

ORIGINAL

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

Appellate Case No. 2013-000912

Omni Insurance Company ..... Appellant,

v.

Christopher Wright ..... Respondent.

RECORD ON APPEAL

**RECEIVED**

DEC 30 2013

**SC Court of Appeals**

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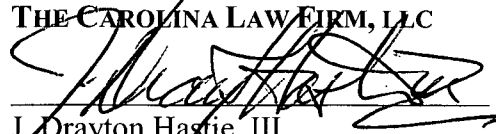
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I certify that this Record on Appeal contains all matter designated to be included by the parties, and no matter which is irrelevant to this appeal.

Columbia, South Carolina  
December 27, 2013

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**



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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-11-061

Omni Insurance Company

Christopher Wright

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☒ Defendant

or

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

This matter is presently before the Court to determine the existence or lack thereof of underinsured motorist coverage. After reviewing the materials presented and considering the arguments offered by the attorneys, the Court finds that the insurance policy does provide underinsured motorist coverage to Mr. Wright.

The Court views a determination of underinsurance coverage to be, first and foremost, one of policy/contract interpretation. If the insurance contract bought by Mr. Barron provides for underinsured coverage to Mr. Wright, Mr. Wright is entitled to make a claim for the coverage if his damages exceed the liability amount. Here it does not seem to be contested that Mr. Wright's injuries were very significant and that the monetary amount of his claim will exceed the liability coverage (which has already been paid) and any possible underinsured motorist coverage which may apply under this policy (underinsured amount being \$25,000.00).

Procedurally, Omni (Plaintiff) filed a document entitled "Memorandum In Support Of Declaratory Judgment" wherein Omni concludes by asking the Court to "recognize and uphold UIM coverage limitation." Wright (Defendant) filed a document entitled "Notice and Motion For Judgment On The Pleadings" along with Defendant's Memorandum In Support Of Motion For Judgment On The Pleadings.



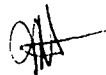
The Plaintiff's pleading in the case consists of a summons and complaint for Declaratory Judgment, and an Amended Complaint for Declaratory Judgment wherein Omni seeks, among other things, a finding that the policy provisions limit the ability of the Defendant to bring UIM claim where he has already brought a liability claim against the same Policy for the same damages arising from the same Accident. The other relief sought by Omni is not related to the substantive issue of the existence of coverage. The Defendant's pleading consists of an Answer and Counterclaim. In his Answer, the Defendant denies the Plaintiff's right to a declaratory judgment and asserts in the counterclaim that he was a guest passenger in the vehicle and asserts a bad faith claim due to Omni's assertions of alleged policy provisions which do not exist as a basis for denying his claim for UIM coverage. In its reply, the Plaintiff denies the allegations asserted in the Answer and Counterclaim.

The Court requests that one of the lawyers for Mr. Wright prepare an order finding that underinsured motorist coverage exists under the terms of the policy in the amount of \$25,000.00. Applying customary contract construction rules and principles (plain meaning rule, Court should not rewrite policy where language is clear, Court should strive to determine parties intent from the language used, etc. ) to the contract. With this type of analysis, the Court can find that coverage exists and the policy's limiting language alleged in the Amended Complaint did not apply to Mr. Wright's situation. The Court notes with particular interest and relevance that the policy language alleged in paragraph 33 of the original Complaint is not actually contained in the policy. The actual policy's language which limits the extension of UIM coverage does not apply to Mr. Wright's situation. Thus under the policy terms, UIM coverage is provided to Mr. Wright because he is a defined "Insured" under section Part C2-underinsured motorist coverage—Insuring Agreement A. Insured as used in this Part means: 2 and also 3.

Certain sections of the insurance policy are presented to the Court as possibly being ambiguous. It is asserted that since the Plaintiff was the drafter of the insurance documents, the ambiguities should be construed against the drafter and a reasonable interpretation be given to find coverage. Even if ambiguities are found in the policy, the reasonable construction of these provisions also leads to the conclusion that underinsurance motorist coverage in the amount of \$25,000.00 exists in favor of Mr. Wright.

Omni goes to great effort to argue that limiting Mr. Wright's recovery under the present policy to only liability coverage is not inconsistent with legislative intent, and that underinsured motorist coverage is voluntary coverage, and no legislative requirement exists to provide underinsured coverage to passengers, etc. This Court does not disagree with these positions. The case presented to the Court is not a case where an injured party is trying to extend legislatively mandated coverage to a person not intend be reached by the legislative mandate. Clearly parties to an insurance policy can contact and agree to whatever coverage they wish as long as it is not inconsistent with what the legislature requires.

The case presented to this Court is simply one where it is asked to determine the extent of the coverage from the language within a policy. Here the language provides underinsurance coverage to Mr. Wright in the amount of \$25,000.00. The policy limits the total any one injured person can receive for bodily injury in an accident to the "sum" of the limits of liability shown in the Declarations for each person for



Bodily Injury Liability (\$25,000.00 liability coverage) "and" Underinsured Motorist Coverage (\$25,000.00). The Court agrees the writer of the policy left out the word "and". The use of the word "sum" indicates a clear intent that two or more coverages were to be added together to create the limit of monetary exposure for the insurance company. The clear intent is that the liability coverage was to be added to the underinsurance coverage amount to create the limit of liability.

Again, this is simply a case of construing the meaning of terms in an insurance policy. Even though Omni argues "actuarial difficulties" in calculating premiums and also suggests the possibility that Mr. Barron did not pay for the underinsured coverage to extend to Mr. Wright, these assertions are not supported by evidence in this case. No evidence of insurance industries practices were offered by expert opinion. Also the only evidence presented to establish what insurance Mr. Barron may have intended to purchase was the insurance policy itself. As explained above, the policy provided UIM coverage to Mr. Wright. Customarily the best evidence of what the parties intended is contained in the written agreement.

Under the evidence which has been presented in this case, the Court looks only to the terms of the policy. If the contract had not intended to extend underinsured motorist coverage to this third party passenger, the policy would have read "underinsured motorist coverage is not extended to third party passengers." The provisions of the policy do not suggest such an intent. To the contrary, the policy provided UIM coverage to "any other person occupying your covered vehicle."

There was an argument presented that suggests Omni may now wish to void the contract because of some type of wrongful use of the vehicle by Mr. Barron's daughter. This assertion by Omni does not alter the Court's decision. The company's decision seems odd especially since it has been explained to the Court that Omni has already paid the liability amount of \$25,000.00 to Mr. Wright. This Court fails to see how an insurance company's alleged threat to void a policy of an insured after the insurance company paid the claim, with the presumed consent of the insured, can affect the present interpretation of the policy's content. The Court's view of the policy remains the same. Nevertheless, the procedural mechanism by which the present motions come before the Court are (1) a motion on the pleadings and (2) a generalized memorandum seeking declaratory relief. The only evidence presented to the Court was the pleadings and the insurance contract. No evidence was presented to support the allegations raised in the amended complaint related to the wrongful use of the vehicle by Mr. Barron's daughter.

Therefore, the Plaintiff's motion is denied and the Defendant's motion is granted except to the allegation related to the alleged wrongful use. The Court has not been asked to rule upon the claim of bad faith asserted in the Counterclaim.

The formal order once signed by the Court and filed with the Clerk of Court will be the final order of the Court on these motions.

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

**ORDER INFORMATION**

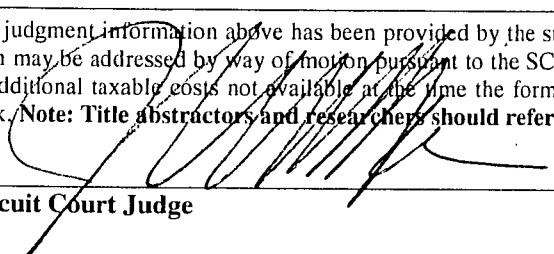


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This order ☐ ends ☒ does not end the case.  
Additional Information for the Clerk : \_\_\_\_\_

| INFORMATION FOR THE PUBLIC INDEX                                                                                                                                                                             |                                          |                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|----------------------------------------------------------|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. |                                          |                                                          |
| Judgment in Favor of<br>(List name(s) below)                                                                                                                                                                 | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|                                                                                                                                                                                                              |                                          | \$                                                       |
|                                                                                                                                                                                                              |                                          | \$                                                       |
|                                                                                                                                                                                                              |                                          | \$                                                       |
| If applicable, describe the property, including tax map information and address, referenced in the order:                                                                                                    |                                          |                                                          |

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

  
Circuit Court Judge

\_\_\_\_\_  
Judge Code

7/17/12  
Date

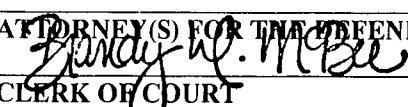
### For Clerk of Court Office Use Only

This judgment was entered on the 18 day of July, 20 12 and a copy mailed first class or placed in the appropriate attorney's box on this 18 day of July, 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

J. Drayton Hastie III  
1417 Calhoun Street  
Columbia, SC 29201

James B. Richardson Jr.  
1229 Lincoln Street  
Columbia, SC 29201

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

  
ATTORNEY(S) FOR THE DEFENDANT(S)  
\_\_\_\_\_  
CLERK OF COURT

Court Reporter:

## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 12-CP-11-61

Omni Insurance Company,

Christopher Wright

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: James B. Richardson, Jr.

Attorney for: ☐ Plaintiff or ☐ Defendant  
☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's motion for judgment on the pleadings is granted; UIM coverage exists to the limit of \$25,000.00; complaint dismissed without prejudice if construed as action to void policy.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Defendant's counterclaim remains on the docket.

## INFORMATION FOR THE JUDGMENT INDEX

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

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
| N/A                                          |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

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

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

J. Mark Hayes, II  
Circuit Court Judge

2132  
Judge Code

10/25/12

Date

**For Clerk of Court Office Use Only**

This judgment was entered on the 30<sup>th</sup> day of Oct, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 7<sup>th</sup> day of November, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

James B. Richardson, Jr.

1229 Lincoln St., Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

J. Drayton Hastie, III

1417 Calhoun St.

Columbia, SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

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

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company,) )  
Plaintiff, ) )  
-vs- ) )  
Christopher Wright, ) )  
Defendant. ) )

Case No. 12-CP-11-61

ORDER

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 OCT 30 PM 10 15  
BRANDY W. MOSE

In this declaratory judgment action, Omni Insurance Company seeks a judgment finding that the defendant, Christopher Wright, is entitled to no underinsured motorist benefits under Omni's policy of insurance. The defendant Wright moves for judgment on the pleadings. Finding that the defendant is an insured under the underinsurance provisions of the policy, and that none of the policy provisions relied upon by Omni applies here, the Court grants judgment on the pleadings to the defendant.

Christopher Wright was a passenger in the insured vehicle driven by Jennifer Barron, the daughter of Omni's named insured, Anthony Barron. Jennifer lost control of the car, which left the road and struck a guard rail, severely injuring Wright.

The Omni insurance policy issued to Mr. Barron extends five types of insurance coverage: (1) Liability Coverage (in Part A of the policy); (2) Medical Payments Coverage (in Part B); (3) Uninsured Motorists Coverage (in Part C1); (4) Underinsured Motorists Coverage (in Part C2); and (5) Coverage for Damage to Your Auto (in Part D). Each Part contains its own definition of who is insured. With respect to underinsurance:

**Insured** as used in this Part [i.e., Part C2 –  
UNDERINSURED MOTORISTS COVERAGE] means:



1. **You** or any family member.
2. *Any other person occupying your covered auto.*

Omni policy, PART C2, ¶ A.1. & A.2. (emphasis added). Since Wright was a “person occupying [the] covered auto,” he was an insured under Part C2 — underinsured motorist coverage. This much is beyond dispute.

In response to Wright’s negligence claim against Jennifer, Omni paid to Wright its Part A liability limit of \$25,000.00. Because Wright’s damages allegedly exceed the amount paid under the liability provisions of the Omni policy, Wright made an additional claim under the underinsured motorist coverage. Omni contends that it cannot owe coverage to Wright under both Part A, liability insurance, and Part C2, underinsurance. Omni contends that nothing is owed, on account of three policy provisions. The first two provisions were alleged in Omni’s complaint, filed in April 2011. The third provision was added soon before the hearing of defendant’s motion by way of an amended complaint.<sup>1</sup>

The issue of this case implicates no statutes and no public policy. This is a case of contract interpretation. Familiar rules and principles of contract interpretation apply here. Foremost among these is the polestar which always guides the Court in discerning what the parties meant: their contractual intent is first sought in the plain meaning of the words they used. This maxim applies to insurance policies as well as to all other contracts. Much of what our Court of Appeals had to say in the case of *South*

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<sup>1</sup> Omni’s complaint originally alleged that the Barron policy contained terms not found in the policy. This error led to Wright’s bad faith counterclaim. The error was corrected in the amended complaint. The Court has not been asked to rule upon the claim of bad faith asserted in the counterclaim.



*Carolina Farm Bureau Ins. Co. v. Kennedy*, 390 S.C. 125, 700 S.E.2d 258 (Ct. App.

2010), applies here. For example:

The general rules of contract construction apply to insurance policies. *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct.App.1999). "[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together." *Id.* "Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so." *Id.* "This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning." *Id.* at 548-49, 520 S.E.2d at 823." An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." *Id.* "[A]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Id.* "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Id.*

*Id.* at 261. The search for contractual intention begins with the plain meaning of the words used.

# **1. Paragraph A of the LIMIT OF LIABILITY provisions of Part A.**

The policy limit for each of the five types of insurance is set forth in the manner often used in insurance policies. The carrier begins by promising to pay whatever damages or losses are the subject of the coverage. Later, in a separate paragraph styled "LIMIT OF LIABILITY," the upper limit of that obligation is set forth. For example, in Part A, the liability insurance section, the carrier begins by promising:

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.

Part A, page 3. This promise would be open-ended if not for the limit of that promise, found two pages later:

  
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#### LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one auto accident. . . .

The carrier's unconditional promise to pay, followed later by a "LIMIT OF LIABILITY" paragraph, is done in the same fashion in each of the five types of insurance granted by this policy. Thus, the LIMIT OF LIABILITY paragraph of each policy Part applies to the type of insurance granted in that specific Part.

In paragraph 29 of its amended complaint, Omni disclaims underinsurance coverage in reliance upon the provision quoted above, found in Part A of its policy.

Part A is entitled: "LIABILITY COVERAGE". \$25,000 is the limit for the type of insurance granted in Part A, the "LIABILITY COVERAGE" part of the policy. Omni contends that the Bodily Injury Limit of its liability coverage is the most it could ever owe to anyone.

This Court cannot agree with Omni's contention. The liability insurance granted in Part A applies to "damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident." PART A – LIABILITY COVERAGE, ¶ A, page 3. Thus, \$25,000.00 is Omni's "maximum limit of liability for all damages . . ." The "damages" here are those damages "for which any insured becomes legally responsible to pay because of an auto accident." Part A, ¶ A, page 3. The Part A (liability) limit applies to liability insurance coverage and nothing else. Each of the other four types of insurance has its own separately stated limit. Underinsured motorist coverage is not liability coverage, and has its own and different limit. The limit for underinsured motorist

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coverage is as follows:

LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
  - 1. Our maximum limit of liability for all damages . . . 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 Motorists Coverage. (*sic*)

Part C2, page 15. Thus, Omni's "limit of liability" for UIM coverage is the *sum* of two "limits of liability shown in the Declarations," not a single number as is the case with the limit upon liability coverage.

The five separate limits found in this policy — and the type of insurance coverage to which each one applies — are unambiguous. Determining whether a policy provision is ambiguous requires examining "the context of the entire integrated agreement . . . ." *Hansen v. United Services Auto. Assoc.*, 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct. App. 2002). As the index to the policy shows, there is a LIMIT OF LIABILITY provision in Part A — "LIABILITY COVERAGE", and a separate and different LIMIT OF LIABILITY provision in each of the other four parts. Part C2 — "UNDERINSURED MOTORISTS COVERAGE" has its own limit, quoted above.

If the provision relied upon by Omni applied to both liability and underinsured motorist coverage, the policy would say so clearly. On the contrary, no two of the five limits are the same. If Part A's limit were transposed to Part C2, then Part C2's limit would be displaced. This would amount to re-writing the policy, something which the Court may not do.

Even if the Court were to deem the limits ambiguous, however, there is no doubt

as to how that ambiguity would be resolved. South Carolina law requires any ambiguity to be resolved in favor of the insured. *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969) ("It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy."); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) ("Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted."); *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) ("Where language used in an insurance contract is ambiguous, . . . that construction which is most favorable to the insured will be adopted.").

For these reasons the LIMIT OF LIABILITY which applies to the liability insurance coverage of Part A does not apply to the UIM coverage of Part C2.

**2. Paragraph B.2. of the LIMIT OF LIABILITY provisions of Part A.**

In paragraph 30 of its amended complaint, Omni relies upon a second provision found in the LIMIT OF LIABILITY provisions of Part A of its policy, the liability coverage. This provision is found at page 6 of the policy and reads in material part as follows:

- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage [i.e., liability coverage] and:
  - 1. Part **B** or Part **C** of this policy; or
  - 2. Any Underinsured Motorists Coverage provided by this policy.

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Omni contends that Wright would be receiving "duplicate payments for the same elements of loss" if he received both liability coverage and UIM coverage.

If this provision were intended to prohibit anyone from receiving *both* liability insurance payments *and* underinsured motorist payments in any case, it would say so clearly. But the only thing narrowly prohibited by this provision is a liability payment which *duplicates* underinsurance payments. Conversely, liability payments which do *not* duplicate underinsurance payments are foreseen and allowed.

This provision, found in the LIMIT OF LIABILITY section of PART A – LIABILITY COVERAGE, is a limit on "*this coverage*" — *liability* coverage — not underinsured motorists coverage. In other words, *liability* insurance payments may not duplicate *underinsured motorists* payments. But there is no corresponding limitation in Part C2 — the underinsurance part. The reason is obvious: No payment under *any* underinsured motorists coverage ever "duplicates" any payment made under any liability coverage. By definition, UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the claimant for his loss. Hence, underinsurance payments never duplicate liability payments. If Mr. Wright's UIM claim "duplicated" his liability claim, then by definition he would have no valid UIM claim. No amount paid in UIM coverage would "duplicate" the previous \$25,000 liability payment under Part A "for the same elements of loss".

### **3. The LIMIT OF LIABILITY provision of Part C2.**

Omni amended its complaint to add a third policy provision in support of its contention that it owes nothing in UIM coverage. This provision is found in Part C2 –

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UNDERINSURED MOTORISTS COVERAGE. Therefore, this provision does apply to Wright's UIM claim, unlike the two provisions of PART A — liability coverage — quoted above. Omni relies upon the following provision of Part C2, the UIM coverage:

LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
1. Our maximum limit of liability for all damages . . . 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 Motorists Coverage.

The limit in question is **the sum of** "limits of liability shown in the Declarations". In this context, "**the sum of**" can only mean:

**sum** • n. . . . 2. (**the sum of**) the total amount resulting from the addition of two or more numbers or amounts.

THE CONCISE OXFORD DICTIONARY 1434 (10th ed. 1999). The use of the phrase "**the sum of**" indicates a clear intent that two or more coverages were to be added together to create the limit of monetary exposure for the insurer. The two numbers to be added together are "shown in the Declarations". Inexplicably, there is nothing called a "Bodily Injury Liability Underinsured Motorists Coverage" in the Declarations or anywhere else in the policy. Even if such a thing existed, it would be only one of the numbers to be summed. The defendant plausibly suggests that the word "and" was omitted from this phrase. The phrase would make sense if it reads: "Bodily Injury Liability **and** Underinsured Motorists Coverage", the limits of which are to be summed. The Declarations show a Bodily Injury Liability Limit of \$25,000 per person and an Underinsured Motorist Bodily Injury Limit of \$25,000 per person. The clear intent is that

 8

the limit of liability coverage was to be added to the limit of underinsurance coverage to define the insurer's overall "maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident. . . ." The sum of these two limits — \$50,000 — is the only **sum** which makes sense.

When a typographical error is apparent in an insurance policy or other contract, the court can and should correct the error. *See, e.g., Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). It is essential to supply the missing word "and"; otherwise, the quoted provision would be meaningless. It would call for the "sum" of a single nonexistent number — nonsensical twice over.

Omni denies any typographical error, but cannot point to a "Bodily Injury Liability Underinsured Motorists Coverage" number or to any two numbers on the Declarations page to be summed.

#### **4. Underinsured motorist coverage as voluntary insurance.**

Omni makes the point that UIM coverage is voluntary, not mandatory, so that the carrier has much discretion in fashioning the scope of coverage. That is true, and in this instance Omni has chosen to extend the UIM coverage offered by this policy to third parties who did not pay for it. The same is true of the medical payments coverage provided in Part B.

This is not a stacking case. The many stacking decisions cited by Omni have nothing to say about the construction of Omni's insurance policy. The determination of



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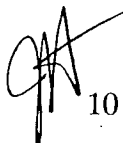
underinsurance coverage is one of contract interpretation. It requires only a reading of the policy provisions to determine whether Wright is an insured under the UIM coverage of Part C2 and, if he is, then whether his receipt of the limits under Part A, the liability coverage, precludes a claim in any amount under the UIM coverage. As a passenger in the insured vehicle, he clearly is an insured under the UIM provisions. Omni has chosen to offer its customers an insurance product enhanced in this way. The parties to an insurance contract can agree to whatever coverage they wish as long as their agreement is not inconsistent with legislative mandate.

None of the three provisions relied upon by Omni preclude UIM coverage to this insured on account of Omni's previous liability coverage payment.

**5. Fraud in the insurance application.**

Omni alleges in its complaint that its policyholder, Mr. Barron, failed to name his daughter Jennifer as an "Additional Driver," thereby affecting the premium. Omni does not seek to void the policy for fraud in the application. Rather, it offers this fact as what it describes as an "additional sustaining ground" for a declaration that it owes nothing to Wright in UIM coverage.

Knowing of the named insured's failure to list Jennifer as an "Additional Insured," Omni paid its liability limit to Wright. Although it does not appear that Omni seeks to void the policy, the allegations of the complaint, if proved, may be broad enough to warrant that relief. If Omni wished to attempt to void the Barron policy, the policyholder would be a necessary party under Rule 41(b), SCRCP, but Omni has not joined him. Where the plaintiff fails to join a necessary party, a proper course is to dismiss the

  
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action without prejudice. *Cromer v. Cromer*, 293 S.C. 360, 360 S.E.2d 528 (Ct. App. 1987). In order to preserve Omni's right to attempt to void the policy, if it should hereafter elect to do so, the complaint will be dismissed without prejudice insofar as it may be construed as an effort to void the policy.

### CONCLUSION

Omni asks the Court to read its policy in such a way that an insured guest passenger can never receive *UIM* benefits when he has received the limit of *liability* coverage. To read the policy provisions in that way would be to render the UIM coverage illusory in the case of a guest passenger injured by the negligence of the driver.

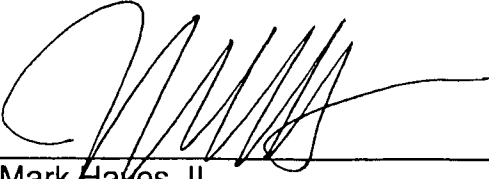
The two provisions upon which Omni relied when it began this action apply to liability coverage, not underinsured motorist coverage. The recently added third provision refers to the **sum** of two numbers, and can only mean that Omni's total responsibility for liability and UIM coverage cannot exceed the **sum** of its liability limit and its UIM limit. If it does not mean that, then it is meaningless.

Accordingly:

IT IS ORDERED:

- (1) That the defendant's motion for judgment on the pleadings is granted, except insofar as the complaint may be construed to allege a cause of action to void the policy for fraud in the application; and
- (2) That underinsured motorists coverage exists in favor of the defendant to the limit of \$25,000.00; and
- (3) That the complaint is dismissed without prejudice insofar as it may be construed to allege a cause of action to void the policy for fraud in the application.





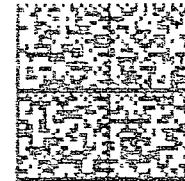
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J. Mark Hayes, II  
Presiding Judge, Seventh Judicial Circuit

Spartanburg, South Carolina

~~July~~ <sup>Oct 25</sup> \_\_, 2012.

**BRANDY W. MCBEE**  
CLERK OF COURT, CHEROKEE COUNTY  
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J. Drayton Hastie III  
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Columbia, SC 29201

2920132208 0303 11/08/2012 11:08:00 031A 0005180652

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, SC  
JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP1100061

2012 DEC 3 PM 4 12

BRANDY W. MCBEE  
Omni Insurance Company vs. Christopher Wright

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Amended Order Superseding Order of October, 25th 2012

Dated at Gaffney, South Carolina, this the 3rd day of December, 2012.

Court Reporter:

s/ J. Mark Hayes

**PRESIDING JUDGE - J. Mark Hayes**

This judgment was entered on the the 30th day of November, 2012, and a copy mailed first class this the 3rd day of December, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

**J. Drayton Hastie III** 1417 Calhoun St. Columbia,  
SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

**James B. Richardson Jr.** 1229 Lincoln St.  
Columbia, SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

*Brandy W. McBee*

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )  
Omni Insurance Company, )  
Plaintiff, )  
-vs- )  
Christopher Wright, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
Case No. 12-CP-11-64  
AMENDED ORDER SUPERSEDING  
ORDER OF OCTOBER 25, 2012  
FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 NOV 30 AM 7:00  
BRANDY W. MCCLINTOCK

In this declaratory judgment action, Omni Insurance Company seeks a judgment finding that the defendant, Christopher Wright, is entitled to no underinsured motorist benefits under Omni's policy of insurance. The defendant Wright moves for judgment on the pleadings. Finding that the defendant is an insured under the underinsurance provisions of the policy, and that none of the policy provisions relied upon by Omni applies here, the Court grants judgment on the pleadings to the defendant.

Christopher Wright was a passenger in the insured vehicle driven by Jennifer Barron, the daughter of Omni's named insured, Anthony Barron. Jennifer lost control of the car, which left the road and struck a guard rail, severely injuring Wright.

The Omni insurance policy issued to Mr. Barron extends five types of insurance coverage: (1) Liability Coverage (in Part A of the policy); (2) Medical Payments Coverage (in Part B); (3) Uninsured Motorists Coverage (in Part C1); (4) Underinsured Motorists Coverage (in Part C2); and (5) Coverage for Damage to Your Auto (in Part D). Each Part contains its own definition of who is insured. With respect to underinsurance:

**Insured** as used in this Part [*i.e.*, Part C2 – UNDERINSURED MOTORISTS COVERAGE] means:

1. **You** or any family member.
2. *Any other person occupying your covered auto.*

Omni policy, PART C2, ¶ A.1. & A.2. (emphasis added). Since Wright was a "person occupying [the] covered auto," he was an insured under Part C2 — underinsured

motorist coverage. This much is beyond dispute.

In response to Wright's negligence claim against Jennifer, Omni paid to Wright its Part A liability limit of \$25,000.00. Because Wright's damages allegedly exceed the amount paid under the liability provisions of the Omni policy, Wright made an additional claim under the underinsured motorist coverage. Omni contends that it cannot owe coverage to Wright under both Part A, liability insurance, and Part C2, underinsurance. Omni contends that nothing is owed, on account of three policy provisions. The first two provisions were alleged in Omni's complaint, filed in April 2011. The third provision was added soon before the hearing of defendant's motion by way of an amended complaint.<sup>1</sup>

\*The issue of this case implicates no statutes and no public policy. This is a case of contract interpretation. Familiar rules and principles of contract interpretation apply here. Foremost among these is the polestar which always guides the Court in discerning what the parties meant: their contractual intent is first sought in the plain meaning of the words they used. This maxim applies to insurance policies as well as to all other contracts. Much of what our Court of Appeals had to say in the case of *South Carolina Farm Bureau Ins. Co. v. Kennedy*, 390 S.C. 125, 700 S.E.2d 258 (Ct. App. 2010), applies here. For example:

The general rules of contract construction apply to insurance policies. *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct.App.1999). "[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together." *Id.* "Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so." *Id.* "This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning." *Id.* at 548-49, 520 S.E.2d at 823." An insurer's obligation under a policy of

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<sup>1</sup> Omni's complaint originally alleged that the Barron policy contained terms not found in the policy. This error led to Wright's bad faith counterclaim. The error was corrected in the amended complaint. The Court has not been asked to rule upon the claim of bad faith asserted in the counterclaim.

insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." *Id.* "[A]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Id.* "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Id.*

*Id.* at 261. The search for contractual intention begins with the plain meaning of the words used.

**1. Paragraph A of the LIMIT OF LIABILITY provisions of Part A.**

The policy limit for each of the five types of insurance is set forth in the manner often used in insurance policies. The carrier begins by promising to pay whatever damages or losses are the subject of the coverage. Later, in a separate paragraph styled "LIMIT OF LIABILITY," the upper limit of that obligation is set forth. For example, in Part A, the liability insurance section, the carrier begins by promising:

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.

Part A, page 3. This promise would be open-ended if not for the limit of that promise, found two pages later:

**LIMIT OF LIABILITY**

A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one auto accident. . . .

The carrier's unconditional promise to pay, followed later by a "LIMIT OF LIABILITY" paragraph, is done in the same fashion in each of the five types of insurance granted by this policy. Thus, the LIMIT OF LIABILITY paragraph of each policy Part applies to the type of insurance granted in that specific Part.

In paragraph 29 of its amended complaint, Omni disclaims underinsurance coverage in reliance upon the provision quoted above, found in Part A of its policy.

Part A is entitled: "LIABILITY COVERAGE". \$25,000 is the limit for the type of



insurance granted in Part A, the "LIABILITY COVERAGE" part of the policy. Omni contends that the Bodily Injury Limit of its liability coverage is the most it could ever owe to anyone.

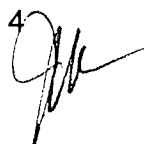
This Court cannot agree with Omni's contention. The liability insurance granted in Part A applies to "damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident." PART A – LIABILITY COVERAGE, ¶ A, page 3. Thus, \$25,000.00 is Omni's "maximum limit of liability for all damages . . ." The "damages" here are those damages "for which any insured becomes legally responsible to pay because of an auto accident." Part A, ¶ A, page 3. The Part A (liability) limit applies to liability insurance coverage and nothing else. Each of the other four types of insurance has its own separately stated limit. Underinsured motorist coverage is not liability coverage, and has its own and different limit. The limit for underinsured motorist coverage is as follows:

LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
  - 1. Our maximum limit of liability for all damages . . . 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 Motorists Coverage. (*sic*)

Part C2, page 15. Thus, Omni's "limit of liability" for UIM coverage is the *sum* of two "limits of liability shown in the Declarations," not a single number as is the case with the limit upon liability coverage.

