THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
HONORABLE R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2013-000857

Omni Insurance Company, ... Appellant,

v.

Cary Glenn Ryals, ... Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal involves a declaratory judgment action filed on February 24, 2011, by Appellant Omni Insurance Company ("Omni") regarding whether or not Cary Glenn Ryals, a third party passenger claimant ("Claimant"), is entitled to *both* mandatory liability coverage and voluntary underinsured motorist ("UIM") coverage under the same policy issued to Christopher Constine[1] 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

[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.

be afforded to him via Mr. Constine's policy in addition to the liability coverage. The parties filed cross motions for Summary Judgment.

Omni is appealing the "Defendant's Order Granting Summary Judgment," by Circuit Court Judge R. Markley Dennis, which granted Respondent's Motion for Summary Judgment. Appellant timely filed a Motion for Reconsideration. Judge Dennis denied the Motion for Reconsideration by Order dated March 12, 2013, and filed on March 15, 2013. The post mark for the date the Clerk of Court mailed notice of the entry of the Order is March 19, 2013, and was received on Monday, March 25, 2013. Appellant filed its Notice of Appeal on April 15, 2013. The transcript of the October 25, 2012, hearing on the Parties' cross motions for Summary Judgment before the Circuit Court was received on Tuesday, September 17, 2013. This Initial Brief was filed and served on Thursday, October 17, 2013.

FACTS

The essential facts regarding this matter are undisputed and have been admitted in the Parties' pleadings. Plaintiff issued an automobile insurance policy ("Policy") covering a 2004 Nissan Pathfinder ("Vehicle") that was owned by Christopher Constine. *See* Policy Dec. Page; Claimant's Answer, ¶6. On May 26, 2009, during the applicable Policy period, Mr. Constine was operating the Vehicle with Claimant as a passenger along with Autumn Sinclair, who is not involved in this litigation, when a one car collision occurred. *See* Claimant's Answer, ¶¶ 7-9. Claimant is not a resident relative of the named insured of the Policy. *See id.*, ¶ 8. Following the accident, Claimant and Mr. Constine got into a knife fight, resulting in injuries to Claimant and in criminal charges being brought against Mr. Constine. *See* Affidavit of Detective Randy Gray. In an

apparent effort to mitigate the criminal charges and curry favor with Claimant by facilitating his claim for damages covered by insurance, Mr. Constine breached his duty to cooperate in the defense by executing an Affidavit alleging that Claimant's injuries were attributable to the accident rather than to the knife fight. *See* Affidavit of Constine.

Claimant brought claims against Mr. Constine, alleging that he caused the accident and that Claiamnt was injured. *See id.* ¶15. The Policy provides minimum limits coverage in the amount of $25,000 per claim. *See id.* ¶16; 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. Constine from personal liability. *See* Claimant's Answer, ¶¶ 17-19. This payment was made before any litigation was filed. *Compare* Covenant not to Execute, *with* Claimant's Liability 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* Claimant's Answer, ¶¶ 20-21. However, because Claimant decided not to acquire UIM coverage of his own, he seeks to double-dip his claim against the Constine Policy by seeking UIM coverage that was requested by Mr. Constine, paid by Mr. Constine, and issued to Mr. Constine. *See id.* ¶23. 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.* ¶¶20-21. 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 obtained it.

LEGAL ARGUMENT

I. THE POLICY CONTAINS LIMITATIONS THAT PREVENT CLAIMANT FROM RECEIVING VOLUNTARY UIM COVERAGE WHERE HE HAS ALREADY RECEIVED THE POLICY LIMITS AND WHERE MR. CONSTINE BREACHED THE POLICY.

The Policy issued to Mr. Constine 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 Constine 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 Constine 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 Constine 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 Coverage[2] 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.

Lastly, the Policy allows Omni to void voluntary coverage in the event of a breach by the policyholder. In this instance, Mr. Constine failed to provide prompt notice of the accident, and he failed to cooperate in the defense by providing an Affidavit alleging to attribute the injuries received by Claimant to the accident rather than to the knife fight,

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

which is a clear attempt to facilitate policy coverage of Claimant's injuries received after the accident. Counsel for Claimant recently apprised Appellant that this Affidavit establishes that there should be UIM coverage for the injuries. The Policy provides as follows:

> We have no duty to provide coverage under this policy unless there ha been full compliance with the following duties:
> A. We must be notified promptly of how, when, and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
> B. A person seeking any coverage must:
> 1. Coorperate with us in the investigation, settlement, or defense of any claim or suit.

Policy, Part E – Duties After Accident or Loss, A.-B.1., p.22. As is set forth *infra* Section V, although an insurer may not suspend mandatory 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, such as UIM. 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. Constine'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. 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, Claimant 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, Claimant is unable to do so because there is no discord between Omni's UIM limitation and the UIM Act. *See infra,* Section II.B. 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 II.C. Additionally, the South Carolina General Assembly and Supreme Court have expressly allowed policy provisions that limit the applicability of UIM coverage. *See infra,* Sections II.D., II.E. 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[3] 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.
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> 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 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.

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[3] The portion of the statute addressing UNinsured motorist coverage is irrlevant to this case and is omitted.

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 his own UIM coverage and who have already received Policy limits in accordance with his Tyger River Policy limits demand. This fact is established not only by a simple review of the UIM Act *supra*, but also by the Claimant's 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 Mr. Constine are free to agree to those terms as are set forth in the Policy. As a third party to the Policy, Claimant is not in a position to object to the Policy provisions established between Omni and Mr. Constine anymore than they could have objected to Mr. Constine's failure to obtain UIM coverage (should he have failed to do so).

