M&G
MURPHY & GRANTLAND, P.A.

J. R. Murphy
Direct dial 803-454-1231
jrmurphy@murphygrantland.com

August 31, 2012

**HAND DELIVERED**
Daniel E. Shearouse
South Carolina Supreme Court
Supreme Court Building, 1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211-1330

Re: Joshua Bell vs. Progressive Direct Insurance Company
Civil Action No.: 2007-CP-26-05890
Claim No.: 06-8214842
Case Tracking No.: 2009138187
Our File No.: 1115-1543

Dear Mr. Shearouse:

Enclosed please find herewith for filing with the Court the original and eighteen (18) copies of Respondent's Brief in the above-referenced matter. I would appreciate your filing the original and returning three (3) clocked copies to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,

J. R. Murphy

JRM/kbd
Enclosure
cc: Georgia S Hamilton, Esquire
Gene M. Connell, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

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Opinion No. 2011-UP-242 Filed May 24, 2011
Withdrawn, Substituted and Re-filed June 23, 2011

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Joshua Bell ..... Petitioner,

v.

Progressive Direct Insurance Company ..... Respondent.

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# BRIEF OF RESPONDENT

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J. R. Murphy, Esquire
Ashley B. Stratton, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

Other Counsel of Record:
Gene M. Connell, Esquire
Kelaher, Connell & Connor, P.C.
P.O. Drawer 14547
Surfside Beach, SC 29587
Attorneys for Petitioner

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# BRIEF OF RESPONDENT

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J. R. Murphy, Esquire
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MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

Other Counsel of Record:
Gene M. Connell, Esquire
Kelaher, Connell & Connor, P.C.
P.O. Drawer 14547
Surfside Beach, SC 29587
Attorneys for Petitioner

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### South Carolina Cases

**Cases From Other Jurisdictions**

**Statutes and Rules**



**Secondary Sources**

## ISSUES ON APPEAL

I) WHETHER SOUTH CAROLINA SHOULD ADOPT THE DOCTRINE OF REASONABLE EXPECTATIONS WHEN THE DOCTRINE CANNOT BE RECONCILED WITH THE GENERAL RULES OF CONTRACT CONSTRUCTION.

II) APPLYING GENERAL RULES OF CONTRACT CONSTRUCTION, WHETHER PROGRESSIVE'S POLICY IS AMBIGUOUS AND WHETHER PETITIONER IS AN INSURED.

## STATEMENT OF THE CASE

This appeal arises out of an insurance coverage dispute in which Petitioner Joshua Bell claims he is entitled to underinsured motorist ("UIM") coverage under a policy of insurance issued by Respondent Progressive Direct Insurance Company ("Progressive") to Petitioner's former girlfriend, Sarah Severn. On May 31, 2006, Petitioner was a passenger in a vehicle owned by his employer which was involved in an accident. Petitioner received the liability limits of the at-fault driver's insurance, but there was no UIM coverage on the company vehicle in which Petitioner was riding. Petitioner filed the instant suit seeking to recover UIM benefits under the Progressive policy covering a Honda CRV owned by his former girlfriend.

Progressive policy 13507563-0 was issued to Sarah Severn with effective dates of November 4, 2005, to May 4, 2006. On the declarations page, the policy listed Bell as a "driver and household resident", but not as a "named insured". (R.p.52[1].) The policy provided UIM coverage for an "insured person", which is defined as "you" or a "relative". "You" is defined in the policy as a named insured or spouse if residing in the same household; "relative" is defined as a person related to the named insured by blood or marriage and also residing in the same household. (R.p.26.)

Petitioner also asserts a common law marriage existed between himself and Ms. Severn. According to Petitioner, he and Ms. Severn had been engaged at various times, but had never married. (R.pp.102-109.) Although he resided with Ms. Severn and had given her an engagement ring, they never set a date to be married. (R.pp.103, 105-108.) Ms. Severn left Bell and South Carolina subsequent to the accident and, while she was

[1] Because Petitioner did not incorporate the Record on Appeal into the Appendix, cites are made to the Record where appropriate.

residing without Bell in Maryland, the engagement was definitely broken off. (R.pp.103-105, 108.)

