THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III
Circuit Court Judge

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Case No. 2011-CP-46-00021

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State Farm Fire and Casualty Company . . . . . Respondents,

vs.

Phyllis Paden-Adams and Alonzo Adams. . . . . Appellants.

---

# RECORD ON APPEAL

---

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

# JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4600021

## State Farm Fire and Casualty Company *vs.* Phyllis Paden Adams

*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: _____

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

**ORDER**

Dated at York, South Carolina, this 2nd day of September, 2011.

*Court Reporter:*

*s/ JOHN C. HAYES, III.*

PRESIDING JUDGE - **JOHN C. HAYES, III.**

This judgment was entered on the 2nd day of September, 2011, and a copy mailed first class this 2nd day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

**Charles R. Norris** Nelson Mullins Riley & Scarborough, LLP P.O. Box 1806 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

✓**Christi P Cox & W. Keith Martens** Hamilton Martens Ballou P.O. Box 10940 Rock Hill, SC 29731
Thomas A. McKinney

ATTORNEY(S) FOR THE DEFENDANT(S)

**David Hamilton**

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK<br><br>State Farm Fire and Casualty Company,<br><br>Plaintiff,<br><br>vs.<br><br>Phyllis Paden-Adams and Alonzo Adams,<br><br>Defendants. | ) | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT<br>C.A. No.: 2011-CP-46-0021<br><br>ORDER |

FILED-RECEIVED
2011 SEP -2 PM 12: 02
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This is a declaratory judgment action regarding underinsured motorist coverage. Plaintiff has moved for summary judgment. The Court heard the motion on August 29, 2011. Plaintiff was represented by Charles Norris, Esq., Defendants by Christi P. Cox, Esq. Present also were Thomas A. McKinney, Esq. who represents the Defendant in 2010-CP-46-854, the underlying tort action brought by Defendants against The South Carolina Department of Transportation (DOT). W. Keith Martins, Esq. was present with Ms. Cox on behalf of Defendants.

The Court will not here in detail set forth the facts in the tort claim. It is sufficient here to state that the claim against the DOT in the tort case is that a vehicle preparing the surface of a road for an application of gravel did so negligently. In the tort claim it is alleged that due to the negligent application and the failure of gravel later applied to adhere to the road bed Defendant Phyllis Paden-Adams experienced a one car accident which resulted in injury to her. This accident occurred thirteen days after the alleged negligent work by employees of the DOT.

The Court finds that issues raised in the declaratory judgment action are novel. Novel issues should not be ruled upon without full development of the facts. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003).

As Judge Ralph King Anderson observed in Schmidt;

> . . . summary judgment is a "drastic remedy," which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues . . . it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery."
>
> XXX
>
> Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law . . .
>
> Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied. 357 S.C. at 318 and 319 (internal citations omitted).

Here, even though to a great degree the operable facts are not in dispute, there remains an issue as to how these facts apply under Plaintiff's policy of insurance. There are also factual issues which may be relevant to the issues here which have not yet been fully developed.

The instant fact pattern has not been addressed in South Carolina and the only case with a similar fact pattern found is that of Jackson v. Daley, 739 S.C.2d 1031(Miss. 1991). The Mississippi court found for the insured in Daley. Daley has no real impact on this case at this time. However, it is worth noting that a court applying language which mirrors that of our applicable statutory language has extended coverage in a similar setting.

Section 38-77-140, South Carolina Code of Laws, 1976, as amended, coupled with Section 38-77-160, provides for underinsured motorist coverage, if purchased, to extend to the "ownership, use, or maintenance of an underinsured motor vehicle. Defendants' policy offers

more coverage than required as it provides coverage also for the "operation" of an underinsured motor vehicle.[1]

From a grammatical stand point the statute covers situations beyond that of the "use" of a vehicle. If that were not the case the use in the statute of the one word "use" would have sufficed. The legislature, in the undersigned's opinion, intended for coverage to extend beyond the use of the vehicle as currently applied by our Appellate courts.[2]

"Maintain" is defined as "the act of maintaining or the state of being maintained" and "the work of keeping something in proper condition, upkeep." The Free Dictionary, www.thefreedictionary.com/maintenance. "Ownership" is defined as "the state or fact of being an owner." The Free Dictionary, www.thefreedictionary.com/ownership. Owner is defined as "to have or possess as property; to have control over." The Free Dictionary, www.thefreedictionary.com/owner.

The reason this short Lexicology lesson is here inserted is because the controlling law applicable to the instant case appears to ignore terms, maintenance and ownership, specifically inserted by the legislature and focuses on the term "use."

Were the Court here only dealing with the statutory language stare decisis would require the granting of summary judgment. This is true because our court set forth a three prong test applicable to the three noted statutory terms. The test was established in State Farm Fire and Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (S.C. 1998) and most recently applied in Peaglar v. USAA Insurance Company, 368 S.C. 153, 628 S.E.2d 475 (S.C. 2006).

[1] The Defendants' policy uses only the words "operation or ownership." However, by law, the statutory coverage, which includes maintenance and use, applies.

[2] The Court recognizes that the legislature has had ample time to review the statute if it felt the Appellate Court's interpretations were in error.

Peagler, supra, holds that for there to be underinsured motorist coverage under § 38-77-140. The insured must show:

1. A causal connection exists between the vehicle and the injury, and

2. No act of independent significance breaks the causal link between the vehicle and the injury, and

3. The vehicle was being used for transportation purposes at the time of the injury.

The Aytes test (which the Court feels wrongly focuses on the time of injury, not the time of the tortuous act) cannot be found to be controlling as to State Farms policy here at this the summary judgment stage of this litigation.

Research has not revealed any comparable case wherein the courts have defined the word "operation" as it relates to insurance coverage. This leaves unresolved the scope of coverage's Plaintiff's policy afforded Defendants relative to the accident at issue.

The reason that Plaintiff is not entitled to summary judgment is three fold.

First, Defendants have additional coverage beyond that required by the statute, to wit; the operation of an underinsured motor vehicle.

Second, the subject policy does not restrict coverage to an event coterminous with injury, but extends coverage to injury or damage "caused by accident."

Third, there are genuine issues of material fact relative to whether or not under their policy the Defendants are entitled to underinsured motorist coverage.

Therefore, Plaintiff's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

JCHHH

John C. Hayes, III
Presiding Judge #5

September 2nd, 2011
York, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4600021

| State Farm Fire and Casualty Company | Phyllis Paden Adams Alonzo Adams |
|---|---|
| PLAINTIFF(S) | DEFENDANT(S) |

| Submitted by: | Attorney for: ☐ Plaintiff ☐ 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), 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; (formal order to follow) ☐ Statement of Judgment by the Court:

# Order

ORDER INFORMATION

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 (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| N/A | N/A | N/A |
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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.

*s/John C. Hayes, III* — Circuit Court Judge
2049 — Judge Code
October 24, 2011 — Date

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

For Clerk of Court Office Use Only

This judgment was entered on **December 1, 2011**, and a copy mailed first class or placed in the appropriate attorney's box on **December 1, 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

**Ronnie F Craig** Clawson & Staubes LLC 756 Tyvola Road Ste 130 Charlotte, NC 28217
**Charles R. Norris** Nelson Mullins Riley & Scarborough, LLP P.O. Box 1806 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

**Christi P Cox** Hamilton Martens Ballou P.O. Box 10940 Rock Hill, SC 29731

ATTORNEY(S) FOR THE DEFENDANT(S)

*David Hamilton*

David Hamilton - Clerk of Court

Court Reporter

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK | ) | C.A. No.: 2011-CP-46-0021 |
| | ) | |
| | ) | |
| State Farm Fire and Casualty Company, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | ORDER |
| | ) | |
| Phyllis Paden-Adams and Alonzo Adams, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

FILED-RECEIVED
2011 DEC -1 PM 2:32
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This is a declaratory judgment action regarding underinsured motorist coverage. This court issued an order on September 2, 2011, denying Plaintiff's motion for summary judgment. Plaintiff filed a motion for reconsideration on September 13, 2011. Defendants filed a Memorandum in Opposition to Plaintiff's Motion for Reconsideration on September 26, 2011.

In its prior order, this court held that Plaintiff was not entitled to summary judgment on three grounds. First, the court held that Defendants had additional coverage beyond that required by statute. Second, the court held that the policy at issue did not restrict coverage to an event coterminous with injury, but extended coverage to injury "caused by accident." Third, the court held that there were genuine issues of material fact relative to whether or not, under the policy, the Defendants are entitled to underinsured motorist coverage.

Plaintiff contends "that the Court's order of September 2, 2011 contains factual and legal error in that it states that State Farm's policy offers more coverage than is required under § 38-77-140 because the policy provides coverage for "operation" of an underinsured motor vehicle." Citing Hite, Plaintiff further asserts that "[u]nder South Carolina law, "use" of motor vehicles is

a broader term than the "operation" of a motor vehicle." Hite v. Hartford Accident & Indemnity Company, 344 S.E.2d 173, 175 (S.C. App. 1986).

The court agrees with Plaintiff. Under Hite, the language used in the policy at issue does not expand coverage beyond that required by §§ 38-77-140 and 38-77-160. Therefore, as stated in the court's prior order, stare decisis requires the granting of summary judgment.

The Aytes test, as clarified in Peaglar v. USAA Insurance Company, 368 S.C. 153, 628 S.E.2d 475 (S.C. 2006), requires that for there to be underinsured motorist coverage under § 38-77-140, the insured must show:

1. A causal connection exists between the vehicle and the injury, and
2. No act of independent significance breaks the causal link between the vehicle and the injury, and
3. The vehicle was being used for transportation purposes at the time of the injury.

In this case, the insured cannot satisfy the third prong. The accident which resulted in injury to the defendant occurred thirteen days after the alleged tortious act. Clearly, the vehicle which allegedly caused the accident was not "being used for transportation purposes at the time of the injury."[1] Therefore, under Aytes, Plaintiff is entitled to Summary Judgment.

---

[1] It appears that the instant fact pattern has not been addressed in South Carolina. As noted in its previous order, the court feels that the Aytes test wrongly focuses on the time of the injury, not the time of the tortious act. The facts of this case are very distinct from the assault cases which led to the formation of the Aytes test. By focusing on the time of the injury, the Aytes test positively precludes underinsured motorist coverage for accidents which arise out of the use, maintenance, or ownership of a vehicle, so long as the vehicle responsible for the accident is not being used for transportation purposes at the time of the injury. For cases with a similar fact pattern to this case, see Merchants co. v. Hartford Accident & Indemnity Co., 187 Miss. 301, 188 So. 571 (1939) (Finding liability where poles were used to remove a truck from a ditch and were subsequently left on the highway, causing an accident. The court held that "where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation . . . which, therefore, would exclude liability under the automobile policy." The court found that the failure to remove the poles from the road was not an intervening cause of the accident.) *See also* Jackson v. Daley, 739 So2d 1031 (Miss. 1991) (Finding coverage where county dumped dirt beside the road and a small amount of the dirt extended into the road, causing accident. Insurance policy covered bodily injury resulting from "the ownership, maintenance, or use of a covered auto.")

Therefore, Plaintiff's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge #3

October 24th, 2011
York, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4600021

| State Farm Fire and Casualty Company | Phyllis Paden Adams Alonzo Adams |
|---|---|
| PLAINTIFF(S) | DEFENDANT(S) |

| Submitted by: | Attorney for: ☐ Plaintiff ☐ 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), 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; (formal order to follow) ☐ Statement of Judgment by the Court:

# Order

ORDER INFORMATION

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 (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| N/A | N/A | N/A |
| | | |
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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.

*s/John C. Hayes, III* — 2049 — November 14, 2011
Circuit Court Judge — Judge Code — Date

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

For Clerk of Court Office Use Only

This judgment was entered on December 1, 2011, and a copy mailed first class or placed in the appropriate attorney's box on December 1, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Ronnie F Craig Clawson & Staubes LLC 756 Tyvola Road Ste 130 Charlotte, NC 28217
Charles R. Norris Nelson Mullins Riley & Scarborough, LLP P.O. Box 1806 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Christi P Cox Hamilton Martens Ballou P.O. Box 10940 Rock Hill, SC 29731

ATTORNEY(S) FOR THE DEFENDANT(S)

*David Hamilton*

David Hamilton - Clerk of Court

Court Reporter

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK | ) | C.A. No.: 2011-CP-46-0021 |
| | ) | |
| | ) | |
| State Farm Fire and Casualty Company, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | ORDER |
| | ) | |
| Phyllis Paden-Adams and Alonzo Adams, | ) | |
| | ) | |
| Defendants. | ) | |

FILED-RECEIVED
2011 DEC -1 PM 2:32
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

The Court issued an Order granting Plaintiff's Motion to Reconsider the Court's initial Order of September 2, 2011. The Reconsideration Order issued October 24, 2011. Defendants have moved the Court to reconsider the latter Order. Defendants' Motion to Reconsider is dated November 4, 2011.

The Court denies Defendants' Motion to Reconsider, but will supplement the October 24, 2011, herein below:

**Head Note I**
(Facts)

The operative facts are that by use of a motor vehicle, The South Carolina Department of Transportation (SCDOT), applied a "chip seal" road resurfacing on October 8, 2009, on the roadway upon which Defendant Phyllis Paden-Adams had a one-car accident thirteen days later, October 21, 2009. Defendants' position is that the accident was a direct and proximate result of negligence by the SCDOT in the applicant of the "chip seal."

Defendant Phyllis Paden-Adams sustained substantial injuries in the wreck of October 21, 2009.

## Head Note II through IV

These concerns of Defendant are, in the undersigned's opinion, adequately addressed in the October 24, 2011 Order.

## Head Note V

The October 24, 2011 Order did not address Defendants' counterclaims for Breach of Contract, Bad Faith, and attorney's fees.

Each of Defendants' counterclaims are predicated on their contract of insurance with Plaintiff. The Order of October 24, 2011 does not find that no contract existed as alleged, but rather that the contract does not provide to Defendants' underinsured motorist coverage for her wreck of October 21, 2009. That is, Plaintiff has no contractual obligation to Defendants for underinsured motorist coverage.

The finding of no underinsured motorist coverage results in Defendants' claims of Breach of Contract and Bad Faith being moot. If the contract extends no underinsured coverage to Defendants, Plaintiff cannot be found to have breach its contract with Defendants. There being no contractual obligation afforded by Plaintiff to Defendants, Plaintiff cannot, in this case, be found to have acted in bad faith.

The finding of no underinsured motorist coverage results again, in Plaintiff having no duty to Defendants which would give rise to a cause of action under Section 38-59-40, S.C. Code of Laws, 1976, as amended.

It is of note that in the third counterclaim recognized the justiciable issue of coverage the Defendants themselves asserting a request for a declaratory judgment.

JC 3/14/12

## Head Note VI

In their motion Defendants argue summary judgment should not be granted to Plaintiff until further discovery is conducted. Other than the general and vague assertion that Defendants need time to develop facts showing the entire circumstances "of the accident," no specification of what circumstances need further development.

The Court observes that the accident in question occurred two years ago. The Court takes judicial notice that Defendants brought suit against the SCDOT in February 2010. This latter case is pending and was on the York County Trial docket the week of November 7, 2011. In the Tort action a SCDOT employee was deposed on August 18, 2010. Defendants do not argue the employee needs to be redeposed for purpose of the instant action. In fact, the Defendants neither noticed nor proposed any further discovery in this action which has been pending since January 5, 2011.

Plaintiff is entitled to summary judgment as a matter of law as to all three of Defendants' counterclaims.[1]

Wherefore;

1. Defendants' Motion for Reconsideration of the Court's Order of October 24, 2011 is denied.

2. In addition to the rulings set forth in the October 24, 2011 Order, Plaintiff is granted summary judgment as to Defendants' first, second and fourth counterclaims.

[1] The third counterclaim is for a declaratory judgment finding underinsured motorist coverage for Defendants under the Insurance Policy at issue. The Court has by the Order of October 24, 2011, disposed of this counterclaim by virtue of the holding therein.

IT IS SO ORDERD.

John C. Hayes, III
Presiding Judge

November 14, 2011
York, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011CP4600221

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

v.

PHYLLIS PADEN-ADAMS AND ALONZO ADAMS,

Defendant.

**SUMMONS**

**(Declaratory Judgment)**

FILED-RECEIVED
2011 JAN -5 AM 9:53
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

**TO: THE DEFENDANT(S) ABOVE NAMED:**

**YOU ARE HEREBY SUMMONED** and REQUIRED to answer the Complaint of the Plaintiffs in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at his office at 756 Tyvola Road, Suite 130, Charlotte, North Carolina 28217, within thirty (30) days after the service thereof, exclusive of the day of such service; and, if you fail to answer the Complaint within the time aforesaid, the Plaintiff(s) in this action will apply to the Court for the relief demanded in the said Complaint.

CLAWSON & STAUBES, LLC

Ronnie Craig
SC Bar No.: 12532
756 Tyvola Road, Suite 130
Charlotte, NC 28217
(704) 940-9128

Charlotte, North Carolina
January 4, 2011

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011CP4600021

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

v.

PHYLLIS PADEN-ADAMS AND ALONZO ADAMS,

Defendant.

FILED-RECEIVED
2011 JAN -5 AM 9:53
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

**COMPLAINT**

**(Declaratory Judgment)**

Plaintiff State Farm Fire and Casualty Company brings this declaratory judgment action against Defendant and would respectfully allege and show unto this Court as follows:

1. State Farm Fire and Casualty Company ("State Farm") is an insurance company organized and existing pursuant to the laws of the State of Illinois with its principal place of business in the State of Illinois.

2. Upon information and belief, Phyllis Paden-Adams and Alonzo Adams, are citizens and resident of York County, South Carolina.

3. Phyllis Paden-Adams and Alonzo Adams have filed a personal injury action in York County, South Carolina Court of Common Pleas, entitled **Phyllis Paden-Adams and Alonzo Adams v. South Carolina Department of Transportation, Civil Action No.: 2010-CP-46-00854.**

4. This is an action for a declaratory judgment brought pursuant to **S.C. Code Ann. §§ 15-53-10, *et seq.*** in which Plaintiff asks this Court to inquire into the real and actual controversy that exists among the parties and determine the respective rights and obligations set forth below.

5. Venue is proper in this Court pursuant to S.C. Code Ann. § 15-7-30.

6. State Farm issued policies of insurance on the vehicles of Phyllis Paden-Adams.

| Policy No | Vehicle |
|---|---|
| 113-1117-40 | 2004 Honda Accord |
| 0989-817-40 | 2003 Honda Accord |
| 113-8514-40 | 1997 Honda Accord |
| 121-5620-40 | 2007 Nissan Titan Pick-up |
| 105-9958-40 | 1994 Honda Accord |

7. That Mrs. Phyllis Paden-Adams purchased underinsured motorist coverage for each of the vehicles, subject to the terms, definitions, conditions, and limitations contained therein. That the face value of the underinsured motorist coverage was:

| Policy No | Vehicle | Underinsured Face Value |
|---|---|---|
| 113-1117-40 | 2004 Honda Accord | $100,000 |
| 0989-817-40 | 2003 Honda Accord | $100,000 |
| 113-8514-40 | 1997 Honda Accord | $100,000 |
| 121-5620-40 | 2007 Nissan Titan Pick-up | $100,000 |
| 105-9958-40 | 1994 Honda Accord | $100,000 |

8. That upon information and belief, Policy 105-9958-40 covering the 1994 Honda Accord was cancelled at the request of Phyllis Paden- Adams on October 6, 2009.

9. On October 21, 2009, on information and belief, Mrs. Paden - Adams drove her 2004 Honda Accord too fast for conditions on Craig Road, just south of Rock Hill, South Carolina, and was involved in a single-car accident, after she ran off the roadway to the right, overcorrected onto the roadway, ran off the roadway to the left, struck an embankment, and then hit a tree.

10. As a result of the accident, Mrs. Paden-Adams sustained very serious injuries.

11. State Farm Fire and Casualty Company's policies all contained identical language specifying the maximum amount of underinsured motorist coverage that Mrs. Paden-Adams was entitled to pursue under certain factual circumstances. The policies also each provided:

**SECTION III - UNDERINSURED MOTOR VEHICLE - COVERAGE W**

**UNDERINSURED MOTOR VEHICLE - COVERAGE W**

***You*** have this coverage if "W" appears in the "Coverages" space on the declarations page.

We will pay damages for ***bodily injury*** or ***property damage*** an ***insured:***

1. is legally entitled to collect from the owner or driver of an ***underinsured motor vehicle***; or

2. would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute.

The ***bodily injury*** or ***property damage*** must be caused by accident arising out of the operation or ownership of the ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured***.

...

***Underinsured Motor Vehicle*** - means a ***motor vehicle***, as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in the ***Financial Responsibility Act*** and:

1. the amount of the insurance or bond is less than the amount of the ***insured's*** damages; or

2. the ***insured's*** damages exceed any damages cap or limitation imposed by statute.

An ***underinsured motor vehicle*** does not include any ***motor vehicle*** while located for use as premises.

**Our Right to Defend**

If the ***insured*** files suit against the owner or driver of the ***underinsured motor vehicle***, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.

**Definitions**

***Financial Responsibility Act*** - means the Motor Vehicle Financial Responsibility Act of South Carolina.

***Motor Vehicle*** - means a self - propelled vehicle or trailer designed for use on public roads.

A ***motor vehicle*** does not include:

1. traction engines;
2. road rollers;
3. farm tractors;
4. tractor cranes;
5. power shovels;
6. well drillers; or
7. electric trolleys.

...

Coverage W

1. Bodily Injury

The amount of coverage is shown on the declarations page under "Limits of Liability - W - Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to ***bodily injury*** to one ***person. "Bodily injury*** to one ***person"*** includes all injury and damages to others resulting from this ***bodily injury***. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to ***bodily injury*** to two or more ***persons*** in the same accident.

12. That on May 6, 2010, Mrs. Paden-Adams, filed an Amended Complaint, alleging that the South Carolina Department of Transportation, carried out a road surfacing project known as "chip sealing", on Craig Road, by applying a single layer of asphalt binder, and then covering it with a layer of aggregate.

13. Mrs. Paden - Adams further alleges that the South Carolina Department of Transportation (SCDOT) carried out its "chip sealing" project, by using several motor vehicles that they owned , including **trucks, asphalt distributors, spreaders, back hoes, compactors and sweepers.**

14. Mrs. Paden - Adams alleges that SCDOT was negligent because they improperly prepared the surface of Craig Road. They negligently operated various vehicles in the paving project, allowing loose aggregate to form and remain on the highway, and the "chip seal" surface to develop a condition known as "raveling" or "shelling."

15. Mrs. Paden - Adams alleges, SCDOT, negligently created dangerous road conditions, between October 8, 2009 and October 21, 2009. As a result of the dangerous road conditions, she struck a loose patch of aggregate, lost control of her car and wrecked.

16. On April 30, 2010, counsel for Mrs. Paden-Adams wrote to State Farm that the **SCDOT spreader trucks and rolling equipment**, used to transport and apply emulsion and aggregate to the roadway, along with **"those trucks and equipment"**, were negligent in the application of emulsion and aggregate, thus causing the dangerous conditions and damages complained of in the Plaintiff's lawsuit. This being so, even after the roadway was swept on October 9, 2009, leaving large quantities of loose gravel on the road.

17. Mrs. Paden-Adams' counsel has indicated that **SCDOT has agreed to tender the statutory liability cap ($300,000.00), pursuant to the State Tort Claims Act**, to Mrs. Paden-Adams, **in exchange for a Covenant Not to Execute against SCDOT.**

18. Counsel for Mrs. Paden-Adams alleges that the Plaintiff is entitled to UIM coverage on the grounds that Mrs. Paden-Adams' damages are attributable to the negligent operation of SCDOT vehicles. It is alleged that "but for" the improper and wrongful maintenance, operation and ownership of these vehicles, creating a dangerous condition on Craig Road, Mrs. Paden-Adams would not have lost control of her car and wrecked.

19. Counsel for Mrs. Paden-Adams cites the South Carolina cases of **State Farm Fire and Cas. Co. vs. Aytes**, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998); and **State Farm Mutual Automobile Insurance Company vs. Bookert**, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) for authority that **the SCDOT equipment and vehicles all qualify as underinsured motor vehicles** within the meaning of State Farm's UIM polices and South Carolina law.

20. As a result of the accident, Mrs. Paden-Adams' counsel alleges that, since **SCDOT's liability** to Mrs. Paden-Adams **is limited to $300,000.00, State Farm's UIM coverage is available** to Mrs. Paden-Adams, and that she is entitled to recover **five (5) times the face value of her UIM coverage, or $500,000.00.**

21. **State Farm contends** that **the SCDOT equipment and vehicles do not qualify as Underinsured Motor Vehicles within the meaning of the policies**, and that coverage is not afforded under its policies, pursuant to their terms and conditions, and requirements of South Carolina law, or that Mrs. Paden-Adams' injuries were proximately caused by SCDOT vehicles.

22. That upon information and belief, the Plaintiff's damages alleged in the Complaint, were due to a single-car accident, caused by the Plaintiff's own negligence. There were **no underinsured motorist vehicles involved in the accident**, as defined under the terms and conditions of State Farm's policy and South Carolina law.

23. That a present and justiciable controversy exists between the parties.

24. State Farm requests that the Court inquire into the facts and circumstances surrounding this accident, to determine whether Mr. and Mrs. Paden-Adams' injuries and damages were caused by an underinsured motor vehicle, under the terms and conditions of State Farm's policy, and South Carolina law, so as to be able to determine whether Mr. and Mrs. Paden-Adams are potentially able to collect underinsured motorist coverage.

## DECLARATORY RELIEF SOUGHT

25. Upon information and belief, Defendants contend that State Farm provides underinsured motorist coverage to Mr. and Mrs. Paden-Adams for her October 21, 2009 motor vehicle accident.

26. State Farm contends that it is entitled to a Declaration from this Court, that Mr. and Mrs. Paden-Adams are not entitled to Underinsured Motorist Coverage from State Farm, for claims arising out of the October 21, 2009 motor vehicle accident.

27. A real and justiciable controversy exists between the Plaintiffs and Defendants in necessitating a judicial determination with the rights and responsibilities of State Farm and the Defendants, who claim rights in interest under the State Farm policy.

**WHEREFORE**, the Plaintiff, State Farm, requests that the Court inquire into the facts and law surrounding this matter, and declare whether Mr. and Mrs. Paden-Adams are legally entitled to pursue:

- $500,000.00 in underinsured motorist coverage, totaling the five (5) policies originally known to exist;
- $400,000.00 in underinsured motorist coverage if it is shown that policy 105-9958-40, covering a 1994 Honda Accord, was canceled at the request of Phyllis Paden-Adams before October 19-20, 2009;
- No underinsured motorist coverage, as the Plaintiff is not entitled, under the terms and conditions of the policies, nor South Carolina Law, as the Plaintiffs have failed to meet the requirements of the law and contracts for insurance.

This the 04 day of January, 2011.

CLAWSON & STAUBES, LLC

Ronnie Craig
SC Bar No. 12532
756 Tyvola Road, Suite 130
Charlotte, North Carolina 28217-3535
(704) 940-9128
Attorney for Plaintiff

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| State Farm Fire and Casualty Co.,<br><br>Plaintiff,<br><br>v.<br><br>Phyllis Paden-Adams and Alonzo Adams,<br><br>Defendants. | ) | Case No.: 2011-CP-46-0021<br><br>**ANSWER AND COUNTERCLAIM**<br>**(Jury Trial Demanded)** |

FILED-RECEIVED
2011 FEB -2 PM 12: 59
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, S.C.

The Defendants, Phyllis Paden Adams and Alonzo Adams (together referred to herein as the "Adams" or the "Defendants"), responding to the allegations contained in the Plaintiff's Complaint, and asserting the following counterclaims for relief, would respectfully show and prove to this Court as follows:

**FOR A FIRST DEFENSE**

1. Each and every allegation contained in the Plaintiff's Amended Complaint not hereinafter admitted, modified, or otherwise explained is denied and strict proof demanded thereof.
2. On information and belief, Defendants admit the allegations contained in Paragraph 1 of the Complaint.
3. Defendants admit the allegations contained in Paragraph 2 of the Complaint.
4. Defendants admit the allegations contained in Paragraph 3 of the Complaint.
5. The statements contained in Paragraph 4 of the Complaint are legal conclusions, therefore no response by the Defendants is required.

6. Responding to Paragraph 5 of the Complaint, Defendants admit that venue and jurisdiction are proper and consent to jurisdiction in this Court.

7. Responding to Paragraph 6 of the Complaint, Defendants admit that at all times relevant hereto they insured all of their vehicles with the Plaintiff, and Defendants crave reference to the written policies for the specific policy numbers and policy terms contained therein.

8. Responding to Paragraph 7 of the Complaint, Defendants admit that at all times relevant hereto the Defendants insured all of their vehicles with the Plaintiff, and the Defendants crave reference to the written policies for the specific policy numbers and policy terms and conditions contained therein.

9. Defendants are without sufficient information to admit the allegations contained in Paragraph 8 of the Complaint and therefore deny the same and demand strict proof thereof.

10. Responding to Paragraphs 9 and 10 of the Complaint, Defendants admit only that on October 21, 2009 Phyllis Paden-Adams was involved in a serious automobile collision (the "Collision") that rendered Mrs. Adams quadriplegic and caused other permanent, physical, personal, actual and consequential damages to the Adams. The remaining allegations are denied in their entirety and strict proof of the same is demanded. Defendants further submit that allegations Of Mrs. Adams' alleged negligence are without any evidentiary support.

11. Responding to Paragraph 11 of the Complaint, Defendants crave reference to the written terms and conditions of the policies of insurance at issue in this action and deny any terms inconsistent therewith.

12. Responding to Paragraphs 12-15 of the Complaint, Defendants admit that they filed a Complaint and Amended Complaint against SCDOT (Case. No. 2010-CP-46-0854) asserting SCDOT negligently operated, maintained and/or used SCDOT vehicles thereby causing serious damages to the Adams. Defendants crave reference to the written records on file with this Court in connection with Case No. 2010-CP-46-0854 for the allegations and statements contained therein and deny anything inconsistent therewith.

13. Responding to Paragraph 16 of the Complaint, Defendants admit to writing the Plaintiff on many occasions over the course of more than a year demanding that they honor the terms and conditions of the policies owned by the Defendants/Insureds. Defendants crave reference to each written letter for the terms and conditions contained therein and deny anything inconsistent therewith.

14. Responding to Paragraph 17 of the Complaint, Defendants admit that SCDOT tendered liability limits to Defendant Phyllis Paden Adams in exchange for a written covenant not to execute.

15. Responding to Paragraphs 18, 19 and 20 of the Complaint, Defendants (by and through their undersigned counsel) admit to writing the Plaintiff numerous times after the Collision occurred requesting that the Plaintiff investigate the matter and demanding payment of the underinsured motorist coverage in accordance with the terms and conditions of their insurance policies. Defendants further admit to citing specific caselaw and providing citations and references to the insurance policies in support of their requests for investigation and/or payment; however, Defendants submit that the Plaintiff never provided any meaningful response to

the same. Finally, Defendants crave reference to each and every written document between the Defendants and the Plaintiff concerning the matters at issue in this lawsuit, as well as the written notices to Plaintiff and the attachments to the same (including but not limited to the Complaint and Amended Complaint) for the specific terms contained therein, and Defendants deny anything inconsistent therewith.

16. Defendants deny the allegations contained in Paragraphs 21 and 22 of the Complaint and demand strict proof thereof. Further responding, Defendants submit that the allegations contained in Paragraphs 21 and 22 contain unsupported factual assertions and self-serving interpretations of the terms and definitions of the policies; that such assertions were made without any reasonable evidentiary or legal authority; and that such assertions were made for the sole purpose of avoiding the obligation of payment owed to the Defendants. Further responding Defendants assert that Plaintiff's allegations in Paragraphs 21 and 22 are in direct conflict with existing South Carolina caselaw; contradictory to a plain reading of the policies; and in flagrant disregard of its obligations of good faith and fair dealing owed to the Defendants.

17. The allegations contained in Paragraphs 23 and 24 of the Complaint contain legal assertions and/or conclusions, and the Defendants are not required to respond to the same.

18. Defendants admit the allegations contained in Paragraph 25 of the Complaint.

19. Defendants deny the allegations contained in Paragraphs 26 and 27 of the Complaint and demand strict proof thereof.

## COUNTERCLAIMS
### Factual History and Procedural Background

20. Defendants reiterate the responses, allegations and defenses contained in the foregoing Paragraphs and incorporate them by reference to the extent not inconsistent herewith.

21. Defendants are citizens and residents of York County, South Carolina having maintained their residence on Marshall Road, just south of Rock Hill, South for over 20 years. Defendants live nearby and frequently travel State Road 735, also named Craig Road. At all times relevant, the speed limit on Craig Road was 55 miles per hour.

22. On October 8, 2009, The South Carolina Department of Transportation ("SCDOT") carried out a road re-surfacing project on Craig Road. Instead of improving the condition of Craig Road, SCDOT, through its negligent ownership, operation, and maintenance of its motor vehicles, left substantial amounts of loose aggregate and patchy exposed emulsion on Craig Road. SCDOT's negligent operation of its vehicles created a deceptively dangerous condition on Craig Road, directly causing Defendants' damages.

23. At all times relevant to this action, the vehicles negligently operated and maintained by SCDOT in the Craig Road Project were owned by SCDOT; registered with the State of South Carolina; and insured by automobile liability policies through the Insurance Reserve Fund.

24. On October 21, 2009, Phyllis Adams was traveling on Craig Road within the lawful speed limit, on her way to work. Her car struck a patch of loose aggregate and exposed emulsion that had been negligently deposited on the roadway by

SCDOT motor vehicles. Ms. Adams' vehicle spun out of control in the loose aggregate, slid off the roadway and struck an embankment (the "Collision").

25. As a result of the Collision, Mrs. Adams suffered quadriplegia and the Defendants suffered other severe and permanent personal injuries and damages.

26. Defendants filed a lawsuit against SCDOT asserting negligence and gross negligence causes of action based upon SCDOT's improper operation, ownership, and/or maintenance of its motor vehicles in connection with the road re-surfacing work performed on Craig Road. After 8 months of litigation, SCDOT tendered its liability limits to Defendants in connection with the collision, in exchange for a covenant not to execute. As a result, defense of the liability action was tendered to State Farm, which action is currently pending before this Court as Case. No.: 2010-CP-46-0854.

27. SCDOT's negligent ownership, operation and maintenance of its vehicles directly caused the damages to the Defendants as evidenced by SCDOT's tender of its liability limits. But for SCDOT's negligent operation, ownership, and/or maintenance of its vehicles, the damages to the Defendants would not have occurred. No evidence, and certainly no reasonable or credible evidence, exists to suggest otherwise. The damages suffered by the Defendants greatly exceed the liability limits tendered by SCDOT.

28. The SCDOT vehicles at issue in this action were underinsured motor vehicles as defined by S.C. Code Ann. §38-77-30(15).

## Auto Policies with State Farm

29. The Adams have been customers of State Farm for more than 20 years, insuring all of their vehicles and property. The motor vehicle driven by Mrs. Adams on the date of the collision, a 2004 Honda Accord, was owned by the Defendants and was insured by State Farm pursuant to Policy Number 113 8514-F16-40A ("Policy"). The Policy provided UIM coverage in the amount of One Hundred Thousand and 00/100 ($100,000.00), per person/per accident.

30. At the time of the Collision, the Adams also owned four other vehicles, specifically a 2003 Honda (098 9817-B25-40D), a 1994 Honda (105 9958-A28-40A), a 1997 Honda (113 8514-F16-40A) and a 2007 Nissan (121-5620-D28-40A). On information and belief, all of these vehicles were covered by State Farm on the date of the Collision, with each vehicle having $100,000.00 of Underinsured Motorist coverage, per person, per accident.

31. South Carolina insurance law provides that Class I Insureds are entitled to stack UIM benefits, up to the amount of the damages sustained by the insured. Mrs. Adams was a Class I insured on the date of the Collision, therefore entitling the Defendants to stack the UIM coverage for all 5 vehicles, for a total coverage amount of $500,000.00.

## The UIM Policy and State Farm's Denial of the Adams' Claim

32. The terms of the Policy specifically provide that:

> **We [State Farm] will pay damages for bodily injury or property damage an insured:**
>
> **1. is legally entitled to collect from the owner or driver of an underinsured motor vehicle; or**

**2. would have been legally entitle to collect except for the existence of any damages cap or limitation imposed by statute.**

**The bodily injury or property damage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle.**

33. Defendants/Insureds suffered damages that were caused by an accident arising out of SCDOT's ownership, operation and/or maintenance of its motor vehicles. Defendants' damages greatly exceed the liability limits tendered by SCDOT and the available UIM coverage with the Plaintiff. But for the statutory damages cap, the Defendants would have been able to recover damages in excess of the liability limits from SCDOT in an amount exceeding $800,000.

34. For more than a year after the Collision, the Defendants made numerous requests and demands to State Farm to honor the terms of the UIM coverage under their Policy. However, State Farm unreasonably failed to investigate the claim, unreasonably refused to pay the UIM claim, and unreasonably failed to provide prompt and accurate responses to the Defendants' requests for policy information.

35. Specifically, the Defendants first notified State Farm of the claim on November 9, 2009, and requested copies of all policies owned by the Defendants on the date of the Collision. State Farm responded by identifying only 2 of the 5 vehicles insured by the Defendants. On information and belief, no investigation of any sort was launched by State Farm into the claim.

36. On March 17, 2010, Defendants wrote State Farm again to provide a courtesy copy of the Complaint filed against SCDOT and requested that State Farm tender the UIM coverage under the Policy. After several telephone conversations, State Farm finally confirmed in writing that they were denying the Defendants UIM

claim. In denying the claim, State Farm concluded, without any evidentiary support or legal authority, that "the claim did not appear to qualify as an underinsured claim...based on the knowledge that no vehicle was involved in this accident other than Mrs. Paden-Adams." On information and belief, no investigation of any sort and no legal research had been obtained by State Farm to arrive at this self-serving conclusion.

37. On April 30, 2010, Defendants responded to State Farm's denial by writing a lengthy letter which included specific references to the Policy, citations to caselaw and statutory authority, and provided information regarding the specific SCDOT underinsured vehicles which caused the Collision. Defendants also requested coverage information for the 3 other vehicles owned by Defendants, which information had been previously requested in November 2009. State Farm responded by providing information on only 2 of the 3 additional vehicles. On information and belief, State Farm failed to conduct any investigation into the substance of the claim and failed to have the issue reviewed by legal counsel.

38. On May 14, 2010, a State Farm claims representative sent an letter to Defendants simply reiterating its previous conclusion that coverage did not appear to exist based upon their interpretation that SCDOT was not a underinsured vehicle. State Farm provided no explanation and provided no evidentiary support or legal authority supporting its conclusion. State Farm further opined, without conducting <u>any</u> investigation or research, that the SCDOT and its trucks "do not qualify as underinsured motor vehicles" as they are "not designed for use on public roads."

39. On information and belief, State Farm never inquired or even investigated as to which SCDOT vehicles were involved in causing the Collision, despite having been informed of such in the Complaint and Amended Complaint. On information and belief, State Farm never investigated the scene of the Collision; State Farm never talked to any witnesses; State Farm never researched any legal authority in South Carolina on the issue of coverage and whether its denial was proper under the law; and State Farm never secured legal advice or even attempted to obtain legal authority in order to provide reasonable responses to the Defendants' demand letters.

40. State Farm waited well over a year after the Collision occurred and months after being advised that SCDOT was tendering its liability limits before it even attempted to initiate a declaratory judgment action. Had State Farm conducted ***any*** investigation, it would have learned that the Defendants' damages were caused by accident arising out of the operation, maintenance and use of numerous SCDOT motor vehicles, which were registered with S.C.D.M.V., insured by SCDOT through the Insurance Reserve Fund, and designed for use on public roads.

41. During the more than 15 months that transpired between the Collision and the Plaintiff's filing of this D.J. action, the ***only*** issue State Farm ever raised as a potential issue precluding coverage, was whether the SCDOT vehicles qualified as underinsured motor vehicles. For the first time, however, State Farm *now* asserts in its Complaint that the Defendants' damages were caused solely by their own negligence and that the damages were not proximately caused by SCDOT.

On information and belief, these new assertions were made without conducting any investigation and were made in bad faith, without any reasonable basis or factual support.

42. Had State Farm conducted any investigation at all, it would have known that:

a. The *only* expert identified in the liability case has opined that the SCDOT vehicles negligently caused the Collision;

b. It is undisputed that SCDOT tendered the liability limits after only 8 months of litigation;

c. The speed limit on Craig Road on the date of the Collision was 55 m.p.h.;

d. The *only* evidence on the record shows that Mrs. Adams was travelling within the speed limit;

e. The SCDOT witnesses deposed in the liability case testified that they were never provided any training or instruction on how to clean, maintain, or operate the asphalt distributor truck (as required by the vehicle's manual), therefore causing the emulsion to be spread inappropriately;

f. Mrs. Adams was the only witness to the accident and her deposition testimony shows that she was without any fault in the Collision;

g. It is undisputed that the following SCDOT vehicles were used in the road-resurfacing project that caused the Collision, all of which are designed for use on public roads:

¾ Ton Pickup Standard Cab; S.C.Tag No.: SG78023;

¾ Ton Utility Truck, Standard Cab, Tag No.: SG87139;

1 Ton Platform Truck, Standard Cab, Tag No.: SG65018;

16.5 Ton 3P Dump Truck (8yd), Tag No.: SG65061;

16.5 Ton 2P Dump Truck (8yd), Tag No.: SG82517;

16.5 Ton Dump Truck (8yd), Tag No.: SG76375;

16.5 Ton Asphalt Distributor Truck, Tag No.: SG82543;

16.5 Ton Dump Truck (8yd), Tag No.: SG87887.

h. No witnesses have been identified in the liability action concerning Ms. Adams' alleged negligence and no witnesses have testified that the Defendants were in any way responsible for the Collision.

43. On information and belief, State Farm has not identified, consulted, or retained, an expert who supports its conclusions as to liability.

44. On January 4, 2011, after numerous discussions between counsel regarding the UIM issues, Defendants wrote State Farm requesting that they agree to stipulate to liability in the underlying action, based upon what Defendants submit is a clear liability situation. Alternatively, Defendants also requested that State Farm agree to explore stipulations of fact, so as to avoid the cost and delay of unnecessary duplicative lawsuits. In response, on January 12, 2011, State Farm advised Defendants that:

> State Farm does not believe that it is necessary to stipulate to anything regarding damages or liability of SCDOT. These issues have nothing to do with State Farm's UIM coverage.

