimant to receive voluntary UIM when he has already received the full liability coverage policy limits. Claimant served an Answer and Counterclaim denying that Omni is entitled to the declaratory judgment sought, and seeking a declaration that UIM coverage should be afforded to him Mr. Barron's policy in addition to the liability coverage. Claimant also filed and served on this same day a Motion for Judgment on the Pleadings.

Omni is appealing the "Amended Order Superseding Order of October 25, 2013, by Circuit Court Judge J, Mark Hayes II, which granted Respondent's Motion for Judgment on the Pleadings. Appellant timely filed a Motion for Reconsideration. Judge

¹ Significantly, Claimant is not seeking recovery via his own insurance policy, as he opted not to obtain and has thus failed to pay for such coverage under his own policy.

Hayes denied the Motion for Reconsideration by Order dated March 19, 2013, and filed on March 21, 2013. The post mark for the date the Clerk of Court mailed the Order is March 22, 2013, and was received on Monday, March 26, 2013. Appellant filed its Notice of Appeal on April 24, 2013. The transcript of the June 11, 2012, hearing on Respondent's Motion for Judgment on the Pleadings before the Circuit Court was mailed on July 30, 2013, and received on August 1, 2013. The transcript of the February 19, 2013, hearing on Appellant's Motion to Reconsider before the Circuit Court was mailed on May 15 2013, and received on May 17, 2013. This Initial Brief was filed and served on Tuesday, September 3, 2013, following the Labor Day long weekend.

FACTS

The essential facts regarding this matter are undisputed and have been admitted in the Parties' pleadings. Further, Respondent's Motion for Judgment on the Pleadings requires that the allegations in Omni's pleadings be taken as true.

Omni issued Anthony Barron a policy bearing number 3111851 insuring his 1995 Ford Mustang bearing VIN 1FALP4049SF176408 ("Vehicle") for a policy period from June 4, 2009, to June 4, 2010 ("Policy"). *See* Policy Dec. Page. Anthony Barron is the only driver identified and listed on the Policy. *See id.* Jennifer Barron is Anthony Barron's daughter, who was living with her father at the time of the accident, and who had been living with him since 2004. *See* Amended Complaint ¶9. Despite having lived for many years with her father, Mr. Barron refused to identify her and add her as a driver under his Policy with Omni. *See id.* ¶¶7-10; Policy Dec. Page. Had Mr. Barron added his daughter to his Policy, the premium would have increased. *See* Amended Complaint ¶11. Ms. Barron did not have her own car, nor did she have her own insurance. *Id.* ¶13. Despite

not being a listed driver under the Policy, and despite being a resident relative of Mr. Barron for many years, Ms. Barron was allowed to use Mr. Barron's Vehicle insured by the Policy on an as needed basis. *See id.* ¶¶9-14. In so doing, Mr. Barron violated the Policy. *See id.* ¶¶42-43; Policy, SC Amendatory Endorsement, § IV, Part F – General Provisions, B., p.28.

On the night of May 8, 2010, Ms. Barron took the Vehicle to a bar, where she met Claimant. *See id.* ¶¶15-18. In the early morning hours of May 9, 2010, they left the bar together in the Vehicle operated by Ms. Barron when a one car accident occurred. *Id.* Claimant is married and maintains his own household, so he is not a resident relative of the Barron family. *See id.* ¶21.

Claimant brought claims against Ms. Barron, alleging that she caused the accident and that he was injured. *See id.* ¶¶19-22. The Policy provides minimum limits coverage in the amount of \$25,000 per claim. *See id.* ¶23; Policy Dec. Page. Claimant made a Tyger River demand for the Policy limits, in response to which Omni tendered the Policy limits of \$25,000.00 and in exchange for a Covenant not to Execute, thereby insulating Mr. and Ms. Barron from personal liability. *See Amended Complaint* ¶¶24-25. This payment was made before any litigation was filed. *Compare* Covenant not to Execute, *with* Amended Complaint.

Claimant next made a claim for underinsured motorist ("UIM") benefits under the same Policy against which the Claimant has already received full Policy limits. *See id.* ¶¶26-27. However, because Claimant decided not to acquire UIM coverage of his own, he seeks to double-dip his claim against the Barron Policy by seeking UIM coverage that was requested by Mr. Barron, paid by Mr. Barron, and issued to Mr. Barron. *See id.* ¶28. Claimant is asserting the same claims for damages arising from the same accident

related to the UIM claim as he previously asserted in making his policy limits demand against the same Policy. *See id.* ¶¶17-28. Nothing in this action seeks to prevent Claimant from recovering his own UIM coverage, which would have been personal and portable to him, and thus could have been available to him had he not refused it. *See id.* ¶35.

LEGAL ARGUMENT

I. THE POLICY CONTAINS LIMITATIONS THAT PREVENT CLAIMANT FROM RECEIVING UIM COVERAGE WHERE HE HAS ALREADY RECEIVED THE POLICY LIMITS.

The Policy issued to Mr. Barron contains the following limitations, which prevent non-resident, non-relative, third party passengers, such as Claimant, from making more than one claim against the same Policy for damages arising from the same incident:

The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of bodily injury sustained by one person in any one auto accident.

Policy, Part A-Liability Coverage, Limit of Liability, A., p.5.

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

Policy, Part A-Liability Coverage, Limit of Liability, B.2., p.6. Therefore, under circumstances as are presented here, where Claimant is not a resident relative of the family that was issued the Policy by Omni, he can make a single claim against the Policy- either for liability coverage, as was done, or, for instance, for UIM coverage, if another driver were at fault and Claimant's damages exceeded the available policy limits of the other driver (which was not the case given these facts). Under this Policy limitation, the Barron family has UIM coverage in the amount they opted to purchase, and this coverage, being personal and portable to them, does not in any way limit their ability to receive the UIM

coverage for which they opted and paid. The Barron Policy UIM coverage, however, is not personal and portable to third party claimants such as Claimant, who has already made a claim against and received the full Policy limits.