In an Order filed January 9, 2008, the trial court granted Progressive summary judgment based on the finding that Petitioner was not an "insured" under the Progressive policy and could not establish the existence of a common law marriage to Ms. Severn. (R.pp. 5-7.) The trial court also held that Petitioner was not entitled to UIM coverage under the doctrine of reasonable expectations because that doctrine has been explicitly rejected by South Carolina Courts. (R.p.5 (citing Ex parte United Servs. Auto. Ass'n, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005)).

Petitioner appealed and the Court of Appeals affirmed summary judgment in Progressive's favor. In an opinion[2] submitted June 23, 2011, the Court of Appeals held Petitioner was not an insured under Severn's policy because he was not "you" or a "relative" as those terms are defined in the policy. In doing so, the Court of Appeals specifically held listing Petitioner as a "household resident" on the declaration page does not create an ambiguity. The Court of Appeals also affirmed there is no genuine issue of any material fact that Petitioner and Severn are not common law married when they merely cohabitated and where there is no evidence they held themselves out as being married. Finally, the Court of Appeals refused to adopt the doctrine of reasonable expectations because it cannot be reconciled with South Carolina's longstanding rules of contract construction.

This Court granted the Petition for Writ of Certiorari to review the Court of Appeals' decision on July 12, 2012.

[2] This opinion substituted the Court of Appeals' original opinion which was filed on May 24, 2011, and subsequently withdrawn.

## STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 (c), SCRCP; Berry v. McLeod, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997). The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by showing there is an absence of evidence to support the nonmoving party's case. Id. Once the moving party carries its initial burden, the opposing party must do more than simply show there is some metaphysical doubt as to the material facts but must come forward with specific facts showing there is a genuine issue for trial. Id.

All ambiguities, conclusions and inferences arising from the evidence must be construed against the moving party. Young v. South Carolina Dept. of Corr., 33 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). However, when the evidence is susceptible of only one reasonable interpretation, summary judgment is proper. Brooks v. Northwood Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

## ARGUMENT

### I) SOUTH CAROLINA HAS NOT ADOPTED THE DOCTRINE OF REASONABLE EXPECTATIONS AND SHOULD NOT DO SO NOW WHEN THE DOCTRINE CANNOT BE RECONCILED WITH THE GENERAL RULES OF CONTRACT CONSTRUCTION.

When the Court of Appeals' recognized the rejection of the doctrine of reasonable expectations, it cited the only two cases in South Carolina which have addressed the doctrine. The most thorough explanation of the doctrine and its rejection in South Carolina is found in Allstate Insurance Co. v. Mangum, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989), which states:

> This doctrine essentially is that "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated these expectations." The theory is based upon the proposition that the construction of the language of an insurance contract is not ordinarily controlled by the standards applicable to a contract negotiated at arms length between two parties on the same plane.
>
> ***This view has never been accepted by the Supreme Court of this State.*** In South Carolina insurance policies are subject to the general rules of contract construction.
>
> If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the insurer and the insured, a condition or stipulation not contemplated by the parties. A reviewing court should not rewrite or "torture the meaning of policy language" to achieve a result never intended by the parties.

Mangum, 299 S.C. at 231, 383 S.E.2d at 466-67 (emphasis added) (internal citations omitted). The other case addressing the doctrine, Ex parte: United Services Automobile Association, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005), distinguishes cases from other jurisdictions relying on the doctrine and recognizes the rejection of the doctrine in Mangum.

The only other jurisprudence on the doctrine in this State derives from the District Court sitting in diversity and charged with applying South Carolina law. The District Court, citing Mangum, has repeatedly recognized South Carolina's rejection of the doctrine. See Doe v. Nationwide Mut. Life Ins. Co., 2012 WL 2405510 *6 (D.S.C.)

("South Carolina has not adopted the doctrine of 'reasonable expectations' in construing insurance policies."); Mize v. Travelers Cas. Co. of Connecticut, 2011 WL 891322 *4 (D.S.C.) ("[T]his doctrine has been rejected in South Carolina and this court finds no reason to conclude that South Carolina courts would choose to adopt it in the present case."); NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC, 2010 WL 146482 *5 (D.S.C.) ("South Carolina does not follow the doctrine of reasonable expectations."); Bankers Ins. Co. v. Prezzy, 2009 WL 3459189 *1 (D.S.C.) ("South Carolina courts have continuously refused to incorporate the doctrine of reasonable expectations into South Carolina insurance law."); Southern Land and Golf Co. Ltd. v. Harleysville Mut. Ins. Co., 2006 WL 2443340 *8 (D.S.C.) ("The parties' mutual expectations of coverage are not a basis for estoppel ... South Carolina has not adopted the doctrine of 'reasonable expectations.'").

