THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS
HONORABLE PAUL M. BURCH, CIRCUIT COURT JUDGE

Appellate Case No. 2013-000881

Melissa Baird and Chastity Baird .... Respondents,

v.

Omni Insurance Company .... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN FAILING TO APPLY THE UIM COVERAGE LIMITATION IN THE POLICY THAT PREVENTS THE SAME THIRD PARTY CLAIMANTS FROM RECOVERING TWICE AGAINST THE SAME POLICY FOR DAMAGES ARISING FROM THE SAME ACCIDENT BECAUSE SUCH LIMITATION VIOLATES SOUTH CAROLINA LAW?

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

III. DID THE CIRCUIT COURT ERR IN FAILING TO DISTINGUISH BETWEEN A CLAIMANT AND AN INSURED IN APPLYING THE POLICY LIMITATIONS IN THE CONTEXT OF A UIM CLAIM?

IV. DID THE COURT ERR IN APPLYING LEGAL PRINCIPLES APPLICABLE TO MANDATORY <u>UN</u>INSURED COVERAGE WHILE THE ISSUES IN THIS CASE RELATE TO VOLUNTARY <u>UNDER</u>INSURED COVERAGE?

V. DID THE COURT ERR IN RELYING UPON *BRATCHER V. NATIONAL GRANGE MUT. INS. CO.*, 292 S.C. 330, 356 S.E.2D 151 (CT. APP. 1987) AND *BURGESS V. NATIONWIDE MUT. INS. CO.*, 361 S.C. 196, 603 S.E.2D 861 (CT. APP. 2004)?

VI. DID THE CIRCUIT COURT ERR IN FAILING TO ADDRESS ALL POLICY PROVISIONS RAISED BY OMNI IN SUPPORT OF LIMITING UIM COVERAGE?

STATEMENT OF THE CASE

This appeal involves a declaratory judgment action filed on January 10, 2012, regarding whether or not Melissa Baird and Chastity Baird ("Claimants"), as third party passengers, are entitled to *both* mandatory liability coverage and voluntary underinsured motorist ("UIM") coverage under Appellant Omni Insurance Company ("Omni") policy that was issued to Shasta Atkinson[1]. An Answer was filed and served seeking a declaration that UIM coverage should not be afforded to Claimants under Mrs.

[1] Significantly, Claimants are not seeking recovery via their own insurance policy.

Atkinson's policy in addition to the liability coverage because the policy limits the ability of third party claimants such as Respondents to receive voluntary UIM when they have already received the full liability coverage policy limits.

On November 6, 2012, the Circuit held a hearing to resolve the declaratory judgment action. Omni is appealing the Order of the Honorable Paul M. Burch, dated January 31, 2013, and filed on February 5, 2013, arising from this hearing, which declared that Claimants were entitled to UIM coverage under Mrs. Atkinson's Policy. Notice of entry of Order is dated February 7, 2013, and was received on February 11, 2013. Appellant served a Motion for Reconsideration on February 21, 2012. Judge Burch denied this Motion without oral argument and by Order dated March 8, 2013, and filed March 13, 2013. Appellant received the Order on March 20, 2013, via counsel for Claimants. Appellant filed its Notice of Appeal on April 17, 2013. The transcript of the November 6, 2012, hearing on declaratory judgment action before the Circuit Court was mailed on Friday, August 2, 2013, and received the following week on August 6, 2013. This Initial Brief was filed and served on September 5, 2013.

FACTS

The essential facts regarding this matter are undisputed and have been stipulated to by both counsel as set forth in the Stipulated Set of Facts.

Omni Insurance Company ("Omni") insured a 1999 Ford Explorer bearing VIN 1FMZU32E6XUA82823 ("Vehicle") belonging to Shasta Atkinson for a policy period spanning from December 1, 2007 to June 1, 2008, bearing Policy number 3126604 ("Policy"). *See* Policy Dec. Page. The Policy provides liability coverage in the amount of

$25,000 per person and $50,000 per accident for bodily injury. *See id.* Shasta Atkinson also opted and paid for UIM coverage under this Policy. *See id.*

Shasta Atkinson is the named insured on this Policy. *See id.* On May 7, 2008, Melissa Baird and Chasity Baird were travelling in the Vehicle driven by Mrs. Atkinson, when an auto wreck occurred ("Accident"). Complaint, ¶3. Claimants are third party passengers who do not reside with Mrs. Atkinson. Order dated January 31, 2013, pp. 3-4;[2] Transcript of the November 6, 2012 Hearing, p.6, ll.6-7. Claimants asserted claims against Mrs. Atkinson alleging that she caused the accident and that they were injured. Complaint, ¶4. Claimants made a Tyger River demand, seeking the Policy limits, which were paid by Omni in exchange for Covenants not to Execute against Mrs. Atkinson. Complaint, ¶¶5-6. Claimants then alleged that their damages exceeded the available Policy coverage. Complaint, ¶7; Order dated January 31, 2013, p. 4. However, because Claimants do not have UIM coverage of their own, they seek to double-dip their claims against Mrs. Atkinson's Policy by seeking UIM coverage that was requested by Mrs. Atkinson, paid by Mrs. Atkinson, and issued to Mrs. Atkinson. Order dated January 31, 2013, pp. 3-4.