However, in its Complaint for Declaratory Judgment, State Farm takes the complete opposite position and states that SCDOT was not liable for the damages to the Defendants, and boldy asserts that the Defendants' damages were caused

solely by their own negligence. (See Paragraphs 21 and 22 of the Plaintiff's Complaint for Declaratory Judgment.)

45. As a result, State Farm seeks to "double-team" the Defendants by requesting that the liability question be decided in this Declaratory Judgment action as well as the underlying liability claim.

**FOR A FIRST COUNTERCLAIM**
**Breach of Contract**

46. The allegations of the foregoing Paragraphs are reiterated and incorporated by reference to the extent not inconsistent herewith.

47. The insurance Policy constitutes a contract between Plaintiff and Defendants.

48. Defendants have fully complied with their contractual duties under the Policy by paying premiums when due, by complying with the claims reporting requirements of the Policy, and in such other particulars as will be shown at trial.

49. Notwithstanding Defendants' complete performance pursuant to its contract with the Plaintiff, Plaintiff has breached its contract with Defendants as follows:

(a) By failing and refusing to reasonably and/or timely investigate Defendants' Claim for UIM coverage;

(b) By failing and refusing to provide Defendant with a good faith explanation of Plaintiff's denial of coverage under the Policy, including, without limitation, an explanation as to why the SCDOT vehicles at issue in this action are not underinsured vehicles;

(c) By failing and refusing to substantively respond to correspondence from and/or on behalf of Defendants soliciting further explanation and/or justification of the denial;

(d) By failing and refusing to provide benefits due Defendants pursuant to its contract; and

(e) In such other particulars as shall be proven at a trial of this matter.

50. As a direct and proximate result of Plaintiff's breach of the Policy, Defendants have suffered and continue to suffer certain actual, incidental and consequential damages in such sums as shall be proven at trial.

**FOR A SECOND COUNTERCLAIM**
**Bad Faith**

51. The allegations of the foregoing Paragraphs are reiterated and incorporated by reference to the extent not inconsistent herewith.

52. State Farm is obligated to perform its responsibilities under the Policy in good faith. The duty of good faith requires State Farm to put the interests of the insured ahead of its own interests, or at the least, to treat such interests as equal to its own.

53. The Policy clearly and unambiguously provides that State Farm will "pay damages for bodily injury or property damage an insured: (1) is legally entitled to collect from the owner or driver of an underinsured motor vehicle; or (2) would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute." The policy further provides "[t]he bodily injury or property damage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle."

54. Defendants' claims for UIM coverage fall squarely within the terms of the Policy. Defendants suffered severe bodily injuries and tremendous other damages which

were caused by an accident arising out of SCDOT's negligent ownership, maintenance and operation of its motor vehicles.

55. Despite the clear and unambiguous language of the Policy, State Farm intentionally and unreasonably refused to honor the terms of the policy concerning payment of UIM benefits. State Farm's refusal to pay benefits under the Policy was in bad faith.

56. State Farm further breached its duty of good faith and fair dealing by failing to investigate the Defendants' claim in a reasonable, prudent, and prompt manner, to wit:

a. State Farm failed to talk to any witnesses;

b. State Farm failed to interview the Defendants;

c. State Farm failed to inspect the site of the Collision;

d. State Farm failed to research or conduct any independent review of SCDOT's involvement in the Collision, despite having knowledge of the same;

e. State Farm failed to conduct any legal research on the issues of coverage and failed to consult or retain a legal expert to advise it on the same;

f. State Farm failed to identify or consult an engineer or other road expert concerning the circumstances and cause of the Collision;

g. State Farm failed to assert a declaratory judgment action in a reasonable and timely manner, thereby causing additional and unnecessary delay;

h. State Farm failed to review the Policy terms and the Defendants factual assertions good faith;

i. State Farm unreasonably and self-servingly concluded that SCDOT did not cause the damages to the Defendants, despite clear and undisputed evidence to the contrary;

j. State Farm unreasonably and self-servingly concluded that the Defendants' own negligence caused their damages, without conducting any investigation and without establishing any facts to support the same;

k. State Farm failed to provide timely, complete and accurate responses to Defendants request for Policy and other coverage information;

l. State Farm unreasonably failed to stipulate that Defendants damages exceed the amount of liability and UIM coverage in this matter; and

m. In such other particulars as will be shown at trial.

57. State Farm's intentional and bad faith conduct in unreasonably denying and processing the Defendants' claim damaged the Defendants in an amount to be determined by a jury.

58. Based upon and due to the foregoing, Plaintiffs seek and submit they are entitled to punitive damages and attorneys' fees.

**FOR A THIRD COUNTERCLAIM**
**Declaratory Judgment**

59. The allegations of the foregoing Paragraphs are reiterated and incorporated by reference to the extent not inconsistent herewith.

60. Based upon and due to the foregoing Paragraphs, and pursuant to §15-53-30, S.C. Code of Laws, 1976 as amended, Defendants seek and are entitled to a judicial declaration that:

a.) The SCDOT vehicles involved in the Collision are underinsured motor vehicles, so as to trigger UIM coverage for the Defendants' damages in this matter; and

b.) The Policy provides $100,000 in UIM coverage for each vehicle owned and insured by the Defendants on the date of the Collision.

**FOR A FOURTH COUNTERCLAIM**
**(Statutory Liability for Attorneys' Fees– S.C. Code Ann. § 38-59-40)**

61. Each and every allegation of the foregoing Paragraphs is realleged and incorporated herein by reference.

62. State Farm failed and refused to pay the Adams' claim for benefits within ninety (90) days following the Adams' demand for payment.

63. State Farm's failure and refusal to pay benefits was without reasonable cause and/or in bad faith.

64. By reason of the foregoing, the Adams are entitled to recover, in addition to any sum or amount otherwise recoverable, an additional sum for their attorney's fees incurred in the prosecution of this case against the Plaintiff.

WHEREFORE, having fully answered the Plaintiff's Complaint and having asserted counterclaims for relief against the Plaintiff, the Defendants Phyllis Paden-Adams and Alonzo Adams pray for an Order by this Court declaring, pursuant to S.C. Code Ann. § 15-53-30, that the SCDOT vehicles involved in the Collision are underinsured motor vehicles, so as to trigger UIM coverage for the Defendants damages in this matter; and that the State Farm Policy provides $100,000 in UIM coverage for each vehicle owned and insured by the Defendants on the date of the Collision. The Defendants further pray for a jury trial on all issues of fact, for judgment against Plaintiff for actual, compensatory, consequential, and punitive damages in an

amount to be determined by a jury, for reasonable attorney's fees and the costs of this action, and for such other and further relief as this Court may deem just and proper.

February 1, 2011

Christi P. Cox
W. Keith Martens
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

4831-5488-5128, v. 1

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| | ) | PLAINTIFF'S REPLY TO DEFENDANTS' COUNTERCLAIM |
| vs. | ) | |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | (Jury Trial Requested) |
| Defendants. | ) | |

The plaintiff replies to the defendants' counterclaim as follows:

FOR A FIRST DEFENSE

1. Answering paragraph 20, the plaintiff incorporates the allegations in its complaint and denies paragraphs 1 through 19 of the defendants' answer and counterclaim to the extent those paragraphs do not admit the allegations in the plaintiff's complaint.

2. Answering paragraph 21, the plaintiff admits the defendants are citizens and residents of York County, denies the speed limit on Craig Road was 55 mph and the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21 and, therefore, those allegations are denied.

3. Answering paragraph 22, the plaintiff refers to and incorporates by reference pursuant to SCRCP 10(c) the answer of the SCDOT in Adams v. SCDOT, Civil Action No. 2010-CP-46-0854 and otherwise paragraph 22 is denied.

4. Answering paragraph 23, the plaintiff denies that equipment utilized by the SCDOT for performance of roadwork constituted vehicles and denies that the equipment was negligently operated and maintained by the SCDOT and the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 and, therefore, those allegations are denied.

5. Answering paragraph 24, the plaintiff incorporates pursuant to SCRCP 10(c) the answer of the SCDOT in Civil Action No. 2010-CP-46-0854 and otherwise paragraph 24 is denied.

6. Answering paragraph 25, the plaintiff incorporates by reference pursuant to SCRCP 10(c) the response of the SCDOT in Civil Action No. 2010-CP-46-0854 and otherwise paragraph 25 is denied.

7. Answering paragraph 26, the plaintiff admits the defendants filed a lawsuit against the SCDOT, the plaintiff refers to the complaint in that lawsuit for the allegations therein, the plaintiff admits the SCDOT paid part of its liability under the South Carolina Tort Claims Act to the defendants in exchange for a covenant not to execute, admits State Farm assumed the defense of Civil Action No. 2010-CP-46-0854 and that that action is pending in York County but otherwise paragraph 26 is denied.

8. Answering paragraph 27, the plaintiff incorporates by reference pursuant to SCRCP 10(c) the answer of the SCDOT in Civil Action No. 2010-CP-46-0854, the plaintiff is without knowledge or information sufficient to form a belief as to whether the defendants' damages greatly exceed the liability limits tendered by the SCDOT and the remaining allegations in paragraph 27 are denied.

9. Paragraph 28 is denied.

10. Answering paragraph 29, the plaintiff admits the defendants have insured vehicles with the plaintiff for a number of years, admit that on October 21, 2009 the motor vehicle driven by Mrs. Adams, a 2004 Honda Accord, was owned by the defendants and insured by State Farm, State Farm refers to the policy for the UIM coverage provided under that policy, and otherwise paragraph 29 is denied.

11. Answering paragraph 30, the plaintiff admits that at the time of the October 21, 2009 accident the defendants owned 4 other vehicles listed in paragraph 30, the plaintiff refers to the policies in effect on the date of the collision for the amount of UIM coverage, the plaintiff denies the policy on the 1994 Honda was in effect on the date of the accident and otherwise paragraph 30 is denied.

12. Answering paragraph 31, the plaintiff admits that under South Carolina law a Class I insured is entitled to stack applicable UIM benefits to the extent an insured's damages support payment of applicable UIM benefits but the remaining allegations in paragraph 31 are denied.

13. Answering paragraph 32, the plaintiff refers to and incorporates the applicable language of those policies in effect on October 21, 2009 and, to the extent the allegations in paragraph 32 are inconsistent with the wording in the applicable policies, paragraph 32 is denied and otherwise paragraph 32 is denied.

14. Answering paragraph 33, the plaintiff is without knowledge or information sufficient to form a belief as to whether the defendants' damages greatly exceed liability limits paid by the SCDOT but admit the defendants' damages exceed available UIM coverage with the plaintiff, the plaintiff is without knowledge or

information sufficient to form a belief as to whether the amount of damages recoverable against the SCDOT in the absence of a statutory damages cap would exceed the amount referenced in paragraph 33 and, therefore, this allegation is denied and the remaining allegations in paragraph 33 are denied.

15. Answering paragraph 34, the plaintiff admits that the attorneys for the defendants made requests to the plaintiff to provide UIM coverage but the remaining allegations in paragraph 34 are denied.

16. Answering paragraph 35, the plaintiff admits the defendants' attorney on November 9, 2009 wrote State Farm agent Dennis Harrington and requested copies of all policies held by the defendants on the date of the accident, and the plaintiff admits it initially identified 2 of 4 vehicles insured by the plaintiff on the date of the accident but the remaining allegations in paragraph 35 are denied.

17. Answering paragraph 36, the plaintiff admits the defendants' attorney on March 17, 2010 wrote Richard D. Findley of the plaintiff, that this letter enclosed a copy of the lawsuit against the SCDOT, that this letter requested that the plaintiff inform the defendants' attorney if the plaintiff was interested in tendering the applicable policy limits, that several telephone conversations occurred between the plaintiff and the defendants' attorneys, that on April 28, 2010 the plaintiff advised the defendants' attorneys that the defendants' claim "does not appear to qualify as an underinsured claim," "based on the knowledge that no vehicle was involved in this accident other than Mrs. Paden-Adams," and that the plaintiff had at that date obtained no specific legal research but the remaining allegations in paragraph 36 are denied.

18. Answering paragraph 37, the plaintiff admits that the defendants' attorney wrote a letter dated April 30, 2010 to Lindsay R. Smith, the plaintiff admits that at this time it did not have an attorney review the plaintiff's position that the claim did not appear to qualify as an underinsured claim, admits the letter from the defendants' attorney cited 2 South Carolina appellate court decisions, admits the letter requested information on 3 policies and that in May 2010 the plaintiff provided certificates of coverage on 2 policies but the remaining allegations in paragraph 37 are denied.

19. Answering paragraph 38, the plaintiff admits its representative sent a letter dated May 14, 2010 to the defendants' attorneys which stated the claim did not appear to qualify as an underinsured motor vehicle and which referenced the definition of motor vehicle on page 20 of the policy but otherwise paragraph 38 is denied.

20. Answering paragraph 39, the plaintiff admits it did not obtain a legal opinion at that time but the remaining allegations in paragraph 39 are denied.

21. Answering paragraph 40, the plaintiff admits it filed this lawsuit January 5, 2011 which was more than 1 year after the October 2009 accident and that this declaratory judgment action was initiated approximately 1 month after the defendants signed a covenant not to execute against the SCDOT but the remaining allegations in paragraph 40 are denied.

22. Answering paragraph 41, the plaintiff denies its complaint alleges the defendants' damages were caused solely by the defendants' own negligence, the plaintiff admits paragraph 21 of its complaint denies Phyllis Paden-Adams' injuries

were proximately caused by SCDOT vehicles but the remaining allegations in paragraph 41 are denied.

23. Paragraph 42 and all subparagraphs therein are denied.

24. Answering paragraph 43, the plaintiff admits it has not identified an expert in this case and the plaintiff would further show that if this paragraph refers to Civil Action No. 2010-CP-46-0854 it is an improper attempt to discover through litigation in a declaratory judgment action evidence which is non-discoverable in Civil Action No. 2010-CP-46-0854 concerning whether the plaintiff has consulted or retained an expert and the remaining allegations are denied.

25. Answering paragraph 44, the plaintiff admits Ronnie Craig had discussions with the defendants' attorneys concerning certain issues, admits the defendants' attorneys sent a letter to Ronnie Craig dated January 4, 2011, the plaintiff refers to the statements in that letter and, to the extent the allegations in paragraph 44 contradict the letter of January 4, 2011, those allegations are denied, the plaintiff admits Ronnie Craig sent a letter to the defendants' attorneys dated January 7, 2011 and State Farm refers to and incorporates that letter and, to the extent paragraph 44 contradicts Ronnie Craig's letter of January 7, 2011, paragraph 44 is denied and in response to the remaining allegations in paragraph 44 State Farm refers to and incorporates the allegations in its complaint and otherwise paragraph 44 is denied.

26. Paragraph 45 is denied and State Farm would further show it is agreeable to removing from its complaint any allegations pertaining to who was at fault in causing the accident in question.

27. Answering paragraph 46, the plaintiff incorporates its responses to paragraphs 20 through 45 as fully and effectually as if set forth verbatim.

28. Paragraph 47 is admitted.

29. Answering paragraph 48, the plaintiff admits the defendants have complied with contractual duties by paying premiums when due and by reporting their claim but the remaining allegations in paragraph 48 are denied.

30. Paragraph 49 and all subparagraphs thereof are denied.

31. Paragraph 50 is denied.

32. Answering paragraph 51, the plaintiff incorporates its responses to paragraphs 20 through 50 as fully and effectually as if set forth verbatim.

33. Answering paragraph 52, the plaintiff admits it is obligated to perform responsibilities under the contract of insurance in good faith but the plaintiff would further show that any duties owed to the defendants are matters of law to be determined by the Court and otherwise paragraph 52 is denied.

34. Answering paragraph 53, the plaintiff refers to the language in its policy and, to the extent the allegations in paragraph 53 contradict the language in the plaintiff's policies, paragraphs 53 is denied and otherwise paragraph 53 is denied.

35. Paragraph 54 is denied.

36. Answering paragraph 55, the plaintiff admits the language in its policy is clear and unambiguous but the remaining allegations in paragraph 55 are denied.

37. Paragraph 56 and all subparagraphs thereof are denied.

38. Paragraph 57 is denied.

39. Paragraph 58 is denied.

40. Answering paragraph 59, the plaintiff incorporates its responses to paragraphs 20 through 58 as fully and effectually as if set forth verbatim.

41. Answering paragraph 60, the plaintiff admits its policies provided $100,000 UIM coverage per person for each vehicle insured by the defendants on the date of the October 21, 2009 accident but the plaintiff denies that the facts of the defendants' claim warrant the application of UIM coverage and the remaining allegations in paragraph 60 are denied.

42. Answering paragraph 61, the plaintiff incorporates its responses to paragraphs 20 through 60 as fully and effectually as if set forth verbatim.

43. Answering paragraph 62, the plaintiff admits it has not paid the defendants' claim for UIM benefits for the October 21, 2009 accident but the remaining allegations in paragraph 62 are denied.

44. Paragraph 63 is denied.

45. Paragraph 64 is denied.

46. Except as is specifically admitted, each and every allegation in the counterclaim and in the prayer of the counterclaim is denied.

Wherefore, having replied to the defendants' counterclaim, the plaintiff prays that the counterclaim be dismissed, with costs, and for such other and further relief as this Court may deem just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

April 4, 2011

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK )

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2010 FEB 26 AM 11:14
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Phyllis Paden-Adams and Alonzo Adams, ) C/A No. 2010-CP-46-00854

Plaintiffs, )

v. ) COMPLAINT
(Jury Trial Demanded)

South Carolina Department of Transportation, )

Defendant. )

Plaintiffs, complaining of Defendant, South Carolina Department of Transportation, would respectfully allege and show unto the court as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are citizens and residents of York County, South Carolina. Until October 21, 2009, Plaintiff Phyllis Paden-Adams was employed as a school teacher at York Road Elementary School.

2. Defendant is a "governmental agency" of South Carolina, as defined by S.C. Code Ann. § 15-78-30 (Law. Co-op. 2005).

3. This action is brought under the South Carolina Tort Claims Act.

4. The acts or omissions of Defendant that give rise to this action occurred in York County, South Carolina.

5. Pursuant to S.C. Code Ann. § 15-78-100 (Law. Co-op. 2005), this court has jurisdiction over the parties and the subject matter of this dispute. Venue is proper in York County, South Carolina.

FACTS

6. Plaintiffs reside on Marshall Road, just south of Rock Hill, South Carolina. Plaintiffs frequently travel State Road 735, also named Craig Road. At all times at issue in this complaint, the speed limit on Craig Road was 55 miles per hour.

7. On or about October 8, 2009, Defendant carried out a road surfacing project known as "chip sealing" on Craig Road. Chip sealing is carried out by applying a single layer of asphalt binder, and then covering that with a layer of aggregate. By design and specification, the aggregate is intended to be embedded into the binder in order to protect the asphalt layer from damage and to develop a textured surface skid-resistant surface for vehicles.

8. Defendant carried out its "chip sealing" project using several motor vehicles that were owned and operated by Defendant, including trucks, asphalt distributors, spreaders, backhoes and compactors.

9. On information and belief, Defendant did not properly prepare the surface of Craig Road to accept the "chip seal" layer, did not properly apply asphalt binder and aggregate, and did not exercise proper quality control and monitoring of the project to ensure a uniform and properly adhered "chip seal" coat upon the roadway.

10. As a result, Defendant's "chip seal" surface almost immediately developed a failure condition known as "raveling" or "shelling." "Raveling" is the loss of aggregate from the chip seal's surface, causing the aggregate to become loose and resulting in a loss of skid resistance for the "chip seal" surface.

11. Between October 8, 2009 and October 21, 2009, one or more residents of Craig Road contacted Defendant to complain about the poor condition of the road, the presence of loose aggregate on the road surface, and the hazardous condition of the road.

12. Defendant did not effectively respond to the residents' complaints, leaving the surface of Craig Road in an unreasonably dangerous condition.

13. On October 21, 2009, Phyllis Paden-Adams was traveling Craig Road within the posted speed limits, on her way to work. Her car struck a patch of loose aggregate that had been spread on the roadway by Defendant's trucks. Ms. Adams' vehicle spun out of control in the loose aggregate, slid off the roadway and struck an embankment.

14. As a result of the accident, Ms. Adams suffered quadriplegia and other severe and permanent personal injuries.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)

15. Defendant owed a duty of care to Plaintiffs and to other members of the public to ensure that Defendant maintained Craig Road in a suitable and safe condition, and to ensure that Defendant's maintenance of Craig Road was completed in a safe and effective manner.

16. Defendant breached its duty of care in one or more of the following particulars:

a. In failing to properly "chip seal" Craig Road;

b. In using motor vehicles owned or operated by Defendants in failing to properly apply a sufficient coating of binder to Craig Road to adhere aggregate to the road's surface;

c. In using motor vehicles owned or operated by Defendant to apply a large quantity of loose aggregate to the surface of Craig Road, and then leaving the loose aggregate upon the surface of Craig Road;

d. In failing to adequately warn Plaintiffs and other members of the public of the dangerous condition of Craig Road following completion of Defendant's defective "chip sealing" project;

e. In failing to adequately respond to resident's complaints concerning the dangerous condition of Craig Road as a result of Defendant's "chip sealing" project;

f. In failing to promptly remedy Defendant's defective "chip sealing" project;

g. In failing to post adequate warning signs and traffic control devices, and in failing to timely re-install downed warning signs in a timely manner after Defendant had actual or constructive notice that the signs were down;

h. In leaving Craig Road in a dangerous condition following completion of Defendant's "chip sealing" project;

i. In such other particulars as shall be proven at trial.

17. As a direct and proximate result of Defendant's negligence and gross negligence, Plaintiffs have suffered severe physical, economic and emotional damages, well in excess of the statutory limits of liability under the South Carolina Tort Claims Act. Plaintiffs' damages, including bodily injury and property damage, were caused by an accident arising out of Defendant's operation or ownership of one or more motor vehicles.

18. Plaintiffs are entitled to recover actual damages in such sums as will be determined by a jury. If permitted under the Tort Claims Act, Plaintiffs are also entitled to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION BY ALONZO ADAMS
(Loss of Consortium)

19. Plaintiffs reiterate the allegations of Paragraphs 1-18 and incorporate them by reference.

20. In addition to economic and emotional damages, Plaintiff Alonzo Adams has suffered the loss of companionship and society of his spouse that he enjoyed prior to his spouse's injuries and quadriplegia.

21. Plaintiff Alonzo Adams is entitled to recover such actual damages for loss of consortium as will be determined by a jury. If permitted by the Tort Claims Act, Plaintiff Alonzo Adams is also entitled to an award of punitive damages.

WHEREFORE, Plaintiffs pray for judgment against Defendant, for actual damages in such sums as will be determined by a jury, for punitive damages if allowed under the Tort Claims Act, for the costs of this action, and for such other and further relief as the court deems just and proper. Plaintiffs demand a jury trial.

February 25, 2010

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ATTORNEYS FOR PLAINTIFFS

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| Phyllis Paden-Adams<br>and Alonzo Adams,<br><br>Plaintiffs,<br><br>v.<br><br>South Carolina Department<br>of Transportation,<br><br>Defendant. | C/A No. 2010-CP-46-00854<br><br>AMENDED COMPLAINT<br>(Jury Trial Demanded) |

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2010 MAY -6 PM 2:25
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Plaintiffs, complaining of Defendant, South Carolina Department of Transportation, would respectfully allege and show unto the court as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are citizens and residents of York County, South Carolina. Until October 21, 2009, Plaintiff Phyllis Paden-Adams was employed as a school teacher at York Road Elementary School.

2. Defendant is a "governmental agency" of South Carolina, as defined by S.C. Code Ann. § 15-78-30 (Law. Co-op. 2005).

3. This action is brought under the South Carolina Tort Claims Act.

4. The acts or omissions of Defendant that give rise to this action occurred in York County, South Carolina.

5. Pursuant to S.C. Code Ann. § 15-78-100 (Law. Co-op. 2005), this court has jurisdiction over the parties and the subject matter of this dispute. Venue is proper in York County, South Carolina.

FACTS

6. Plaintiffs reside on Marshall Road, just south of Rock Hill, South Carolina. Plaintiffs frequently travel State Road 735, also named Craig Road. At all times at issue in this complaint, the speed limit on Craig Road was 55 miles per hour.

7. On or about October 8, 2009, Defendant carried out a road surfacing project known as "chip sealing" on Craig Road. Chip sealing is carried out by applying a single layer of asphalt binder, and then covering that with a layer of aggregate. By design and specification, the aggregate is intended to be embedded into the binder in order to protect the asphalt layer from damage and to develop a textured surface skid-resistant surface for vehicles.

8. Defendant carried out its "chip sealing" project using several motor vehicles that were owned and operated by Defendant, including trucks, asphalt distributors, spreaders, backhoes, compactors and sweepers.

9. On information and belief, Defendant did not properly prepare the surface of Craig Road to accept the "chip seal" layer, operated motor vehicles involved in the work in a negligent manner such that the vehicles did not properly distribute asphalt binder and aggregate along the road way, operated motor vehicles in a negligent manner such that loose aggregate was not removed from the roadway, and did not exercise proper quality control and monitoring of the project to ensure a uniform and properly adhered "chip seal" coat upon the roadway.

10. As a result, Defendant's "chip seal" surface almost immediately developed a failure condition known as "raveling" or "shelling." "Raveling" is the loss of aggregate

from the chip seal's surface, causing the aggregate to become loose and resulting in a loss of skid resistance for the "chip seal" surface.

11. Between October 8, 2009 and October 21, 2009, one or more residents of Craig Road contacted Defendant to complain about the poor condition of the road, the presence of loose aggregate on the road surface, and the hazardous condition of the road.

12. Defendant did not effectively respond to the residents' complaints, leaving the surface of Craig Road in an unreasonably dangerous condition.

13. On October 21, 2009, Phyllis Paden-Adams was traveling Craig Road within the posted speed limits, on her way to work. Her car struck a patch of loose aggregate that had been spread on the roadway by Defendant's trucks. Ms. Adams' vehicle spun out of control in the loose aggregate, slid off the roadway and struck an embankment.

14. As a result of the accident, Ms. Adams suffered quadriplegia and other severe and permanent personal injuries.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)

15. Defendant owed a duty of care to Plaintiffs and to other members of the public to ensure that Defendant maintained Craig Road in a suitable and safe condition, and to ensure that Defendant's maintenance of Craig Road was completed in a safe and effective manner.

16. Defendant breached its duty of care in one or more of the following particulars:

a. In failing to properly "chip seal" Craig Road;

b. In operating its motor vehicles in a negligent and careless manner, such that the vehicles did not properly and adequately distribute a sufficient coating of binder to Craig Road;

c. In operating its motor vehicles in a negligent and careless manner, such that the vehicles spread a large quantity of loose aggregate across the surface of Craig Road;

d. In operating its motor vehicles in a negligent and careless manner, such that SCDOT's sweeping vehicles did not remove loose aggregate from the surface of Craig Road following completion of the "chip seal" work;

e. In leaving quantities of loose aggregate upon the surface of Craig Road;

f. In failing to adequately warn Plaintiffs and other members of the public of the dangerous condition of Craig Road following completion of Defendant's defective "chip sealing" project;

g. In failing to adequately respond to resident's complaints concerning the dangerous condition of Craig Road as a result of Defendant's "chip sealing" project;

h. In failing to promptly remedy Defendant's defective "chip sealing" project;

i. In failing to post adequate warning signs and traffic control devices, and in failing to timely re-install downed warning signs in a timely manner after Defendant had actual or constructive notice that the signs were down;

j. In leaving Craig Road in a dangerous condition following completion of Defendant's "chip sealing" project;

k. In such other particulars as shall be proven at trial.

17. As a direct and proximate result of Defendant's negligence and gross negligence, including Defendant's negligent operation of its emulsion distributor truck, aggregate spreader truck and sweeping truck in connection with the "chip seal" project, Plaintiffs have suffered severe physical, economic and emotional damages, well in excess of the statutory limits of liability under the South Carolina Tort Claims Act. Plaintiffs' damages, including bodily injury and property damage, were caused by an accident arising out of Defendant's operation or ownership of one or more motor vehicles.

18. Plaintiffs are entitled to recover actual damages in such sums as will be determined by a jury. If permitted under the Tort Claims Act, Plaintiffs are also entitled to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION BY ALONZO ADAMS
(Loss of Consortium)

19. Plaintiffs reiterate the allegations of Paragraphs 1-18 and incorporate them by reference.

20. In addition to economic and emotional damages, Plaintiff Alonzo Adams has suffered the loss of companionship and society of his spouse that he enjoyed prior to his spouse's injuries and quadriplegia.

21. Plaintiff Alonzo Adams is entitled to recover such actual damages for loss of consortium as will be determined by a jury. If permitted by the Tort Claims Act, Plaintiff Alonzo Adams is also entitled to an award of punitive damages.

WHEREFORE, Plaintiffs pray for judgment against Defendant, for actual damages in such sums as will be determined by a jury, for punitive damages if allowed under the Tort Claims Act, for the costs of this action, and for such other and further relief as the court deems just and proper. Plaintiffs demand a jury trial.

May 5, 2010

W. Keith Martens

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ATTORNEYS FOR PLAINTIFFS

4822-1592-9094, v. 1

State of South Carolina )
)
County of York )

In the Court of Common Pleas
of York

Case No.: 2010-GS-46-00949
2010-GS-46-00950

State Farm and Casualty., Company., )
Plaintiff., )
-vs- )
Phyllis Paden-Adams., and, Alonzo Adams., )
Defendants. )

Transcript of Record

August 29, 2012
York, South Carolina

B E F O R E:

Honorable John C. Hayes, III.

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

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Wanda Nelson
Circuit Court Reporter
Sixteenth Judicial Circuit

I-N-D-E-X

ALSO APPEARING:

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No Exhibits were received into the record.

Court Reporter's Certificate Page . . . . . Page 43

(COURT IN SESSION MONDAY, AUGUST 29, 2012 AT 11:05 AM.)

THE COURT: Next is Phyllis Paden Adams. There are two cases, one is a motion to consolidate and that's *Phyllis Paden-Adams versus DOT*. And then there is what looks like it must be some sort of a declaratory judgement action named *State Farm versus Phyllis Paden-Adams*. I don't --

MR. NORRIS: Good morning, Your Honor.

THE COURT: How are you?

MR. NORRIS: I'm fine.

THE COURT: This is the one I think I see Ronnie Craig's name on there. I think I got notice from him he did not need to be here or something.

MR. NORRIS: I told Mr. Craig last week that I didn't think it was necessary. He had another hearing in another case so I said I'd cover his back.

THE COURT: All right.

I guess we'll take them in the order that their set forth; Plaintiff's Motion to Consolidate.

Ms. Cox.

MS. COX: Yes, sir, we'll hand a copy of the Memorandum in Opposition. We're handling both of these motions together. This is our response to the Summary Judgment Motion.

Make sure we give the Court the original.

THE COURT: Mr. McKinny, how are you?

MR. MCKINNEY: Judge, I'm fine. Thank you. How are you getting along?

THE COURT: Good.

MR. MCKINNEY: Drove up this morning and I am going to -- I'm here because I should be here, but I'm going to defer most of my arguments or anything to Mr. Norris.

THE COURT: While Richard is getting set up I'm gonna go make myself a cup of coffee.

MR. MCKINNEY: Do that.

THE COURT: Utilize a few minutes. Actually, I'd like to step down the hall too, so we'll take a short break while everybody gets ---

MS. COX: Thank you, Judge.

MR. MCKINNEY: Sure.

THE COURT: --- fixed up here.

(COURT IN RECESS AT 11:04 AM.)

(COURT BACK IN SESSION AT 11:10 AM.)

THE COURT: Now the Motion to Consolidate, Ms. Cox. Do you want to wait for Mr. Wallace to come back? There he comes. Keep losing him.

MS. COX: May it please the Court.

THE COURT: Yes, ma'am.

MS. COX: The motion that we are here to start with is

our motion that we filed on behalf of Phyllis Paden-Adams and Alonzo Adams, Christie Cox and Keith Martens representing the Adams. We filed a Motion to Consolidate the underlying liability case in which the allegations are that Ms. Adams was injured severely; in fact she was rendered quadraplegic as a result of matters related to SCDOT's operation of certain of it's vehicles. Subsequent to that State Farm filed a Declaratory Judgment Action in which they are asserting that the accident that Ms. Adams was involved in is not covered under the UIM Policy.

After approximately eight months of nothing happening in the underlying liability case; in which SCDOT took over responsibility for defending that matter, and after trying exhaustively to figure out a way to come up with either stipulated facts or some other mechanism that could achieve consistenancy and factual determinations and also get the issue of UIM to the court we filed this motion. And again we are looking under Rule 42 (A) to consolidate Cases 2010-854 and 2011-021.

The purpose, even though State Farm's response to our motion is that they believe that our motion is going to actually result in more, more duplicative litigation, really what it's an effort to do is to try and get consistency and streamline the case so that we can get a determination of facts as well as questions of law.

In order to understand our motion I think its important for the Court to have a little bit of background about both cases. In the Adams versus SCDOT the factual allegations in that action and what actually has been discovered in that case is that on October 8th, 2009 SCDOT carried out a resurfacing project which is called chip sealing on Craig Road. In the course of performing that job SCDOT actually used a 2003 Chevy truck that was mounted with an asphalt distributor, sprayer. Essentially what would happen is while the driver of the truck was driving down the road, you would also apply this sticky tack that would stick to the road. After that what's supposed to happen is the dump trucks are supposed to dump rocks and push the rocks into the sticky tack. What happened was, the driver didn't appropriately use enough tack when he was driving down the road essentially spraying two little and spraying sparsely.

So what ended up happening is that when the rocks were dumped onto the road, they didn't stick at all, or they stuck in certain places, and as a result when Ms. Adams traveled down the road on the way to work she hit a patch of the rock that was not attached to the road and slid off of the road. What ended up happening is she immediately severed her spinal cord and she described the moments before she lost control of her vehicle as feeling like

driving on marbles. And the context of that case we filed an action on her behalf in February of 2010, eight months later SCDOT tendered liability limits and at that point State Farm filed a Notice of Appearance and was in the case to defend the case on liability.

Since their notice, since State Farm becoming involved in this case nothing has happened in that case. There has been no additional discovery, there has been nothing except to sit and wait. We've been prepared to try that case since November of 2010 and we can't move forward.

One of the reasons why we understand we can't move forward is because State Farm wants to have this question of coverage determined. However the question of coverage obviously implicates facts that have not been decided in the underlying liability action. We thought a good way to do it was to come up with stipulated facts. We couldn't get any response from State Farm to do that. We tried to stipulate in both sides, the underlying case as well as the liability case, and essentially we feel like we're being whipsawed. One of State Farm's counsel says that we need to ask the other one for a determination on that. The other one says you need to ask him.

In terms of the UIM DJ action I think it's important for the Court to have a little bit of back ground in that case as well. State Farm was made aware of the claim after

the accident occurred within days. The accident occurred on October 21st, 2009. After being notified by the client's the attorney's for the Adam's - us - contacted State Farm on November 9th, gave them written notice of the accident, ask for copies of the policy and followed up again by a telephone call just a month later.

State Farm settles Ms. Adam's vehicle which was totaled in the accident; no investigation or testing on the vehicle was performed. That was done in January of 2010. March 17th 2010 we did write on behalf of Ms. Adams requesting that State Farm tender the UIM coverage and we provided them through the mail a copy of the complaint that was served against SCDOT. In fact if you look at the activity logs which are in the records from State Farm it shows that they were aware that they were on notice for a UIM Claim. We end up having conversations with State Farm where State Farm says we're denying that claim because SCDOT cannot be an under insured driver, and the vehicles can't be under insured vehicles. I ask them to put that in writing; they put that in writing in April of 2010 and they essentially say well this is not a claim that is covered.

They request our thoughts, so we respond two days later with another letter that suggest that -- in which we provide a lengthy response that gives case law, citations to the policy. We say we think it's clear that this policy

is implicated and subsequent to that we get a four letter sentence -- a four sentence document from State Farm in which they simply say the claims are not UIM claims. Essentially what the adjustor does in the activity log is just say let's give this a little more time then we'll close this case if there is no further activity. We filed an amended complaint, we're finishing up trying to resolve resolution with SCDOT; we served the Department of Insurance as well as State Farm with the amended complaint and State Farm steps in, in November to defend the underlying liability action. At this point in time we're also giving very specific information to State Farm about what vehicles, they're asking us what vehicles are involved in this; why do you think this is a UIM claim. Again we give it, provide the letter that we've done before. We're trying to come up with a way to resolve the factual underlying -- the facts of the underlying case to see if we can get the UIM claim determined without having to go through litigation, and then in January of 2011 State Farm files the Declaratory Judgment Action, over a year after the accident's occurred. And they assert that the vehicles are not UIM claims; that the Adams' damages did not arise from the operation of UIM vehicles. And also asserts that the Adams are responsible for their own damage. Only after we filed this motion to consolidate has State Farm made any

formal effort to remove those allegations that Ms. Adams did not cause her injuries from the complaint.

The question in the Judgment Declaratory Complaint that State Farm seeks to have answered is essentially this. Did the bodily injury that Ms. Adams suffered, did it arise from -- Was it caused by an accident arising out of the ownership, operation or maintenance of the UIM vehicle. In order to determine that question we have to know what vehicles were used, what were the vehicles doing that were used; what were the damages suffered by the Adams'; did the damages arise out of the SCDOT UIM vehicles? Essentially it's a causation question. We've ask for a jury trial on the questions of facts. State Farm asserts that we should now stop everything and get a decision on the coverage issue but we can't decide the coverage issue in a vacuum. There has to be facts and unless we're able to come up with stipulated facts as to what happened; or unless we have a record from the underlying action it seems as if we are stuck.

Additionally State Farm even though they essentially said that the claim was not covered as a UIM claim because the vehicles do not constitute UIM vehicles back in April of 2010, they also suggested that they needed to do more discovery; to go back and interview all the other witnesses that were interviewed in the underlying action. We

couldn't stipulate to the transcripts of the witness's in the underlying action. However, what's strange is that once we file a motion to consolidate after we've had no movement is only when this Motion for Summary Judgment appears which suggest that State Farm didn't need to do any more discovery in order to get the question determined.

I think one of the fundamental problems is that in discovery State Farm refuses to even admit what vehicles were involved in the underlying action. How we can answer the question in this case without doing that, I don't know. All we want is for the Court to give us a streamline fashion to get these issues decided in a fashion where we don't have to have two separate trials or we can have some facts discovered -- determined in the factual case and then move forward with the issues of the UIM determination. We do think that, that clearly there are facts and issues of law that are common to both and we would request that the Court consolidate and move forward with a scheduling order that helps us get some clarity in this case.

THE COURT: Thank you.

Mr. Norris.

MR. NORRIS: Thank you, Your Honor.

I submitted to the Court, I think a week ago, our Memorandum in Opposition to the Adams' Motion to Consolidate. If Your Honor does not have that I have

additional copies.

THE COURT: Why don't you hand one up.

MR. NORRIS: Sure.

THE COURT: I don't -

MR. NORRIS: Sure. Actually I've got two. I got one for you and one for --

And I'm going to call the Adam's the Adams rather than the Plaintiff or Defendant because they are Plaintiff in one case and the Defendant in the other so for clarity I'll refer to State Farm and I'll refer to the Adams. And also I'm going to try to avoid sedge way into our motion for Summary Judgment because that's a completely separate issue that's a separate motion. So for the time being I'm going to focus my comments on the Adams' motion to consolidate.

I think there is a fundamental flaw underlying the Motion to Consolidate and it is this. It is that the issues in the two cases are the same. They aren't. The issues in the *Adams' versus SCDOT* are, for example, who was at fault in causing the accident. That's not an issue in *State Farm v. Adams*. At issue is the amount of damages. The amount of damages does not impact the insurance coverage case unless and until they get a verdict in excess of the statutory limitation of the SCDOT. And the causation analysis in the two cases are different. As Your Honor heard extensively in the Summary Judgment Motion that

preceded this case, causation involves a but for and a foresee ability analysis when you're proving a tort and that's what's alleged in the SCDOT by the Adams' is a tort. But the causation analysis for purposes of insurance coverage is different. It involves questions of whether the vehicle was an active accessory; it involves questions of whether the injury was foreseeably identifiable with the normal use of a vehicle. Those are not issues in the tort action against the SCDOT. And of course there's issues about breach of contract in the coverage case and bad faith in the coverage case so the issues are not the same. There is not over lap and there will not be inconsistent determinations by the trier of the fact. That's my main point.

My main point number two is, there's only -- The only reason to try Adam's versus SCDOT is to go after any applicable under insurance motorist coverage. If there is no applicable under insurance motorist coverage, I cannot conceive any reason to tie up the Court's resources for a week trying a case. It would seem to be pointless and for that reason we believe that the Declaratory Judgment issue namely whether there is or is not under insurance motorist coverage should be resolved first.

The other issue that they have raised because it's not just a motion to consolidate, it's also a motion to freeze

discovery in the coverage case and to let their case go ahead first. Now, they've already deposed in August of 2010 employees of the South Carolina Department of Transportation. And as I state in our Memorandum in Opposition to the Adams' Motion to Consolidate, in that case in 2010 they went into questions that have nothing to do with coverage. And there was no attorney for State Farm at that deposition specifically a Bradley Trout. So what they've already done once is try to phrase facts that nobody in State Farm present at the deposition. Now I think they're trying to freeze us, State Farm, from engaging in any discovery on the issue of coverage while they go ahead and develop further facts to their own benefit in the case against the SCDOT.

And again, the issues are not the same. So for that reason we don't believe that it would be proper to try the case against the SCDOT first. And the other thing is I don't even know why it's even necessary to consolidate the cases. Your Honor is the administrative judge, if you need to set some kind of schedule for these two cases Your Honor can do that at your discretion. Under Rule 42 there has to be common questions of law or fact to consolidate cases and even when they're consolidated they retain their own separate identity.

What the question of law is common to the two cases, I

haven't the foggiest idea. As far as the common questions of fact I don't think there are as I've just detailed. So I think it's both unnecessary and I think it would be improper to consolidate these two cases. That's all I have to say on it.

THE COURT: Any follow up on that or move on to the Motion for Summary Judgment?

MS. COX: Your Honor, I do think that there are common questions of fact. If you look at the complaint that's filed by State Farm they're asserting allegations which I assume they assert it because they needed to have that included in it to have the determination of UIM decided. They've asserted in this motion that the vehicles that we've identified do not constitute UIM vehicles. However, they refuse to admit in discovery in the DJ action what vehicles those are. I assume because it doesn't help their theory of the case which I'll guess we'll get into a little bit more with the Summary Judgment issue, but fundamental to the question in UIM is what vehicles were involved, fundamental to the questions in the liability case for what vehicles were involved by SCDOT, what they did. We have an expert who's gonna testify to the same thing. The fact that State Farm will not even admit to that question in the DJ action poses a problem for the Court having everything in front of it to be able to decide the UIM case. And it

seems to me, Your Honor, that a lot of the things that are asserted as allegations in their own complaint are things that are necessarily asserted, and actually they are taken from the allegations in our complaint against SCDOT.