As established by the South Carolina courts' decisions (set forth *infra* Section II.E.1.), a clear message is conveyed that while policy limitations affecting mandatory coverage[4] may be deemed to be void, UIM limitations must be viewed in a different light due to the fact that UIM coverage is entirely voluntary. 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

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

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 Claimant, as a third party 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.[5] 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 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. Constine and Omni. If the Claimant failed to obtain his own UIM coverage, then this Court should not seek to reform a Policy to which Claimant 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

[5] 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.

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.").

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

Not only are Omni's UIM limitations 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.[6] If a UIM claimant could recover under any set of facts where his damages 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

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

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[7] and UM coverage[8] 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 II.E.1. Although UIM must be offered, there is no dispute in this matter pertaining to Omni's UIM offer to Mr. Constine, and this offer requirement does not extend to third party passengers like Claimant. 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 §

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[7] 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."

[8] 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."

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 Granting Summary Judgment, ¶¶6, 9-11. 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 insured 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 Claimant 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*, 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).[9] 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 Claimant has already received payment incident to Omni's payment of the full Policy limits.

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 Claimant was in the insured vehicle does not mean he is necessarily entitled to both liability and UIM coverage, because, as the *Burgess* Court noted, UIM coverage does not follow the insured vehicle. The *Burgess* Court further elaborated that:

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[9] 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.

> UIM coverage ... **permits insureds, at *their*[10] 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 coverage is less than the amount of the claimant's actual damages.") (emphasis added). Therefore, UIM applies to protect the named insured and his resident relatives, and not to serve as a supplement to a liability claim against the same insured by third party passengers such as Claimant. 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 a third party claimant could make a

[10] 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."

claim for UIM coverage, but he 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 Claimant 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. <u>UIM Coverage is Not Mandatory and Thus May Be Limited</u>.

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.[11] 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");[12] *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 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).

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[11] 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.

[12] 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.

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.**[13]

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.[14] This clearly stands for the proposition that Policy provisions that limit the scope of UIM coverage are

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[13] 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."

[14] 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.

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 multiple claims 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 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 II.B.) 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.

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 Granting Summary Judgment, ¶¶7, 9-11. 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 Claimant, 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),[15] and it is essentially the same as Claimant's reasoning presented to and relied upon by the Circuit Court in the issuance of its Order, and just as this reasoning was rejected by the South Carolina Supreme Court, so too should this Court reject it.

[15] 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 IV.

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 II.B., 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 Claimant obtained his own UIM coverage, then it would have followed him and been available to him, but he may not necessarily seek to attach a claim for UIM coverage simply by virtue of the fact that he was in the Constine vehicle given 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 Constine 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. 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, 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. *See* Order Granting Summary Judgment, ¶6. However, this ***very*** 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 in an overbroad manner. 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 Claimant, because a third party passenger such as he has no "option" to exercise with regard to the UIM coverage for the vehicle in which he is a passenger. 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*[16] 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

[16] 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."

by a third party passenger such as Claimant. His failure to obtain UIM coverage of his own does not justify refusal to recognize the Policy's limitation to UIM coverage.

IV. 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.

Claimant presented and the Circuit Court cited 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. . *See* Order Granting Summary Judgment, ¶¶7, 9-11. 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).[17] 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.[18] *Burgess*, 373 S.C. at 41-42, 644 S.E.2d at 43.

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[17] 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.

[18] 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

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. *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 Granting Summary Judgment, ¶¶9-11.

Additionally, *Bratcher* is distinguishable in that the claimant in that case was a resident relative of the policyholder, whereas Claimant in this case is a third party claimant to the Policy. If the Claimant was a resident relative of Mr. Constine, then the Policy provision limiting UIM coverage would not be applied to them. However, the fact remains that he is not, and South Carolina courts commonly apply different insurance

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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 II.E.2.) to that utilized by Judge Sanders in the 1987 *Bratcher* decision.

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).[19] In it, the Court of Appeals allowed the UIM coverage in the face of the limitation and substantiated

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

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). By Contrast, no South Carolina court has cited to *Bratcher* since the *Burgess* decision changed the legal analysis related to UIM coverage and the application of limitations to same.

V. THE CIRCUIT COURT ERRED IN FAILING TO LIMIT VOLUNTARY UIM COVERAGE AFFORDED UNDER THE POLICY DUE TO THE NAMED INSURED'S BREACH OF THE POLICY BY FAILING TO COOPERATE IN THE DEFENSE.

The Court erroneously dismissed Appellant's alternate sustaining ground for denying voluntary UIM coverage due Mr. Constine's refusal to cooperate in the defense

in violation of the Policy. The Court erroneously bases this decision on the misapprehension that Appellant's compliance with the South Carolina Financial Responsibility Act's requirement that mandatory liability coverage not be defeated by a named insured's subsequent policy breaches somehow precludes Appellant from raising such policy breaches in response to claims for voluntary coverage, such as UIM." *See* Order Granting Summary Judgment, ¶8; Transcript, P.6, L.23 to P.9,L7, P.11, L.17 to P.13, L.8. Refusing to consider this alternate sustaining ground for denial of voluntary UIM coverage constituted error.

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.

By refusing to promptly notify Appellant of the Accident, and by seeking to mitigate his criminal liability by facilitating Claimant's basis for recovering damages under the Policy, Mr. Constine 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 recission 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 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 Summary Judgment; and (2) determine that UIM coverage is not available to Claimant given the circumstances presented in this litigation.

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Respectfully Submitted,
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