The five separate limits found in this policy — and the type of insurance coverage to which each one applies — are unambiguous. Determining whether a policy provision is ambiguous requires examining "the context of the entire integrated agreement . . . ." *Hansen v. United Services Auto. Assoc.*, 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct. App. 2002). As the index to the policy shows, there is a LIMIT OF LIABILITY provision in Part A – "LIABILITY COVERAGE", and a separate and different

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LIMIT OF LIABILITY provision in each of the other four parts. Part C2 —  
“UNDERINSURED MOTORISTS COVERAGE” has its own limit, quoted above.

If the provision relied upon by Omni applied to both liability and underinsured motorist coverage, the policy would say so clearly. On the contrary, no two of the five limits are the same. If Part A's limit were transposed to Part C2, then Part C2's limit would be displaced. This would amount to re-writing the policy, something which the Court may not do.

Even if the Court were to deem the limits ambiguous, however, there is no doubt as to how that ambiguity would be resolved. South Carolina law requires any ambiguity to be resolved in favor of the insured. *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969) (“It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy.”); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) (“Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted.”); *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) (“Where language used in an insurance contract is ambiguous, . . . that construction which is most favorable to the insured will be adopted.”).

For these reasons the LIMIT OF LIABILITY which applies to the liability insurance coverage of Part A does not apply to the UIM coverage of Part C2.

**2. Paragraph B.2. of the LIMIT OF LIABILITY provisions of Part A.**

In paragraph 30 of its amended complaint, Omni relies upon a second provision

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found in the LIMIT OF LIABILITY provisions of Part A of its policy, the liability coverage.

This provision is found at page 6 of the policy and reads in material part as follows:

- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage [i.e., liability coverage] and:
1. Part **B** or Part **C** of this policy; or
  2. Any Underinsured Motorists Coverage provided by this policy.

Omni contends that Wright would be receiving "duplicate payments for the same elements of loss" if he received both liability coverage and UIM coverage.

If this provision were intended to prohibit anyone from receiving *both* liability insurance payments *and* underinsured motorist payments in any case, it would say so clearly. But the only thing narrowly prohibited by this provision is a liability payment which *duplicates* underinsurance payments. Conversely, liability payments which do *not* duplicate underinsurance payments are foreseen and allowed.

This provision, found in the LIMIT OF LIABILITY section of PART A – LIABILITY COVERAGE, is a limit on "*this coverage*" — *liability coverage* — not underinsured motorists coverage. In other words, *liability* insurance payments may not duplicate *underinsured motorists* payments. Although not identified in its amended complaint, in its motion to reconsider Omni has pointed out that a similar provision is found in the UIM part of the policy. There, the limitation is upon UIM payments which "duplicate" liability payments, medical expense payments, UM payments, other UIM payments, or property damage payments. No payment under *any* underinsured motorists coverage ever "duplicates" any payment made under any liability coverage. <sup>(R)</sup> By definition, UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the claimant for his loss. Hence, underinsurance payments never duplicate liability payments. <sup>\*</sup> If Mr. Wright's UIM claim "duplicated" his liability claim, then by definition he would have no valid UIM claim. No amount paid in UIM coverage would "duplicate" the previous \$25,000 liability payment under Part A "for the

same elements of loss".

### 3. The LIMIT OF LIABILITY provision of Part C2.

Omni amended its complaint to add a third policy provision in support of its contention that it owes nothing in UIM coverage. This provision is found in Part C2 – UNDERINSURED MOTORISTS COVERAGE. Therefore, this provision does apply to Wright's UIM claim, unlike the two provisions of PART A — liability coverage — quoted above. Omni relies upon the following provision of Part C2, the UIM coverage:

#### LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
  - 1. Our maximum limit of liability for all damages . . . 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 Motorists Coverage.

The limit in question is **the sum of** "limits of liability shown in the Declarations". In this context, "**the sum of**" can only mean:

**sum • n. . . . 2. (the sum of)** the total amount resulting from the addition of two or more numbers or amounts.

THE CONCISE OXFORD DICTIONARY 1434 (10th ed. 1999). The use of the phrase "**the sum of**" indicates a clear intent that two or more limits — *plural* — were to be added together to create the "maximum limit" of monetary exposure for the insurer. The limits to be added together are "shown in the Declarations". Inexplicably, there is nothing called a "Bodily Injury Liability Underinsured Motorists Coverage" in the Declarations or anywhere else in the policy. Even if such a thing existed, it would be only one of the numbers to be summed. The defendant plausibly suggests that the word "and" was omitted from this phrase. The phrase would make sense if it reads: "Bodily Injury Liability **and** Underinsured Motorists Coverage", the limits of which are to be summed. The Declarations show a Bodily Injury Liability Limit of \$25,000 per person and an Underinsured Motorist Bodily Injury Limit of \$25,000 per person. The clear intent is that



the limit of liability coverage was to be added to the limit of underinsurance coverage to define the insurer's overall "maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident. . . ." The sum of these two limits — \$50,000 — is the only **sum** which makes sense.

When a typographical error is apparent in an insurance policy or other contract, the court can and should correct the error. See, e.g., *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). It is essential to supply the missing word "and"; otherwise, the quoted provision would be meaningless. It would call for the "sum" of a single nonexistent number — nonsensical twice over.

Omni denies any typographical error, but cannot point to a "Bodily Injury Liability Underinsured Motorists Coverage" number or to any two numbers on the Declarations page to be summed.

#### **4. Underinsured motorist coverage as voluntary insurance.**

Omni makes the point that UIM coverage is voluntary, not mandatory, so that the carrier has much discretion in fashioning the scope of coverage. That is true, and in this instance Omni has chosen to extend the UIM coverage offered by this policy to third parties who did not pay for it. The same is true of the medical payments coverage provided in Part B.

This is not a stacking case. The many stacking decisions cited by Omni have nothing to say about the construction of Omni's insurance policy. The determination of underinsurance coverage is one of contract interpretation. It requires only a reading of the policy provisions to determine whether Wright is an insured under the UIM coverage of Part C2 and, if he is, then whether his receipt of the limits under Part A, the liability coverage, precludes a claim in any amount under the UIM coverage. As a passenger in

the insured vehicle, he clearly is an insured under the UIM provisions. Omni has chosen to offer its customers an insurance product enhanced in this way. The parties to an insurance contract can agree to whatever coverage they wish as long as their agreement is not inconsistent with legislative mandate.

None of the three provisions relied upon by Omni preclude UIM coverage to this insured on account of Omni's previous liability coverage payment.

#### 5. Fraud in the insurance application.

Omni alleges in its complaint that its policyholder, Mr. Barron, failed to name his daughter Jennifer as an "Additional Driver," thereby affecting the premium. Omni does not seek to void the policy for fraud in the application. Rather, it offers this fact as what it describes as an "additional sustaining ground" for a declaration that it owes nothing to Wright in UIM coverage. No authority is cited and no basis is offered for the contention that the named insured's failure in this regard is a ground to deny UIM coverage or, for that matter, to affect any provision of the policy.

#### CONCLUSION

Omni asks the Court to read its policy in such a way that an insured guest passenger can never receive *UIM* benefits when he has received the limit of *liability* coverage. To read the policy provisions in that way would be to render the UIM coverage illusory in the case of a guest passenger injured by the negligence of the driver.

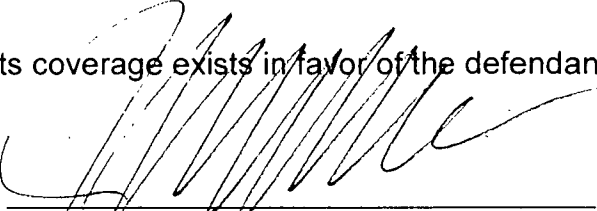
The two provisions upon which Omni relied when it began this action apply to liability coverage, not underinsured motorist coverage. The recently added third provision refers to the **sum** of two coverage limits, and can only mean that Omni's total responsibility for liability and UIM coverage cannot exceed the **sum** of its liability limit and its UIM limit. If it does not mean that, then it is meaningless.

Accordingly:



IT IS ORDERED:

- (1) That the defendant's motion for judgment on the pleadings is granted,;  
and
- (2) That underinsured motorists coverage exists in favor of the defendant to  
the limit of \$25,000.00.



\_\_\_\_\_  
J. Mark Hayes, II  
Presiding Judge, Seventh Judicial Circuit

Spartanburg, South Carolina

11-28-12, 2012.

FILED IN OFFICE OF  
STATE OF SOUTH CAROLINA CLERK OF COURT JUDGMENT IN A CIVIL CASE  
COUNTY OF CHEROKEE CHEROKEE COUNTY, S.C. CASE NO: 2012CP1100061  
IN THE COURT OF COMMON PLEAS 2013 MAR 21 PM 3 44

BRANDY W. MCBEE  
Omni Insurance Company vs. Christopher Wright

CHECK ONE:

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

**Order Denying Second Motion to Reconsider**

Dated at Gaffney, South Carolina, this the 21st day of March, 2013.

Court Reporter:

s/ J. Mark Hayes

PRESIDING JUDGE - J. Mark Hayes

This judgment was entered on the the 19th day of March, 2013, and a copy mailed first class this the 21st day of March, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

J. Drayton Hastie III 1417 Calhoun St. Columbia,  
SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

James B. Richardson Jr. 1229 Lincoln St.  
Columbia, SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

*Brandy W. McBee*

Brandy W. McBee - Clerk of Court

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )  
Omni Insurance Company,) )  
Plaintiff, )  
- vs- )  
Christopher Wright, )  
Defendant. )

IN THE COURT OF COMMON PLEAS

Case No. 12-CP-11-61

ORDER DENYING SECOND MOTION  
TO RECONSIDER

BRANDY W. MOORE

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2013 MAR 21 AM 10 56

This case returns to the Court upon the plaintiff Omni's second motion to alter or amend the grant of defendant Wright's motion for judgment on the pleadings.

In the Order initially entered in this matter, dated October 25, 2012, the Court rejected Omni's contention that the terms of its automobile insurance policy precluded Wright from recovering under the underinsured motorist coverage of Omni's policy when he had already recovered under the liability coverage of the policy.

In opposition to Wright's motion for judgment on the pleadings, Omni filed a memorandum entitled "Memorandum in Support of Declaratory Judgment for Plaintiff." In the "Statement of Facts" part of its memorandum, Omni referred to the allegation of its complaint that its named insured, Anthony Barron, had failed to identify his daughter Jennifer as a driver in his insurance application. Omni alleged that it would have charged a greater premium, had it known. Omni's complaint sought no relief incident to this allegation. Omni concluded its memorandum with the following statement:

As noted *supra*, this is not a circumstance where Omni is seeking to deny coverage to the very people who paid the premiums and obtained the Policy. Nor is this an instance where Omni is seeking to avoid coverage entirely, as Omni

has already paid its Policy limits. This is simply an instance where Omni seeks to uphold the Policy as it is written, which limits Defendant's ability to assert duplicate claims against a Policy that is not his own for damages arising from the same incident.

Although Omni did not seek to void the policy or any part thereof in its complaint, and expressly sought "to uphold the Policy as it is written," this Court found in its initial Order that, liberally construing Omni's complaint, the right should be reserved to Omni to attempt to void the policy. Since the policyholder would be a necessary party to such an effort, the Court dismissed Omni's complaint without prejudice "insofar as it may be construed to allege a cause of action to void the policy for fraud in the application." This left Omni free to bring a new action seeking such relief, if so minded.

Omni moved to alter or amend on the ground, *inter alia*, that it had no "intent to void the entire Policy." Rather, it took the position that the UIM portion of the policy, not the entire policy, was void — apparently meaning void *ab initio* — and moreover that its policyholder was not a necessary party to such a claim. Omni offered this position as what it called an "alternate sustaining ground for denying [UIM] coverage." Omni having disclaimed any intent to void the policy, the Court issued an Amended Order dated November 28, 2012, removing the reservation of such a right to Omni but reaffirming the judgment on the merits in all respects.

Omni has moved a second time to alter or amend on the ground of fraud in the inception, with immaterial variations in wording. Omni again asserts that UIM coverage is void because of its policyholder's alleged fraud in the application. In the Order of October 25, 2012, the Court rejected the contention that alleged fraud could be asserted as a ground for voiding UIM coverage in the absence of the policyholder as a necessary

party. The Order of November 28, 2012, made no change in this ruling, but only withdrew the right accorded Omni to bring a new action — a right which Omni eschewed. Omni's successive motion raises no new ground in regard to whether the UIM coverage is void for fraud.

The remaining grounds raised in Omni's second motion to alter or amend are verbatim identical to those raised in the first such motion, with immaterial variations, and have already been rejected in the Order of November 28, 2012.

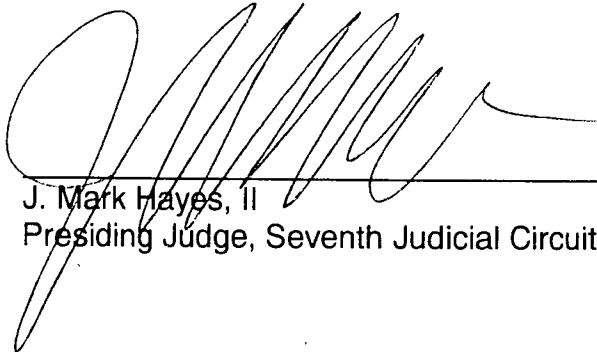
A handwritten signature, possibly reading "JA", is written in the lower right area of the page. A long, thin, curved line starts from the upper left and extends diagonally across the page, passing over the signature.

Accordingly,

IT IS ORDERED that the plaintiff's second motion to alter or amend, dated December 18, 2012, is denied.

Spartanburg, South Carolina

March 19, 2013.

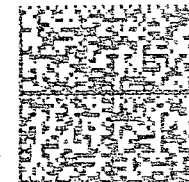


J. Mark Hayes, II  
Presiding Judge, Seventh Judicial Circuit

FILED IN OFFICE OF  
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2013 MAR 21 AM 10 57  
BRANDY W. MCBEE

**BRANDY W. McBEE**

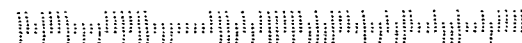
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GAFFNEY, SC 29342



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03/22/2013  
031A 0006180652

J. Drayton Hastie III  
1417 Calhoun St.  
Columbia, SC 29201

29201250917



34

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHEROKEE ) FILED IN OFFICE OF SEVENTH JUDICIAL CIRCUIT  
) CLERK OF COURT  
Omni Insurance Company, ) CHEROKEE COUNTY, S.C. Civil Action No.: 2012-CP-11-061  
) 2012 MAY 13 PM 1:16  
- v - ) **AMENDED DECLARATORY**  
) **JUDGMENT COMPLAINT**  
Christopher Wright, ) (Determination of Coverage)  
) **BRANDY W. MCBEE**  
Defendant. )

The Plaintiff, Omni Insurance Company ("Plaintiff" or "Omni"), complaining of the Defendant, Christopher Wright ("Defendant"), would respectfully show unto the Court as follows:

**THE PARTIES AND JURISDICTION**

1. Plaintiff is organized and existing under the laws of a State other than South Carolina, is authorized to conduct business in the State of South Carolina, and does business in Richland County, South Carolina.
2. Plaintiff is informed and believes that Defendant is a resident of Cherokee County, South Carolina.
3. This Court has jurisdiction over the parties and subject matter jurisdiction over the litigation pursuant to the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 *et seq.*
4. Venue is proper in this forum.

**CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

5. The allegations of the foregoing paragraphs of this Complaint are hereby restated by reference.
6. Plaintiff insured a 1995 Ford Mustang bearing VIN 1FALP4049SF176408 ("Vehicle") belonging to Anthony Barron for a policy period spanning from June 4, 2009, to

June 4, 2010, bearing Policy number 3111851 ("Policy"). *See* Declarations Page (already on file as **Exhibit A** to previously filed Complaint).

7. Anthony Barron is the only named insured on this Policy. *See id.* (already on file as **Exhibit A** to previously filed Complaint).

8. Although there is only one named insured, the Policy covered two vehicles, one of which was not involved in this matter.

9. Jennifer Barron is Anthony Barron's daughter, who was living with her father at the time of the accident, and who had been living with him since 2004.

10. Ms. Barron was not listed as an insured on the Policy.

11. If Ms. Barron had been included as a named insured, then this would have affected the premium paid for the Policy.

12. Plaintiff has been informed that in the early morning hours of May 9, 2010, the Vehicle was being operated by Jennifer Barron, who, although being a resident relative of Anthony Barron, was not listed by the named insured as a driver on the Policy. *See id.* (already on file as **Exhibit A** to previously filed Complaint).

13. Ms. Barron does not have her own vehicle, nor does she have her own insurance.

14. Plaintiff is informed that Ms. Barron was given permission to use the Vehicle by the named insured, and she had used the Vehicle before as necessary.

15. Plaintiff has been informed that Christopher Wright was a passenger in the Vehicle.

16. Plaintiff has been informed that sometime in the course of the night of May 8 and the early morning of May 9, 2010, Ms. Barron and Mr. Wright were at a bar together, and they left the bar together.

17. Plaintiff has been informed that Mr. Wright and Ms. Barron were involved in a single car accident in which the vehicle ran off the road and struck a guard rail adjacent to some train tracks in Gaffney, S.C. ("Accident").

18. Plaintiff has been informed that Ms. Barron and Mr. Wright did not previously know each other and could not even recall the other's name following the accident.

19. Plaintiff has been informed that Mr. Wright alleges to have been a passenger in the Vehicle who was injured as a result of the Accident for which Ms. Barron is alleged to be liable.

20. Mr. Wright is represented by Brent P. Stewart, Esq.

21. Mr. Wright, who was married at the time of the accident and maintains his own household, is not a resident relative of Anthony Barron, the named insured.

22. Mr. Wright asserted a liability claim against Ms. Barron as a result of the injuries allegedly incurred in the Accident.

23. The Policy provides liability coverage in the amount of \$25,000 per claim and \$50,000 per accident. *See* Declarations Page (already on file as **Exhibit A** to previously filed Complaint).

24. Counsel for Defendant made a demand for the liability coverage Policy limits.

25. Plaintiff tendered its liability Policy limits of \$25,000.00 and in exchange Defendant a Covenant not to Execute against Plaintiff's insured.

26. Counsel for Defendant alleged that the injuries arising from the accident exceed the available liability coverage Policy limits.

27. After Plaintiff tendered the liability coverage Policy limits, counsel for Defendant demanded UIM coverage Policy limits.

28. Defendant decided not to obtain UIM coverage for himself, so he seeks to assert an additional claim for UIM benefits under Anthony Barron's Policy.

29. However, the Policy's terms provide no more liability coverage than the 25/50 liability coverage limits that have already been paid. *See* Declarations Page (already on file as **Exhibit A** to previously filed Complaint); Policy, Part A-Liability Coverage, Limit of Liability, A (already on file as **Exhibit B** to previously filed Complaint) ("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.").

30. The Policy also limits the ability of a party who is not a resident relative of the named insured to assert both a liability claim and a UIM claim against the same Policy for the same injuries arising from the same Accident:

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.

*See* Omni's South Carolina Personal Auto Policy, Part A-Liability Coverage, Limit of Liability, B.2 (already on file as **Exhibit B** to previously filed Complaint).

31. Under this Policy limitation, the named insured and their resident relatives have UIM coverage in the amount they opted to purchase, and this coverage is personal and portable to them, in accordance with South Carolina case law addressing this issue.

32. However, where, as here, Defendant is not a resident relative of the named insured, and where, as here, Defendant has already sued under the liability portion of the Policy and received the full Liability Policy limits, then the Policy provisions do not allow the same claim to be reasserted against the same Policy seeking UIM coverage for the same injuries arising from the same accident.

33. The Policy has an additional limitation to the applicability of UIM benefits, which limits Defendant'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.

*See* Omni's South Carolina Personal Auto Policy, Part C2-Underinsured Motorist Coverage, Limit of Liability, A.1. (already on file as **Exhibit B** to previously filed Complaint).

34. Due to these Policy limitations, Defendant has been informed that UIM coverage is not available under this particular Policy.

35. Of course, should Defendant have opted and paid for his own UIM coverage, then he is welcome to pursue such benefits.

36. This limitation is in accord with South Carolina law allowing an insurer and an insured to agree to those Policy terms that do not conflict with the applicable statutory structure.

37. South Carolina courts have held on numerous occasions that UIM coverage is voluntary coverage and thus distinguishable from mandatory coverage such as liability coverage and UM coverage.

38. South Carolina courts have held that limitations to voluntary UIM coverage are enforceable and do not conflict with South Carolinas law or public policy.

39. Further, South Carolina courts have held that applying UIM limitations in a manner that encourages people to obtain their own UIM coverage advances the public policy interests of the State of South Carolina.

40. The Policy limitations addressed *supra* are in accord with these goals, and should be applied and enforced as agreed to between Plaintiff and the named insured who obtained the

Policy, and who opted and paid for the UIM coverage in accordance with the provisions set forth in the Policy, which include the limitation set forth herein.

41. Additionally, South Carolina courts have held that while mandatory coverage may not be defeated by an insured's breach of the applicable Policy, voluntary coverage may be voided by a Policy breach.

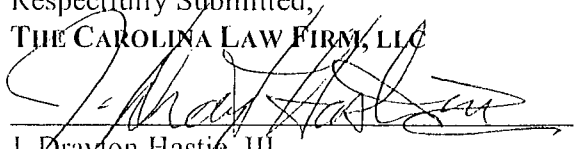
42. Because the named insured failed to include his daughter as a named insured despite the fact that she was a resident relative who received permission to use the insured vehicles, the named insured is not entitled to receive coverage beyond that required by the South Carolina Financial Responsibility Act.

43. Accordingly, UIM coverage under the Policy, as non-mandatory coverage, may be denied in the event of a Policy breach, as has occurred here.

**WHEREFORE**, the Plaintiff requests that this Court award the following relief:

1. Enter judgment in favor of the Plaintiff and against Defendant, finding that the Policy provisions limit the ability of Defendant to bring a UIM claim where he has already brought a liability claim against the same Policy for the same damages arising from the same Accident;
2. Tax the costs of this action, including attorneys' fees, against the Defendant;
3. Grant a bench trial; and
4. For such further and additional relief in favor of the Plaintiff as the Court deems just and proper.

Columbia, South Carolina  
May 31, 2012

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**  
  
J. Drayton Hastie, III  
SC Bar #: 15583  
1417 Calhoun Street  
Columbia, South Carolina 29201  
Tel: (803) 319-2157  
Fax: (803) 929-5333  
draytonhastie@sc.rr.com  
**ATTORNEY FOR PLAINTIFF**

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
Civil Action #: 2012-CP-11-061

Omni Insurance Company,  
vs. Plaintiff,  
Christopher Wright,  
Defendant.

CERTIFICATE OF SERVICE

I certify that a copy of the Amended Declaratory Judgment Complaint and Consent Order to Amend Complaint has been served upon the below named individuals and/or counsel this the 4<sup>th</sup> day of June 2012, via electronic mail addressed as follows: *SAH*

PARTIES SERVED

Law Offices of James B. Richardson, Jr.  
1229 Lincoln Street  
Columbia, SC 29201  
[jbrcolumbia@gmail.com](mailto:jbrcolumbia@gmail.com)

Columbia,  
South Carolina

*Courtney Austin*  
Courtney Austin

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 JUN 6 AM 11 06  
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company, )  
Plaintiff, )

Case No. 11-CP-40-3899

-vs-

ANSWER AND COUNTERCLAIM

Christopher Wright, )  
Defendant. )

The defendant above-named, answering the complaint of the plaintiff and counterclaiming, would respectfully show as follows:

FOR A FIRST DEFENSE:

1. All allegations of the complaint not hereafter expressly admitted, modified or explained are hereby denied.
2. Paragraphs 1 and 2 of the complaint are admitted.
3. Answering the allegations of paragraph 3: defendant admits that the Court of Common Pleas of South Carolina has jurisdiction of declaratory judgment actions and has personal jurisdiction of the defendant, but the defendant would show that Richland County is not the proper venue for this action since the defendant is a resident of Cherokee County.
4. Paragraph 4 is denied. Cherokee County is the only proper venue.
5. Paragraph 5 calls for no new response.
6. Upon information and belief, defendant admits the allegations of paragraph 6 and admits the authenticity of the declarations page, Exhibit A of the complaint.
7. Upon information and belief, paragraphs 7 and 8 are admitted.
8. Answering the allegations of paragraph 9: defendant has insufficient

information upon which to form a belief as to the truth of the allegation of paragraph 9 as to the time at which Jennifer Barron began living in the household of her father and therefore denies same. Upon information and belief, defendant admits that Jennifer Barron was a resident relative of her father's household at the time of the accident.

9. Paragraph 10 is admitted.

10. The allegations of paragraph 11 are irrelevant and the defendant moves that they be stricken.

11. Answering the allegations of paragraph 12: defendant admits that Jennifer Barron was driving the insured vehicle at the time of the accident on May 9, 2010. The plaintiff's declarations page does not call for the named insured to identify all persons who may drive the insured vehicle. It only calls for the identity of "DRIVER" in the singular, obviously calling for the identity of the principal driver only.

12. The allegations of paragraph 13 are irrelevant and the defendant moves that they be stricken.

13. Answering the allegations of paragraph 14: defendant admits that Jennifer Barron was driving the insured vehicle at the time of the accident with the permission of the named insured. Defendant has insufficient information upon which to form a belief as to the truth of the remaining allegation.

14. The allegation of paragraph 15 as to what the plaintiff has been informed is irrelevant and defendant moves that it be stricken. Defendant would show that he was a guest passenger in the insured vehicle at the time of the accident, which vehicle was driven by Jennifer Barron with the consent of the named insured.

15. The allegations of paragraph 16 as to what the defendant has been informed, and where the driver and the defendant had been, or where they left from are irrelevant and the defendant moves that they be stricken.

16. Answering the allegations of paragraph 17: the plaintiff knows that the

accident happened as alleged, regardless of what it has been "informed".

17. The allegations of paragraph 18 are irrelevant and the defendant moves that they be stricken.

18. Answering the allegations of paragraph 19: the allegation that the defendant "alleges" to have been a passenger in the insured vehicle at the time of the accident is made in bad faith as the plaintiff knows that this is true, having possession and knowledge of all the facts which would lead any reasonably careful insurer, operating in good faith, to accept and conclude that this was the case. The allegation that Jennifer Barron is "alleged" to be liable for the defendant's injuries is likewise made in bad faith, the plaintiff having concluded after its own diligent investigation that Jennifer Barron is in fact liable.

19. Paragraph 20 is admitted.

20. Answering the allegations of paragraph 21: defendant's marital status and household status are irrelevant and the defendant moves that these allegations be stricken. Defendant admits that he is not a resident relative of the named insured.

21. Paragraphs 22, 23, and 24 are admitted.

22. Answering the allegations of paragraph 25: defendant admits that the plaintiff tendered and paid its liability limit of \$25,000.00. Defendant craves reference to the terms of the Covenant Not to Execute for a full understanding of the terms thereof.

23. The allegations of paragraph 26 concerning what defendant's attorney alleged are irrelevant and the defendant moves that they be stricken. The defendant would show that the plaintiff concluded and knew after its own diligent investigation that the defendant's injuries far exceed \$25,000.00.

24. Paragraph 27 is admitted.

25. The allegations of paragraph 28 are irrelevant and the defendant moves

that they be stricken.

26. Answering the allegations of paragraph 29: the defendant admits that the liability limit of the plaintiff's policy is \$25,000.00 per person and admits that this amount has been paid to the defendant.

27. Answering the allegations of paragraph 30: the defendant would show that the policy provision partially quoted is found in Section B.2 of Part A, which part pertains exclusively to "LIABILITY", and has nothing to do with underinsured motorist coverage, as the plaintiff well knows.

28. Answering the allegations of paragraph 31: defendant would show Section B.2 of Part A has nothing to do with underinsured motorist coverage, as the plaintiff well knows. The defendant would show further that the underinsured coverage provided by the subject policy insures not only the named insured and resident relatives but any other persons, such as the defendant, who are covered by the terms of the underinsurance provisions thereof.

29. Paragraph 32 is denied.

30. Paragraph 33 is denied. The subject policy contains no such provision, as the plaintiff well knows.

31. Answering the allegations of paragraph 34: defendant would show that the plaintiff has denied underinsured coverage to the defendant, claiming that a nonexistent provision of the subject policy prevents coverage.

32. The allegations of paragraph 35 are irrelevant and the defendant moves that they be stricken.

33. Answering the allegations of paragraph 36: the plaintiff knows that the limitation which it asserts is nonexistent.

34. The allegations of paragraph 37, 38, 39, 40, 41, and 42 are irrelevant and moreover constitute a conclusion of law, not an allegation of fact, and the defendant

moves that they be stricken.

35. Answering the allegations of paragraph 43: defendant would show that the plaintiff has alleged no breach of any provision of the subject policy.

FOR A SECOND DEFENSE:

36. Defendant is a resident of Cherokee County.

37. Venue in Richland County is improper. Venue in Cherokee County is proper.

FOR A THIRD DEFENSE AND BY WAY OF A FIRST COUNTERCLAIM:

38. The defendant was a guest passenger in the vehicle insured by the plaintiff at the time of the accident and is an insured under the underinsured motorist provisions of the plaintiff's insurance policy.

39. A copy of the policy is incorporated in the complaint as Exhibit B. The defendant adopts Exhibit B as fully as though attached to this answer and counterclaim and repeated verbatim.

40. The defendant is entitled to a declaration that the subject policy provides underinsured coverage to the defendant in accordance with the policy terms

FOR A SECOND COUNTERCLAIM:

41. The allegations of the second defense are incorporated herein.

42. The plaintiff has denied and continues to deny underinsured motorist coverage to the defendant, claiming that coverage is excluded under a provision of the subject policy which the plaintiff knows to be nonexistent.

43. The plaintiff's denial of coverage upon the ground of a nonexistent policy provision is done in bad faith.

44. The defendant has suffered actual damages on account of the plaintiff's bad faith denial of coverage.

45. The defendant is entitled to an award of punitive damages on account of

plaintiff's bad faith denial of coverage.

46. The defendant is entitled to an award of attorney's fees and court costs on account of the necessity to file this answer and counterclaim in order to establish coverage under the rule of *Hegler v. Gulf Oil Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978).

WHEREFORE, having fully answered the complaint and having counterclaimed, the defendant demands the following relief:

- (1) That the Court issue its judgment declaring that the defendant is entitled to underinsured motorist coverage under the plaintiff's policy of insurance; and
- (2) That the Court enter judgment against the plaintiff for such amount of damages, actual and punitive, as may be just and proper; and
- (3) That the Court award to the defendant a reasonable attorney's fee, together with the costs of this action; and
- (4) That the Court award to the defendant such other and further relief as may be just and proper.