So either the allegations, and they include issues related to the vehicles that are involved, the question of causation which is even in the UIM situation. It's a question of fact that has to be decided by a jury. We can't present that to a jury without giving them all of the information about what happened in the accident. And so for purposes of simply trying to get some clarity and consistency to avoid the situation like the Rhodes case where you have determinations of fact made in the underlying liability case being inconsistent with the determination of fact in the DJ case that's why we moved to do this. If the Court can help us come up with some other way to help with this, we certainly are interested to explore that. This was an attempt after eight months of having no movement to try and get some consistency and clarity.

Unfortunately now that we've filed this motion State Farm now can file -- State Farm now believes that they can file a motion for Summary Judgment whereas before they thought they needed to do a bunch of discovery. So that's the problem we're having is that there are questions of

facts that have to be determined for the Court to decide the UIM issue.

THE COURT: But -

You'll get your turn in a minute.

MR. MCKINNEY: I just wanted you to know -

THE COURT: Is the -- Of course if Summary Judgment is granted they can go somewhere else but if Summary Judgment is denied why can't this DJ action be tried in the next few months?

MS. COX: I think either way we've got to present the factual history of the accident to a jury -

THE COURT: But that' wasn't my question. My question is, regardless of that, why can't -- why can't the State Farm case, the coverage issue, be tried within the next few months?

MS. COX: We would be happy to do that, your Honor. I think what happens is and what we're trying to do is that assuming we try the DJ action just the same as -- It's gonna get appealed no matter how we do this. We're trying to figure out a easy way to do it because if it ended today we do the DJ action which is going to require I think presentation to the Court or the jury of the events of the accident that the only decision out of that is going to be whether or not coverage exist. Then we still have a liability action out here which on appeal we either have to

decide because that's always an issue that State Farm can refuse to pay on the UIM claim.

I mean it seems like we can't simply sit back and not do the liability case either; but trying a liability case actually gets facts decided that ought to be decided once and for all as to how the accident occurred, when it occurred and then after that is when you have an opportunity to deal with UIM.

THE COURT: Well let me flip that. Like I said a minute ago, why can't the -- I presume that Mr. McKinney is involved as the -- under the UIM vending for the Department of Transportation, why can't that case be going, it's an '09 case, it's a 2010, why can't we go ahead and try that?

MS. COX: Well, I don't want to speak for Tom but Tom has essentially wanted to stop everything in that case to see what happened in the UIM case. And I guess that's --

THE COURT: Well it's a chicken and egg, one of them's got to go first.

MS. COX: Exactly. We think that deciding the factual background provides information that helps the UIM claim that perhaps we can have everything done in one case. I mean if it's facts that are, you know, the history of the accident, what vehicles are involved; if the questions are presented in a way that the jury is asking a series of questions we can do it one time versus having these

witnesses come back and do the same thing all over again or a piece of that. We get finality with the liability action or at least we believe that we can get finality with the underlying liability action because you're setting facts that have to do with the accident itself that also apply to the UIM side of things.

But I understand the Court's point on this and I guess what we would simply ask is if the Court thinks that there is not a way to get these things in together and streamline it then that's what we intend to do is go ahead and move forward with a liability trial. We ask the Court to help us set those days.

MR. NORRIS: Your Honor, just a couple of --

THE COURT: Mr. McKinney kind of stood up.

MR. NORRIS: Im' sorry.

MR. MCKINNEY: I'll defer - well, all I wanted to say, Your Honor, was that I am the company's attorney in the underlying action. And if the Court would recall some three or four months ago, we actually set up a status conference with you. I think Keith Martens and I attended that, that particular status conference. And at that time I don't believe this case had even appeared on the roster; the trial roster, it did shortly after that. I had been involved in the case for a brief period of time and had been monitoring the case through Mr. Millar. We have

received all the information from Mr. Millar. Ms. Cox keeps saying State Farm in the underlying case hasn't done any additional discovery. State Farm has done what I felt they needed to do or hasn't done things that I didn't think they needed to do in the underlying action. I opposed, at that status conference I opposed trying the liability case first because I felt very strongly that the DJ action needed to be decided because I felt that, that would be probably determinative of the issues in the case.

At that time you said that -- actually most of our time wasn't spent on the underlying case, it was spent on what was going on, on the DJ side. And you basically told Mr. Martens to get with Mr. Norris and for them to try to talk things through, see what needed to be done, and as a result we're here on these motions.

You said at that time that we would revisit the issue of when to try the liability case in the fall. I believe I'm correct there.

Right, Mr. Norris?

And that's basically where I am with this matter. Thank you.

THE COURT: This is --

MR. MCKINNEY: Yes, sir. I agree.

THE COURT: It's close enough.

MR. MCKINNEY: Close enough.

THE COURT: Mr. Norris, you want to move to the Summary Judgment?

MR. NORRIS: Yes, Your Honor. Just let me make one final point on the Motion to Consolidate. Sure the case against SCDOT is the older case, but again there is no point in trying that case other than to get UIM benefits. If there is no UIM coverage what's the point?

The other point I'd like to make is that Ms. Cox said perhaps everything can be done in one case. How exactly is that going to happen I wonder? You would have a jury sitting there; you would have to have me participating in that case, that would inherently involve evidence of insurance. There is no way to do all this in one case. The whole thing is unworkable and impractical. And again there are separate issues in the two cases in any event.

Now, let me move to the Motion for Summary Judgment. I sent Your Honor our Memorandum last Monday. If for whatever reason you don't have that I have addition copies.

THE COURT: We've got it. I'm sorry, my law clerk has it. Okay. You got more? Thank you.

MR. NORRIS: You got three copies.

And I sent Mr. Marten's and Ms. Cox copies of our Motion for Summary Judgment and the Memorandum the same time I sent it to the Court last Monday. I was just handed at the start of this hearing the Adams' Motion in

Opposition to State Farm's Motion for Summary Judgment and of course I have not had an opportunity to read it.

Your Honor, my brief in support of State Farm's Motion for Summary Judgment is twenty-five pages long. And I think it recites in great detail the law of South Carolina.

THE COURT: Well, there is some theory that if it takes twenty-five pages to say that there are no genuine issues of material fact there must be an issue of material fact --

MR. NORRIS: I had heard that before. But I wanted to set forth all the cases setting forth all the law. Most of -- very little of the brief talks about the "facts". Most of it is setting forth the law because the law -- and this is one of those cases in South Carolina where there's plenty of law on it. In fact by my count there have been twelve cases with twelve factual scenarios; three have found coverage, nine have found no coverage; which hence set forth the standards and the guidelines that the Court is supposed to go by in determining whether a claim arises out of the operation, the use, the maintenance and the ownership of a motor vehicle. And that's ultimately what we're talking about today.

State Farm's Motion for Summary Judgment is based upon the allegation in the Adams' own counter claim and in their answers to State Farm's interrogatories. We have attached

the Answers to the Interrogatories to our Memorandum. What they have submitted in opposition to State Farm's Motion for Summary Judgment are parts of the claim file; State Farm's Discovery Responses, and an affidavit dated in March of this year; their expert witness Cloyce Darnell.

Now, the cases that we have cited in our Memorandum, first of all state that to have an injury arising out of the operation, use and maintenance of a motor vehicle first of all the use of the motor vehicle must be an active accessory giving rise to the injury with one continuing act. Now, we can go do more depositions. Well actually I haven't done any depositions. But we can go do depositions and learn more about this case but we already know enough. Because what we know is that on October the 8th of 2009 the SCDOT did a chip seal operation on Craig Road in York County. What we know is that thirteen days later on October 21st of 2009 Ms. Adams had a one car accident at the area on Craig Road where the chip seal operation was under going.

If you look at the three cases that have found coverage of *Chapman versus All State;* in fact, all of those cases are set forth on Pages -- they're itemized on Pages 3 and 4 of my brief. I've actually broken it down into two categories. If you look on Page 3, the left side is the cases that have found that it arose out of the operation,

ownership, maintenance, and use of a motor vehicle. The cases on the right side are where they did not. The reason I briefed it so long is I actually discuss every single case. And if I'm wrong on the law I'm sure that Ms. Cox will correct me, but I don't think I am. And I discuss every single case. But in the cases that have found coverage, the three cases is *Chapman,* the *Chapman v. All State case; Home Insurance Company versus Towe* and the, *Wausau Underwriters versus Howser.* In all of those cases the vehicle was an active accessary giving rise to the injury and it was one continuing act.

For example, Chapman fell out of the -- fell out of an automobile that was moving. In the *Howser* case of course that involved Columbia Attorney Dave Howser's daughter. His daughter was shot from a moving vehicle. In the *Towe* case somebody riding in the car in question actually threw a bottle and it hit somebody in another car. But it was one continuing act and the vehicle under which they sought coverage was an active accessory.

To hold in this case that the motor vehicles of the SCDOT thirteen days before the accident were an active accessory basically renders the word active, the adjective active, before accessory meaningless. And the Court's have put that word there for a reason. It's also -- I don't think under any construction even giving them the

benefit of the doubt, as we must do in this Summary Judgment Motion, is certainly not one continuing act because you had a thirteen day interval between the completion of the work by the DOT and the accident thirteen days later.

What I have said in my brief, Your Honor, is also made the point of it is not unusual for the SCDOT to be sued over road work. I think that happens across the state fairly frequently. And all road ways have to be constructed or maintained through the use of some equipment or a motor vehicle if for no other reason than just simply to take the SCDOT worker's to the work site. If a one car accident that happens thirteen days after road work occurs out of the operation, use or maintenance of the SCDOT motor vehicle, you know, it's difficult to conceive of when automobile insurance coverage would not exist for an injury attributable to a defective roadway.

In fact you could use that same reasoning to a defective bridge, a house or a building, because all of those are constructed through some use of motor vehicles. So what the Adams' are trying to do in this case is open up a whole new range of insurance coverage that is at odds with the settled law of this state.

Now, in addition to the requirement that it be an accident -- an active accessory, the injury must also be

foreseeably identifiable with the normal use of a vehicle. And again the point I've made in the brief is that the normal use of a vehicle, at least it seems to me, is to take a person from Point A to Point B. And having some equipment of the SCDOT spray a material on the roadway is not foreseeably identifiable with the normal use of a vehicle. Now, by the way let me make one thing clear. I'm assuming for purposes of this Motion for Summary Judgment that the equipment of the SCDOT constituted motor vehicles. If my Motion for Summary Judgment is denied I certainly intend to engage in discovery on that issue because I think there's a question about whether the particular equipment did constitute a motor vehicle. But for the purposes of today I'm assuming that the stuff they had out there, and you've seen it going up and down the road laying asphalt or whatever; I'm assuming that it constituted a motor vehicle.

Another thing that they have to prove is that the motor vehicle under which they seek coverage was used for transportation purposes at the time of the injury. Now that is set forth in the case of *USAA versus Peagler* which is one of the cases they did not find coverage. And the Adams' have stated in their answer to State Farm's interrogatories that no motor vehicle of the SCDOT was being used for transportation purposes at the time of the injury. The case can end right there because they have to

prove all these things, not just one of them. Every single thing I'm talking about they have to prove and it's their burden of proof. And if they fail on any one of them then under the case law they don't have coverage. They also need to prove under the case law that there was no act of independent significance breaking the causal link. Again, we have an interval of thirteen days between the completion of the project and the injury.

Now, in opposition to State Farm's Motion for Summary Judgment they have submitted an affidavit of their expert Cloyce Darnell, and I assume Your Honor has that, in their materials. What Mr. Darnell says in Paragraph 7 and 9 of his affidavit is that the SCDOT did not properly operate the distributor vehicle to insure uniform and adequate layers of emulsion at a sufficient application rate.

And I've got if Your Honor -- I've got an additional copy of that affidavit if Your Honor wants to look at it.

THE COURT: I've got it.

MR. NORRIS: Now, of course, in the context of this Motion for Summary Judgment we have to assume that Mr. Darnell's opinions are correct; so we'll assume that for today's purposes. We'll assume that he's correct, that the SCDOT did not properly operate the distributor vehicle to insure a uniform and adequate layer of emulsion at a sufficient application rating and that's what he says in

Paragraph 7 and Paragraph 9 of his affidavit.

However, even if you assume that, that's true what does that have to do and how does it create a question of fact on whether the motor vehicle was an active accessory to the injury? What does that have to do with whether the injury was foreseeably identifiable with the normal use of a motor vehicle? How does that create a question of fact that a SCDOT motor vehicle was being used for transportation purposes at the time of the injury? How does that create a question of fact on whether an active independent significance breaks a causal link? It doesn't create a question of fact on any of those things. So take the affidavit, accept it as true, and it doesn't make any difference. So that is the Motion for Summary Judgment on the issue of coverage.

And as I say in the conclusion from the brief on Page 25 I set forth some of the things they have to prove, it's indented with the bullet points beside it. They have to prove all of those elements. Not only can they not prove all of them, they can't prove any of them. And if they can't get over any one of them that in and of itself is enough to grant State Farm's Summary Judgment on the issue of coverage.

Again, perhaps the clearest of the clear is the fact that no vehicles owned and operated by the SCDOT were being

used for transportation purposes at the site of her injury on Craig on October 21st of 2009. Again that's the *Peagler versus USAA* case and that fact is undisputed.

Now we've also moved for summary judgment on the breach of contract. Obviously if there is no coverage there can be no breach of contract. The other thing is that if you look at the case of *Lawson versus Porter* for there to actually be a breach of contract, there has to first be a judgment which there is not. So summary judgment should be granted on that.

As for the bad faith, again, if there is no coverage it's hard to see how there could be any bad faith. There's not because actually one of the elements of a bad faith claim is a failure to pay benefits owed under the contract of insurance. But I would hope that even they would concede that based upon all of this law we put in there that at least State Farm had a reasonable basis as a matter of law for contesting and challenging the issue of coverage. And after all, all State Farm did was initiate a declaratory judgment action to adjudicate the issue of coverage. So where the bad faith is I don't know.

The final thing that we detailed on Pages 19 and 23 of the brief, is that State Farm has not caused the Adams' any damage. It has not failed to pay them any benefits they're entitled to recover. And the only point in which they

would be entitled to recover benefits you have to have two things happen. Number One, you have to have a determination that coverage does exist. And ultimately I think that's going to end up in Columbia. And Number Two, they would have to get a judgment against the SCDOT in excess of it's limits under the Tort Claim's Act, neither of which has occurred. So for all those reasons we believe the Court should grant State Farm's Motion for Summary Judgment.

We haven't taken any depositions. We don't think we need to. We can take fifty depositions, its not going to change the fact that the road work was completed on October the 8th and her injury was on October the 21st; and no vehicle of the SCDOT was being used for transportation purposes on Craig Road on October the 21st. We can take depositions until the cows come home and those things are not going to change. Nonetheless if a motion for summary judgment is denied, I do intend to take depositions because you had ask in the previous motion how long it would take to, or when the DJ Case could be tried. I'd like to take several depositions to further explore things that I don't think even need to be explored because we can resolve this thing right here and now. But if for reason its denied then I certainly intend to take some depositions and move forward with the thing. Anything else I have to say I

think, Your Honor, would be repetitive of the Memorandum. And I'll be glad to answer any questions Your Honor has.

THE COURT: I don't' have any questions at this time. I certainly got reading to do on the cases but I don't have any questions at this time.

MR. NORRIS: All right. Thank you, Judge.

THE COURT: Ms. Cox.

MS. COX: Thank you, Your Honor.

We submitted a Memorandum as well, I put that to the Court. We've also filed the deposition transcripts in the underlying action which we believe are relevant to this case and State Farm has refused to allow that information into this record so I do want to start with that, is that State Farm's Memorandum supplies only some of the undisputed facts that are relevant to this issue on coverage because they're not willing to stipulate any facts in this case or in the underlying liability action. It makes it very difficult to respond but we would ask that the Court consider the deposition transcripts in the underlying action in the context of this motion as well.

This is actually up until I just heard this come out of Mr. Norris's mouth I was unaware that they didn't think any discovery had to be done at all. The Summary Judgment Motion was actually something surprising to us as a result of our Motion to Consolidate. At any rate, what's

interesting is that yes we are aware of the case law that has been asserted in State Farm's brief. All of those cases, as far as I can tell, were submitted to the Court based on stipulated facts or facts after a trial had been had in the underlying action which formed the basis of the factual dispute, or that it was stipulated. So from the start the cases that have been asserted put us in a different posture because we don't have that record available for the Court to look at and we think that's important for the Court to know.

The cases that have been cited by State Farm deal with how the Court addresses statutory mandated insurance; what the State will mandate in terms of 38-77-140. However what we have here is a contract dispute which is different in which provides more we contend than what the statute mandates. The statute itself deals with damages or injuries arising out of the negligent operation -- excuse me, the ownership, maintenance or use of the motor vehicles. Whereas here the specific policy provisions in State Farm provide that they will provide coverage for any injury that is caused by an accident arising out of the operation, use or maintenance of a vehicle.

THE COURT: Where is that in the policy? I have the policy right here.

MS. COX: Page 19 of what we submitted up under Tab 2.

THE COURT: I got it. Okay.

MS. COX: And what it specifically says and what State Farm obligates itself to do is to pay damages for bodily injury or property damage which an insurer is legally entitled to collect from an under insured motor vehicle; or, would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute. The bodily injury or property damage must be caused by accident arising out of the operation or ownership of the under insured motor vehicle.

To begin with this policy does not even comport with the statute. The statute requires you to issue a policy that says ownership, maintenance and use. They completely leave out the term maintenance. But aside from that and the bare question is, is Mr. Adams able to show that her damages were caused by an accident that arose out of the use or operation of a motor vehicle? And clearly there's enough evidence in the record for us to survive Summary Judgment.

In this case we've identified a SCDOT truck which is a 2003 Chevy truck that's tabbed in the document that we've provided. How in the world State Farm can suggest that you can shot a gun out of a moving vehicle and that is covered, which is covered under the *Chapman* case, but you can't shoot something else out of that car when you're actually

using it to drive the car down the road to put that on there which is exactly the situation we have here is mind boggling. We think that the specific provisions of the contract only require that the accident be -- That the accident be involved and that's what our expert has specifically said. In fact our expert specifically shows that the vehicle was not being operated appropriately when it was driving down the road so at the time the tortuous conduct was committed the vehicle was being used for transportation purposes as well. So we clearly meet that threshold even if we go to the active accessory discussion in the cases to meet that standard.

What's more important is that none of the cases cited by State Farm stand for the proposition that a vehicle has to be in eyesight or some how close in proximity to the individual when they are being harmed. Those cases simply just don't say that and what State Farm is asking you to do is read in terms that aren't contained in the policy.

The claim that we've asserted State Farm seems to be concerned about what ramifications a decision on this avenue would have as to SCDOT that somehow it opens the flood gate to SCDOT causes of action and that simply is not accurate either. What we've asserted is something very specific to the use of the vehicle. The use of the 2003 Chevy truck which goes down the road at the same time being

operated for transportation purposes; it applies sticky tack that is not appropriate in terms of the amount, or, in how it's uniformly applied. Our expert has tied together the tortuous conduct with the injuries to Ms. Adams and so we believe that clearly we meet the provisions of the contract.

One of the other issues, and again one of the problems with where we are in this case is that State Farm refuses to acknowledge which vehicles were involved in the October 8th chip seal process. We submit just as State Farm submits Request for Admissions to us which we tried answering in good faith when we send them Request for Admissions that these vehicles were involved in the chip seal on October 8th they said they can't -- They've investigated and they can't determine whether they were or were not. That's an undisputed fact in the underlying liability action. And so even to get to this question we need to be able to get to the underlying action to establish that. The vehicle that we've asserted is the under insured motor vehicle clearly meets the definition of the policy. The policy defines motor vehicle and we fit in that definition.

In terms of the bad faith action, we have been able to establish that State Farm did nothing from the time they were advised of this claim beginning just a few days after

the accident occurred. They've done nothing until the law suit was filed and they filed a Notice of Appearance. They filed a Notice of Appearance in November, however, they didn't even file an answer to the complaint until April of 2011. They admitted in their discovery responses which we've tabbed in our booklet that they did no investigation; they didn't interview any witnesses; they didn't contact the Adams' to get a statement, they didn't contact anyone at SCDOT; they didn't do any investigation as to the policy; they didn't even pull out the actual terms of the policy to see whether or not it fit within that. They didn't do anything until they filed a DJ action almost a year after, more than a year after the accident occurred. So there is clearly enough evidence in the record to let us put that bad faith action before a jury.

Keith, both of us have been working on this since. In our response to motion we have also included a case which is out of Mississippi the Court has followed. Mississippi authority before -- the Mississippi case is directly on point, it deals with a situation where dump trucks dumped a bunch of rocks on the road and the Court found that it was connected and found that there was liability in that action. So I think that we would ask the Court to look at that particular case but in terms of all this case law that State Farm has submitted that it contends is relevant; what

it really is dealing with is whether an injury arises out of the ownership, maintenance or use of the vehicle. We think we can establish based upon our memorandum that we submitted we can establish all of those facts we have to. But in this particular case our contract doesn't require that we do that. And we certainly have the affidavit of an expert who connects those dots for us and that is what we think we have to do to meet the contract requirements.

THE COURT: Have you got the Mississippi cite?

MR. NORRIS: Your Honor, actually its in my brief. I cited the *Mississippi* case in my brief.

THE COURT: Okay.

MR. NORRIS: And with the cite --

THE COURT: I can get it later.

MR. MARTENS: Your Honor, it's *Jackson versus Daley*. If I can hand a copy up, it's *739 So. 2d 1031*.

THE COURT: Okay. Thank you.

MS. COX: Your Honor, I don't have anything else to add unless there is any particular questions about certain other factual allegations.

THE COURT: Okay. Any followup Mr. Norris?

MR. NORRIS: Yes, Your Honor. The *Jackson versus Daley* case as I mentioned is cited at Page 10 of our brief. Page 10 of our brief also cites a *Wyoming* case *Worthington versus State of Wyoming* which reaches the opposite result

from the *Mississippi* case. And the point I make in our brief is that we don't feel it's necessary to resort to out of state law for guidance. The Court's of this state typically resort to out of state law for guidance where there is no guidance in this state. We have ample guidance in this state; there are many, many cases saying what they have to prove to establish coverage. Let me make a few more points.

Ms. Cox talked about the *Chapman* case and I guess she was talking about also the *Howser* case where a gun was fired. The point is as set forth in *Peagler versus USAA* and other cases, the vehicle under which you seek coverage has to be used for transportation purposes at the time of the injury. And that among many others is a hump they cannot get over. I don't care how you construe the facts. That fact is not going to change. The language in the policy says the bodily injury and again this is page --

THE COURT: I got my finger on it.

MR. NORRIS: Okay. Must arise of the operation or ownership. If Your Honor wants to insert the other language from the statute, I think the statute uses different words like maintenance or use, here -- and one other word; here it's operation or ownership, all of these cases use the same words. And I don't care whether you want to restrict the analysis to the words operation or

ownership or whether you want to go operation, ownership, maintenance or use, under any standard that you want to take, be it the statute or be it the policy, all of these cases show that the undisputed facts of this case don't get them there. And that's not going to change and I don't care what facts we stipulate to it's not going to change.

As far as the bad faith: State Farm did no investigation. Really all you need to know about this case when you put the undisputed facts of this case up against the law as we've cited in our brief, as you have road work that ends on October 8th and you have a one car accident that is thirteen days later on October the 21st, and that's really all you need to know. And that's enough under the law of this state to grant summary judgment. And one thing that's not going to change is the law. So I don't know what else to say.

MR. MCKINNEY: Can I just make a brief comment?

Once I got into this case, once State Farm tendered it, sent it to me, I have monitored it, Mr. Millar and I have met on numerous occasions before he tendered the defense to me. I agreed once the case was settled with the DOT; I agree with Ms. Cox that we would certainly do everything we could and allow her to do anything she wanted to, to preserve any evidence that I did disagree with the underlying case being tried before the DJ case. The real

issue I think here for me at least in all this argument is which of these two cases will be tried first. And if we are revisiting I don't think that -- I don't have any argument with Mr. Norris's position with regard to the motion to consolidate, that his Motion to Consolidate, I don't have a dog in the fight really with regard to his motion for Summary Judgment. The only matter that concerns me at this point is which of these cases will be tried first? Which is the best to be tried first? What's best for the court, what's best for the plaintiff? And those things I do think we need to discuss at some point in time. I don't know if the court wants to do that today or not because I think my understanding is the only issues before the court today would be the plaintiff's Motion to Consolidate and the Summary Judgment motion. Thank you, Your Honor.

THE COURT: Anything else?

MS. COX: Your Honor, I do think it's important to go back and note again, that the statute Section 38-77-140 says that no automobile insurance policy may be issued or delivered unless it contains the minimum which says that damages or an injury arising out of the ownership, maintenance or use of these vehicles is contained in that policy. State Farm's policy doesn't need that because it doesn't have the terminology maintenance in it which is

directly at issue in this case. But aside from that the statute also says that there is nothing to prevent an insurer from doing more than that. And by wording the policy in this case to say that it is bodily injury that's caused by an accident arising out of the ownership, operation or maintenance of a vehicle --

THE COURT: You got me a little confused. Where is the maintenance of a motor vehicle in -- maintenance, where is the maintenance of a motor vehicle? I know the motor vehicle maintained the road but I read that and interpret that being the maintenance of the automobile.

MS. COX: Well we believe in this case, Your Honor, that the attachment of the sprayer to the vehicle there are specific issues which again are contained in the deposition transcripts where SCDOT did not maintain that vehicle in a way where the spray submitted, put enough out onto the road. So there is an issue of maintenance that's directly at issue in this.

THE COURT: I follow you.

MS. COX: In *Peagler, Peagler* does not stand for the proposition that State Farm asserts that it is. There is no case that says that you have to be at the site, that you have to see the vehicle when the injury occurs. What *Peagler* does is desensitize what these other cases that really quite frankly deal with shooting of a gun outside of

a car which are going to automatically be an instantaneous damage. Shooting a gun is not going to happen the next day. Having said that, there is no case that puts to rest our issues here, and we believe that without having some direct assertion from the Court that it has to be in this manner that State Farm contends it is, puts this case as a question of fact as to whether or not the accident arose out of the ownership, maintenance or use of the SCDOT vehicle.

THE COURT: All right. Well I'm gonna take this one under advisement also. Thank you all.

MR. MCKINNEY: Thank you, Your Honor.

MR. NORRIS: Thank you, Judge.

MS. COX: Thank you, Judge.

(COURT IN RECESS AT 12:10 PM.)

CERTIFICATE OF REPORTER

State of South Carolina )
)
County of York )

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 29th day of August 2011.

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

Wanda Nelson

Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 2-1-2012

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | MOTION FOR SUMMARY JUDGMENT |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendants. | ) | |

Pursuant to SCRCP 56 the plaintiff moves for summary judgment on the following grounds:

1. The plaintiff moves for summary judgment on its declaratory judgment action. The plaintiff is entitled to summary judgment on the issue of whether the defendants are entitled to underinsurance motorist (UIM) coverage for a one car accident involving Phyllis Adams on October 21, 2009 while operating a 2004 Honda. State Farm is entitled to summary judgment that no UIM coverage exists for Phyllis Adams' accident of October 21, 2009 because:

(a) Phyllis Paden-Adams' accident was not caused by the ownership, use or maintenance of an underinsured motor vehicle;

(b) The vehicles which the Adams' claim constitute UIM vehicles – vehicles owned and operated by the South Carolina Department of Transportation (SCDOT) – were not being used for transportation purposes at the site of Phyllis Adams' injury on Craig Road at the time of her injury on October 21, 2009;

(c) No causal connection exists between any SCDOT vehicle and Phyllis Paden-Adams' injury on October 21, 2009;

(d) An act of independent significance broke the causal link between any SCDOT vehicle and the injury sustained by Phyllis Paden-Adams on October 21, 2009;

(e) No vehicle of the SCDOT was an active accessory to Phyllis Paden-Adams' injury on October 21, 2009;

(f) Phyllis Paden-Adams' injury was not foreseeably identifiable with the normal use of the SCDOT vehicles.

2. The plaintiff is entitled to summary judgment on the defendants' counterclaim for breach of contract because:

(a) The plaintiff has not breached any contract of insurance by failing to pay UIM benefits which are contractually owed;

(b) The defendants' counterclaim for breach of contract is premature as the defendants have not obtained a judgment against the alleged tortfeasor so as to trigger a contractual obligation to make UIM payments;

(c) As set forth in paragraph 1, the defendants are not entitled to UIM coverage for the October 21, 2009 accident.

3. The plaintiff is entitled to summary judgment on the defendants' second counterclaim for bad faith because:

(a) As a matter of law State Farm did not act unreasonably or in bad faith as it simply initiated a declaratory judgment action to resolve a question of UIM coverage;

(b) State Farm as a matter of law had a reasonable basis for questioning the defendants' claim to entitlement of UIM coverage for Phyllis Paden-Adams' accident of October 21, 2009;

(c) An element of a cause of action for bad faith refusal to pay benefits is a refusal by the insurer to pay benefits due under the contract of insurance and the plaintiff has not refused to pay benefits due under the contract of insurance;

(d) The defendants are not entitled to UIM coverage for Phyllis Paden-Adams' accident of October 21, 2009;

(e) The plaintiff has not caused the defendants any damages.

4. State Farm is entitled to summary judgment on the defendants' third counterclaim for declaratory judgment because as a matter of law the defendants are not entitled to UIM coverage for Phyllis Paden-Adams' accident of October 21, 2009 for the reasons set forth above.

5. The plaintiff is entitled to summary judgment on the defendants' fourth counterclaim for statutory attorney's fees under § 38-59-40 because:

(a) The plaintiff does not owe UIM coverage to the defendants for Phyllis Paden-Adams' accident of October 21, 2009;

(b) The plaintiff's refusal to provide UIM coverage to the defendants for Phyllis Paden-Adams' accident of October 21, 2009 was not in bad faith nor was it without reasonable cause.

The plaintiff's motion for summary judgment is based upon the attached certified copy of the policy for the car involved in the accident, the parts of the plaintiff's complaint admitted by the defendants, the allegations in the defendants' counterclaim, written discovery exchanged in this case, discovery undertaken by the defendants in the case of Adams v. SCDOT, 2010-CP-46-0854 and applicable statutory and case law.

[SIGNATURE PAGE TO FOLLOW]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: C. R. N

Charles R. Norris
SC Bar No. 004238
E-Mail: charles.norris@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

June 15, 2011

# State Farm Insurance Companies®

Atlanta Operations Center
11350 Johns Creek Parkway
Duluth, Georgia 30098-0001

## CERTIFICATE

I, the undersigned, do hereby certify that I am custodian of the records pertaining to the issuance of policies issued by the South Carolina Division of State Farm Fire and Casualty Company of Bloomington, Illinois.

I further certify that the attached policy, number 113 1117-F03-40, is a copy of the policy issued, Phyllis Paden-Adams, 4280 Marshall Rd., Rock Hill, SC 29730-8620 together with endorsements issued subsequently and effective as follows, based on our available records:

6127YY - Amendatory Endorsement – Effective – 6/03/06.
6940.2 - Amendatory Endorsement – Effective – 12/03/07.

The policy was in effect on the loss date October 21, 2009.

Gayle Pinholster
Underwriting Operations Team Manager

Dated this 2 day of May, 2011.

Notary Public

Joni Stowe
Notary Public
Forsyth County, Georgia
My Commission Expires
April 22, 2014

State Farm Fire and Casualty Company
*11350 Johns Creek Parkway*
*Duluth GA 30098*

26137-5-O FIRE OVL

**DECLARATIONS PAGE**

NAMED INSURED 40-1218-5Q2O

PADEN-ADAMS, PHYLLIS
4280 MARSHALL RD
ROCK HILL SC 29730-8620

POLICY NUMBER 113 1117-F03-40
POLICY PERIOD JUN 03 2005 to DEC 03 2005

STATE FARM PAYMENT PLAN NUMBER
1036372127

AGENT
DENNIS HARRINGTON
1920 INDIA HOOK ROAD
ROCK HILL, SC 29732-1218

PHONE: (803)366-8323

DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.
SEPARATE STATEMENT ENCLOSED IF AMOUNT DUE.

| YEAR | MAKE | MODEL | BODY STYLE | VEHICLE ID. NUMBER | CLASS |
|---|---|---|---|---|---|
| 2004 | HONDA | ACCORD | 4DR | 1HGCM56304A061897 | 6D301312 |

| SYMBOLS | COVERAGES | PREMIUMS |
|---|---|---|
| | | 2004 HONDA |
| | See policy for coverage details. | |
| A | Bodily Injury/Property Damage Liability<br>Limits of Liability-Coverage A-Bodily Injury<br>Each Person, Each Accident<br>$100,000 $300,000<br>Limits of Liability-Coverage A-Property Damage<br>Each Accident<br>$50,000 | $220.76 |
| P8 | Personal Injury Protection<br>(See Policy Schedule for Limits.) | $19.40 |
| D1000 | $1000 Deductible Comprehensive | $42.79 |
| G1000 | $1000 Deductible Collision | $101.33 |
| H | Emergency Road Service | $4.30 |
| R1 | Car Rental/Travel Expenses<br>Limits of Liability - Car Rental Expense<br>Each Day Each Occurrence<br>80% $500 | $20.70 |
| U | Uninsured Motor Vehicle<br>Limits of Liability-U<br>Each Person, Each Accident<br>$100,000 $300,000<br>Limits of Liability-U-Property Damage<br>Each Accident<br>$50,000 | $22.53 |
| W | Underinsured Motor Vehicle<br>Limits of Liability-W<br>Each Person, Each Accident<br>$100,000 $300,000<br>Limits of Liability-W-Property Damage<br>Each Accident<br>$50,000 | $89.28 |
| | Total premium for this policy period JUN 03 2005 to DEC 03 2005. | $521.09 This is not a bill. |

**IMPORTANT MESSAGES**

Your policy consists of this declarations page, the policy booklet - form 9940.3, and any endorsements that apply, including those issued to you with any subsequent renewal notice.

**EXCEPTIONS AND ENDORSEMENTS (See individual endorsement for details.)**

FINANCED- FAMILY TRUST FEDERAL CR UN, PO BOX 10233, ROCK HILL SC 29731-0233.
6893QO AMENDMENT OF CAR RENTAL AND TRAVEL EXPENSES COVERAGES.
6940.1 AMENDMENT OF DEFINED WORDS, LIABILITY, MEDICAL PAYMENTS, UNINSURED MOTOR VEHICLE, UNDERINSURED MOTOR VEHICLE, PHYSICAL DAMAGE COVERAGES.

Agent: DENNIS HARRINGTON
Telephone: (803)366-8323
Prepared JUN 07 2005 1218-343

02417/04823
1.1 02-2003 (o1a025hc) (o1a0254b)
(o1a025lc)

## 6893QQ AMENDMENT OF CAR RENTAL AND TRAVEL EXPENSES COVERAGES

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as *your* policy unless a different effective date is specified by us in writing.

In consideration of the premium charged, it is agreed that SECTION IV — PHYSICAL DAMAGE COVERAGES of *your* policy is changed as follows:

**CAR RENTAL AND TRAVEL EXPENSES — COVERAGE R1** and **CAR RENTAL AND TRAVEL EXPENSES — COVERAGE R2** are deleted and replaced by the following:

**CAR RENTAL AND TRAVEL EXPENSES – COVERAGE R1.** *You* have this coverage if "R1" appears in the "Coverages" space on the declarations page.

1. **Car Rental Expense.**
   a. If:
      (1) a dollar amount is shown under "Limits of Liability - Car Rental Expense, Each Day" on the declarations page, we will pay *you* the daily rental charge up to that dollar amount; or
      (2) a percentage amount is shown under "Limits of Liability - Car Rental Expense, Each Day" on the declarations page, we will pay *you* that percentage of the daily rental charge

   when *you* rent a *car* from a car rental agency or *car business*. "Daily rental charge" means the daily rental rate plus charges for mileage and related taxes.

   If *you* choose not to rent a *car*, we will pay *you* $10 for each complete 24 hour period that *your car* is not drivable. *You* must report to us the period of time that *your car* was not drivable.

   We will pay only if *your car* is not drivable because of a *loss* which would be payable under coverage D or G.

   b. Payment will be made for a period that:
      (1) starts:
         (a) when *your car* is not drivable due to the *loss*; or
         (b) if *your car* is drivable, when *you* leave it at the shop for agreed repairs; and
      (2) ends:
         (a) when *your car* has been repaired or replaced; or
         (b) when we offer to pay for the *loss*, if *your car* is repairable but *you* choose to delay repairs; or
         (c) five days after we offer to pay for the *loss* if:
            (i) *your car* was stolen and not recovered; or
            (ii) we declare that *your car* is a total loss;

      whichever comes first.

   If the incurred daily rental charge is payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most.

2. **Travel Expenses.** If *your car* is not drivable due to a *loss* which occurs more than 50 miles from home and which would be payable under coverage D or G, we will pay *you* for expenses incurred by *you*, *your spouse* and any *relative* for:
   a. commercial transportation fares to continue to *your* destination or home;
   b. extra meals and lodging needed when the *loss* to *your car* causes a delay enroute. The expenses must be incurred between the time of the *loss* and *your* arrival at *your* destination or home or by the end of the fifth day, whichever occurs first; and
   c. meals, lodging and commercial transportation fares incurred by *you* or a *person you* choose to drive *your car* from the place of repair to *your* destination or home.

3. **Rental Car – Repayment of Deductible Amount Expense.** We will pay the expense of any deductible amount *you* are required to pay the owner under comprehensive or collision coverage in effect on a substitute *car* rented from a car rental agency or *car business*.

**Total Amount of Expenses Payable – Coverage R1**

1. The most we will pay for "Car Rental Expense" incurred in any one occurrence is shown on the declarations page under "Limits of Liability – Car Rental Expense, Each Occurrence".
2. The most we will pay for "Travel Expenses" incurred by all *persons* in any one occurrence is $400.
3. The most we will pay for "Rental Car – Repayment of Deductible Amount Expense" incurred in any one occurrence is $400.

Edward B Rust, Jr.
Chief Executive Officer

# 6940.1 AMENDATORY ENDORSEMENT

This endorsement is a part of ***your*** policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as ***your*** policy unless a different effective date is specified by us in writing.

In consideration of the premium charged, it is agreed that ***your*** policy is changed as follows:

**1. DEFINED WORDS**

a. The following definition is added:

***Fungi*** – means any type or form of fungus or fungi and includes:

1. mold;
2. mildew; and
3. any of the following that are produced or released by fungi:
   a. mycotoxins;
   b. spores;
   c. scents; or
   d. byproducts.

b. ***Non-Owned Car*** – The provision which reads:

***Non-owned car*** does not include a rented ***car*** while it is used in connection with the ***insured's*** employment or business.

is deleted.

**2. SECTION I — LIABILITY — COVERAGE A**

Under the paragraph that reads "In addition to the limits of liability, we will pay for an ***insured*** any costs listed below resulting from such accident":

a. item 3.c. is deleted.

b. item 4 is changed to read:

4. The following costs and expenses if related to and incurred after a civil lawsuit has been filed against an ***insured*** for damages for which liability coverage is provided by this policy:
   a. loss of wages or salary, but not other income, up to $100 for each day an ***insured*** attends at ***our*** request:
      (1) an arbitration;
      (2) a mediation; or
      (3) a trial of a civil suit.
   b. reasonable expenses incurred by an ***insured*** at ***our*** request, other than loss of wages, salary, or other income.

   The amount of any of the costs or expenses listed above that are incurred by an ***insured*** must be reported to us before we will pay.

c. The provision titled **Trailer Coverage** is changed to read:

**Trailer Coverage**

The liability coverage extends to the ownership, maintenance or use, by an ***insured***, of:

1. trailers designed to be pulled by a ***private passenger car*** or a ***utility vehicle,*** except those trailers in 2.a. below.

   Farm implements and farm wagons are considered trailers while pulled on public roads by a ***car*** we insure for liability.

   These trailers are not described in the declarations and no extra premium is charged.

2. the following trailers only if they are described on the declarations page and extra premium is paid:

   a. trailers designed to be pulled by a ***private passenger car*** or a ***utility vehicle***:

      (1) if designed to carry ***persons***; or

      (2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or

      (3) while used as premises for office, store or display purposes; or

   b. trailers not designed to be pulled by a ***private passenger car*** or a ***utility vehicle.***

When we refer to trailer coverage, ***insured*** means:

1. ***you***;
2. ***your spouse;***
3. the ***relatives*** of the first ***person*** named in the declarations;
4. any other ***person*** while using ***your car***, a ***newly acquired car*** or a ***temporary substitute car,*** if its use is within the scope of consent of ***you*** or ***your spouse;*** and
5. any other ***person*** or organization liable for the use of a covered trailer by one of the above ***insureds***.

THERE IS NO COVERAGE WHEN A TRAILER IS USED WITH A MOTOR VEHICLE THAT IS NOT COVERED UNDER THE LIABILITY COVERAGE OF THIS POLICY.

d. The first paragraph under **Limits of Liability** is changed to read:

**Limits of Liability**

1. The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability — Coverage A — Bodily Injury, Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to ***bodily injury*** to one ***person***. "***Bodily injury*** to one ***person***" includes all injury and damages to other ***persons*** resulting from this ***bodily injury,*** and all emotional distress resulting from this ***bodily injury*** sustained by other ***persons*** who do not sustain ***bodily injury***. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to ***bodily injury*** to two or more ***persons*** in the same accident.

3. **MEDICAL PAYMENTS — COVERAGE C**

The following is added to **What Is Not Covered Under Coverage C:**

a. THERE IS NO COVERAGE FOR *BODILY INJURY* THAT RESULTS FROM EXPOSURE TO *FUNGI*.

b. THERE IS NO COVERAGE FOR *BODILY INJURY* THAT RESULTS FROM:

(1) NUCLEAR REACTION;

(2) RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR

(3) THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE.