The Policy that was issued to Mrs. Atkinson is the same Policy against which the applicable Policy limits have already been paid. Transcript of the November 6, 2012 Hearing, p.6, ll.10-14. Claimants submitted no additional evidence of damages than were submitted in making the initial Policy limits demand, so these are damages arising from the same accident. *Id.*

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[2] The citations to the page numbers for this Order shall appear as they are on the Order. However, the first page of the Order is identified as the third and the numeration progresses from there.

LEGAL ARGUMENT

I. THE POLICY CONTAINS LIMITATIONS THAT PREVENT CLAIMANTS FROM RECEIVING UIM COVERAGE WHERE THEY HAVE ALREADY MADE CLAIMS AND RECEIVED PAYMENTS UNDER THE POLICY.

The Policy issued to Mrs. Atkinson contains the following limitations, which prevent non-resident, third party passengers, such as Claimants, 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 Claimants are not resident relatives of the family that was issued the Policy, they 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 Claimants' damages exceeded the available policy limits of the other driver (which was not the case given these facts). Under this Policy limitation, the Atkinson 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 Atkinson Policy UIM coverage, however, is not personal and portable to the third party Claimants who have already made a claim against and received their portion of 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, pg. 15. There is no dispute that Omni has already complied with Claimants' Policy limits demand. Having already received their portion of the Policy limits from the Policy, Claimants are 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 Coverage[3] and Part A, Part B, Part C, or Part D of the Policy." Policy, Part C2 – Underinsured Motorist Coverage, Limit of Liability, D., pg. 16 of 37. 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 third party claimant against the same policy for damages arising from the same accident.

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

II. THE CIRCUIT COURT ERRED IN RULING THAT THE POLICY'S UIM COVERAGE LIMITATION VIOLATES SOUTH CAROLINA LAW.

A. South Carolina Courts Recognize Policy Limitations.

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 Property & Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858, 861 (Ct. App. 1989) (emphasis added); *Pennsylvania Nat. Mut. Ins. Co. v. Parker*, 282 S.C. 546, 550-51, 320 S.E. (2d) 458, 461 (Ct. App. 1984). *Rhame v. National Grange Mutual Ins. Co.*, 238 S.C. 539, 544, 121 S.E. (2d) 94, 96 (1961); *Jordan v. Aetna Casualty & Surety Co.*, 264 S.C. 294, 214 S.E. (2d) 818 (1975); Couch On Insurance, Section 45:82 (rev. ed. 1981). *See 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."). 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).

Therefore, Claimants must demonstrate that there is some statutory prohibition to limiting the scope of UIM coverage, or that such a limitation is violates public policy. As is demonstrated herein, Claimants are unable to do so because there is no discord between Omni's UIM limitation and the UIM Act. *See infra,* Section *_____. In fact, not only is there no conflict with public policy, but the public policy of this state,

as set forth by the South Carolina Supreme Court and its chief justice, support enforcement of this UIM limitation. *See infra,* Section *_____. Additionally, the South Carolina Supreme Court has expressly allowed policy provisions that limit the applicability of UIM coverage. *See infra,* Section *____. Therefore, Omni's Policy provisions limiting UIM coverage should be recognized by this Court.

B. The Policy's UIM Limitation Complies With The UIM Act.

South Carolina courts have ruled that UIM coverage is controlled by and subject to the underinsured motorist act ("UIM Act"), and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy. *See, e.g., Ferguson v. State Farm Mutual Automobile Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973). By the same token, provisions that are not inconsistent with the UIM Act should be recognized. The UIM Act is set forth under S.C. Code Ann. § 38-77-160, which provides in pertinent part[4] as follows:

> Automobile insurance carriers shall offer, at the option of the insured, ... underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by ... underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage. Benefits paid pursuant to this section are not subject to subrogation and assignment.
>
> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the

[4] The portion of the statute addressing UNinsured motorist coverage is omitted.

> underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

S.C. Code Ann. § 38-77-160. Reviewing the Policy's UIM limitations together with the UIM Act shows that there is nothing that violates the UIM Act and its requirements.

Significantly, there is no provision requiring that an insurer provide UIM coverage for a third party passenger riding in the insured vehicle who does not obtain their own UIM coverage and who have already received Policy limits in accordance with their Tyger River Policy limits demand. This fact is established not only by a simple review of the UIM Act *supra*, but also by the Claimants' and the Circuit Court's failure to identify any component of the statute that conflicts with the Policy and that must be incorporated into the Policy. Because there is no statutory conflict, Omni and Mrs. Atkinson are free to agree to those terms as are set forth in the Policy. As a third party to the Policy, Claimants are not in a position to object to the Policy provisions established between Omni and Mrs. Atkinson anymore than they could have objected to Mrs. Atkinson's failure to obtain UIM coverage (should she have failed to do so).