Brent P. Stewart  
Stewart Law Offices, LLC  
P. O. Box 670  
Rock Hill, South Carolina 29731  
(803) 328-5876

James B. Richardson, Jr.  
1229 Lincoln St.  
Columbia, South Carolina 29201  
(803) 799-9412

by: James B. Richardson, Jr.  
Attorneys for Defendant.

August 29, 2011.

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company, )  
Plaintiff, )

Case No. 11-CP-40-3899

-vs-

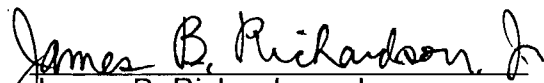
CERTIFICATE OF SERVICE

Christopher Wright, )  
Defendant. )

I certify that I served a copy of defendant's answer and counterclaim upon the plaintiff by first class mail, postage prepaid, addressed to plaintiff's attorney at his address of record, namely:

J. Drayton Hastie, III, Esq.  
The Carolina Law Firm, LLC  
1417 Calhoun St.  
Columbia, SC 29201

on August 29, 2011.

  
James B. Richardson, Jr.  
Attorney for Defendant.

August 29, 2011.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-388

Omni Insurance Company, )  
 )  
Plaintiff, )  
 )  
-v- )  
 )  
Christopher Wright, )  
 )  
Defendant. )

**Reply to Counterclaim**

RICHLAND COUNTY  
FILED  
2011 OCT 11 AM 9:13  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

Plaintiff, Omni Insurance Company (hereinafter "Omni"), hereby replies to the allegations asserted by Defendant in his Answer and Counterclaim. Except as expressly admitted herein, each and every allegation of Defendant is denied.

1. Defendant's Answer and Counterclaim contains paragraphs numbered 1-37 asserting responses and defenses by Defendants related to Omni's Complaint for Declaratory Judgment. Therefore, such allegations in these paragraphs do not require any response from Omni; however, in the event that these paragraphs may be construed to contain allegations of fact pertaining to Omni, they are denied to the extent that they do not correspond to the allegations set forth in Omni's pleadings.

RESPONDING TO DEFENDANTS' SECOND DEFENSE & COUNTER CLAIM

2. The allegations of Paragraphs 38-46 are denied.
3. Responding to the paragraph that begins with the word "wherefore," Omni denies that Defendant is entitled to the relief sought therein.

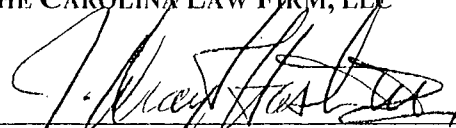
**WHEREFORE**, Omni prays for relief and judgment against Defendant as follows:

1. Dismiss the counterclaim by Defendant against Omni;
2. Declare that UIM coverage is not available given the applicable circumstances as applied to the subject Policy as set forth in Omni's Complaint;

3. Award Omni the costs, expenses, and attorneys' fees incurred responding to this counterclaim; and
4. For such further and additional relief in favor of Omni as the Court deems just and proper.

Columbia, South Carolina  
September 27, 2011

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**



---

J. Drayton Hastie, III  
SC Bar #: 15583  
1417 Calhoun Street  
Columbia, South Carolina 29201  
Tel: (803) 319-2157  
Fax: (803) 929-5333  
draytonhastie@sc.rr.com  
**ATTORNEY FOR PLAINTIFF**  
**Omni Insurance Company**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-388

Omni Insurance Company, )  
 )  
Plaintiff, )  
 )  
-v- )  
 )  
Christopher Wright, )  
 )  
Defendant. )

**Certificate of Service**

RICHLAND COUNTY  
FILED  
2011 OCT 11 AM 9:13  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

I certify that a copy of the foregoing **Reply to Counterclaim** has been served upon the below named counsel on this the 27th day of September, 2011, via U.S. Mail, postage prepaid:

**PARTIES SERVED**

***Attorney for Plaintiff***

Brent P. Stewart  
Stewart Law Offices, LLC  
P.O. Box 670  
Rock Hill, SC 29731

  
J. Drayton Hastie III

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

Omni Insurance Company,

☐ Plaintiff

v.

Christopher Wright,

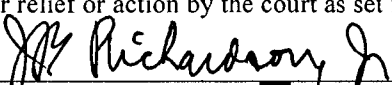
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2012 - CP - 11 - 61

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                         |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Plaintiff's Attorney:<br/>James B. Richardson, Jr. Bar No. <u>4718</u><br/>Address: <u>1229 Lincoln St.</u><br/><u>Columbia, SC 29201</u><br/>phone: <u>803-359-7996</u> fax: <u>803-799-9628</u><br/>e-mail: <u>jbrcolumbia@gmail.com</u> her:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p>Defendant's Attorney:<br/>J. Drayton Hastie, III Bar No. <u>15583</u><br/>Address: <u>1417 Calhoun St.</u><br/><u>Columbia, SC 29201</u><br/>phone: <u>803-319-2157</u> fax: <u>803-929-5333</u><br/>e-mail: <u>draytonhastie@sc.rr.com</u> her:</p> |
| <p><input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and 111)<br/><input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS 11 and 111)<br/>ELPROPOSED ORDER/CONSENT ORDER (complete SECTIONS 11 and 111)</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                         |
| <p><b>SECTION 1: Hearing Information</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                         |
| <p>Nature of Motion: <u>Motion for judgment on the pleadings</u><br/>Estimated Time Needed: <u>15 minutes</u> Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                         |
| <p><b>SECTION 11: Motion/Order Type</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                         |
| <p><input checked="" type="checkbox"/> Written motion attached<br/><input type="checkbox"/> Form Motion/Order<br/>I hereby move for relief or action by the court as set forth in the attached proposed order.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                         |
| <p><br/>Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant Date submitted <u>May 15, 2012</u></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                         |
| <p><b>SECTION III: Motion Fee</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                         |
| <p><input checked="" type="checkbox"/> PAID - AMOUNT: <u>\$25.00</u><br/><input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br/>(check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br/><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br/><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br/><input type="checkbox"/> Motion for Stay in Bankruptcy<br/><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)<br/><input type="checkbox"/> Proposed order submitted at request of the court; or,<br/>reduced to writing fi-orn motion made in open court per judge's instructions<br/>Name of Court Reporter: _____<br/><input type="checkbox"/> Other: _____</p> |                                                                                                                                                                                                                                                         |
| <p><b>JUDGE'S SECTION</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                         |
| <p><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br/><input type="checkbox"/> Other: _____</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p>JUDGE _____<br/>CODE: _____ Date: _____</p>                                                                                                                                                                                                          |
| <p><b>CLEWS VERIFICATION</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                         |
| <p>Collected by: _____ Date Filed: _____</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                         |
| <p><input type="checkbox"/> MOTION FEE COLLECTED: _____<br/><input type="checkbox"/> CONTESTED - AMOUNT DUE: _____</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                         |

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company, )  
Plaintiff, )  
-vs- )  
Christopher Wright, )  
Defendant. )

Case No. 12-CP-11-61

NOTICE AND  
MOTION FOR JUDGMENT  
ON THE PLEADINGS

TO: J. DRAYTON HASTIE, III, ESQUIRE, AND THE CAROLINA LAW FIRM,  
LLC, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the defendant will move on the tenth day after service hereof, or as soon thereafter as counsel can be heard, for an order granting judgment on the pleadings on the issue of underinsurance coverage. The motion is based upon the ground that the pleadings establish such coverage as a matter of law.

Brent P. Stewart, Esq.  
Stewart Law Offices, LLC  
P. O. Box 670  
Rock Hill, South Carolina 29731  
(803) 328-5876

James B. Richardson, Jr.  
1229 Lincoln St.  
Columbia, South Carolina 29201  
(803) 799-9412

by: James B. Richardson, Jr.  
Attorneys for Defendant.

May 15, 2012.

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company, )  
Plaintiff, )  
-vs- )  
Christopher Wright, )  
Defendant. )

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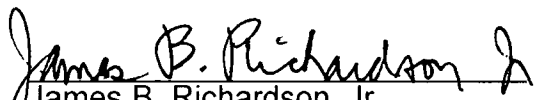
Case No. 12-CP-11-61

CERTIFICATE OF SERVICE

I certify that I served a copy of defendant's motion for judgment on the pleadings upon the plaintiff by first class mail, postage prepaid, addressed to plaintiff's attorney at his address of record, namely:

J. Drayton Hastie, III, Esq.  
The Carolina Law Firm, LLC  
1417 Calhoun St.  
Columbia, SC 29201

on May 15, 2012.

  
James B. Richardson, Jr.  
Attorney for Defendant.

May 15, 2012.

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS

Omni Insurance Company, )  
Plaintiff, )

Case No. 12-CP-11-61

-vs-

Christopher Wright, )  
Defendant. )

DEFENDANT'S MEMORANDUM  
IN SUPPORT OF MOTION  
FOR JUDGMENT ON THE PLEADINGS

In this declaratory judgment action, Omni Insurance Company seeks a judgment finding that the defendant, Christopher Wright, is entitled to no underinsured motorist benefits under Omni's policy of insurance. Believing that none of the policy provisions relied upon by Omni support its contention, the defendant moves for judgment on the pleadings.

The defendant, Christopher Wright, was a passenger in the insured vehicle driven by Jennifer Barron, the daughter of Omni's named insured, Anthony Barron. Jennifer lost control of the car, which left the road and struck a guard rail, severely injuring Wright. In response to Wright's negligence claim against Jennifer, Omni paid to Wright its liability limit of \$25,000.00.

There is no dispute about the fact that Wright is an insured with respect to the underinsured motorist coverage of the Omni policy.<sup>1</sup> Because Wright's damages far exceed the amount paid under the liability provisions of the Omni policy, Wright made an additional claim under the underinsured motorist coverage.

---

<sup>1</sup> **Insured** as used in this Part [*i.e.*, Part C2 – UNDERINSURED MOTORISTS COVERAGE] means:

1. **You** or any family member.
2. *Any other person occupying your covered auto.*

Omni policy, PART C2, ¶ A.1. & A.2. (emphasis added).

Although Omni does not question Wright's status as an insured for underinsured motorist purposes, Omni contends that nothing is owed, on account of three policy provisions. The first two provisions were alleged in Omni's complaint, filed in April 2011. The third provision was added one week ago by way of an amended complaint.

Believing that none of these three provisions has the effect claimed by Omni, Wright moves for judgment on the pleadings.

I.

**The LIMIT OF LIABILITY provisions of Part A apply to liability coverage, not underinsured motorist coverage.**

The Omni insurance policy at issue extends five types of insurance coverage: (1) Liability Coverage (in Part A of the policy); (2) Medical Payments Coverage (in Part B); (3) Uninsured Motorists Coverage (in Part C1); (4) Underinsured Motorists Coverage (in Part C2); and (5) Coverage for Damage to Your Auto (in Part D).

The policy limit for each of the five types of insurance is set forth in the manner often used in insurance policies. The carrier begins by promising to pay whatever damages or losses are the subject of the coverage. Then, the upper limit of that obligation is set forth in a separate paragraph, styled "LIMIT OF LIABILITY." For example, in Part A, the liability insurance section, the carrier begins by promising:

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.

Part A, page 3. This promise would be open-ended; but two pages later is found the limit of that promise:

**LIMIT OF LIABILITY**

A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one auto accident. . . .

The carrier's unconditional promise to pay, followed later by a "LIMIT OF LIABILITY"

paragraph, is done in the same fashion in each of the five types of insurance granted by this policy. Thus, the LIMIT OF LIABILITY paragraph of each policy Part applies to the type of insurance granted in that specific Part.

A. Paragraph A of the LIMIT OF LIABILITY provisions of Part A applies to liability coverage, not UIM coverage.

In paragraph 29 of its amended complaint, Omni disclaims coverage in reliance upon a provision found in Part A of its insurance policy. Part A is entitled: "LIABILITY COVERAGE". The provision cited by Omni is found at page 5 of the policy and reads in material part as follows:

LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one auto accident. . . .

\$25,000 is the limit for the type of insurance granted in Part A, the "LIABILITY COVERAGE" part of the policy. Omni contends that the Bodily Injury Limit of its liability coverage is the most it could ever owe to anyone. The liability insurance granted in Part A applies to "damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident." PART A – LIABILITY COVERAGE, ¶ A, page 3. Thus, \$25,000.00 is Omni's "maximum limit of liability for all damages . . . ." The "damages" here are those damages "for which any insured becomes legally responsible to pay because of an auto accident." Part A, ¶ A, page 3. The Part A (liability) limit applies to the liability insurance coverage and nothing else. Each of the other four types of insurance has its own separately stated limit. Underinsured motorist coverage is not liability coverage, and has its own and different limit. The limit for underinsured motorist coverage is as follows:

LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
1. Our maximum limit of liability for all damages

... 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 Motorists Coverage. (*sic*)

Part C2, page 15. Thus, Omni's "limit of liability" for UIM coverage is the *sum* of two "limits of liability shown in the Declarations," not a single number as is the case with the limit upon liability coverage.

The defendant Wright believes that the five separate limits found in this policy — and the type of insurance coverage to which each one applies — are clear and unambiguous. The very most which Omni could possibly contend is that there is ambiguity as to whether the LIMIT OF LIABILITY provision contained in Part A — liability insurance — applies only to liability coverage or to liability coverage *and* underinsured motorist coverage.

Determining whether a policy provision is ambiguous requires examining "the context of the entire integrated agreement . . . ." *Hansen v. United Services Auto. Assoc.*, 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct. App. 2002). As the index to the policy shows, there is a LIMIT OF LIABILITY provision in Part A — "LIABILITY COVERAGE", and a separate and different LIMIT OF LIABILITY provision in each of the other four parts. Part C2 — "UNDERINSURED MOTORISTS COVERAGE" has its own limit.

If the provision relied upon by Omni applied to both liability and underinsured motorist coverage, the policy would say so clearly. On the contrary, no two of the five limits are the same.

Even if the court were to deem the limits ambiguous, there is no doubt as to how that ambiguity would be resolved. South Carolina law requires any ambiguity to be resolved in favor of the insured. *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969) ("It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in

case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy."); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) ("Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted."); *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) ("Where language used in an insurance contract is ambiguous, . . . that construction which is most favorable to the insured will be adopted.").

For these reasons the LIMIT OF LIABILITY which applies to the liability insurance coverage of Part A does not apply to the UIM coverage of Part C2.

B. Paragraph B.2. of the LIMIT OF LIABILITY provisions of Part A likewise applies to only liability coverage, not UIM coverage.

In paragraph 30 of its amended complaint, Omni relies upon a second provision found in the LIMIT OF LIABILITY provisions of Part A of its insurance policy, the liability coverage. This provision is found at page 6 of the policy and reads in material part as follows:

- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage [i.e., liability coverage] and:
1. Part B or Part C of this policy; or
  2. Any Underinsured Motorists Coverage provided by this policy.

Omni contends that Wright would be receiving "duplicate payments for the same elements of loss" if he received both liability coverage and UIM coverage.

This provision, found in the LIMIT OF LIABILITY section of PART A – LIABILITY COVERAGE, is a limit on *liability* coverage payments, not underinsured motorist coverage payments. A similar provision is found again in PART B – MEDICAL PAYMENTS COVERAGE. It is absent from PART C2 – UNDERINSURED

MOTORISTS COVERAGE. There is no such limit on UIM coverage. In other words, payments under Part A — liability payments — may not duplicate payments under Part C2 — underinsured motorist payments. *But the converse is not true.* There is no prohibition against underinsured motorist payments duplicating liability payments. The reason is obvious: No payment under *any* underinsured motorist coverage ever “duplicates” any payment made under any liability coverage. By definition, UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the claimant for all his elements of loss. By definition, there can be no duplication between liability coverage and underinsurance. If Mr. Wright’s UIM claim “duplicated” his liability claim, then by definition he would have no UIM claim.

A payment of \$25,000 in UIM coverage under Part C2 of this policy will not “duplicate” the previous \$25,000 liability payment under Part A “for the same elements of loss”. The claimant’s elements of loss include lost income, medical expenses, and pain and suffering, among others. The liability payment previously made only began to cover Wright’s medical expenses of more than \$94,000. A further \$25,000 payment will help further to defray this damage and other elements of loss suffered by the claimant. By definition, UIM payments cannot “duplicate” liability payments.

## II.

### **The LIMIT OF LIABILITY provision of Part C2 does not destroy UIM coverage.**

One week ago, Omni amended its complaint to add a third policy provision in support of its contention that it owes nothing in UIM coverage. This provision is found in Part C2 – UNDERINSURED MOTORISTS COVERAGE and therefore does apply to Wright’s UIM claim, unlike the two provisions of PART A — liability coverage — quoted above. Omni relies upon the following provision of Part C2, the UIM coverage:

#### LIMIT OF LIABILITY

- A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
  - 1. Our maximum limit of liability for all damages

... 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 Motorists Coverage.

The overall limit in question is the **sum** of two "limits of liability shown in the Declarations". In this context the word "sum" means:

1. Mathematics

- a. An amount obtained as a result of adding numbers.

THE FREE DICTIONARY, "sum". The two numbers to be added together are "shown in the Declarations". There is no such thing as "Bodily Injury Liability Underinsured Motorists Coverage" in the Declarations or anywhere else. Undoubtedly by typographical error, the word "and" was omitted from this phrase. The phrase only makes sense when it reads: "Bodily Injury Liability **and** Underinsured Motorists Coverage", the limits of which are to be summed. The Declarations show a Bodily Injury Liability Limit of \$25,000 per person and an Underinsured Motorist Bodily Injury Limit of \$25,000 per person. The sum of these two limits — \$50,000 — is the only **sum** which could possibly be contemplated in the quoted provision.

When a typographical error is apparent in an insurance policy or other contract, the court can and should correct the error. See, e.g., *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). It is essential to supply the missing word "and"; otherwise, the quoted provision would be gibberish. It would call for the "sum" of one nonexistent number — nonsensical twice over.

### CONCLUSION

Omni asks the court to read its policy in such a way that an insured guest passenger can never receive *UIM* benefits when he has received the limit of *liability* coverage. To read the policy provisions in that way would be to render the UIM

coverage illusory in the case of a guest passenger.

The two provisions with which Omni began this action apply to liability coverage, not underinsured motorist coverage. The third provision refers to the **sum** of two numbers, and can only mean that Omni's overall responsibility for liability and UIM coverage cannot exceed the **sum** of its liability limit and its UIM limit.

For these reasons, the defendant urges the court to grant judgment on the pleadings.

Respectfully submitted,

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by: James B. Richardson, Jr.  
Attorneys for Defendant.

June 7, 2012.

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

FILED IN OFFICE OF  
CLERK OF THE COURT OF COMMON PLEAS  
CHEROKEE COUNTY, S.C.  
2012 JUN 11 Civil Action No.: 2012-CP-11-061

Omni Insurance Company,

)  
Plaintiff, )

-v-

Christopher Wright,

)  
Defendant. )

**MEMORANDUM**  
**IN SUPPORT OF DECLARATORY**  
**JUDGMENT FOR PLAINTIFF**

Plaintiff Omni Insurance Company (hereinafter, "Omni") hereby respectfully submits this Memorandum in Support of Declaratory Judgment in its favor regarding the applicability of a limitation on the scope of UIM coverage. For the reasons discussed herein, Omni prays that this Court enforce the Policy provisions that limit the ability of a third party claimant who is not a resident relative of the Policyholder from recovering Policy limits twice against the same Policy for damages arising from the same accident.

**STATEMENT OF FACTS**

The essential facts regarding this matter are undisputed and have been admitted in the Parties' pleadings. Further, Defendant's motion requires that the allegations in the Complaint be taken as true. The documents upon which these matters are based have been filed with this Court as exhibits to the pleadings.

Plaintiff insured a 1995 Ford Mustang bearing VIN 1FALP4049SF176408 ("Vehicle") belonging to Anthony Barron for a policy period spanning from June 4, 2009, to June 4, 2010, bearing Policy number 3111851 ("Policy"). *See* Declarations Page (already on file as Exhibit A to the Complaint). Anthony Barron is the only driver identified and listed on the Policy. *See id.* Jennifer Barron is Anthony Barron's daughter, who was living with her father at the time of the accident, and who had been living with him since 2004. *See* Amended

Complaint. Despite having lived for many years with her father, Mr. Barron refused to add her as a driver under his Policy with Omni. *See id.*; Declarations Page (already on file as Exhibit A to the Complaint). Had Mr. Barron added his daughter to his Policy, the premium would have increased. *See Amended Complaint.* Ms. Barron did not have her own car, nor did she have her own insurance. *Id.* Despite not being a listed driver under the Policy, and despite being a resident relative of Mr. Barron for many years, Ms. Barron was allowed to use Mr. Barron's Vehicle insured by the Policy on an as needed basis. *Id.* In so doing, Mr. Barron violated the Policy.

On the night of May 8, 2010, Ms. Barron took the Vehicle to a bar, where she met Defendant. *Id.* They left the bar together, and in the early morning hours of May 9, 2010, the Vehicle was being operated by Ms. Barron with Defendant as a passenger when a one car accident occurred. *Id.* Defendant is married and maintains his own household, so he is not a resident relative of the Barron family. *Id.*

Defendant brought claims against Ms. Barron, alleging that she caused the accident and that he was injured. *Id.* The Policy provides minimum limits coverage in the amount of \$25,000 per claim and \$50,000 per accident. *See Declarations Page (Ex. A to Complaint).* Defendant made a Policy limits, Tyger River demand, in response to which Plaintiff tendered its Policy limits of \$25,000.00 and in exchange for a Covenant not to Execute, thereby insulating Ms. Barron from personal liability. *See Amended Complaint.* This payment was made before any litigation was filed.

Defendant next made a claim for underinsured motorist ("UIM") benefits under the same Policy against which the Defendant has already received full Policy limits. *Id.* However, because Defendant did not chose to acquire UIM coverage of his own, he seeks to

double-dip his claim against the Barron Policy by seeking UIM coverage that was requested by Mr. Barron, paid by Mr. Barron, and issued to Mr. Barron. *Id.* Defendant 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. *Id.* Nothing in this action seeks to prevent Defendant from recovering his own UIM coverage, which would have been personal and portable to him, and thus could have been available to him had he not refused it. This decision by Defendant not to obtain his own UIM coverage is the source of his present situation, not Omni's Policy provisions (set forth below).

#### **APPLICABLE POLICY PROVISIONS**

The Barron Policy contains the following limitation, which prevents a non-resident, non-relative, third party passengers, such as Defendant, 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.

Part A-Liability Coverage, Limit of Liability, A, pg. 5 (Exhibit B to the Complaint).

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.

Part A-Liability Coverage, Limit of Liability, B.2, pg. 6 (Exhibit B to the Complaint).

Therefore, under circumstances as are presented here, where Defendant 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 Defendant's damages exceeded the available policy limits of the other driver (which was not the case given these facts). Under this Policy limitation, the Barron family has

UIM coverage in the amount they opted to purchase, and this coverage, being personal and portable to them, does not in any way limit their ability to receive the UIM coverage for which they opted and paid. The Barron Policy UIM coverage, however, is not personal and portable to third party claimants such as Defendant, 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 Defendant'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.

Part C2-Underinsured Motorist Coverage, Limit of Liability, A.1, pg. 15 (Exhibit B to the Complaint). There is no dispute that Omni has already complied with Defendant's Policy limits demand. Having already received Policy limits from the Barron Policy, Defendant is unable to assert an additional claim against this same Policy for the same damages allegedly 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. Barron refused to identify his daughter as a driver despite the fact that she was a resident relative with him since 2004, and despite the fact that she was allowed to drive his insured vehicles. The Policy provides as follows:

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

South Carolina Amendatory Endorsement, Section IV, Part F – General Provisions, B., pg. 28 (Exhibit B to the Complaint). As is set forth herein, although an insurer may not suspend coverage required by the South Carolina Financial Responsibility Act in the event of a policy breach by an insured, South Carolina courts do allow an insurer to suspend voluntary coverage in excess of the mandatory minimum limits set forth by the South Carolina Financial Responsibility Act. South Carolina does not require an insured to have UIM coverage, as distinguished from the mandatory minimum limits required for liability and uninsured motorist coverage. As a result, Mr. Barron's breach of the Policy provides a secondary basis for voluntary UIM benefits to be denied.

### LEGAL ANALYSIS

#### **I. SOUTH CAROLINA RECOGNIZES 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, Defendant must demonstrate that there is some statutory prohibition to limiting the scope of UIM coverage, or that such a limitation violates public policy. As is demonstrated herein, Defendant is unable to do so because there is no discord between Omni's UIM limitation and the UIM Act. *See infra*, Section II. 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 III. Additionally, the South Carolina Supreme Court has expressly allowed policy provisions that limit the applicability of UIM coverage. *See infra*, Section V.C. Therefore, Omni's Policy provisions limiting UIM coverage should be recognized by this Court.

## **II. OMNI'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<sup>1</sup> 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

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<sup>1</sup> The portion of the statute addressing uninsured motorist coverage is omitted.

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 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 Omni's UIM limitation 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 did not obtain his own UIM coverage and who has 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 Defendants' 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. Barron are free to agree to those terms as are set forth in the Policy. As a third party to the Policy, Defendant is not in a position to object to the Policy provisions established between Omni and Mr. Barron anymore than he could have objected to Mr. Barron'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 III), a clear message is conveyed that while policy limitations affecting mandatory coverage<sup>2</sup> may be deemed to be against public policy, UIM limitations must be viewed in a different light due to the fact that UIM coverage is entirely voluntary. *See infra*, Section V.B. 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 Omni's Policy provisions need not be modified or stricken to comply with the UIM Act, and they may enforced in accordance with the plain language they employ.

### **III. 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 recently 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

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<sup>2</sup> Being liability coverage and uninsured motorist coverage in the statutorily mandated minimum limits.

being limited to the named insureds and their resident relatives, as those who have properly exercised the diligence and foresight to opt for and acquire UIM coverage. Allowing Defendant, as a third party to the Policy who failed to look after his own interests by failing to obtain UIM coverage, to seek a double recovery on a liability claim does not further this public policy goal. To the contrary, allowing this result creates an incentive for such persons to refuse to acquire their own UIM coverage to continue under the expectation that they can simply attach themselves to someone else's coverage.

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.<sup>3</sup> As a result, through this UIM limitation, Omni is preventing the dilution of such funds by parties to whom such funds are not entitled. Thus, this UIM limitation allows Omni to fulfill its duty to its insured 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 § 44-7-140. There is no dispute that Omni complied with this requirement via its tender of its Policy limits of \$25,000.00. The existence of UIM coverage arises solely as voluntary coverage pursuant to terms agreed between Mr. Barron and Omni. If the Defendant failed to

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<sup>3</sup> 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.

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

#### IV. 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 Ann. § 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.<sup>4</sup> If a UIM claimant could recover under any set of facts where his damages exceeded the available liability insurance, then this provision would be needless. As a result, the Legislature intended that an insurer be able to apply limitations 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

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<sup>4</sup> 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).

impossible to deny or limit coverage, as Defendants' reasoning would have it, then this statutory definition would have no meaning.

The Legislature requires that automobiles driven within this State have insurance for liability coverage<sup>5</sup> and UM coverage<sup>6</sup> 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 V.B. Although UIM must be offered, there is no dispute in this matter pertaining to Omni's UIM offer to Mr. Barron, and this offer requirement does not extend to third party passengers like Defendants. *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."). Therefore, it has been recognized that the broad use of the term "insured" in the statutes does not necessarily apply to *every* insured, thereby allowing the Policy limitations to be enforced.

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<sup>5</sup> 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."

<sup>6</sup> 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."

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 § 44-7-160 (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 Defendants 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.

V. **SOUTH CAROLINA CASE LAW EXPRESSLY ALLOW UIM COVERAGE TO BE LIMITED.**

A. **The South Carolina Supreme Court has Consistently Construed the UIM Act.**

The South Carolina Supreme Court first construed the UIM Act in *Gambrell v. Travelers Insurance Companies*,<sup>7</sup> 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"

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<sup>7</sup> 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.

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 Defendant has already received the applicable Policy limits.

Several courts have since ruled that the UIM Act that allows limitations to UIM coverage. Relatively recently, 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 Defendant was in the insured vehicle does not mean he is 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*<sup>8</sup> 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

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<sup>8</sup> 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.”

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 Defendant. This follows the clear rationale identified in *Gambrell*. *Supra*.

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

**B. 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 I. 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 and not required insurance; therefore, it 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.<sup>9</sup> This began with the South Carolina Supreme Court’s first interpretation of the UIM Statute, and

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<sup>9</sup> 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.

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”);<sup>10</sup> *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”); *Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (“UIM coverage is voluntary”); *State Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 170 (4th Cir. S.C. 2009) (under South Carolina law, UIM coverage is not mandatory). *See also State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (endorsement providing for set-off of workers’ compensation benefits for UIM valid where UM set-off is not, because UIM coverage is voluntary).

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,

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<sup>10</sup> 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.

S.C. Code Section 38-77-350 expressly and repeatedly refers to UIM coverage as “optional coverage.”

C. **Analysis of Cases That Allow Limiting the Scope of UIM Coverage.**

1. *Burgess v. Nationwide Mutual Insurance Company*

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

Neither § 38-77-160 nor our prior decisions decide the issue presented here: **Is public policy offended** by an automobile insurance policy provision that limits basic UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy? **We find it is not.**<sup>11</sup>

*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.<sup>12</sup> 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, Defendant, as a third party passenger, should be denied UIM

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<sup>11</sup> 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.”

<sup>12</sup> UIM coverage follows the insured, even when he is in a vehicle other than the one insured by the insurer. However, in this instance, because the insured deliberately chose NOT to have UIM coverage as to the specific vehicle involved in the accident and thus did not pay for UIM coverage as to that vehicle, the *Burgess* Court refused to allow him to claim under the UIM coverage he had on other policies. Similarly, the Defendants decided not to obtain or pay for their own UIM coverage. Therefore, this limitation in the McRae’s Policy should be recognized and applied.

coverage because he is limited from asserting a UIM claim against the same Policy for damages arising from the same incident. Defendant has already received Policy limits under the liability coverage claim against this same Policy. If Defendant 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, Defendant chose not to do so, and now must live with the consequences of this decision. Similarly, if the Mr. Barron wanted twice the amount of liability coverage, then they could have requested, paid for, and obtained such additional liability coverage.

The *Burgess* case provided consequences to a claimant for not obtaining the type of coverage for which coverage is later sought. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) (An insured “has the ability to decide whether to purchase voluntary UIM coverage. Burgess chose not to do so....”). This decision aligns with the public policy analysis (set forth *supra* Section III) 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, Defendant, 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). 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 Defendants, 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 very similar to the Defendant’s reasoning, and just as this reasoning was rejected by the South Carolina Supreme Court, so too should this Court reject it.

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

Applying the South Carolina Supreme Court’s decision in *Burgess*, the Court of Appeals applied a UIM policy provision that completely eliminated UIM coverage for an insured. *Zurich Am. Ins. Co. v. Tolbert*, 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 III, 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 UIM limitation offend public policy (in fact it advances S.C.’s public policy of encouraging UIM), nor is it in conflict with the insurance laws of South Carolina.