4. **SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U AND UNDERINSURED MOTOR VEHICLE — COVERAGE W**

a. Item 1. Bodily Injury, under **Limits of Liability Coverage U** is changed to read:

1. Bodily Injury

The amount of coverage is shown on the declarations page under "Limits of Liability – U – Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to ***bodily injury*** to one ***person***. "***Bodily injury*** to one ***person***" includes all injury and damages to others resulting from this ***bodily injury***, and all emotional distress resulting from this ***bodily injury*** sustained by other ***persons*** who do not sustain ***bodily injury***. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to ***bodily injury*** to two or more ***persons*** in the same accident.

b. Item 1. Bodily Injury, under **Limits of Liability Coverage W** is changed to read:

1. Bodily Injury

The amount of coverage is shown on the declarations page under "Limits of Liability – W – Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to ***bodily injury*** to one ***person***. "***Bodily injury*** to one ***person***" includes all injury and damages to others resulting from this ***bodily injury***, and all emotional distress resulting from this ***bodily injury*** sustained by other ***persons*** who do not sustain ***bodily injury***. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to ***bodily injury*** to two or more ***persons*** in the same accident.

c. Item 4. under **When Coverages U and W Do Not Apply** is replaced with the following:

THERE IS NO COVERAGE FOR ***BODILY INJURY*** OR ***PROPERTY DAMAGE*** TO THE EXTENT THE LIMITS OF LIABILITY OF COVERAGES U AND W UNDER THIS POLICY EXCEED THE LIMITS REQUIRED BY THE ***FINANCIAL RESPONSIBILITY ACT*** WHILE:

a. ***YOU***,

b. ***YOUR SPOUSE***, OR

c. ANY ***RELATIVE***

IS ***OCCUPYING*** A ***MOTOR VEHICLE*** OWNED BY OR LEASED TO:

a. ***YOU***,

b. ***YOUR SPOUSE***, OR

c. ANY ***RELATIVE***

IF IT IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR*** AND IT IS NOT INSURED FOR THIS COVERAGE.

d. The provision titled **If There Is Other Uninsured Motor Vehicle Coverage** is replaced with the following:

**If There Is Other Uninsured Motor Vehicle Coverage**

1. If uninsured motor vehicle coverage for ***bodily injury*** or ***property damage*** is available to ***you, your spouse*** or a ***relative*** from more than one policy provided by us or any other insurer, then the uninsured motor vehicle coverage provided by this policy shall apply:
   a. on a primary basis if ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying your car,*** or while not ***occupying*** a motor vehicle or trailer.
   b. on an excess basis if ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer other than ***your car.***
2. If:
   a. ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while not ***occupying*** a motor vehicle or trailer; and
   b. uninsured motor vehicle coverage from more than one of our policies issued to ***you, your spouse*** or a ***relative*** applies to the accident, then:
      (1) only one policy with the highest uninsured motor vehicle coverage limit shall apply in that limit; and
      (2) the uninsured motor vehicle coverage from each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the ***Financial Responsibility Act*** for bodily injury and property damage liability.
3. If ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer other than ***your car*** that is owned by or leased to ***you, your spouse*** or a ***relative***, then this coverage applies only to the extent of:
   a. the uninsured motor vehicle coverage applicable to the occupied motor vehicle or trailer, or
   b. the minimum limits required by the ***Financial Responsibility Act*** for bodily injury and property damage,

   whichever is higher.
4. If ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer not owned by or leased to ***you, your spouse*** or a ***relative,*** then only one policy issued by us to ***you, your spouse*** or any ***relative*** with the highest uninsured motor vehicle coverage limit shall apply.
5. Subject to items 1, 2, 3 and 4 above, if this policy and one or more other policies provide uninsured motor vehicle coverage for ***bodily injury*** or ***property damage***:
   a. on a primary basis, then we are liable only for our share. Our share is that percent of the damages

payable on a primary basis that the limit of liability that applies from this policy bears to the total of all applicable uninsured motor vehicle coverage provided on a primary basis.

b. on an excess basis, then we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability that applies from this policy bears to the total of all applicable uninsured motor vehicle coverage provided on an excess basis.

e. The provision titled **If There Is Other Underinsured Motor Vehicle Coverage** is replaced with the following:

**If There Is Other Underinsured Motor Vehicle Coverage**

1. If underinsured motor vehicle coverage for ***bodily injury*** or ***property damage*** is available to ***you, your spouse*** or a ***relative*** from more than one policy provided by us or any other insurer, then the underinsured motor vehicle coverage provided by this policy shall apply:
   a. on a primary basis if ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying your car,*** or while not ***occupying*** a motor vehicle or trailer.
   b. on an excess basis if ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer other than ***your car***.
2. If:
   a. ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while not ***occupying*** a motor vehicle or trailer; and
   b. underinsured motor vehicle coverage from more than one of our policies issued to ***you, your spouse*** or a ***relative*** applies to the accident, then:
      (1) only one policy with the highest underinsured motor vehicle coverage limit shall apply in that limit; and
      (2) the underinsured motor vehicle coverage from each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the ***Financial Responsibility Act*** for bodily injury and property damage liability.
3. If ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer other than ***your car*** that is owned by or leased to ***you, your spouse*** or a ***relative,*** then this coverage applies only to the extent of:
   a. the underinsured motor vehicle coverage applicable to the occupied motor vehicle or trailer, or
   b. the minimum limits required by the ***Financial Responsibility Act,*** for bodily injury and property damage,

whichever is higher.

4. If *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle or trailer not owned by or leased to *you*, *your spouse* or a *relative*, then only the one policy issued by us to *you*, *your spouse* or any *relative* with the highest underinsured motor vehicle coverage limit shall apply.

5. Subject to items 1, 2, 3 and 4 above, if this policy and one or more other policies provide underinsured motor vehicle coverage for *bodily injury* or *property damage*:

   a. on a primary basis, then we are liable only for our share. Our share is that percent of the damages payable on a primary basis that the limit of liability that applies from this policy bears to the total of all applicable underinsured motor vehicle coverage provided on a primary basis.

   b. on an excess basis, then we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability that applies from this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis.

5. SECTION IV — PHYSICAL DAMAGE COVERAGES

   a. The following is added to the definition of *Loss*:

      *Loss* does not include any reduction in the value of any vehicle or detachable living quarters after it has been repaired, as compared to its value before it was damaged.

   b. Item 2 under **COMPREHENSIVE – COVERAGE D** is changed to read:

      2. We will pay *you* for transportation costs incurred if *your car* is stolen. We will pay up to $25 per day beginning when *you* tell us of the theft and ending when we offer to pay for the *loss*.

         If the daily incurred transportation costs are payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most. If payments have been made under Car Rental and Travel Expenses Coverage and such payments have either exhausted the total amount payable under Car Rental Expense or reduced the total amount payable under Car Rental Expense to less than $25, then we will pay under Comprehensive Coverage.

   c. The following is added to **COLLISION – COVERAGE G**:

      *Loss* caused by *collision* does not include *loss* due to:

      1. missiles or falling objects;
      2. windstorm or hail;
      3. earthquake, water or flood;
      4. theft or larceny;
      5. malicious mischief or vandalism; or
      6. riot or civil commotion.

   d. The first paragraph of **Limit of Liability — Comprehensive and Collision Coverages** is changed to read:

The limit of our liability for *loss* to property or any part of it is the lower of:

1. the actual cash value; or
2. the cost of repair or replacement. The cost of repair or replacement does not include any reduction in the value of the property after it has been repaired, as compared to its value before it was damaged.

e. The paragraph under **CAR RENTAL AND TRAVEL EXPENSES – COVERAGE R1** in *your* policy booklet that reads:

> Any car rent payable under this coverage is REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE.

is changed to read:

> If the incurred daily rental charge is payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most.

f. The provision titled **Total Amount of Expenses Payable – Coverage R1** in *your* policy booklet is changed to read:

> **Total Amount of Expenses Payable – Coverage R1**
>
> 1. The most we will pay for **Car Rental Expense** incurred in any one occurrence is $400.
> 2. The most we will pay for **Travel Expenses** incurred by all ***persons*** in any one occurrence is $400.
> 3. The most we will pay for **Rental Car – Repayment of Deductible Amount Expense** incurred in any one occurrence is $400.

g. **Trailer Coverage**

The paragraph which reads:

> The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is $500.

is changed to read:

> The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is $2500.

h. Item 2.c. of **Trailer Coverage** is deleted.

i. The following is added to **When The Physical Damage Coverages Do Not Apply:**

> a. THERE IS NO COVERAGE FOR ***LOSS*** TO ANY VEHICLE DUE TO ***FUNGI***. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE ***FUNGI*** RESULT FROM A ***LOSS*** THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. WE WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF ***FUNGI***, OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ***YOUR CAR*** THAT ARE DUE TO THE EXISTENCE OF ***FUNGI***.
>
> b. THERE IS NO COVERAGE FOR ***LOSS*** TO ANY VEHICLE THAT RESULTS FROM:
>
> (1) NUCLEAR REACTION;
>
> (2) RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
>
> (3) THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE.

# 6940.2 AMENDATORY ENDORSEMENT

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as *your* policy unless a different effective date is specified by us in writing.

In consideration of the premium charged, it is agreed that *your* policy is changed as follows:

## 1. DEFINED WORDS

a. The following definition is added:

*Fungi* – means any type or form of fungus or fungi and includes:

1. mold;
2. mildew; and
3. any of the following that are produced or released by fungi:
   a. mycotoxins;
   b. spores;
   c. scents; or
   d. byproducts.

b. *Non-Owned Car* – The provision which reads:

*Non-owned car* does not include a rented *car* while it is used in connection with the *insured's* employment or business.

is deleted.

## 2. SECTION I — LIABILITY — COVERAGE A

Under the paragraph that reads "In addition to the limits of liability, we will pay for an *insured* any costs listed below resulting from such accident":

a. item 3.c. is deleted.

b. item 4 is changed to read:

4. The following costs and expenses if related to and incurred after a civil lawsuit has been filed against an *insured* for damages for which liability coverage is provided by this policy:
   a. loss of wages or salary, but not other income, up to $100 for each day an *insured* attends at *our* request:
      (1) an arbitration;
      (2) a mediation; or
      (3) a trial of a civil suit.
   b. reasonable expenses incurred by an *insured* at *our* request, other than loss of wages, salary, or other income.

   The amount of any of the costs or expenses listed above that are incurred by an *insured* must be reported to us before we will pay.

c. The provision titled **Trailer Coverage** is changed to read:

**Trailer Coverage**

The liability coverage extends to the ownership, maintenance or use, by an *insured*, of:

1. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*, except those trailers in 2.a. below.

   Farm implements and farm wagons are considered trailers while pulled on public roads by a *car* we insure for liability.

   These trailers are not described in the declarations and no extra premium is charged.

2. the following trailers only if they are described on the declarations page and extra premium is paid:

   a. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*:

      (1) if designed to carry *persons*; or

      (2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or

      (3) while used as premises for office, store or display purposes; or

   b. trailers not designed to be pulled by a *private passenger car* or a *utility vehicle*.

When we refer to trailer coverage, *insured* means:

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* named in the declarations;
4. any other *person* while using *your car*, a *newly acquired car* or a *temporary substitute car*, if its use is within the scope of consent of *you* or *your spouse*; and
5. any other *person* or organization liable for the use of a covered trailer by one of the above *insureds*.

d. The first paragraph under **Limits of Liability** is changed to read:

**Limits of Liability**

1. The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability — Coverage A — Bodily Injury, Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to other *persons* resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

**3. MEDICAL PAYMENTS — COVERAGE C**

The following is added to **What Is Not Covered Under Coverage C:**

a. THERE IS NO COVERAGE FOR *BODILY INJURY* THAT RESULTS FROM EXPOSURE TO *FUNGI*.

b. THERE IS NO COVERAGE FOR *BODILY INJURY* THAT RESULTS FROM:

   (1) NUCLEAR REACTION;

   (2) RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR

(3) THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE.

4. **SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U AND UNDERINSURED MOTOR VEHICLE — COVERAGE W**

a. The following wording under the definition of "*Uninsured Motor Vehicle*" is deleted:

An *uninsured motor vehicle* does not include any motor vehicle owned by the *insured* who sustains *bodily injury* or *property damage*.

b. **Who Is an Insured** is changed to read:

**Who Is an Insured**

*Insured* – means:

1. *you, your spouse* and *relatives*;
2. any other *person* while *occupying* or using *your car*, a *newly acquired car* or a trailer attached to either, if that *person* is *occupying* or using the vehicle with *your* consent; and
3. any *person* to the extent he or she may recover damages under a state wrongful death statute because of the death of an *insured* under 1. or 2. above.

c. Item 1. Bodily Injury, under **Limits of Liability Coverage U** is changed to read:

1. Bodily Injury

The amount of coverage is shown on the declarations page under "Limits of Liability – U – Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

d. Item 1. Bodily Injury, under **Limits of Liability Coverage W** is changed to read:

1. Bodily Injury

The amount of coverage is shown on the declarations page under "Limits of Liability – W – Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

e. Item 4. under **When Coverages U and W Do Not Apply** is replaced with the following:

THERE IS NO COVERAGE TO THE EXTENT THE COVERAGE LIMITS UNDER THIS SECTION OF THIS POLICY EXCEED THE

LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT*:

a. WHILE ANY *INSURED* IS *OCCUPYING* A *MOTOR VEHICLE* OWNED BY OR LEASED TO *YOU, YOUR SPOUSE*, OR ANY *RELATIVE* IF:

(1) IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*; AND

(2) IT IS NOT INSURED FOR THE COVERAGE SOUGHT UNDER THIS SECTION OF THIS POLICY;

b. IF THE *UNINSURED MOTOR VEHICLE* OR *UNDERINSURED MOTOR VEHICLE* IS OWNED BY OR LEASED TO *YOU, YOUR SPOUSE*, OR ANY *RELATIVE*.

f. Item 5. under **When Coverages U and W Do Not Apply** is deleted.

g. The following is added to **When Coverages U and W Do Not Apply**

THERE IS NO COVERAGE FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF *YOUR CAR* OR A *NEWLY ACQUIRED CAR*.

h. The provision titled **If There Is Other Uninsured Motor Vehicle Coverage** is replaced with the following:

**If There Is Other Uninsured Motor Vehicle Coverage**

1. If uninsured motor vehicle coverage for *bodily injury* or *property damage* is available to *you, your spouse* or a *relative* from more than one policy provided by us or any other insurer, then the uninsured motor vehicle coverage provided by this policy shall apply:

a. on a primary basis if *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying your car*, or while not *occupying* a motor vehicle or trailer.

b. on an excess basis if *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle or trailer other than *your car*.

2. If:

a. *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* while not *occupying* a motor vehicle or trailer; and

b. uninsured motor vehicle coverage from more than one of our policies issued to *you, your spouse* or a *relative* applies to the accident, then:

(1) only one policy with the highest uninsured motor vehicle coverage limit shall apply in that limit; and

(2) the uninsured motor vehicle coverage from each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

3. If *you, your spouse* or a *relative* sustains *bodily injury* or

*property damage* while *occupying* a motor vehicle or trailer other than *your car* that is owned by or leased to *you*, *your spouse* or a *relative*, then this coverage applies only to the extent of:

a. the uninsured motor vehicle coverage applicable to the occupied motor vehicle or trailer, or

b. the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage,

whichever is higher.

4. If *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle or trailer not owned by or leased to *you*, *your spouse* or a *relative*, then only one policy issued by us to *you*, *your spouse* or any *relative* with the highest uninsured motor vehicle coverage limit shall apply.

5. Subject to items 1, 2, 3 and 4 above, if this policy and one or more other policies provide uninsured motor vehicle coverage for *bodily injury* or *property damage*:

a. on a primary basis, then we are liable only for our share. Our share is that percent of the damages payable on a primary basis that the limit of liability that applies from this policy bears to the total of all applicable uninsured motor vehicle coverage provided on a primary basis.

b. on an excess basis, then we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability that applies from this policy bears to the total of all applicable uninsured motor vehicle coverage provided on an excess basis.

i. The provision titled **If There Is Other Underinsured Motor Vehicle Coverage** is replaced with the following:

**If There Is Other Underinsured Motor Vehicle Coverage**

1. If underinsured motor vehicle coverage for *bodily injury* or *property damage* is available to *you*, *your spouse* or a *relative* from more than one policy provided by us or any other insurer, then the underinsured motor vehicle coverage provided by this policy shall apply:

a. on a primary basis if *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying your car*, or while not *occupying* a motor vehicle or trailer.

b. on an excess basis if *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle or trailer other than *your car*.

2. If:

a. *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while not *occupying* a motor vehicle or trailer; and

b. underinsured motor vehicle coverage from more than one of our policies issued to *you*, *your spouse*

or a ***relative*** applies to the accident, then:

(1) only one policy with the highest underinsured motor vehicle coverage limit shall apply in that limit; and

(2) the underinsured motor vehicle coverage from each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the ***Financial Responsibility Act*** for bodily injury and property damage liability.

3. If ***you, your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer other than ***your car*** that is owned by or leased to ***you, your spouse*** or a ***relative***, then this coverage applies only to the extent of:

   a. the underinsured motor vehicle coverage applicable to the occupied motor vehicle or trailer, or

   b. the minimum limits required by the ***Financial Responsibility Act***, for bodily injury and property damage,

   whichever is higher.

4. If ***you***, ***your spouse*** or a ***relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle or trailer not owned by or leased to ***you, your spouse*** or a ***relative***, then only the one policy issued by us to ***you***, ***your spouse*** or any ***relative*** with the highest underinsured motor vehicle coverage limit shall apply.

5. Subject to items 1, 2, 3 and 4 above, if this policy and one or more other policies provide underinsured motor vehicle coverage for ***bodily injury*** or ***property damage***:

   a. on a primary basis, then we are liable only for our share. Our share is that percent of the damages payable on a primary basis that the limit of liability that applies from this policy bears to the total of all applicable underinsured motor vehicle coverage provided on a primary basis.

   b. on an excess basis, then we are liable only for our share. Our share is that percent of the damages payable on an excess basis that the limit of liability that applies from this policy bears to the total of all applicable underinsured motor vehicle coverage provided on an excess basis.

5. SECTION IV — PHYSICAL DAMAGE COVERAGES

   a. The following is added to the definition of *Loss*:

      *Loss* does not include any reduction in the value of any vehicle or detachable living quarters after it has been repaired, as compared to its value before it was damaged.

   b. Item 2 under **COMPREHENSIVE – COVERAGE D** is changed to read:

2. We will pay *you* for transportation costs incurred if *your car* is stolen. We will pay up to $25 per day beginning when *you* tell us of the theft and ending when we offer to pay for the *loss*.

   If the daily incurred transportation costs are payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most. If payments have been made under Car Rental and Travel Expenses Coverage and such payments have either exhausted the total amount payable under Car Rental Expense or reduced the total amount payable under Car Rental Expense to less than $25, then we will pay under Comprehensive Coverage.

c. The following is added to **COLLISION – COVERAGE G**:

   *Loss* caused by ***collision*** does not include *loss* due to:

   1. missiles or falling objects;
   2. windstorm or hail;
   3. earthquake, water or flood;
   4. theft or larceny;
   5. malicious mischief or vandalism; or
   6. riot or civil commotion.

d. The first paragraph of **Limit of Liability — Comprehensive and Collision Coverages** is changed to read:

   The limit of our liability for *loss* to property or any part of it is the lower of:

   1. the actual cash value; or
   2. the cost of repair or replacement. The cost of repair or replacement does not include any reduction in the value of the property after it has been repaired, as compared to its value before it was damaged.

e. The paragraph under **CAR RENTAL AND TRAVEL EXPENSES – COVERAGE R1** in *your* policy booklet that reads:

   Any car rent payable under this coverage is REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE.

   is changed to read:

   If the incurred daily rental charge is payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most.

f. The provision titled **Total Amount of Expenses Payable – Coverage R1** in *your* policy booklet is changed to read:

   **Total Amount of Expenses Payable – Coverage R1**

   1. The most we will pay for **Car Rental Expense** incurred in any one occurrence is $400.
   2. The most we will pay for **Travel Expenses** incurred by all *persons* in any one occurrence is $400.
   3. The most we will pay for **Rental Car – Repayment of Deductible Amount Expense** incurred in any one occurrence is $400.

g. **Trailer Coverage**

   The paragraph which reads:

The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is $500.

is changed to read:

The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is $2500.

h. Item 2.c. of **Trailer Coverage** is deleted.

i. The following is added to **When The Physical Damage Coverages Do Not Apply:**

a. THERE IS NO COVERAGE FOR ***LOSS*** TO ANY VEHICLE DUE TO ***FUNGI***. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE ***FUNGI*** RESULT FROM A ***LOSS*** THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. WE WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF ***FUNGI***, OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ***YOUR CAR*** THAT ARE DUE TO THE EXISTENCE OF ***FUNGI***.

b. THERE IS NO COVERAGE FOR ***LOSS*** TO ANY VEHICLE THAT RESULTS FROM:

(1) NUCLEAR REACTION;

(2) RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR

(3) THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE.

6. **CONDITIONS**

The following is added to **1. Policy Changes:**

e. **Change of Policy Address**

We may change the named insured's policy address as shown on the Declarations Page and in our records to the most recent address provided to us by:

1. ***you***; or
2. the United States Postal Service.

7. The following is added to ***your*** policy:

***Your*** purchase of this policy may allow ***you*** to purchase certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other policies from State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, and subsidiaries or affiliates of either, subject to their applicable eligibility rules.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO CONSOLIDATE |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendants. | ) | |

On October 21, 2009, Phyllis Adams was involved in a one car accident. This one car accident has spawned two lawsuits:

1. Adams v. South Carolina Department of Transportation (SCDOT) filed in February 2010. This lawsuit concerns who was at fault in causing Phyllis Adams' one car accident and the amount of damages, if any, Phyllis Adams and her husband are entitled to recover from that accident.

2. State Farm Fire and Casualty Company (State Farm Fire) v. Phyllis Adams and Alonzo Adams. This lawsuit was filed in January 2011 and seeks a declaratory judgment that the Adams' are not entitled to underinsurance motorist (UIM) coverage for Phyllis Adams' October 21, 2009 accident.

The defendants now seek to consolidate into one case the Adams' tort claim against the SCDOT with State Farm's declaratory judgment action to determine whether any insurance coverage exists for Phyllis Adams' one car accident. This is both unnecessary and improper.

When State Farm's declaratory judgment action alleged Phyllis Adams was at fault in causing her accident, the Adams' counterclaim asserted that including allegations in a declaratory judgment action of who was at fault in causing the accident was improper.

(Adams' counterclaim ¶ 45) These allegations have since been removed from the declaratory judgment complaint by consent order. This is consistent with the Adams' answer to State Farm's supplemental interrogatory 16 which states "issues of SCDOT's negligence are not properly part of this [declaratory judgment] litigation." (Defendants' answers to plaintiff's supplemental interrogatories attached as Exhibit 1) Now, however, the Adams seek to consolidate the two cases, arguing "these cases involve common questions of law and fact..." (Defendants' motion, p. 1)

The supposed common questions are listed in paragraph 3 on page 3 of the Defendants' Motion to Consolidate:

- Which SCDOT vehicles were involved in the acts or omissions giving rise to the Adams' claims in the underlying action;
- Facts concerning the ownership, maintenance and operation of the SCDOT vehicles;
- Whether the Adams' injuries were proximately caused by the ownership, operation and maintenance of one or more motor vehicles;
- Whether the Adams' suffered damages in excess of the liability limits of the SCDOT under the South Carolina Tort Claims Act.

What questions of law are common to the two cases are not specified.

It is not necessary to litigate these issues in the case against the SCDOT in order to determine whether the Adams' are entitled to UIM coverage for Phyllis Adams's October 21, 2009 accident. State Farm has moved for summary judgment on the issue of coverage and that issue can be resolved in State Farm's favor without the necessity of a trial in either case.

However, in the event State Farm's motion for summary judgment in its declaratory judgment action is denied, the Adams' are attempting through their motion to consolidate to prevent State Farm from engaging in discovery in the declaratory judgment action, while at the

same time attempting to develop facts in the case against the SCDOT to be used against State Farm in determining coverage. Counsel for the Adams' has already attempted to do this in the deposition of an employee of the SCDOT, Bradley Trout. Attached as Exhibit 2 are pages 83 – 90 of Trout's deposition on August 18, 2010, wherein counsel for the Adams' asked a series of questions about the equipment of the SCDOT. These questions had no relation to whether the SCDOT was at fault in causing Phyllis Adams's injury. Instead, the questions were designed to establish that equipment of the SCDOT used on the chip seal project on Craig Road constituted motor vehicles. In fact, counsel for the Adams even prefaced this series of questions by stating:

> I want to ask you about the equipment that was used on the chip seal project. These questions may seem odd to you, but I believe there is a method in my madness. (Bradley Trout deposition, page 83)

The "madness" was an attempt to establish facts in the case against the SCDOT and then use those facts against State Farm on the issue of coverage. No attorney representing State Farm was present at Trout's deposition as it was taken on August 18, 2010, but State Farm was not served with the UIM complaint in the action against the SCDOT until October 5, 2010. (Exhibit 3) The Adams' now want to continue to develop in their lawsuit against the SCDOT facts they consider germane to the issue of insurance coverage while precluding State Farm from conducting any discovery. Allowing this will unfairly stymie State Farm from its right to engage in discovery on the issue of insurance coverage in the event State Farm's Motion for Summary Judgment is denied.

**THE DECLARATORY JUDGMENT ACTION SHOULD BE RESOLVED BEFORE THE TRIAL OF ADAMS v. SCDOT.**

The Defendants allege that "SCDOT tendered its liability limits to Defendants in connection with the collision, in exchange for a covenant not to execute." (Counterclaim ¶ 26)

The Defendants' counterclaim further alleges that as a result of the covenant not to execute entered into with the SCDOT, "defense of the liability action was tendered to State Farm..." (Counterclaim ¶ 26)

The only source from which to satisfy a judgment of the Adams in excess of the SCDOT's statutory liability limits is UIM coverage the Adams' have with State Farm. It follows that if no UIM coverage exists for Phyllis Adams' October 21, 2009 accident, there is no point in trying Adams v. SCDOT. In other words, the trial of Adams v. SCDOT will be a waste of judicial resources if no UIM coverage exists.

Adjudicating the declaratory judgment action before trial of the Adams' case against the SCDOT may make the SCDOT case moot. However, a trial of Adams v. SCDOT prior to determining coverage will not render the coverage case moot unless the Adams' fail to recover an amount in excess of their settlement with the SCDOT. It is therefore in the interest of judicial economy to stay Adams v. SCDOT and try the declaratory judgment action first. The drafters of SCRCP 57 presumably had this situation in mind in including in this rule that "the court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

**CONSOLIDATION OF THESE TWO CASES UNDER SCRCP 42 IS UNNECESSARY AND IMPROPER.**

Under SCRCP 42(a) a court may consolidate actions when the actions involve a common question of law or fact. The moving party has the burden of persuading the court that consolidation is desirable. Keels v. Pierce, 433 S.E. 2d 902, 904 (S.C. App. 1993)

The questions in Adams v. SCDOT are:

- Who was at fault in causing Phyllis Adams' one car accident on October 21, 2009?

- Did any action of the SCDOT in performing a chip seal project on Craig Road on October 8, 2009 proximately cause Phyllis Adams' one car accident thirteen days later on October 21, 2009?

- If the Adams' are entitled to recover from the SCDOT, what is the amount of their damages?

In contrast, some of the questions in the declaratory judgment action of State Farm against the Adams' are:

- Was Phyllis Adams' one car accident caused by the ownership, use or maintenance of an underinsured motor vehicle?

- Did the equipment of the SCDOT used on the chip seal project on Craig Road constitute a motor vehicle as defined in § 38-77-30 (9)?[1]

- Did a causal connection exist between any SCDOT vehicle and Phyllis Adams' injury on October 21, 2009?[2]

- Was Phyllis Adams' injury foreseeably identifiable with the normal use of a SCDOT vehicle?

- Was the SCDOT vehicle being used for transportation purposes at the time of Phyllis Adams' injury?

It is not necessary or even proper to litigate any of these issues in Adams v. SCDOT.

It is therefore inaccurate for the Adams' to claim they are being forced to simultaneously litigate "the same issues" in Adams v. SCDOT and in State Farm v. Adams. (Adams' motion to consolidate, p. 4)

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[1] This issue is not raised in State Farm's Motion for Summary Judgment. If State Farm's Motion for Summary Judgment is denied State Farm will conduct discovery on this issue.

[2] The causation analysis for determining tort liability is not the same as the causation analysis for determining insurance coverage. The causation analysis in the context of insurance coverage is a three part test. Doe v. South Carolina State Budget and Control Board, 523 S.E.2d 457, 458 (S.C. 1999) This test involves whether the vehicle was an "active accessory" to the injury and whether the injury was foreseeably identifiable with the normal use of a automobile. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181, 182 (S.C. 1999); Peagler v. USAA Insurance Company, 628 S.E.2d 475, 479 (S.C. 2006) In contrast, causation in a tort case requires proof of causation in fact and legal cause, the latter of which involves foreseeability. Eadie v. Krause, 671 S.E.2d 389 (S.C. App. 2008)

## CONCLUSION

The issues in Adams v. SCDOT and State Farm v. Adams are separate and distinct. The former involves questions of tort liability and the amount of damages caused by the alleged tortfeasor. The latter concerns issues of insurance coverage. If State Farm's motion for summary judgment is granted, there is no reason to try Adams v. SCDOT. If State Farm's motion for summary judgment is denied, the declaratory judgment action to determine whether the Adams are entitled to any UIM coverage should be resolved before the trial of Adams v. SCDOT as a resolution of the issue of insurance coverage may make the trial of Adams v. SCDOT unnecessary.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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*Counsel for State Farm Fire and Casualty Company*

Charleston, South Carolina

August 18, 2011

W5CC033328

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| State Farm Fire and Casualty Co.,<br><br>Plaintiff,<br><br>v.<br><br>Phyllis Paden-Adams and Alonzo Adams,<br><br>Defendants. | Case No.: 2011-CP-46-0021<br><br>**DEFENDANTS' RESPONSES TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES** |

TO: CHARLES R. NORRIS, COUNSEL FOR PLAINTIFF:

Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams" or "Defendants") serve the following Responses to Supplemental Interrogatories upon Plaintiff State Farm Fire and Casualty Co. ("State Farm").

RESPONSES TO SUPPLEMENTAL INTERROGATORIES

10. Was any vehicle or other piece of equipment of the SCDOT being used for transportation purposes on Craig Road on either October 21 or October 22, 2009 at the time and place of Phyllis Adams' injury?

RESPONSE: No.

11. Were any of the SCDOT vehicles or other equipment listed by the defendants in responses to the plaintiff's interrogatory 9 being used on Craig Road on either October 21 or October 22, 2009 at the time and location of Phyllis Adams' injury?

RESPONSE: No.



12. At the time of Phyllis Adams' injury on October 21 or October 22, 2009 did Phyllis Adams come into contact with any of the SCDOT vehicles or other equipment listed by the defendants in response to the plaintiff's interrogatory 9?

RESPONSE: No.

13. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams see any equipment or vehicles of the SCDOT being used on Craig Road at the site of her injury?

RESPONSE: No.

14. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams have to take any action to avoid collision with any piece of equipment or vehicle of the SCDOT?

RESPONSE: No.

15. If it is the defendants' position that the vehicles or equipment of the SCDOT listed in response to the plaintiff's interrogatory 9 were being used on Craig Road on October 21 or October 22, 2009 at or near the site of Phyllis Adams' accident state the name of the operator or operators of those vehicles or equipment.

RESPONSE: N/A

16. State how the equipment or vehicles of the SCDOT were negligently operated by the SCDOT on Craig Road at the site of Phyllis Adams' injury on either October 21 or October 22, 2009.

RESPONSE: Defendants object to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. As Plaintiff and its counsel are aware, Defendants have never asserted that SCDOT vehicles or equipment

were operated in a negligent manner on October 21, 2009 or October 22, 2009. Furthermore, issues of SCDOT's negligence are not properly part of this litigation.

17. Is it the defendants' position that all 8 vehicles or equipment listed by the defendants in answer to the plaintiff's interrogatory 9 caused Phyllis Adams' injury on either October 21 or October 22, 2009?

RESPONSE: No.

18. Set forth all damages of the defendants which the defendants claim have been caused by the plaintiff, as opposed to having been caused by the SCDOT.

RESPONSE: See answers to Plaintiff's first set of interrogatories.

June 10, 2011

s/ W. Keith Martens

Christi P. Cox
W. Keith Martens
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens & Ballou, LLC, certifies that the within DEFENDANTS' RESPONSES TO SUPPLEMENTAL INTERROGATORIES was served upon Plaintiff's Counsel and other parties of record on this date, by depositing same in the United States Mail, with sufficient postage affixed, and addressed as follows:

Charles R. Norris
Nelson Mullins Riley & Scarborough LLP
151 Meeting St.
Charleston, SC 29401-2239

Ronnie Craig, Esq.
Clawson & Staubes, LLC
756 Tyvola Rd., Suite 130
Charlotte, NC 28217

June 16, 2011.

K. Alex Kropp

K. Alex Kropp

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | |
| | | |
| PHYLLIS PADEN-ADAMS AND ALONZO ADAMS, | ) | |
| | ) | |
| PLAINTIFFS, | ) | |
| | ) | |
| -VS- | ) | CA NO. 10-CP-46-00854 |
| | ) | |
| SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION, | ) | |
| | ) | |
| DEFENDANT. | ) | |
| | ) | |

DEPOSITION OF BRADLEY TROUT

ROCK HILL, SOUTH CAROLINA

AUGUST 18, 2010

REPORTER: SHIRLEY DALLAS-GERRALD, CVR-CM

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minimum of three passes within thirty minutes?
A To keep the rollers up with the rock chip.
Q Does thirty minutes have anything to do with the cure rate of the emulsion?
A It could.
Q Is it important to make sure that the aggregate is seated before the emulsion starts to set up?
A Yes, sir.
Q Would the emulsion set up quicker in cooler temperatures than it would in warmer temperatures?
A Yes, sir.
Q Mr. Trout, you testified that you were actually present at the job site - - - Let me back up. You testified that when you were present at the job site on Craig Road, you noticed that one of the rollers for that project was out of commission on the side of the road. Correct?
A Yes, sir.
Q Do you remember what time of day that was?
A I was thinking it was in the afternoon. I'm not sure of the exact time.
Q Do you remember how far in the completion of the chip seal project the crew was at the time you were out there?
A I remember the roller broke down probably within a



couple of hundred feet of Highway 72, on the Highway 72 end of Craig Road.
Q Where did you start the chip seal? Which end of Craig Road did you start it?
A That I can't remember.
Q So it either broke down within the first couple hundred feet of the job or the last couple hundred feet of the job?
A It depends on which way they was going. They could have done one whole side, and then when they turned around coming back, it could have broke down.
Q Other than your recall of the piece of equipment having broken down, do you have any other recall about that job on that particular day?
A No, sir.
Q I want to ask you about the equipment that was used on the chip seal project. These questions may seem odd to you, but I believe there's a method in my madness. The first piece of equipment is the 3/4 ton pickup standard. That's just a pickup truck. Correct?
A Yes, sir.
Q Is that a piece of equipment that DOT regularly operates on the public roadways?
A Yes, sir.



Q Is it something that has a license and registration?
A Yes, sir.
Q Is part of its intended use in projects such as this chip seal operation?
A I believe it's the foreman's pickup truck.
Q The next piece of equipment, 3/4 ton utility standard truck. What is that?
A I believe that's Mr. Elkins' pickup. It has a utility bed on it. Instead of a pickup with a standard bed on it, this one actually has a bed with a toolbox.
Q And those are the trucks they drive around in to and from job sites?
A Yes, sir.
Q And is the 3/4 ton truck one that is licensed and registered by the Department of Motor Vehicles?
A Yes, sir.
Q And it is intended to be operated on the public roadways of the State?
A Yes, sir.
Q And it was used in conjunction with the completion of this chip seal project?
A It was used on this day, yes, sir.
Q The next piece of equipment is a one ton platform



standard truck. What is that piece of equipment?
A It's a truck with a different type of bed on it. This is going to sound weird. It's a platform bed. It's just a flat bed. It's assigned to the 14 crew. He has a service truck, so that may have been a service truck, something to haul signs or something.
Q Is that truck one that is registered and licensed with the Department of Motor Vehicles?
A Yes, sir.
Q Is it one that is intended to be operated on the public roadways of the State?
A Yes, sir.
Q Is it a piece of equipment that was used in conjunction with this chip seal operation?
A Yes, sir.
Q The next piece of equipment is a 16.5 ton 3P DMP.
A Three person dump truck.
Q And the one below that is a two person dump truck?
A Yes, sir. Some have bench seats, some have bucket.
Q Are those two dump trucks, are they pieces of equipment that are registered with DMV and have license plates?
A Yes, sir.
Q What's the purpose of those dump trucks?

A To haul the Stalite material to the roadway.
Q Are those dump trucks intended to be operated on the public roadways of the State?
A Yes, sir.
Q And were they operated on the public roadways of the State in conjunction with this chip seal project?
A Yes, sir.
Q The next piece of equipment listed is a 16.5 ton distributor truck. What is that piece of equipment?
A That is the truck that has the distributor tank on it.
Q That's the tack truck?
A Yes, sir, that's part of it.
Q Is the tack truck licensed and registered with the Department of Motor Vehicles?
A I believe so.
Q Is it a vehicle that is intended to be operated on the public roadways of the State?
A Yes, sir.
Q Is it a vehicle that the Department of Transportation operates on the public roadways of this State?
A Yes, sir.



Q Was it operated as it was intended to be operated when it was used in conjunction with this chip seal project?
A Yes, sir.
Q The next two pieces of equipment are listed at 16.5 ton three person eight yard dump trucks. Correct?
A Yes, sir.
Q It looks like those are basically the same as the two dump trucks that we talked about before?
A Yes, sir. They haul the Stalite material to the spreader.
Q And they're licensed and registered with the Department of Motor Vehicles. Correct?
A Yes, sir.
Q And they're intended to be operated on the public roadways of the State?
A Yes, sir.
Q And they are regularly operated on the public roadways of the State?
A Yes, sir.
Q When they were used in conjunction with this project, were they operated as they were intended to be used?
A Yes, sir.
Q They were used to transport materials?



A Yes, sir.
Q To the job site and around the job site. Correct?
A Yes, sir.
Q The next piece of equipment listed, asphalt-trk distributor. What is that?
A I believe that's the actual pump and motor for the distributor truck.
Q So it's a piece of equipment mounted on the truck?
A Yes, sir. Certain units can have multiple numbers to it.
Q So that's not a vehicle?
A No, sir, I don't believe it is.
Q The next piece of equipment, pneumatic wheel self roller. That's the rollers we've been talking about?
A Yes, sir.
Q Is that piece of equipment licensed and registered?
A I wouldn't think it would be.
Q Other than its use in construction projects or maintenance projects, is it intended to be operated on the public roadways of the State?
A Maybe transporting it from road to road, something like that.
Q Is it typically driven from site to site or is it typically loaded on a trailer and hauled from site



to site?
A That one could be driven. It depends on the proximity of the next road they're going to and as long as you have adequate vehicles following behind it.
Q And was it being operated as it was intended to be operated when it participated in this chip seal project on October 8, 2009?
A Yes, sir.
Q The next two items are self-propelled steel wheel rollers.
A Yes, sir.
Q Are those steel wheel rollers, are they registered with the Department of Motor Vehicles and licensed?
A I don't believe they are.
Q Are they capable of being driven from place to place on the public roadways of the State?
A Normally we haul them.
Q The next piece of equipment - - - Let me ask you this. On those steel wheel rollers, piece 171-01-0026 and 171-04-0047, were they used as they were intended to be used during the chip seal operation on Craig Road on October 8, 2009?
A Yes, sir, up until the hose busted on the one. Now, as far as the transporting, I leave that to

the discretion of the foreman. Again, it depends on the proximity of the next road.
Q So they could be driven?
A Could be. Normally we haul them, but it just depends on where they're going to next and the availability of a trailer.
Q The next piece of equipment, aggregate spreader. Is that a vehicle?
A No, sir.
Q The next piece of equipment is a backhoe/loader, four wheel drive. What is that?
A That is the backhoe they use to scoop up the material and load the trucks with to haul to a job site.
Q Is that a vehicle that is registered and licensed with the Department of Motor Vehicles?
A I don't believe it is either, but it can be used on the roadway. You can travel it down the roadway.
Q And was it operated as it was intended to be operated in conjunction with this chip seal project on October 8, 2009?
A Yes, sir.
Q After your crew completed the chip sealing of Craig Road on October 8, 2009, when was the next time that you inspected that road?



A That I can't recall.
Q Have you inspected the road since October 8, 2009 at a time you can recall?
A Yes, sir.
Q Have you seen any problems with the chip seal application on Craig Road?
A I've seen places where the emulsion has streaked. There was maybe a little small spot. I've seen that some of the stone has been stripped away.
Q You mean the aggregate came loose?
A Yes, sir, in spots.
Q Did you notice anything else about the chip seal application?
A I'm not following you.
Q I asked what was your impression, and you said I saw some streaking. I saw some places where stone was stripped away. Anything else that you observed when you looked at Craig Road?
A I noticed some loose stone on the shoulders.
Q Now, in your experience as the resident maintenance engineer overseeing chip seal applications in York County, do you believe that streaks in the emulsion layer are indicative of a proper chip seal job?
A Can you rephrase that for me?
Q Yes, and that's not a good question. Let me ask it



this way. How long do you, as a resident maintenance engineer, expect a properly completed chip seal application to last?
A I hope to get three to five years out of it.
Q Based on your experience as a resident maintenance engineer for York County, do you see chip seal applications that last for three to five years?
A Yes, sir.
Q Do those chip seal applications where you see that have lasted for three to five years, do you observe evidence of streaking within a few months following the chip seal application?
A You do some roads that will have a couple of spots where the distributor may have dribbled instead of getting a spray. It just depends on where he started and stopped the truck, take off and things like that, but we can touch those up by hand.
Q Is the streaking that you've witnessed on Craig Road worse than the streaking you've seen on other successfully completed chip seal?
A You're meaning with the emulsion?
Q Yes, sir.
A No, not really.
Q Is the loss of stone that you've observed on Craig Road more than what you have witnessed in other



chip seal jobs completed in York County?
A Yes, sir.
Q What does that tell you about the chip seal application that was done on Craig Road on October 8, 2009?
A It tells me that the stone stripped off the roadway.
Q Do you know why?
A No, sir, I do not know why.
Q Have you tried to determine why?
A There's all types of guesses you could have.
Q What are the guesses that you have?
A It could have been supplier of the material. It could have been the rock. It could be temperature. It could be humidity. It could be all types of things. You can't really pinpoint it.
Q Do you agree that the chip seal application on Craig Road has not held up the way you would expect it to hold up as the resident maintenance engineer?
A The stone didn't hold up, but the liquid did. The liquid did seal the cracks, the majority of the cracks, so hopefully the water will not penetrate into the roadway.
Q And when you say the stone didn't hold up, it came off the roadway, stripped away from the roadway, as

# South Carolina Department of Insurance

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MARK SANFORD
Governor

SCOTT H. RICHARDSON
Director of Insurance

October 5, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
STATE FARM FIRE AND CASUALTY CO
Vice President – Agency
7 Technology Circle, Suite 400
Columbia, SC 29203-0000

Dear Sir:

On October 5, 2010, I accepted service of the attached Summons and Amended Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70 (Supp. 2003). By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C Code Ann. § 38-77-160 (Supp. 2003). I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

**You must promptly acknowledge in writing your receipt of this accepted process.** When replying, please refer to File Number 142741, Phyllus Paden-Adams , *et al.* v. South Carolina Department of Transportation, 2010-CP-46-00854.