As established by the South Carolina courts' decisions (set forth *infra* Section *____), a clear message is conveyed that while policy limitations affecting mandatory coverage[5] may be deemed to be void, UIM limitations must be viewed in a

[5] Being liability coverage and uninsured motorist coverage in the amount set by the statutorily mandated minimum limits.

different light due to the fact that UIM coverage is entirely voluntary. *See infra,* Section *___. Where insurance coverage is voluntary, the insurer and insured are free to enter into contract provisions in accordance with their own choosing. If an insured does not like the policy provisions offered, he is free to seek a Policy endorsement or obtain insurance coverage with another provider with different terms. As a result, the Policy provisions need not be modified or stricken to comply with the UIM Act, and its terms should be enforced in accordance with their plain language.

C. South Carolina Public Policy Supports Enforcement Of The UIM Limitation.

The rule of statutory construction of 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). Under this clear articulation of public policy, there is no conflict with the UIM statute being limited to named insureds and their resident relatives, as those who have properly exercised the diligence and foresight to opt for and acquire UIM coverage. Allowing Claimants, as a third parties to the Policy 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.

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.[6] As a result, through this UIM coverage limitation, Omni is preventing the dilution of such funds by parties who did not actually contract for or otherwise pay for such coverage. Thus, this UIM coverage limitation allows Omni to fulfill its duty to its named insureds to maintain the UIM coverage for the ones 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 § 38-77-140. There is no dispute that Omni complied with this requirement via

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[6] 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.

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 Mrs. Atkinson and Omni. If the Claimants failed to obtain their own UIM coverage, then this Court should not seek to reform a Policy to which Claimants are 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 olicy.").

D. The Legislature Expressly Allows For UIM Coverage To Be Limited.

Not only is Omni's UIM limitation compliant with the UIM Act, but the South Carolina Legislature has expressed a clear intent to allow an insurer to limit the scope of UIM coverage via statutory provisions related to automobile insurance. For instance, S.C. Code § 15-78-190 allows a Tort Claims Act claimant to *potentially* recover against his own UIM policy, subject to the terms of the policy providing UIM coverage under those circumstances.[7] If a UIM claimant could recover under any set of facts where his damages

[7] S.C. Code Ann. § 15-78-190 provides as follows: "If the amount of the verdict or judgment is not satisfied by reason of the monetary limitations of this chapter upon recovery from the State or political subdivision thereof, **the plaintiff's insurance company, *subject to the underinsured* and uninsured defendant *provisions of the plaintiff's insurance policy*, if any, shall compensate the plaintiff** for the difference between the amount of the verdict or judgment and the payment by the political subdivision. If a cause of action is barred under § 15-78-60 of the 1976 Code, the

exceeded the available liability insurance, then this provision would be meaningless. As a result, the Legislature clearly intended that an insurer be able to apply limitations to UIM coverage that do not conflict with the UIM Act. Similarly, "uninsured motor vehicle" is defined as "a motor vehicle as to which ... the insurer writing the same successfully denies coverage thereunder...." S.C. Code Ann. § 38-77-30(14)(b). If it were impossible to deny or limit coverage, then this statutory definition would have no meaning.

The Legislature requires that automobiles driven within this State have insurance for liability coverage[8] and UM coverage[9] in the minimum amount of $25,000. *See* S.C. Code Ann. §§ 38-77-140, 150. Automobiles driven within this State are **not** required to have UIM coverage. *See infra,* Section *____. Although UIM must be offered,

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plaintiff's insurance company must compensate him for his losses subject to the aforementioned provisions of his insurance policy." (emphasis added).

[8] S.C. Code Ann. § 38-77-140 reads as follows: "(A) An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: (1) twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person; (2) fifty thousand dollars because of bodily injury to two or more persons in any one accident; and (3) twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.(B) Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements."

[9] S.C. Code Ann. § 38-77-150 reads as follows: "No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140."

there is no dispute in this matter pertaining to Omni's UIM offer to Mrs. Atkinson, and this offer requirement does not extend to third party passengers like Claimants. If one were to make an overbroad application of the term "insured" to the UIM Act, as the Circuit Court does, *see See* Order, dated January 31, 2013, pp.4-5, then this results in an insurer having to make UIM offers every time a passenger gets into a vehicle. *See Wright v. Allstate Ins. Co.*, 746 F. Supp. 612, 614 (D.S.C. 1990) ("Despite use of the blanket term 'insured' in § 38-77-160, it would be nonsensical, and create an impossible task, for the legislature to require an insurer to make a meaningful offer of optional coverage to every person who may, after the policy is written, become a ... guest in the policyholder's automobile."). The Circuit Court makes this same error. *See* Order, dated January 31, 2013, pp.4-5. Therefore, it has been recognized that the broad use of the term "insured" in the statutes does not necessarily apply to the UIM Act for persons who are essentially Claimants against the Policy, rather than the insureds to whom the Policy was issued. Recognizing this distinction in the context of the UIM Act allows the Policy limitations to be enforced.