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

In *State Farm Mutual Automobile Insurance Company v. Calcutt*, the South Carolina Court of Appeals allowed a limitation to the scope of UIM coverage in the form of a Worker's Compensation setoff, ruling that "section 38-77-160 does not prohibit a setoff provision, ... [t]herefore, State Farm's setoff provision does not conflict with our insurance laws." 340 S.C. 231, 233, 530 S.E.2d 896-97 (Ct. App. 2000). Calcutt was injured by an at-fault underinsured driver while driving employer's vehicle, which did not have UIM coverage. Calcutt had a personal UIM policy, the terms of which provided that UIM benefits would be reduced by amounts received under workers' compensation. Calcutt demanded payment of the UIM benefits from State Farm while he had a pending claim for workers' compensation benefits. State Farm brought a declaratory judgment action to determine application of the setoff provision. The *Calcutt* Court ruled that "nothing in State Farm's offset provision changes or contradicts the definition of an 'underinsured motor vehicle' under S.C. Code Ann. § 38-77-30(15). Similarly, nothing in section 38-77-160, which provides for UIM policies, conflicts with the setoff provision in Calcutt's policy." *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 233-34, 530 S.E.2d 896-97 (Ct. App. 2000). 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.

**4.      *Rowzie v. Allstate Insurance Company***

The Fourth Circuit Court of Appeals has observed that "because UIM coverage is optional in South Carolina, there is no prohibition on an insurer's ability to reduce the amount paid by reference to the insured's PIP coverage." *Rowzie v. Allstate Ins. Co.*, 556 F.3d 165, 168 (4th Cir. 2009) (applying S.C. law to reduce UIM coverage by the amount paid in PIP payments

in accordance with the policy provisions). “South Carolina law does not specifically prohibit UIM set-offs, and the state’s courts have expressly permitted insurers to offset UIM benefits based on worker’s compensation benefits.” *Rowzie 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 district 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 Barron Policy’s reasonable limitation on a third party claimant’s ability to receive policy limits twice against the same Policy for damages arising from the same accident.

**D. Duplicative Recoveries May Be Limited.**

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 Defendant alleges that his damages exceed the liability limits of the Barron Policy, unless he opted to purchase his own UIM coverage, he may not assert duplicate claims against the Barron 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 Omni Insurance

Group, Personal Auto Policy, South Carolina, Part A - Liability Coverage, Limit of Liability, B.2 pg. 6 (Exhibit B to the Complaint).

E. **Allowing Plaintiff 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.

**VI. BREACH OF THE POLICY MAY VOID NONMANDATORY COVERAGE.**

By refusing to list his daughter as a driver on the Policy, Mr. Barron breached his obligations under the Policy. Although such a breach may not invalidate mandatory coverage, South Carolina courts allow an insurer to suspend voluntary coverage in the event of a Policy breach. *See infra*. The purpose of the Motor Vehicle Financial Responsibility Act is to "afford greater protection to those injured through the negligent operation of automobiles in this State." *Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984). The South Carolina Legislature has provided that the South Carolina Motor Vehicle Financial Responsibility Act is to be construed so as to make uniform the laws of those states that enact substantially identical legislation. *See United Servs. Auto. Ass'n v. Markosky*, 340 S.C. 223, 228, 530 S.E.2d 660, 663 (Ct. App. 2000) (citing S.C. Code Ann. § 56-9-120). South Carolina, along with a number of other jurisdictions, has concluded that the Financial Responsibility Act was mandated by the legislature to protect innocent third parties, and therefore conduct by the insured in violation of the policy terms may not defeat coverage up to the applicable minimum limits required by the Act. *United Servs. Auto. Ass'n v. Markosky*, 340 S.C. 223, 227-30, 530 S.E.2d 660, 663-64 (Ct. App. 2000) (requiring only minimum limits to be afforded, despite policy coverage in excess of these minimum limits, where the insured failed to cooperate in the defense and went into default) (citing *Shores v. Weaver*, 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993) ("the purpose of the Motor Vehicle Financial Responsibility Act and the Automobile Reparation Reform Act of 1974 is to afford greater protection to those injured through the negligent operation of automobiles in this State."); *Universal Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co.*, 298 S.C. 404, 410, 380 S.E.2d 858, 862 (Ct. App. 1989) (the Financial Responsibility Act "provides no basis to hold that the provision of the

policy limiting coverage to the statutory minimum is contrary to public policy."); *Odum v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87, 91, 92 (N.C. Ct. App. 1991), review denied, 329 N.C. 499, 407 S.E.2d 539 (N.C. 1991) (Fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability for up to the statutory minimum amount once injury has occurred; however, where the policy limit was greater than the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud.); *Swain v. Nationwide Mut. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (N.C. 1960) (stating Vehicle Financial Responsibility Act of 1957 changed the law with respect to the compulsory amount such that a violation of a policy provision was not a defense to liability of the insurer, but as to any amount in excess of that, a policy provision requiring notice to the insurer would be enforced as written and a violation was a valid and complete defense); *Canal Ins. Co. v. Carolina Casualty Ins. Co.*, 59 F.3d 281 (1st Cir. 1995) (applying New Hampshire law to find Financial Responsibility Law prevails over any contrary policy provision, but in fairness to insurer, beyond this the exclusion stands); *Universal Underwriters Ins. Co. v. American Motorists Ins. Co.*, 541 F. Supp. 755 (N.D. Miss. 1982) (applying Mississippi law to hold employee exclusion is ineffective up to minimum limits, but it does not affect the enforceability of the exclusion from excess coverage); *Arceneaux v. State Farm Mut. Auto. Ins. Co.*, 113 Ariz. 216, 550 P.2d 87 (Ariz. 1976) (holding automobile liability's household exclusion invalid only to the extent it conflicted with the Financial Responsibility Act); *Prudential v. Estate of Rojo-Pacheco*, 192 Ariz. 139, 962 P.2d 213 (Ariz. Ct. App. 1997) (holding that upon proof of insured's misrepresentation, insurer would be entitled to rescission of policy as to the excess coverage); *DeWitt v. Young*, 229 Kan. 474, 625 P.2d 478 (Kan. 1981) (adhering to general rule to find household exclusion void only as to the minimum coverage required by

statute); *State Farm Mut. Auto. Ins. Co. v. Shelly*, 394 Mich. 448, 231 N.W.2d 641 (Mich. 1975) (holding that where an exclusionary clause is void as against statutory policy, reinstated coverage is limited to the amount required so that the vehicle is not an uninsured motor vehicle within the meaning of the statute); *State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523 (Mo. 1995) (holding household exclusion unenforceable up to statutory liability limits but valid as to any coverage exceeding those amounts); *Equity Mut. Ins. Co., v. Spring Valley Wholesale Nursery, Inc.*, 747 P.2d 947 (Okla. 1987) (finding with a geographical exclusion clause, freedom of contract principles control as to any vehicle coverage in excess of that required by statute); *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987) (holding that under Utah's then-applicable No-Fault Insurance Act household or family exclusion is valid as to insurance provided by an automobile policy in excess of the statutorily mandated amounts and benefits); *Allstate Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 619 P.2d 329, 333 (Utah 1980) (stating, in holding named driver exclusion unenforceable only to the extent of statutory minimum coverage, "contracting parties are free to limit coverage in excess of the minimum required limits, and the exclusion found in the contract is valid in relation to any coverage exceeding the minimum amounts. Thus, a balance is struck between the necessity of securing minimum automobile liability coverage and the availability of lower premiums because of the exclusion of high insurance risks."); *Tibbs v. Johnson*, 30 Wn. App. 107, 632 P.2d 904 (Wash. Ct. App. 1981) (noting non-cooperation is a valid defense to policy amount above the minimum limits); *Dotts v. Taressa J.A.*, 182 W. Va. 586, 390 S.E.2d 568 (W. Va. 1990) (concluding intentional tort exclusion in a motor vehicle liability insurance policy is precluded under Safety Responsibility law up to the minimum coverage required, but policy exclusion will operate as to any amount above the statutory minimum); *Pribble v. State Farm Mut. Auto. Ins. Co.*, 933 P.2d 1108 (Wyo.

1997) (recognizing majority of cases hold exclusions enforceable with respect to policy amounts in excess of the statutory minimum in holding household exclusion does not violate public policy where it provides for the statutory minimum coverage). Therefore, because UIM coverage is deemed to be voluntary coverage by South Carolina courts, *see supra* Section V.B., such voluntary coverage may be limited in the event of a Policy breach. This provides alternate sustaining grounds for determining that UIM coverage is not available to Defendant.

## **VII. SOUTH CAROLINA LAW & THE CONSTRUCTION OF POLICY TERMS.**

### **A. Courts Should Apply the Plain Meaning of the Policy Language.**

Contracts of insurance, like other contracts, should be interpreted according to general rules of contract construction and the language employed is to be understood in its plain, ordinary and popular sense. *Universal Underwriters Ins. Co. v. Metropolitan Property & Life Ins. Co.*, 298 S.C. 404, 407, 380 S.E.2d 858, 860 (Ct. 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 construction of an agreement is a matter of contract law. *McDuffie v. McDuffie*, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993). “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. Enter., Inc. v. South Carolina Health and Human Serv. Fin. Comm’n*, 296 S.C. 373, 377-378, 373 S.E.2d 584, 586 (1988) (quoting *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983)). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract’s language determines the instrument’s force and effect. *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). Therefore, this Court should apply the plain language of the UIM limitation so to prevent Defendant from making duplicate claims against a single Policy that is not his own. Having already recovered the full Policy limits, the plain language of the Policy precludes Defendant from seeking additional UIM coverage against this same Policy. Nothing prevents Defendant from seeking his own UIM coverage from his own policy.

**B. The Court Should Apply the Intent of the Parties to the 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). The intent of the parties to the Policy, being Mr. Barron and Omni, is as it plainly reads, as set forth *supra*, limiting third party claimants from making more than one claim for the damages against the same Policy arising from the same incident.

**C. Courts Should Not Rewrite a Policy.**

“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). Courts are limited to the interpretation of the contract made by the parties, regardless of its “wisdom or folly, apparent unreasonableness, or failure of the parties to guard their rights carefully.” *Gray*, 327 S.C. at 649, 491 S.E.2d at 274. “The court is without authority to alter a contract by construction or to make a new contract for the parties.” *Sphere Drake*, 313 S.C. at 473, 438 S.E.2d at 277. “[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, Defendant is not a party to this Policy and he is not allowed to seek to create terms to the Policy that do not exist, and this Court should not

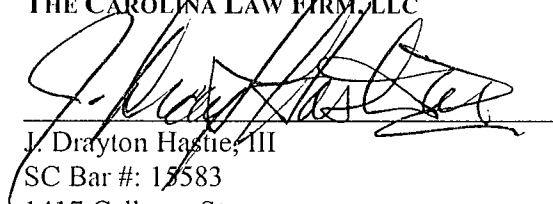
facilitate this effort by rewriting the Policy to provide UIM coverage that does not exist under the Policy. As noted *supra*, this is not a circumstance where Omni is seeking to deny coverage to the very people who paid the premiums and obtained the Policy. Nor is this an instance where Omni is seeking to avoid coverage entirely, as Omni has already paid its Policy limits. This is simply an instance where Omni seeks to uphold the Policy as it is written, which limits Defendant's ability to assert duplicate claims against a Policy that is not his own for damages arising from the same incident.

### **CONCLUSION**

In accordance with the reasoning and citation to authority as set forth herein, Omni respectfully requests that this Court recognize and uphold the UIM coverage limitation.

Columbia, South Carolina  
June 11, 2012

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**



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**Attorney for Omni Insurance Company**

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
Civil Action No.: 2012-CP-11-061

Omni Insurance Company, )  
Plaintiff, )

-v- )

Christopher Wright, )  
Defendant. )

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

Plaintiff's Attorney:  
J. Drayton Hastie, III Bar No. 015583  
Address:  
1417 Calhoun Street, Columbia, SC 29201  
Phone: (803) 319-2157 Fax: (803) 929-5333  
E-mail: [draytonhastie@sc.rr.com](mailto:draytonhastie@sc.rr.com) Other: \_\_\_\_\_

Defendant's Attorney:  
James B. Richardson, Jr. Bar No. \_\_\_\_\_  
Address:  
1229 Lincoln Street, Columbia, SC 29201  
Phone: (803) 799-9412 Fax: (803) 799-9628  
E-mail: [jbrcolumbia@gmail.com](mailto:jbrcolumbia@gmail.com) Other: \_\_\_\_\_

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)  
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)  
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Reconsider **15 mins**  
Estimated Time Needed: N/A Court Reporter Needed: **YES/ NO**

**SECTION II: Motion/Order Type**

- ☒ Written motion attached  
☐ Form Motion/Order

I hereby move for relief of action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

November 13, 2012  
Date submitted

**SECTION III: Motion Fee**

- ☒ **PAID - AMOUNT: \$25.00**  
☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support  
(check reason) ☐ Domestic Abuse or Abuse and Neglect  
☐ Indigent Status ☐ State Agency v. Indigent Party  
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief  
☐ Motion for Stay in Bankruptcy  
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)  
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_  
☐ Other: \_\_\_\_\_

**JUDGE'S SECTION**

**JUDGE CODE**

Motion Fee to be paid upon filing of the attached order.  
Other: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_, 20\_\_\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_

CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 NOV 16 AM 10 46  
BRANDY W. MCBEE

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

)  
SEVENTH JUDICIAL CIRCUIT

COUNTY OF CHEROKEE

FILED IN OFFICE OF

CLERK OF COURT

Action No.: 2012-CP-11-061

Omni Insurance Company,

CHEROKEE COUNTY, S.C.

Plaintiff, )

MOTION TO RECONSIDER

-v-

2012 NOV 16 AM 10 46

Christopher Wright,

)  
BRANDY W. MCBEE

Defendant: )

Plaintiff Omni Insurance Company (hereinafter, "Omni") hereby respectfully submits this Motion to Reconsider, pursuant to Rule 50(e) SCRPC, seeking that this Court reconsider its Order in favor Defendant's Motion for Judgment on the Pleadings. For the reasons discussed herein, and in accordance with the case law set forth in the prior Memorandum to the Court, Omni prays that this Court reconsider its Order file stamped October 30, 2012, and mailed on November 8, 2012 (hereinafter "Order"), and recognize the Policy provisions that limit the ability of a third party claimant who is not a resident relative of the Policyholder from recovering Policy limits twice against the same Policy for damages arising from the same accident.

#### STANDARD OF REVIEW

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff would entitle him or her to judgment. All properly pleaded factual allegations are deemed admitted for purposes of considering the motion for judgment on the pleadings. *Russell v. City Of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991).

I. **The Limit of Liability for UIM Coverage is Not the “Sum” of Two Limits Shown in the Declarations.**

On page five of the Order,<sup>1</sup> this Court states that “Omni’s ‘limit of liability’ for UIM coverage is the *sum* of two ‘limits of liability shown in the declarations,’ not a single number as is the case with the limit upon liability coverage.” This is mistaken. The Declarations Page to which this claim pertains and which was submitted and filed as an Exhibit to the Court, clearly identifies the Underinsured Motorist Bodily Injury limit to be \$25,000 per person. “Sum” is a term synonymous with “amount.” Black’s Law Dictionary confirms this, defining the term “sum” as “[t]he sense in which the term is most commonly used is ‘money;’ a quantity of money or currency, ... a sum of money...” *Id.* at 1435 (6<sup>th</sup> ed. 1990). Further, the Court quotes to a non-legal lay dictionary in support of an alternate meaning; however, the term “sum” possesses many meanings in the lay dictionary, and the more specific of which pertains to “sum” in the context of money, as is clearly the case here: “an amount or quantity, especially of money.” Webster’s Universal College Dictionary, at 788 (1997). Thus, the limit of liability is the amount shown on the Declarations of \$25,000.00 per person for UIM coverage.

Further, in the context of Defendant’s Motion for Judgment on the Pleadings, there is no basis for the Court to attempt to rewrite the Policy to provide double the \$25,000.00 in UIM coverage clearly identified in the Declarations as sought by the Defendant. South Carolina case law is clear, as cited in Omni’s prior memorandum, that a Court ought not rewrite a policy to create coverage. Evidence may be submitted by Plaintiff at trial by those who drafted the Policy and this Court ought not take such action prematurely and based purely upon the pleadings. For instance, it is equally plausible that the phrase referred to by the Court relates to liability for bodily injury under the underinsured motorist coverage, and not some amalgamation

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<sup>1</sup> This mistake is repeated on pages 8-9 of the Order as well.

of liability coverage and UIM coverage as proposed. There is absolutely no evidence to support such a conclusion at this stage of the litigation.

**II. The Policy Limits UIM Coverage Where Defendant Has Already Received Payment Under the Policy.**

The Policy limits a claimant such as Defendant to receiving only one payment under the Policy. There is no dispute that Defendant has received Policy limits once already. In subsequently making his UIM claim, Defendant 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, Defendant simply asserted the duplicate claims against different aspects of the Policy. This was in contravention of the Policy terms and limitations.

Further, on page 7, this Court mistakenly asserts that there is no corresponding limitation in the UIM section. The Policy provides: “No one will be entitled to receive duplicate payments for the same elements of loss under this Coverage<sup>2</sup> and Part A, Part B, Part C, or Part D of the Policy.” Omni Policy, Part C2 – Underinsured Motorist Coverage, Limit of Liability, D., pg. 16 of 37. This evinces a clear intent that the Policy limitation be applied uniformly, and that Defendant be limited to a single claim against the Policy. As argued to the Court in its memorandum, in construing these limitations, the Court should apply the plain meaning of the Policy terms. 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 (6<sup>th</sup> ed. 1990). The basis for Defendant’s demand for payment remained the same. The information submitted in support for his claim for

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

liability limits was the exact same as that submitted for the claim for UIM limits. Nothing new was submitted in support of the duplicate demand; the only difference lay not in the demand, but the target to which the demand was directed. *See* Amended Complaint for Declaratory Judgment, 3-4. Thus, it was a duplicate demand for payment, which provided the basis for the limitation to UIM coverage under the Policy. Further, in the context of Defendant's Motion for Judgment on the Pleadings, the allegations in the Complaint must be taken as true, and this limitation should be recognized and enforced. Evidence of the duplicate nature of this demand for payment may be submitted to the Court at the trial in the form of the written demand actually made by Defendant.

**III. Omni May Void a Section of the Voluntary Coverage without Voiding the Entire Policy.**

This Court erroneously presumes that Omni's intent is to void the entire Policy due to the failure of the named insured to identify his resident relative, adult daughter as a driver of one of two vehicles listed on the Policy. Because of this presumed intent, the Court erroneously dismissed this alternate sustaining ground for denying voluntary coverage, holding that the named insured would be a necessary party. *See* Order, pg. 10-11. There is no basis for this. Omni's position is as set forth in its Amended Complaint and Memorandum. Given the status of Defendant's Motion as one for Judgment on the Pleadings, Omni's pleadings must be taken as they appear. The true party at interest in the enforcement of the Policy terms pertaining to voluntary UIM coverage is the Defendant, 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 Defendant, as a third party to the Policy, is entitled to voluntary UIM coverage or whether the Policy limitations should be applied.

Further, Defendant's motion is not one to dismiss pursuant to Rule 19, SCRCR. Once again, Defendant's Motion is one for Judgment on the Pleadings. Under this format, such relief was neither requested nor appropriate at this juncture, even if such were necessary, which, given the allegations in the Amended Complaint, it is not.

**IV. This Court Should Recognize the Policy Limitations to UIM Coverage.**

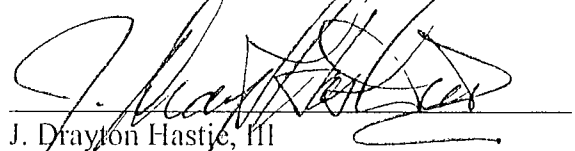
Plaintiff further requests that this Court reconsider the arguments as set forth in its memorandum to the Court, which are incorporated herein by reference, and that this Court deny Plaintiff's Motion for Judgment on the Pleadings, and that this Court recognize the Policy limitations regarding voluntary UIM coverage for nonresident passengers such as Defendant who have already received Policy limits for damages arising from the same accident on duplicate claims against the same Policy.

**CONCLUSION**

/ In accordance with the reasoning and citation to authority as set forth herein, Omni respectfully requests that this Court reconsider its Order and recognize and uphold the UIM coverage limitations.

Columbia, South Carolina  
November 13, 2012

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**



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Attorney for Omni Insurance Company

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

Civil Action #: 2012-CP-11-061

Omni Insurance Company,

Plaintiff,

vs.

Christopher Wright,

Defendant.

CERTIFICATE OF SERVICE

I certify that a copy of the Motion to Reconsider has been served upon the below named individuals and/or counsel this the 13<sup>th</sup> day of November 2012, via U.S. Mail and Email addressed as follows:

PARTIES SERVED

Law Offices of James B. Richardson, Jr.  
1229 Lincoln Street  
Columbia, SC 29201  
[jbrcolumbia@gmail.com](mailto:jbrcolumbia@gmail.com)

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 NOV 16 AM 10 47  
BRANDY W. MCBEE

Columbia,  
South Carolina

  
Courtney Austin

**Drayton Hastie**

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**From:** <tammy.humphries@cherokeecountysc.com>  
**To:** <draytonhastie@sc.rr.com>  
**Sent:** Tuesday, November 20, 2012 3:25 PM  
**Subject:** Motion "MRECON-Motion/Reconsider" for Case "2012CP1100061- Omni Insurance Company VS Christopher Wright" was added to a Motions Roster for 12/18/2012 at 9:30 AM

The case referenced in the email is scheduled on the Motions docket for Tuesday, December 18, 2012 at 9:30 am. The docket is available at <http://publicindex.sccourts.org/courtrosters/>. Any request for a continuance is considered a motion and requires a \$25.00 motion fee, which must be paid at the time of the request. Request may be submitted to the Common Pleas Administrative Judge J. Mark Hayes. If you have any communication regarding this case, please do NOT call this office. Please send it in writing, via fax (864)487-2754 or email at the following address: [tammyhumphries@cherokeecountysc.com](mailto:tammyhumphries@cherokeecountysc.com).

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12/17/2012

STATE OF SOUTH CAROLINA

COUNTY OF Cherokee

Omni Insurance Company  
Plaintiff,

vs.

Christopher Wright  
Defendant.

IN THE COURT OF COMMON PLEAS

7th JUDICIAL CIRCUIT

CASE NO.: 2012-CP-11-00061

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |  |                                                                                                                                                                                                                                          |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Plaintiff's Attorney: <u>S. Drayton Hustle III</u><br>_____, Bar No. <u>0015583</u><br>Address: <u>1417 Calloway St.</u><br><u>Columbia, SC 29201</u><br>Phone: <u>803-219-2157</u> Fax: <u>803-929-5333</u><br>E-mail: <u>draytonhustle@sc.rr.com</u>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  | Defendant's Attorney: <u>James B. Richardson</u><br>_____, Bar No. _____<br>Address: <u>1229 Lincoln St.</u><br><u>Columbia, SC 29201</u><br>Phone: <u>803-799-9412</u> Fax: <u>803-799-9888</u><br>E-mail: <u>jb@colombia@gmail.com</u> |  |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |                                                                                                                                                                                                                                          |  |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: <u>Motion for Reconsideration</u><br>Estimated Time Needed: <u>15 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |  |                                                                                                                                                                                                                                          |  |
| <b>SECTION II: Motion/Order Type</b><br><input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="display: flex; justify-content: space-between;"><div>Signature of Attorney for <input type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant<br/><u>[Signature]</u></div><div>Date submitted <u>12/18/12</u></div></div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |  |                                                                                                                                                                                                                                          |  |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$</b> <u>25.00</u><br><input type="checkbox"/> <b>EXEMPT:</b> (check reason)<br><div style="display: flex; justify-content: space-between;"><div><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br/><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br/><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br/><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br/><input type="checkbox"/> Motion for Stay in Bankruptcy<br/><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)<br/><input type="checkbox"/> Proposed order submitted at request of the court; or,<br/>Name of Court Reporter: _____<br/><input type="checkbox"/> Other: _____</div><div style="writing-mode: vertical-rl; transform: rotate(180deg);">FILED IN OFFICE OF<br/>CLERK OF COURT<br/>CHEROKEE COUNTY, SC<br/>DEC 18 PM 1<br/>RANDY W. MOORE</div></div> |  |                                                                                                                                                                                                                                          |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |  | JUDGE CODE _____<br>Date: _____                                                                                                                                                                                                          |  |
| <b>CLERK'S VERIFICATION</b><br>Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |  |                                                                                                                                                                                                                                          |  |

STATE OF SOUTH CAROLINA ) ~~SA~~ IN THE COURT OF COMMON PLEAS  
COUNTY OF CHEROKEE ) SEVENTH JUDICIAL CIRCUIT  
Omni Insurance Company, FILED IN OFFICE OF  
CLERK OF COURT Action No.: 2012-CP-11-061  
CHEROKEE COUNTY, S.C.  
Plaintiff, ) MOTION TO RECONSIDER  
-v- 2012 NOV 16 AM 10 46  
Christopher Wright, ) BRANDY W. MCBEE  
Defendant. )

Plaintiff Omni Insurance Company (hereinafter, "Omni") hereby respectfully  
submits this Motion to Reconsider, pursuant to Rule ~~59~~ <sup>59</sup> (e) SCRCP, seeking that this Court  
reconsider its Order in favor Defendant's Motion for Judgment on the Pleadings. For the reasons  
discussed herein, and in accordance with the case law set forth in the prior Memorandum to the  
Court, Omni prays that this Court reconsider its Order file stamped ~~October~~ <sup>Amended</sup> 30, 2012, and mailed  
~~on November 8, 2012~~ <sup>December 3</sup> (hereinafter "Order"), and recognize the Policy provisions that limit the  
ability of a third party claimant who is not a resident relative of the Policyholder from recovering  
Policy limits twice against the same Policy for damages arising from the same accident.

#### STANDARD OF REVIEW

A judgment on the pleadings against the plaintiff is not proper if there is an issue  
of fact raised by the complaint which, if resolved in favor of the plaintiff would entitle him or her  
to judgment. All properly pleaded factual allegations are deemed admitted for purposes of  
considering the motion for judgment on the pleadings. *Russell v. City Of Columbia*, 305 S.C. 86,  
406 S.E.2d 338 (1991).

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 DEC 18 PM 1 14  
BRANDY W. MCBEE

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I. The Limit of Liability for UIM Coverage is Not the "Sum" of Two Limits Shown in the Declarations.

On page ~~five~~<sup>four</sup> of the Order,<sup>1</sup> this Court states that "Omni's 'limit of liability' for UIM coverage is the *sum* of two 'limits of liability shown in the declarations,' not a single number as is the case with the limit upon liability coverage." This is mistaken. The Declarations Page to which this claim pertains and which was submitted and filed as an Exhibit to the Court, clearly identifies the Underinsured Motorist Bodily Injury limit to be \$25,000 per person. "Sum" is a term synonymous with "amount." Black's Law Dictionary confirms this, defining the term "sum" as "[t]he sense in which the term is most commonly used is 'money,' a quantity of money or currency, ... a sum of money..." *Id.* at 1435 (6<sup>th</sup> ed. 1990). Further, the Court quotes to a non-legal lay dictionary in support of an alternate meaning; however, the term "sum" possesses many meanings in the lay dictionary, and the more specific of which pertains to "sum" in the context of money, as is clearly the case here: "an amount or quantity, especially of money." Webster's Universal College Dictionary, at 788 (1997). Thus, the limit of liability is the amount shown on the Declarations of \$25,000.00 per person for UIM coverage.

Further, in the context of Defendant's Motion for Judgment on the Pleadings, there is no basis for the Court to attempt to rewrite the Policy to provide double the \$25,000.00 in UIM coverage clearly identified in the Declarations as sought by the Defendant. South Carolina case law is clear, as cited in Omni's prior memorandum, that a Court ought not rewrite a policy to create coverage. Evidence may be submitted by Plaintiff at trial by those who drafted the Policy and this Court ought not take such action prematurely and based purely upon the pleadings. For instance, it is equally plausible that the phrase referred to by the Court relates to liability for bodily injury under the underinsured motorist coverage, and not some amalgamation

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<sup>1</sup> This mistake is repeated on pages ~~4~~<sup>7-8</sup> of the Order as well.

SDt

of liability coverage and UIM coverage as proposed. There is absolutely no evidence to support such a conclusion at this stage of the litigation.

**II. The Policy Limits UIM Coverage Where Defendant Has Already Received Payment Under the Policy.**

The Policy limits a claimant such as Defendant to receiving only one payment under the Policy. There is no dispute that Defendant has received Policy limits once already. In subsequently making his UIM claim, Defendant 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, Defendant simply asserted the duplicate claims against different aspects of the Policy. This was in contravention of the Policy terms and limitations.

~~Further, on page 7, this Court mistakenly asserts that there is no corresponding limitation in the UIM section. The Policy provides: "No one will be entitled to receive duplicate payments for the same elements of loss under this Coverage<sup>2</sup> and Part A, Part B, Part C, or Part D of the Policy." Omni Policy, Part C2—Underinsured Motorist Coverage, Limit of Liability, D., pg. 16 of 37. This evinces a clear intent that the Policy limitation be applied uniformly, and that Defendant be limited to a single claim against the Policy.~~ SDH

As argued to the Court in its memorandum, in construing these limitations, the Court should apply the plain meaning of the Policy terms. 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 (6<sup>th</sup> ed. 1990). The basis for Defendant's demand for payment remained the same. The information submitted in support for his claim for

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

liability limits was the exact same as that submitted for the claim for UIM limits. Nothing new was submitted in support of the duplicate demand; the only difference lay not in the demand, but the target to which the demand was directed. See Amended Complaint for Declaratory Judgment, 3-4. Thus, it was a duplicate demand for payment, which provided the basis for the limitation to UIM coverage under the Policy. Further, in the context of Defendant's Motion for Judgment on the Pleadings, the allegations in the Complaint must be taken as true, and this limitation should be recognized and enforced. Evidence of the duplicate nature of this demand for payment may be submitted to the Court at the trial in the form of the written demand actually made by Defendant.

III. Omni May Void a Section of the Voluntary Coverage without Voiding the Entire Policy.

~~This Court erroneously presumes that~~ <sup>voluntary UIM</sup> Omni's intent is to void ~~the entire Policy~~ <sup>fraud by</sup> due to the failure of the named insured to identify his resident relative, adult daughter as a driver of one of two vehicles listed on the Policy. <sup>A</sup> ~~Because of this presumed intent,~~ <sup>IDA</sup> The Court erroneously dismissed this alternate sustaining ground for denying voluntary coverage, holding that the named insured would be a necessary party. See Order, pg. 10-11. There is no basis for this. <sup>@ P 7-11, 41-43</sup> <sup>@ Section VI</sup> Omni's position is as set forth in its Amended Complaint and Memorandum. Given the status of Defendant's Motion as one for Judgment on the Pleadings, <sup>IDA</sup> Omni's pleadings must be taken as they appear. The true party at interest in the enforcement of the Policy terms pertaining to voluntary UIM coverage is the Defendant, 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 Defendant, as a third party to the Policy, is entitled to voluntary UIM coverage or whether the Policy limitations should be applied.