By:

Jeff Jacobs
Chief Legal Counsel
(803)737-6200

Sincerely Yours,

Scott Richardson
Director
State of South Carolina
Department of Insurance

Attachment

CC: Christi P. Cox
Post Office Box 10940
Rock Hill, SC 29731

EXHIBIT
3

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DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendants. | ) | |

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

State Farm Fire and Casualty Company (State Farm) filed this lawsuit to determine if underinsurance motorist (UIM) coverage exists for a one car accident on October 21, 2009 in which Phyllis Adams was injured. Both the policies issued by State Farm to the defendants and the law require as a condition of insurance coverage that bodily injury be caused by an accident arising out of the operation, ownership, maintenance or use of a motor vehicle. (State Farm policy form 8403, page 19 attached to plaintiff's motion for summary judgment; § 38-77-140; § 38-77-160)

State Farm's position is that Phyllis Adams' accident of October 21, 2009 did not arise out of the ownership, maintenance, operation or use of a motor vehicle. In contrast, the defendants maintain equipment used by the South Carolina Department of Transportation (SCDOT) for road resurfacing work on Craig Road in York County on October 9, 2009 constituted motor vehicles and that the SCDOT negligently operated, owned and maintained these vehicles and that directly caused Phyllis Adams' October 21, 2009 accident. (Defendants' answer and counterclaim ¶ 27 and ¶ 28) Applying South Carolina case law to the undisputed

facts can lead to but one conclusion—Phyllis Adams' accident on October 21, 2009 was not caused by and did not arise out of the ownership, maintenance, use or operation of an underinsured motor vehicle.

UNDISPUTED FACTS

On October 8, 2009 the SCDOT carried out a road resurfacing project on Craig Road. (Defendants' counterclaim ¶ 22) The Defendants allege this road resurfacing work left substantial amounts of loose aggregate and patchy exposed emulsion on Craig Road. (Defendants' counterclaim ¶ 22) Thirteen days later on October 21, 2009 Phyllis Adams struck a patch of loose aggregate and exposed emulsion while traveling on Craig Road, spun out of control, slid off the roadway, and struck an embankment. (Defendants' counterclaim ¶ 24)[1] At the time of Phyllis Adams' injury she did not come into contact with any SCDOT vehicles, she did not have to take any action to avoid collision with any equipment or vehicle of the SCDOT, nor did she see any equipment or vehicles of the SCDOT being used on Craig Road at the time of her injury. (Defendants' answers to plaintiff's supplemental interrogatories 12-14 attached as Exhibit 1) None of the SCDOT vehicles or other equipment the defendants claim caused Phyllis Adams' injury were being used on Craig Road at the time and location of Phyllis Adams' injury and no vehicle or other equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of Phyllis Adams' injury. (Defendants' answers to plaintiff's supplemental interrogatories 10 and 11 attached as Exhibit 1) The defendants do not assert the SCDOT vehicles or equipment were operated in a

[1] Any allegations, statements or omissions contained in a pleading are conclusive against the pleader and a party cannot subsequently take a contrary or inconsistent position. Charleston County School District v. Laidlaw Transit, 559 S.E.2d 362, 364 (SC App 2001)

negligent manner on the date of Phyllis Adams' injury. (Defendants' answer to plaintiff's supplemental interrogatory 16 attached as Exhibit 1)

SOUTH CAROLINA LAW

A number of South Carolina cases have considered a variety of factual scenarios on the issue of whether an accident arose out of the operation, ownership, maintenance or use of a motor vehicle. These cases set forth guidelines and standards for determining when an accident arises out of or is caused by the operation, ownership, maintenance or operation of a motor vehicle. The cases finding insurance coverage for an accident arising out of the operation, use, ownership or maintenance of a motor vehicle and those cases finding no coverage where an accident did not arise out of or was caused by the operation, ownership, maintenance or use of a motor vehicle are set forth below:

**Cases finding accidents arose out of operation, ownership, maintenance or use of a motor vehicle**

1. Chapman v. Allstate Insurance Company, 211 S.E.2d 876 (S.C. 1975)
2. Wausau Underwriters Insurance Company v. Howser, 422 S.E.2d 106 (S.C. 1992)
3. Home Insurance Company v. Towe, 441 S.E.2d 825 (S.C. 1994)

**Cases finding accidents did not arise out of operation, ownership, maintenance or use of a motor vehicle**

1. Hite v. Hartford Accident Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986)
2. Canal Insurance Company v. Insurance Company of North America, 431 S.E.2d 577 (S.C. 1993)
3. Carraway v. Smith, 467 S.E.2d 120 (S.C. App. 1995)
4. State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998)
5. Doe v. South Carolina State Budget and Control Board, 523 S.E.2d 457 (S.C. 1999)
6. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999)

7. South Carolina Property and Casualty Guaranty Association v. Yensen, 548 S.E.2d 880 (S.C. App. 2001)
8. Peagler v. USAA Insurance Company, 628 S.E.2d 475 (S.C. 2006)
9. South Carolina Farm Bureau Mutual Insurance Company v. Kennedy, 700 S.E.2d 258 (S.C. 2010)

SUMMARY OF CASES FINDING COVERAGE WHERE ACCIDENT WAS CAUSED BY OR AROSE OUT OF OPERATION, OWNERSHIP, USE OR MAINTENANCE OF A MOTOR VEHICLE

In Chapman v. Allstate Insurance Company, 211 S.E.2d 876 (S.C. 1975), the Supreme Court held Chapman's injury arose out of the use of an insured automobile when Chapman received her injuries in a fall from the automobile. Wausau Underwriters Insurance Company v. Howser, 422 S.E.2d 106 (S.C. 1992), held Howser's injury arose out of the ownership, maintenance or use of an uninsured vehicle when Howser was shot by the driver of an unknown car. Citing Chapman, the Supreme Court held there was a sufficient causal connection between the vehicle and Howser's injury and that Howser's injury arose out of use of the assailant's vehicle.

The most recent case to find uninsured motorist coverage where an injury arose out of the use of an automobile is Home Insurance Company v. Towe, 441 S.E.2d 825 (S.C. 1994). In that case, Alexander was riding in a vehicle driven by Towe and threw a bottle from the moving vehicle at a road sign. However, instead of striking the sign the bottle hit a vehicle driven by McClaskey in the opposite direction and seriously injured McClaskey. Citing Howser, the Supreme Court held that for purposes of uninsured motorist coverage an injury arises out of the use of an automobile if there is a causal connection between the vehicle and the injury and if no act of independent significance breaks the causal link. In finding coverage,

the Supreme Court stated the use of the automobile placed Alexander in the position to throw the bottle at the sign and the vehicle speed contributed to the velocity of the bottle, thereby increasing the seriousness of McClaskey's injuries. As in Howser, the Supreme Court held the automobile was an active accessory that gave rise to the injuries and that the use of the automobile and the throwing of the bottle were "inextricably linked" as one continuing act. 441 S.E.2d at 827 In the present case the use of the SCDOT vehicles and Mrs. Adams injury was not "one continuing act." Instead, there was a 13 day interval between the completion of roadwork on October 8 and Mrs. Adams' injury on October 21.

The three cases which have found an injury arose out of the operation, use or ownership of a vehicle involved factual scenarios where an injury was sustained by falling out of the vehicle (Chapman), by a gun shot from the vehicle (Howser), and by a bottle thrown from the vehicle (Towe). In these cases the Court held the motor vehicle in question was an active accessory giving rise to the injuries and that the use of the automobile and the act causing the injury were inextricably linked as one continuing act. Again, these factual situations are distinguishable from the present case wherein the Adamses claim that road work completed on October 8 by some unspecified motor vehicle of the SCDOT caused a one car automobile accident 13 days later.

SUMMARY OF CASES IN WHICH NO COVERAGE EXISTS

In Hite v. Hartford Accident Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986), Hite left his insured automobile and walked 50 feet before being struck by an automobile being driven by Martin. Hite was not in, on or touching the vehicle he had been driving which was insured by Hartford. In finding no coverage, the Court of Appeals held that for an injury to be caused by the "use" of a vehicle the injury must be foreseeably identifiable with the normal

use, maintenance and ownership of the vehicle and if the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its "use." The Court held that Hite's leaving the insured automobile and walking 50 feet was an independent or intervening cause wholly disassociated from, independent of and remote from the use of the insured automobile. 344 S.E.2d at 176, 177

In Canal Insurance Company v. Insurance Company of North America, 431 S.E.2d 577 (S.C. 1993), the Court of Appeals reversed a finding of coverage by the circuit court. The issue was whether use of a crane constituted use of a motor vehicle to mandate coverage under § 38-77-140. The Court of Appeals held the truck crane was not being used for transportation at the time of the accident and it construed § 38-77-140 and defined "use of a motor vehicle" as limited to transportation uses.

The Court of Appeals again reversed a finding of coverage by the circuit court in Carraway v. Smith, 467 S.E.2d 120 (S.C. App. 1995). Carraway was stopped at a red light behind Smith. Smith exited the car and spoke to third party for about five minutes and then pulled out a gun and started firing and one bullet hit Carraway. Concluding there was no coverage, the Court of Appeals held the party seeking coverage must establish a causal connection between the vehicle and the injury and there must exist no act of independent significance breaking the causal link. 467 S.E.2d at 121 The Court of Appeals distinguished the Howser case by stating that in Carraway "there was no ongoing use of a vehicle in this case to carry out the attack" and that "Carraways's injuries were caused by an independent act wholly separate from the use of the vehicle." 467 S.E.2d at 121, 122

In State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998), Dawson owned a vehicle insured by State Farm. Aytes forcibly took Dawson's car key and forced Dawson into her car and then drive Dawson to an area of Aytes' property with the expressed intent of killing Dawson. While standing outside the car on the passenger side, Aytes fired a pistol toward Dawson and struck her in the foot. The Supreme Court held there was not a causal connection as the vehicle was not an active accessory nor was it being used for transportation at the time of the injury. Accordingly, Dawson's injuries did not result from the ownership, maintenance or use of her vehicle. Aytes is significant in that it explicitly cites Canal Insurance Company for a requirement of coverage that "the vehicle was being used for transportation at the time of the assault." This is a common thread in Chapman, Howser and Towe that at the time of the injury the vehicle under which coverage was sought was being used for transportation. In the present case, no vehicle or equipment of the SCDOT was being used for transportation purposes at the time and place of Phyllis Adams' injury. (Defendants' answer to plaintiff's supplemental interrogatory 10 attached as Exhibit 1)

In Doe v. South Carolina State Budget and Control Board, 523 S.E.2d 457 (S.C. 1999), Doe was stopped by a police officer on suspicion of driving under the influence and was offered the option of being arrested or having sex with the police officer. In concluding no coverage existed, the Supreme Court cited the three part test announced in Aytes, the third element of which was that the vehicle be used for transportation at the time of the assault. In finding no coverage, the Court held the police cruiser was not being used for transportation at the time of the assault and it was not an active accessory.

State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999) reversed a decision of the South Carolina Court of Appeals which found coverage.

Bookert was injured when two soldiers fired shots in a McDonalds parking lot. Again, the Court cited the three part test for coverage in Aytes that: (1) there exist a causal connection between the vehicle and the injury; (2) no act of independent significance breaks the causal link; (3) the vehicle is being used for transportation at the time of the assault. The Court held that the causal connection requirement means the vehicle must be an "active accessory" to the injury, something less than proximate cause but more than the mere site of the injury and the injury must be foreseeably identifiable with the normal use of the vehicle. 523 S.E.2d at 182 Because Bookert's injuries were not foreseeably identifiable with the normal use of an automobile, no coverage was found and the decision of the Court of Appeals finding coverage was reversed.

The issue of whether an injury arose out of the operation, use or maintenance of an automobile was next considered in South Carolina Property and Casualty Guaranty Association v. Yensen, 548 S.E.2d 880 (S.C. App. 2001). Yensen was standing next to a car while it was being hooked up to a tow truck when another driver struck Yensen and others. The South Carolina Court of Appeals held there was no causal connection between the tow truck and Yensen's injury.

The factual scenario in Peagler v. USAA Insurance Company, 628 S.E.2d 475 (S.C. 2006), was that Kathy Thompson was fatally injured when her husband was unloading two shotguns from a pick-up truck she was occupying. Thompson's husband lifted the shotguns off the rear seat and placed the barrel of the guns pointing toward the floor, but as he picked up one of the shotguns and began to exit the vehicle it discharged, striking and killing Kathy Thompson. The question was whether her fatal injury arose out of the ownership, maintenance or use of the pick-up truck. In finding no coverage, the Supreme Court referenced the Aytes

three part test, the third element of which was that the vehicle must be used for transportation purposes at the time of the injury. The Supreme Court held that Peagler, as Personal Representation of the Estate of Kathy Thompson, did not demonstrate the truck was an active accessory to the injury as it was not actively used or involved in causing the injury but was merely the site of the injury. 628 S.E.2d at 481 The Supreme Court concluded that resolution of the causal connection factor made it unnecessary to analyze the remaining Aytes factors, one of which was whether the vehicle was being used for transportation purposes at the time of the injury. Again, according to the defendants' answer to the plaintiff's supplemental interrogatory 10, no vehicle or equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of Phyllis Adams' injury.

The last case to consider this issue was South Carolina Farm Bureau Mutual Insurance Company v. Kennedy, 700 S.E.2d 258 (S.C. 2010). Kennedy exited the truck he had been driving and was injured while standing near the truck. In finding no coverage, the Supreme Court held there was no causal connection between Kennedy's use of the truck he had been driving and his being struck by another truck and he was not entitled to UIM coverage on the truck he had been driving.

These cases require that for insurance coverage to exist the vehicle alleged to have caused the injury must:

- Be an active accessory to the injury;
- Be used for transportation purposes at the time of the injury;
- The injury must be foreseeably identifiable with the normal use of the vehicle; and
- No act of independent significance breaks the causal link between the vehicle and the injury.

## OUT OF STATE CASES

The South Carolina cases cited above on when and under what circumstances an injury arises out of the operation, use or maintenance of a motor vehicle provide sufficient guidance to resolve this case such that it is unnecessary to resort to out-of-state cases for guidance. Nonetheless, if the Court is inclined the seek guidance from out-of-state cases the decisions are contradictory. For example, in Jackson v. Daley, 739 So.2d 1031 (Miss. 1999), Jackson was injured when his car overturned on a one lane gravel road. Before the accident the county had dumped three piles of dirt on the side of the road and Jackson's heirs argued the accident was caused by Jackson's striking one of the piles of dirt or attempting to avoid the piles of dirt. A USF&G policy provided insurance for injuries resulting from the ownership, maintenance or use of a county automobile. In finding Jackson's accident was covered by the USF&G policy, the Court found the county employees' failure to remove the piles of dirt or maintain the road was not so remote as to bear no direct or substantial relation to the use or operation of the dump truck and, consequently, Jackson's accident was covered by the USF&G policy.

A contrary result was reached in Worthington v. State of Wyoming, 598 P.2d 796 (Wyoming 1979). In that case a highway had recently been resurfaced by the Wyoming State Highway Department. Because of the resurfacing work there was no center strip or shoulder marking and there was no temporary center line and no warning signs. A car operated by Malar ran into Scott. Malar claimed a cloud of dust caused by gravel on the road obscured his vision and that, combined with the lack of a center line and shoulder line, caused him to run into Scott. The Wyoming Supreme Court affirmed the decision of the trial court granting State Farm's motion for summary judgment. In seeking coverage, the appellant argued that when the use of a highway department's vehicle causes a condition on the highway which causes an

accident "the injury sustained as a result arises out of the use of the insured vehicle." 598 P.2d at 806 The Wyoming Supreme Court held that the evidence must demonstrate the injury was a natural and reasonable incident or consequence of the use of an insured vehicle, the causal connection being reasonably apparent. The Wyoming Supreme Court concluded that "the evidence here simply fails to disclose that the injuries were the natural and reasonable incident of the use of state owned vehicles in repairing the highway." 598 P.2d at 809 See also, Raube v. Christianson, 70 N.W.2d 639 (Wisconsin 1955).

## ARGUMENT

It is not unusual for the SCDOT to be sued for injuries allegedly caused by the condition of a roadway constructed or maintained by the SCDOT. All roadways constructed or maintained by the SCDOT must involve some use of equipment or a motor vehicle, if for no other reason than to transport the SCDOT workers to the site for work on the roadway. If a one car accident occurring 13 days after road work allegedly involving SCDOT equipment or motor vehicles arises out of the use of a motor vehicle, it is difficult to conceive of when automobile insurance coverage would not exist for injuries attributable to defective roadways. In fact, the same reasoning could apply to any injury caused by a defective bridge, house or building constructed through some use of motor vehicles.

### I. The vehicles the Adamses claim constitute UIM vehicles—vehicles owned and operated by the SCDOT—were not being used for transportation purposes at the site of Phyllis Adams' injury on Craig Road at the time of her injury on October 21, 2009.

The South Carolina Supreme Court has made it explicitly clear that one requirement for an injury to arise out of the ownership, maintenance or use of a motor vehicle is that the vehicle be used for transportation purposes at the time of the injury. Peagler v. USAA

Insurance Company, 628 S.E.2d 475, 478 (S.C. 2006). The defendants' answer to the plaintiff's supplemental interrogatory 10 states that no vehicle or other piece of equipment of the SCDOT was being used for transportation purposes on Craig Road on either October 21 or October 22, 2009 at the time and place of Phyllis Adams' injury. This alone is sufficient to grant summary judgment to State Farm.

**II. No causal connection exists between any SCDOT vehicle and Phyllis Adams' injury on October 21, 2009.**

The party seeking insurance coverage must show a causal connection exists between the vehicle and the injury. Peagler v. USAA Insurance Company, 628 S.E.2d 475, 479 (S.C. 2006) In this context causal connection involves a different analysis than establishing proximate cause to prove a tort. Proximate cause in the context of establishing tort liability requires proof of causation in fact and legal cause, the latter of which involves foreseeability. Eadie v. Krause, 671 S.E.2d 389 (S.C. App. 2008) In contrast, proving a causal connection for the purpose of establishing insurance coverage requires proof that:

(a) The vehicle was an active accessory to the injury;

(b) The vehicle was something less than the proximate cause but more than the mere site of the injury;

(c) The injury was foreseeably identifiable with the normal use of the vehicle.

Peagler v. USAA Insurance Company, 628 S.E.2d at 479 The absence of any one of these causal elements is fatal to the Adamses' claim for coverage.

In the three cases in which an accident has been found to have arisen out of the use of an automobile for purposes of establishing insurance coverage, the automobile was an active accessory giving rise to the injuries. In Chapman, Chapman fell from a moving car. In Howser, Howser's injury arose out of the use of an assailant's vehicle when a shot was fired at

Howser from that vehicle. In Towe, the use of the automobile placed Alexander in the position to throw the bottle at a sign and the vehicle's speed contributed to the velocity of the bottle, thereby increasing the seriousness of McClaskey's injuries. Here, however, as in State Farm Fire and Casualty Company v. Aytes, the vehicle was not an active accessory to the injury. If motor vehicles having some connection with road work which cause an injury 13 days after completion of the road work can be found to be an "active accessory" in causing the injury, the requirement that the vehicle be an "active accessory" to the injury will become meaningless.

**III. An act of independent significance broke the causal link between any SCDOT vehicle and the injury sustained by Phyllis Adams on October 21, 2009.**

One of the requirements for establishing insurance coverage is that no act of independent significance break the causal link. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181, 182 (S.C. 1999) Here, there was a 13 day interval between the completion of road work on Craig Road on October 8, 2009 and Phyllis Adams' accident on October 21, 2009. In the context of determining whether injuries arise out of the ownership, maintenance or use of a motor vehicle, a 13-day gap between the alleged use of the motor vehicle and the injury is in itself an act of independent significance to break the causal link.

**IV. Phyllis Adams' injury was not foreseeably identifiable with the normal use of SCDOT vehicles.**

South Carolina courts have used a three part test to determine whether an individual's personal injuries arise out of the ownership, maintenance or use of an automobile such that they are covered by an automobile insurance policy. State Farm Mutual Automobile Insurance

Company v. Bookert, 523 S.E.2d 181, 182 (S.C. 1999) One of the three elements of this test is that there exist a causal connection between the vehicle and the injury. There are three components to the causal connection requirement, one of which is that the injury must be foreseeably identifiable with the normal use of the automobile. 523 S.E.2d at 182

Even assuming the equipment used by the SCDOT in resurfacing Craig Road and which the Adamses claim caused Phyllis Adams' accident constituted "motor vehicles" as that term is defined in § 38-77-30 (9), none of the SCDOT motor vehicles collided with Phyllis Adams on the date of her accident, nor did Phyllis Adams have to take any evasive action to avoid a motor vehicle of the SCDOT on the date of her accident. (Defendants' answers to plaintiff's supplemental interrogatories 12, 14) Instead, the Adamses claim it is roadwork by motor vehicles which caused her injury.

The normal use of an automobile is to transport a person from point A to point B. No motor vehicle of the SCDOT was being used for transportation purposes at the location of and on the date of Phyllis Adams' injury. Accordingly, her injury was not foreseeably identifiable with the normal use of an automobile.

**V. State Farm has not breached any contract of insurance by failing to pay UIM benefits which are contractually owed.**

The Adamses' first counterclaim against State Farm is for breach of contract. (Adamses counterclaim ¶ 46 - 50) To prove this cause of action the Adamses need to establish that State Farm has breached some part of its insurance contract with the Adamses. Although extra contractual duties, such as the duty of good faith and fair dealing, are implied into the contract of insurance, any alleged breach of those extra contractual duties must be asserted in the bad faith cause of action.

Recovery under uninsured motorist coverage is subject to the condition that the insured established legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. After judgment is entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement. Lawson v. Porter, 180 S.E.2d 643, 644 (S.C. 1971) By extension, the predicate for recovery under UIM coverage is the establishment of liability on the part of the alleged underinsured motorist—here, the SCDOT vehicles—and a judgment in excess of the damage cap imposed by the South Carolina Tort Claims Act. However, that has not occurred as the case of Adams v. SCDOT has not gone to trial. Until that case is tried and in that trial the Adamses establish legal liability upon the SCDOT and obtain a judgment in excess of the statutory cap of damages under the Tort Claims Act, the Adamses cannot recover for breach of contract against State Farm.

Here, as in Snyder v. State Farm Mutual Automobile Insurance Company, 586 F.Supp.2d 453 (D.S.C. 2008), there is no provision in the contract between the insured and State Farm that requires State Farm to disburse any UIM benefits prior to a formal entry of judgment against the tortfeasor in excess of the tortfeasor's liability coverage limits or statutory limit of liability. 586 F.Supp.2d at 462 Where the plaintiff can point to no specific provision of the contract that State Farm violated, the plaintiff's claim that State Farm breached the contract fails as a matter of law. 586 F.Supp.2d at 463 State Farm is therefore entitled to summary judgment on the Adamses' counterclaim for breach of contract.

Another reason State Farm is not liable on the Adamses' counterclaim for breach of contract is that there is no UIM coverage applicable to Phyllis Adams' accident because that accident did not arise out of the operation, ownership, maintenance or use of a motor vehicle.

If there is no UIM coverage, then State Farm cannot be liable for failing to pay the Adamses UIM benefits. For all of these reasons State Farm is entitled to summary judgment on the Adamses' counterclaim for breach of contract.

**VI. State Farm is entitled to summary judgment on the Adamses' second counterclaim for bad faith because as a matter of law State Farm did not act unreasonably or in bad faith as it has simply initiated a declaratory judgment action to resolve a question of UIM coverage.**

The Adamses' counterclaim concedes State Farm has raised as a potential issue precluding coverage the question of whether the SCDOT vehicles qualified as underinsured motor vehicles. (Adamses' counterclaim ¶ 41) As explained in the first section of this brief, there is no UIM coverage because Phyllis Adams' injury did not arise out of the operation, use or maintenance of an underinsured motor vehicle. In January of this year State Farm filed this declaratory judgment action to receive a ruling on that issue. Where an insurance company is justified in litigating an issue it does not act in bad faith. Shumpert v. Time Insurance Company, 496 S.E.2d 653, 659 (S.C. App. 1998) It is not per se bad faith or unfair dealing on the part of an insurance company to resort to a judicial forum to resolve disputes with its insured. Varnadore v. Nationwide Mutual Insurance Company, 345 S.E.2d 711, 714, 715 (S.C. 1986)

**VII. State Farm is entitled to summary judgment on the defendants' second counterclaim for bad faith because as a matter of law State Farm had a reasonable basis for questioning the Adamses' claim to entitlement of UIM coverage for Phyllis Adams' accident of October 21, 2009.**

Where an insurer's decision is reasonable an appellate court will reverse a trial court's determination the insurer breached the covenant of good faith and fair dealing. Doe v. South Carolina Medical Malpractice Association, 557 S.E.2d 670 (S.C. 2001) Bad faith is a knowing failure on the part of an insurer to exercise an honest and informed judgment in

processing a claim. An insurer acts in bad faith only where there is no reasonable basis to support the insurer's decision. Where the only reasonable inference is that an insurer did not act in bad faith nor unreasonably in handling a claim there is no error in the lower court's decision to direct a verdict in favor of the insurance company. American Fire & Casualty v. Johnson, 504 S.E.2d 356, 359 (S.C. App. 1998) In fact, as long as an insurer denies coverage in good faith and with a reasonable basis in fact and law it has no extra contractual duty to determine the existence of coverage by bringing a declaratory judgment action or otherwise. Brown v. South Carolina Insurance Company, 324 S.E.2d 641, 645 (S.C. App. 1984)

If there is reasonable ground for contesting a claim there is no bad faith. Crossley v. State Farm Mutual Automobile Insurance Company, 415 S.E.2d 393, 397 (S.C. 1992) An insurance company should be able to litigate novel issues without fear of being accused of acting in bad faith. Mixson v. American Loyalty Insurance Company, 562 S.E.2d 659, 661, 662 (S.C. App. 2002) If an insurer has a reasonable ground for contesting a claim summary judgment is properly granted as to the bad faith claim. Helena Chemical Company v. Lexington Insurance Company, 594 S.E.2d 455, 462 (S.C. 2004)

Applying South Carolina case law on the circumstances in which an automobile accident arises out of the operation, use or maintenance of a motor vehicle to the facts of this case establishes that State Farm as a matter of law had reasonable basis for questioning the Adamses' entitlement to UIM coverage for Phyllis Adams' October 21, 2009 accident. State Farm is therefore entitled to summary judgment on the Adamses' second counterclaim for bad faith.

**VIII. State Farm is entitled to summary judgment on the Adamses' second counterclaim for bad faith because an element of a cause of action for bad faith refusal to pay benefits is a refusal by the insurer to pay benefits due**

**under the contract of insurance and State Farm has not refused to pay benefits due under the contract of insurance.**

One of the elements of a bad faith refusal to pay benefits is a refusal by the insurer to pay benefits due under the contract. Mixson v. American Loyalty Insurance Company, 562 S.E.2d 659 (S.C. App. 2002); Hansen v. United Services Automobile Association, 565 S.E.2d 114, 119 (S.C. App. 2002); Peterson v. West American Insurance Company, 518 S.E.2d 608, 614, 615 (S.C. App. 1999); Howard v. State Farm Mutual Automobile Insurance Company, 450 S.E.2d 582, 586 (S.C. 1994) The Adamses' counterclaim alleges "State Farm's refusal to pay benefits under the policy was in bad faith." (¶ 55) However, as explained in preceding sections of this memorandum, no benefits are due under the contract of insurance as the Adamses have not obtained a judgment against the SCDOT in excess of its statutory liability in order to create a contractual obligation for State Farm to pay UIM benefits to the Adamses.[2] The Adamses therefore cannot establish an element of a cause of action for bad faith refusal to pay benefits. Therefore, State Farm is entitled to summary judgment on the counterclaim for bad faith.

## IX. State Farm is entitled to summary judgment on the Adamses' counterclaim for bad faith because the Adamses are not entitled to UIM coverage for Phyllis Adams' accident of October 21, 2009.

Where it is determined an insured is not entitled to recover a claim for insurance benefits, the insured's cause of action for bad faith refusal to pay the claim must fail. Carolina Amusement Company, Inc. v. Connecticut National Life Insurance Company, 437 S.E.2d 122, 127 (S.C. App. 1993) As explained in the earlier sections of this brief, the Adamses are not

[2] Even if the Adamses obtain a judgment against the SCDOT in excess of its statutory liability, State Farm will still have no obligation to pay UIM benefits if no coverage exists for the Adamses' claim.

entitled to UIM coverage for Phyllis Adams' accident of October 21, 2009. Therefore, the Adamses' cause of action for bad faith must be dismissed.

**X. State Farm is entitled to summary judgment on the Adamses' counterclaim for bad faith because State Farm has not caused the Adamses any damages.**

One of the elements of a bad faith claim against an insurance company is that the plaintiff must show damage caused by the insurer's bad faith. Peterson v. West American Insurance Company, 518 S.E.2d 608, 615 (S.C. App. 1999) As explained in part V of this memorandum, the Adamses have not procured a judgment against the tortfeasor so as to create an obligation by State Farm to pay the Adamses UIM benefits, even assuming that coverage exists.

Attached as Exhibit 2 is the Adamses' answer to State Farm's interrogatory 4. The itemization of the Adamses' damages in subparagraphs (a) through (k) are damages caused by the alleged tortfeasor SCDOT, not by State Farm. The damages the Adamses claim have been caused by State Farm are referenced as "the underinsured motorist benefits of their policies with State Farm..." However, as explained in parts I, II, III and IX of this brief, the Adamses are not entitled to UIM coverage for Phyllis Adams' October 21, 2009 accident and, in any event, the Adamses have not obtained a judgment against the alleged tortfeasor SCDOT in order to trigger a contractual obligation to pay UIM benefits should coverage exist.

According to their answer to State Farm's interrogatory 4, the Adamses are also claiming entitlement to sums in excess of their policy limits. However, any judgment against the alleged tortfeasor in excess of the Adamses' UIM policy limits would be damages caused by the tortfeasor, not by State Farm. Under these circumstances, an insurer is not liable for a judgment in excess of UIM coverage.

One of the elements of a tort is proximate causation. Troutman v. Facetglass, Inc., 316 S.E.2d 424 (S.C. App. 1984) Any verdict awarded against the SCDOT would not represent damages caused by State Farm. Instead, this verdict would represent damages caused by the SCDOT. Unlike a Tyger River situation which involves liability coverage, the amount of a verdict over the amount of underinsured motorist coverage does not harm the plaintiff. In a Tyger River situation, the amount of the verdict above the amount of liability coverage harms the plaintiff by exposing the plaintiff to personal liability. This reasoning does not apply to an excess verdict over UIM limits.

In McCall v. Allstate Insurance Company, the Georgia Supreme Court considered the issue of whether an uninsured motorist carrier may be liable for a recovery in excess of the uninsured policy limits where before trial the insured offered to settle for less than the policy limits, the insurer refused the offer and the jury returned a verdict in excess of the uninsured policy limits. 310 S.E.2d 513 (Ga. 1984) The Georgia Supreme Court distinguished such a situation from what in South Carolina is known as a "Tyger River" case by stating that with an uninsured motorist claim "the insurance company is not, by refusing to settle with the insured, gambling with funds of the insured." 310 S.E.2d at 515 The court further held that in defending against the claims of the insured under the uninsured motorist provisions the insurer was not under a duty to protect the interests of the insured because the insured had no exposure for liability. 310 S.E.2d at 515 The court concluded the insurer was not liable for the amount of the judgment recovered against the uninsured motorist in excess of the policy limits.

In State Farm Mutual Automobile Insurance Company v. Superior Court, the insured argued that the amount of damages caused by an uninsured driver was relevant in determining the amount of the insured's damages which could be awarded to her in a suit against the

insurer for bad faith in settling her uninsured motorist claim. 123 Cal. App. 4th 1424 (2004) The California Court of Appeals held that the personal injury damages caused **by the accident** (emphasis in original) are not relevant where an insurer has in fact paid full policy benefits.

The California Court of Appeals in State Farm v. Superior Court cited the California Supreme Court decision of Neal v. Farmer's Insurance Exchange, 582 P.2d 980 (1978) wherein the California Supreme Court distinguished between excess verdicts in a third party context (or, what are known in South Carolina as "Tyger River" cases) and first party claims. The court held that:

> In the first party uninsured motorist context however, the insured has sustained damages (property and/or personal injury) occasioned by the vehicular accident itself, and those damages occur prior to the insurer's alleged breach of its duty of good faith and fair dealing. Thus, those damages "cannot be a proximate result of [any bad faith conduct], and therefore cannot serve as a proper measure of damages. 123 Cal. App. 4th at 1434

Florida's courts have also rejected the notion that a verdict in excess of the amount of uninsured motorist limits has any relevance to the measure of damages in a bad faith action for failing to settle a first party claim. In Continental Insurance Company v. Jones, the Florida Supreme Court considered a question certified to it by the Eleventh Circuit of the United States Court of Appeals - what is the appropriate measure of damages in a first party action for bad faith failure to settle an uninsured motorist claim under a Florida statute? 592 So.2d 240 (Fla. 1992) The Florida Supreme Court cited McLeod v. Continental Insurance Company, 591 So.2d 621 (Fla. 1992) that damages recoverable in a first party bad faith suit under a Florida statute are those damages which are the natural, proximate, probable or direct consequence of the insurer's bad faith and that such damages may include interest, court costs and reasonable

attorney's fees. The court did not hold the amount of the verdict in excess of the uninsured motorist limits to be the measure of damages.

In McLeod v. Continental Insurance Company, the Florida Supreme Court considered the question of what is the appropriate measure of damages in a first party action for bad faith failure to settle an uninsured motorist claim. 591 So.2d 621 (Fla. 1992) The Florida Supreme Court held that the damages recoverable in a first party action for bad faith failure to settle an uninsured motorist claim are those damages which are the natural, proximate, probable or direct consequence of the insurer's bad faith actions. In refusing to measure damages in a bad faith action arising out of the handling of a first party claim by the amount of the verdict in excess of the uninsured motorist limits the Florida Supreme Court reasoned that:

> We agree with District Court that there are "fundamental differences" between first and third party actions. In the third party action, damages based on the above definitions [in Florida statute 624.155] would include the amount of a judgment in excess of policy limits because the insured is exposed to additional liability for the excess amount. Such is not the case in a first party action, because the insured is not injured by the excess judgment amount. To allow recovery of the excess judgment in first party cases would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause . . . Even though the insurer's bad faith in refusing to settle a first party action leads to an excess judgment in favor of the insured and against the third party, causing the excess judgment to occur is not enough. To be liable under the statute, Continental must not only cause the excess judgment, but the excess must also injure the insured. While the amount of the excess judgment represents damages sustained by McLeod, the tortfeasor, not Continental, caused those damages. Thus, in the uninsured motorist case, the excess judgment does not qualify as damages resulting from a violation of the statute. 521 So.2d at 624

See also, Adams v. Fidelity and Casualty Company of New York, wherein the Supreme Court of Florida stated "we rejected the contention that first party bad faith damages should be fixed by the amount of the excess judgment." 591 So.2d 929, 930 (Fla. 1992)[3]

[3] After the Florida Supreme Court's decision in McLeod, supra, the Florida legislature enacted

The appellate courts in California, Georgia and Florida have specifically rejected the notion that the measure of damages in a bad faith case arising out of a first party claim such as uninsured motorist coverage is the amount of the verdict in excess of the coverage. The reasoning of these courts is that the excess verdict in a first party claim such as uninsured motorist coverage does not cause the insured damages, unlike an excess verdict in a third party claim. This reasoning equally applies to UIM coverage. For this reason any verdict against the SCDOT in excess of the Adamses' UIM coverage limits cannot be a measure of the Adamses' damages against State Farm.

State Farm does not owe the Adamses:

- Contractual benefits – the Adamses have not obtained a judgment against the SCDOT in excess of its statutory liability limits, even assuming UIM coverage exists.

- Damages caused by the SCDOT. For example, in answer to State Farm's interrogatory 4 the Adamses claim damages for "permanent impairment and disability" and "loss of enjoyment of life." State Farm did not cause those damages, nor cause the medical bills and lost wages.

- Damages in excess of the UIM limits should it be determined UIM coverage exists and the Adamses obtain a judgment against the SCDOT in excess of liability limits imposed by the Tort Claims Act

State Farm is therefore entitled to summary judgment because it has not caused the Adamses any damages.

**XI. State Farm is entitled to summary judgment on the Adamses' third counterclaim for declaratory judgment because as a matter of law the**

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§ 627.727(10) to provide that damages recoverable from an uninsured motorist carrier in a bad faith lawsuit should include the total amount of the claimant's damages including the amount in excess of the policy limits. In State Farm Mutual Automobile Insurance Company v. Laforet, 658 So.2d 55 (Fla. 1995) the Florida Supreme Court declined to apply this statute retroactively as the Florida Supreme Court considered the statute to be, in substance, a penalty. Of course, South Carolina has no statute such as Florida statute 627.727(10).

**Adamses are not entitled to UIM coverage for Phyllis Adams' accident of October 21, 2009.**

The Adamses third counterclaim seeks a declaratory judgment that the SCDOT vehicles were underinsured motor vehicles so as to trigger UIM coverage for the Adamses' damages. (¶ 60) If State Farm is entitled to a declaratory judgment that the Adamses are not entitled to UIM coverage, it necessarily follows the Adamses counterclaim for the opposite relief must be denied.

The Adamses' counterclaim for declaratory relief also seeks a declaration that the State Farm policies provide $100,000 in UIM coverage for each vehicle owned and insured by the Adamses on the date of Phyllis Adams' accident. However, if the Adamses are entitled to no UIM coverage then the amount of that coverage is a moot point.

**XII. State Farm is entitled to summary judgment on the Adamses' fourth counterclaim for statutory attorneys' fees under § 38-59-40 because State Farm does not owe UIM coverage for Phyllis Adams' accident and State Farm's refusal to provide UIM coverage was not in bad faith nor was it without reasonable cause.**

The Adamses' fourth counterclaim is for statutory attorneys' fees under § 38-59-40. That statute allows recovery of attorneys' fees when the trial judge determines the insurer's refusal to make payment on the contract of insurance was without reasonable cause or in bad faith. The Adamses are not entitled to attorneys' fees under the statute for several reasons. First, as explained in part VI and VII of this memorandum, State Farm had a reasonable basis for questioning the Adamses entitlement to UIM benefits and as a matter of law State Farm has not acted without reasonable cause and has not acted in bad faith. Additionally, as explained in part V of this memorandum State Farm does not owe the Adamses UIM benefits.

For these reasons, State Farm is entitled to summary judgment on the Adamses' fourth counterclaim for statutory attorneys' fees.

## CONCLUSION

A number of South Carolina cases have set forth what must be proven by an insured seeking to establish insurance coverage based upon an accident arising out of the operation, use or maintenance of a motor vehicle. To prove entitlement to UIM benefits for Phyllis Adams' October 21, 2009 accident the Adamses must prove:

- The vehicles owned and operated by the SCDOT were being used for transportation purposes at the site of Phyllis Adams' injury on Craig Road at the time of her injury.
- A causal connection exists between the SCDOT vehicle and Phyllis Adams' injury on October 21, 2009.
- No act of independent significance broke the causal link between any SCDOT vehicle and the injury sustained by Phyllis Adam on October 21, 2009.
- A vehicle or vehicles of the SCDOT were active accessories to Phyllis Adams' injury on October 21, 2009.
- Phyllis Adams' injury was foreseeably identifiable with the normal use of the SCDOT vehicles.

The Adamses must establish **all** of these elements.[4] Not only can the Adamses not prove all of these elements, they cannot prove any of them. Nor can the Adamses establish State Farm has breached the contract of insurance or that State Farm has acted unreasonably or in bad faith. For all of these reasons, State Farm is entitled to summary judgment on its declaratory judgment action and on all counterclaims.

[4] There are additional elements of proof required of the Adamses, such as that the SCDOT equipment they claim injured Phyllis Adams constituted motor vehicles, but that element is not a ground of this motion for summary judgment.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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SC Bar No. 004238
E-Mail: charles.norris@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

*Counsel for Plaintiff*

Charleston, South Carolina

August 22, 2011

2011CP4600213

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| State Farm Fire and Casualty Co.,<br><br>Plaintiff,<br><br>v.<br><br>Phyllis Paden-Adams and Alonzo Adams,<br><br>Defendants. | Case No.: 2011-CP-46-0021<br><br>**DEFENDANTS' RESPONSES TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES** |

TO: CHARLES R. NORRIS, COUNSEL FOR PLAINTIFF:

Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams" or "Defendants") serve the following Responses to Supplemental Interrogatories upon Plaintiff State Farm Fire and Casualty Co. ("State Farm").

RESPONSES TO SUPPLEMENTAL INTERROGATORIES

10. Was any vehicle or other piece of equipment of the SCDOT being used for transportation purposes on Craig Road on either October 21 or October 22, 2009 at the time and place of Phyllis Adams' injury?

RESPONSE: No.

11. Were any of the SCDOT vehicles or other equipment listed by the defendants in responses to the plaintiff's interrogatory 9 being used on Craig Road on either October 21 or October 22, 2009 at the time and location of Phyllis Adams' injury?

RESPONSE: No.

EXHIBIT
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12. At the time of Phyllis Adams' injury on October 21 or October 22, 2009 did Phyllis Adams come into contact with any of the SCDOT vehicles or other equipment listed by the defendants in response to the plaintiff's interrogatory 9?

RESPONSE: No.

13. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams see any equipment or vehicles of the SCDOT being used on Craig Road at the site of her injury?

RESPONSE: No.

14. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams have to take any action to avoid collision with any piece of equipment or vehicle of the SCDOT?

RESPONSE: No.

15. If it is the defendants' position that the vehicles or equipment of the SCDOT listed in response to the plaintiff's interrogatory 9 were being used on Craig Road on October 21 or October 22, 2009 at or near the site of Phyllis Adams' accident state the name of the operator or operators of those vehicles or equipment.

RESPONSE: N/A

16. State how the equipment or vehicles of the SCDOT were negligently operated by the SCDOT on Craig Road at the site of Phyllis Adams' injury on either October 21 or October 22, 2009.