Regardless of whether the rejection of the doctrine in Mangum is dicta or not, the fact remains that the doctrine has never been adopted in South Carolina and should not be adopted now because there is no way to reconcile the doctrine with longstanding rules of contract construction. In South Carolina, insurance policies are subject to the general rules of contract construction. Mangum, 299 S.C. at 231, 383 S.E.2d at 467 (citing Gambrell v. Travelers Ins. Co., 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983)). Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it. Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984). If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the

agreement between the insurer and the insured a condition or stipulation not contemplated by the parties. Mangum, 299 S.C. at 231, 383 S.E.2d at 467 (citing Carroway v. Johnson, 245 S.C. 200, 203, 139 S.E.2d 908, 910 (1965)). A reviewing court should not rewrite or torture the meaning of policy language to achieve a result never intended by the parties. Id. (citing Gambrell, 280 S.C. at 71, 310 S.E.2d at 816)). A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning. USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Id.

The incongruity between the doctrine of reasonable expectations and general rules of contract construction is noted in other jurisdictions which have also rejected the doctrine. Of particularly helpful instruction is the Supreme Court of Michigan's opinion in Wilkie v. Auto-Owners Insurance Company, 664 N.W.2d 776 (Mich. 2003)[3]. Progressive urges the Court to find this Michigan case persuasive because Michigan jurisprudence in the area of insurance law has often been followed by this State, most notably in the area of intentional acts exclusions[4]. In Wilkie, the Supreme Court of

[3] Petitioner's inclusion of Michigan in his list of "thirty-six jurisdictions" which have recognized the doctrine of reasonable expectations is an incorrect representation of Michigan law. To the extent the case cited by Petitioner, Crowell v. Federal Life and Casualty Company, 247 N.W.2d 503 (Mich. 1976), applies the doctrine of reasonable expectations, such jurisprudence is clearly overruled by the more recent decision of the Michigan Supreme Court in Wilkie.

[4] See, e.g., Miller v. Fidelity-Phoenix, 268 S.C. 72, 231 S.E.2d 701 (1977) (adopting rule that not only the act causing the loss must have been intentional but that the results of the act must also have been intended); State Farm Fire & Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000) & Mfrs. & Merchs. Mut. Ins. Co. v. Harvey, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998) (following Michigan's adoption of the

Michigan expressly refused to adopt the doctrine because it requires judges to "divine the parties' reasonable expectations and then rewrite the contract accordingly," which is "contrary to the bedrock principle of American contract law that parties are free to contract as they see fit." Wilkie, 664 N.W.2d at 782. Twice the Court recited the following maxim:

> [T]he expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligation on the theory that there was no contract at all for there was no meeting of the minds.
> But to allow such person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.

Id. at 784-85 (citing Raska v. Farm Bureau Ins. Co., 314 N.W.2d 440 (Mich. 1982)).

Specifically, the Michigan Court found that the doctrine is inapplicable as to both unambiguous and ambiguous contracts. Where the contract is unambiguous, the doctrine is inapplicable "because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract." Id. at 787. Even when the doctrine's "application is limited to ambiguous contracts, [it] . . . is just a surrogate for the rule of construing [a contract] against the drafter." Id. at 786-87. This rule of construction recognized in Michigan mirrors South Carolina's rule that "[wh]ere language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted." Hansen ex rel. Hansen v. United Services Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct. App. 2002) (citing Poston v. National Fid. Life Ins. Co., 303 S.C.

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"inferred intent" doctrine in sexual misconduct cases); Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) (following Michigan case law holding shooting did not arise out of use of vehicle).

182, 187, 399 S.E.2d 770, 772 (1990)). Accordingly, the doctrine was rejected because it contributed nothing to the manner in which Michigan courts already construe contracts. Id. at 787 ("Thus, it appears that the 'rule of reasonable expectations' is nothing more than a unique title given to traditional contract principles applied to insurance contracts.").