Further, Defendant's motion is not one to dismiss pursuant to Rule 19, SCRCP.

Once again, Defendant's Motion is one for Judgment on the Pleadings. Under this format, such relief was neither requested nor appropriate at this juncture, even if such were necessary, which, ~~SDA~~

given the allegations in the Amended Complaint, it is not. *Awarding UIM coverage without resolution of the fraud alleged in the Pleading would be improper, especially*  
IV. This Court Should Recognize the Policy Limitations to UIM Coverage. *giving Defendant's Motion.*

Plaintiff further requests that this Court reconsider the arguments as set forth in its memorandum to the Court, which are incorporated herein by reference, and that this Court deny Plaintiff's Motion for Judgment on the Pleadings, and that this Court recognize the Policy limitations regarding voluntary UIM coverage for nonresident passengers such as Defendant who have already received Policy limits for damages arising from the same accident on duplicate claims against the same Policy.

#### CONCLUSION

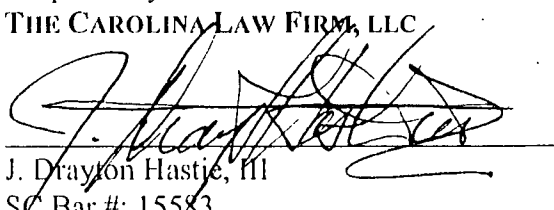
In accordance with the reasoning and citation to authority as set forth herein, Omni respectfully requests that this Court reconsider its Order and recognize and uphold the UIM coverage limitations.

Columbia, South Carolina

~~November 13, 2012~~

December 18

~~SDA~~

Respectfully Submitted,  
THE CAROLINA LAW FIRM, LLC  


J. Drayton Hastie, III  
SC Bar #: 15583  
1417 Calhoun Street  
Columbia, South Carolina 29201  
Tel: (803) 319-2157  
Fax: (803) 929-5333  
draytonhastie@sc.rr.com  
Attorney for Omni Insurance Company

BRANDY W. MCBEE  
2012 DEC 18 PM 1 14  
CHEROKEE COUNTY, S.C.  
CLERK OF COURT  
FILED IN OFFICE OF

STATE OF SOUTH CAROLINA  
COUNTY OF CHEROKEE

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
Civil Action #: 2012-CP-11-061

Omni Insurance Company,  
Plaintiff,  
vs.  
Christopher Wright,  
Defendant.

CERTIFICATE OF SERVICE

I certify that a copy of the Motion to Reconsider has been served upon the below named individuals and/or counsel this the 18<sup>th</sup> day of ~~November~~ December 2012, via U.S. Mail and Email addressed as follows:

*SDA*

PARTIES SERVED

Law Offices of James B. Richardson, Jr.  
1229 Lincoln Street  
Columbia, SC 29201  
[jbrcolumbia@gmail.com](mailto:jbrcolumbia@gmail.com)

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 NOV 16 AM 10 47  
BRANDY W. MCBEE

Columbia,  
South Carolina

*Courtney Austin*  
Courtney Austin

*J. Mark Austin*

FILED IN OFFICE OF  
CLERK OF COURT  
CHEROKEE COUNTY, S.C.  
2012 DEC 18 PM 1 15  
BRANDY W. MCBEE



Date: Tuesday, January 22, 2013 4:30 PM  
From: tammy.humphries@cherokeecountysc.com  
To: draytonhaslie@sc.rr.com  
Subject: Motion "MRECON-Motion/Reconsider" for Case "2012CP1100061- Omni Insurance Company VS Christopher Wright" was added to a Motions Roster for 2/19/2013 at 9:30 AM

The case referenced in the email is scheduled on the Motions docket for Tuesday, February 19, 2013 at 9:30 am. The docket is available at <http://publicindex.sccourts.org/courtrosters/>. Any request for a continuance is considered a motion and requires a \$25.00 motion fee, which must be paid at the time of the request. Request may be submitted to the Common Pleas Administrative Judge J. Mark Hayes. If you have any communication regarding this case, please do NOT call this office. Please send it in writing, via fax (864)487-2754 or email at the following address: [tammyhumphries@cherokeecountysc.com](mailto:tammyhumphries@cherokeecountysc.com).

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STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHEROKEE )  
  
Omni Insurance Company, )  
 ) TRANSCRIPT OF RECORD  
Plaintiff, ) 2012-CP-11-0061  
-vs- )  
 )  
Christopher Wright, )  
 ) June 11, 2012  
Defendant. ) Gaffney, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES, II, JUDGE

A P P E A R A N C E S:

J. DRAYTON HASTIE, III, ESQUIRE  
Attorney for the Plaintiff

JAMES B. RICHARDSON, JR., ESQUIRE  
Attorney for the Defendant

Margaret A. Woods  
Circuit Court Reporter

**ORIGINAL**

11

1 THE COURT: Alright, we'll go on the record on the matter  
2 of of Omni Insurance Company vs. Wright, believe that this is  
3 an action for a a declaratory judgment, is that correct, and  
4 that there's been a, defendant has filed a motion for judgment  
5 on the pleadings.

6 MR. HASTIE: That's correct, Your Honor, and just to  
7 supplement that with the consent of Mr. Richardson, he had  
8 identified an error in the original pleadings and so I  
9 corrected that error and had sent previously for the Court,  
10 uh, an amended clar -- complaint with a proposed consent  
11 order. I have that order here now, I think Your Your Honor  
12 unless you saw it this morning may not have had an opportunity  
13 to approve it.

14 THE COURT: Well they gave it to me and I've executed it.

15 MR. HASTIE: Well okay and if ---

16 THE COURT: That ---

17 MR. HASTIE: --- at all -- there was actually a typo on  
18 that on on an aside, and, uh, ---

19 THE COURT: So we're gonna consent to amend the  
20 amendment?

21 MR. HASTIE: Yes, sir.

22 THE COURT: Okay.

23 MR. HASTIE: Well just the the Order itself is is all  
24 that that that referenced the the the final line. I used a  
25 form from a prior Order and the the relief that was being

1 granted was the wrong relief.

2 MR. RICHARDSON: I was never in default, Judge, thank  
3 goodness.

4 MR. HASTIE: That's absolutely correct, Mr. Richardson's  
5 been very gracious.

6 THE COURT: Okay.

7 MR. RICHARDSON: Your Honor, please, Jim Richardson  
8 representing the defendant. Your Honor, the only matter  
9 technically before the Court today is the defendant's motion  
10 for judgment on the pleadings. Frankly, it might better have  
11 been styled a motion to dismiss under Rule 12(b)(6) for  
12 failure to state a claim but I don't think it makes much  
13 difference and Mr. Hastie and I have discussed with the clerk  
14 the fact that the the case appears to present almost entirely  
15 pure questions of law either in the interpretation of the  
16 contract or in the application of South Carolina case law and  
17 statutes ---

18 THE COURT: Um-hum.

19 MR. RICHARDSON: --- so it may be possible that we can  
20 argue the whole thing today and I say that with with the one  
21 exception: In a memorandum filed today, the plaintiff alludes  
22 to the fact that it may be contending as I read the memorandum  
23 that the UIM coverage of this policy is void because of a  
24 misrepresentation made by the named insured in the  
25 application. I don't know anything about that and if that

1 allegation survives today then we'll certainly need some  
2 discovery on that but and perhaps Mr. Hastie would like to add  
3 some comments to what I've just said.

4 MR. HASTIE: There are two alternate sustaining grounds  
5 in our declaratory judgment complaint the first of which being  
6 a limitation in the policy, Mr. Richardson has I think blew up  
7 some of those terms, and alternate sustaining grounds is the  
8 facts that the, uh, Mr. Barron is the person to whom the  
9 policy was issued. For five years prior to the accident, his  
10 daughter was living with him. Durin' that time period he  
11 never included her on the application, he never listed her as  
12 a driver, that would have affected the premium, it was a  
13 breach of his duties and obligations under the policy and so  
14 without launching further into a legal argument, he is  
15 correct, there are two alternate grounds there. Unless he's  
16 willing to stipulate to the fact that there was a breach, I I  
17 think he is correct that there may be some potential issues  
18 that that would have to be set forth either by affidavit or  
19 via testimony of the witnesses, however, for purposes of  
20 today's hearing of course all the statements in the pleadings  
21 are are deemed true for the purposes of a motion to dismiss or  
22 motion for judgment on the pleadings.

23 MR. RICHARDSON: Well I think that's true, Your Honor.

24 THE COURT: Okay.

25 MR. RICHARDSON: May it please the Court. The Omni

1 Insurance Company issued the policy in question to its named  
2 insured Mr. Barron, the policy was in force when the  
3 automobile, the insured automobile, was being driven by  
4 Mr. Barron's daughter Jennifer. The defendant Christopher  
5 Wright was a passenger in the automobile. Jennifer lost  
6 control of the car, it struck the guardrail and Mr. Wright  
7 suffered severe injuries as a result. Omni paid, in response  
8 to Mr. Wright's negligence claim against Jennifer, Omni paid  
9 it's full liability limits of twenty-five thousand dollars  
10 (\$25,000.00) this being a minimum limits policy. Since his  
11 injuries were far greater than that Mr. Wright made a second  
12 claim under the same policy under the mu -- under the  
13 underinsured motorist provisions of the Omni policy. Omni  
14 filed its declaratory judgment action stating that for a  
15 ver -- variety of reasons Mr. Wright would not be entitled to  
16 receive underinsurance. The first question that arises is is  
17 Mr. Wright a an insured under this policy, under the UIM  
18 provisions of this policy? Let me go back just one step, Your  
19 Honor. The policy in question has five different types of  
20 insurance. Part A deals with liability insurance, Part B  
21 deals with medical payments, Part C is in two parts, C(1) is  
22 uninsured motorist coverage and C(2) is underinsured motorist  
23 coverage, the fifth and final part, Part D deals with property  
24 damage to the car, so we're here today only in respect of, uh,  
25 part C(2) the underinsurance provisions of this policy and,

1 Your Honor, I've taken the liberty of of more for my benefit  
2 than yours of of blowing up some of the relevant excerpts from  
3 the policy in aid of the argument today. Here's (indicating)  
4 Part C(2) which is the underinsurance. Insured as used in  
5 this (indicating) part underinsurance means, number (1) "you",  
6 and that's defined to mean the named insured, "or any family  
7 member", (2) "any other person occupying your covered auto."  
8 Well Mr. Wright was another person occupying the covered auto,  
9 there's no question about it, that's stipulated and agreed, so  
10 he was an insured for the ben -- for the benefit of the  
11 underinsurance provisions of this policy. Omni didn't have to  
12 do that, this is not compulsory insurance. This is  
13 non-compulsory insurance, they can write their policy any way  
14 they want to. They've written it so that Mr. Wright  
15 unquestionably is insured so it's difficult for me to see how  
16 we get to the argument that he's not but we'll hear from my  
17 friend in just a minute about that.

18 Now there are three other substantive provisions in this  
19 policy which Omni relies upon in contending that even if he is  
20 an insured he's owed zero, that's the way I conceive of it, he  
21 can be an insured but be entitled to nothing.

22 THE COURT: Nothing under that paragraph C.

23 MR. RICHARDSON: Under C(2), Your Honor, the  
24 underinsurance. Now the first clause or provision that Omni  
25 cites is found in Part A "liability coverage" and each of the

1 five insurance parts contains its own limit of liability  
2 provision. This provision applies to the liability coverage,  
3 " We will pay damages for bodily injury," and the damages are  
4 defined elsewhere in the policy to mean damages which the  
5 insured is legally responsible to pay, in other words,  
6 liability damage. "We will pay damages which the insured  
7 becomes legally responsible to pay or because of an auto  
8 accident," and then in the next portion of Part A "the limited  
9 liability", "The limited liability as shown in the dec -- decs  
10 for each person", and that's twenty-five thousand dollars  
11 (\$25,000.00), "for bodily injury liability is our maximum  
12 limit of liability for all damages arising out of bodily  
13 injury sustained by any one person in an auto accident." So  
14 Omni says, Well if you read it as it, as it plainly says, all  
15 he gets is the amount shown on the dec. page for liability,  
16 twenty-five thousand dollars (\$25,000.000), not so. This  
17 provision applies to a limit of liability for Part A liability  
18 coverage only, in other words, nobody can ever get more than  
19 twenty-five thousand dollars (\$25,000.00) as a result of the  
20 liability of the named insured or whoever insured person is  
21 driving the car. They point to another provision in Part A,  
22 "liability coverage" paragraph B, "No one will be entitled to  
23 receive duplicate payments for the same elements of loss under  
24 this coverage," that's part.A "liability coverage," "and",  
25 Number 2 is the relevant one, "any underinsured motorist

1 coverage provided by this policy". So Omni says that they've  
2 paid twenty-five thousand (25,000) in liability, if they pay  
3 another twenty-five thousand in underinsurance (25,000),  
4 that's a duplication of the twenty-five thousand (25,000)  
5 they've already paid. There several reasons why this argument  
6 cannot possibly be sustained; number one, this is a limitation  
7 on liability coverage, it's and it provi -- prohibits  
8 duplicate payments under the liability coverage not the  
9 underinsurance coverage. They have already paid the liability  
10 coverage without question, it didn't duplicate anything. A  
11 similar prohibition of duplicate payments is not found in the  
12 UIM coverage and there's a good reason for that because  
13 underinsurance never duplicates liability insurance, by  
14 definition it can't. If the liability coverage had defrayed  
15 all the damages, the man wouldn't have a UIM claim, never  
16 could. Underinsurance by definition does not duplicate  
17 liability insurance, it's on top of liability insurance.

18 Then we come, Your Honor, from -- to the last provision  
19 quoted in the policy and this is in Part C (2) so it does  
20 apply, whatever it means it does apply. Here's what it says,  
21 "If bodily injury's sustained by an insured", Mr. Wright's an  
22 insured, "while occupying your covered auto, our maximum limit  
23 of liability for all damages arising out of bodily injury  
24 sustained by any one person in that accident is the sum of the  
25 limits of liability shown on the dec. page for each person

1 for," now this is literally what it says, "bodily injury  
2 liability underinsured motorist coverage". There two things  
3 relevant about this language; number one, we're looking for a  
4 sum, we're looking for the addit -- we're looking for two  
5 things to add together, both of which are presumably on the  
6 dec. page. There is no such thing in this policy as bodily  
7 injury liability underinsured motorist coverage, there's --  
8 the phrase is undefined nor could it ever be the sum of two  
9 things because that says one thing, whatever it is. This is a  
10 typo, can only be a typo, it must mean bodily injury liability  
11 and underinsured motorist coverage. You can never get more  
12 than twenty-five thousand (25,000) for the bodily injury  
13 liability and twenty-five thousand (25,000) for the  
14 underinsured motorist coverage. If you don't put the word  
15 "and" in that phrase then this is gibberish, this is nonsense,  
16 there's noth -- nothing to be summed but there's gotta be two  
17 things to have a sum and there's only one there and the one  
18 that's there doesn't make any sense, it's nowhere to be found  
19 in the policy. So, Your Honor, we think based on the three  
20 quoted provisions in the policy which are the subject of the  
21 DJ amended complaint we're entitled to judgment on the  
22 pleadings on all three of those. Now it's also alleged in in  
23 the complaint that, as Mr. Hastie said earlier, Mr. Barron did  
24 not tell Omni that his daughter Jennifer was driving the car  
25 and had been for five years, that's the bare allegation of the

1 complaint. There's no allegation as to the content of the  
2 application form, what they ask him to reveal, there's  
3 nothing, there's nothing further, just the bare allegation  
4 that he didn't tell them that one thing thing. If you're  
5 gonna try to avoid coverage as an insurance company, a  
6 necessary party to the action is a named insured for sure.  
7 They've not made any effort to join Mr. Barron as a defendant  
8 in this case, he certainly would wanna be heard and would be a  
9 necessary party to be heard in any action to void the  
10 underinsurance whether he's the claimant or not so we think  
11 the allegations of the complaint are ca -- unsustainable on  
12 that ground alone but if the Court disagrees and feels that  
13 this business about Mr. Barron not having revealed Jennifer as  
14 a a driver of the car, it it is sufficient to go forward, we  
15 would need discovery on that issue, as to everything else I  
16 submit we're entitled to judgment. Thank you.

17 MR. HASTIE: Thank you, Your Honor. As Mr. Richardson  
18 pointed out, this is not a situation in which Omni is seeking  
19 to avoid paying on a claim, this is a situation where, uh, you  
20 know, before any litigation was brought a Tyger River demand  
21 was made, an investigation was done and we tendered, Omni  
22 tendered its policy limits in exchange for a covenant not to  
23 execute. Now there were some questionable issues about the  
24 accident but ultimately they decided that the best interest  
25 would be served by insulating the insured from liability, uh,

1 personal liability under those circumstances and then after  
2 that settlement was done a renewed demand came for essentially  
3 policy limits again and so the purpose of this proceeding,  
4 Your Honor, is to determine is the claimant allowed to make  
5 two claims against the same policy for damages arising from  
6 the same accident when that claimant is not the clai -- is not  
7 the insured who opted for the UIM, is not the insured who paid  
8 for the UIM, he's not the insured to whom that UIM is entitled  
9 to go and I'm sure Your Honor is familiar with the legions of  
10 case on that, I do have a memorandum I plan to hand up, Your  
11 Honor, that that addressed the issue of the fact that that UIM  
12 insurance is personal and portable to the person, it it  
13 doesn't necessarily follow the auto and in this instance the  
14 claimant is a third party, he's not a resident relative, he's  
15 got his own family and situation, I think that that was  
16 admitted in the, in the pleadings, so this is a situation  
17 where he's trying after already getting the UIM limits to  
18 obtain an additional scope of recovery.

19 THE COURT: You mean he got the liability limits.

20 MR. HASTIE: Excuse me, yes, sir, Your Honor, I I  
21 misstated. After already getting the liability limits, he's  
22 he's seeking to to obtain those again. Now nothing this  
23 action would prevent him from seeking recovery of his own UIM  
24 type policy and if he had, if he had decided to get his own  
25 UIM insurance, that would have covered him but he chose not to

1 do so, Your Honor, and so under these circumstances he's bound  
2 by that decision. Now there have been several recent cases  
3 addressing UIM, the UIM Act, in particular, Your Honor, is  
4 *Burgess vs. believe Allstate -- Nationwide*, excuse me, Your  
5 Honor, and in *Burgess vs. Nationwide* there were limitations in  
6 the policy pertaining to the scope of UIM coverage and despite  
7 the fact that that he was even the one who did have UIM and  
8 was a first party insured under those circumstances, the Court  
9 determined that because he was in a vehicle that he decided  
10 not to get UIM, basically he was trying to stack versus other  
11 autos that did have UIM, the auto he was in that that was in  
12 the accident did not have UIM, he chose not to get UIM for  
13 that policy, the Court refused to allow him to stack his other  
14 UIM for his injuries because he chose not to get UIM. The  
15 Court further goes on to say that the public policy arguments  
16 that that any limitations UIM coverage would be, you know,  
17 against public policy or would actually be inaccurate because  
18 they they state in that case that the public policy of South  
19 Carolina is to encourage people to get their own UIM coverage  
20 on all available automobiles and failing to recognize the  
21 limitation would not advance that purpose. By the same token,  
22 Your Honor, the limitation in the policy here with respect to  
23 no duplicate payments, that is very much the similar  
24 circumstance. If Mr. Barron wanted fifty thousand dollars  
25 (\$50,000.00) in coverage, he could have opted and have gotten

1 fifty thousand dollars (\$50,000.00) in coverage. This isn't a  
2 situation where all of a sudden the the claimant is entitled  
3 to fifty thousand dollars (\$50,000.00) to make a fifty  
4 thousand dollar (\$50,000.00) claim against one policy for the  
5 same accidents where the limitations on the dec. page clearly  
6 say twenty-five (25) per person and that that is the  
7 limitation that goes across the board and where a third-party  
8 claimant has already made and received full liability  
9 payments, the limitation says that UIM is not afforded to that  
10 claimant. Now that's not to say across the board that he  
11 couldn't be entitled to UIM and so this is the purpose of the  
12 limitation of why it applies in a section where it's quoted.  
13 If, for instance, Mrs. Barron had been T-boned, for instance,  
14 by another, uh, by another vehicle and she wasn't at fault  
15 shall we say and that other vehicle was insufficiently insured  
16 then he could under those circumstances make a claim for UIM,  
17 however, it's in those circumstances where he's already  
18 received policy limits under the liability, he can't double  
19 dip again and seek an additional twenty-five (25), Your Honor,  
20 and that's the purpose essentially of the the limitation.  
21 Again, as I'm sure you know, this is not a situation dealing  
22 with mandatory limits of either UM or liability which you  
23 can't have policy limitations limiting. UIM has been held  
24 pretty much across the board to be voluntary coverage and  
25 under those circumstances voluntary coverage may be limited in

1 the, in the courts with -- in accordance with the agreement  
2 between the the person who's contracting for the policy and  
3 the insured and that of course is not the claimant, that would  
4 be Mr. Barron and Omni Insurance Company and they're available  
5 and able to agree that those terms under the policy that they  
6 deem prudent and Mr. Wright as the claimant is essentially,  
7 you know, coming and objecting to those terms and he has no  
8 more right to object to the terms of the policy than he would  
9 to object to Mr. Barron for instance refusing UIM coverage  
10 when, you know, obviously Mr. Barron did decide to get it for  
11 himself but he just doesn't have standing on those grounds to  
12 object to those terms.

13 Again, in addition to the limitation as to no duplicate  
14 payments, you can't make a double dip claim, there is of  
15 course the issue where Mr. Barron in the application and all  
16 follow-ups refused to identify his his adult daughter as, uh,  
17 being on the policy, she was allowed and, uh, and and used the  
18 vehicle and did in fact use the vehicle, that would have  
19 affected the premium, it would have gone up and as such it was  
20 a breach of the policy for him to have done that and under  
21 those circumstances, Your Honor, and I've got cases detailed  
22 in my brief here as well, the South Carolina courts do allow  
23 non-mandatory coverage to be invalidated as a result of that.  
24 Now Mr. Richardson brings up the point, Well if you're gonna  
25 be denying coverage, you need to implead Mr. Barron as a

1 party, however, that for gets a key issue: In this instance  
2 Omni has fulfilled its duties to its insured by getting a  
3 covenant not to execute insulating them from all personal  
4 liability arising as a result of the accident and Mr. Barron  
5 doesn't have any interest in the UIM claim, it's purely the  
6 claimant who has the interest in this particular UIM claim so  
7 again as to that particular issue we would believe that the  
8 parties at interest here are the appropriate parties interest  
9 and we would request that, uh, the policy limitations be  
10 enforced and that mis -- the claimant be limited to his  
11 liability limits which he has already received.

12 THE COURT: Any reply?

13 MR. RICHARDSON: Briefly, Your Honor. Uh, I don't object  
14 to anything in this policy, nothing at all, I I want the  
15 policy to be enforced as is written. I heard my friend say  
16 that if the the insured automobile had been T-boned then my  
17 client would be entitled to claim UIM coverage, in other  
18 words, he isn't insured under this policy, that's the way they  
19 wrote it. He's an insured. I think the the the really the  
20 heart of their argument is this duplicate payments coverage  
21 claim and let's see, where is it, right here (indicating).  
22 Again, let me emphasize this is from the liability coverage  
23 Part A. This clause is not found in the UIM coverage.  
24 Liability payments cannot duplicate other payments including  
25 underinsured payments but the converse is not true. There's

1 no pro -- no provision prohibiting the duplication of  
2 uninsured motorist coverage with liability coverage but again  
3 I get back again to the, to the heart of of what i -- what UIM  
4 is. There can be no duplication of UIM, that's why that  
5 provision is not found in the UIM portion, it wouldn't make  
6 any sense. UIM coverage never duplicates liability coverage.  
7 If your liability coverage fully compensated the injured  
8 party, he wouldn't have a UIM claim, there'd be nothin' to  
9 duplicate. It's only when his injuries are greater than  
10 liability that he has a UIM claim and then by definition it  
11 can't be, there can't be a duplication, that's why it's not  
12 found in Part C(2) "the underinsured".

13 Again, Your Honor, I don't wanna beat this dog to death  
14 but on this business about not showing Jennifer as a of  
15 somebody who used the car, the policy itself defines as  
16 insureds any resident relative of the household so why'd they  
17 put that in there if they're not gonna insure Jennifer but  
18 here's (indicating) the dec. page and all it says is, "Driver  
19 Anthony Barron". Apparently they don't contemplate listing  
20 everybody who might ever drive the automobile, they only call  
21 for that and they name one driver the named insured but in any  
22 case if we're gonna go further about whether they have a claim  
23 of invalidity of the UIM coverage because he said something  
24 wrong on the application, we would have to have discovery and  
25 go forward on that. Thank you, Your Honor, that's all.

1 MR. HASTIE: If I may respond to one item, Your Honor.

2 THE COURT: Sure.

3 MR. HASTIE: As he points out, the limitation on the  
4 duplication is set forth there on the liability limits and the  
5 reason for that is because that limitation only applies where  
6 a claimant has already received the liability limits ---

7 THE COURT: You said.

8 MR. HASTIE: The limitation on the that you you don't get  
9 to double dip a non-duplicate claimant limitations, Your  
10 Honor, ---

11 THE COURT: You're talkin' about ---

12 MR. HASTIE: There's a copy, there's a full copy of the  
13 policy that they -- is on file with the Court, Your Honor, and  
14 and I'm happy to hand up a an extra copy as well just so you  
15 don't have to squint purely at that one.

16 THE COURT: I'm no -- I'm getting old but I can still  
17 see.

18 (Laughter.)

19 MR. HASTIE: I I would have to squint from there, Your  
20 Honor, so I I say that in in in the -- anyway, for for for  
21 ease of of the the Court and myself, I'm happy to hand up an  
22 extra copy but the the the purpose of the limitation and  
23 liability is there because it only where a liability claim has  
24 first been made that it comes into effect. As as we  
25 stipulated before, had Mr. Wright not sued mis -- Mr. Barron

1 and received the policy limits for liability if it had been a  
2 third party that had caused the accident he could have the the  
3 the UIM coverage there so again, this isn't a situation where  
4 we're tryin' to block all claims at all instances or anything  
5 untoward of that nature, it's simply a situation where you're  
6 tryin' to limit a claimant from double dipping on the same  
7 claims against the same policy where they've already received  
8 the policy limits once and when the dec. page says twenty-five  
9 thousand (25,000) per person.

10 THE COURT: Now let me ask you a question.

11 MR. HASTIE: Yes, sir, Your Honor.

12 THE COURT: Tell me what C(2) means now and tell me what  
13 C(2) means standing alone if it reads, "If bodily injury is  
14 sustained in in an accident by any insured while occupying  
15 your covered vehicle," alright, "if bodily injury" and I think  
16 you are agreeable that they got, somebody's got severe  
17 injuries so that's bo -- the bodily injury, "is sustained in  
18 an accident", that that's not contested it's an automobile  
19 accident, "by any insured" and I think you would agree that  
20 according to the definition of insured above any other person  
21 occupying your covered automobile it makes him an insured for  
22 purposes of this policy, "while occupying your covered  
23 vehicle", I think you are, I'm not hearing any disagreement it  
24 says the vehicle was actually covered.

25 MR. HASTIE: It -- vehicle is listed on the dec. page.

1 THE COURT: Right, "our maximum limit of liability for  
2 all damages arising out of bodily injury sustained by any one  
3 person in that accident is the sum of the limits of liability  
4 shown in the declar -- declarations for each person for bodily  
5 injury liability underinsured motorist coverage."

6 MR. HASTIE: Your Honor, I think the what what that  
7 refers to there, uh, and I've got a copy of of the dec. page  
8 here but is is the bodily injury for the uninsured motorist  
9 and whether or not they would be liable for that or not,  
10 it's ---

11 THE COURT: Well how how much is the underinsured  
12 motorist coverage on this policy?

13 MR. HASTIE: It is twenty-five (25), the same as the  
14 minimum limits.

15 THE COURT: I mean, what what's -- why not treat this,  
16 why treat this differently than in the numerous cases that I  
17 had in private practice and then that really I don't really  
18 see this many cases in in in court because it's just automatic  
19 known that you stack these coverages, why treat this  
20 differently than those types of cases when reading a  
21 reasonable reading of the policy's terms, a policy that was  
22 drafted by, assumably drafted by the insurance company and a  
23 reasonable reading of these terms is that underinsured  
24 motorist coverage in the amount of that twenty-five thousand  
25 dollars (\$25,000.00) would be available to this person, why

1 not read it that way?

2 MR. HASTIE: Well Your Your Honor brings up a very good  
3 point and and that was that you don't often see this because  
4 there's a lot a of body a case law dealing with stacking and  
5 things of that nature. Stacking as Your Honor knows applies  
6 only to a Class I insured, not a third-party claimant who's  
7 not a resident relative under the policy, so that's ---

8 THE COURT: So you wanna make the distinction that,  
9 excuse me for interrupting because I ---

10 MR. HASTIE: Yeah.

11 THE COURT: --- I wanna get to this point, you wanna make  
12 the distinction that it's not mandatory coverage and that's,  
13 and that's the difference in this case than the other cases.

14 MR. HASTIE: That is absolutely correct, Your Honor, and  
15 it is not the person who opted for and paid for the UIM  
16 coverage. In this instance he did not choose UIM coverage,  
17 he's not the one who paid for it, he is protected by the  
18 liability policy that is there. The UIM is personal and  
19 portable to Mr. Barron and his family, not to Mr. Wright under  
20 these circumstances where he's already received the policy  
21 limits.

22 THE COURT: But why should I sit here and and say that  
23 Mr. Barron did not actually intend to have this coverage and  
24 he wanted to buy it and he was generous and he saw that he  
25 would be having third parties occupy his vehicle and that he

1 wanted to have coverage that would extend underinsured  
2 motorist coverage to these third parties and that is there a  
3 prohibition against him from actually buying that type a  
4 coverage?