The Legislature's intent for UIM to be able to be limited to the named insured and his or her resident relatives is indicated by the plain language of the UIM Act. First, the UIM Act provides that '[a]utomobile insurance carriers shall offer, ***at the option of the insured***, ... underinsured motorist coverage..." S.C. Code § 38-77-160 (emphasis added). Thus, the term "insured" as utilized in the UIM Act pertains to the named insured, because third party passengers have no "option" to exercise with regard to the UIM coverage for the vehicle in which they are passengers. *See Wright*, 746 F. Supp. at 614 (construing 'insured' in the context of the UIM Act, § 38-77-160, to mean the named insured). Third party passengers such as Claimants are, of course, free to contract for their

own UIM coverage, under which they would be named insureds and under which they may assert their own UIM claims.

E. South Carolina Case Law Expressly Allows UIM Coverage To Be Limited.

The South Carolina Supreme Court first construed the UIM Act in *Gambrell v. Travelers Insurance Companies*,[10] 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.* The "one" who "buys" the UIM coverage is to protect "himself" and his resident relatives is, of course, the named insured. *See id.* The insured in *Gambrell* was also a named insured. *See id.* 280 S.C. at 71, 310 S.E.2d at 816. Thus, the purpose of the UIM statute is to protect the insureds who opted and paid for this coverage from at fault drivers- not to provide additional liability coverage for third party passengers. Such third party claims, should they exist, exist as liability claims against the at fault driver. There is no dispute that Claimants have already received payment incident to Omni's payment of the full Policy limits.

[10] 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.

Several courts have since ruled that the UIM Act that 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 Claimants were in the insured vehicle does not mean they are entitled to both liability and UIM coverage, as the *Burgess* Court noted that UIM coverage does not follow the insured vehicle. The *Burgess* Court further elaborated that:

> UIM coverage ... **permits insureds, at *their*[11] option, to purchase insurance** coverage for situations where ***they* are injured** by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages. Essentially, **the insured is buying insurance** coverage for situations, as **where *he* is a passenger in another's vehicle** or is a pedestrian, **where *he* cannot otherwise insure *himself*.**

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 through the possessive language above. *See also 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 the insured to those asserting claims against the insured); *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

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[11] It is notable that time and again, SC courts make specific reference to the fact that UIM 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."

coverage is less than the amount of the claimant's actual damages.") (emphasis added). Therefore, UIM applies to protect the named insured and her resident relatives, and not to serve as a supplement to a liability claim against the same insured by third party passengers such as Claimants. This follows the clear rationale identified in *Gambrell. Supra.*

Thus, the intent is that UIM protect the particular insureds who negotiated and paid for the protection it affords. Of course, an insurer is welcome to offer a greater scope of UIM coverage under its policies; however, under the Policy at issue in this appeal, Omni limited the scope of UIM coverage such that third party claimants could make a claim for UIM coverage, but they may not do so in addition to a liability claim against the same policy for damages arising under the same accident. The fact that other insurers do not include such a limitation in their policies is irrelevant to the issues presented in this appeal addressing this particular Policy. Conversely, liability coverage, which is required by statute, protects persons such as Claimants who may be 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.

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

As noted above, 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." *Supra*, Section II. Thus, because UIM coverage is not statutorily mandated, Policy limitations to UIM 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 insurance, and thus may be limited.

Many South Carolina courts have observed that the UIM Statute does not make UIM coverage mandatory, as is the case with minimum limits of liability and UM coverage.[12] This began with the South Carolina Supreme Court's first interpretation if 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");[13] *Fireman's Ins. Co. of Newark, N.J. v. State Farm Mut. Auto. Ins. Co.*, 295 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

[12] 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.

[13] 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)). 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.

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"); *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."

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

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.**[14]

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

[14] 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."

coverage, even though other vehicles he insured did have UIM coverage.[15] 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, Claimants, as a third party passengers, should be denied UIM coverage because they are limited from asserting a UIM claim against the same Policy for damages arising from the same incident. Claimants have already received Policy limits under the liability coverage claim against this same Policy. If Claimants wanted portable UIM coverage of their own, then they could have obtained it, and it would have been portable and applicable to this accident. However, Claimants did not do so.

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 III) in that insureds are to be encouraged to obtain **their own** UIM coverage. The *Burgess* Court reasoned:

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[15] UIM coverage follows the insured, even when he or she 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 UIM coverage via other policies.

> 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, Claimants, as third party passengers who failed to obtain their UIM coverage consequently may recover under only the liability portion of the policy.