RESPONSE: Defendants object to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. As Plaintiff and its counsel are aware, Defendants have never asserted that SCDOT vehicles or equipment

were operated in a negligent manner on October 21, 2009 or October 22, 2009. Furthermore, issues of SCDOT's negligence are not properly part of this litigation.

17. Is it the defendants' position that all 8 vehicles or equipment listed by the defendants in answer to the plaintiff's interrogatory 9 caused Phyllis Adams' injury on either October 21 or October 22, 2009?

RESPONSE: No.

18. Set forth all damages of the defendants which the defendants claim have been caused by the plaintiff, as opposed to having been caused by the SCDOT.

RESPONSE: See answers to Plaintiff's first set of interrogatories.

June 10, 2011

s/ W. Keith Martens

Christi P. Cox
W. Keith Martens
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens & Ballou, LLC, certifies that the within DEFENDANTS' RESPONSES TO SUPPLEMENTAL INTERROGATORIES was served upon Plaintiff's Counsel and other parties of record on this date, by depositing same in the United States Mail, with sufficient postage affixed, and addressed as follows:

Charles R. Norris
Nelson Mullins Riley & Scarborough LLP
151 Meeting St.
Charleston, SC 29401-2239

Ronnie Craig, Esq.
Clawson & Staubes, LLC
756 Tyvola Rd., Suite 130
Charlotte, NC 28217

June 16, 2011.

K. Alex Kropp

K. Alex Kropp

2011-CP-46-03328

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|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK ) | |
| State Farm Fire and Casualty Co., ) | Case No.: 2011-CP-46-0021 |
| ) | |
| Plaintiff, ) | |
| ) | **DEFENDANTS' RESPONSES TO** |
| v. ) | **PLAINTIFF'S FIRST SET OF** |
| ) | **INTERROGATORIES** |
| Phyllis Paden-Adams and ) | |
| Alonzo Adams, ) | |
| ) | |
| Defendants. ) | |
| ) | |

TO: CHARLES R. NORRIS, COUNSEL FOR PLAINTIFF:

Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams" or "Defendants") serve the following Responses to First Set of Interrogatories upon Plaintiff State Farm Fire and Casualty Co. ("State Farm").

RESPONSES TO FIRST SET OF INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.

RESPONSE:

a. Phyllis Paden-Adams
4280 Marshall Road
Rock Hill, SC

Ms. Adams is a defendant in this action. She has knowledge concerning her automobile accident, the condition of Craig Road at the time of her accident and the

EXHIBIT
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damages she and her husband have suffered as a result of the accident. Ms. Adams' deposition was taken in the underlying action.

b. Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Mr. Adams is a defendant in this action. He has knowledge concerning the condition of Craig Road at the time of Ms. Adams' accident, Ms. Adams injuries and treatment, the damages that both plaintiffs have suffered as a result of the accident, and the purchase and renewal of the policies at issue in this case. Mr. Adams' deposition was taken in the underlying action.

c. Lauren Adams
C/O Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Ms. Adams is the Adams' adult daughter. She has knowledge concerning the nature and extent of the Adams' injuries and damages. No written or recorded statements have been taken.

d. Phillip Adams
C/O Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Phillip Adams is the Adams' adult son. He has knowledge concerning the nature and extent of the Adams' injuries and damages. No written or recorded statements have been taken.

e. Bradley Trout – Resident Maintenance Engineer
Clint Beaver – Assistant Resident Maintenance Engineer
Paul Elkins - Foreman
James Hardin – Emulsion Distributor Truck Operator
South Carolina Department of Transportation
P.O. Box 2932 CRS

Rock Hill, SC 29731

These individuals are employees of SCDOT, who have knowledge concerning SCDOT's chip seal operations on Craig Road in October 2009, and the use and operation of SCDOT motor vehicles to carry out that work. Each of these individuals was deposed in the underlying action.

e. Any witness identified by State Farm.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claims or defenses in the case.

RESPONSE:

a. State Farm Automobile Insurance Policy;

b. Correspondence between State Farm and Counsel for Adams regarding Adams' claim for benefits under UIM provisions of her policy, and State Farm's refusal to pay claim;

c. Deposition Transcripts of all witnesses deposed in underlying action;

d. SCDOT Daily Work Reports for Secondary Road 735 for October and November 2009;

e. SCDOT's automobile insurance policy covering vehicles used in chip seal of Craig Road on October 8, 2009;

f. SCDOT's certificates of registration for vehicles used in chip seal of Craig Road on October 8, 2009.

3. In cases involving personal injury set forth the names and address of all physicians who have treated the party and all hospitals to which the party has been

committed in connection with said injuries and also set forth a statement of all medical costs involved.

RESPONSE: While this is not a case involving personal injury, it relates to insurance coverage for personal injuries. As a result of her personal injuries, Ms. Adams received medical treatment and care from the following:

a. Ambu-Star, Inc.
P.O. Box 370
Cowpens, SC 29330

b. Carolina Rehabilitation
P.O. Box 96072
Charlotte, NC 28296-0072

c. NeuroSurgery & Spine
225 Baldwin Avenue
Charlotte, NC 28204-3109

d. Carolinas Medical Center
P.O. Box 32861
Charlotte, NC 28232-2861

e. CMC Faculty Physicians
P.O. Box 70826
Charlotte, NC 28272-0826

f. Peachtree Orthopedic
P.O. Box 105258
Atlanta, GA 30348-5258

g. CH Martin Company
Orthotics & Prosthetics
329 Marietta Street NW
Atlanta, GA 30313

h. Shepherd Center
Post Office Box 102421
Atlanta, GA 30368-0421

i. Shepherd Home Care DME
2020 Peachtree Road
Atlanta, GA 30309

j. Interim HealthCare
PO Box 890105
Charlotte, NC 28289-0105

k. Medic
P.O. Box 651547
Charlotte, NC 28265

l. Chesapeake Rehab Equipment
4347 Statesville Road
Charlotte, NC 28269

m. Ilderton Conversions
5518 Westpark Dr.
Charlotte, NC 28217

Itemized statement of medical costs for each provider is provided separately.

4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

RESPONSE: Defendants have been deprived of the underinsured motorist benefits of their policies with State Farm (either $400,000 or $500,000), plus incidental and consequential damages. The Adams' damages as a result of SCDOT's use, maintenance or operation of underinsured motor vehicles far exceeds that amount, and includes the amounts set forth below. Because State Farm has unreasonably refused to pay the Adams' claim for benefits, and unreasonably refused to investigate and adjust the claim, the Adams are entitled to sums in excess of their policy limits, including punitive damages and attorney's fees.

The Adams' damages exclusive of pain and suffering include:

a. Medical Expenses and Hospitalization to date – See attached spreadsheet.

SUBTOTAL - $ 449,579.03

b. Future Medical Expenses (present value)- $1,112,884.00 (est.)

| | | |
|---|---|---|
| c. | Destruction of Honda automobile - | $ 6,500.00 (est.) |
| d. | Cost of Toyota ramp van - | $ 20,000.00 |
| e. | Cost of wheel chair, bed and other durable medical equipment - | [Included in spreadsheet] |
| f. | Cost of modifications to home - | $5,000.00 (est.) |
| g. | Loss of earnings – | |
| | Phyllis - | $41,217.65 |
| | Alonzo - | [TBD] |
| h. | Future loss of earnings - | $1,250,000.00 |
| i. | Permanent impairment and disability | [TBD] |
| j. | Loss of enjoyment of life | [TBD] |
| k. | Attorney's fees and costs | [TBD] |
| | TOTAL - | $2,885,180.68++ |

5. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

RESPONSE:

J. Cloyce Darnell, P.E.
Centerline Consulting
P.O. Box 895
Shalimar, FL 32579

Mr. Darnell has been retained as an expert in chip seal applications and is the Adams' expert in the underlying action. To the extent expert testimony is required, Mr. Darnell can testify that SCDOT motor vehicles were "used or operated" by SCDOT for their intended purpose, but in a negligent manner in applying chip seal to Craig Road.

6. For each expert witness listed in response to interrogatory 5, set forth every opinion held by that expert concerning this litigation.

RESPONSE: Affidavit is being produced. On information and belief, Mr. Darnell has other opinions regarding the chip sealing of Craig Road, which are relevant to the underlying action, but are not relevant to this particular action.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See response to Interrogatory Number 1.

8. Was any vehicle or other piece of equipment of the SCDOT being used for transportation purposes at the time of Phyllis Adams' injury on October 21, 2009?

RESPONSE: Defendants object to this interrogatory on the grounds of relevance. Further responding, and subject to this objection, Defendants believe that the answer to this interrogatory is yes.

9. If the answer to interrogatory 8 is anything other than an unqualified "no," list every vehicle or other piece of equipment of the SCDOT that was being used for transportation purposes at the time of Phyllis Adams' injury on October 21, 2009 and identify the operator of that vehicle or piece of equipment.

RESPONSE: Defendants object to this interrogatory on the grounds of relevance, and further object on the grounds that the interrogatory is unduly broad and burdensome, not limited in geographic scope, and not reasonably calculated to lead to the discovery of admissible evidence. SCDOT operates vehicles on thousands, if not millions, of miles of

road throughout the state every day. Defendants could not possibly ascertain the information needed to respond to this interrogatory.

Further responding to Interrogatories 8 and 9, and subject to the stated objections, the Adams' claim for UIM benefits is based upon the fact that underinsured motor vehicles were operated by SCDOT in connection with SCDOT's chip sealing of Craig Road on October 8, 2009. Those vehicles were used, maintained and/or operated in a negligent manner and for their intended purpose, leaving the road in an unreasonably dangerous condition. Ms. Adams suffered severe personal injuries when she lost control of her vehicle while travelling the road on October 22, 2009. There were no independent acts of negligence to break the causal chain between SCDOT's negligent operation of its motor vehicles on October 8, 2009 and the resulting injuries to Ms. Adams, which were suffered on October 22, 2009. The Adams do not believe that the UIM policy, statute, or case law of this state require an underinsured vehicle to be physically present at the time a victim suffers injuries, provided the underinsured vehicle was being used in its intended manner when the negligent act occurred, and where the injuries are the natural and proximate result of the use, operation or maintenance of an underinsured vehicle. SCDOT vehicles that were being used in their intended manner when the negligent acts which gave rise to Ms. Adams' injuries occurred were:

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck, Standard Cab
Equipment No.: 010-01-0061

Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment Number: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-04-0113
Tag No.: SG87887

May 3, 2011

W. Keith Martens

Christi P. Cox
W. Keith Martens
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens & Ballou, LLC, certifies that the within DEFENDANTS' RESPONSES TO FIRST SET OF INTTEROGATORIES was served upon Plaintiff's Counsel and other parties of record on this date, by depositing same in the United States Mail, with sufficient postage affixed, and addressed as follows:

Charles R. Norris
Nelson Mullins Riley & Scarborough LLP
151 Meeting St.
Charleston, SC 29401-2239

Ronnie Craig, Esq.
Clawson & Staubes, LLC
756 Tyvola Rd., Suite 130
Charlotte, NC 28217

May 3, 2011.

K. Alex Kropp

K. Alex Kropp

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|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>PHYLLIS PADEN-ADAMS and ALONZO ADAMS,<br><br>Defendants. | ) | C/A No. 2011-CP-46-0021<br><br>NOTICE OF FILING AFFIDAVIT AND DISCOVERY RESPONSES |

TO: CHARLES R. NORRIS AND RONNIE F. CRAIG, ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants Phyllis Paden-Adams and Alonzo Adams have filed, and will introduce, the following in opposition to Plaintiff's Motion for Summary Judgment:

1. Affidavit of J. Cloyce Darnell, P.E.;
2. State Farm Car Policy (S.C.) – Policy Form 9940.3;
3. SCDOT Daily Work Report 5988928, Dated Oct. 8, 2009;
4. State Farm Answers to Interrogatories;
5. State Farm Responses to Requests for Admissions;
6. State Farm Responses to Requests for Documents (Bates Stamped Documents SF 0283 – SF 0301; SF 0389-SF 0404; SF 0463; SF 0468)

August 24, 2011

W. Keith Martens

W. Keith Martens
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ATTORNEYS FOR DEFENDANTS

STATE OF FLORIDA )

AFFIDAVIT OF J. CLOYCE DARNELL, P.E.

COUNTY OF OKALOOSA )

1. I am a 1967 graduate of Vanderbilt University, with a Bachelor of Science degree in Civil Engineering. I am licensed professional engineer, holding licenses in six states. I am the owner and president of Cloyce Darnell, Inc. d/b/a Centerline Consulting, a licensed engineering corporation located in Shalimar, Florida. I have over forty years experience as a practicing civil engineer, including over 18 years of experience related to chip seal applications. A copy of my CV is attached.

2. In March 2010, I was retained by Hamilton Martens & Ballou, LLC to provide expert consultation and analysis concerning a chip seal project constructed by SCDOT on October 8, 2009 along Craig Road (SCDOT Secondary Road 735) in York County, South Carolina. I learned that Phyllis Paden Adams, one of the Plaintiffs in this action, had lost control of her vehicle while traveling along Craig Road approximately 13 days after SCDOT had completed its chip seal project. After losing control of her vehicle, Ms. Adams crashed into an embankment along the road and suffered severe personal injuries. Ms. Adams reported that it felt like she was "driving on marbles" immediately before her accident.

In connection with my services as an expert in this case, I visited, inspected and photographed Craig Road on April 13, 2010. At the same time, I also visited another road that had been chip sealed by the same SCDOT crew on October 8, 2009.

I have also reviewed applicable SCDOT standards for chip seal applications, including Section 406 of the SCDOT 2007 STANDARD SPECIFICATIONS FOR HIGHWAY CONSTRUCTION and SCDOT's "Procedure Guide" for seal coat surfacing (chip seal) having an Effective Date of 07/01/04 (Trout Deposition Exhibit 3) concerning the October 8, 2009 chip sealing of Craig Road. I have also reviewed deposition testimony of the following SCDOT personnel: Resident Maintenance Engineer for York County; Assistance Resident Maintenance Engineer for York County; on-site foreman for its October 8, 2009 chip seal project; and the operator of the asphalt distributor truck for the October 8, 2009 chip seal project. Based upon my inspection of Craig Road, my review of the referenced documents and testimony, and my education, training and experience in chip seal applications, I am able to draw several conclusions regarding the chip seal application on Craig Road. My conclusions and opinions set forth in this affidavit are to a reasonable degree of professional certainty.

3. Chip sealing is an asphalt surface treatment process that consists of a layer of asphalt emulsion binder topped by a layer of embedded aggregate. When properly applied, chip seal provides, among other things, moisture protection to underlying asphalt pavement and additional vehicle skid resistance by its macrotexture surface.

4. The asphalt binder is typically applied to the road surface using a distributor vehicle equipped with an asphalt tank, pump, and a spray-bar designed to apply a uniform layer of asphalt emulsion binder at a specified application rate onto the road surface. The

spray-bar is equipped with several nozzles, which are designed to spray the liquid emulsion in a "fan-like" pattern onto the road's surface. In this case, SCDOT's crew used an asphalt distributor truck to apply the asphalt emulsion binder.

5. In applying an asphalt emulsion binder layer for chip seal, it is critical to ensure that a sufficient quantity of binder is applied uniformly to the road surface and at a uniform rate. SCDOT's Standard Specifications require the asphalt emulsion to be applied at rate of .28 - .35 gallons per square yard of road surface, and SCDOT's Procedure Guide specifies 0.25 – 0.35 gallons per square yard. SCDOT's Mr. Trout testified SCDOT's target rate of emulsion to be applied was 0.30 gallons per square yard.

To ensure a uniform application of binder across the road's surface, it is also critical that the spray-bar's nozzles are properly adjusted so that the spray pattern from each nozzle overlaps and forms a uniform layer of emulsion on the road's surface.

6. When binder is not applied at a sufficient rate, or where the spray-bar nozzles on the distributor vehicle are not properly adjusted, it is difficult or impossible to achieve an adequate uniform bonding surface for the aggregate. The result is often a failure of the chip seal application, with the aggregate becoming easily dislodged from the road's surface, or in some cases, never adhering at all. In severe failures, a large quantity of loose aggregate may be left on the roadway, creating a hazard to motorists.

7. Based upon the information I have reviewed in this case, I am of the opinion that the operator of SCDOT's asphalt distribution truck did not properly operate the distributor vehicle to ensure a uniform and adequate layer of emulsion was applied to Craig Road. SCDOT's work records reflect that its emulsion vehicle applied emulsion at the rate of only .22 gallons per square yard, or 27% less than SCDOT's targeted 0.30 gallons per

square yard and well below SCDOT's minimum specified application rate. Additionally, the operator of the emulsion distributor testified that he did not make any adjustments to the spray-bar nozzles to ensure a uniform spray pattern. In fact, he testified that he had not been trained regarding the proper procedure for adjusting the spray-bar nozzles.

8. My inspection of Craig Road in April 2010 revealed almost a complete failure of the chip seal application. There was a large quantity of aggregate that had been moved off the roadway by vehicular traffic and multiple areas on the road's surface where it was obvious that aggregate had been become dislodged or whipped off by traffic. My observations were consistent with what one would expect to see when asphalt binder is applied at an inadequate rate and without appropriate overlap of the spray-bar nozzle patterns.

9. Based upon my observations of Craig Road, the testimony of SCDOT's Resident Maintenance Engineer and members of its chip seal crew, SCDOT records that I reviewed, and Ms. Adams' description that it felt like she was "driving on marbles" when she lost control of her car, I am of the opinion that the operator of SCDOT's emulsion distributor did not properly operate that vehicle to apply a uniform layer of emulsion at a sufficient application rate. As a result, the aggregate applied over the binder was easily dislodged by traffic, including Ms. Adams' car. Ms. Adams' description of her accident is consistent with a quantity of loose aggregate being left upon the roadway following completion of the chip seal.

FURTHER AFFIANT SAYETH NOT.

DATED this 15th day of March, 2011

J. Cloyce Darnell, P.E.
Affiant

STATE OF FLORIDA }

COUNTY OF OKALOOSA }

This is to certify that on this 15th day of March, 2011, before me, the undersigned Notary Public in and for the State of Florida, duly commissioned and qualified, personally appeared J. Cloyce Darnell, to me known to be the person described in and who executed the within and foregoing Affidavit.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official the day and year first above written.

Annette C. Wolfe
Notary Signature

Print Name: Annette C. Wolfe

NOTARY PUBLIC in and for the State of Florida, residing at Hancock Bank in Shalimar.

My Commission expires: Sept 24, 2011

ANNETTE C. WOLFE
Notary Public - State of Florida
My Commission Expires Sep 24, 2011
Commission # DD 718924
Bonded Through National Notary Assn.

PLEASE READ YOUR POLICY CAREFULLY. IF YOU HAVE AN ACCIDENT, CONTACT YOUR STATE FARM AGENT OR ONE OF OUR CLAIM OFFICES AT ONCE. (SEE "REPORTING A CLAIM-INSURED'S DUTIES" IN THIS POLICY.)

Authorized Representative




State Farm Fire and Casualty Company, Home Office, Bloomington, Illinois

Georgia-South Carolina Office • 11350 Johns Creek Parkway • Duluth, GA 30098-0001 • Ph (770) 418-5413

# YOUR STATE FARM CAR POLICY

South Carolina
Policy Form 9940.3

# STATE FARM FIRE AND CASUALTY COMPANY
# BLOOMINGTON, ILLINOIS
# A STOCK COMPANY

## DEFINED WORDS
## WHICH ARE USED IN SEVERAL PARTS OF THE POLICY

We define some words to shorten the policy. This makes it easier to read and understand. Defined words are printed in boldface italics. *You* can pick them out easily.

***Bodily Injury*** – means bodily injury to a ***person*** and sickness, disease or death which results from it.

***Car*** – means a land motor vehicle with four or more wheels, which is designed for use mainly on public roads. It does not include:

1. any vehicle while located for use as a dwelling or other premises; or
2. a truck-tractor designed to pull a trailer or semi-trailer.

***Car Business*** – means a business or job where the purpose is to sell, lease, repair, service, transport, store or park land motor vehicles or trailers.

***Insured*** – means the ***person***, ***persons*** or organization defined as ***insureds*** in the specific coverage. If the information ***you*** have provided State Farm is incorrect or incomplete, or changes during the policy period, State Farm may decrease or increase the premium during the policy period as set out in the provision titled **Premium** of the Conditions section of this policy.

***Loss*** – defined in Sections IV and V.

***Motor Vehicle*** – defined in Sections II and III.

***Newly Acquired Car*** – means a ***replacement car*** or an ***additional car***.

***Replacement Car*** – means a ***car*** purchased by or leased to ***you*** or ***your spouse*** to replace ***your car***. This policy will only provide coverage for the ***replacement car*** if ***you*** or ***your spouse***:

1. tell us about it within 30 days after its delivery to ***you*** or ***your spouse***; and
2. pay us any added amount due.

***Additional Car*** – means an added ***car*** purchased by or leased to ***you*** or ***your spouse***. This policy will only provide coverage for the ***additional car*** if:

1. it is a ***private passenger car*** and we insure all other ***private passenger cars***; or
2. it is other than a ***private passenger car*** and we insure all ***cars*** owned by or leased to ***you*** or ***your spouse*** on the date of its delivery to ***you*** or ***your spouse***.

This policy provides coverage for the ***additional car*** only until the earlier of:

1. 12:01 A.M. Standard Time at the address shown on the declarations page on the 31st day after the delivery of the ***car*** to ***you*** or ***your spouse***; or
2. the effective date and time of a policy issued by us or any other company that describes the ***car*** on its declarations page.

***You*** or ***your spouse*** may apply for a policy that will provide coverage beyond the 30th day for the ***additional car***. Such policy will be issued only if both the applicant and the vehicle are eligible for coverage at the time of application.

If a ***newly acquired car*** is not otherwise afforded comprehensive or collision coverage by this or any other policy, this policy will provide the comprehensive or collision coverage not otherwise provided for the ***newly acquired car***. If

such coverage is provided by this paragraph, it will apply only until 12:01 A.M. Standard Time at the address shown on the declarations page on the sixth day after the delivery of the *car* to *you* or *your spouse*. Any comprehensive or collision coverage provided by this paragraph is subject to a deductible of $500.

*Non-Owned Car* – means a *car* not owned by, registered to or leased to:

1. *you*, *your spouse*;
2. any *relative* unless at the time of the accident or *loss*:
   a. the *car* currently is or has within the last 30 days been insured for liability coverage; and
   b. the driver is an *insured* who does not own or lease the *car*;
3. any other *person* residing in the same household as *you*, *your spouse* or any *relative*; or
4. an employer of *you*, *your spouse* or any *relative*.

*Non-owned car* does not include a:

1. rented *car* while it is used in connection with the *insured's* employment or business; or
2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy.

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

*Occupying* – means in, on, entering or alighting from.

*Person* – means a human being.

*Private Passenger Car* – means a *car*:

1. with four wheels;
2. of the private passenger or station wagon type; and
3. designed solely to carry *persons* and their luggage.

*Relative* – means a *person* related to *you* or *your spouse* by blood, marriage or adoption who resides primarily with *you*. It includes *your* unmarried and unemancipated child away at school.

*Spouse* – means *your* husband or wife who resides primarily with *you*.

*Temporary Substitute Car* – means a *car* not owned by or leased to *you* or *your spouse*, which replaces *your car* for a short time. Its use has to be with the consent of the owner. *Your car* has to be out of use due to its breakdown, repair, servicing, damage or *loss*. A *temporary substitute car* is not considered a *non-owned car*.

*Utility Vehicle* – means a motor vehicle with:

1. a pickup, panel or van body; and
2. a Gross Vehicle Weight of 10,000 pounds or less.

*You* or *Your* – means the named insured or named insureds shown on the declarations page.

*Your Car* – means the *car* or the vehicle described on the declarations page.

We, the State Farm Fire and Casualty Company, agree to insure *you* according to the terms of this policy based:

1. on *your* payment of premium for the coverages *you* chose; and
2. in reliance on *your* statements in these declarations.

*You* agree, by acceptance of this policy that:

1. the statements in these declarations are *your* statements and are true; and
2. we insure *you* on the basis *your* statements are true; and
3. this policy contains all of the agreements between *you* and us or any of our agents.

Unless otherwise stated in the exceptions space on the declarations page, *your* statements are:

1. Ownership. *You* are the sole owner of *your car*.
2. Insurance and License History. Neither *you* nor any member of *your* household within the past three years has had:
   a. vehicle insurance canceled by an insurer; or
   b. a license to drive or vehicle registration suspended, revoked or refused.
3. Use. *Your car* is used for pleasure and business.

## WHEN AND WHERE COVERAGE APPLIES

### When Coverage Applies

The coverages *you* chose apply to accidents and *losses* that take place during the policy period.

The policy period is shown under "Policy Period" on the declarations page and is for successive periods of six months each for which *you* pay the renewal premium. Payments must be made on or before the end of the current policy period. The policy period begins and ends at 12:01 A.M. Standard Time at the address shown on the declarations page.

### Where Coverage Applies

The coverages *you* chose apply:

1. in the United States of America, its territories and possessions or Canada; or
2. while the insured vehicle is being shipped between their ports.

The liability, personal injury protection, medical payments and physical damage coverages also apply in Mexico within 50 miles of the United States border. A physical damage coverage *loss* in Mexico is determined on the basis of cost at the nearest United States point.

Death, dismemberment and loss of sight coverage applies anywhere in the world.

If a creditor is shown in the declarations, we may pay any comprehensive or collision *loss* to:

1. *you* and, if unpaid, the repairer; or
2. *you* and such creditor, as its interest may appear, when we find it is not practical to repair *your car*; or
3. the creditor, as to its interest, if *your car* has been repossessed.

When we pay the creditor for *loss* for which *you* are not covered, we are entitled to the creditor's right of recovery against *you* to the extent of our payment. Our right of recovery shall not impair the creditor's right to recover the full amount of its claim.

The coverage for the creditor's interest only is valid until we terminate it. We will not terminate such coverage because of:

1. any act or negligence of the owner or borrower; or
2. a change in the ownership or interest unknown to us, unless the creditor knew of it and failed to tell us within 10 days; or
3. an error in the description of the vehicle.

The date of termination of the creditor's interest will be at least 10 days after the date we mail or electronically transmit the termination notice.

## REPORTING A CLAIM — INSURED'S DUTIES

**1. Notice to Us of an Accident or Loss**

The *insured* must give us or one of our agents written notice of the accident or *loss* as soon as reasonably possible. The notice must give us:

a. *your* name;

b. the names and addresses of all *persons* involved;

c. the hour, date, place and facts of the accident or *loss*; and

d. the names and addresses of witnesses.

**2. Notice to Us of Claim or Suit**

If a claim or suit is made against an *insured*, that *insured* must at once send us every demand, notice or claim made and every summons or legal process received.

**3. Other Duties Under the Physical Damage Coverages**

When there is a *loss*, *you* or the owner of the property also shall:

a. make a prompt report to the police when the *loss* is the result of theft or larceny;

b. protect the damaged vehicle. We will pay any reasonable expense incurred to do it;

c. show us the damage, when we ask;

d. provide all records, receipts and invoices or certified copies of them. We may make copies;

e. answer questions under oath when asked by anyone we name, as often as we reasonably ask, and sign copies of the answers.

**4. Other Duties Under Personal Injury Protection, Medical Payments, Uninsured Motor Vehicle, Underinsured Motor Vehicle and Death, Dismemberment and Loss of Sight Coverages**

Any *person* who suffers a *bodily injury* which results in a personal injury protection or medical payments coverage claim must notify us of the claim in writing as soon as reasonably possible after the *person's* first examination or treatment resulting from the *bodily injury*. Another *person* may give us the required notice on behalf of the injured *person*.

The *person* making claim also shall:

a. under personal injury protection, medical payments, uninsured motor vehicle, underinsured motor vehicle, and death, dismemberment and loss of sight coverages:

(1) give us all the details about the death, injury, treatment and other information we need to determine the amount payable.

(2) be examined by physicians chosen and paid by us as often as we reasonably may require. A copy of the report will be sent to the *person* upon written request. The *person*, or his or her legal representative if the *person* is dead or unable to act, shall authorize us to obtain all medical reports and records.

(3) answer questions under oath when asked by anyone we name, as often as we reasonably ask, and sign copies of the answers.

b. under the uninsured motor vehicle coverage:

(1) report a "hit-and-run" accident to the police within a reasonable time and to us within 30 days.

(2) let us see the insured *car* the *person occupied* in the accident.

(3) send us at once a copy of all suit papers if the *person* sues the party liable for the accident for damages.

c. under the uninsured motor vehicle and underinsured motor vehicle coverages, if making claim for damage to property, give us a sworn proof of loss within 60 days of the accident. This proof must state as to the property:

(1) who owns it and how much they own;

(2) the amount of any claims or liens;

(3) its value at the time of the accident; and

(4) details of the accident and any other insurance on it.

If we ask, the *insured* shall show us the property.

d. under the death, dismemberment and loss of sight coverage, give us proof of claim on forms we furnish.

**5. Insured's Duty to Cooperate With Us**

The *insured* shall cooperate with us and, when asked, assist us in:

a. making settlements;

b. securing and giving evidence;

c. attending, and getting witnesses to attend, hearings and trials; and

d. preserving his or her right to recover damages from others.

The *insured* shall not, except at his or her own cost, voluntarily:

a. make any payment or assume any obligation to others; or

b. incur any expense, other than for first aid to others.



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## SECTION I — LIABILITY — COVERAGE A

*You* have this coverage if "A" appears in the "Coverages" space on the declarations page.

We will:

1. pay damages which an *insured* becomes legally liable to pay because of:
   a. *bodily injury* to others, and
   b. damage to or destruction of property including loss of its use,

   caused by accident resulting from the ownership, maintenance or use of *your car*; and
2. defend any suit against an *insured* for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the accident which is the basis of the lawsuit.

In addition to the limits of liability, we will pay for an *insured* any costs listed below resulting from such accident.

1. Court costs of any suit for damages that we defend.
2. Interest on damages owed by the *insured* due to a judgment and accruing:
   a. after the judgment, and until we pay, offer or deposit in court, the amount due under this coverage; or
   b. before the judgment, where owed by law, and until we pay, offer or deposit in court the amount due under this coverage, but only on that part of the judgment we pay.
3. Premiums or costs of bonds:
   a. to secure the release of an *insured's* property attached under a court order;
   b. required to appeal a decision in a suit for damages if we have not paid our limit of liability that applies to suit; and
   c. up to $250 for each bail bond nee because of an accident or related t fic law violation.

   We have no duty to furnish or apply any bonds. The amount of any bond pay for shall not be more than our li of liability.
4. Expenses incurred by an *insured*:
   a. for loss of wages or salary up to $ per day if we ask the *insured* to att the trial of a civil suit.
   b. for first aid to others at the time of accident.
   c. at our request.

We have the right to investigate, negotiate settle any claim or suit.

### Coverage for the Use of Other Cars

The liability coverage extends to the use, by *insured*, of a *newly acquired car*, a *tempor substitute car* or a *non-owned car*.

### Who Is an Insured

When we refer to *your car*, a *newly acquired* or a *temporary substitute car*, *insured* mean

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* name the declarations;
4. any other *person* while using such a if its use is within the scope of consen *you* or *your spouse*; and

5. any other *person* or organization liable for the use of such a *car* by one of the above *insureds*.

When we refer to a *non-owned car*, *insured* means:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any *person* or organization which does not own or hire the *car* but is liable for its use by one of the above *persons*.

THERE IS NO COVERAGE FOR *NON-OWNED CARS*:

1. IF THE DECLARATIONS STATE THE "USE" OF *YOUR CAR* IS OTHER THAN "PLEASURE AND BUSINESS", OR

2. WHILE:

a. BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* WHILE THAT *PERSON* IS WORKING IN ANY *CAR BUSINESS*; OR

b. USED IN ANY OTHER BUSINESS OR OCCUPATION. This does not apply to a *private passenger car* driven or *occupied* by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

**Trailer Coverage**

1. Trailers designed to be pulled by a *private passenger car* or a *utility vehicle*, except those trailers in 2.a. below, are covered while owned or used by an *insured*.

Farm implements and farm wagons are considered trailers while pulled on public roads by a *car* we insure for liability.

These trailers are not described in the declarations, and no extra premium is charged.

2. The following trailers are covered only if described on the declarations page and extra premium is paid:

a. those trailers designed to be pulled by a *private passenger car* or a *utility vehicle*:

(1) if designed to carry *persons*; or

(2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or

(3) while used as premises for office, store or display purposes; or

b. any trailer not designed for use with a *private passenger car* or a *utility vehicle*.

THERE IS NO COVERAGE WHEN A TRAILER IS USED WITH A MOTOR VEHICLE OWNED OR HIRED BY *YOU* WHICH WE DO NOT INSURE FOR LIABILITY COVERAGE.

**Limits of Liability**

The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability – Coverage A – Bodily Injury, Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

The amount of property damage liability coverage is shown on the declarations page under "Limits of Liability – Coverage A – Property Damage, Each Accident".

We will pay damages for which an *insured* is legally liable up to these amounts.

The limits of liability are not increased because more than one *person* or organization may be an *insured*.

A motor vehicle and attached trailer are one vehicle. Therefore, the limits are not increased.

The liability coverage shall be excess over and shall not pay again any expenses paid under the personal injury protection or medical payments coverages.

**When Coverage A Does Not Apply**

In addition to the limitations of coverage in **Who Is an Insured** and **Trailer Coverage**:

THERE IS NO COVERAGE:

1. WHILE ANY VEHICLE INSURED UNDER THIS SECTION IS:
   a. RENTED OR LEASED TO OTHERS;
   b. USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to the use on a share expense basis of:
      (1) a *private passenger car*; or
      (2) a *utility vehicle*, if all passengers are riding in that area of the vehicle designed by the manufacturer of the vehicle for carrying passengers;
   c. BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS* TO THE EXTENT THE LIMITS OF LIABILITY OF THIS POLICY EXCEED THE LIMITS OF LIABILITY REQUIRED BY LAW. This does not apply to:
      (1) *you* or *your spouse*;
      (2) any *relative*;
      (3) any resident of *your* household; or
      (4) any agent, employee or partner of *you*, *your spouse*, any *relative* or such resident.

   This coverage is excess for (3) and ( above.

2. FOR ANY *BODILY INJURY* TO:
   a. A FELLOW EMPLOYEE WHI ON THE JOB AND ARISIN FROM THE MAINTENANCE C USE OF A VEHICLE BY A OTHER EMPLOYEE IN THE E PLOYER'S BUSINESS. *You* a *your spouse* are covered for su injury to a fellow employee.
   b. ANY EMPLOYEE OF AN *I SURED* ARISING OUT OF HIS C HER EMPLOYMENT. This do not apply to a household employ who is not covered or required to covered under any workers' compe sation insurance.

3. FOR:
   a. THE UNITED STATES OF AME ICA OR ANY OF ITS AGENCIE OR
   b. ANY *PERSON* WHO IS AN E PLOYEE OF THE UNITE STATES OF AMERICA OR AN OF ITS AGENCIES, IF THE PR VISIONS OF THE FEDERA TORT CLAIMS ACT APPLY.

4. FOR ANY DAMAGES TO PROPERT OWNED BY, RENTED TO, IN TH CHARGE OF OR TRANSPORTED B AN *INSURED*. But coverage appli to a rented
   a. residence; or
   b. private garage

   damaged by a *car* we insure.

5. FOR ANY OBLIGATION OF AN *INSURED*, OR HIS OR HER INSURER, UNDER ANY TYPE OF WORKERS' COMPENSATION OR DISABILITY OR SIMILAR LAW.

6. FOR LIABILITY ASSUMED BY THE *INSURED* UNDER ANY CONTRACT OR AGREEMENT.

**If There Is Other Liability Coverage**

**1. Policies Issued by Us to You, Your Spouse or Any Relative**

If two or more vehicle liability policies issued by us to *you*, *your spouse*, or any *relative* apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

**2. Other Liability Coverage Available From Other Sources**

Subject to item 1, if other vehicle liability coverage applies, we are liable only for our share of the damages. Our share is the per cent that the limit of liability of this policy bears to the total of all vehicle liability coverage applicable to the accident.

**3. Temporary Substitute Car, Non-Owned Car, Trailer**

Subject to items 1 and 2, if a *temporary substitute car*, a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle*

a. has other vehicle liability coverage on it; or

b. is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law,

then this coverage is excess over such insurance or self-insurance.

**4. Newly Acquired Car**

THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER VEHICLE LIABILITY COVERAGE ON A *NEWLY ACQUIRED CAR*.

**Motor Vehicle Compulsory Insurance Law or Financial Responsibility Law**

**1. Out-of-State Coverage**

If an *insured* under the liability coverage is in another state or Canada and, as a nonresident, becomes subject to its motor vehicle compulsory insurance, financial responsibility or similar law:

a. the policy will be interpreted to give the coverage required by the law; and

b. the coverage so given replaces any coverage in this policy to the extent required by the law for the *insured's* operation, maintenance or use of a *car* insured under this policy.

Any coverage so extended shall be reduced to the extent other coverage applies to the accident. In no event shall a *person* collect more than once.

**2. Financial Responsibility Law**

When certified under any law as proof of future financial responsibility, and while required during the policy period, this policy shall comply with such law to the extent required. The *insured* agrees to repay us for any payment we would not have had to make under the terms of this policy except for this agreement.

## SECTION II — PERSONAL INJURY PROTECTION — COVERAGE P AND MEDICAL PAYMENTS — COVERAGE C

### PERSONAL INJURY PROTECTION – COVERAGE P

*You* have this coverage if "P" with a number beside it appears in the "Coverages" space on the declarations page. "P" with a number beside it is *your* coverage symbol.

Check *your* coverage symbol with the Schedule in the **Limits of Liability** for the choice of coverage *you* made.

**What We Pay**

We will pay for *bodily injury* to an *insured*, caused by accident, resulting from the maintenance or use of a *motor vehicle* as a vehicle:

1. **Medical Expenses.** These are reasonable expenses incurred, for services furnished within three years of the date of the accident, for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing services, eyeglasses, hearing aids and prosthetic devices.

   REASONABLE MEDICAL EXPENSES DO NOT INCLUDE EXPENSES:

   FOR TREATMENT, SERVICES, PRODUCTS OR PROCEDURES THAT ARE:

   (1) EXPERIMENTAL IN NATURE, FOR RESEARCH, OR NOT PRIMARILY DESIGNED TO SERVE A MEDICAL PURPOSE; OR

   (2) NOT COMMONLY AND CUSTOMARILY RECOGNIZED THROUGHOUT THE MEDICAL PROFESSION AND WITHIN THE UNITED STATES AS A
   PROPRIATE FOR TH
   TREATMENT OF TH
   *BODILY INJURY*; OR

   b. INCURRED FOR:

   (1) THE USE OF THE
   MOGRAPHY, OR OTHI
   RELATED PROCEDURE
   OF A SIMILAR NATUR
   OR

   (2) THE PURCHASE
   RENTAL OF EQUIPME
   NOT PRIMARILY D
   SIGNED TO SERVE
   MEDICAL PURPOSE.

   Expenses are reasonable only if they a
   consistent with the usual fees charged
   the majority of similar medical provid
   in the geographical area in which t
   expenses were incurred for the speci
   medical service.

   Services are necessary only if the servic
   are rendered by a medical provider with
   the legally authorized scope of t
   provider's practice and are essential
   achieving maximum medical improv
   ment for the *bodily injury* sustained in t
   accident.

   We have the right to make or obtain
   utilization review of the medical e
   penses and services to determine if th
   are reasonable and necessary for the *bo
   ily injury* sustained.

   The *bodily injury* must be discovered a
   treated within one year of the date of t
   accident.

2. **Funeral Expenses.** These are funeral, burial or cremation expenses. Subject to the Aggregate Limit shown for *your* coverage symbol in the Schedule in **Limits of Liability,** the most we pay for Funeral Expenses is $3,000 per *person.*

If *your* coverage symbol is P1, P2, P3, P4, P5, P6 or P7, we will also pay for the following for *bodily injury* to an *insured*, caused by accident, resulting from the maintenance or use of a *motor vehicle* as a vehicle:

1. **Loss of Income.** This is 85% of an *insured's* actual loss of earnings from work due to *bodily injury* to the *insured.* This applies only if the *insured* was receiving earnings from work at the time of the accident. The loss must be incurred within three years of the date of the accident and while the *insured* is living.

2. **Essential Services Expenses.** These are reasonable expenses incurred for needed services the *insured* would have done for his or her family. This benefit applies only if the *insured* was not receiving earnings from work at the time of the accident. The expense must be incurred within three years of the date of the accident and while the *insured* is living.

**Definitions**

*Insured* – means:

1. *you, your spouse* and any *relative*:

   a. while *occupying* a *motor vehicle* other than a motorcycle; or

   b. when struck as a *pedestrian* by a *motor vehicle*; or

2. any other *person* while *occupying your car*, a *non-owned car*, a *newly acquired car* or a *temporary substitute car*, if Coverage P is carried on *your car*.

   The vehicle must be used by or with the permission of *you* or *your spouse.*

*Motor Vehicle* – means a vehicle or trailer of a kind required to be registered under South Carolina law.

*Pedestrian* – means a *person* not *occupying* a land motor vehicle.

**Deciding Amount**

The amount due under this coverage shall be decided by agreement between the *insured* and us. If there is no agreement, the amount due shall be decided by arbitration upon written request of the *insured* or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on us, the *insured*, any assignee of the *insured* and any *person* or organization with whom the *insured* expressly or impliedly contracts for the rendition of medical, essential or funeral services. The arbitrators shall not award punitive damages or other noncompensatory damages.

The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.

The arbitration shall take place in the county in which the *insured* resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

**If There Is Other Coverage**

1. No Duplication of Benefits

   No *insured* shall recover more than once for the same expense or loss under this or similar vehicle insurance or self-insurance.

2. If an *insured* sustains *bodily injury* while *occupying your car*, and *your car* is described on the declarations page of another policy providing personal injury protection coverage:

a. the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability; and

b. we are liable only for our share. Our share is that percent of the damages that the limit of liability of this coverage bears to the total of all such personal injury protection coverage applicable to the accident.

3. If an *insured* sustains *bodily injury* while *occupying* a *motor vehicle* which is not *your car* or a *newly acquired car*, and:

a. such vehicle is described on the declarations page of another policy providing personal injury protection coverage, or

b. its driver, other than *you*, *your spouse*, or any *relative*, is an *insured* under another policy,

coverage under this policy applies:

a. as excess to any similar coverage that applies to the vehicle or driver as primary coverage, but

b. only in the amount by which the limits of this coverage exceed the primary coverage.

If coverage from more than one policy applies as excess:

a. the total limit of liability shall not exceed the difference between the limit of liability of the coverage that applies as primary and the highest limit of liability of any one of the coverages that apply as excess; and

b. we will pay our share. Our share is that percent of the expense or loss that the excess coverage provided by this policy bears to the total of all applicable limits of liability of all personal injury protection coverages that apply as excess.