5 MR. HASTIE: That would be called a fifty thousand dollar  
6 (\$50,000.00) liability policy, Your Honor.

7 THE COURT: But not the way this policy is written.

8 MR. HASTIE: The the way this policy is written it is  
9 to ---

10 THE COURT: Because he ---

11 MR. HASTIE: --- preclude ---

12 THE COURT: --- want -- excuse me for one moment, sorry  
13 to interrupt, because he saw that he wanted to give the people  
14 that occupy his car as a passenger some liability protection  
15 and then if there was a wreck that was, that he happened to be  
16 at at fault of a driver of one of his cars with a passenger in  
17 it, in in it, in in his car give that person the ability to go  
18 back to their insurance company and apply any insurance they  
19 might have through automobiles of which a a household which  
20 they were a member of that might have coverage that would  
21 apply and then if by chance that didn't satisfy, allow them  
22 the opportunity to come and apply this underinsured motorist  
23 coverage under the policy that Mr. Barron so generously bought  
24 from the insurance company and then make the assumption that  
25 he actually read this policy and read it in a reasonable

1 fashion and understood this language, why do I want to sit  
2 here and say that a reasonable reading of this insurance  
3 policy that is drafted by Omni and applying a reasonable  
4 reading to it that then I should take away insurance coverage?

5 MR. HASTIE: Well again, Your Honor, I I think that the  
6 the reasonable reading and what's clear to the parties is is  
7 exactly as it is set forth here on on the summary and it's  
8 twenty-five (25) per person and it couldn't be more clear in  
9 in that regard. He has received his twenty-five (25), the  
10 limitation is there so that it's trying to be as broad and as  
11 expansive as possible where UIM can be afforded under any  
12 circumstance except where he has already received his  
13 twenty-five (25).

14 THE COURT: And you think that's what that section tells  
15 me?

16 MR. HASTIE: That is the intent of that section, Your  
17 Honor, yes, sir, is to limit it under those circumstances and  
18 and, Your Honor, if I may, it's it's set forth in my brief but  
19 it does serve a purpose as well in terms of protecting the  
20 named insured, being the people who opted for the UIM and paid  
21 for the UIM. If you take for instance this, these are not  
22 facts that apply in this particular case, Your Honor, but it  
23 illustrates another purpose behind this limitation, if you  
24 take for instance where Mr. Barron was drivin' down the road  
25 with his daughter, uh, and say two passengers in the back ---

1 THE COURT: Um-hum.

2 MR. HASTIE: --- and he has an accident and, you know,  
3 say it's his fault under those cir -- or somebody hits,  
4 somebody hits them, it's not his fault, somebody hits 'em and  
5 they don't have enough coverage to pay for everyone. Now the  
6 UIM coverage again, you you buy it for for your your family,  
7 you buy it as you say to to provide those circumstances where  
8 the at-fault party isn't, uh, sufficiently insured, that would  
9 be primarily his daughter and and and himself under by by  
10 limiting the ability to, you know, have a double dip claim  
11 that UIM applies solely for the purposes of Mr. Barron and the  
12 daughter, not necessarily for the the third party passengers  
13 in the back and those are the ones who who again, I mean,  
14 they'd they'd be entitled to the benefit if they had not  
15 already been, you know, received the the full liability  
16 limitation but it it protects and say for instance Ms. Ms.  
17 Barron's, you know, injuries are fifty-one thousand (51,000),  
18 she would have to apportion that UIM with the other people  
19 rather than have it entirely for themselves. If the other  
20 people wanted UIM coverage, they are perfectly able and to to  
21 get UIM coverage, as as Your Honor knows, it's it's offered  
22 with with every single policy that that's out there,  
23 unfortunately under these circumstances Mr. Wright decided he  
24 didn't want it and now he's trying to get it and and it's  
25 under those circumstances that, uh, I think he made a

1 imprudent decision, ---

2 THE COURT: Well what ---

3 MR. HASTIE: --- I I wish that he'd had gotten ---

4 THE COURT: --- what what was the imprudent decision?

5 MR. HASTIE: Not to have his own UIM coverage.

6 THE COURT: I mean, do we even know that Mr. Wright had a  
7 car?

8 MR. RICHARDSON: I I I don't, Your Honor, and that's ---

9 THE COURT: Yeah.

10 MR. RICHARDSON: --- certainly not in the pleadings.

11 THE COURT: Yeah, I mean, ---

12 MR. HASTIE: As to it is in the pleadings that he didn't  
13 have his own UIM coverage.

14 MR. RICHARDSON: Well it's not in the pleadings that he  
15 had a car or that he turned down UIM ---

16 THE COURT: Yeah, ---

17 MR. RICHARDSON: --- and I don't know that.

18 THE COURT: --- okay. I mean, and you use the term  
19 "double dip", I mean, if injuries have been sustained that far  
20 exceed both the liability coverage and the underinsured  
21 motorist coverage assuming that both are applicable, how is  
22 that double dipping?

23 MR. HASTIE: Um, it would be the same claim, uh, for the,  
24 from the same accident against the same policy. You're taking  
25 a twenty-five (25) per person limit and you're doubling it to

1 fifty (50), that that would be the ---

2 THE COURT: Double ---

3 MR. HASTIE: --- double ---

4 THE COURT: --- dipping denotes to me that there's  
5 something evil or sinister about receiving the payment when it  
6 is simply the person that has been injured trying to be  
7 adequately compensated for the damages that have been  
8 received.

9 MR. HASTIE: I I don't mean to infer that Mr. Wright is  
10 evil certainly by any means but, uh, certainly to the extent  
11 that I I'm trying to to illustrate on a twenty-five (25)  
12 limits policy you don't get fifty (50) under these  
13 circumstances, you get twenty-five (25) and he's limited to  
14 his liability limits; if he's trying to double it, that that's  
15 the double dipping so I I didn't mean to to refer to it ---

16 THE COURT: Would you agree that that he doesn't get to  
17 receive both the liability and underinsured coverage unless  
18 the policy provides for it?

19 MR. HASTIE: Um, I would agree that, uh, he can make ---

20 THE COURT: Bad question.

21 MR. HASTIE: --- liability ---

22 THE COURT: Bad question, let me rephrase the question.  
23 Is there, is there case law out there that prohibits a reading  
24 of an insurance policy to allow for receipt of i -- of  
25 liability coverage and also underinsurance coverage that

1 prohibits, it just says it -- you can't do it?

2 MR. HASTIE: I I'm not sure if I follow Your Honor. I I  
3 do have a lotta case law that recognize UIM limitations and  
4 that's essentially what we have is non-mandatory coverage with  
5 a limitation where if you make a liability claim you can't  
6 double and make a a subsequent UIM claim and under those  
7 circumstances the Supreme Court of South Carolina in the  
8 *Burgess* case have have have recognized the application of  
9 those limitations. Now ---

10 THE COURT: In *Burgess* ---

11 MR. HASTIE: --- I I will stipulate, Your Honor, yes,  
12 that that there there's no case on point with this particular  
13 set of facts and so this is an un un, uh, unresolved issue. I  
14 I do know other circuit courts have ruled on it and enforced  
15 it but no circuit courts are binding upon the other so I'd be  
16 happy to hand one of those up to Your Honor if if you like but  
17 I I again, it's it would be just I imagine advisory for that  
18 purpose but other, other than another circuit, this particular  
19 issue has not been, uh, ---

20 THE COURT: Whatever ---

21 MR. HASTIE: --- addressed ---

22 THE COURT: --- you'd like and I --and please do not  
23 consider that, feel like I'm picking on you, I'm ---

24 MR. HASTIE: No, no, ---

25 THE COURT: --- I'm asking questions.

1 MR. HASTIE: --- I I I welcome a hot bench, Your Honor, I  
2 prefer it to tell you the truth.

3 THE COURT: Uh, okay. You say it's *Burgess* you want me  
4 to look at.

5 MR. HASTIE: Um, yes, sir, and if I may, uh, may I hand  
6 up the memo, I gave a copy to, uh, and I filed it as well.

7 (Whereupon, counsel handed the document to the Court.)

8 THE COURT: I think ---

9 MR. HASTIE: And there there been cases since *Burgess*,  
10 Your Honor, also similarly applying it.

11 THE COURT: Yeah, I've got yours, yeah.

12 THE CLERK: He has it.

13 MR. HASTIE: Okay.

14 (Whereupon, the Court handed the document back to the  
15 plaintiff's attorney.)

16 MR. HASTIE: Um, and I imagine if you have the file  
17 attached to the original complaint is a copy of the dec. page  
18 and the, uh, policy language just for for future reference,  
19 Your Honor. If you need me or I can hand up ---

20 THE COURT: Alright, let me ask you ---

21 MR. HASTIE: Do you want me to hand this up as well or do  
22 you have one?

23 THE COURT: What is that?

24 MR. HASTIE: This is just the dec. declarations page ---

25 THE COURT: If it's ---

1 MR. HASTIE: --- and a copy of the ---

2 THE COURT: --- attached to the complaint, I know I've  
3 got the complaint.

4 MR. HASTIE: Okay, it it's there, Your Honor.

5 THE COURT: Cherokee's, the clerks office is good about  
6 not losing documents.

7 MR. HASTIE: I I didn't mean to infer that.

8 THE COURT: No, I mean, I I I meant compared to other  
9 places, okay. Alright, and tell me again what's your reading  
10 of that Part A liability coverage paragraph B, what -- why  
11 does that not limit it or ---

12 MR. RICHARDSON: Your Honor, each of the five insurance  
13 parts of this policy ---

14 THE COURT: Right.

15 MR. RICHARDSON: --- it's really five different, might as  
16 well be five different insurance policies, each one has a it  
17 starts off by saying we cover everything, we will pay damage  
18 and then what they do is later on in a subsequent paragraph  
19 limited liability they say "but no more than" and each of the  
20 parts of this policy has its own separate limit of liability.  
21 The underinsurance has this (indicating) one, the liability  
22 coverage has that (indicating) one. This (indicating) one  
23 applies to liability, this (indicating) one applies to  
24 underinsurance. You can't have that both of 'em don't apply,  
25 can't. The best they can get outta that is that there's some

1 ambiguity that maybe you take the liability, limited liability  
2 and in Part A and cut and paste it and put it down here  
3 (indicating) as an additional limited liability in the  
4 Part C(2) underinsurance but we know how ambiguities are  
5 resolved in South Carolina if there is one but there's really  
6 not one. This is a limitation, it says if you make a  
7 liability claim you can never get more than the liability  
8 limit, that's what it means. We're not here today about  
9 uni --- about liability insurance, we're here about  
10 underinsurance and once again I haven't heard my friend refer  
11 to the what's the sum. Un -- underinsurance is limited by the  
12 sum of two things, gotta be two things. This is non-existent,  
13 there's no such thing on the dec. page as this phrase here  
14 (indicating). You got to insert the word "and", bodily injury  
15 liability and underinsurance, uh, underinsured motorist  
16 coverage to get a sum of two things and that would be  
17 twenty-five (25) and twenty-five (25) is fifty (50) and  
18 there's no double dipping because my client hadn't come  
19 anywhere close to being compensated for his injuries even if  
20 he did get the full fifty (50).

21 MR. HASTIE: And, Your Honor, I would simply state that  
22 "sum" is a word meaning a figure or an amount and does not  
23 necessarily denote the addition of two items together and  
24 obviously they -- I I don't think that "and" should be read  
25 into that, I think you should just read it under its its plain

1 language. If "and" were to be read into it then you would  
2 have a circumstance where the UIM limits would be in excess of  
3 what the minimum limits would be since it would be a fifty  
4 (50), it be, it be twice that amount and as you know your UIM  
5 is limited to whatever your liability is. You can't have  
6 liability of twenty-five (25) and then UIM of some greater  
7 number, uh, so I would certainly say that that since  
8 statutorily it's required that way the intent is not to add  
9 the two together, the intent is that it be twenty-five (25) as  
10 it reads.

11 THE COURT: Alright, and and you're wanting me to declare  
12 that there is coverage but based on just a limited reading of  
13 the pleadings?

14 MR. RICHARDSON: Yes, Your Honor, we we've  
15 counter-claimed for coverage, uh, and the only motion  
16 technically before you today is judgment on the pleadings but  
17 that would involve a declaration of coverage, in other words,  
18 the pleadings being the complaints say no coverage and the  
19 counter-claim showing coverage, same coverage.

20 MR. HASTIE: And and I believe we do have the other issue  
21 as to the other component where he indicated that he'd wanna  
22 do some discovery and we can do that. I don't know if Your  
23 Honor would wanna have a second hearing and decide it together  
24 or whatever ---

25 THE COURT: Or give it to somebody else.

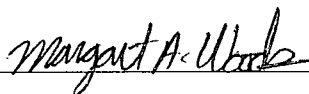
1 (Laughter.)  
2 MR. HASTIE: Kick it down ---  
3 MR. RICHARDSON: We don't wanna ---  
4 MR. HASTIE: --- the line, that's right.  
5 MR. RICHARDSON: --- go through this again, Judge.  
6 THE COURT: Alright, I think I understand. Alright,  
7 we'll go off the record.  
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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on June 11, 2012 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 31, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

June 13, 2013



Margaret A. Woods, Court Reporter

in and for the State of South Carolina at Large.

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STATE OF SOUTH CAROLINA

-----x

OMNI INSURANCE COMPANY,  
Appellant,

Case No.  
2012-CP-11-0061

-against-

CHRISTOPHER WRIGHT,  
Respondent.

-----x

February 19, 2013  
Gaffney, S.C.

B E F O R E:

HONORABLE J. MARK HAYES

A P P E A R A N C E S:

J. Drayton Hastie, Esquire  
Attorney for the Petitioner

James B. Richardson, Esquire  
Attorney for the Respondent

Aileen Butler  
Official Court Reporter

1 THE CLERK: The next case is  
2 2012-CP-11-0061, Omni Insurance versus  
3 Christopher Wright.

4 THE COURT: All right. I got this is as  
5 Omni Insurance Company versus Wright and that we  
6 are again present on a Motion to Reconsider. I  
7 will be more than happy to hear from you.

8 MR. HASTIE: Thank you, very much, Your  
9 Honor.

10 Drayton Hastie here on behalf of Omni  
11 Insurance Company. Your Honor, this motion  
12 arises out of a motion for judgement on the  
13 pleadings in the context of a declaratory  
14 judgement action that was brought between Omni  
15 Insurance Company and the claimant, Christopher  
16 Wright, to construe the terms of the policy in  
17 order to determine whether the limitation on the  
18 UMI coverage was effective and recognizable and  
19 would prevent a third-party claimant, that being  
20 a nonresident, non-relative member, essentially a  
21 guest passenger in the vehicle, to be able to  
22 assert whether liability claim which is mandatory  
23 coverage as required under the South Carolina  
24 financial responsibility act and also a UMI claim  
25 which is non-mandatory coverage in which the

1 Courts have stated as set forth in prior motions  
2 submitted to this Court, may be limited provided  
3 that it is not in violation of any statute or  
4 public policy.

5 The key issue here really, Your Honor,  
6 relates to the construction of the limitation.  
7 Now the limitation states -- and Your Honor has  
8 it in the amended order superseding the order  
9 dated October 25, 2012, but the limitation  
10 essentially limits duplicate payments for the  
11 same claim for those third party claimants.

12 Now Your Honor construes at the urging of  
13 claimant's counsel, that duplicate payments be  
14 construed to mean duplicate damages. And the  
15 Court goes on to note that any UMI claim it is  
16 impossible to have duplicate damages. And Your  
17 Honor, we would simply point out that in  
18 construing a policy to mean an impossibility that  
19 would be an improper construction, Your Honor,  
20 and we would request that the Court construe it  
21 in the fashion in which it was intended and that  
22 mean than duplicate payments mean duplicate  
23 claims. Because in the context of these  
24 insurance policies and things of these nature  
25 payments don't get made unless there is a claim.

1       Whereas construing as duplicate damages creates  
2       impossibility which Your Honor notes in his order  
3       on page six can never arise. So under the  
4       context where you have a duplicate claim for the  
5       same damages arising from the same accident  
6       asserted in claims against the same policy it is  
7       our position Your Honor that this limitation  
8       would come in. It would allow Omni to limit the  
9       damages that have been paid in this matter to  
10      25,000 under the liability coverage.

11           In addition Your Honor, the order makes note  
12      of the fact that the policy should be construed  
13      to mean a sum when it talks about the sum of the  
14      limit of the damages, Your Honor. And the Court  
15      construes sum to mean in the sense of a  
16      mathematical equation, the addition of two  
17      separate figures.

18           Your Honor, I would simply point to the  
19      Court that in this context if you are reading it  
20      as the many decisions required in the context  
21      of the policy, sum arises in the context of UMI  
22      claims. UMI claims of course being payments  
23      which are sums of money and in the context both  
24      of Blacks Law Dictionary in addition to the  
25      legal - - I am sorry, the non-legal language

1 cited provided at the urging of claimant's  
2 counsel, sum in that context just simply means  
3 an amount of money, not necessarily the addition  
4 of two separate figures, Your Honor.

5 Lastly Your Honor, as I noted at the outset,  
6 the context of this particular hearing from which  
7 this motion to consideration arises was  
8 plaintiff's motion for judgement on the pleadings  
9 and I am sorry, I said plaintiff. I misstated.  
10 Complainant's motion for judgement on the  
11 pleadings and under that context all  
12 statements, all allegations set forth in the  
13 pleadings are deemed true and correct Your Honor.  
14 So I would simply note that to the extent that  
15 any decision is made as to evidence not yet in  
16 the record, I would simply state that that would  
17 be mistaken, Your Honor. That the opportunity  
18 for affidavits and other evidence would come  
19 forward in the context outside of the scope of  
20 the judgement from the pleadings that would  
21 otherwise effect the construction of this  
22 particular policy, Your Honor.

23 Thank you.

24 MR. RICHARDSON: Your Honor, Jim Richardson  
25 representing the defendant.

1           The Court dealt fully with all the arguments  
2           that my friend made in the original order in this  
3           case and then slightly modified that order as a  
4           result of the first motion to reconsider. Now we  
5           have a second motion to reconsider raising  
6           exactly the same point all over again. I think  
7           the Court already dealt fully with everything my  
8           friend has said in the previous orders. This is  
9           simply it is a successive motion to reconsider.

10           The same thing all over again.

11           THE COURT: All right.

12           MR. HASTIE: If I may respond?

13           THE COURT: Limited to what he just argued.

14           MR. HASTIE: Exactly, Your Honor, and I  
15           anticipated that.

16           You are correct, Your Honor, Mr. Richardson  
17           is correct that successive Motions for  
18           Reconsideration would be improper. However, I  
19           would direct the Court's attention to this  
20           particular order which was filed after my Motion  
21           for Reconsideration was made, but before the  
22           date for the hearing was set. And this  
23           particular order is expressly stated as  
24           an amended order superseding the prior order. So  
25           in that context, Your Honor, this order took the

1 place of the prior order for which the motion to  
2 reconsider applied. The subsequent motion to  
3 reconsider was amended so to address the  
4 differences between the two orders. But there  
5 has been as yet no ruling on the Motion to  
6 Reconsider, Your Honor.

7 MR. RICHARDSON: I think the Court fully  
8 addressed every point that my friend has made.

9 THE COURT: All right, thank you very much.

10 MR. HASTIE: Thank you, sir.

11 MR. RICHARDSON: Thank you, Your Honor.

12 \* \* \*

13 (END OF TRANSCRIPT)  
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## C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for Cherokee County, South Carolina, on the 19th day of February, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 15, 2013

Aileen Butler

EX. A



**OMNI INSURANCE COMPANY  
2018 POWERS FERRY ROAD  
SUITE 400  
ATLANTA, GA 30339**

**AMENDED  
DECLARATIONS**

**NAMED INSURED AND ADDRESS**

ANTHONY BARRON  
117 MARC ANTHONY DRIVE  
GAFFNEY, SC 29340

**PRODUCER**

OMNI INSURANCE GROUP (1000033410)  
PO BOX 105021  
ATLANTA, GA 30348  
800-753-5322

**PRIVATE PASSENGER AUTO**POLICY NUMBER: 3111851DECPAGE ID: 22Replaces Policy Number: Omni01DA 50350204**POLICY PERIOD:**

June 4, 2009 12:01 A.M. to June 4, 2010  
12:01 A.M.

DECPAGE EFFECTIVE:

May 8, 2010 12:01 A.M.**VEHICLE**

Vehicle: 1  
Make: 1996 Ford  
Model: EXPLORER  
VIN#: 1FMDU32X0TUB67243  
Use: Pleasure  
BI/MED/PhysDam Symbol: 300  
\500\7  
Territory: 48  
Tier: 1

**DRIVER**

ANTHONY BARRON  
Birthdate: 09/29/1951  
Marital Status: Single  
License: MD  
B650067497751  
Class: SM57

**DISCOUNTS / SURCHARGES**

Multi Car  
No Lapse In Coverage (Prior Coverage  
Discount)  
Good Customer

Vehicle: 2  
Make: 1995 Ford  
Model: MUSTANG  
VIN#: 1FALP4049SF176408  
Use: Pleasure  
BI/MED/PhysDam Symbol: 300  
\500\19  
Territory: 48  
Tier: 1

ANTHONY BARRON  
Birthdate: 09/29/1951  
Marital Status: Single  
License: MD  
B650067497751  
Class: SM57

Multi Car  
No Lapse In Coverage (Prior Coverage  
Discount)  
Good Customer

**COVERAGE (Premiums for 0.87 months)**

LIMIT PREMIUM PREMIUM  
Veh 1 Veh 2

Premium is based on your selection of the following:

|                                               |                                                          |         |         |
|-----------------------------------------------|----------------------------------------------------------|---------|---------|
| Bodily Injury Liability                       | <u>25,000 per person</u><br><u>50,000 per occurrence</u> | \$21.59 | \$21.59 |
| Property Damage Liability                     | <u>25,000 per occurrence</u>                             | \$15.35 | \$15.35 |
| Uninsured Motorist Bodily Injury              | <u>25,000 per person</u><br><u>50,000 per occurrence</u> | \$1.90  | \$1.90  |
| Underinsured Motorist Bodily Injury           | <u>25,000 per person</u><br><u>50,000 per occurrence</u> | \$1.78  | \$1.78  |
| Uninsured Motorist Property Damage            | <u>25,000 per occurrence</u>                             | \$0.90  | \$0.90  |
| Uninsured Motorist Property Damage Deductible | <u>\$200 Deductible</u>                                  |         |         |
| Underinsured Motorist Property Damage         | <u>25,000 per occurrence</u>                             | \$0.07  | \$0.07  |
| Total Premium for each vehicle:               |                                                          | \$41.59 | \$41.59 |
| Total Policy Premium:                         |                                                          |         | \$83.18 |

Only the insurance coverages indicated by a specific limit of liability and/or a premium amount are provided.

**ACCIDENTS/VIOLATION POINTS**

151



# Personal Auto Policy

South Carolina



COPY

THIS IS A TRUE AND CERTIFIED COPY OF THE ORIGINAL  
CUSTOMER SERVICE MANAGER  
NOTARY PUBLIC  
3/5/10  
DATE

OMNI 0739

(02/07)

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Form 0739 (South Carolina)

## ENDORSEMENTS

(Only those listed in the Declarations are effective on your policy)

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## PERSONAL AUTO POLICY

### AGREEMENT

In return for payment of the premium and subject to all the terms of this policy, we agree with you as follows:

### DEFINITIONS

- A. Throughout this policy, **you** and **your** refer to:
1. The **named insured** shown in the Declarations; and
  2. The spouse if a resident of the same household.  
If the spouse ceases to be a resident of the same household during the policy period or prior to the inception of this policy, the spouse will be considered **you** and **your** under this policy but only until the earlier of:
    - a. The end of 90 days following the spouse's change of residency;
    - b. The effective date of another policy listing the spouse as a **named insured**; or
    - c. The end of the policy period.
- B. **We**, **us** and **our** refer to the Company providing this insurance.
- C. For purposes of this policy, a private passenger type auto, pickup or van shall be deemed to be owned by a person if leased:
1. Under a written agreement to that person; and
  2. For a continuous period of at least 6 months.
- Other words and phrases are defined. They are in boldface when used.
- D. **Bodily injury** means bodily harm, sickness or disease, including death that results.
- E. **Business** includes trade, profession or occupation.
- F. **Family member** means a person related to **you** by blood, marriage or adoption who is a resident of **your** household. This includes a ward or foster child.
- G. **Occupying** means in, upon, getting in, on, out or off.
- H. **Property damage** means physical injury to, destruction of or loss of use of tangible property.
- I. **Trailer** means a vehicle designed to be pulled by a:
1. Private passenger auto; or
  2. Pickup or van.
- It also means a farm wagon or farm implement while towed by a vehicle listed in 1. or 2. above.
- J. **Your covered auto** means:
1. Any vehicle shown in the Declarations.
  2. A **newly acquired auto**.
  3. Any **trailer you own**.
  4. Any auto or **trailer you** do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:

- a. Breakdown;
- b. Repair;
- c. Servicing;
- d. Loss; or
- e. Destruction.

This provision (J.4) does not apply to Coverage For Damage To Your Auto.

**K. Newly acquired auto:**

1. **Newly acquired auto** means any of the following types of vehicles you become the owner of during the policy period:
  - a. A private passenger auto; or
  - b. A pickup or van, for which no other insurance policy provides coverage.
2. Coverage for a **newly acquired auto** is provided as described below. If you ask us to insure a **newly acquired auto** after a specified time period described below has elapsed, any coverage we provide for a **newly acquired auto** will begin at the time you request the coverage.
  - a. For any coverage provided in this policy except Coverage For Damage To Your Auto, a **newly acquired auto** will have the broadest coverage we now provide for any vehicle shown in the Declarations. Coverage begins on the date you become the owner. However, for this coverage to apply to a **newly acquired auto** which is in addition to any vehicle shown in the Declarations, you must ask us to insure it within 14 days after you become the owner.  
If a **newly acquired auto** replaces a vehicle shown in the Declarations, coverage is provided for this vehicle without your having to ask us to insure it.
  - b. **Collision coverage for newly acquired auto** begins on the date you become the owner. However, for this coverage to apply, you must ask us to insure it within:
    - (1) 14 days after you become the owner if the Declarations indicate that Collision coverage applies to at least one auto. In this case, the **newly acquired auto** will have the broadest coverage we now provide for any auto shown in the Declarations.
    - (2) Four days after you become the owner if the Declarations do not indicate that Collision coverage applies to at least one auto. If you comply with the 4 day requirement and a loss occurred before you asked us to insure the **newly acquired auto**, a Collision deductible of \$500 will apply.
  - c. **Other Than Collision coverage for a newly acquired auto** begins on the date you become the owner. However, for this coverage to apply, you must ask us to insure it within:
    - (1) 14 days after you become the owner if the Declarations indicate that Other Than Collision coverage applies to at least one auto. In this case, the **newly acquired auto** will have the broadest coverage we now provide for any auto shown in the Declarations.

- (2) Four days after you become the owner if the Declarations do not indicate that Other Than collision coverage applies to at least one auto. If you comply with the 4 day requirement and a loss occurred before you asked us to insure the **newly acquired auto**, an Other Than Collision deductible of \$500 will apply.

## PART A – LIABILITY COVERAGE

### INSURING AGREEMENT

- A. We will pay damages for **bodily injury or property damage** for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the **insured**. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for **bodily injury or property damage** not covered under this policy.
- B. **Insured as used in this Part means:**
  1. You or any **family member** for the ownership, maintenance or use of any auto or trailer.
  2. Any person using your **covered auto**.
  3. For your **covered auto**, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
  4. For any auto or trailer, other than your **covered auto**, any other person or organization but only with respect to legal responsibility for acts or omissions of you or any **family member** for whom coverage is afforded under this Part. This provision (B.4.) applies only if the person or organization does not own or hire the auto or trailer.

### SUPPLEMENTARY PAYMENTS

In addition to our limit of liability, we will pay on behalf of an insured:

1. Up to \$250 for the cost of bail bonds required because of an accident, including related traffic law violations. The accident must result in **bodily injury or property damage** covered under this policy.
2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.
3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.
4. Up to \$200 a day for loss of earnings, but not other income, because of attendance at hearings or trials at our request.

5. Other reasonable expenses incurred at our request.

#### EXCLUSIONS

**A. We do not provide Liability Coverage for any insured:**

1. Who intentionally causes **bodily injury** or **property damage** to the extent that the limits of liability for this coverage exceed the limits of liability required by the South Carolina Financial Responsibility Act.
2. For **property damage** to property owned or being transported by that **insured**.
3. For **property damage** to property:

- a. Rented to;
  - b. Used by; or
  - c. In the care of;
- that **insured**.

This exclusion (A.3.) does not apply to **property damage** to a residence or private garage.

4. For **bodily injury** to an employee of that **insured** during the course of employment. This exclusion (A.4.) does not apply to **bodily injury** to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.

5. For that **insured's** liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. This exclusion (A.5.) does not apply to a share-the-expense car pool.

6. While employed or otherwise engaged in the business of:

- a. Selling;
- b. Repairing;
- c. Servicing;
- d. Storing; or
- e. Parking;

vehicles designed for use mainly on public highways. This includes road testing and delivery. This exclusion (A.6.) does not apply to the ownership, maintenance or use of **your covered auto** by:

- a. You;
- b. Any family member; or
- c. Any partner, agent or employee of you or any family member.

7. Maintaining or using any vehicle while that **insured** is employed or otherwise engaged in any **business** (other than farming or ranching) not described in Exclusion A.6.

This exclusion (A.7.) does not apply to the maintenance or use of a:

- a. Private passenger auto;
- b. Pickup or van; or
- c. Trailer used with a vehicle described in a. or b. above.

8. Using a vehicle without a reasonable belief that that **insured** is entitled to do so. This exclusion (A.8.) does not apply to a family member using **your covered auto** which is owned by you.

9. For **bodily injury** or **property damage** for which that **insured**:

- a. Is an **insured** under a nuclear energy liability policy; or
- b. Would be an **insured** under a nuclear energy liability policy but for its termination upon exhaustion of its limit of liability.

A nuclear energy liability policy is a policy issued by any of the following or their successors:

- (1) Nuclear Energy Liability Insurance Association;
- (2) Mutual Atomic Energy Liability Underwriters; or
- (3) Nuclear Insurance Association of Canada.

**B. We do not provide Liability Coverage for the ownership, maintenance or use of:**

1. Any vehicle which:

- a. Has fewer than four wheels; or
- b. Is designed mainly for use off public roads.

This exclusion (B.1.) does not apply:

- a. While such vehicle is being used by an **insured** in a medical emergency;
- b. To any trailer; or
- c. To any non-owned golf cart.

2. Any vehicle, other than **your covered auto**, which is:

- a. Owned by you; or
- b. Furnished or available for **your** regular use.

3. Any vehicle, other than **your covered auto**, which is:

- a. Owned by any family member; or
- b. Furnished or available for the regular use of any family member.

However, this exclusion (B.3.) does not apply to you while you are maintaining or occupying any vehicle which is:

- a. Owned by a family member; or
- b. Furnished or available for the regular use of a family member.

4. Any vehicle, located inside a facility designed for racing, for the purpose of:

- a. Competing in; or
  - b. Practicing or preparing for;
- any prearranged or organized racing or speed contest.