The sound reasoning espoused by the Michigan Court reflects the nationwide modern trend of either rejecting the doctrine or significantly limiting its application. In addition to Michigan and South Carolina, ten other states have expressly rejected or refused to adopt the doctrine on the general basis that traditional contract interpretation and construction rules should govern. For instance, the Supreme Court of Florida declined to adopt the doctrine stating: "There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which premiums are charged." Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998); see also Casey v. Highlands Ins. Co., 600 P.2d 1387 (Idaho 1979); Fed. Deposit Ins. Co. v. Zaborac, 773 F.Supp. 137 (C.D. Ill. 1984); Nationwide Mut. Ins. Cos. v. Lagodinski, 683 N.W.2d 903 (N.D. 2004); Sterling Merchandise Co. v. Hartford Ins. Co., 506 N.E.2d 1192 (Ohio 1986); Culhane v. Western Nat'l Mut. Ins. Co., 704 N.W.2d 287 (S.D. 2005); Allen v. Prudential Prop. and Cas. Ins. Co., 839 P.2d 798 (Utah 1992); Keenan v. Indus. Indem. Ins. Co., 738 P.2d 270 (Wash. 1987); St. Paul Fire & Marine v. Albany Co. Sch. Dist. 1, 763 P.2d 1255, 1263 (Wyo. 1988); see also Collins v. Farmers Ins. Co., 822 P.2d 1146 (Or. 1991) (recognizing doctrine has not been adopted but also recognizing weak support for it).

Contrary to Petitioner's representation, only eight states have adopted the reasonable expectations doctrine in its entirety[5]. Since the initial recognition of the doctrine by Professor Keeton in 1970, a majority of courts have significantly limited the doctrine's application. The shift in the application of the doctrine over the past forty years indicates that courts were initially attracted to the doctrine, but slowly backed off after realizing the general rules of contract construction were more than sufficient for interpreting insurance contracts. Nearly all of the thirty-six cases presented by Petitioner were decided before 1990 and, consequently, represent only the first two decades of the doctrine's existence[6]. A survey of nationwide case law after 1990 represents the modern approach to the doctrine and shows a marked trend in limiting the doctrine's application to only ambiguous policies. Of the eighteen states applying a substantially limited form of the doctrine, most do so as an extension of the standard contra proferentem rule of construction requiring ambiguous provisions to be construed against the drafter[7]. The

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[5] See Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc., 682 P.2d 1108 (Alaska 1984); Cretens v. State Farm Fire & Cas. Co., 60 F.Supp.2d 987 (D. Ariz. 1999); Shelter Mut. Ins. Co. v. Breit, 908 P.2d 1149 (Colo. Ct. App. 1996); Clark-Peterson Co., Inc. v. Indep. Ins. Assoc., 492 N.W.2d 675 (Iowa 1992); Nile Valley Coop. Grain and Milling Co. v. Farmers Elevator Mut. Ins. Co., 193 N.W.2d 752 (Neb. 1972); Berlangieri v. Running Elk Corp., 44 P.3d 538 (N.M. Ct. App. 2002); Am. Equity Ins. Co. v. Lignetics, Inc., 284 F.Supp.2d 399 (N.D.W.Va. 2003); Dowhower v. West Bend Mut. Ins. Co., 284 F.Supp.2d 399 (Wis. 2000).

[6] Petitioner cites only two cases decided after 1990 which include West Virginia and Oklahoma. As noted above, West Virginia adopts the doctrine in its entirety. Oklahoma, on the other hand applies a specific, limited version of the doctrine. Blue v. Universal Underwriters Life Ins. Co., 912 P.2d 861 (N.D. Okla. 2009).

[7] Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So. 2d 705 (Ala. 2007); Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co., 116 Cal. Rptr. 2d 370 (Cal. App. 4th 2002); Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925 (Del. 1982); Yu v. Albany Ins. Co., 281 F.3d 803 (9th Cir. 2002) (applying Hawaii law); McGuire v. Century Sur. Co., 861 N.E.2d 357 (Ind. Ct. App. 2007); Liggatt v. Employers Mut. Cas. Co., 46 P.3d 1120 (Kan. 2002); True v. Raines, 99 S.W.3d 439 (Ky. 2003); Nerness v. Christian Fid. Life Ins. Co., 733 So. 2d 146 (La. Ct. App. 1999); Minnesota Sch. Boards Ass'n Ins. Trust v. Employers Ins. of Wausau, 331 F.3d 579 (8th Cir. 2003) (applying Minnesota Law); Nabil v. State Farm Mut. Auto. Ins. Co., 877 S.W.2d 177 (Mo. Ct. App. 1994); Generali-U.S. Branch v. Alexander, 87 P.3d 1000 (Mont. 2004); Farmers Ins. Exch. v. Young, 832 P.2d 376 (Nev. 1992); Godbout v. Lloyd's Ins. Syndicates, 834 A.2d 360 (N.H. 2003); Flomerfelt v. Cardiello, 997 A.2d 991 (N.J. 2010); Haber v. St. Paul Guardian Ins. Co., 137 F.3d 691 (2d Cir. 1998) (applying New York law); Blue v. Universal