Perhaps most 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). The Circuit Court makes the critical error of relying upon this over ruled decision in support of its Order. *See* Order, dated January 31, 2013, p.7. In *Burgess v. Nationwide Mut. Ins. Co.,* 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004), the Court of Appeals allowed the UIM coverage in the face of the limitation and substantiated its decision with the same arguments as are advanced by Claimants, namely 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). This is the same flawed reasoning and approach utilized in *Bratcher v. National Grange Mut. Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987),[16] and it is essentially the same as Claimants' reasoning presented to and relied upon by the Circuit Court in the issuance of its Order,

[16] For a more in depth analysis of this decision and why it too should be deemed over ruled, and why it was error for the Circuit Court to rely upon it, please see Section *____.

and just as this reasoning was rejected by the South Carolina Supreme Court, so too should this Court reject it.

In *Zurich American Insurance Company v. Tolbert*, the Court of Appeals applied *Burgess* to a UIM policy provision that completely eliminated UIM coverage for a named 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 UM coverage, which is a mandatory part of all automobile insurance policies."). Seemingly following the public policy approach discussed *supra,* Section *___, 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." *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 498, 662 S.E.2d 606, 608 (Ct. App. 2008). By the same token, neither should the Omni's UIM coverage limitation offend public policy (in fact it advances S.C.'s public policy of encouraging UIM, *supra*), nor is it in conflict with the insurance laws of South Carolina.

In *Nationwide Mutual Insurance Company v. Rhoden*, the Court refused UIM coverage even to a resident relative of a named insured under the policy where that claimant failed to obtain her own UIM coverage. 387 S.C. 194, 691 S.E.2d 497 (Ct. App. 2010). The Court further noted that "UIM coverage follows the individual insured rather than the vehicle insured." *Id.*, at 198, 691 S.E.2d at 489. Thus, had Claimants obtained their own UIM coverage, then it would have followed them and been available to them, but they may not necessarily seek to attach a claim for UIM coverage simply by virtue of

the fact that they were in the Atkinson vehicle due to the Policy limitations on UIM coverage.

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." *Calcutt*, at 233-34, 530 S.E.2d at 896-97. By the same token, Omni's UIM limitations should be employed because they do not conflict with the existing statutory framework associated with UIM claims.

In *Rowzie v. Allstate Insurance Company*, the Fourth Circuit Court of Appeals 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." 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 v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) (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 § 38-77-144, the court concluded that it "must give effect to the terms of the policy." *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009). Similarly, this Court should give effect to the Atkinson 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.

3. <u>Duplicative Recoveries May Be Limited</u>.

In *Fireman's Ins. Co. of Newark, N.J. v. State Farm Mut. Auto. Ins. Co.*, the named insured's damages exceeded the amount available under one portion of the policy, so the named insured sought, and the trial court allowed, recovery under both the UM and UIM portions of his policy. 295 S.C. 538, 540-41, 370 S.E.2d 85, 86-87 (1988). The South Carolina Supreme Court reversed the trial court, ruling that "duplicative recoveries are prohibited." *Id.* 295 S.C. at 543, 370 S.E.2d at 88. Similarly, even though Claimants allege that their damages exceed the liability limits of the Atkinson Policy, unless they opted to purchased their own UIM coverage, they may not assert duplicate claims against the Atkinson Policy. Significantly, the actual language from the Omni Policy limits the

assertion of a UIM claim because "[n]o one will be entitled to receive duplicate payments for the same elements of loss..." *See* Part A - Liability Coverage, Limit of Liability, B.2; Part C2 – Underinsured Motorist Coverage, Limit of Liability, D.

4. **Allowing Claimants 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, this Policy provision should be enforced.

III. THE DEFINITION OF "INSURED" SET FORTH UNDER S.C. CODE § 38-77-30(7) HAS BEEN RECOGNIZED TO BE OVERLY BROAD IN THE CONTEXT OF S.C. CODE § 38-77-160 REGARDING UIM COVERAGE.

The Court's Order cites to the definition of the term "insured" as set forth under S.C. Code § 38-77-30(7) to support its award of UIM coverage to Plaintiffs. However, this statute specifically notes at the very outset that the definitions only apply "***unless*** the context requires otherwise." S.C. Code § 38-77-30 (emphasis added). In the framework of S.C. Code § 38-77-160 (hereinafter "UIM Act"), the context definitely requires that this definition NOT be applied. The statute provides that "carriers shall also offer, *at the option of the insured*, underinsured motorist coverage..." S.C. Code § 38-77-160. Applying the definition set forth in SC Code § 38-77-30(7) to SC Code § 38-77-160 would require an insurer to offer UIM coverage to every passenger in any vehicle insured in this state- an absurd result that clearly demonstrates that such a broad definition of "insured" does not apply in the context of the UIM Act. *See Wright v. Allstate Ins. Co.*, 746 F. Supp. 612, 614 (D.S.C. 1990) ("Despite use of the blanket term 'insured' in § 38-77-160, it would be nonsensical, and create an impossible task, for the legislature to require an insurer to make a meaningful offer of optional coverage to every person who may, after the policy is written, become a ... guest in the policyholder's automobile."). The term "insured" as utilized in the UIM Act does not refer to Plaintiffs, because third party passengers such as they have no "option" to exercise with regard to the UIM coverage for the vehicle in which they are passengers. Thus, the plain language of the UIM Act itself reveals that "insured" is meant to refer to the Policyholder and his resident relatives.