4. If an *insured* sustains *bodily injury*:

a. as a *pedestrian*; or

b. while *occupying* a *motor vehicle* which is not *your car* or a *newly acquired car*, and:

(1) such vehicle is not described on the declarations page of another policy providing personal injury protection coverage, and

(2) its driver is:

(i) *you* or *your spouse*; or

(ii) any other *person* who does not have personal injury protection coverage that covers the occupants of such vehicle;

then:

a. the total limits of liability under all policies issued by us shall not exceed that of the policy with the highest limit of liability; and

b. we will pay our share. Our share is that percent of the expense or loss that the applicable limit of liability of this policy bears to the total applicable limit of liability.

5. Coverage under this policy applies as excess over any benefits recovered under any workers' compensation law.

6. THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER PERSONAL INJURY PROTECTION COVERAGE ON A *NEWLY ACQUIRED CAR*.

**What Is Not Covered Under Coverage P**

1. THERE IS NO COVERAGE FOR *BODILY INJURY* TO ANY *PERSON*:

a. WHO INTENTIONALLY CAUSES AN ACCIDENT;

b. VOLUNTARILY *OCCUPYING* A *MOTOR VEHICLE* KNOWN BY THAT *PERSON* TO BE STOLEN;

c. WHILE COMMITTING A FELONY;



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d. WHILE ATTEMPTING TO ELUDE A POLICE OFFICER; OR

e. *OCCUPYING*, USING OR MAINTAINING A MOTORCYCLE.

2. THERE IS NO COVERAGE:

a. WHILE A *NON-OWNED CAR* IS USED:

(1) BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*; OR

(2) IN ANY OTHER BUSINESS OR JOB. This does not apply when the first *person* named in the declarations, his or her *spouse* or any *relative* is operating or *occupying* a *private passenger car.*

b. WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY ANY *MOTOR VEHICLE* OR TRAILER:

(1) DESIGNED MAINLY FOR USE OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR

(2) LOCATED FOR USE AS A RESIDENCE OR PREMISES; OR

(3) THAT RUNS ON RAILS OR CRAWLER-TREADS.

c. FOR *BODILY INJURY* DUE TO WAR OF ANY KIND.

d. FOR *BODILY INJURY*:

(1) SUSTAINED WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A VEHICLE OWNED BY OR LEASED TO *YOU*, *YOUR SPOUSE* OR ANY *RELATIVE*, WHICH IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY; OR

(2) SUSTAINED BY ANY *PERSON*, other than the first *person* named in the declarations, his or her *spouse* or their *relatives*, WHILE *OCCUPYING* A VEHICLE:

(i) RENTED OR LEASED TO OTHERS; OR

(ii) USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to a *private passenger car* used on a share expense basis.

**Limits of Liability**

1. The Most We Pay

The most we pay for all loss and expense due to *bodily injury* to one *insured* is the amount shown under "Aggregate Limit" in the Schedule for *your* coverage symbol.

A *motor vehicle* and attached trailer are one vehicle as respects limits.

2. Schedule

| Coverage Symbol | Aggregate Limit |
|---|---|
| P1 | $ 1,000 |
| P2 | 1,500 |
| P3 | 2,000 |
| P4 | 2,500 |
| P5 | 5,000 |
| P6 | 10,000 |
| P7 | 25,000 |
| P8* | 1,000 |
| P9* | 1,500 |
| P10* | 2,000 |
| P11* | 2,500 |
| P12* | 5,000 |
| P13* | 10,000 |
| P14* | 25,000 |

*Coverages P8 through P14 do not include loss of income and essential services expenses coverages.

## MEDICAL PAYMENTS – COVERAGE C

*You* have this coverage if "C" appears in the "Coverages" space on the declarations page.

### MEDICAL EXPENSES

We will pay reasonable medical expenses incurred, for *bodily injury* caused by accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices.

REASONABLE MEDICAL EXPENSES DO NOT INCLUDE EXPENSES:

1. FOR TREATMENT, SERVICES, PRODUCTS OR PROCEDURES THAT ARE:
   a. EXPERIMENTAL IN NATURE, FOR RESEARCH, OR NOT PRIMARILY DESIGNED TO SERVE A MEDICAL PURPOSE; OR
   b. NOT COMMONLY AND CUSTOMARILY RECOGNIZED THROUGHOUT THE MEDICAL PROFESSION AND WITHIN THE UNITED STATES AS APPROPRIATE FOR THE TREATMENT OF THE *BODILY INJURY*; OR
2. INCURRED FOR:
   a. THE USE OF THERMOGRAPHY OR OTHER RELATED PROCEDURES OF A SIMILAR NATURE; OR
   b. THE PURCHASE OR RENTAL OF EQUIPMENT NOT PRIMARILY DESIGNED TO SERVE A MEDICAL PURPOSE.

Expenses are reasonable only if they are consistent with the usual fees charged by the majority of similar medical providers in the geographical area in which the expenses were incurred for the specific medical service.

Services are necessary only if the services ar rendered by a medical provider within the le gally authorized scope of the provider's practic and are essential in achieving maximum medica improvement for the *bodily injury* sustained i the accident.

We have the right to make or obtain a utilizatio review of the medical expenses and services t determine if they are reasonable and necessar for the *bodily injury* sustained.

The *bodily injury* must be discovered and treate within one year of the date of the accident.

**Persons for Whom Medical Expenses Ar Payable**

We will pay medical expenses for *bodily injur* sustained by:

1. a. the first *person* named in the declara tions;
   b. his or her *spouse*; and
   c. their *relatives*.

   These *persons* have to sustain the *bodil injury*
   a. while they operate or *occupy* a vehicl covered under the liability section;
   b. through being struck as a *pedestria* by a motor vehicle or trailer.

   A *pedestrian* means a *person* not an oc cupant of a motor vehicle or trailer.
2. any other *person* while *occupying*:
   a. a vehicle covered under the liabilit coverage, except a *non-owned ca* Such vehicle has to be used by a *pe son* who is insured under the liabilit coverage; or
   b. a *non-owned car*. The *bodily injur* has to result from such *car's* operatic or occupancy by the first *perso* named in the declarations, his or h *spouse* or their *relatives*.

**Deciding Amount**

The amount due under this coverage shall be decided by agreement between the *person* making claim and us. If there is no agreement, the amount due shall be decided by arbitration upon written request of the *person* making claim or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on us, the *person* making claim, any assignee of the *person* making claim and any *person* or organization with whom the *person* making claim expressly or impliedly contracts for the rendition of medical services. The arbitrators shall not award punitive damages or other noncompensatory damages.

The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.

The arbitration shall take place in the county in which the *person* making claim resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

**Payment of Medical Expenses**

We may pay the injured *person* or any *person* or organization performing the services.

**Limit of Liability**

Medical Expenses. The amount of coverage for medical expenses, including funeral services, is shown on the declarations page under "Limit of Liability – Coverage C – Each Person". If the amount shown is $3,000 or more, the most we pay for funeral services is $3,000 per *person*.

A motor vehicle and attached trailer are one vehicle as respects limits.

**If There Are Other Medical Payments Coverages**

1. Non-Duplication

   No *person* for whom medical expenses are payable under this coverage shall recover more than once for the same medical expense under this or similar vehicle insurance.

2. Policies Issued by Us to You, Your Spouse or Relatives

   If two or more policies issued by us to *you*, *your spouse* or *your relatives* provide vehicle medical payments coverage and apply to the same *bodily injury* sustained:

   a. while *occupying* a *non-owned car*, a *temporary substitute car*, or

   b. as a *pedestrian*

   the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

3. Subject to items 1 and 2 above, if other vehicle medical payments, personal injury protection or similar coverage applies to *bodily injury*, this coverage is excess.

4. THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER VEHICLE MEDICAL PAYMENTS COVERAGE ON A *NEWLY ACQUIRED CAR*.

**What Is Not Covered Under Coverage C**

THERE IS NO COVERAGE:

1. WHILE A *NON-OWNED CAR* IS USED

   a. BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*; OR

   b. IN ANY OTHER BUSINESS OR JOB. This does not apply when the first *person* named in the declarations, his or her *spouse* or any *relative* is operating or *occupying* a *private passenger car*.

2. WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY ANY MOTOR VEHICLE OR TRAILER:

a. DESIGNED MAINLY FOR USE OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR

b. LOCATED FOR USE AS A RESIDENCE OR PREMISES; OR

c. THAT RUNS ON RAILS OR CRAWLER-TREADS.

3. FOR *BODILY INJURY* DUE TO WAR OF ANY KIND.

4. FOR MEDICAE EXPENSES FOR *BODILY INJURY*:

a. SUSTAINED WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A VEHICLE OWNED BY OR LEASED TO *YOU*, *YOU SPOUSE*, OR ANY *RELATIVE*, WHICH IS NOT INSURED UNDER THIS COVERAGE; OR

b. TO THE EXTENT WORKER COMPENSATION BENEFITS ARE REQUIRED TO BE PAYABLE; OR

c. SUSTAINED BY ANY *PERSON* other than the first *person* named in the declarations, his or her *spouse*, their *relatives*, WHILE *OCCUPYING* A VEHICLE:

(1) RENTED OR LEASED TO OTHERS; OR

(2) USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to a *private passenger car* used on a share expense basis.

## SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U AND UNDERINSURED MOTOR VEHICLE — COVERAGE W

### UNINSURED MOTOR VEHICLE – COVERAGE U

*You* have this coverage if "U" appears in the "Coverages" space on the declarations page.

We will pay damages for *bodily injury* or *property damage* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation or ownership of the *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured*.

*Uninsured Motor Vehicle* – means a land

1. a *motor vehicle*, the ownership, maintenance or use of which is

a. not insured or bonded for bodily injury and property damage liability at the time of the accident; or

b. insured or bonded for bodily injury and property damage liability at the time of the accident, but:

(1) the limits of liability are less than required by the *Financial Responsibility Act*;

(2) the insuring company denies coverage or is, or becomes, insolvent; or

(3) a cause of action for the *bodily injury* or *property damage* is barred by the South Carolina Tort Claims Act; or

2. a "hit-and-run" *motor vehicle* whose owner or operator remains unknown, but only if:

a. the *bodily injury* or *property damage* was caused by physical contact with the unknown vehicle, or the accident was witnessed by someone other than the owner or operator of the insured vehicle. The witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit; and

b. the *insured* was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

An *uninsured motor vehicle* does not include any motor vehicle owned by:

1. the *insured* who sustains *bodily injury* or *property damage*;

2. a self-insurer in accordance with the applicable provisions of law; or

3. the State or any of its political subdivisions when the vehicle is operated by a *person* with proper authorization.

## UNDERINSURED MOTOR VEHICLE – COVERAGE W

*You* have this coverage if "W" appears in the "Coverages" space on the declarations page.

We will pay damages for *bodily injury* or *property damage* an *insured*:

1. is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*; or

2. would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute.

The *bodily injury* or *property damage* must be caused by accident arising out of the operation or ownership of the *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*.

THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL APPLICABLE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY INSURANCE POLICIES OR BONDS THAT APPLY TO THE ***BODILY INJURY*** OR ***PROPERTY DAMAGE*** HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS; OR PAYMENT HAS BEEN MADE UNDER SUCH POLICIES OR BONDS UP TO ANY DAMAGES CAP OR LIMITATION IMPOSED BY STATUTE.

*Underinsured Motor Vehicle* – means a *motor vehicle*, as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in the *Financial Responsibility Act* and:

1. the amount of the insurance or bond is less than the amount of the *insured's* damages; or

2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

An *underinsured motor vehicle* does not include any *motor vehicle* while located for use as premises.

## Our Right to Defend

If the *insured* files suit against the owner or driver of the *underinsured motor vehicle*, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.

## Definitions

*Financial Responsibility Act* – means the Motor Vehicle Financial Responsibility Act of South Carolina.

*Motor Vehicle* – means a self-propelled vehicle or trailer designed for use on public roads.

A *motor vehicle* does not include:

1. traction engines;
2. road rollers;
3. farm tractors;
4. tractor cranes;
5. power shovels;
6. well drillers; or
7. electric trolleys.

*Property Damage* – means damage to property of the *insured*.

## Who Is an Insured

*Insured* – means:

1. *you*, *your spouse* and *relatives*;
2. any other *person* while *occupying* or using *your car*, a *newly acquired car* or a trailer attached to either, if such vehicle is:
   a. insured under the liability coverage; and
   b. being used with *your* consent; and
3. any *person* to the extent he or she may recover damages under a state wrongful death statute because of the death of an *insured* under 1. or 2. above.

## Payment of Any Amount Due

We will pay any amount due to the *insured* or the *insured's* representative.

## Limits of Liability

### Coverage U

1. Bodily Injury
   The amount of coverage is shown on th declarations page under "Limits of Liabili – U – Each Person, Each Accident". Und "Each Person" is the amount of coverage f all damages due to *bodily injury* to one *pe son*. "*Bodily injury* to one *person*" include all injury and damages to others resultin from this *bodily injury*. Under "Each Acc dent" is the total amount of coverage, subje to the amount shown under "Each Person" for all damages due to *bodily injury* to tw or more *persons* in the same accident.
2. Property Damage
   The amount of coverage is shown on th declarations page under "Limits of Liabili – U – Property Damage, Each Accident". This is the amount of coverage for all *prop erty damage* as the result of one accident.
3. The most we pay will be the lesser of:
   a. the difference between:
      (1) the amount of the *insured's* damage and
      (2) the amount paid to the *insured* by for any *person* or organization who or may be held legally liable for th *bodily injury* or *property damage*;
   b. the limit of liability of this coverage.

### Coverage W

1. Bodily Injury
   The amount of coverage is shown on th declarations page under "Limits of Liabili – W – Each Person, Each Accident". Und "Each Person" is the amount of coverage f all damages due to *bodily injury* to one *pe son*. "*Bodily injury* to one *person*" include

all injury and damages to others resulting from this *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

2. Property Damage

The amount of coverage is shown on the declarations page under "Limits of Liability – W – Property Damage, Each Accident". This is the amount of coverage for all *property damage* as the result of the accident.

3. Any amount payable under this coverage shall be reduced by any amount paid or payable under any:

a. workers' compensation;

b. disability benefits;

c. or similar law.

This does not reduce the limits of liability of this coverage.

4. The most we pay will be the lesser of:

a. the difference between:

(1) the amount of the *insured's* damages; and

(2) the amount paid to the *insured* by or for any *person* or organization who is or may be held legally liable for the *bodily injury* or *property damage*; or

b. the limit of liability of this coverage.

**Coverages U and W**

1. The limits of liability are not increased because more than one vehicle or *person* is insured under this policy.

2. Any amount paid under these coverages shall reduce any amount paid or payable to or for the *insured* under the liability coverage of this policy.

**When Coverages U and W Do Not Apply**

THERE IS NO COVERAGE:

1. UNDER COVERAGE U FOR ANY *INSURED* WHO, WITHOUT OUR WRITTEN CONSENT:

a. SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE*; AND

b. THEREBY IMPAIRS OUR RIGHT TO RECOVER OUR PAYMENTS.

2. TO THE EXTENT IT BENEFITS:

a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY.

b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION, OR DISABILITY BENEFITS OR SIMILAR LAW.

3. FOR *PROPERTY DAMAGE* FOR WHICH THE *INSURED* HAS BEEN PAID.

4. FOR *BODILY INJURY* OR *PROPERTY DAMAGE* TO THE EXTENT THE LIMITS OF LIABILITY OF COVERAGES U AND W UNDER THIS POLICY EXCEED THE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT* WHILE:

a. *YOU*,

b. *YOUR SPOUSE* OR

c. ANY *RELATIVE*

IS *OCCUPYING* A *MOTOR VEHICLE* OWNED BY OR LEASED TO:

a. *YOU*

b. *YOUR SPOUSE*, OR

c. ANY *RELATIVE*

IF IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*.

5. FOR *BODILY INJURY* OR *PROPERTY DAMAGE*:

a. WHILE AN *INSURED*, OTHER THAN:

(1) *YOU*;

(2) *YOUR SPOUSE*; OR

(3) ANY *RELATIVE*;

IS *OCCUPYING* A *MOTOR VEHICLE* OTHER THAN *YOUR CAR*, A *NEWLY ACQUIRED CAR*, OR A TRAILER ATTACHED TO EITHER.

b. IF ANY *INSURED* IS STRUCK AS A PEDESTRIAN BY A *MOTOR VEHICLE* OWNED BY OR LEASED TO:

(1) *YOU*;

(2) *YOUR SPOUSE*; OR

(3) ANY *RELATIVE*.

6. UNDER COVERAGE U, FOR THE FIRST $200 OF *PROPERTY DAMAGE* SUSTAINED BY EACH *INSURED* IN EACH ACCIDENT.

**If There Is Other Uninsured Motor Vehicle Coverage**

If:

a. *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* as a pedestrian; and

b. coverage from more than one of our policies issued to *you*, *your spouse* or a *relative* applies to the accident.

(1) the one policy with the highest limit shall apply in that limit; and

(2) each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if policies issued by other insurers apply, we are liable only for our share. Our share is that percent of the damages that the amount of the limit of liability that applies from this policy bears to the total of all such uninsured motor vehicle coverage that applies to the accident.

2. If:

a. the *insured* sustains *bodily injury* or *property damage* while *occupying* a *car* and

b. *your car* is described on the declarations page of another policy providing uninsured motor vehicle coverage:

(1) the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability; and

(2) we are liable only for our share. Our share is that percent of the damages that the limits of liability of this coverage bear to the total of all such uninsured motor vehicle coverage that applies.

3. If *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a *motor vehicle* owned by or leased to *you*, *your spouse* or *relative* which is not *your car* or a *newly acquired car*, this policy shall:

a. be excess; and

b. apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if other policies apply as excess, we are liable only for our share. Our share is that percent of the damages in excess of the limits of the primary coverage that the minimum amount required by the *Financial Responsibility Act* for bodily injury and property damage liability bears to the total of all uninsured motor vehicle coverage that applies as excess to the accident.

4. If *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a vehicle not owned by or leased to *you, your spouse* or any *relative*, this coverage applies as excess to any uninsured motor vehicle coverage which applies to the vehicle as primary coverage.

If coverage from more than one of our policies issued to *you, your spouse* or a *relative* applies to the accident:

a. the one policy with the highest limit shall apply in that limit; and

b. each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if policies issued by other insurers apply, we are liable only for our share. Our share is that percent of the damages that the amount of the limit of liability that applies from this policy bears to the total of all uninsured motor vehicle coverage that applies as excess to the accident.

**If There Is Other Underinsured Motor Vehicle Coverage**

1. If:

a. *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* as a pedestrian; and

b. coverage from more than one of our policies issued to *you, your spouse*, or a *relative* applies to the accident:

(1) the one policy with the highest limit shall apply in that limit; and

(2) each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if policies issued by other insurers apply, we are liable only for our share. Our share is that percent of the damages that the amount of the limit of liability that applies from this policy bears to the total of all underinsured motor vehicle coverage that applies to the accident.

2. If:

a. the *insured* sustains *bodily injury* or *property damage* while *occupying your car*; and

b. *your car* is described on the declarations page of another policy providing underinsured motor vehicle coverage:

(1) the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limits of liability; and

(2) we are liable only for our share. Our share is that percent of the damages that the limits of liability of this coverage bear to the total of all such underinsured motor vehicle coverage that applies.

3. If *you, your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a *motor vehicle* owned by or leased to *you, your spouse* or *relative* which is not *your car* or a *newly acquired car*, this policy shall:

a. be excess; and

b. apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if other policies apply as excess, we are liable only for our share. Our share is that percent of the damages in excess of the limits of the primary coverage that the minimum amount required by the *Financial Responsibility Act* for bodily injury and property damage liability bears to the total of all underinsured motor vehicle coverage that applies as excess to the accident.

4. If *you*, *your spouse* or a *relative* sustains *bodily injury* or *property damage* while *occupying* a vehicle not owned by or leased to *you*, *your spouse* or any *relative*, this coverage applies as excess to any underinsured motor vehicle coverage which applies to the vehicle as primary coverage.

If coverage from more than one of our policies issued to *you*, *your spouse* or a *relative* applies to the accident:

a. the one policy with the highest limit shall apply in that limit; and

b. each of the other policies we issued shall apply only in an amount equal to the minimum limits required by the *Financial Responsibility Act* for bodily injury and property damage liability.

Subject to the above, if policies issued by other insurers apply, we are liable only for our share. Our share is that percent of the damages that the amount of the limit of liability that applies from this policy bears to the total of all underinsured motor vehicle coverage that applies to the accident.

## SECTION IV — PHYSICAL DAMAGE COVERAGES

*Loss* – means, when used in this section, each direct and accidental loss of or damage to:

1. *your car*;
2. its equipment which is common to the use of *your car* as a vehicle;
3. clothes and luggage insured; and
4. a detachable living quarters attached or removed from *your car* for storage. Detachable living quarters includes its body and items securely fixed in place as a permanent part of the body. *You* must have told us about the living quarters before the *loss* and paid any extra premium needed.

**COMPREHENSIVE COVERAGE D.** *You* have this coverage if "D" appears in the "Coverages" space on the declarations page. If a deductible applies the amount is shown by the number beside "D".

1. Loss to Your Car. We will pay for *loss* to *your car* EXCEPT *LOSS BY COLLISION* but only for the amount of each such *loss* in excess of the deductible amount, if any. The deductible amount does not apply to *loss* to safety glass.

Breakage of glass, or *loss* caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, is payable under this coverage. *Loss* due to hitting or being hit by a bird or an animal is payable under this coverage.

2. We will repay *you* for transportation costs if *your car* is stolen. We will pay up to $16 per day for the period that begins 48 hours after *you* tell us of the theft. The period ends when we offer to pay for *loss*.

**COLLISION – COVERAGE G.** *You* have this coverage if "G" appears in the "Coverages" space on the declarations page. The deductible amount is shown by the number beside "G".

We will pay for *loss* to *your car* caused by *collision* but only for the amount of each such *loss* in excess of the deductible amount. The deductible amount does not apply to *loss* to safety glass. If the *collision* is with another motor vehicle insured with us, *you* do not pay *your* deductible if it is $100 or less as we pay it.

*Collision* – means *your car* upset or hit or was hit by a vehicle or other object.

**Clothes and Luggage – Comprehensive and Collision Coverages**

We will pay for *loss* to clothes and luggage owned by the first *person* named in the declarations, his or her *spouse*, and their *relatives*. These items have to be in or on *your car*. *Your car* has to be covered under this policy for:

1. Comprehensive, and the *loss* caused by fire, lightning, flood, falling objects, explosion, earthquake, or theft. If the *loss* is due to theft *YOUR* ENTIRE *CAR* MUST HAVE BEEN STOLEN; or

2. Collision, and the *loss* caused by *collision*.

We will pay up to $200 for *loss* to clothes and luggage in excess of any deductible amount shown for comprehensive or collision. $200 is the most we will pay in any one occurrence even though more than one *person* has a *loss*. This coverage is excess over any other coverage.

**Limit of Liability – Comprehensive and Collision Coverages**

The limit of our liability for *loss* to property or any part of it is the lower of:

1. the actual cash value; or

2. the cost of repair or replacement.

Actual cash value is determined by the market value, age and condition at the time the *loss* occurred. Any deductible amount that applies is then subtracted.

The cost of repair or replacement is based upon one of the following:

1. the cost of repair or replacement agreed upon by *you* and us;

2. a competitive bid approved by us; or

3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources, including non-original equipment manufacturers.

Any deductible amount that applies is then subtracted.

**Settlement of Loss – Comprehensive and Collision Coverages**

We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:

1. pay the agreed upon actual cash value of the property at the time of the *loss* in exchange for the damaged property. If the owner keeps the damaged property, we will deduct its value after the *loss* from our payment. The damaged property cannot be abandoned to us;

2. pay to:

   a. repair the damaged property or part,

   or

   b. replace the property or part.

   If the repair or replacement results in betterment, *you* must pay for the amount of betterment; or

3. return the stolen property and pay for any damage due to the theft.

If we can pay the *loss* under either comprehensive or collision, we will pay under the coverage where *you* collect the most.

When there is *loss* to *your car*, clothes and luggage in the same occurrence, any deductible will be applied first to the *loss* to *your car*. *You* pay only one deductible.

If the owner of the property and we cannot agree on the amount due, it shall be decided by an appraisal of the *loss* upon written request by either party. Each party shall select a competent appraiser. These two shall select a third appraiser. The written decision of any two appraisers shall be binding on each party. The cost of the appraiser shall be paid by the party who hired him or her. The cost of the third appraiser and other appraisal expenses shall be shared equally by both parties. We do not waive any of our rights by any act relating to appraisal. The terms of the provision titled **Limit of Liability – Comprehensive and Collision Coverages** are not subject to appraisal. If *you* give us *your* consent, we may move the damaged property, at our expense, to reduce storage costs during the appraisal process. If *you* do not give us *your* consent, we will pay only the storage costs which would have resulted if we had moved the damaged property.

The Settlement of Loss provision for comprehensive and collision coverages incorporates the Limit of Liability provision of those coverages.

**EMERGENCY ROAD SERVICE – COVERAGE H.** *You* have this coverage if "H" appears in the "Coverages" space on the declarations page.

We will pay the fair cost *you* incur for *your car* for:

1. mechanical labor up to one hour at the place of its breakdown;

2. towing to the nearest place where the necessary repairs can be made during regular business hours if it will not run;

3. towing it out if it is stuck on or immediately next to a public highway;

4. delivery of gas, oil, loaned battery, or tire. WE DO NOT PAY THE COST OF THE GAS, OIL, BATTERY OR TIRE;

5. locksmith services, up to one hour, to open *your car* if *your* key is lost, stolen or locked inside *your car*. We will only pay the cost of labor.

**CAR RENTAL EXPENSE – COVERAGE R.** *You* have this coverage if "R" appears in the "Coverages" space on the declarations page.

We will repay *you* up to $10 per day when *you* rent a *car* from a car rental agency or garage due to a *loss* to *your car* which would be payable under coverage D or G, starting:

1. when it cannot run due to the *loss*; or

2. if it can run, when *you* leave it at the shop for agreed repairs;

and ending when:

1. it has been repaired or replaced, or
2. we offer to pay for the *loss*, or
3. *you* incur 30 days rent,

whichever comes first.

Any car rent payable under Coverage R is REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE.

**CAR RENTAL AND TRAVEL EXPENSES – COVERAGE R1.** *You* have this coverage if "R1" appears in the "Coverages" space on the declarations page.

1. **Car Rental Expense.** We will:
   a. pay *you* up to $16 of the daily rental charge when *you* rent a *car* from a car rental agency or garage; or
   b. pay *you* $10 for each complete 24 hour period that *your car* is not drivable if *you* choose to not rent a *car*. *You* must report to us the period of time that *your car* was not drivable.

   We will pay only if *your car* is not drivable because of a *loss* which would be payable under coverage D or G.

   This applies during a period starting:
   a. when *your car* cannot run due to the *loss*; or
   b. if *your car* can run, when *you* leave it at the shop for agreed repairs;

   and ending:
   a. when it has been repaired or replaced, or
   b. (1) when we offer to pay for the *loss*, if *your car* is repairable; or
      (2) five days after we offer to pay for the *loss*, if *your car* was stolen and not recovered or we declared it a total loss;

   whichever comes first.

   Any car rent payable under this coverage is REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE.

2. **Travel Expenses.** If *your car* cannot run due to a *loss* which would be payable under coverage D or G more than 50 miles from home, we will repay *you* for expenses incurred by *you*, *your spouse* and any *relative* for:
   a. Commercial transportation fares to continue to *your* destination or home.
   b. Extra meals and lodging needed when the *loss* to *your car* causes a delay enroute. The expenses must be incurred between the time of the *loss* and *your* arrival at *your* destination or home or by the end of the fifth day, whichever occurs first.
   c. Meals, lodging and commercial transportation fares incurred by *you* or a *person you* choose to drive *your car* from the place of repair to *your* destination or home.

3. **Rental Car – Repayment of Deductible Amount Expense.** We will repay the expense of any deductible amount you are required to pay the owner under comprehensive or collision coverage in effect on a substitute *car* rented from a car rental agency or garage.

**Total Amount of Expenses Payable – Coverage R1**

1. The most we will pay for the total of the "Car Rental Expense" and "Rental Car – Repayment of Deductible Amount Expense" incurred in any one occurrence is $400.
2. The most we will pay for "Travel Expenses" incurred by all *persons* in any one occurrence is $400.

**CAR RENTAL AND TRAVEL EXPENSES – COVERAGE R2.** *You* have this coverage if "R2" appears in the "Coverages" space on the declarations page.

**1. Car Rental Expense.**

a. We will:

(1) pay 80% of the rental charge when *you* rent a *car* from a car rental agency or garage. "Rental charge" means the daily rental rate plus charges for mileage and related taxes; or

(2) pay *you* $10 for each complete 24 hour period that *your car* is not drivable if *you* choose to not rent a *car*. *You* must report to us the period of time that *your car* was not drivable.

We will pay only if *your car* is not drivable because of a *loss* which would be payable under coverage D or G.

b. Payment will be made for a period that:

(1) starts:

(a) when *your car* is not drivable due to the *loss*; or

(b) if *your car* is drivable, when *you* leave it at the shop for agreed repairs; and

(2) ends:

(a) when *your car* has been repaired or replaced; or

(b) when we offer to pay for the *loss*, if *your car* is repairable but *you* choose to delay repairs; or

(c) five days after we offer to pay for the *loss* if:

(i) *your car* was stolen and not recovered; or

(ii) we declare that *your car* is a total loss;

whichever comes first.

Any car rent payable under this covera is REDUCED TO THE EXTENT IT PAYABLE UNDER COMPREHENSIV

**2. Travel Expenses.** If *your car* is not drivab due to a *loss* which occurs more than 50 mil from home and which would be payab under coverage D or G, we will pay *you* expenses incurred by *you*, *your spouse* ar any *relative* for:

a. commercial transportation fares to co tinue to *your* destination or home;

b. extra meals and lodging needed when t *loss* to *your car* causes a delay enrout The expenses must be incurred betwee the time of the *loss* and *your* arrival *your* destination or home or by the end the fifth day, whichever occurs first; an

c. meals, lodging and commercial transpo tation fares incurred by *you* or a *perso you* choose to drive *your car* from t place of repair to *your* destination home.

**3. Rental Car – Repayment of Deductibl Amount Expense.** We will pay the ex pense of any deductible amount *you* ar required to pay the owner under compre hensive or collision coverage in effect on substitute *car* rented from a car rental agenc or garage.

**Total Amount of Expenses Payable – Cover age R2**

1. The most we will pay for "Car Rental Ex pense" incurred in any one occurrence $500.
2. The most we will pay for "Travel Expenses incurred by all *persons* in any one occur rence is $400.
3. The most we will pay for "Rental Car Repayment of Deductible Amount Expense" incurred in any one occurrence is $400.

**Trailer Coverage**

**1. Owned Trailer**

*Your* trailer is covered:

a. when it is described on the declarations page of the policy; and

b. for the coverages shown as applying to it.

**2. Non-Owned Trailer or Detachable Living Quarters**

Any physical damage coverage in force on *your car* applies to a non-owned:

a. trailer, if it is designed for use with a *private passenger car*; or

b. detachable living quarters unit;

used by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is $500.

A non-owned trailer or detachable living quarters unit is one that:

a. is not owned by or registered in the name of:

(1) *you, your spouse*, any *relative*;

(2) any other *person* residing in the same household as *you, your spouse* or any *relative*; or

(3) an employer of *you, your spouse* or any *relative*; and

b. has not been used or rented by or in the possession of *you, your spouse* or any *relative* during any part of each of the last 21 or more consecutive days. If *you* are insured by one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy; and

c. is not rented and used in connection with the employment or business of *you, your spouse* or any *relative*.

**Coverage for the Use of Other Cars**

The coverages in this section *you* have on *your car* extend to a *loss* to a *newly acquired car*, a *temporary substitute car* or a *non-owned car*. These coverages extend to a *non-owned car* while it is driven by or in the custody of an *insured*.

*Insured* – as used in this provision means:

1. the first *person* named in the declarations;

2. his or her *spouse*; or

3. their *relatives*.

**When the Physical Damage Coverages Do Not Apply**

THERE IS NO COVERAGE FOR:

1. A *NON-OWNED CAR*:

a. IF THE DECLARATIONS STATE THE "USE" OF *YOUR CAR* IS OTHER THAN PLEASURE AND BUSINESS;

b. WHILE BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* WHILE THAT *PERSON* IS WORKING IN ANY *CAR BUSINESS*; OR

c. WHILE USED IN ANY OTHER BUSINESS OR OCCUPATION. This does not apply to a *private passenger car* driven or *occupied* by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

2. ANY VEHICLE WHILE:

a. RENTED OR LEASED TO OTHERS; OR

b. USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to the use on a share expense basis.

3. *LOSS* TO ANY VEHICLE DUE TO:

a. TAKING BY ANY GOVERNMENTAL AUTHORITY;

b. WAR OF ANY KIND;

c. AND LIMITED TO WEAR AND TEAR, FREEZING, MECHANICAL OR ELECTRICAL BREAKDOWN OR FAILURE. This does not apply when the *loss* is the result of a theft covered by this policy. Nor does it apply to emergency road service; OR

d. CONVERSION, EMBEZZLEMENT OR SECRETION BY ANY *PERSON* WHO HAS THE VEHICLE DUE TO ANY LIEN, RENTAL, LEASE OR SALES AGREEMENT.

4. TIRES unless:

a. stolen, or damaged by fire or vandalism; or

b. other *loss* covered by this section happens at the same time.

5. TAPES OR DISCS FOR RECORDING OR REPRODUCING SOUND.

6. ANY LASER OR RADAR DETECTOR.

7. *YOUR CAR* WHILE SUBJECT TO ANY LIEN, LEASE OR SALES AGREEMENT NOT SHOWN IN THE DECLARATIONS.

**If There Is Other Coverage**

**1. Policies Issued by Us to You, Your Spouse or Any Relative**

If two or more vehicle policies issued by us to *you*, *your spouse*, or any *relative* apply to the same *loss* or occurrence, we will pay under the policy with the highest limit.

**2. Coverage Available From Other Sources**

Subject to item 1, if other coverage applies to the *loss* or expenses, we will pay only our share. Our share is the percent the limit of liability of this policy bears to the total of all coverage that applies.

**3. Temporary Substitute Car, Non-Owned Car or Trailer**

Subject to items 1 and 2, if a *temporary substitute car*, a *non-owned car* or trailer designed for use with a *private passenger car* has other coverage on it, then this coverage is excess.

**No Benefit to Bailee**

These coverages shall not benefit any carrier or other bailee for hire liable for *loss*.

## SECTION V — DEATH, DISMEMBERMENT AND LOSS OF SIGHT — COVERAGE S

If "S" is shown in the "Coverages" space on the declarations page each ***insured*** has the coverage.

We will pay the amount shown in the schedule that applies for death, or ***loss***, caused by accident. The ***insured*** has to be ***occupying*** or be struck by a land motor vehicle or trailer. The death or ***loss*** must be the direct result of the accident and not due to any other cause. The death or ***loss*** must occur within 90 days of the accident.

***Insured*** – means a ***person*** listed under "Persons Insured – Coverage S" on the declarations page.

***Loss*** – means the loss of:

1. the foot or hand, cut off through or above the ankle or wrist; or
2. the whole thumb or finger; or
3. all sight.

### The Most We Pay

The most we will pay because of the death of, or ***loss*** to, the ***insured***, except as provided below, is shown under "Amount" next to his or her name on the declarations page.

The amount shown in the schedule for death or ***loss*** is doubled for an ***insured*** who, at the time of the accident, is using the vehicle's complete restraint system as recommended by the vehicle's manufacturer.

If the ***insured*** dies as a result of this accident, any payment made or due for ***loss*** reduces the amount of the death payment.

### SCHEDULE

| If amount under S in the declarations is: | $5,000 | $10,000 |
|---|---|---|
| Death | $5,000 | $10,000 |
| ***Loss*** of: | | |
| hands; feet; sight of eyes; one hand & one foot; or one hand or one foot & sight of one eye | 5,000 | 10,000 |
| one hand or one foot; or sight of one eye | 2,500 | 5,000 |
| thumb & finger on one hand; or three fingers | 1,500 | 3,000 |
| any two fingers | 1,000 | 2,000 |

### Payment of Any Amount Due

We will pay any amount due:

1. to the ***insured***;
2. to a parent or guardian if the ***insured*** is a minor or an incompetent ***person***;
3. to the surviving ***spouse***; or
4. at our option, to any ***person*** or organization authorized by law to receive such payment.

Any payment made is to its extent a complete discharge of our obligations. We are not responsible for the way the money is used.

### Autopsy

We have the right to have an autopsy made where it is not forbidden by law.

**When Coverage S Does Not Apply**

THIS COVERAGE DOES NOT APPLY TO:

1. AN *INSURED* WHILE ON THE JOB, OPERATING, *OCCUPYING*, LOADING OR UNLOADING:
   a. AN EMERGENCY VEHICLE; OR
   b. A VEHICLE USED IN THE *INSURED'S* BUSINESS OR JOB.

   But 1.b does not apply if the vehicle is:
   (1) a *private passenger car* or school bus; or
   (2) of the pickup or van type, with a Gross Vehicle Weight of 10,000 pounds or less, while not used for delivery.
2. AN *INSURED* WHILE:
   a. ON THE JOB IN ANY *CAR BUSINESS*; OR
   b. *OCCUPYING* ANY:
      (1) VEHICLE WHILE BEING USED IN A RACE; OR
      (2) MILITARY VEHICLE
3. AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A MOTOR VEHICLE OR TRAILER:
   a. THAT RUNS ON RAILS O CRAWLER TREADS;
   b. DESIGNED FOR USE MAINL OFF PUBLIC ROADS WHILE OF PUBLIC ROADS; OR
   c. LOCATED FOR USE AS PREM ISES.
4. THE DEATH OF OR *LOSS* TO A *INSURED* DUE TO:
   a. DISEASE except pus forming infec tion due to *bodily injury* received i the accident; or
   b. SUICIDE OR ATTEMPTED SU CIDE WHILE SANE OR INSANE OR
   c. WAR OF ANY KIND.

## CONDITIONS

**1. Policy Changes**

**a. Policy Terms.** The terms of this policy may be changed or waived only by:

(1) an endorsement issued by us; or

(2) the revision of this policy form to give broader coverage without an extra charge. If any coverage ***you*** carry is changed to give broader coverage, we will give ***you*** the broader coverage without the issuance of a new policy as of the date we make the change effective.

**b. Change of Interest.** No change of interest in this policy is effective unless we consent in writing. However, if ***you*** die, we will protect as named insured, except under death, dismemberment and loss of sight coverage:

(1) ***your*** surviving ***spouse***;

(2) any ***person*** with proper custody of ***your car***, a ***newly acquired car*** or a ***temporary substitute car*** until a legal representative is qualified; and then

(3) the legal representative while acting within the scope of his or her duties.

Policy notice requirements are met by mailing the notice to the deceased named insured's last known address.

**c. Consent of Beneficiary.** Consent of the beneficiary under death, dismemberment and loss of sight coverage is not needed to cancel or change the policy.

**d. Joint and Individual Interests.** When there are two or more named insureds, each acts for all to cancel or change the policy.

**2. Suit Against Us**

There is no right of action against us:

a. until all the terms of this policy have been met; and

b. under the liability coverage, until the amount of damages an ***insured*** is legally liable to pay has been finally determined by:

(1) judgment after actual trial, and appeal if any; or

(2) agreement between the ***insured***, the claimant and us.

Bankruptcy or insolvency of the ***insured*** or his or her estate shall not relieve us of our obligations.

c. under personal injury protection, medical payments, any physical damage and death, dismemberment and loss of sight coverages, until 30 days after we get the ***insured's*** notice of accident or ***loss***.

d. under the underinsured motor vehicle coverage, unless copies of the pleadings in the action establishing liability are served upon us in the manner provided by law.

**3. Our Right to Recover Our Payments**

a. Underinsured motor vehicle and death, dismemberment and loss of sight coverage payments are not recoverable by us.

b. Under personal injury protection and medical payments coverages:

(1) we are subrogated to the extent of our payment to the right of recovery the injured ***person*** has against any party liable for the ***bodily injury***.

(2) if the *person* to or for whom we have made payment has not recovered from any party liable for the *bodily injury*, he or she shall:

(a) not hurt our rights to recover;

(b) keep these rights in trust for us;

(c) execute any legal papers we need; and

(d) when we ask, take action through our representative to recover our payments.

(3) if the *person* to or for whom we make payment recovers from any party liable for the *bodily injury*, that *person* shall hold in trust for us the proceeds of the recovery, and reimburse us to the extent of our payment.

c. To the extent allowed by law, under uninsured motor vehicle coverage:

(1) the right of recovery of the *insured* passes to us, to the extent of our payments;

(2) we shall pay our share of the reasonable costs of any recovery. Our share is the percent that our recovery bears to the total recovery. We reserve the right to select an attorney to handle the recovery;

(3) an *insured* making claim for *property damage* shall assign to us, to the extent of our payments, the right to any other compensation for it. We do not have to make any payment until the *insured* has done this.

d. Under all other coverages, the right of recovery of any party we pay passes to us. Such party shall:

(1) not hurt our rights to recover; and

(2) help us get our money back.

## 4. Cancellation

**How You May Cancel.** *You* may cance *your* policy by notifying us in writing of th date to cancel, which must be later than th date *you* mail or deliver it to us. We ma waive these requirements by confirming th date and time of cancellation to *you* in wri ing.

**How and When We May Cancel.** We ma cancel *your* policy by written notice, maile or delivered to *your* last known address. Th notice shall give the date cancellation is e fective.

If we cancel *your* policy effective during th first 90 days that the policy is in force, th cancellation notice will be mailed or deli ered to *you* at least 15 days before the ca cellation effective date.

If we cancel *your* policy effective after it h been in force for more than 90 days, ar notice of cancellation will be mailed or d livered to *you* at least:

a. 15 days before the cancellation effecti date if the cancellation is because *you* d not pay the premium; or

b. 20 days before the cancellation effecti date if the cancellation is because of a other reason.

The mailing of the notice shall be sufficie proof of notice.

Unless we cancel *your* policy effective d ing the first 90 days that the policy is in for we will not cancel *your* policy before the e of the current policy period unless:

a. *you* fail to pay the premium when due;

b. *you*, *your spouse*, any *relative* or a other *person* who usually drives *your c* has had his or her driver's license s pended or revoked:

(1) during the policy period or;

(2) if the policy is a renewal, during its policy period or the 90 days immediately preceding the last anniversary of the effective date of the policy.