remaining twelve states either have not clearly addressed the doctrine[8] or have applied a vague version of it extremely sparingly[9].

Contrary to Petitioner's representation, the doctrine of reasonable expectations is not widely accepted and should not be adopted by this State. In its most popular and frequently applied form, the doctrine simply extends South Carolina's well-settled rule of contra proferentem. Because the general rules of contract construction provide adequate protection for contracting parties while maintaining the sanctity of written instruments, this Court should not adopt a doctrine which essentially invites judicial rewriting of insurance policies and guarantees uncertainties in both the interpretation of contracts and the setting of insurance premiums.

## II) APPLYING GENERAL RULES OF CONTRACT CONSTRUCTION, PROGRESSIVE'S POLICY IS NOT AMBIGUOUS AND PETITIONER IS NOT AN INSURED.

The relevant policy provision for a determination of whether Petitioner is entitled to underinsured motorist coverage for the injuries he sustained in the accident of March 30, 2006, is dependent upon whether he qualifies as an "insured person" as defined in the policy. An "insured person" includes both "you" and a "relative", both of which are also defined terms in the policy. The definitions are set forth within the policy as follows:

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Underwriters Life Ins. Co., 912 P.2d 861 (N.D. Okla. 2009); Employers Mut. Cas. Co. v. Pires, 723 A.2d 295 (R.I. 1999); Vermont Mut. Ins. Co. v. Parsons Hill P'ship, 1 A.3d 1016 (Vt. 2010).

[8] Arkansas, Tennessee, and Virginia.

[9] Nat'l Grange Mut. Ins. Co. v. Santaniello, 961 A.2d 387 (Conn. 2009); Richards v. Hanover Ins. Co., 299 S.E.2d 561 (Ga. 1983); Baybutt Const. Corp. v. Commercial Union Ins. Co., 455 A.2d 914 (Me. 1983) overruled by Peerless Ins. Co. v. Brennon, 564 A.2d 383 (Me. 1989); Gov't Employees Ins. Co. v. Ropka, 536 A.2d 1214 (Md. Ct. Spec. App. 1988); Bond Bros., Inc. v. Robinson, 471 N.E.2d 1332 (Mass. 1984); Brown v. Blue Cross & Blue Shield of Mississippi, Inc., 427 So. 2d 139 (Miss. 1983); Great Am. Ins. Co. v. C. G. Tate Const. Co., 279 S.E.2d 769 (N.C. 1981); Tonkovic v. State Farm Mut. Auto. Ins. Co., 521 A.2d 920 (Pa. 1987); but see Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co., 517 A.2d 910 (Pa. 1986); Vandeventer v. All Am. Life & Cas. Co., 101 S.W.3d 703 (Tex. App. 2003).

**ADDITIONAL DEFINITIONS**

When used in this Part III:

1. "**Insured person**" and "**insured persons**" mean:
   a. **You** or a **relative**;
   b. any person **occupying** a **covered vehicle**;

. . .

11. "**Relative**" means a person residing in the same household as **you**, and related to **you** by blood, marriage or adoption,

...

14. "**You**" and "**Your**" mean:
   a. a person or persons shown as a named insured on the **Declarations Page**; and
   b. the spouse of a named insured if residing in the same household.

(R.pp.26, 32.)

**A) LISTING PETITIONER AS A "HOUSEHOLD RESIDENT" AND "DRIVER" ON THE DECLARATIONS PAGE DOES NOT MAKE HIM AN "INSURED PERSON".**

In order to qualify as a named insured, an individual must be listed as a named insured on the declarations page of the policy. Ex parte: United Servs. Auto. Ass'n, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005); Shelby Mut. Ins. Co. v. Askins, 307 S.C. 81, 413 S.E.2d 855 (Ct. App. 1992). The declarations page in this case clearly indicates that only Sarah K. Severn was the named insured under the section listing the drivers and household residents (under which Bell's name also appears, but without the designation as a named insured). Moreover, the addressee section only includes Sarah K. Severn as the named insured. (R.p.52.) Therefore, based on the plain and unambiguous terms of the policy, Bell is not a named insured under the policy.