This intent is further recognized time and again by how South Carolina courts have addressed the scope of the UIM Act. The South Carolina Supreme Court first construed the UIM Act in *Gambrell v. Travelers Insurance Companies*, 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 Policyholder and his resident relatives is fully consonant with the South Carolina Supreme Court's analysis in *Gambrell.* The "one" who "buys" the UIM coverage to protect "himself" and his resident relatives is, of course, the Policyholder. *See id.* Thus, the purpose of the UIM statute is to protect those who opted and paid for this coverage from at fault drivers- the purpose is not to provide additional liability coverage for third party passengers such as Plaintiffs. Such third party claims, should they exist, exist as liability claims against the at fault driver. There is no dispute that Plaintiffs have already received the applicable liability Policy limits and released the at fault driver from personal liability.

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 Plaintiffs were in the insured vehicle does not mean they are entitled to both liability and UIM coverage, as the *Burgess* Court noted that UIM coverage does not follow the insured vehicle. The *Burgess* Court further elaborated that:

> UIM coverage ... **permits insureds, at *their*[17] option, to purchase insurance** coverage for situations where ***they* are injured** by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages. Essentially, **the insured is buying insurance** coverage for situations, as **where *he* is a passenger in another's vehicle** or is a pedestrian, **where *he* cannot otherwise insure *himself*.**

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 through 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, UIM applies to protect insured and not to serve as a supplement to a liability claim against the same insured by third party passenger such as Plaintiffs. Plaintiffs failure to obtain UIM coverage of their own does not justify refusal to recognize the Policy's limitation to UIM coverage.

IV. THE POLICY UNAMBIGUOUSLY LIMITS UIM COVERAGE WHERE CLAIMANTS HAVE ALREADY MADE A CLAIM AND RECEIVED PAYMENT UNDER THE POLICY AND THE CIRCUIT COURT ERRED IN CONSTRUING THE UIM COVERAGE LIMITATION IN A MANNER THAT ONLY APPLIES TO AN IMPOSSIBLE SET OF CIRCUMSTANCES.

The Court's Order ruled that the Policy provides UIM coverage provided that the Claimants' total damages do not exceed the Policy proceeds. Order, dated January 31, 2013, pp.10, 11. Such a determination requires that the term "duplicate payments," as used in the Policy limitations cited by Omni, to mean "duplicate damages." Given the context of these limitations arising in the Policy section addressing *payment* of UIM *claims*,

[17] It is notable that time and again, SC courts make specific reference to the fact that UIM 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."

it is clear that "duplicate payments" means "duplicate claims". The Policy limits third party Claimants to receiving only one claim and one payment under the Policy- either a liability claim/payment under Part A, or a UIM claim/payment under Part C2. There is no dispute that Claimants have made a claim for and received payment once already under Part A of the Policy that addresses liability coverage. In subsequently making their UIM claim under Part C2 of the Policy, Claimants 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. *See* Complaint for Declaratory Judgment, at ¶¶ 4-7. Thus, the Claimants' UIM claim for payment was a duplicate demand that invoked application of the Policy's provisions limiting UIM Coverage:

> No one will be entitled to receive duplicate payments for the same elements of loss under this Coverage[18] 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 third party Claimants are limited to making a single claim against the Policy.

In construing this Policy provision, 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*

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

Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co., 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct. 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 Claimants' claim for liability limits was the exact same as that submitted in their 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* Complaint for Declaratory Judgment, ¶¶4-7. Thus, it was a duplicate demand for payment, which provided the basis for the limitation to UIM coverage under the Policy.

The Circuit Court erroneously construed the term "duplicate payments" to mean "duplicate damages" by ruling that the Claimants sought "additional payments for injuries and damages that are left uncompensated after exhaustion of the available liability

coverage." Order, dated January 31, 2013, p.11. 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 ambiguous, or where they are capable of two ***reasonable*** interpretations, the construction will be adopted which is most favorable to the insured." Order, dated January 31, 2013, p.9 (emphasis added) (citing *Gordon v. Fidelity & Cas. Co. of New York*, 238 S.C. 438, 120 S.E.2d 509 (1961)). However, construing the Policy limitation in a manner that results in an impossible circumstance is not a ***reasonable*** interpretation. UIM claims can never present "duplicate damages," because UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the Claimants for their alleged loss. If Claimants' UIM claim for damages duplicated their liability claim, then they would have no valid UIM claim. Therefore, the Circuit Court's decision to construe the Policy provisions in a fashion to render them meaningless and never applicable was ***not*** a reasonable interpretation, and its doing so constituted error.