Similarly, the Policy has a limitation to the applicability of UIM benefits, which limits Claimant's recovery under the Policy for "all damages" to the \$25,000.00 set forth on the Declarations page:

Our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of bodily injury sustained by any one person in that accident is the sum of the limits of liability shown in the Declarations for each person for Bodily Injury Liability Underinsured Motorist Coverage.

Policy, Part C2-Underinsured Motorist Coverage, Limit of Liability, A.1, p.15. There is no dispute that Omni has already complied with Claimant's Policy limits demand. Having already received Policy limits from the Barron Policy, Claimant is unable to assert an additional claim against this same Policy for damages allegedly arising from the same accident. The Policy also provides:

No one will be entitled to receive duplicate payments for the same elements of loss under this Coverage² and Part A, Part B, Part C, or Part D of the Policy.

Policy, Part C2 – Underinsured Motorist Coverage, Limit of Liability, D., p.16. This provision, of course, compliments to the Part A limitation, set forth *supra*, which clearly demonstrates that the intent is to prevent duplicate claims by the same person against the same policy for damages arising from the same accident.

² This coverage being the applicable Part of the Policy in which it appears, which is UIM Coverage under Part C2.

Lastly, the Policy allows Omni to void voluntary coverage in the event of a breach by the policyholder. In this instance, Mr. Barron refused to identify his daughter as a driver despite the fact that she was a resident relative with him since 2004, and despite the fact that she was allowed to drive his insured vehicles. The Policy provides as follows:

We issue your policy in reliance of the information you provided on your insurance application. We may void coverage under this policy if you have knowingly concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct the time the application was made or in connection with a claim.

South Carolina Amendatory Endorsement, Section IV, Part F – General Provisions, B., p.28. As is set forth *infra* Section V, although an insurer may not suspend coverage required by the South Carolina Financial Responsibility Act, in the event of a policy breach by an insured, South Carolina courts do allow an insurer to suspend voluntary coverage. South Carolina does not require an insured to have UIM coverage, as distinguished from the mandatory minimum limits required for liability and uninsured motorist coverage. As a result, Mr. Barron’s breach of the Policy provides additional grounds for voluntary UIM coverage to be voided and Claimant’s additional claim against the Policy to be denied.

II. THIS COURT SHOULD RECOGNIZE AND ENFORCE THE POLICY’S UIM COVERAGE LIMITATIONS.

“A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). “When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law.” *Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). “In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support

them.” *Id.* at 46-47, 717 S.E.2d at 592 (citation omitted). However, given the nature of Claimant’s Motion for Judgment on the Pleadings, the Circuit Court should have taken all allegations in the pleadings as true, *see Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991), so any finding of fact by the Circuit Court that does not comport with the Amended Complaint constitutes error. Significantly, this Court may make its own determination on questions of law and need not defer to the Circuit Court’s rulings in this regard. *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 592.

South Carolina courts have long recognized that “insurers have the right to limit their liability and to impose whatever conditions they desire upon an insured, **provided they are not in contravention of some statutory inhibition or public policy.**” *Universal Underwriters Ins. Co. v. Metropolitan Prop. & Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858, 861 (Ct. App. 1989) (emphasis added). *See Pennsylvania Nat. Mut. Ins. Co. v. Parker*, 282 S.C. 546, 550-51, 320 S.E. (2d) 458, 461 (Ct. App. 1984); *Jordan v. Aetna Casualty & Surety Co.*, 264 S.C. 294, 214 S.E. (2d) 818 (1975); *Willis v. Fidelity & Cas. Co.*, 253 S.C. 91, 169 S.E.2d 282 (1969) (“parties are free to choose their terms regarding voluntary coverage that is not governed by statute.”); *Rhame v. National Grange Mutual Ins. Co.*, 238 S.C. 539, 544, 121 S.E. (2d) 94, 96 (1961); Couch On Insurance, Section 45:82 (rev. ed. 1981). As a result, South Carolina courts have recognized reasonable policy limitations that do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes. *Parker*, 282 S.C. at 551, 320 S.E.2d at 461; *Pennsylvania Nat’l Mutual Casualty Ins. Co. v. Dawkins*, 551 F. Supp. 971 (D.S.C. 1982); *Heaton v. State Farm Mutual Automobile Ins. Co.*, 278 F. Supp. 725 (D.S.C. 1968). Even counsel for Claimant acknowledges that

voluntary UIM coverage may be limited by the Policy. Transcript of 6.11.12 Hearing, p.6, ll.12-14. The Circuit Court also confirmed that the Policy did not violate either statute or public policy, making this a matter of contract interpretation. Amended Order Superseding Order of October 25, 2013, p.2. As a result, the task is to apply the terms of the Policy to the facts presented, as further addressed *infra* Sections III - V. For the reasons set forth *infra*, the Circuit Court erred in refusing to recognize and enforce the Policy provisions limiting UIM coverage.

A. **South Carolina Public Policy Supports Enforcement Of The UIM Limitation.**

The rule of statutory construction for statutes pertaining to public policy is strong. “When a statute is a part of other legislation, designed as a whole to establish an expressed state policy, the court should strive to effectuate that policy.” *Spoone v. Newsome Chevrolet Buick*, 306 S.C. 438, 444, 412 S.E.2d 434, 438 (Ct. App. 1991) (citing *Gregg Dyeing Co. v. Query*, 166 S.C. 117, 164 S.E. 588 (1930)). The South Carolina Supreme Court has ruled that enforcing the policy limitation upon the scope and applicability of UIM coverage advances public policy of “encourag[ing] persons to purchase UIM insurance on all their vehicles.” *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40, 42 (2007). *See also Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 92, 644 S.E.2d 62, 64 (2007) (Chief Justice Toal’s dissent identifying the Court’s public policy interest of encouraging the purchase of UIM coverage). Allowing Claimant, as a third party to the Policy who failed to look after his own interests by failing to obtain UIM coverage, to seek a double recovery on a liability claim does not further this public policy goal. To the contrary, allowing this result creates an incentive for such persons to refuse

to acquire their own UIM coverage to continue under the expectation that they can simply attach themselves to someone else's coverage without having to pay for it.