Despite the fact Petitioner is not listed as a named insured, he claims entitlement to coverage based on the appearance of his name as a "household resident" and "driver" on the declarations page. In determining Petitioner's designation as a "household

resident" and "driver" does not entitle him to coverage, the Court of Appeals correctly relied on Ex parte: United Services Automobile Association, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005). In United Services, the driver seeking coverage argued she should be allowed to stack coverages on other vehicles at her residence because she was listed as an "operator" on the declarations page of the applicable insurance policy. The driver argued her inclusion as an "operator" on the declarations page of the policy created an ambiguity as to whether she was a named insured and such an ambiguity should be resolved in favor of coverage. Id. at 54, 614 S.E.2d at 654. The Court of Appeals held that "listing a driver on the declarations page of an insurance policy does not make that person a named insured." Id. at 55, 614 S.E.2d at 654. The failure of the policy to define the term "operator" does not render the policy vague or ambiguous when "operator" can be defined "according to the usual understanding of term's significance to the ordinary person." Id. The Court held that to construe "named insured" and "operator" as synonymous would expand the term "named insured" beyond its common sense meaning. Id. (citing Nationwide Mut. Ins. Co. v. Williams, 472 S.E.2d 220, 222 (N.C. Ct. App. 1996) (being named a "driver" does not create an ambiguity and does not transform one into a named insured)).

United Services is squarely on point with the instant case in which Petitioner is listed as a "driver" and a "household resident", but is not listed as a "named insured". The terms "driver" and "household resident" are not synonymous with named insured. A driver may be a permissive user, friend, or anyone actually operating a vehicle. A household resident could include unlicensed drivers, minors, non-family members, etc. The designation as a driver and/or household resident originates in the policy application

process and is used to help insurance companies properly evaluate the risks to be insured under the policy. While dependent on a number of factors, the risk which an insurer undertakes can increase by virtue of the presence of household residents or drivers even if those individuals do not qualify as Class I insureds. In other words, risk is affected by the number of persons to regularly operate or occupy the insured vehicle even if they would not otherwise qualify as a named insured or "resident relative", entitling them to personal and portable coverage. The frequency to which an individual may occupy or operate an insured vehicle is relevant for a determination of risk even though that person is not a named insured or the spouse/resident relative of the named insured.

The only "named insured" under the policy is Ms. Severn. As in United Services, UIM coverage is afforded to "insured persons" and the policy defines "insured persons" for purposes of UIM while occupying a non-owned auto as "**you** or a **relative**." (R.p.32.) The policy further defines "**you**" as the person "shown as a named insured on the **Declarations Page**; and the spouse of a named insured if residing in the same household." (R.p.26.) "**Relative**" is defined as "a person residing in the same household as **you**, and related to **you** by blood, marriage, or adoption." (R.p.26.) Thus, the exact reasoning of United Services applies:

> [E]ven though ["driver"] is not defined in the policy, the policy is not ambiguous. Where a term is not defined in a policy, it is to be defined according to the usual understanding of the term's significance to the ordinary person .:. [T]he policy defines "you" and "your" as "the 'named insured' shown in the declarations." The only person listed in the "Named Insured" box on the declarations page was [Severn]. Thus, we see no ambiguity.

United Services, 365 S.C. at 55-56, 614 S.E.2d at 654-55 (citations omitted and "driver" substituted for "operator" and "Severn" substituted for "Washnok").

Petitioner's attempt to distinguish United Services, based on his "household resident" argument, is unpersuasive when the only person designated as a "named insured" under that section of the declarations page is Ms. Severn and when the failure to define "household resident" does not render the policy ambiguous. Accordingly, United Services controls the instant case and the decision of the Court of Appeals should be affirmed.

**B) PETITIONER IS NOT A "RELATIVE" AS THAT TERM IS DEFINED IN THE POLICY.**

As previously noted, the policy defines an "insured person" as "you or a relative." "You" is defined as the person shown as the named insured on the declarations page and the spouse of the named insured. Bell clearly is not listed as the named insured on the declarations page and, as explained below, he was not Severn's spouse. Therefore, "Bell" is not an "insured person."