Conversely, 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. This correlation between "duplicate payments" and "duplicate claims" is further evidenced by the fact that there is no such thing as a "duplicate damages" under a UIM claim. A UIM claimant's damages must necessarily exceed the liability damages in order for that claimant to even meet the minimum threshold required for asserting a UIM claim. Therefore, the meaning is clearly intended to cover "duplicate claims for payment" and any attempt to construe "duplicate payments" as "duplicate damages" is unreasonable as it

creates an impossible set of circumstances to which the limitation could never apply. Therefore, this Court should apply the plain language of the UIM limitation so to prevent Claimants from making duplicate claims against a single Policy that is not their own. Having already asserted claims and recovered payment under the Policy, the plain language of the Policy limitations precludes Claimants from recovering a second time on 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 Claimants 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, Claimants are not a party to this Policy and they are 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 them given the Policy provisions limiting UIM coverage.

V. <u>THE CIRCUIT COURT ERRED IN RELYING UPON *BRATCHER v. NATIONAL GRANGE MUTUAL INSURANCE COMPANY* AND NOT UPON THE SUPREME COURT DECISION *BURGESS v. NATIONWIDE MUTUAL INSURANCE COMPANY* AND ITS PROGENY IN ASSESSING THE EFFICACY OF THE UIM COVERAGE LIMITATIONS.</u>

Claimants presented and the Circuit Court cites to a court of appeals decision, *Bratcher v. National Grange Mut. Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987), to support the contention that the Policy provisions limiting a third party claimant's ability to claim UIM coverage violates the UIM Statute. Order, dared January 31, 2013, pp.14-15. In addition to be factually and legally distinguishable, this decision has been effectively abrogated by the South Carolina Supreme Court's decision in *Burgess v. Nationwide Mutual Insurance Company*, which is 20 years more recent and from a superior court. 373 S.C. 37, 644 S.E.2d 40 (2007).[19] The Supreme Court's *Burgess* decision expressly recognized policy limitations to the scope of UIM coverage afforded under that policy. The Circuit Court relied upon *Bratcher* for the proposition that limiting UIM coverage violates the UIM Act and public policy, and this has been overruled by the Supreme Court's *Burgess* Court decision that recognized and enforced policy provisions limiting UIM coverage.[20] *Burgess*, 373 S.C. at 41-42, 644 S.E.2d at 43.

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[19] Additionally, the Circuit Court erroneously cites to the Court of Appeals decision in *Burgess* for the proposition that the UIM Act does not allow an insurer to limit or exclude basic UIM in any way. Order, dated January 31, 2013, p.7. This is the exact issue overruled by the Supreme Court's *Burgess* decision, which allowed enforcement of a UIM limitation in the policy.

[20] Compare the South Carolina Supreme Court's reversal of Court of Appeals' decision in *Burgess* to similarities in how the Court of Appeals reasoned in *Bratcher*. Had *Bratcher* been appealed to South Carolina Supreme Court these days, then South Carolina Supreme Court's decision in *Burgess* is instructive as to how such a reversal would play out now. It is also illustrative to contrast the reasoning of Chief Judge Hearn (presently Justice Hearn) in the 2008 *Tolbert* decision (*see infra*, Section *____.) to that utilized by Judge Sanders in the 1987 *Bratcher* decision.

Additional evidence of the fact that *Bratcher* ought not be considered viable precedent regarding UIM coverage limitations lies in the fact that the *Bratcher* court relied upon *Hogan v. Home Insurance* Company, 260 S.C. 157, 194 S.E.2d 890 (1973), in determining a policy provision limiting UIM coverage to be invalid under the UIM Act. However, the *Hogan* case actually involved UNinsured motorist coverage, which is mandatory coverage, not UIM coverage, which is voluntary. As addressed *supra*, this distinction between mandatory coverage and voluntary coverage is critical in assessing whether or not a policy provision is in conflict with the mandates of South Carolina's statutes. Thus, the *Hogan* case related to ***un***insured coverage, not underinsured coverage as is involved in this case.[21] *See Hogan*, 260 S.C. 157, 159, 194 S.E.2d 890 (1973). As a result, the very grounds upon which *Bratcher* is premised are flawed. Because the Circuit Court makes a similar error in conflating mandatory UNinsured coverage with voluntary UNDERinsured coverage, indicates that this Court should reverse the Circuit Court's Order, and recognize and enforce the applicable Policy provisions limiting UIM coverage. *See* Order, dated January 31, 2013, p. 13 ("An uninsured motorist endorsement that is contrary to the mandates of South Carolina's statutes is invalid.").