Further, allowing third parties to claim against the available UIM coverage actually reduces the amount of UIM coverage available to the policyholders who opted and paid for it.³ As a result, through this UIM limitation, Omni is preventing the dilution of such funds by parties to whom such funds are not entitled. Thus, this UIM limitation allows Omni to fulfill its duty to its named insured to maintain the full amount of UIM coverage for the person who contracted with Omni for the Policy and who had the diligence and foresight to opt for, pay for, and obtain UIM coverage.

The General Assembly has indicated that the required minimum limits of coverage for both liability and UM are 25,000 per person and 50,000 per accident. *See* S.C. Code § 44-7-140. There is no dispute that Omni complied with this requirement via its tender of its Policy limits of \$25,000.00. The existence of UIM coverage arises solely as voluntary coverage pursuant to terms agreed between Mr. Barron and Omni. If the

³ Take, for instance, two couples travelling together, Mr. and Mrs. Owner with Mr. and Mrs. Passenger. The Owners (who own the vehicle) opted for and paid for UIM coverage of \$25,000 per person and \$50,000 per accident. The Passengers decided they did not want to pay for UIM coverage on their vehicle (UIM coverage is personal and portable, and thus would be available to them while passengers in the Owner's vehicle). Mr. Owner causes an accident and the liability coverage limits are insufficient to cover the damages suffered by both Mrs. Owner and the Passengers. Should Mrs. Owner's damages total \$25,000 in excess of the liability coverage of the at fault driver, then Omni's UIM limitation would ensure that she receives the full amount of UIM coverage for which she paid. However, if the Passengers' damages also total \$50,000 in excess of the liability coverage, then without Omni's UIM limitation, Mrs. Owner would be required to apportion the available UIM coverage with the Passengers. This would result in the Owners being denied the coverage they need and should be entitled to, while the Passengers reap a benefit of additional coverage for which they never paid, all to the detriment of the Owners. While this example does not reflect the situation in the present case, it illustrates the proper purpose served by the Policy limitations.

Claimant failed to obtain his own UIM coverage, then this Court should allow him to be bound by his own decision not to have UIM coverage, rather than allow him to seek to reform a Policy to which he is not a party so to create coverage that does not otherwise exist. *See, e.g., GEICO v. Draine*, 389 S.C. 586, 698 S.E.2d 866 (Ct. Ap. 2010) (refusing to reform policy to provide UIM coverage where insured previously rejected UIM coverage); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 601 (Ct. App. 2000) (“The fact the amount of liability insurance selected by State Farm’s insured may not be adequate to pay the full amount of both types of injuries is a repercussion of the choice made by the insured, not any contravention of South Carolina law or public policy.”).

B. Because South Carolina Courts Allow Limitations to Voluntary Coverage, This Court Should Recognize and Enforce Appellant’s UIM Coverage Limitations.

The South Carolina Supreme Court first construed the UIM coverage under S.C. Code § 38-77-160 in *Gambrell v. Travelers Insurance Companies*,⁴ and explained that “[o]ne buys ... **underinsured motorist coverage to protect *himself*** in case an at fault driver has liability coverage but the amount is insufficient to cover the damages sustained. ... This is the **protection provided for the additional premium** paid for the underinsured motorist coverage.” 280 S.C. 69, 72, 310 S.E.2d 814, 816 (1983) (emphasis added). Thus, the fact that UIM coverage is intended to protect the named insured and his resident relatives is fully consonant with the South Carolina Supreme Court’s analysis in *Gambrell*.

⁴ Although this case allowed recovery of UIM coverage, the facts entailed a named insured who actually purchased the UIM coverage. Her insurer sought to deny her UIM claim where the amount of the at fault party’s liability coverage exceeded the UIM coverage, even though her damages exceeded the amount available under the liability claim. Clearly, these facts are not applicable to this case.

This approach continues to the present. *See O'Neill v. Smith*, 388 S.C. 246, 254-55, 695 S.E.2d 531, 535-36 (2010) (observing under South Carolina law, carriers must offer UIM coverage up to the limits of the insured's liability coverage, and the purpose of the UIM statute is to provide to an insured who is an injured claimant the same benefit level as that provided by that insured to those asserting claims against him). The "one" who "buys" the UIM coverage to protect "himself" and his resident relatives is, of course, the named insured. *See Gambrell*, 280 S.C. at 72, 310 S.E.2d at 816. The insured in *Gambrell* was also a named insured. *See id.* at 71, 310 S.E.2d at 816. Thus, the purpose of the UIM statute is to protect the person⁵ who opted and paid for this coverage from at fault drivers- not to provide additional coverage for third party passenger claimants who desire to assert claims against the person paying for the UIM coverage. Such third party claims, should they exist, exist as liability claims against the at fault driver. There is no dispute that Claimant has already received the applicable Policy limits.

Several courts have since ruled that the UIM Act allows limitations to UIM coverage. The South Carolina Supreme Court ruled that UIM coverage "is 'personal and portable,' that is, **the coverage follows the individual insured and not the insured vehicle.**" *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 40, 644 S.E. 2d 40, 42 (2007) (emphasis added). Therefore, the mere fact that Claimant was in the insured vehicle does not necessarily mean he is entitled to both liability and UIM coverage. The *Burgess* Court further elaborated that:

UIM coverage ... **permits insureds, at their⁶ option, to purchase insurance coverage for situations where they are injured by an at-fault**

⁵ As well as any resident relatives of the named insured.

⁶ It is notable that time and again, SC courts make specific reference to the fact that UIM

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**.

Id. 373 S.C. at 42, 644 S.E.2d at 43 (emphasis added). Similar to the *Gambrell* Court, the *Burgess* Court makes consistent reference to the personal nature of UIM coverage by utilizing the possessive language above. See also *State Farm Mut. Auto. Ins. Co. v. Horry*, 304 S.C. 165, 169, 403 S.E.2d 318, 320 (S.C. 1991) (“UIM coverage provides benefits to an insured **under his own policy** at any time the at fault driver’s liability coverage is less than the amount of the claimant’s actual damages.”) (emphasis added). Therefore, the principle purpose of UIM coverage is to protect insured and resident relatives of the insured who opted and paid for it, and **not** to serve as a supplement to a liability claim against the same insured by third party passenger such as Claimant. This follows the clear rationale first identified in *Gambrell*. *Supra*.