Bell also does not qualify as a "relative" as that term is defined as "a person residing in the same household as you, and related to you by blood, marriage, or adoption." (R.p.26.) Petitioner contends he is related to Severn because he was the father of her child. "A 'relative' is ordinarily defined as 'a person connected by blood or marriage.'" Inman v. South Carolina Ins. Co., 300 S.C. 550, 551, 389 S.E.2d 173, 174 (Ct. App. 1990). Being the father of Severn's child does not mean Bell is related to Severn by blood. Further, Bell is not related to Severn by marriage because the phrase "related by marriage" applies to an individual's in-laws, who become affiliated with him by virtue of his marriage to one of their blood or adoptive relatives. See, e.g., Benjamin v. McKinnon, 887 N.E.2d 14 (Ill. Ct. App. 2008) ("'Related by marriage' is synonymous with 'related by affinity.' There are degrees of affinity. 'Direct affinity' is '[t]he

relationship of a spouse to the other spouse's blood relatives,' such as 'a wife and her husband's brother.' 'Collateral affinity' is '[t]he relationship of a spouse's relatives to the other spouse's blood relatives,' such as a 'wife's brother and her husband's sister.') (citations omitted); McCance v. McCance, 908 A.2d 905 (Pa. Super. Ct. 2006). Therefore, Bell could not qualify as a "relative" of Severn, as defined in the Progressive policy, as a matter of law. Because Bell is not "you or a relative," he is not an "insured person" according to the plan terms of Severn's policy.

**C) PETITIONER FAILED TO PRODUCE ANY EVIDENCE HE WAS COMMON LAW MARRIED TO SEVERN AND, THEREFORE, IS NOT ENTITLED TO COVERAGE AS HER SPOUSE.**

There is no genuine issue of any material fact that a common law marriage did not exist between Petitioner and Severn. Whether a common-law marriage exists is a question of law. Campbell v. Christian, 235 S.C. 102, 104, 110 S.E.2d 1, 2 (1959). The proponent of the alleged marriage has the burden of proving the elements by a preponderance of the evidence. Ex parte Blizzard, 185 S.C. 131, 133, 193 S.E. 633, 634 (1937). Appellate review is limited to a determination of whether or not there is any evidence to support the findings of the trial judge. Tarnowski v. Lieberman, 348 S.C. 616, 619, 560 S.E.2d 438, 440 (Ct. App. 2002) (citing Weathers v. Bolt, 293 S.C. 486, 488, 361 S.E.2d 773, 774 (Ct.App.1987)). Because this action sounds in law, and the existence of a common law marriage is a question of fact, the Court is bound by the trial court's factual findings and its credibility determinations and must affirm if any evidence supports the trial court's findings. Id.

There are five requirements of common law marriage. First, the party asserting common law marriage must prove that the parties participated in an "apparently

matrimonial" cohabitation and had a reputation in the community of being married. Callen v. Callen, 365 S.C. 618, 624, 624 S.E.2d 59, 62 (2005). "Apparently matrimonial" cohabitation creates a rebuttable presumption that the couple is married under common law, which can be overcome by proof that the couple never intended to marry. Id. Second, the parties must hold themselves out to the public as husband and wife. Third, the parties must be sixteen years of age or older. S.C. Code Ann. § 20-1-100. Fourth, the parties must intend to be married to each other and have a mutual understanding of that intention. Callen, 365 S.C. at 624, 620 S.E.2d at 62. Fifth, in order to have a valid common law marriage, there can be no impediments to marriage such as lack of validity of common law marriage in the jurisdiction in which the parties reside. Id.

As the Court of Appeals correctly held, Petitioner failed to produce any evidence he and Severn held themselves out as married. The record is clear that Bell and Severn were never married and never considered themselves to be married. To the contrary, Bell repeatedly admitted that he and Severn were merely engaged and that their co-habitation was under the promise to be married, not under the premise that they were already married. (R.pp.103-107). For example, Bell testified as follows:

Q. … February of '07 when she left, you-all were engaged at that time?

A. Yes sir.

Q. And do you remember when you gave her the ring?

A. No, not off the top of my head, sir, no, I don't.

Q. Did you-all become unengaged when she left?

A. Yeah.

. . . .