#### LIMIT OF LIABILITY

- A. 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 any one person in any one auto accident. Subject to this limit for each person, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident.**

The limit of liability shown in the Declarations for each accident for Property Damage Liability is our maximum limit of liability for all property damage resulting from any one auto accident. This is the most we will pay regardless of the number of:

1. Insureds;
  2. Claims made;
  3. Vehicles or premiums shown in the Declarations; or
  4. Vehicles involved in the auto accident.
- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
1. Part B or Part C of this policy; or
  2. Any Underinsured Motorists Coverage provided by this policy.

#### OUT OF STATE COVERAGE

If an auto accident to which this policy applies occurs in any state or province other than the one which **your covered auto** is principally garaged, we will interpret your policy for that accident as follows:

- A. If the state or province has:
1. A financial responsibility or similar law specifying limits of liability for **bodily injury or property damage** higher than the limit shown in the Declarations, your policy will provide the higher specified limit.
  2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.
- B. No one will be entitled to duplicate payments for the same elements of loss.

#### FINANCIAL RESPONSIBILITY

When this policy is certified as future proof of financial responsibility, this policy shall comply with the law to the extent required.

#### OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

### PART B - MEDICAL PAYMENTS COVERAGE

#### INSURING AGREEMENT

- A. We will pay reasonable expenses incurred for necessary medical and funeral services because of **bodily injury**:
1. Caused by accident; and
  2. Sustained by an **insured**.
- We will pay only those expenses incurred within 3 years from the date of the accident.
- B. **Insured** as used in this Part means:

1. You or any family member:
  - a. While **occupying**; or
  - b. As a pedestrian when struck by; a motor vehicle designed for use mainly on public roads or a trailer of any type.
2. Any other person while **occupying your covered auto**.

#### EXCLUSIONS

- A. We do not provide Medical Payments Coverage for any insured for **bodily injury**:
1. Sustained while **occupying** any motorized vehicle having fewer than four wheels.
  2. Sustained while **occupying your covered auto** when it is being used as a public or livery conveyance. This exclusion (2.) does not apply to a share-the-expense car pool.
  3. Sustained while **occupying** any vehicle located for use as a residence or premises.
  4. Occurring during the course of employment if workers' compensation benefits are required or available for the **bodily injury**.
  5. Sustained while **occupying**, or when struck by, any vehicle (other than your **covered auto**) which is:
    - a. Owned by you; or
    - b. Furnished or available for your regular use.
  6. Sustained while **occupying**, or when struck by, any vehicle (other than your **covered auto**) which is:
    - a. Owned by any family member; or
    - b. Furnished or available for the regular use of any family member.
 However, this exclusion (6.) does not apply to you.
  7. Sustained while **occupying** a vehicle without a reasonable belief that that **insured** is entitled to do so. This exclusion (7.) does not apply to a family member using your **covered auto** which is owned by you.
  8. Sustained while **occupying** a vehicle when it is being used in the business of an **insured**. This exclusion (8.) does not apply to **bodily injury** sustained while **occupying** a:
    - a. Private passenger auto;
    - b. Pickup or van that you own; or
    - c. Trailer used with a vehicle described in a. or b. above.
  9. Caused by or a consequence of:
    - a. Discharge of a nuclear weapon (even if accidental);
    - b. War (declared or undeclared);
    - c. Civil war;
    - d. Insurrection; or
    - e. Rebellion or revolution.
  10. From or as a consequence of the following, whether controlled or uncontrolled or however caused:

- a. Nuclear reaction;
  - b. Radiation; or
  - c. Radioactive contamination.
11. Sustained while **occupying** any vehicle located inside a facility designed for racing, for the purpose of:
- a. Competing in; or
  - b. Practicing or preparing for;
- any prearranged or organized racing or speed contest.

#### LIMIT OF LIABILITY

- A. The limit of liability shown in the Declarations for this coverage is **our** maximum limit of liability for **each person** injured in any one accident. This is the most **we** will pay regardless of the number of:
- 1. **Insureds**;
  - 2. Claims made;
  - 3. Vehicles or premiums shown in the Declarations; or
  - 4. Vehicles involved in the accident.
- B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
- 1. Part A or Part C of this policy; or
  - 2. Any **Underinsured Motorists Coverage** provided by this policy.

#### OTHER INSURANCE

If there is other applicable auto medical payments insurance, **we** will pay only **our** share of the loss. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a vehicle **you** do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.

### PART C1 - UNINSURED MOTORISTS COVERAGE

#### INSURING AGREEMENT

- A. We will pay damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
- 1. **Bodily injury** sustained by an **insured** and caused by an accident; and
  - 2. **Property damage** caused by an accident.
- The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle**.
- B. **Insured** as used in this Part means:
- 1. **You or any family member**.
  - 2. Any other person **occupying your covered auto**.
  - 3. Any person for damages that person is entitled to recover because of **bodily injury** to which this coverage applies sustained by a person described in 1. or 2. above.

C. **Property damage** as used in this endorsement means injury to or destruction of the property of an **insured**.

D. **Uninsured motor vehicle** means a land motor vehicle or trailer of any type:

- 1. To which neither:
  - a. A liability bond or policy; nor
  - b. Cash or securities deposited with the State Treasurer; applies at the time of the accident.
- 2. To which a liability bond or policy applies at the time of the accident. In this case its limit for liability must be less than the minimum limits specified by the South Carolina Financial Responsibility Act.
- 3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits or which causes an accident resulting in **bodily injury** or **property damage** without hitting:
  - a. **You or any family member**;
  - b. A vehicle which **you or any family member** are **occupying**;
  - c. **Your covered auto**; or
  - d. Any of **your property**.

If there is no physical contact with the hit-and-run vehicle the facts of the accident must be corroborated by an affidavit attesting to the truth of the facts of the accident signed by any eyewitness other than the owner or operator of the vehicle which **you or any family member** were **occupying** at the time of the accident.

- 4. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:
  - a. Successfully denies coverage;
  - b. Is or becomes insolvent;
  - c. Is in delinquency proceedings, suspension or receivership; or
  - d. Is proven unable to respond to a judgment.

However, **uninsured motor vehicle** does not include any vehicle or equipment:

- 1. Owned by any governmental unit or agency unless a cause of action against that governmental unit or agency is barred by the Tort Claims Act, South Carolina Laws 1986, Ratification No. 514, Subsection 15-78-60, or by other applicable statute.
- 2. Operated on rails or crawler treads.
- 3. Designed mainly for use off public roads while not on public roads.

#### EXCLUSIONS

- A. We do not provide Uninsured Motorists Coverage for **property damage** or **bodily injury** sustained by any **insured**:
- 1. If that **insured** or the legal representative settles the **bodily injury** or **property damage** claim without our consent.
  - 2. While **occupying your covered auto** when it is being used as a public or livery conveyance. This Exclusion (A.2.) does not apply to a share-the-expense car pool.

3. Using a vehicle without a reasonable belief that that **insured** is entitled to do so. This exclusion (A.3.) does not apply to a family member using your **covered auto** which is owned by you.
  4. For the first \$200 of the amount of **property damage** to the property of each **insured** as the result of any one accident.
- B. This coverage shall not apply directly or indirectly to benefit:
1. Any insurer or self-insurer under any of the following or similar law:
    - a. Worker's compensation law; or
    - b. Disability benefits law.
  2. Any insurer of property.

#### **LIMIT OF LIABILITY**

- A. If **bodily injury** or **property damage** is sustained in an accident by you or any family member while **occupying your covered auto**:

1. 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 Uninsured Motorists Coverage.
2. Our maximum limit of liability for all damages, including damages for care, loss of services subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the sum of the limits of liability shown in the Declarations for each accident for Bodily Injury Liability Uninsured Motorists Coverage.
3. Our maximum limit of liability for all **property damage** resulting from that accident is the sum of the limits of liability shown in the Declarations for each accident for Property Damage Liability Uninsured Motorists Coverage.

Subject to the maximum limit of liability set forth in Paragraphs 1., 2. or 3. above:

1. The most we will pay for **bodily injury** or **property damage** sustained in that accident by an **insured** other than you or any family member is that **insured's** pro rata share of the each person or each accident limit shown in the Declarations for this coverage applicable to the vehicle that **insured** was **occupying** at the time of the accident; and
2. You or any family member who sustains **bodily injury** or **property damage** in that accident will also be entitled to a pro rata share of the each person or each accident limit described in Paragraph 1. above.

A person's pro rata share shall be the proportion that that person's damages bears to the total damages sustained by all **insureds**.

The maximum limit of liability is the most we will pay regardless of the number of:

1. **Insureds**;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

- B. If **bodily injury** or **property damage** is sustained in an accident by you or any family member while not **occupying** any auto:

1. 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 Uninsured Motorists Coverage.
2. Subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the sum of the limits of liability shown in the Declarations for each accident for Bodily Injury Liability Uninsured Motorists Coverage.
3. Our maximum limit of liability for all **property damage** resulting from that accident is the sum of the limits of liability shown in the Declarations for each accident for Property Damage Liability Uninsured Motorists Coverage. The maximum limit of liability is the most we will pay regardless of the number of:
  - a. **Insureds**;
  - b. Claims made;
  - c. Vehicles or premiums shown in the Declarations; or
  - d. Vehicles involved in the accident.

- C. If **bodily injury** or **property damage** is sustained in an accident by you or any family member while **occupying** a vehicle not owned by you or any family member:

1. 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 highest each person limit of liability shown in the Declarations for Bodily Injury Liability Uninsured Motorists Coverage applicable to any one of your **covered autos**;
2. Subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the highest each accident limit of liability shown in the Declarations for Bodily Injury Liability Uninsured Motorists Coverage applicable to any one of your **covered autos**; and
3. Our maximum limit of liability for all **property damage** resulting from that accident is the highest each accident limit of liability shown in the Declarations for Property Damage Liability Uninsured Motorists Coverage applicable to any one of your **covered autos**. The maximum limit of liability is the most we will pay regardless of the number of:
  - a. **Insureds**;
  - b. Claims made;
  - c. Vehicles or premiums shown in the Declarations; or
  - d. Vehicles involved in the accident.

- D. If **bodily injury** or **property damage** is sustained by an **insured** other than you or any family member in an accident in which neither you nor any family member sustained **bodily injury** or **property damage**:

1. 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 will be the each person limit of liability shown in the Declarations for Bodily Injury Liability Uninsured Motorists Coverage applicable to the vehicle that **insured** was **occupying** at the time of that accident.
2. Subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the each accident limit of liability shown in the Declarations for Bodily Injury Liability Uninsured Motorists Coverage applicable to the vehicle that **insured** was **occupying** at the time of the accident.
3. Our maximum limit of liability for all **property damage** resulting from that accident is the each accident limit of liability shown in the Declarations for Property Damage Liability Uninsured Motorists Coverage applicable to the vehicle that **insured** was **occupying** at the time of the accident.  
The maximum limit of liability is the most we will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made;
  - c. Vehicles or premiums shown in the Declarations; or
  - d. Vehicles involved in the accident.
- E. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and:
  1. Part A or Part B of this policy;
  2. Any Underinsured Motorists Coverage provided by this policy; or
  3. Part D of this policy or any similar coverage under any other policy.
- F. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

#### OTHER INSURANCE

- A. If an **insured** sustains **bodily injury** while occupying a vehicle not owned by that person or while not occupying any vehicle, the following priorities of recovery apply:

**FIRST PRIORITY** – The policy affording Uninsured Motorists Coverage to the vehicle the **insured** was **occupying** at the time of the accident.

**SECOND PRIORITY** – Any policy affording Uninsured Motorists Coverage to the **insured** as a **named insured** or **family member**.

1. If there is no applicable insurance available under the first priority, the maximum recovery under all policies in the second priority shall not exceed the highest applicable limit for any one vehicle under any one policy.
2. If there is applicable insurance available under the first priority:
  - a. The limit of liability applicable to the vehicle the **insured** was **occupying**, under the policy in the first priority, shall first be exhausted; and

- b. The maximum recovery in the second priority shall not exceed the highest limit for any one vehicle under any one policy in the second priority.
3. We will pay only our share of the loss, not to exceed our share of the maximum recovery. Our share is the proportion that our limit of liability bears to the total of all applicable limits in the same level of priority.
- B. With respect to **property damage**, this insurance shall apply only after the limits of any other collectible insurance applicable to the damaged property have been exhausted.

#### GENERAL PROVISIONS

Part F is amended as follows with respect to Uninsured Motorists Coverage:

- A. The **Our Right to Recover Payment** Provision is replaced by the following:

##### OUR RIGHT TO RECOVER PAYMENT

1. If we make payment under this policy and the person to or for whom payment was made has a right to recover damages from another, we shall be subrogated to that right to the extent of such payment that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act. That person shall do:
  - a. Whatever is necessary to enable us to exercise our rights; and
  - b. Nothing after loss to prejudice them.
2. If an **insured** has prosecuted to judgment any suit against any person responsible, we will be entitled to an assignment of the judgment to the extent of payment under this insurance that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act.
3. We will pay our proportionate part of any reasonable costs and expenses incurred for any recovery, including reasonable attorneys' fees. However, we reserve the right to retain an attorney of our choice to pursue a claim instead of reasonable attorneys' fees.
4. If an **insured** making a claim for **property damage** under this insurance is also entitled to insurance or other compensation for the **property damage**, we will not be obligated to pay a claim until the **insured** has assigned us the rights to the compensation, to the extent of payment under this insurance that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act.

- B. The following is added to the **Two or More Auto Policies** Provision:

##### TWO OR MORE AUTO POLICIES

1. This provision does not apply to Uninsured Motorists Coverage.
2. No one will be entitled to receive duplicate payments for the same elements of loss under Uninsured Motorists Coverage.

- C. The following provision is added:

##### CONFORMITY TO STATUTE

This policy is intended to be in full conformity with the South Carolina Insurance Laws. If any provision conflicts with that law, it is changed to comply with the law.

## PART C2 - UNDERINSURED MOTORISTS COVERAGE

### INSURING AGREEMENT

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

1. **Bodily injury** sustained by an **insured** and caused by an accident; and
2. **Property damage** caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle**.

We will pay under this coverage only after the limits of liability under any liability bonds or policies applicable to the **underinsured motor vehicle** have been exhausted by payment of judgments or settlements.

**Insured** as used in this Part means:

1. **You** or any **family member**.
2. Any other person **occupying your covered auto**.
3. Any person for damages that person is entitled to recover because of **bodily injury** to which this coverage applies sustained by a person described in 1. or 2. above.

**Property damage** as used in this endorsement means injury to or destruction of **your covered auto**. However, **property damage** does not include damage to property owned by the **insured** while contained in **your covered auto**.

**Underinsured motor vehicle** means a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident in limits equal to or greater than the minimum limit for liability specified by the South Carolina Financial Responsibility Act, but the limits of that bond or policy are not enough to pay the full amount the **insured** is legally entitled to recover as damages. However, **underinsured motor vehicle** does not include any vehicle or equipment:

1. Operated on rails or crawler treads.
2. Designed mainly for use off public roads while not upon public roads.
3. While located for use as a residence or premises.

### EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for **bodily injury** or **property damage** sustained by any **insured**:

1. While **occupying your covered auto** when it is being used as a public or livery conveyance. This Exclusion (A.1.) does not apply to a share-the-expense car pool.
2. Using a vehicle without a reasonable belief that that **insured** is entitled to do so. This Exclusion (A.2.) does not apply to a family member using **your covered auto** which is owned by you.

B. This coverage shall not apply directly or indirectly to benefit:

1. Any insurer or self-insurer under any of the following or similar law:
  - a. Workers' compensation law; or

- b. Disability benefits law.
2. Any insurer of property.

### LIMIT OF LIABILITY

A. If **bodily injury** is sustained in an accident by any **insured** while **occupying your covered auto**, or if **your covered auto** sustains **property damage** in an accident:

1. 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 Motorists Coverage.
2. Subject to this limit for each person, our maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the sum of the limits of liability shown in the Declarations for each accident for Bodily Injury Liability Underinsured Motorists Coverage.

3. Subject to the maximum limit of liability set forth in Paragraphs 1. and 2. above:

- a. The most we will pay for **bodily injury** sustained in that accident by an **insured** other than **you** or any **family member** is that **insured's** pro rata share of the each person or each accident limit shown in the Declarations for Bodily Injury Liability Underinsured Motorists Coverage applicable to the vehicle that **insured** was **occupying** at the time of the accident; and
- b. **You** or any **family member** who sustains **bodily injury** in that accident will also be entitled to a pro rata share of the each person or each accident limit described in Paragraph a. above.

A person's pro rata share shall be the proportion that that person's **bodily injury** damages bears to the total of all **bodily injury** damages sustained by all **insureds**.

4. Our maximum limit of liability for all **property damage** resulting from that accident is the sum of the limits of liability shown in the Declarations for each accident for Property Damage Liability Underinsured Motorists Coverage. The maximum limit of liability is the most we will pay regardless of the number of:

- a. **Insureds**;
- b. Claims made;
- c. Vehicles or premiums shown in the Declarations; or
- d. Vehicles involved in the accident.

B. If **bodily injury** is sustained in an accident by **you** or any **family member** while not **occupying any auto**:

1. 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 Motorists Coverage.

2. Subject to this limit for each person, **our** maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the sum of the limits of liability shown in the Declarations for each accident for Bodily Injury Liability Underinsured Motorists Coverage.  
The maximum limit of liability is the most **we** will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made;
  - c. Vehicles or premiums shown in the Declarations; or
  - d. Vehicles involved in the accident.
- C. If **bodily injury** is sustained in an accident by **you** or any **family member** while **occupying** a vehicle not owned by **you** or any **family member**:
  1. 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 highest each person limit of liability shown in the Declarations for Bodily Injury Liability Underinsured Motorists coverage applicable to any one of **your covered autos**.
  2. Subject to this limit for each person, **our** maximum limit of liability for all damages arising out of **bodily injury** sustained in that accident is the highest each accident limit of liability shown in the Declarations for Bodily Injury Liability Underinsured Motorists coverage applicable to any one of **your covered autos**; and  
The maximum limit of liability is the most **we** will pay regardless of the number of:
    - a. Insureds;
    - b. Claims made;
    - c. Vehicles or premiums shown in the Declarations; or
    - d. Vehicles involved in the accident.
- D. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A, Part B, Part C, or Part D of this policy.
- E. We will not make a duplicate payment under this coverage for any element of loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible.
- F. We will not pay for any element of loss if a person is entitled to receive payment for the same element of loss under any of the following or similar law:
  1. Workers' compensation law; or
  2. Disability benefits law.

**OTHER INSURANCE**

- A. If an **insured** sustains **bodily injury** while **occupying** a vehicle not owned by that person or while not **occupying** any vehicle, the following priorities of recovery apply:

- FIRST PRIORITY** – The policy affording Underinsured Motorists Coverage to the vehicle the **insured** was **occupying** at the time of the accident.
- SECOND PRIORITY** – Any policy affording Underinsured Motorists Coverage to the **insured** as a **named insured** or **family member**.
1. If there is no applicable insurance available under the first priority, the maximum recovery under all policies in the second priority shall not exceed the highest applicable limit for any one vehicle under any one policy.
  2. If there is applicable insurance available under the first priority:
    - a. The limit of liability applicable to the vehicle the **insured** was **occupying**, under the policy in the first priority, shall first be exhausted; and
    - b. The maximum recovery in the second priority shall not exceed the highest limit for any one vehicle under any one policy in the second priority.
  3. We will pay only **our** share of the loss, not to exceed **our** share of the maximum recovery. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits in the same level of priority.
  - B. With respect to **property damage**, this insurance shall apply only after the limits of any other collectible insurance applicable to the damaged property have been exhausted.

**ADDITIONAL DUTY**

Any person seeking coverage under this endorsement must also promptly send us copies of the legal papers if a suit is brought.

**GENERAL PROVISIONS**

- Part F is amended as follows with respect to Underinsured Motorists Coverage:
- A. The **Our Right To Recover Payment** Provision does not apply to Underinsured Motorists Coverage.
  - B. The following is added to the **Two Or More Auto Policies** Provision:  
**TWO OR MORE AUTO POLICIES**
    1. This provision does not apply to Underinsured Motorists Coverage.
    2. No one will be entitled to receive duplicate payments for the same elements of loss under Underinsured Motorists Coverage.
  - C. The following provision is added;  
**CONFORMITY TO STATUTE**  
This policy is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this policy conflicts with that law, it is changed to comply with the law.

**PART D - COVERAGE FOR DAMAGE TO YOUR AUTO**

**INSURING AGREEMENT**

- A. We will pay for direct and accidental loss to **your covered auto** or any **non-owned auto**, including their equipment, minus any applicable deductible shown in the

Declarations. If loss to more than one **your covered auto** or **non-owned auto** results from the same **collision**, only the highest applicable deductible will apply. We will pay for loss to **your covered auto** caused by:

1. **Other than collision** only if the Declarations indicate that Other Than Collision coverage is provided for that auto.
2. **Collision** only if the Declarations indicate that Collision coverage is provided for that auto.

If there is a loss to a **non-owned auto**, we will provide the broadest coverage applicable to any **your covered auto** shown in the Declarations.

- B. **Collision** means the upset of **your covered auto** or a **non-owned auto** or their impact with another vehicle or object.

Loss caused by the following is considered **other than collision**:

1. Missiles or falling objects;
2. Fire;
3. Theft or larceny;
4. Explosion or earthquake;
5. Windstorm;
6. Hail, water or flood;
7. Malicious mischief or vandalism;
8. Riot or civil commotion;
9. Contact with bird or animal; or
10. Breakage of glass.

If breakage of glass is caused by a **collision**, you may elect to have it considered a loss caused by **collision**.

- C. **Non-owned auto** means:

1. Any private passenger auto, pickup, van or trailer not owned by or furnished or available for the regular use of you or any **family member** while in the custody of or being operated by you or any **family member**; or
2. Any auto or trailer you do not own while used as a temporary substitute for **your covered auto** which is out of normal use because of its:
  - a. Breakdown;
  - b. Repair;
  - c. Servicing;
  - d. Loss; or
  - e. Destruction.

#### ADDITIONAL PAYMENTS

In addition, we will pay up to \$10 per day, to a maximum of \$300, for transportation expenses incurred by you. This applies only in the event of the total theft of **your covered auto**. We will pay only transportation expenses incurred during the period:

1. Beginning 48 hours after the theft; and
2. Ending when **your covered auto** is returned to use or we pay for its loss.

#### EXCLUSIONS

We will not pay for:

1. Loss to **your covered auto** or any **non-owned auto** which occurs while it is used as a public or livery conveyance. This exclusion (1.) does not apply to a share-the-expense car pool.
2. Damage due and confined to:
  - a. Wear and tear;
  - b. Freezing;
  - c. Mechanical or electrical breakdown or failure; or
  - d. Road damage to tires.

This exclusion (2.) does not apply if the damage results from the total theft of **your covered auto** or any **non-owned auto**.

3. Loss due to or as a consequence of:
  - a. Radioactive contamination;
  - b. Discharge of any nuclear weapon (even if accidental);
  - c. War (declared or undeclared);
  - d. Civil war;
  - e. Insurrection; or
  - f. Rebellion or revolution.
4. Loss to any electronic equipment designed for the reproduction of sound and any accessories used with such equipment. This includes but is not limited to:
  - a. Radios and stereos;
  - b. Tape decks; or
  - c. Compact disc players.

This exclusion (4.) does not apply to equipment designed solely for the reproduction of sound and accessories used with such equipment, provided:

- a. The equipment is permanently installed in **your covered auto** or any **non-owned auto**; or
- b. The equipment is:
  - (1) Removable from a housing unit which is permanently installed in the auto;
  - (2) Designed to be solely operated by use of the power from the auto's electrical system; and
  - (3) In or upon **your covered auto** or any **non-owned auto** at the time of loss.
5. Loss to any electronic equipment that receives or transmits audio, visual or data signals and any accessories used with such equipment. This includes but is not limited to:
  - a. Citizens band radios;
  - b. Telephones;
  - c. Two-way mobile radios;
  - d. Scanning monitor receivers;
  - e. Television monitor receivers;
  - f. Video cassette recorders;

- g. Audio cassette recorders; or
- h. Personal computers.

This exclusion (5.) does not apply to:

- a. Any electronic equipment that is necessary for the normal operation of the auto or the monitoring of the auto's operating system; or
  - b. A permanently installed telephone designed to be operated by use of the power from the auto's electrical system and any accessories used with the telephone.
6. Loss to tapes, records, discs or other media used with equipment described in exclusions 4. and 5.
7. A total loss to **your covered auto** or any **non-owned auto** due to destruction or confiscation by governmental or civil authorities.
- This exclusion (7.) does not apply to the interests of Loss Payees in **your covered auto**.
8. Loss to:
- a. A **trailer**, camper body, or motor home, which is not shown in the Declarations; or
  - b. Facilities or equipment used with such **trailer**, camper body or motor home. Facilities or equipment include but are not limited to:
    - (1) Cooking, dining, plumbing or refrigeration facilities;
    - (2) Awnings or cabanas; or
    - (3) Any other facilities or equipment used with a **trailer**, camper body, or motor home.

This exclusion (8.) does not apply to a:

- a. **Trailer**, and its facilities or equipment, which **you** do not own; or
  - b. **Trailer**, camper body, or the facilities or equipment in or attached to the **trailer** or camper body, which **you**:
    - (1) Acquire during the policy period; and
    - (2) Ask us to insure within 14 days after **you** become the owner.
9. Loss to any **non-owned auto** when used by **you** or any **family member** without a reasonable belief that **you** or that **family member** are entitled to do so.
10. Loss to equipment designed or used for the detection or location of radar or laser.
11. Loss to any custom furnishings or equipment in or upon any pickup or van. Custom furnishings or equipment include but are not limited to:
- a. Special carpeting and insulation;
  - b. Furniture or bars;
  - c. Height-extending roofs; or
  - d. Custom murals, paintings or other decals or graphics.
- This exclusion (11.) does not apply to a cap, cover or bedliner in or upon any **your covered auto** which is a pickup.
12. Loss to any **non-owned auto** being maintained or used by any person while employed or otherwise engaged in the business of:
- a. Selling;

- b. Repairing;
- c. Servicing;
- d. Storing; or
- e. Parking;

vehicles designed for use on public highways. This includes road testing and delivery.

13. Loss to **your covered auto** or any **non-owned auto**, located inside a facility designed for racing, for the purpose of:
- a. Competing in; or
  - b. Practicing or preparing for; any prearranged or organized racing or speed contest.
14. Loss to, or loss of use of, a **non-owned auto** rented by:
- a. **You**; or
  - b. Any **family member**;
- if a rental vehicle company is precluded from recovering such loss or loss of use, from **you** or that **family member**, pursuant to the provisions of any applicable rental agreement or state law.

#### LIMIT OF LIABILITY

- A. Our limit of liability for loss will be the lesser of the:
- 1. Actual cash value of the stolen or damaged property; or
  - 2. Amount necessary to repair or replace the property with other property of like kind and quality.
- However, the most we will pay for loss to:
- 1. Any **non-owned auto** which is a **trailer** is \$500.
- B. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.
- C. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

#### PAYMENT OF LOSS

We may pay for loss in money or repair or replace the damaged or stolen property. We may, at our expense, return any stolen property to:

- 1. **You**; or
- 2. The address shown in this policy.

If we return stolen property we will pay for any damage resulting from the theft. We may keep all or part of the property at an agreed or appraised value.

#### LOSS PAYABLE CLAUSE

Loss or damage under this policy shall be paid, as interest may appear, to **you** and the loss payee shown in the declarations or in this endorsement. This insurance with respect to the interest of the loss payee, shall not become invalid because of **your** fraudulent acts or omissions unless the loss results from **your** conversion, secretion

or embezzlement of **your covered auto**. However, **we** reserve the right to cancel the policy as permitted by policy terms and the cancellation shall terminate this agreement as to the loss payee's interest. **We** will give the same advance notice of cancellation to the loss payee as **we** give to the **named insured** shown in the Declarations. When **we** pay the loss payee **we** shall, to the extent of payment, be subrogated to the loss payee's rights of recovery.

#### NO BENEFIT TO BAILEE

This insurance shall not directly or indirectly benefit any carrier or other bailee for hire.

#### OTHER SOURCES OF RECOVERY

If other sources of recovery also cover the loss, **we** will pay only **our** share of the loss. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a **non-owned auto** shall be excess over any other collectible source of recovery including, but not limited to:

1. Any coverage provided by the owner of the **non-owned auto**;
2. Any other applicable physical damage insurance;
3. Any other source of recovery applicable to the loss.

#### APPRAISAL

- A. If **we** and **you** do not agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraisers will state separately the actual cash value and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
1. Pay its chosen appraiser; and
  2. Bear the expenses of the appraisal and umpire equally.
- B. Submission of a question of the amount of loss for an appraisal is a condition precedent to the right of initiating legal action on this policy.
- C. **We** do not waive any of **our** rights under this policy by agreeing to an appraisal.

#### PART E - DUTIES AFTER AN ACCIDENT OR LOSS

**We** have no duty to provide coverage under this policy unless there has 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. Cooperate with **us** in the investigation, settlement or defense of any claim or suit.

2. Promptly send **us** copies of any notices or legal papers received in connection with the accident or loss.
  3. Submit, as often as **we** reasonably require:
    - a. To physical exams by physicians **we** select. **We** will pay for these exams.
    - b. To examination under oath and subscribe the same.
  4. Authorize **us** to obtain:
    - a. Medical reports; and
    - b. Other pertinent records.
  5. Submit a proof of loss when required by **us**.
- C. A person seeking Uninsured Motorists Coverage must also:
1. Promptly notify the police if a hit-and-run driver is involved.
  2. Promptly send **us** copies of the legal papers if a suit is brought.
- D. A person seeking Coverage for Damage to Your Auto must also:
1. Take reasonable steps after loss to protect **your covered auto** or any **non-owned auto** and their equipment from further loss. **We** will pay reasonable expenses incurred to do this.
  2. Promptly notify the police if **your covered auto** or any **non-owned auto** is stolen.
  3. Permit **us** to inspect and appraise the damaged property before its repair or disposal.

#### PART F - GENERAL PROVISIONS

##### BANKRUPTCY

Bankruptcy or insolvency of the insured shall not relieve **us** of any obligations under this policy.