Additionally, *Bratcher* is distinguishable in that the claimant in that case was a resident relative of the policyholder, whereas Claimants in this case are a third party

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[21] Claimants' memorandum and argument make this similar mistake, conflating mandatory UM coverage principles for voluntary UIM coverage. Having already recovered under the liability coverage of the Policy, Claimants cannot viably argue that they are entitled to UM coverage, so this must be an error, but a significant one in the manner the two types of coverage are treated by South Carolina courts, and given the Circuit Court's similar misapplication of UM principles and jurisprudence to the UIM issues at issue in this litigation.

claimants to the Policy. If the Claimants were resident relatives of Mrs. Atkinson, then the Policy provision limiting UIM coverage would not be applied to them. However, the fact remains that they are not, and South Carolina courts commonly apply different insurance coverage principles to claimants depending upon their relationship to the policy and the claims made. *See, e.g., Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 257, 626 S.E.2d 6, 9 (2005) ("Class I insureds include the named insured and his or her spouse and relatives residing in the same household. Class II insureds are those using the insured vehicle with permission of the named insured and a guest in the motor vehicle."); *Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998).

Another basis for distinguishing *Bratcher* lies in the fact that the case dealt with what is referred to commonly now as an "owned vehicle exclusion." *Bratcher*, 292 S.C. at 330-31, 356 S.E.2d at 152. *See American Sec. Ins. Co. v. Howard*, 315 SC 47, 431 SE 2d 604 (Ct. App. 1993) (refusing to recognize Owned vehicle exclusion in UIM context). The Policy provisions limiting UIM coverage are not premised upon an "owned vehicle exclusion."

The Supreme Court's *Burgess* decision directly addressed the issue of whether or not policy limitations to UIM coverage were enforceable, or whether they violated the South Carolina law and public policy. While the *Bratcher* decision stood for the proposition that UIM limitations were void, the *Burgess* decision clearly recognized and enforced UIM coverage limitations, thereby indicating a new approach to how courts should analyze questions involving policy limitations to UIM coverage.

Perhaps most 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).[22] In it, the Court of Appeals allowed the UIM coverage in the face of the limitation and substantiated its decision with the same arguments as are advanced by Plaintiffs and the *Bratcher* decision, namely 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). Just as this reasoning was rejected by the South Carolina Supreme Court, so too should this Court reject it and recognize the Policy provisions limiting UIM coverage.

Lastly, the *Burgess* decision has been followed by other recent decisions enforcing limitations to UIM coverage. *See Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 498, 662 S.E.2d 606, 608 (Ct. App. 2008) ("[Claimant] had the ability to decide whether to purchase voluntary UIM coverage. [Claimant] 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."); *Nationwide Mut. Ins. Co. v. Rhoden*, 387 S.C. 194, 691 S.E.2d 497 (Ct. App. 2010) (refusing to allow UIM coverage to a resident relative of a named insured under the policy where that claimant failed to obtain her own UIM coverage).

[22] The case mistakenly relied upon by the Circuit Court. *Supra.*

VI. The Order Cites to Just One of Several Policy Provisions Cited by Omni that Limit UIM Coverage.

Omni cited to multiple Policy provisions in its Memorandum in Support, pages 2-4, that was filed with the Court, and these were presented at oral argument, and this omission was raised in its Motion for Reconsideration. The Circuit Court's Order referenced only one of these provisions. Order, dated January 31, 2013, p.8. To the extent that the Circuit Court failed to account for the applicable Policy limitations cited to reach its conclusions in favor of coverage afforded to Claimants, then this should be reversed to enforce the applicable Policy provisions in accordance with Omni's arguments as set forth in the Record and herein.

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 extend UIM coverage to the Claimants under the Policy; and (2) determine that UIM coverage is not available to Claimant given the circumstances presented in this litigation.

Columbia, South Carolina
September 5, 2013

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS
HONORABLE PAUL M. BURCH, CIRCUIT COURT JUDGE

Appellate Case No. 2013-000881

Melissa Baird and Chastity Baird .... Respondents,

v.

Omni Insurance Company .... Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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

1. Declaratory Judgment Complaint;
2. Answer;
3. Appellant's Memorandum in Support of Declaratory Judgment;
4. Respondents' Memorandum in Support of Declaratory Judgment;
5. Order dated January 31, 2013;
6. Appellant's Motion to Reconsider;
7. Order denying Appellant's Motion to Reconsider;
8. Transcript of the November 6, 2012 Hearing;
9. Auto Policy and Declarations Page; and
10. Covenants not to Execute.

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

Columbia, South Carolina
September 5, 2013

Respectfully Submitted,
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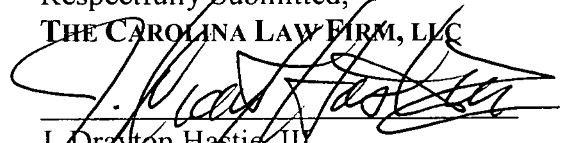

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PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal upon Respondents Melissa Baird and Chastity Baird by depositing a copy of it in the United States Mail, postage prepaid, on September 3, 2013, addressed to their attorney of record, Gary Finklea, 814 West Evans Street, Florence, SC 29503.

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