Q. When she left did she give back the ring or did she keep it?

A. I took it back.

(R.p.104.)

Bell further confirmed that the couple was never married based on his surprise visit to Maryland upon which he found Severn with another man. He testified:

A. I flew up there and found a guy in her apartment so we're no longer getting married. ... We got engaged twice but then she moved away and I thought it was going to be over and she called back, said she wanted to marry me ...

Q. You went up there, gave her the ring back, you-all were going to get married?

A. Yeah. ... [S]he's not being faithful so ...

Q. Last time you have seen her?

A. Yeah. Don't plan on it. ... I don't care if I talk to her at all.

(R.pp.103-105.)

A couple that is going to get married in the future cannot be presently married as a matter of law. The fact that Bell admitted the relationship never passed beyond an engagement, albeit one which was broken off twice, removes any contention that a common law marriage existed between Bell and Severn. As the Court of Appeals held, "[t]he only inference to be drawn from [the evidence that Severn and Bell were engaged to be married as some undetermined point in the future] is that the couple did not have a present intent to be married but instead a future intent to be married." (A.p.5); Bell v. Progressive Direct Ins. Co., Op. No. 2011-UP-242 (S.C. Ct. of App. filed June 23, 2011) (unpublished opinion).

Although Petitioner cites various facts to support his claim he was the common law husband of Sarah Severn, such as bill payment, engagement proposals and the like, he fails to recognize that mere cohabitation does not entitle him to the same rights he would have were he actually married to Severn. Regardless of cultural trends and nontraditional lifestyle choices, the law does not recognize cohabitating individuals and married couples equally.

> The recognition of marriage is a threshold determination in a variety of legal contexts. A court cannot address an alleged spouse's claim for property distribution in divorce or probate proceedings without first determining whether a marriage exists. Nor can the Workers' Compensation Commission or Social Security Administration address the substantive issues of awarding spousal benefits without a preliminary showing of marriage.

Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. Rev. 555 (2007). Therefore, limiting insurance coverage to the named insured, spouse, and resident relatives is entirely consistent both with modern law and with American citizens' expectations of coverage.

Further, as this Court has stated, "The difference between marriage and concubinage ... rests in the intent of the cohabiting parties; the physical and temporal accompaniments of the cohabitation may be the same in both cases, but the intent in the two cases is widely apart always." Kirby v. Kirby, 270 S.C. 137, 140, 241 S.E.2d 415, 416 (1978). Indeed, the "accompaniments of the cohabitation" in this case – co-signing the apartment lease, payment of the bills by Petitioner, having a child together, etc. – look the same as in marriage. However, intent is the key, and intent to be married is precisely what is missing in this case. Because there was not even a scintilla of evidence that Bell and Severn had a present intent to be married and their cohabitation alone is insufficient

to create a common law marriage, the decision of the Court of Appeals should be affirmed.

## CONCLUSION

Petitioner is not entitled to UIM coverage under Severn's policy because he was not a named insured and because listing him as a "household resident" and "driver" does not render the policy ambiguous. Petitioner was neither related to Severn, nor was he her common law husband as there is no evidence of a present intent to be married. Petitioner's expectation of coverage despite the plain and unambiguous terms of the policy does not create coverage because South Carolina has never adopted the doctrine of reasonable expectations and to do so now would require this Court to overturn deeply rooted principles of construing contracts according to their plain and unambiguous terms. For these reasons, Progressive respectfully requests the Court affirm the decision of the Court of Appeals.

Respectfully Submitted,

J. R. Murphy, Esquire
Ashley B. Stratton, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

Columbia, South Carolina
August 31, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 2011-UP-242 Filed May 24, 2011
Withdrawn, Substituted and Re-filed June 23, 2011

Joshua Bell ..... Petitioner,

v.

Progressive Direct Insurance Company ..... Respondent.

**PROOF OF SESRVICE**

I certify that I have served the Brief of Respondent on Petitioner, Joshua Bell, by depositing a copy of it in the United States Mail, postage prepaid, on August 31, 2012, addressed to his attorney of record, Gene M. Connell, Esquire, P.O. Drawer 14547, Surfside Beach, SC 29587.

Respectfully submitted,

J.R. Murphy, Esquire
Ashley B. Stratton, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Respondent

Columbia, South Carolina