##### CHANGES

- A. This policy contains all the agreements between **you** and **us**. Its terms may not be changed or waived except by endorsement issued by **us**.
- B. If there is a change to the information used to develop the policy premium, **we** may adjust **your** premium. Changes during the policy term that may result in a premium increase or decrease include, but are not limited to, changes in:
1. The number, type or use classification of **insured** vehicles;
  2. Operators using **insured** vehicles;
  3. The place of principal garaging of **insured** vehicles;
  4. Coverage, deductible or limits.
- If a change resulting from A. or B. requires a premium adjustment, **we** will make the premium adjustment in accordance with **our** manual rules.
- C. If **we** make a change which broadens coverage under this edition of **your** policy without additional premium charge, that change will automatically apply to **your** policy as of the date **we** implement the change in **your** state. This paragraph (C.) does not apply to changes implemented with a general program revision that

includes both broadenings and restrictions in coverage, whether that general program revision is implemented through introduction of:

1. A subsequent edition of **your** policy; or
2. An Amendatory Endorsement.

#### FRAUD

We do not provide coverage for any **insured** who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy. However, we will provide coverage to such **insured** for damages sustained by any person who has not made fraudulent statements or engaged in fraudulent conduct if such damages result from an accident which is otherwise covered under this policy.

#### LEGAL ACTION AGAINST US

- A. No legal action may be brought against **us** until there has been full compliance with all the terms of this policy. In addition, under Part A, no legal action may be brought against **us** until:
  1. We agree in writing that the **insured** has an obligation to pay; or
  2. The amount of that obligation has been finally determined by judgment after trial.
- B. No person or organization has any right under this policy to bring **us** into any action to determine the liability of an **insured**.

#### OUR RIGHT TO RECOVER PAYMENT

- A. If **we** make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another **we** shall be subrogated to that right. That person shall do:
  1. Whatever is necessary to enable **us** to exercise our rights; and
  2. Nothing after loss to prejudice them.However, our rights in this paragraph (A.) do not apply under Part D, against any person using **your covered auto** with a reasonable belief that that person is entitled to do so.
- B. If **we** make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
  1. Hold in trust for **us** the proceeds of the recovery; and
  2. Reimburse **us** to the extent of our payment.

This provision does not apply to Medical Payments Coverage.

#### POLICY PERIOD AND TERRITORY

- A. This policy applies only to accidents and losses which occur:
  1. During the policy period as shown on the Declarations; and
  2. Within the policy territory.
- B. The policy territory is:

1. The United States of America, its territories or possessions;
2. Puerto Rico; or
3. Canada.

This policy also applies to loss to, or accidents involving, **your covered auto** while being transported between their ports.

#### TERMINATION

##### A. Cancellation.

This policy may be cancelled during the policy period as follows:

1. During the first 60 days this policy is in effect, the policy may be cancelled only if:
  - a. A check or bank draft tendered for payment of premium is returned unpaid for insufficient funds or other reason by the financial institution; or
  - b. You furnish proof from the Department of Highways and Public Transportation that:
    - (1) The **your covered auto** shown in the Declarations has been sold or otherwise disposed of; or
    - (2) You have surrendered the tags and registration of the **your covered auto** shown in the Declarations.
  - c. You have secured another policy which meets the minimum financial responsibility requirements.
2. After this policy has been in effect for more than 60 days:
  - a. The named **insured** shown in the Declarations may cancel by:
    - (1) Returning this policy to **us**; or
    - (2) Giving **us** advance written notice of the date cancellation is to take effect.
  - b. **We** may cancel by mailing notice to the named **insured** shown in the Declarations at the address shown in this policy at least 15 days prior to the date cancellation is to take effect.
3. After this policy has been in effect for more than 90 days, we will cancel only:
  - a. For nonpayment of premium; or
  - b. If **your driver's** license is suspended or revoked.

##### B. Nonrenewal.

If **we** decide not to renew or continue this policy, **we** will mail notice to the named **insured** shown in the Declarations at the address shown in this policy. Notice will be mailed at least 15 days before the end of the policy period.

##### C. Automatic Termination.

If **we** offer to renew or continue and **you** or **your** representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that **you** have not accepted our offer.

If **you** obtain other insurance on **your covered auto**, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

#### D. Other Termination Provisions.

1. We may deliver any notice instead of mailing it. Proof of mailing of any notice shall be sufficient proof of notice.
2. If this policy is cancelled, **you** may be entitled to a premium refund. If so, we will send **you** the refund. The premium refund, if any, will be computed according to **our** manuals. However, making or offering to make the refund is not a condition of cancellation.
3. The effective date of cancellation stated in the notice shall become the end of the policy period.

#### TRANSFER OF YOUR INTEREST IN THIS POLICY

- A. Your rights and duties under this policy may not be assigned without **our** written consent. However, if a **named insured** shown in the Declarations dies, coverage will be provided for:
1. The surviving spouse if resident in the same household at the time of death. Coverage applies to the spouse as if a **named insured** shown in the Declarations; and
  2. The legal representative of the deceased person as if a **named insured** shown in the Declarations. This applies only with respect to the representative legal responsibility to maintain or use **your covered auto**.
- B. Coverage will only be provided until the end of the policy period.

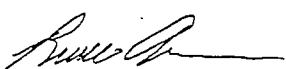
#### TWO OR MORE AUTO POLICIES

If this policy and any other auto insurance policy issued to **you** by **us** apply to the same accident, the maximum limit of **our** liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

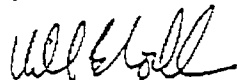
#### ARBITRATION

Submission of any questions regarding this policy to arbitration or appraisal is a condition precedent to initiating legal action on this policy.

IN WITNESS Whereof, we have caused this policy to be executed and attested.



Bruce Arneson, Executive Vice President



William Lockhorn, President

(ISO PP 00 01 06 98, ISO PP 01 80 06 98,  
ISO PP 03 05 08 86, ISO PP 03 09 04 86, ISO PP 03 11 06 98,  
ISO PP 03 68 06 98, ISO PP 04 01 04 86, ISO PP 04 02 04 86,  
ISO PP 05 90 03 99, ISO PP 05 91 11 94)  
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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-1 APPEARS ON THE POLICY DECLARATIONS

#### SOUTH CAROLINA AMENDATORY ENDORSEMENT

We agree to change the policy as follows.

- I. The following sentence is added to the **AGREEMENT** section.  
Your written application, the Declarations page and this policy constitute the entire agreement between us.
- II. **PART A - LIABILITY COVERAGE** is amended as follows.  
**EXCLUSIONS**  
The following Part A. Exclusions are added.
  11. For **bodily injury** or **property damage** resulting from the ownership, maintenance or use of **your covered auto** when it is driven, operated or used by an individual with an insured person's permission if the insured person knows or has reason to know that the operator is under the minimum age to obtain a valid driver's license, does not have a valid driver's license or has a suspended or revoked driver's license.
  12. For **bodily injury** or **property damage** resulting from an insured person committing any unlawful activity (other than a traffic violation) or attempting to flee or fleeing from any law enforcement officer or agent.
  13. For **bodily injury** or **property damage** caused by any vehicle, including **your covered auto**, while used in practicing, participating, or preparing for any organized race, speed contest or performance contest.
- III. **PART D - COVERAGE FOR DAMAGE TO YOUR AUTO** is amended as follows.  
**EXCLUSIONS**  
The following Exclusion is changed.
  13. Loss while **your covered auto** or any **non-owned auto** is used in, practicing, participating, or preparing for any organized race, speed contest or performance contest.  
The following Exclusions are added.
  15. Diminution in value for **your covered auto** or any **non-owned auto**.
  16. Loss to **your covered auto** or any **non-owned auto** due to or resulting from intentional acts committed by **you** or a relative, or by anyone at **your** direction.
  17. Loss to **your covered auto** or any **non-owned auto** caused while being involved in any unlawful activity (other than a traffic violation) or attempting to flee or fleeing from any law enforcement officer or agent.
- IV. **PART F - GENERAL PROVISIONS**  
A. The following sections are added.  
**PAYMENT OF PREMIUM**
  1. This insurance coverage is conditional upon payment of premium. Payment of **your** initial premium by check, draft or other instrument is not considered payment until it is honored upon presentment. If **your** initial premium payment is by check, draft, or any remittance other than cash; coverage under

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this policy is voidable at our election if the check, draft or remittance is not honored upon presentment.

2. If you make a premium payment with a check and the check is returned to us because of insufficient funds, a closed account or a stop payment; a service charge will be added to your account balance.

#### PREMIUM

If you owe us any outstanding premium balances on your expiring, expired or cancelled policy, any moneys received by us will be applied first to pay the oldest outstanding balance.

- B. The following sections are changed by this endorsement.

#### FRAUD

The **FRAUD** section is deleted in its entirety and replaced with the following. We issued your policy in reliance on the information you provided on your insurance application. We may void coverage under this policy if you have knowingly concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct the time application was made or in connection with a claim. We may void this policy for fraud or misrepresentation after the occurrence of an accident or loss. If we void this policy, you must reimburse us for any payment we make.

#### TERMINATION

- 4.b. is amended to read as follows.

If this policy is cancelled, you may be entitled to a premium refund. If so, we will send you the refund. The premium refund, if any, will be computed according to our manuals. However, if the premium refund \$5.00 or less, we will not send you a refund unless you specifically request one. If you owe us \$5.00 or less when the policy is cancelled, we will waive the amount outstanding. Earned premium is calculated on a daily basis. However, making or offering to make the refund is not a condition of cancellation.

0739-1

THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-2 APPEARS ON THE POLICY DECLARATIONS

#### RENTAL REIMBURSEMENT/TRANSPORTATION EXPENSES

In consideration of the premium charged and paid, we will pay for:

1. Temporary transportation expenses you incur in the event of loss to your covered auto. We will pay for such expenses if the loss is caused by:
  - a. Other than collision only if the Declarations indicate that Other Than Collision Coverage is provided for any your covered auto.
  - b. Collision only if the Declarations indicate that Collision Coverage is provided for any your covered auto.
2. Loss of use expenses for which you become legally responsible in the event of

loss to a non-owned auto. We will pay for loss of use expenses if the loss is caused by:

- a. Other than collision only if the Declarations indicate that Other Than Collision Coverage is provided for any your covered auto.
- b. Collision only if the Declarations indicate that Collision Coverage is provided for any your covered auto.

We will pay only expenses beginning when the auto is withdrawn from use for more than 24 hours. Our payment will be limited to that period of time reasonably required to repair or replace your covered auto or the non-owned auto.

The limit of liability shall not exceed the limit shown for this coverage in the Declarations. The total payment under this endorsement shall not exceed the actual cash value of your covered auto or non-owned auto at the time of loss. We will pay only if you rent an auto from a licensed rental car agency.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-3 APPEARS ON THE POLICY DECLARATIONS

#### TOWING AND LABOR COSTS COVERAGE

ISO PP 03 03 04 86

In consideration of the premium charged and paid, we agree to pay for towing and labor costs necessary because of the disablement of your covered auto or a non-owned auto. The limit of liability shall not exceed the limit shown for this coverage in the Declarations. The labor must be performed at the place of disablement.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-4 APPEARS ON THE POLICY DECLARATIONS

#### STATED AMOUNT COVERAGE

ISO PP 03 08 06 94

With respect to the Stated Amount Coverages shown as applicable to a vehicle described in the declarations, the Limit of Liability provision in PART D - COVERAGE FOR DAMAGE TO YOUR AUTO is replaced by the following:

#### Limit of Liability

- A. Our limit of liability for loss shall be the lesser of:
1. the stated amount shown in the declarations;
  2. the actual cash value of your insured car; or
  3. the amount necessary to repair or replace your insured car.
- Our payments for loss will be reduced by any applicable deductible shown in the Declarations. If loss to more than one of your covered autos results from the same collision, only the highest applicable deductible will apply.

- B. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.
- C. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-5 APPEARS ON THE POLICY DECLARATIONS

**COVERAGE FOR AUDIO, VISUAL, AND DATA ELECTRONIC  
EQUIPMENT, AND FOR TAPES, RECORDS, DISCS AND  
OTHER MEDIA**  
(Additional Electronic Equipment)

ISO PP 03 13 06 98

The amount shown in the **Declarations** is not necessarily the amount you will receive at the time of loss or damage for the described property. PLEASE refer to the **Limit Of Liability** provisions below. With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement.

**I. Coverage For Audio, Visual and Data Electronic Equipment**

- A. Exclusion 5, of Part D. Coverage For Damage To Your Auto does not apply to the extent that coverage is provided under this endorsement for audio, visual and data electronic equipment.

- B. In the event of a loss to a **non-owned auto**, or to your **covered auto** shown in the **Declarations** for which Coverage For Audio, Visual and Data Electronic Equipment applies; we will pay, without application of a deductible, for direct and accidental loss to:

1. Any electronic equipment that receives or transmits audio, visual or data signals and is not designed solely for the reproduction of sound; and
2. Any accessories used with such equipment.

Coverage for Audio, Visual and Data Electronic Equipment applies only if:

1. The equipment is permanently installed in the auto; or

2. The equipment is:

- a. Removable from a housing unit which is permanently installed in the auto;
- b. Designed to be solely operated by use of the power from the auto's electrical system; and
- c. In or upon your **covered auto** or any **non-owned auto** at the time of the loss.

- C. Coverage for Audio, Visual and Data Electronic Equipment does not apply to equipment or accessories that are excluded from coverage under exclusion 4 of Part D.

- D. With respect to Coverage For Audio, Visual And Data Electronic Equipment, the **Limit Of Liability** provision of Part D is replaced by the following.

**LIMIT OF LIABILITY**

1. Our limit of liability for the total of all losses to audio, visual or data electronic equipment and any accessories used with the equipment, as a result of any one occurrence shall be the lesser of the:
  - a. Amount shown in the **Declarations**;
  - b. Actual cash value of the stolen or damaged property; or
  - c. Amount necessary to repair or replace the property with other property of like kind and quality.
2. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.
3. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

**II. Coverage For Tapes, Records, Discs and Other Media**

- A. Exclusion 6., Part D. - Coverage For Damage To Your Auto does not apply to the extent that coverage is provided under this endorsement for tapes, records, discs or other media.

- B. We will also pay, without application of a deductible, for direct and accidental loss to tapes, records, discs or other media if they are:

1. Owned by you or any family member; and
2. In or upon your **covered auto** or any **non-owned auto** at the time of the loss.

- C. With respect to the Coverage For Tapes, Records, Discs and Other Media, the **Limit Of Liability** provision of Part D is replaced by the following.

**LIMIT OF LIABILITY**

1. Our limit of liability for the total of all losses to tapes, records, discs or other media, as a result of any one occurrence shall be the lesser of:
  - a. \$200;
  - b. The actual cash value of the stolen or damaged property; or
  - c. The amount necessary to repair or replace the property with other property of the like kind and quality.

If coverage for audio, visual, or data electronic equipment and accessories used with the equipment is purchased, the limit of liability applicable for losses to tapes, records, discs or other media is in addition to the limit of liability applicable to audio, visual or data electronic equipment and any accessories used with the equipment.

2. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.
3. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of betterment.

Nothing in this endorsement shall be held to vary, waive, alter, or extend any of the terms, conditions, agreements or declarations of the policy, other than as stated herein.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-6 APPEARS ON THE POLICY DECLARATIONS

### CUSTOMIZING EQUIPMENT COVERAGE (LIMITED COVERAGE FOR ADDITIONAL EQUIPMENT)

With respect to coverage provided by this endorsement, the provisions of the policy apply unless modified by the endorsement. In consideration of the premium charged and paid and if **your covered auto** has additional customized equipment, we agree to provide the following coverage.

- A. Exclusion 11 of Part D. Coverage For Damage To Your Auto does not apply to coverage provided by this endorsement.
- B. With respect to a vehicle for which the Declarations indicated that Customizing Equipment Coverage applies, we will pay for direct and accidental loss to custom furnishings or equipment including, but not limited to:
  - 1. Special carpeting and insulation;
  - 2. Furniture or bars;
  - 3. Height-extending roofs;
  - 4. Custom murals, paintings or other decals or graphics;
  - 5. Cooking, dining, plumbing, or refrigeration facilities;
  - 6. Awnings or cabanas.We will pay for loss caused by:
  - 1. Other Than Collision only if the Declarations indicated that Other Than Collision coverage is provided for **your covered auto**.
  - 2. Collision only if the Declarations indicates that collision coverage is provided for **your covered auto**.
- C. The following exclusion is added.
  - 1. We will not pay for loss to:
    - a. Clothing or luggage;
    - b. Business or office equipment.
    - c. Articles which are sales samples or used in exhibitions.
- D. This coverage does not apply to furnishings or equipment that are excluded from coverage under Exclusions 4., 5., 6., 8. or 10 of Part D.
- E. With respect to coverage under this endorsement, the Limit of Liability of Part D is replaced by the following.

#### LIMIT OF LIABILITY

Our limit of liability for loss will be the lesser of the:

- 1. Amount shown in the Declarations;
- 2. Actual cash value of the stolen or damaged property; or
- 3. Amount necessary to repair or replace the property with property of like kind and quality.

Our payment for loss will be reduced by any applicable deductible shown in the Declarations. If loss to more than one of **your covered autos** results from the same collision, only the highest applicable deductible will apply.

An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total loss.  
If a repair or replacement results in better than like kind or quality, we will not pay for the amount of betterment.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-7 APPEARS ON THE POLICY DECLARATIONS

### NAMED NON-OWNER COVERAGE

ISO PP 03 22 06 98

With respect to the individuals and coverages listed in the Declarations, the provisions of the policy apply unless modified by the endorsement.

#### I. DEFINITIONS

The Definitions Section is amended as follows.

- A. You or your refers to the individual named in the Declarations.
- B. The definition of **your covered auto** is replaced by the following.  
**Your covered auto** means any of the following types of vehicles on the date you become the owner.
  - a. A private passenger auto; or
  - b. A pickup or van that:
    - (1) Has a Gross Vehicle Weight of less than 10,000 lbs.; and
    - (2) Is not used for the delivery or transportation of goods and materials unless such use is
      - (a) Incidental to your **business** of maintaining or repairing furnishings or equipment; or
      - (b) For farming or ranching.

This provision applies only:

- a. If you acquire the vehicle during the policy period; and
- b. For 14 days after you become the owner.

This insurance does not apply if other insurance applies with respect to newly acquired vehicles.

#### II. PART A - LIABILITY COVERAGE

PART A is amended as follows.

- A. Paragraph 1. of the definition of **insured** is amended by deleting reference to **family member**.
- B. The Exclusions Section is amended as follows.
  - 1. The exception to Exclusion A.3. is replaced by the following.  
This Exclusion (A.3.) does not apply to **property damage** to a residence or private garage caused by a private passenger auto which is insured under this endorsement.
  - 2. Exclusions A.6. and A.7. are replaced by the following.  
We do not provide Liability Coverage for any **insured** maintaining or using

any vehicle in the **business** of that insured. This exclusion does not apply to an auto operated or occupied by you.

3. Exclusion B.2. is replaced by the following.

We do not provide Liability Coverage for the ownership, maintenance or use of any vehicle, other than **your covered auto**, which is owned by you.

4. Exclusion B.3. is replaced by the following.

We do not provide Liability Coverage for the ownership, maintenance or use of any vehicle, other than **your covered auto** which is owned by any **family member**. However, this Exclusion (B.3.) does not apply to you while you are maintaining or occupying any vehicle which is owned by a **family member**.

- C. The Limit of Liability Provision is replaced by the following.

#### LIMIT OF LIABILITY

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

The limit of liability shown in the Declarations for **each accident** for Property Damage Liability is **our** maximum limit of liability for all **property damage** resulting from any one auto accident. This is the most **we** will pay regardless of the number of:

1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the auto accident.

- D. The Out of State Coverage Provision is replaced by the following.

#### OUT OF STATE COVERAGE

If an auto accident to which this policy applies occurs in any state or province other than where you reside, we will interpret your policy for that accident as follows:

If the state or province has:

1. A financial responsibility or similar law specifying limits of liability for **bodily injury** or **property damage** higher than the limit shown in the Declarations, **your** policy will provide the higher specified limit.
2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, **your** policy will provide at least the required minimum amounts and types of coverage.

No one will be entitled to duplicate payments for the same elements of loss.

### III. PART B - MEDICAL PAYMENTS COVERAGE

Part B is amended as follows.

- A. Paragraph 1. of the definition of **insured** is amended by deleting reference to **family member**.

- B. The Exclusions Sections is amended as follows.

1. Exclusion 5. is replaced by the following clause.

We do not provide Medical Payments Coverage for any **insured** for **bodily injury** sustained while **occupying** or, when struck by, any vehicle (other than **your covered auto**) which is owned by you.

2. Exclusion 6. does not apply.

3. Exclusion 8. is replaced by the following clause.

We do not provide Medical Payments Coverage for any **insured** for **bodily injury** sustained while **occupying** any vehicle used in the **business** of that **insured**. This Exclusion (8.) does not apply to a vehicle operated or occupied by you.

### IV. PART C - UNINSURED MOTORISTS COVERAGE

Part C is amended as follows.

- A. Paragraph 1. of the definition of **insured** is amended by deleting reference to **family member**.

- B. The definition of **uninsured motor vehicle** is amended as follows.

1. Any reference in Part 2. to the state in which **your covered auto** is principally garaged is amended to read the state in which you reside.

2. Paragraphs a. and b. of the hit-and-run vehicle section are amended by deleting reference to **family member**.

- C. Limit of Liability

1. Paragraph A. of the Limit Of Liability Provision is replaced by the following.

The limit of liability shown in the Declarations for **each person** for Uninsured Motorists Coverage is **our** maximum limit of liability for all damages. This limit includes damages for care, loss of services or death, arising out of **bodily injury** sustained by any one person in any one accident. Subject to this limit for **each person** the limit of liability shown in the Declarations for **each accident** for Uninsured Motorists Coverage is **our** maximum limit of liability for all damages for **bodily injury** resulting from any one accident.

This is the most **we** will pay regardless of the number of:

- a. Insureds;
- b. Claims made;
- c. Vehicles or premiums shown in the Declarations; or
- d. Vehicles involved in the accident.

2. If the Declarations also indicate an **each accident** limit of liability for Property Damage Uninsured Motorists Coverage, the following is added to Paragraph A.

The limit of liability shown in the Declarations for **each accident** for Property Damage Uninsured Motorists Coverage is **our** maximum limit of liability from any one accident.

This is the most we will pay regardless of the number of:

- a. Insureds;
- b. Claims made;
- c. Vehicles or premiums shown in the Declarations; or
- d. Vehicles involved in the accident.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-8 APPEARS ON THE POLICY DECLARATIONS

### ADDITIONAL INSURED - LESSOR

ISO PP 03 19 08 86

Any liability and any required no-fault coverage afforded by this policy for **your leased auto** also apply to the lessor named in the Declarations as an additional **insured**. This insurance is subject to the following additional provisions.

1. We will pay damages for which lessor becomes legally responsible only if damages arise out of acts or omissions of:
  - a. **you** or any **family member**; or
  - b. any other person except the lessor or any employee or agent of the lessor using **your leased auto**.
2. **Your leased auto** means:
  - a. an auto shown in the Declarations or in this endorsement which **you** lease for a continuous period of at least six months under a written agreement which requires **you** to provide primary insurance for the lessor; and
  - b. any substitute or replacement auto furnished by the lessor named in this endorsement.
3. If we terminate this policy, notice will also be mailed to the lessor.
4. The lessor is not responsible for payment of premiums.
5. The designation of the lessor as an additional insured shall not operate to increase our limits of liability.

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THE FOLLOWING ENDORSEMENT ONLY APPLIES IF FORM 0739-9 APPEARS ON THE POLICY DECLARATIONS

### DRIVER EXCLUSION ENDORSEMENT

In consideration of the premium charged, we agree that insurance coverage is not afforded by this policy while any insured vehicle is being used, driven, operated or manipulated by or under the care, custody or control of the excluded driver(s). The excluded driver(s) is named on the declarations page of this policy. If the interest of any Lienholder creates an obligation to pay money because of a loss excluded by

this endorsement; the **insured** agrees to reimburse the Company for all costs and expenses paid or incurred by the Company.

This endorsement supersedes and excludes from the policy any contrary provision(s). In all other respects this policy remains unchanged.

The named person(s) referenced in this endorsement agrees to this exclusion. They have signed the Driver Exclusion Agreement and Endorsement on the application. Each excluded driver has either surrendered their driver's license to the State Highway Department, or provided evidence that they have obtained another policy of insurance to enable them to drive vehicles.

0739-9

### South Carolina Covenant Not to Execute

**WHEREAS, Christopher Wright**, hereinafter referred to as the undersigned, and **Jennifer Barron** were involved in an automobile accident on or about **May 9, 2010**, in the County of Cherokee in the State of South Carolina: and

**WHEREAS**, the undersigned subsequently claimed bodily injuries and damages as a result of this accident; and

**WHEREAS, Omni Insurance Company**, hereinafter referred to as Carrier, had issued a policy of automobile liability insurance to **Anthony Barron**, hereinafter referred to as Insured, policy number 311851; with liability limits of \$25,000.00 per person and \$50,000.00 per occurrence. Moreover, this policy of insurance contains underinsured motorist coverage in the amount of \$25,000.00 per person and \$50,000.00 per occurrence. The Insured and Carrier have stated to the undersigned that the Insured (nor any resident relative) has not been issued any other insurance policy or coverage applicable to this accident – a material representation which form the basis of this Covenant; and

**WHEREAS**, the undersigned alleges to have sustained substantial damages arising out of the above accident and the undersigned alleges that these damages will exceed the amount of liability insurance coverage and underinsured motorist coverage available to Insured through the policy number listed above; and

**WHEREAS**, the undersigned and Carrier have a dispute over the undersigned's ability under South Carolina law to recover underinsured motorist benefits under the subject policy. As a result, Carrier has agreed to file a Declaratory Judgment Action pursuant to S.C. Code §15-53-10 *et seq.* to determine the rights of the parties under the subject policy; and

**WHEREAS**, Insured and Carrier would wish to limit any liability for damages in excess of the amount Insured and Carrier are obligated to pay under policy 311851;

**NOW THEREFORE**, knowing all men by these presents that I, **Christopher Wright**, for and in consideration of the following:

- a) \$25,000.00 dollars to me in hand paid by Insured and Carrier, constituting the extent of the liability limits under policy 311851, the unconditional receipt and sufficiency whereof is hereby acknowledged; and
- b) Carrier's agreement to abide by the final judicial determination of the Declaratory Judgment Action to determine whether the undersigned is also entitled to \$25,000.00 dollars to him paid by Insured and Carrier, constituting the

underinsured motorist limits under the policy 311851. In other words, should there be a final judicial determination that the undersigned is entitled to recover under the underinsured motorist coverage of policy 311851, the undersigned would be entitled to the policy limits of said coverage of \$25,000.00, for a total recovery under the policy of \$50,000.00.

In exchange of the above consideration, the undersigned, for myself, my heirs, executors, administrators, successor and assigns, do hereby covenant, promise and agree as follows:

That the undersigned does hereby promise and covenant for himself, his executors, administrators, successors, and assigns not to execute against Insured and/or Carrier, their heirs, administrators, legal representatives, successors or assigns, on any judgment that may be obtained by the undersigned on account of any and all claims, domains, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and causes of action, arising from any act, omission, or occurrence, resulting or to result from the above referenced automobile accident.

That furthermore, the undersigned does further covenant and promise that if he should attain a judgment against Insured and/or Carrier and that, upon final determination of whether any other insurance benefits will be paid he or his attorney will cause the judgment to be marked and entered as satisfied.

That should the undersigned or his attorney refuse to mark and enter any judgment obtained against the Insured and/or Carrier satisfied as provided herein above, the undersigned and his attorney do hereby authorize the Clerk of Court for the county in which any action is pending, to mark and enter the judgment as satisfied upon receiving a copy of this agreement from counsel for Insured and/or Carrier.

That the undersigned agrees that the payment made by Insured and Carrier is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part or of any other person hereby benefiting from this Covenant.

That the undersigned hereby declares and represents that no promise or inducement or agreement not herein expressed has been made to him and that this Covenant contains the entire agreement between the parties hereto, and the terms of this Covenant are contractual and not merely a recital and that Insured and Carrier have made no representations as to the possibility of recovery of any monies by the undersigned.

The undersigned further covenants and agrees that this Covenant shall apply to all known, unknown, anticipated, and unanticipated injuries and damages resulting from the above accident.

That the undersigned and his attorney does further agree that should there be any liens for health care services provided, whether by statute or contract or otherwise, that they will cause the health care provider to be reimbursed from the proceeds of this payment and said liens and that they will indemnify and hold harmless Insured and Carrier, their heirs, executors, administrators, legal representatives, successors and assigns, from any and all claims, demands, actions or causes of action of whatsoever kind or nature, including the reimbursement of a reasonable attorneys fee in defending such actions brought by any such purported lien holders.

That the undersigned hereby acknowledges that he relies wholly upon his own judgment, belief, and knowledge of the nature, extent, and duration of his/her injuries and damages, and the possibility of

recovery from said injuries and damages, and that no representations or statements of any kind regarding these injuries and damages or any other matter made by Insured or Carrier or by their agents or representative, having been relied on to any extent whatsoever in making this covenant.

It is mutually understood and agreed that this covenant is not intended as a release or discharge, nor as an accord and satisfaction with any person whatsoever, but only as a Covenant Not To Execute against Insured and Carrier, their heirs, executors, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against Insured and/or Carrier. The undersigned hereby expressly reserves the right to prosecute a legal action in court against Insured and/or Carrier for the purpose of establishing a claim under any insurance policy applicable to this accident including, but not limited to, all additional liability, underinsured, uninsured, excess coverage, personal injury protection, medical payments, or other policies. Nor does this Covenant intend to release any other person, firm, or corporation, who is liable, or may be liable, to the undersigned for any injuries and/or damages that may have been suffered from the above referenced accident.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 5 day of January, 2011.

Claimant's Signature: Scott Wright

STATE OF SOUTH CAROLINA )

COUNTY OF York )

On January 5, 2011 before me personally came Scott Wright and  
\_\_\_\_\_ to me known to be the person who is described in and who executed  
the foregoing instrument, and that he/she acknowledged to me that they executed the same and the same is  
their free act and deed.

Fredericka A. Brune  
NOTARY PUBLIC, SOUTH CAROLINA

My Commission Expires: 10/26/2011

It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. Penalties may include imprisonment, fines, or a denial of insurance benefits.

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

Appellate Case No. 2013-000912

Omni Insurance Company ..... Appellant,

v.

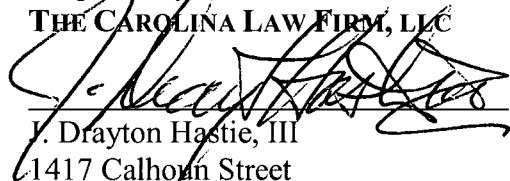
Christopher Wright ..... Respondent.

**PROOF OF SERVICE**

I CERTIFY THAT I HAVE SERVED THE Record on Appeal on Respondent  
Christopher Wright by hand delivery, on December 27, 2013, to his attorney of record, James  
B. Richardson, Jr., at his office of record at 1229 Lincoln Street, Columbia, SC 29201.

Columbia, South Carolina  
December 27, 2013

Respectfully Submitted,  
**THE CAROLINA LAW FIRM, LLC**

  
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