Thus, UIM protects those insureds who negotiated and paid for the protection it affords. Conversely, liability coverage, which is required by statute, protects a claimant who is injured by an at-fault driver. There is no statutory mandate to provide both liability insurance and UIM. Just as an at-fault driver recovers nothing for his injuries under his own liability policy, so too may a third party passenger be limited to recovery under solely the liability if they should fail to obtain and pay for **their own** UIM coverage.

C. UIM Coverage is Not Mandatory and Thus May Be Limited.

As noted *supra*, South Carolina courts have long recognized that insurers have the right to limit their liability and to impose whatever conditions they desire upon an

coverage is personal and applies to those who opt to acquire it. This is consonant with the repeated characterization of UIM coverage as “personal and portable.”

insured, provided they are not in contravention of some statutory inhibition or public policy. Thus, because UIM coverage is not statutorily mandated, Policy limitations to UIM coverage may be applied. By contrast, where a statute requires insurance, the insurer is generally not permitted to defeat the statute's requirements by employing exclusions to coverage that the statute seeks to cover. *Parker*, 282 S.C. at 551, 320 S.E.2d at 461. However, as noted *infra*, UIM coverage is voluntary and not required insurance; therefore, it may be limited.

Many South Carolina courts have observed that the UIM Act does not make UIM coverage mandatory, as is the case with minimum limits of liability and UM coverage.⁷ This began with the South Carolina Supreme Court's first interpretation of the UIM Statute, and it has continued to the present. See *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");⁸ *Fireman's Ins. Co. of Newark, N.J. v. State Farm Mut. Auto. Ins. Co.*, 295

⁷ Even coverage that is considered "mandatory" may be denied under certain circumstances. For instance, liability coverage may be denied for a vehicle that has been stolen, so the circumstances under which a claim is asserted are always relevant, and any effort to apply the SC Financial Responsibility Act too broadly is misguided.

⁸ The *Erwood* Court further ruled that "[w]e find that the mandatory nature of this [UM] coverage distinguishes it from the voluntary UIM coverage at issue in *Burgess*, and that public policy requires that basic UM coverage be afforded to Erwood even when she is a passenger on her spouse's uninsured motorcycle. *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 92, 644 S.E.2d 62, 63-64 (2007) (emphasis added) (citing *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) ("insurance policy endorsement providing for set-off of worker's compensation benefits for UIM valid where UM set-off is not, because UIM coverage is voluntary") (emphasis added)).

S.C. 538, 542, 370 S.E.2d 85, 87 (1988) (noting that UM is required and UIM is optional); *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”); *State 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).

Furthermore, should such an extensive and lengthy application of this basic legal tenet not suffice, there is no denying that S.C. Code Section 38-77-160 permits an insured to reject UIM coverage; therefore, it is clear that such coverage is not mandatory. Additionally, S.C. Code Section 38-77-350 expressly and repeatedly refers to UIM coverage as “optional coverage.”

D. Analysis of Cases That Allow Limiting the Scope of UIM Coverage.

1. *Burgess v. Nationwide Mutual Insurance Company:*

In *Burgess v. Nationwide Mutual Insurance Company*, the South Carolina Supreme Court imposed a limitation to the scope of UIM coverage, ruling that:

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.**⁹

Thus, while public policy may be cited to invalidate policy limitations to mandatory UM coverage, such arguments are unavailing in the context of voluntary UIM coverage.

⁹ Although the UIM limitation at issue in the Omni Policy is a different sort than the limitations assessed by the *Burgess* Court, this decision definitively puts to rest the argument that UIM limitations are “against public policy.”

Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 41-42, 644 S.E.2d 40, 43 (2007) (emphasis added). Given this result, the insurer was allowed to deny UIM benefits in their entirety to an insured whose vehicle that was involved in the accident did not have UIM coverage, even though other vehicles he insured did have UIM coverage.¹⁰ This clearly stands for the proposition that Policy provisions that limit the scope of UIM coverage are not only allowed, but should be enforced against those persons who do not obtain UIM coverage of their own.

The *Burgess* decision evidences the fact that the relationship of the claimant to the applicable insurance policy matters in determining the applicability of UIM coverage. In *Burgess*, even a named insured was denied UIM coverage due to a policy provision limiting the scope of UIM coverage. Here, Claimant, as a third party passenger, should be denied UIM coverage because he is limited from asserting a UIM claim against the same Policy for damages arising from the same incident. Claimant has already received Policy limits under the liability coverage claim against this same Policy. If Claimant wanted portable UIM coverage of his own, then he could have obtained it, and it would have been portable and applicable to this accident. However, Claimant chose not to do so, and now must live with the consequences of this decision. Similarly, if the Mr. Barron

¹⁰ UIM coverage follows the insured, even when he is in a vehicle other than the one insured by the insurer. However, in this instance, because the insured deliberately chose NOT to have UIM coverage as to the specific vehicle involved in the accident and thus did not pay for UIM coverage as to that vehicle, the *Burgess* Court refused to allow him to claim under the UIM coverage he had on other policies. Similarly, the Claimants decided not to obtain or pay for their own UIM coverage. Therefore, this limitation in the McRae's Policy should be recognized and applied.

wanted twice the amount of liability coverage, then they could have requested, paid for, and obtained such additional liability coverage.

The *Burgess* case provided consequences to a claimant for not obtaining the type of coverage for which coverage is later sought. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) (An insured “has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so....”). This decision aligns with the public policy analysis (set forth *supra* Section II.A.) in that insureds are to be encouraged to obtain **their own** UIM coverage. The *Burgess* Court reasoned:

Upholding this limit on portability encourages persons to purchase UIM insurance on all their vehicles. To hold, as did the Court of Appeals, that basic UIM is portable even in this situation permits an individual who owns multiple vehicles to purchase UIM insurance on only one vehicle, yet have basic UIM coverage on all. We find this result undesirable.

Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 42, 644 S.E.2d 40, 41 (2007). By the same token, Claimant, as a third party passenger who failed to obtain his UIM coverage consequently may recover under only the liability portion of the policy given the Policy provisions limiting UIM coverage.

Significantly, the South Carolina Supreme Court’s *Burgess* decision expressly overruled the South Carolina Court of Appeals’ prior decision, *Burgess v. Nationwide Mut. Ins. Co.*, 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004). In it, the Court of Appeals allowed the UIM coverage in the face of a policy limitation, and erroneously premised its decision on the belief that “nothing in the statute permitted an insurer to exclude basic UIM coverage under these circumstances ... [and] that the endorsement purporting to preclude Burgess’s recovery of basic UIM was void as against public policy because § 38-77-160 only permits an insurer to limit excess UIM coverage.” *Burgess v.*

Nationwide Mut. Ins. Co., 373 S.C. 37, 41, 644 S.E.2d 40 (2007). Clearly, the South Carolina Supreme Court's decision in *Burgess* dispels the misapprehension that limitations to UIM coverage violate the UIM Act and are void as against public policy.

2. *Zurich American Insurance Company v. Tolbert:*

In *Zurich American Insurance Co. v. Tolbert*, the Court of Appeals applied the South Carolina Supreme Court's decision in *Burgess* by recognizing and enforcing a UIM policy provision that completely eliminated UIM coverage for an insured. 378 S.C. 493, 498, 662 S.E.2d 606, 608 (Ct. App. 2008) ("The policy at issue in *Burgess* restricted UIM coverage ... The supreme court distinguished voluntary UIM coverage, from UIM coverage, which is a mandatory part of all automobile insurance policies."). Seemingly following the public policy approach discussed *supra*, Section II.A., the *Tolbert* Court noted that the plaintiff:

had the ability to decide whether to purchase voluntary UIM coverage. [Plaintiff] made the decision not to obtain UIM coverage As a result, we hold the Policy's limitation on UIM coverage portability neither offends public policy, nor is in conflict with the insurance laws of South Carolina.

Tolbert, 378 S.C. at 498, 662 S.E.2d at 608. By the same token, neither does the Policy UIM limitation offend public policy (in fact it advances S.C.'s public policy of encouraging UIM), nor is it in conflict with the insurance laws of South Carolina, so it should be recognized and enforced by this Court.

3. *State Farm Mutual Automobile Insurance Company v. Calcutt:*

In *State Farm Mutual Automobile Insurance Company v. Calcutt*, the South Carolina Court of Appeals allowed a limitation to the scope of UIM coverage in the form of a Worker's Compensation setoff, ruling that "section 38-77-160 does not prohibit a setoff provision, ... [t]herefore, State Farm's setoff provision does not conflict with our

insurance laws.” 340 S.C. 231, 233, 530 S.E.2d 896-97 (Ct. App. 2000). Calcutt was injured by an at-fault underinsured driver while driving employer’s vehicle, which did not have UIM coverage. Calcutt had a personal UIM policy, the terms of which provided that UIM benefits would be reduced by amounts received under workers’ compensation. Calcutt demanded payment of the UIM benefits from State Farm while he had a pending claim for workers’ compensation benefits. State Farm brought a declaratory judgment action to determine application of the setoff provision. The *Calcutt* Court ruled that “nothing in State Farm’s offset provision changes or contradicts the definition of an ‘underinsured motor vehicle’ under S.C. Code Ann. § 38-77-30(15). Similarly, nothing in section 38-77-160, which provides for UIM policies, conflicts with the setoff provision in Calcutt’s policy.” *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. at 233-34, 530 S.E.2d at 896-97. By the same token, Omni’s UIM limitations should be recognized and enforced because they do not conflict with the existing statutory framework associated with UIM claims.

4. *Rowzie v. Allstate Insurance Company:*

The Fourth Circuit Court of Appeals has observed that “because UIM coverage is optional in South Carolina, there is no prohibition on an insurer’s ability to reduce the amount paid by reference to the insured’s PIP coverage.” *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) (applying S.C. law to reduce UIM coverage by the amount paid in PIP payments in accordance with the policy provisions). “South Carolina law does not specifically prohibit UIM set-offs, and the state’s courts have expressly permitted insurers to offset UIM benefits based on worker’s compensation benefits.” *Rowzie*, 556 F.3d at 168 (citing *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231,

530 S.E.2d 896 (2000) (neither public policy nor South Carolina law prohibits such a set-off); *Williamson v. United States Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994) (reasoning that a set-off was permissible because, among other reasons, the employer was not statutorily required to carry a certain amount of UIM coverage)). Because UIM coverage is not mandatory, and since the set-off based on PIP/MedPay benefits is not contrary to S.C. Code § 38-77-144, the district court concluded that it “must give effect to the terms of the policy.” *Rowzie*, 556 F.3d at 168. Similarly, this Court should give effect to the Policy’s reasonable limitation on a third party claimant’s ability to receive policy limits twice against the same Policy for damages arising from the same accident.

D. Allowing Claimant to Assert Both Liability and UIM Claims Against the Same Policy Presents Actuarial Difficulties that Cannot Accurately be Calculated into the Premium.

In the *Burgess* decision, the South Carolina Supreme Court supported the fact that an insurer may seek to provide limitations in its Policy so to facilitate premium calculations:

An automobile insurance company, in setting its rates, bases those rates at least in part on the probabilities involving the insured and the vehicle(s) he is insuring. Where, as here, the vehicle is not insured by the company from whom coverage is sought, the carrier cannot accurately calculate its risks. It is one thing to insure against “unknowable” risks, such as the chance that one will be injured by an underinsured at-fault driver while a passenger in another’s vehicle, or as a pedestrian; it is an entirely different calculus where a company’s insured owns and operates a motor vehicle, especially a motorcycle, not insured by the carrier making its risk assessments.

Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). By the same token, it is also an entirely different calculus to provide UIM coverage to unknown third party passengers who are neither the named insured nor resident relatives of the named insured of the carrier making its risk assessments, *and* who are already asserting

claims under the liability coverage of the same policy. Further, Omni's Policy provision at issue in this matter assists in protecting against fraud and collusion between an insured and third party claimants who happen to be passengers in the insured vehicle. Lastly, providing UIM coverage to third party passengers who have already made a claim and collected against the liability portion of the Policy constitutes a risk that Omni did not insure and for which it collected no premium. Therefore, the Policy provisions limiting UIM coverage should be enforced.

III. THE CIRCUIT COURT ERRED IN CONSTRUING THE LIMIT OF LIABILITY FOR UIM COVERAGE TO BE THE "SUM" OF TWO LIMITS SHOWN IN THE DECLARATIONS.

The Circuit Court erroneously concluded that "Omni's 'limit of liability' for UIM coverage is the *sum* of two 'limits of liability shown in the declarations,' not a single number as is the case with the limit upon liability coverage." Amended Order Superseding Order of October 25, 2013, pp. 4, 7-8. The Declarations Page clearly identifies the Underinsured Motorist Bodily Injury limit to be \$25,000 per person. "Sum" is a term synonymous with "amount." Black's Law Dictionary confirms this, defining the term "sum" as "[t]he sense in which the term is most commonly used is 'money;' a quantity of money or currency, ... a sum of money..." *Id.* at 1435 (6th ed. 1990). Further, the Court quotes to a non-legal lay dictionary in support of an alternate meaning, *see* Amended Order Superseding October 25, 2012 Order, 7; however, the term "sum" possesses many meanings in the lay dictionary, and the more specific of which pertains to "sum" in the context of money, as is clearly the case here: "an amount or quantity, especially of money." Webster's Universal College Dictionary, at 788 (1997). Thus, the limit of liability is the amount shown on the Declarations of \$25,000.00 per person for UIM coverage.

IV. THE CIRCUIT COURT ERRED IN CONSTRUING THE UIM COVERAGE LIMITATION IN A MANNER THAT ONLY APPLIES TO AN IMPOSSIBLE SET OF CIRCUMSTANCES.

The Policy limits Claimant to making only one claim against the Policy and receiving only one payment under the Policy. There is no dispute that Claimant has made a claim for and received payment of the Policy limits once already under Part A of the Policy that addresses liability coverage. In subsequently making his UIM claim under Part C2 of the Policy, Claimant submitted a claim for payment against the same Policy for damages arising from the same accident. This second claim duplicated the prior claim for damages that had already been made. Nothing distinguished the two claims; Claimant simply asserted the duplicate claims against different aspects of the Policy. This was in contravention of the following Policy limitation:

No one will be entitled to receive duplicate payments for the same elements of loss under this Coverage¹¹ and Part A, Part B, Part C, or Part D of the Policy.

Policy, Part C2 – Underinsured Motorist Coverage, Limit of Liability, D., p.16. This provision evinces a clear intent that the Policy limitation be applied so that Claimant is limited to making a single claim against the Policy.

In construing these limitations, the Circuit Court should have applied the plain meaning of the Policy terms. Contracts of insurance, like other contracts, should be interpreted according to general rules of contract construction and the language employed is to be understood in its plain, ordinary and popular sense. *Universal Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co.*, 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct.

¹¹ This coverage being the applicable Part of the Policy in which it appears, which is UIM Coverage under Part C2.

App. 1989); *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983); *Sloan Construction Company, Inc. v. Central National Insurance Company of Omaha*, 269 S. C. 183, 236 S.E.2d 818, 819 (1977). *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (“An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.”); *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (“[T]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.”).

The term “duplicate” is defined to mean “to double, repeat, copy, make, or add a thing exactly like the preceding one; ... that which exactly resembles or corresponds to something else; another, correspondent to the first; ... a document the same as another in essential particulars...” Black’s Law Dictionary, at 503 (6th ed. 1990). The basis for Claimant’s demand for payment remained the same. The information submitted in support for his claim for liability limits was the exact same as that submitted for the claim for UIM limits. Nothing new was submitted in support of the duplicate demand; the only difference lay not in the demand, but the target to which the demand was directed. *See* Amended Complaint for Declaratory Judgment, ¶¶17-32. Thus, it was a duplicate demand for payment, which provided the basis for the limitation to UIM coverage under the Policy. Further, in the context of Claimant’s Motion for Judgment on the Pleadings, the allegations in the Complaint must be taken as true, and this limitation should be recognized and enforced. Evidence of the duplicate nature of this demand for payment may be submitted to the Court at the trial in the form of the written demand actually made by Claimant.

The Circuit Court erroneously construed this UIM limitation to be meaningless, concluding:

No payment under *any* underinsured motorist coverage ever “duplicates” any payment made under any liability coverage. By definition, UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the claimant for his loss. Hence, underinsurance payments never duplicate liability payments. If Mr. Wright’s UIM claim “duplicated” his liability claim, then by definition he would have no valid UIM claim. No amount paid in UIM coverage would “duplicate” the previous \$25,000 liability payment under Part A “for the same element of loss.”

Amended Order Superseding Order of October 25, 2013, pp.6-7 (emphasis in the original).

In so doing, the Circuit Court construed the term “duplicate payments” to mean “duplicate damages” instead of “duplicate claims” for payment as urged by Appellant and evidenced by the intent.

In refusing to apply this limitation, the Circuit Court cited the following well established principle of South Carolina law that “Where the words of an insurance policy are capable of two *reasonable* interpretations, the construction most favorable to the insured should be adopted.” Amended Order Superseding Order of October 25, 2013, pp.6-7 (emphasis added) (citing *Helena Chem. Co. v. Allianz Underwriters Ins., Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004)). However, construing the Policy limitation in a manner that results in an impossible circumstance is not a *reasonable* interpretation. As the Circuit Court itself noted, “underinsurance payments never duplicate liability payments....” Amended Order Superseding Order of October 25, 2013, pp.6. Therefore, the Circuit Court’s decision to construe the Policy in a fashion to render it meaningless and never applicable constituted error.

Construing the term “duplicate payments” to mean “duplicate claims” comports with the intended meaning of the limitation, and does not result in there being an impossible meaning that would not and could not apply in the context of a UIM claim. Therefore, this Court should apply the plain language of the UIM limitation so to prevent Claimant from making duplicate claims against a single Policy that is not his own. Having already recovered the full Policy limits, the plain language of the Policy precludes Claimant from recovering a duplicate claim for UIM coverage against this same Policy.

“The foremost rule in interpreting an insurance contract is to give effect to the intent of the parties as shown by the language of the contract itself.” *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 179, 504 S.E.2d 127, 129 (1998). *See Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976) (“The primary objective in construing a contract is to ascertain and give effect to the intention of the parties.”); *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) (“The Court must first look at the language of the contract in order to determine the intention of the parties.”). The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract’s force and effect. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Comm’n*, 296 S.C. 373, 373 S.E.2d 584 (1988). Additionally, the intent should be construed in the context of the UIM section of the Policy

in which the limitation appears. The intent of the Policy is, as the provision plainly reads, to provide a limitation to UIM coverage preventing Claimant from making more than one claim against the same Policy for the damages arising from the same incident. The intent cannot possibly be, as construed by the Circuit Court, to create a limitation on an impossible set of circumstances.

“Parties to a contract of insurance have the right to make their own contract.” *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993). “It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage.” *Id.* See *Gray v. State Farm Auto. Ins. Co.*, 327 S.C. 646, 649, 491 S.E.2d 272, 274 (Ct. App. 1997); *Gambrell v. Travelers Insurance Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983). “[C]ourts are not permitted to torture the ordinary meaning of language to extend coverage expressly excluded by the terms of the policy.” *Sphere Drake*, 313 S.C. at 474, 438 S.E.2d at 277. See *Torrington Co. v. Aetna Casualty & Surety Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975) (“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.”). Therefore, under the circumstances presented here, Claimant is not a party to this Policy and he is not allowed to seek to create terms to the Policy that do not exist, and this Court should not facilitate this effort by rewriting the Policy to provide UIM coverage that does not exist for him given the Policy provisions.

V. **THE CIRCUIT COURT ERRED IN FAILING TO LIMIT VOLUNTARY UIM COVERAGE AFFORDED UNDER THE POLICY DUE TO FRAUD.**

The Court erroneously dismissed Appellant’s alternate sustaining ground for denying voluntary UIM coverage due to fraud arising from Mr. Barron’s refusal to

identify his resident daughter as a driver on his Policy. The Court erroneously bases this decision on the misapprehension that “No authority is cited and no basis is offered for the contention that the named insured’s failure in this regard is ground to deny UIM coverage or, for that matter, to affect any provision of the policy.” *See* Amended Order Superseding Order of October 25, 2012, p.9. There is no basis for this assertion. Appellant’s position is as set forth in its Amended Complaint, ¶¶7-11, 41-43, as well as in Section VI its Memorandum to the Court. Further, given the status of Claimant’s Motion as one for Judgment on the Pleadings, Omni’s pleadings must be taken as they appear in the Amended Complaint, ¶¶7-11, 41-43. Additionally, Appellant did cite authority in support of this in its memorandum to the Circuit Court, which is included *infra*.

The true party at interest in the enforcement of the Policy terms pertaining to voluntary UIM coverage is the Claimant, not the named insured. Omni has secured a Covenant not to Execute, so the policy holder is neither an interested nor a necessary party to the determination of whether or not Claimant, as a third party to the Policy, is entitled to voluntary UIM coverage or whether the Policy limitations should be applied. In its original Order dated October 25, 2012, the Circuit Court took the position that Appellant would be required to sue its own insured and force him to defend Claimant’s ability to bring a UIM claim. Order dated October 25, 2012, pp.10-11. Apparently recognizing the error in this approach, this position was removed in the Amended Order.

By refusing to identify and list his resident daughter as a driver on the Policy, Mr. Barron breached his obligations under the Policy. Although such a breach may not invalidate mandatory coverage, South Carolina courts allow an insurer to suspend voluntary coverage in the event of a Policy breach. *See infra*. The purpose of the Motor

Vehicle Financial Responsibility Act is to “afford greater protection to those injured through the negligent operation of automobiles in this State.” *Pennsylvania Nat’l Mut. Casualty Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). The South Carolina Legislature has provided that the South Carolina Motor Vehicle Financial Responsibility Act is to be construed so as to make uniform the laws of those states that enact substantially identical legislation. *See United Servs. Auto. Ass’n v. Markosky*, 340 S.C. 223, 228, 530 S.E.2d 660, 663 (Ct. App. 2000) (citing S.C. Code Ann. § 56-9-120). South Carolina, along with a number of other jurisdictions, has concluded that the Financial Responsibility Act was mandated by the legislature to protect innocent third parties, and therefore conduct by the insured in violation of the policy terms may not defeat coverage up to the applicable minimum limits required by the Act, but it can defeat voluntary coverage. *United Servs. Auto. Ass’n v. Markosky*, 340 S.C. 223, 227-30, 530 S.E.2d 660, 663-64 (Ct. App. 2000) (requiring only minimum limits to be afforded, despite policy coverage in excess of these minimum limits, where the insured failed to cooperate in the defense and went into default) (citing *Shores v. Weaver*, 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993) (“the purpose of the Motor Vehicle Financial Responsibility Act and the Automobile Reparation Reform Act of 1974 is to afford greater protection to those injured through the negligent operation of automobiles in this State.”)); *Universal Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858, 862 (Ct. App. 1989) (the Financial Responsibility Act “provides no basis to hold that the provision of the policy limiting coverage to the statutory minimum is contrary to public policy.”); *Odum v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87, 91, 92 (N.C. Ct. App. 1991), review denied, 329 N.C. 499, 407 S.E.2d 539 (N.C. 1991)

(Fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability for up to the statutory minimum amount once injury has occurred; however, where the policy limit was greater than the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud.); *Swain v. Nationwide Mut. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (N.C. 1960) (stating Vehicle Financial Responsibility Act of 1957 changed the law with respect to the compulsory amount such that a violation of a policy provision was not a defense to liability of the insurer, but as to any amount in excess of that, a policy provision requiring notice to the insurer would be enforced as written and a violation was a valid and complete defense); *Canal Ins. Co. v. Carolina Casualty Ins. Co.*, 59 F.3d 281 (1st Cir. 1995) (applying New Hampshire law to find Financial Responsibility Law prevails over any contrary policy provision, but in fairness to insurer, beyond this the exclusion stands); *Universal Underwriters Ins. Co. v. American Motorists Ins. Co.*, 541 F. Supp. 755 (N.D. Miss. 1982) (applying Mississippi law to hold employee exclusion is ineffective up to minimum limits, but it does not affect the enforceability of the exclusion from excess coverage); *Arceneaux v. State Farm Mut. Auto. Ins. Co.*, 113 Ariz. 216, 550 P.2d 87 (Ariz. 1976) (holding automobile liability's household exclusion invalid only to the extent it conflicted with the Financial Responsibility Act); *Prudential v. Estate of Rojo-Pacheco*, 192 Ariz. 139, 962 P.2d 213 (Ariz. Ct. App. 1997) (holding that upon proof of insured's misrepresentation, insurer would be entitled to rescission of policy as to the excess coverage); *DeWitt v. Young*, 229 Kan. 474, 625 P.2d 478 (Kan. 1981) (adhering to general rule to find household exclusion void only as to the minimum coverage required by statute); *State Farm Mut. Auto. Ins. Co. v. Shelly*, 394 Mich. 448, 231 N.W.2d 641 (Mich. 1975) (holding that where an

exclusionary clause is void as against statutory policy, reinstated coverage is limited to the amount required so that the vehicle is not an uninsured motor vehicle within the meaning of the statute); *State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523 (Mo. 1995) (holding household exclusion unenforceable up to statutory liability limits but valid as to any coverage exceeding those amounts); *Equity Mut. Ins. Co., v. Spring Valley Wholesale Nursery, Inc.*, 747 P.2d 947 (Okla. 1987) (finding with a geographical exclusion clause, freedom of contract principles control as to any vehicle coverage in excess of that required by statute); *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987) (holding that under Utah's then-applicable No-Fault Insurance Act household or family exclusion is valid as to insurance provided by an automobile policy in excess of the statutorily mandated amounts and benefits); *Allstate Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 619 P.2d 329, 333 (Utah 1980) (stating, in holding named driver exclusion unenforceable only to the extent of statutory minimum coverage, "contracting parties are free to limit coverage in excess of the minimum required limits, and the exclusion found in the contract is valid in relation to any coverage exceeding the minimum amounts. Thus, a balance is struck between the necessity of securing minimum automobile liability coverage and the availability of lower premiums because of the exclusion of high insurance risks."); *Tibbs v. Johnson*, 30 Wn. App. 107, 632 P.2d 904 (Wash. Ct. App. 1981) (noting non-cooperation is a valid defense to policy amount above the minimum limits); *Dotts v. Taressa J.A.*, 182 W. Va. 586, 390 S.E.2d 568 (W. Va. 1990) (concluding intentional tort exclusion in a motor vehicle liability insurance policy is precluded under Safety Responsibility law up to the minimum coverage required, but policy exclusion will operate as to any amount above the statutory minimum); *Pribble v. State Farm Mut. Auto. Ins.*

Co., 933 P.2d 1108 (Wyo. 1997) (recognizing majority of cases hold exclusions enforceable with respect to policy amounts in excess of the statutory minimum in holding household exclusion does not violate public policy where it provides for the statutory minimum coverage). Therefore, because UIM coverage is deemed to be voluntary coverage by South Carolina courts, such voluntary coverage may be limited in the event of a Policy breach. This provides alternate sustaining grounds for determining that UIM coverage is not available to Claimant.

CONCLUSION

In accordance with the reasoning and citation to authority as set forth herein, Omni respectfully requests that this Court: (1) reverse the Circuit Court's decision to grant Claimant Judgment on the Pleadings; and (2) determine that UIM coverage is not available to Claimant given the circumstances presented in this litigation.

Columbia, South Carolina
September 3, 2013

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHEROKEE COUNTY
COURT OF COMMON PLEAS
HONORABLE J. MARK HAYES, II CIRCUIT COURT JUDGE

SC Court of Appeals

Appellate Case No. 2013-000912

Omni Insurance Company Appellant,

v.

Christopher Wright Respondent.

**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

1. Appellant's Amended Declaratory Judgment Complaint;
2. Respondent's Answer and Counterclaim;
3. Respondent's Motion for Judgment on the Pleadings and Memorandum in Support;
4. Appellant's Memorandum in Support of Declaratory Judgment;
5. Order dated October 25, 2012;
6. Appellant's Motion to Reconsider the Order dated October 25, 2012;
7. Amended Order Superseding Order of October 25, 2012;
8. Appellant's Motion to Reconsider the Amended Order Superseding Order of October 25, 2012;
9. Order dated March 19, 2013, denying Appellant's Motion to Reconsider;
10. Transcript of the June 11, 2012 Hearing on Respondent's Motion for Judgment on the Pleadings;
11. Transcript of the February 19, 2013, Hearing on Appellant's Motion to Reconsider the Amended Order Superseding Order of October 25, 2012;
12. Auto Policy and Declarations Page; and
13. Covenant not to Execute.

I certify that this designation contains no matter which is irrelevant to this appeal.

Columbia, South Carolina
September 3, 2013

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Omni Insurance Company Appellant,

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PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Respondent Christopher Wright by hand delivery, on September 3, 2013, to his attorney of record, James B. Richardson, Jr., at his office of record at 1229 Lincoln Street, Columbia, SC 29201.

Columbia, South Carolina
September 3, 2013

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