**Return of Unearned Premium.** If *you* cancel, premium may be earned on a short rate basis. If we cancel, premium will be earned on a pro-rata basis. Any unearned premium may be returned at the time we cancel or within a reasonable time thereafter. Delay in the return of unearned premium does not affect the cancellation.

**5. Renewal**

Unless we mail or deliver to *you* a notice of cancellation or a notice of our intention not to renew the policy, we agree to renew the policy for the next policy period upon *your* payment of the renewal premium when due. It is agreed that the renewal premium will be based upon the rates in effect, the coverages carried, the applicable limits of liability, deductibles and other elements that affect the premium that apply at the time of renewal.

Other elements that may affect *your* premium include, but are not limited to:

a. drivers of *your car* and their ages and marital status;

b. *your car* and its use;

c. eligibility for discounts or other premium credits;

d. applicability of a surcharge based either on accident history, or on other factors.

A notice of our intention to not renew will be mailed or delivered to *your* last known address at least 30 days before the end of the current policy period. The mailing of it shall be sufficient proof of notice.

**6. Conformity With State Statutes**

If any terms of this policy are in conflict with the statutes of South Carolina, they are amended to conform to those statutes.

**7. Premium**

The premium for this policy may vary based upon the purchase of other insurance from one of the State Farm affiliated companies.

The premium for this policy is based on information State Farm has received from *you* or other sources. If the information is incorrect or incomplete, or changes during the policy period, *you* must inform State Farm of any changes regarding the following:

a. *your car*, or its use, including annual mileage;

b. the *persons* who regularly drive *your car*, including newly licensed family members;

c. *your* marital status; or

d. the location where *your car* is principally garaged.

*You* agree that if this information or any other information used to determine the premium is incorrect or incomplete, or changes during the policy period, we may decrease or increase the premium during the policy period based upon the corrected, completed or changed information. *You* agree that if the premium is decreased or increased during the policy period, State Farm will refund or credit to *you* any decrease in premium and *you* will pay for any increase in premium.

**8. Concealment or Fraud**

There is no coverage under this policy if *you* or any other *person* insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

## 9. Participating Policy

*You* are entitled to participate in a distribution of the earnings of the company as determined by our Board of Directors in accordance with the company's Articles of Incorporation, as amended.

In Witness Whereof, the State Farm Fire and Casualty Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois, and countersigned on the declarations page by a duly authorized representative of the Company.

Laura P. Sullivan
SECRETARY

PRESIDEN

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27 **R1 – Car Rental and Travel Expenses** – When *you* need to rent a *car* and pay extra travel expenses because of damage to *your car*.
28 **R2 – Car Rental and Travel Expenses** – When *you* need to rent a *car* and pay extra travel expenses because of damage to *your car*.
31 **S – Death, Dismemberment and Loss of Sight** – Pays for death of or certain injuries to *persons* named.

Conditions

33 1. Policy Changes
33 2. Suit Against Us
33 3. Our Right To Recover Our Payments
34 4. Cancellation
35 5. Renewal
35 6. Conformity With State Statutes
35 7. Premium
35 8. Concealment or Fraud
36 9. Participating Policy


Policy Form 9940.3

# SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
## HIGHWAY MAINTENANCE MANAGEMENT SYSTEM

Daily Work Report

| Organization Unit | District | Date | Report No. |
|---|---|---|---|
| 44612 YORK -EAST ROCK HILL SECT | FOUR | THURSDAY - OCT 08, 2009 | 5988928 |

| Activity | Work Description | Work County | Asset Group |
|---|---|---|---|
| 107 CHIP SEAL | SINGLE | | |

| Asset | | | | | | | Special Event | | Project Number |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | 446 |
| Type | Route | Aux | Begin MP | End MP | Length | Direction | Position | Off System Description | |

Units of Accomplishment: 34,762.000 UOM:SQUARE YARDS Accident:N

| | Labor | Equipment | Material | Total |
|---|---|---|---|---|
| Daily Cost: | 3,100. | 1,457. | 15,732. | 20,289. |

| Number | | Description | Org/UOM | Quantity | Hours | Unit Cost | DWR Cost |
|---|---|---|---|---|---|---|---|
| Labor | | | | | | | |
| 15410 | | BYERS JAMES W | 44613 | | 10.0 | | 177. |
| 48396 | | PATTERSON JOE S | 44621 | | 10.0 | | 261. |
| 49225 | | ELKINS WILLIAM P | 44612 | | 10.0 | | 331. |
| 58082 | | BRAZELL LEWIS E | 44614 | | 10.0 | | 326. |
| 60410 | | RAMSEY CHARLES A | 44614 | | 10.0 | | 220. |
| 60714 | | WALLACE JOEL JR | 44620 | | 10.0 | | 205. |
| 60962 | | IREY LANNY W | 44614 | | 10.0 | | 227. |
| 63523 | | HARDIN JAMES | 44612 | | 10.0 | | 206. |
| 64305 | | SMITH CARL G III | 44614 | | 10.0 | | 216. |
| 64654 | | MOSLEY EDWARD E | 44614 | | 10.0 | | 187. |
| 65233 | | DEAL MICKEY A | 44612 | | 10.0 | | 180. |
| 65945 | | BASS LAURENCE K | 44614 | | 10.0 | | 180. |
| 66530 | | LACHIMIA SCOTT M | 44612 | | 10.0 | | 169. |
| 66725 | | BRIGHT JAMES C | 44612 | | 10.0 | | 169. |
| Equipment | | | | | | | |
| 009-03-0369 | | 3/4 TON PICKUP STANDARD C | 44614 | | 10.0 | 6.20 | 62. |
| 009-03-0455 | | TRK, 3/4 TON UTILITY STAN | 44612 | | 10.0 | 6.15 | 62. |
| 010-01-0061 | | TRK, 1 TON PLATFORM STAND | 44614 | | 10.0 | 7.65 | 77. |
| 014-01-0031 | | TRK, >16.5 TN 3P DMP 8YD | 44613 | | 10.0 | 13.74 | 137. |
| 014-01-0154 | | TRK, >16.5 TN 2P DMP /8YD | 44612 | | 10.0 | 11.91 | 119. |
| 014-01-0167 | | TRK, >16.5 TON DISTRIBUTO | 44612 | | 10.0 | 11.44 | 114. |
| 014-04-0113 | | TRK, >16.5 TN 3P DMP 8YD | 44620 | | 10.0 | 13.74 | 137. |
| 014-07-0042 | | TRK, >16.5 TN 3P DMP 8YD | 44614 | | 10.0 | 13.74 | 137. |
| 079-04-0021 | | DISTRIBUTOR, ASPHALT-TRK | 44612 | | 10.0 | 10.20 | 102. |
| 163-08-0003 | | ROLLER, PNEUM WHEEL SELF | 86206 | | 10.0 | 7.69 | 77. |
| 171-01-0026 | | ROLLER TANDEM SLF PRP 4-6 | 44611 | | 10.0 | 6.87 | 69. |
| 171-04-0047 | | ROLLER TANDEM SLF PRP 4-6 | 41212 | | 10.0 | 6.87 | 69. |
| 181-01-0001 | | SPREADER, AGGREGATE, SELF | 44612 | | 10.0 | 18.87 | 189. |
| 237-04-0249 | | BACKHOE/LOADER, 4WD | 44614 | | 10.0 | 10.58 | 106. |
| Material | | | | | | | |
| 1009 | SP | STALITE AGGREGATE | TONS | 150.00 | | 40.75 | 6,113. |
| 1010 | DP | CRS 2P ASPHALT LIQUID | GALS | 7,758.00 | | 1.24 | 9,620. |

DWR Comment: CHIP SEAL



ROA 231

# SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION
## HIGHWAY MAINTENANCE MANAGEMENT SYSTEM
### Daily Work Report

| Organization Unit | District | Date | Report No. |
|---|---|---|---|
| 44612 YORK -EAST ROCK HILL SECT | FOUR | THURSDAY - OCT 08, 2009 | 5988928 |

| Activity | Work Description | Work County | Asset Group |
|---|---|---|---|
| 107 CHIP SEAL | SINGLE | | |

| Asset | Special Event | Project Number |
|---|---|---|
| | | 446 |

| Type | Route | Aux | Begin MP | End MP | Length | Direction | Position | Off System Description |
|---|---|---|---|---|---|---|---|---|

Units of Accomplishment: 34,762.000 UOM:SQUARE YARDS Accident:N

| | Labor | Equipment | Material | Total |
|---|---|---|---|---|
| Daily Cost: | 3,100. | 1,457. | 15,732. | 20,289. |

| Type | Route | Aux | Begin MP | End MP | Length | Direction | Position | Off System Description |
|---|---|---|---|---|---|---|---|---|
| Report No. | Labor Cost | Equipment Cost | Material Cost | Total Cost | Accomplishment | | | |
| Work County | Beat | | | Asset | | | | |
| | | | | Work Request Number | Requested Date | | | |
| S | 882 | 00 | .00 | 1.09 | 1.09 | BOTH | ROADWAY | |
| 5988936 | | | 1,161. | | 546. | | 5,893. | 7,600. 13,022.000 |
| YORK | | | | | | | | |
| S | 735 | 00 | .00 | 1.47 | 1.47 | BOTH | ROADWAY | |
| 5988941 | | | 1,538. | | 723. | | 7,804. | 10,065. 17,245.000 |
| YORK | | | | | | | | |
| S | 50 | 00 | .00 | .58 | .58 | BOTH | ROADWAY | |
| 5988951 | | | 401. | | 188. | | 2,034. | 2,623. 4,495.000 |
| YORK | | | | | | | | |

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| | ) | PLAINTIFF'S ANSWERS TO |
| vs. | ) | DEFENDANTS' INTERROGATORIES |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendant. | ) | |

Pursuant to SCRCP 33 the plaintiff answers the defendants' interrogatories dated February 4, 2011 as follows:

1. Give the name and, if known, the address and telephone number of each individual likely to have discoverable information that State Farm may use to support its claims or defenses in this action, and identify with reasonable specificity the subject of the information known by each individual identified in response to this interrogatory.

ANSWER:

(a) Derek Miller, Richard D. Findley, Lindsay Smith
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

These witnesses will testify as to the plaintiff's investigation of the defendants' claim for underinsurance motorist (UIM) proceeds and the amount of UIM proceeds available should there be coverage.

(b) Ronnie Craig
Clawson & Staubes, LLC
756 Tyvola Road, Suite 130
Charlotte, NC 28217
(704) 940-9128

Mr. Craig will testify as to his communications with the defendants' attorneys regarding the defendants' claim for UIM proceeds.

(c) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry will testify as to investigation of the scene of the accident.

(d) Robert Grubbs
11350 Johns Creek Parkway
Duluth, GA 30097

Robert Grubbs will testify as to which State Farm policies were in effect at the time of the accident in question.

(e) Sherri Helms
State Farm Agent Dennis Harrington
Rock Hill, SC

Ms. Helms is a member of the staff of State Farm agent Dennis Harrington. Ms. Helms will testify concerning cancellation of a policy on a 1994 Honda Accord prior to October 21, 2009.

2. Set forth a list of photographs, plats, sketches or other prepared documents in State Farm's possession that relate to the claims or defenses in the case.

ANSWER:

(a) Claim file marked Adams SF001 to Adams SF593;

(b) Underwriting file marked Adams SF Underwriting 001 to Adams SF Underwriting 51;

(c) Certified copies of insurance policies in effect on the date of the accident in question;

3. List the names and addresses of any expert witnesses State Farm has either retained or proposes to use as a witness at the trial of the case, and provide all information required to be disclosed pursuant to S.C. Rule 26.

ANSWER: The plaintiff objects to identifying expert witnesses retained as consultants. The plaintiff will timely supplement this interrogatory should it propose to use an expert witness at trial.

4. Give the name, address, job title, and job description of each and every person employed or retained by State Farm who reviewed the claim, or who reviewed the policy in order to assess the claim. In responding to this interrogatory, also provide the date of such review, identify the nature and scope of such review, and identify all documents associated with such review.

ANSWER:

(a) Lindsay Smith – claim representative
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mrs. Smith's job is to evaluate claims.

(b) Richard D. Findley – team manager
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mr. Findley's job is to manage claim representatives who evaluate claims and determine what coverages apply to claims.

(c) Derek Miller – section manager
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mr. Miller's job description is supervision of certain claims and determination of coverages applicable to claims.

(d) Richard J. Leigh
State Farm Insurance Company
One State Farm Plaza, B-3
Bloomington, IL 61710-0001

Richard J. Leigh is a claim consultant who considers and evaluates claims. Mr. Leigh reviewed the declaratory judgment action.

(e) Ronnie Craig
Clawson & Staubes, LLC
756 Tyvola Road, Suite 130
Charlotte, NC 28217
(704) 940-9128

Mr. Craig is an attorney with Clawson & Staubes in its Charlotte, North Carolina office and was retained by the plaintiff to file this lawsuit. The plaintiff objects on the ground of attorney work product privilege and attorney client privilege to stating the nature and scope of Mr. Craig's review and what documents he reviewed.

Mrs. Smith, Mr. Findley and Mr. Miller reviewed information on the facts of the defendants' claim.

(f) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry took photographs of the accident scene and reported to the plaintiff concerning a general description of the scene of the accident. Mr. Faulkenberry is a claim representative who investigates claims.

As for the date of review and the nature and scope of the review by Mr. Miller, Mr. Findley and Mrs. Smith, pursuant to SCRCP 33(c) the plaintiff refers to the non-privileged parts of the claim file marked Adams SF001 to Adams SF593.

5. Give the name, address, job title, job description and date(s) of inspection for each and every person employed or retained by State Farm who inspected the vehicle or the site of the collision in conjunction with the claim.

ANSWER:

(a) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry's job title is claim representative. His job description is investigation of insurance claims. Mr. Faulkenberry inspected the site of the collision on October 29, 20101.

6. Set forth Lindsay Smith's complete employment history with State Farm. Include the following information:

(a) Date of hire;

(b) Identify dates and description of all job positions held while employed by State Farm and basis of compensation;

(c) Identify, date(s) and description of all training courses completed while employed by State Farm;

(d) Identify, date(s) and description of any training courses started, but not completed while employed by State Farm;

(e) Amount and method of compensation and date(s) and reason(s) for any and all changes in compensation; and

(f) Date of termination, if applicable.

ANSWER:

(a) June 22, 2001

(b) Claim representative. Basis of compensation is job title, length of employment and customer service.

(c) Attached and incorporated herein is Lindsay Smith's Education and Training Record. See documents marked PADAM 013 PROD to PADAM 016 PROD.

(d) Mrs. Smith did not fail to complete any training course she started.

(e) The plaintiff objects to disclosing the amount of Mrs. Smith's compensation on the ground that this information is privileged and confidential and is not reasonably calculated to lead to the discovery of admissible evidence. Further objections set forth in response to interrogatory 7 are incorporated herein. The method of compensation is that Mrs. Smith is paid bi-monthly by direct deposit check. During Mrs. Smith's employment with the plaintiff her compensation has been increased as a result of satisfactory performance reviews.

(f) Not applicable.

7. If Lindsay Smith has received any performance-based bonus(es) or pay raises from 2005 to present, provide the following information:

(a) The date(s) of all bonus(es) or pay raise(s);

(b) The amount(s) of such bonus(es) or pay raise(s), either in dollars or as a percentage of Ms. Smith's salary;

(c) The reason(s) for such bonus(es) or pay raise(s);

(d) A detailed description of the criteria considered for each bonus or pay raise.

ANSWER: The plaintiff objects to this interrogatory as it is not reasonably calculated to lead to the discovery of admissible evidence. The plaintiff has no incentive program, goal or measure of job performance that is based on reduction of claim indemnity costs, pending claims, allocated adjustment expenses or other claim

statistics as a condition for promotion or merit pay increase. The plaintiff also objects on the ground this interrogatory seeks irrelevant personal information of an employee who is not named as a party to this litigation and is invasive of that employee's personal privacy. Reserving these objections the plaintiff answers as follows:

(a) May 2005, May 2006, May 2007, May 2008; May 2009, May 2010.

(b) The plaintiff objects to providing this information on the same ground as it objected to interrogatory 5(e) concerning the amount of Mrs. Smith's compensation.

(c) Length of employment and performance reviews.

(d) Length of employment and performance reviews.

8. If Lindsay Smith has received any job performance review(s) from 2005 to present, provide the following information regarding each review:

(a) All criteria on which Lindsay Smith's job performance was reviewed or evaluated, including any specific objective or financial goals established for Ms. Smith; and

(b) The job performance rating awarded to Ms. Smith as a result of such review.

ANSWER:

(a) As stated in response to interrogatories 7(c) and 7(d), any increases in compensation were based upon length of employment and performance reviews. Mrs. Smith has no financial goals. As for specific objectives, Mrs. Smith's job is to efficiently and fairly handle claims.

(b) Mrs. Smith's job performance rating is level II.

9. Identify the name(s), job title(s), job description(s) and primary office location(s) for Lindsay Smith's immediate supervisor or manager.

ANSWER: As of March 21, 2011 Mrs. Smith's immediate supervisor is Phyllis Eledge. Prior to March 21, 2011 and during the pendency of the defendants' claim Mrs. Smith's immediate supervisor was Richard D. Findley. Mr. Findley's job title is team manager. His job description is set forth in response to interrogatory 4. Mr. Findley's primary office location is Columbia, South Carolina.

10. Set forth in detail the policies and procedures that an employee of State Farm holding Lindsay Smith's position is required to follow prior to denying any claim for benefits under an automobile or property policy.

ANSWER: The plaintiff objects to interrogatory 10 as it is overly broad in scope, unrestricted in time frame and geography and is not reasonably calculated to lead to the discovery of admissible evidence as it seeks information far beyond that pertaining to the handling of claims in which coverage for UIM benefits is at issue. The plaintiff handles each claim according to its individual merits and unique set of circumstances as prescribed by individual state and federal law. Additionally, Lindsay Smith has not denied the defendants' claim. Notwithstanding and without waiving these objections, pursuant to SCRCP 33(c) the plaintiff refers to the following documents being produced: PADAM 018 PROD to PADAM 069 PROD.

11. Set forth in detail each and every reason the claim was denied.

ANSWER: The claim has not been denied. Instead, Lindsay Smith's letter of April 28, 2010 states the defendants' claim "does not appear to qualify as an underinsured claim." The plaintiff filed this declaratory judgment action to obtain a ruling on this issue. The plaintiff does not believe the defendants' claim qualifies as an underinsured claim as there was no UIM vehicle involved in causing the accident which

injured Phyllis Paden-Adams. Additionally, one of the policies under which the defendants claim coverage was cancelled at the defendants' request prior to the accident in question.

12. Set forth in detail each and every action taken by State Farm prior to April 28, 2010 to review the claim and/or facts and circumstances of the collision. This request specifically includes but is not limited to any efforts to: review the policy; review the collision site; inspect the vehicle; contact or interview witnesses; review legal authority; obtain/consult an expert (legal, or otherwise); request/review medical records; request/review SCDOT records; etc.

ANSWER: Pursuant to SCRCP 33(c) the plaintiff refers to the non-privileged parts of its claim file produced in conjunction with the response. The plaintiff objects on the ground of attorney client privilege and on the ground of the attorney work product privilege to revealing communications with counsel for State Farm. The plaintiff also objects to disclosing information regarding experts who have been consulted.

13. Set forth in detail any and all policies or procedures in place within State Farm which govern the review of a claim and/or the steps necessary before denying a claim for benefits under an automobile policy.

ANSWER: See response to interrogatory 10 which is incorporated herein.

14. If any internal department, committee or group reviewed State Farm's decision to deny the claim, provide the following information:

(a) The name and composition and identity of the members composing the department, committee or group;

(b) Each and every date the department, committee or group met to consider the claim, or State Farm's decision to deny the claim;

(c) Whether any minutes or notes were made during such meeting; and

(d) The content or substance of such minutes or notes.

ANSWER:

(a) The plaintiff has not denied the defendants' claim for UIM benefits. Instead, the plaintiff has initiated a declaratory judgment action for a decision on whether the circumstances of Phyllis Paden-Adams' October 2009 accident qualifies for UIM coverage. Representatives of the plaintiff do not believe that the facts and circumstances of Phyllis Paden-Adams' October 2009 accident qualify for UIM coverage, nor is it believed that even if coverage exists it exists in the amount claimed by the defendants. The persons involved in the decision to initiate a declaratory judgment action were Lindsay Smith, Richard D. Findley, Derek Miller and Richard Leigh.

(b) Pursuant to SCRCP 33(c) the plaintiff refers to the claim file being produced for communications.

(c) See answer to interrogatory 14(b).

(d) See answer to interrogatory 14(b) and 14(c).

15. Set forth State Farm's current net worth, or provide a copy of its most recent financial statement provided to its shareholders or members, or to any regulatory or licensing agency.

ANSWER: The plaintiff does not provide a financial statement to its shareholders other than financial statements contained in its Annual Statement. Attached as PADAM 009 PROD to PADAM 012 PROD is the plaintiff's Annual

Statement for the year ending December 31, 2009. The Annual Statement for the year ending December 31, 2010 is not yet available.

16. Set forth the total amount of State Farm's current invested reserves.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles a loss reserve is a liability, not a fund. No funds are transferred and no investment is made as the result of setting a reserve. The plaintiff also objects to interrogatory 16 because it is not reasonably calculated to lead to the discovery of admissible evidence.

17. For 2009, set forth the total amount of State Farm's net profits from its auto insurance lines.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles the plaintiff reports its net income or loss as an entity and does not calculate net income or loss by line of insurance or policy type.

18. For 2009, set forth the total amount of State Farm's net profits from operations within the State of South Carolina.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles the plaintiff reports its net income or loss as an entity and does not calculate net income or loss by state or other geographical area.

19. Cite with specificity any and all provisions of the policy upon which State Farm relied in making its April 28, 2010 and May 14, 2010 determination that the claim was not covered by the policy.

ANSWER: Lindsay Smith's letters stated the claim did not appear to qualify as an underinsured claim. See definition of motor vehicle on page 20 of Form 8403. See also, page 19 of Form 8403 that a bodily injury for purposes of UIM coverage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle.

20. Cite with specificity any and all judicial or statutory authority upon which State Farm relied in making its April 28, 2010 and May 14, 2010 determination that the claim was not covered by the policy.

ANSWER: As stated previously, the letters in question did not state that claim was not covered by the policy. Instead, the letters referenced in this interrogatory stated that the claim did not appear to qualify as an underinsured motor vehicle. In making this statement the plaintiff relied upon its general understanding of South Carolina law with regard to underinsurance motorist claims.

21. For the period of 2005 to present, if any audit, review or survey has been conducted of the claims handling practices of Lindsay Smith or of any office or region to which Lindsay Smith was assigned, provide the following information:

(a) The date(s) on which all audits, reviews or surveys were conducted;

(b) The identity of the person, office or region audited, reviewed or surveyed;

(c) The criteria by which the audit, review or survey evaluated the claims handling practices, including any specific objective or financial criteria;

(d) The results of the audit, review or survey, including any specific objective or financial findings or conclusions.

ANSWER: The plaintiff objects to interrogatory 21 because it is overly broad in scope, time and subject matter and is not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory would require the plaintiff to produce highly confidential, self evaluative materials which are immaterial, irrelevant and wholly unrelated to the handling of the defendants' claim for UIM benefits. The interrogatory also calls for the plaintiff to produce confidential, proprietary business information including information subject to the attorney work product and/or attorney client privileges. Without waiving these objections and subject to these objections see the answer to interrogatory 8(a) concerning Lindsay Smith's job and the reasons for increases in compensation.

22. Set forth all evidence (factual or otherwise) which State Farm contends as supports for and/or which State Farm relied upon in asserting its allegations contained in paragraphs 21 and 22 of its complaint, including the source of such evidence.

ANSWER: The information relied upon by the plaintiff for support of the allegation in paragraphs 21 is the SCDOT equipment and vehicles were not in operation and were not being used for transportation at the time of the accident in question. It is also questionable whether the specific equipment which allegedly caused the condition of the road constituted a motor vehicle. Pursuant to SCRCP 33(c) the plaintiff also refers to the non-privileged parts of its claim file being produced. As for

the allegations in paragraph 22 of the complaint, State Farm is agreeable to deleting from the complaint allegations pertaining to who was at fault in causing the accident.

23. There is no interrogatory 23.

24. Identify any and all claims or other lawsuits within the past 10 years in which State Farm was either involved as an uninsured or underinsured carrier, and in which SCDOT or any other governmental entity subject to the Tort Claims Act in South Carolina, was a named party.

ANSWER: The plaintiff objects to the first interrogatory 24 as it is not reasonably calculated to lead to the discovery of admissible evidence. State Farm handles each claim according to its individual merits and unique set of circumstances and information related to disparate claims and mere allegations within lawsuits arising from such claims do not prove the truth of the matter asserted in complaints in those matters or in the instant case. To the extent the first interrogatory 24 calls for information within the attorney work product or attorney client privileges such information is confidential. Additionally, the first interrogatory 24 calls upon the plaintiff to furnish the defendants with personal information of policyholders who are not parties to this litigation and who have expectations that their personal information and their personal privacy rights will be safeguarded by their insurer. Additionally, to the extent the first interrogatory 24 calls for the production of lawsuit information, this is a matter of public record which the defendants can acquire themselves. Finally, the first interrogatory 24 is objected to on the ground of burdensomeness as the plaintiff has no way of furnishing this information other than a manual review of all claims or

lawsuits in the past 10 years to determine whether the SCDOT or other governmental entity was a named party.

24. For each request to admit that was answered by anything other than an unqualified admission, set forth each and every reason for such denial.

ANSWER: Answering the second interrogatory 24 the plaintiff refers to the responses to the defendants' requests to admit.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Charleston, SC 29401-2239
(843) 853-5200

Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

April 5, 2011

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | PLAINTIFF'S RESPONSES TO DEFENDANTS' REQUESTS TO ADMIT |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendant. | ) | |

Pursuant to SCRCP 36 the plaintiff responds to the defendants' request to admit dated February 4, 2011 as follows:

1. Admit that the policy attached hereto as Exhibit A is a true and accurate copy of the insurance policy covering the defendants' 2004 Honda Accord, and which was effective on October 8, 2009 through and including October 21, 2009.

RESPONSE: Responding to paragraph 1, the plaintiff admits that the policy as defined by the defendants' request for admissions was in effect on October 8 through October 21, 2009 but the remainder of paragraph 1 is denied as the entire policy is not attached.

2. Admit that on October 8, 2009 through and including October 21, 2009 the plaintiff insured a 2003 Honda owned by defendants, pursuant to State Farm policy no. 098 9817-B25-40D, which carried underinsured coverage in the amount of $100,000, per person, per accident.

RESPONSE: Admitted as to the coverage per person but denied as to the coverage per accident.

3. Admit that on October 8, 2009 through and including October 21, 2009 the plaintiff insured a 1997 Honda owned by defendants, pursuant to policy no. 113 8514-F16-40A, which provided underinsured coverage in the amount of $100,000 per person, per accident.

RESPONSE: Admitted as to the coverage per person but denied as to the coverage per accident.

4. Admit that on October 8, 2009 through and including October 21, 2009 the plaintiff insured a 2007 Nissan owned by defendants, pursuant to policy no. 21-5620-D28-40A, which provided underinsured coverage in the amount of $100,000 per person, per accident.

RESPONSE: The correct policy number is 121 5620-D28-40A. The plaintiff admits as to the coverage per person but denies as to the coverage per accident.

5. Admit that on October 8, 2009 through and including October 21, 2009 the plaintiff insured a 1994 Honda pursuant to policy no. 105 9958-A28-40A, which provided underinsured coverage owned by defendants, in the amount of $100,000 per person per accident.

RESPONSE: Denied. The defendant requested cancellation of this policy prior to October 21, 2009. See page SF206 in the claim file being produced.

6. Admit that State Farm did not interview any witnesses in regard to the collision at any time prior to April 28, 2010.

**RESPONSE:** Responding to paragraph 6, it is the plaintiff's understanding that the only witness to the collision was Phyllis Paden-Adams. The plaintiff admits it did not interview Phyllis Paden-Adams prior to April 28, 2010 but otherwise paragraph 6 is denied.

7. Admit that the following motor vehicles were owned by SCDOT on October 8, 2009 through October 22, 2009:

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck; Standard Cab
Equipment No. 010-01-0061
Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment No.: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) 16.5 Ton Dump Truck (8yd)
Equipment No. 014-04-0113
Tag No.: SG87887

RESPONSE: The plaintiff has made a reasonable inquiry as to paragraph 7 and the information known or readily obtainable by the plaintiff is insufficient to enable the plaintiff to admit or deny this paragraph. The plaintiff therefore lacks information or knowledge to admit or deny this request.

8. Admit that the following motor vehicles were operated by SCDOT employees on October 8, 2009 to perform road improvements to Craig Road (S-735).

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck, Standard Cab
Equipment No. 010-01-0061
Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment No.: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) Asphalt Distributor Truck
Equipment No.: 079-04-0021

(i) 16.5 Ton Dump Truck (8yd)
Equipment No. 014-04-0113
Tag No.: SG87887

**RESPONSE:** See the response to paragraph 7 which is incorporated herein.

9. Admit that the following motor vehicles were insured by SCDOT through the South Carolina Insurance Reserve Fund from October 8, 2009 through October 22, 2009.

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck, Standard Cab
Equipment No. 010-01-0061
Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment No.: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) Asphalt Distributor Truck
Equipment No.: 079-04-0021

(i) 16.5 Ton Dump Truck (8yd)
Equipment No. 014-04-0113
Tag No.: SG87887

**RESPONSE**: See the response to paragraph 7 which is incorporated herein.

10. Admit that the following motor vehicles were designed for use on public roads:

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck, Standard Cab
Equipment No. 010-01-0061
Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment No.: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) Asphalt Distributor Truck
Equipment No.: 079-04-0021

(i) 16.5 Ton Dump Truck (8yd)
Equipment No. 014-04-0113

RESPONSE: See the response to paragraph 7 which is incorporated herein.

11. Admit that the speed limit on Craig Road on the date of the collision was 55 m.p.h.

RESPONSE: Denied. Photographs of this area in the claim file (SF156, SF157) indicate the speed limit was other than 55 m.p.h. The objection in paragraph 13 is incorporated herein.

12. Admit that Phyllis Paden-Adams was the only witness to the collision.

RESPONSE: Admitted, but the objection to paragraph 13 is incorporated herein.

13. Admit that none of the witnesses identified in the liability case have testified that Phyllis Paden-Adams alleged negligence caused or contributed in any manner to the collision.

RESPONSE: The plaintiff is agreeable to removing from its complaint any reference to who was at fault in causing the accident in question. Therefore, the plaintiff objects to paragraph 13 as irrelevant to the issue of coverage.

14. Admit that State Farm conducted no investigation of the scene of the collision prior to issuing its denial of underinsured benefits on April 28, 2010.

RESPONSE: Responding to paragraph 14, the plaintiff would show it has not denied UIM benefits. Rather, it has advised the attorneys for the defendants that the claim does not appear to qualify as an underinsured motor vehicle claim and

that the plaintiff has initiated a declaratory judgment action for a judicial determination of this issue. Otherwise, the plaintiff admits its representatives did not investigate the scene of the collision prior to April 28, 2010.

15. Admit that State Farm conducted no investigation concerning the condition of Craig Road at the time of the collision.

RESPONSE: See the objection to paragraph 13 which is incorporated herein.

16. Admit that State Farm was provided notice of the collision on November 9, 2009.

RESPONSE: Responding to paragraph 16, the plaintiff admits that on or about November 9, 2009 it received correspondence from attorneys for the defendants of their representation of the defendants but otherwise paragraph 16 is denied.

17. Admit that State Farm failed to provide a response regarding insurance coverage of the 1994 Honda until November 16, 2010.

RESPONSE: Responding to paragraph 17, the plaintiff admits it provided a response regarding insurance coverage on the 1994 Honda on November 16, 2010 but the remaining portion of paragraph 17 is denied.

18. Admit that State Farm paid the defendants $1,000 in PIP coverage for the collision on or about January 11, 2010.

RESPONSE: Responding to paragraph 18, the plaintiff admits it paid the defendants $1,000 in PIP coverage on or about January 11, 2010 but the plaintiff

would further show that PIP coverage is a separate coverage from UIM coverage. Therefore, paragraph 18 is irrelevant to the issue of UIM coverage.

19. Admit that prior to April 28, 2010, State Farm conducted no independent legal research into whether underinsured motorist coverage existed for the claim.

RESPONSE: Responding to paragraph 19, the plaintiff admits that prior to April 28, 2010 it conducted no independent legal research into whether UIM coverage existed for the defendants' claim for UIM benefits.

20. Admit that no witness in the liability case testified under oath that Ms. Adams was operating her vehicle at an excessive rate of speed at the time of the collision.

RESPONSE: See the objection to paragraph 13 which is incorporated herein.

21. Admit that no witness in the liability case testified under oath that Ms. Adams was operating her vehicle in a negligent or careless manner at the time of the collision.

RESPONSE: See the objection to paragraph 13 which is incorporated herein.

22. Admit that State Farm is not aware of any witnesses with knowledge of facts concerning the collision, except for those who were identified as witnesses by either SCDOT or the Adams in the liability case.

RESPONSE: See the objection to paragraph 13 which is incorporated herein.

23. Admit that as a result of the collision, Phyllis Paden-Adams incurred medical bills in excess of $500,000.

RESPONSE: The plaintiff objects to paragraph 23 on the ground that the amount of Phyllis Paden-Adams' medical bills are irrelevant to the issues in the declaratory judgment lawsuit.

24. Admit that as a result of the collision, Phyllis Paden-Adams was rendered quadriplegic.

RESPONSE: The plaintiff objects to paragraph 24 on the ground it is irrelevant to the issues in this case.

25. Admit that as a result of the collision, Phyllis Paden-Adams suffered damages in excess of $300,000.

RESPONSE: Responding to paragraph 25, the plaintiff objects on the ground that the amount of Phyllis Paden-Adams' damages is not an issue in this declaratory judgment action and that this issue is properly determined in the case of Adams v. SCDOT.

26. Admit that as a result of the collision, Phyllis Paden-Adams suffered damages in excess of $800,000.

RESPONSE: Responding to paragraph 26, the plaintiff objects on the ground that the amount of Phyllis Paden-Adams' claim is not an issue in this declaratory judgment action and that this issue is properly determined in the case of Adams v. SCDOT.

27. Admit that the only written denials of coverage from State Farm to defendants in connection with the claim are those attached hereto as Exhibit B.

**RESPONSE:** Paragraph 27 is denied because the correspondence attached as Exhibit B is not a written denial of coverage.

28. Admit that Exhibit C is a true and accurate copy of State Farm's "notice of payment due" sent to Phyllis Paden-Adams on October 7, 2009.

**RESPONSE:** Responding to paragraph 28, the plaintiff admits Exhibit C is a true and accurate copy of its notice of payment due prepared October 7, 2009 but the remainder of paragraph 28 is denied.

Except as is specifically admitted, every Request to Admit is denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Charles R. Norris
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Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

April 5th, 2011

## CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., counsel for Plaintiff State Farm Fire and Casualty Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Plaintiff's Responses to Defendants' Requests to Admit

Counsel Served:

Christi P. Cox, Esquire
W. Keith Martens, Esquire
Hamilton Martens & Ballou, LLC
P.O. Box 10940
Rock Hill, SC 29731

*Counsel for Defendants*

Ronnie Craig, Esquire
Clawson & Staubes, LLC
756 Tyvola Road
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Charlotte, NC 28217

*Counsel for State Farm Fire and Casualty Company*

Elaine Hartley, Certified PLS
Administrative Assistant

April 6, 2011.

AUTO
claim number
40-S515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-04-11 | 05:42 PM | Smith, Lindsay | CAROLINA | GA-SC | 183 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-28-10 | 10:06 AM | Smith, Lindsay | CAROLINA | GA-SC | 180 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-28-10 | 09:56 AM | Findley, Danny | CAROLINA | GA-SC | 179 |

********** TM Review/Entry **********

C 30

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-22-10 | 04:29 PM | Miller, Derek | CAROLINA | GA-SC | 177 |

********** SM Review **********

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-16-10 | 08:22 AM | Smith, Lindsay | CAROLINA | GA-SC | 175 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-13-10 | 12:22 PM | Findley, Danny | CAROLINA | GA-SC | 174 |

********** TM Review/Entry **********

Reviewed log 173.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-08-10 | 03:30 PM | Smith, Lindsay | CAROLINA | GA-SC | 173 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-07-10 | 04:07 PM | Smith, Lindsay | CAROLINA | GA-SC | 172 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-03-10 | 04:04 PM | Atkins, Carmen | CAROLINA | GA-SC | 169 |

AUTO
claim number:
10-35-15-078

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-30-10 | 03:25 PM | Findley, Danny | CAROLINA | GA-SC | 167 |
| ********** | | TM Review/Entry | ********** | | |
| C 30 | | | | | |
| 11-29-10 | 11:17 AM | Smith, Lindsay | CAROLINA | GA-SC | 166 |
| 11-29-10 | 11:02 AM | Findley, Danny | CAROLINA | GA-SC | 164 |
| ********** | | TM Review/Entry | ********** | | |
| 11-29-10 | 10:31 AM | Smith, Lindsay | CAROLINA | GA-SC | 163 |
| 11-22-10 | 12:54 PM | Smith, Lindsay | CAROLINA | GA-SC | 159 |
| 11-22-10 | 12:51 PM | Smith, Lindsay | CAROLINA | GA-SC | 158 |
| 11-22-10 | 11:46 AM | Findley, Danny | CAROLINA | GA-SC | 154 |
| ********** | | TM Review/Entry | ********** | | |

AUTO
claim number
40-S515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-22-10 | 11:26 AM | Miller, Derek | CAROLINA | GA-SC | 153 |

********** SM Review **********

Reviewed file per log #151.

The second issue is that the insured's atty has secured a settlement on this single car loss due to faulty road maintenance against the South Carolina DOT. She is attempting to assert a claim against the UIM coverage of the insured's policies. We disagree with the position taken by the plaintiff atty that these coverages would be involved in a single car loss. The plaintiff atty is threatening to file a DJA.

---

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-21-10 | 01:58 PM | Findley, Danny | CAROLINA | GA-SC | 151 |

********** TM Review/Entry **********

Derek,

I think you should review this letter also. She makes several allegations which are not true. She alleges that we have not disclosed all of the policies that we had with the N/I, our records show that we had 4 policies in effect on the DOL, she says we had 5. Our records reflect that one of the policies she is referring to, on a 1994 Honda cancelled by request on 10/6/09, approximately 2 weeks prior to the DOL. She is attempting to lay the foundation for a bad faith claim, and says that if we do not respond by 11/22/10 she will file a DJA, which is what I think is best for everyone, as I do not think this accident qualifies as a UIM claim, refer to log 138.

In any respect, I felt that you needed to see this letter.

AUTO
claim number
40-8515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-19-10 | 09:38 AM | Smith, Lindsay | CAROLINA | GA-SC | 150 |

In her letter, she indicates we have failed to provide them with all at home policies avail w/ a COC. We have provided her with 4 vehicles that were in effect on DOL. we are trying to obtain info to forward to atty for the 5th veh they beleive should have been insured also. Our records indicate 1994 honda was canceled by request of the insd on Oct 6, 2009

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-19-10 | 09:20 AM | Smith, Lindsay | CAROLINA | GA-SC | 148 |

Claim Rep Error & Review completed for Q0105 created on 11-19-10 at 08:06 AM for Smith, Lindsay.
Q0105 Referral closed in EMEDSC , SC. Complete review.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-19-10 | 08:06 AM | Marston, Cherrie | EMEDSC | GA-SC | 147 |

A Claim Rep Review message has been created for Smith, Lindsay
Q0105 Referral closed in EMEDSC , SC. Complete review.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-19-10 | 08:05 AM | Marston, Cherrie | EMEDSC | GA-SC | 146 |

[Category] CSR Activity Log [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PI P
A Claim Rep Review message has been created for BDII
Q0155 MCRT Report activity for PADEN-ADAMS, PHYLLIS and COL 050
No match found during PING for COL 050.
Submitted to CMS: PADEN-, P, 06/30/1954, F, SSN.
CMS returned: No match

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-18-10 | 10:12 AM | Williams, Janice | CLMCENTA | GA-SC | 144 |

C: Sue w/Dennis Herrington's Ofc called. Gave contact info of Lindsay Smith to and her and warm transf'd her CSA, Loretta Rivers.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-16-10 | 01:13 PM | Smith, Lindsay | CAROLINA | GA-SC | 142 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-15-10 | 01:51 PM | Smith, Lindsay | CAROLINA | GA-SC | 140 |

AUTO
claim number:
40-35115-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-14-10 | 04:51 PM | Findley, Danny | CAROLINA | GA-SC | 138 |
| ********** | | TM Review/Entry | ********** | | |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-11-10 | 03:51 PM | Smith, Lindsay | CAROLINA | GA-SC | 137 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-11-10 | 03:19 PM | Findley, Danny | CAROLINA | GA-SC | 136 |
| ********** | | TM Review/Entry | ********** | | |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-04-10 | 03:38 PM | Smith, Lindsay | CAROLINA | GA-SC | 135 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-04-10 | 11:37 AM | Findley, Danny | CAROLINA | GA-SC | 134 |
| ********** | | TM Review/Entry | ********** | | |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-04-10 | 10:23 AM | Smith, Lindsay | CAROLINA | GA-SC | 133 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-04-10 | 09:22 AM | Smith, Lindsay | CAROLINA | GA-SC | 132 |

AUTO
claim number
40-S515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-02-10 | 10:44 AM | Smith, Lindsay | CAROLINA | GA-SC | 131 |

C:

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-29-10 | 04:19 PM | Faulkenberry, Hask | CAROLINA | GA-SC | 130 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-29-10 | 04:17 PM | Faulkenberry, Hask | CAROLINA | GA-SC | 129 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-29-10 | 01:47 PM | Faulkenberry, Hask | CAROLINA | GA-SC | 128 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-29-10 | 11:52 AM | Smith, Lindsay | CAROLINA | GA-SC | 127 |

********** MAR/LOBBY - OTHER **********

---

CUSTOMER CONTACT INFORMATION:
  Name:
  Best Contact #:
  Alternative Contact #s:
PREFERRED MEETING LOCATION (include city or zip code):
  Home:
  Business:
  Agent's Office:
  OC:
  Other:
MISCELLANEOUS:
WHEN ASSIGNMENT COMPLETED, PLEASE FWD ALL DOCUMENTS TO:

AUTO
claim number
40-8515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-29-10 | 11:44 AM | Findley, Danny | CAROLINA | GA-SC | 126 |

********** TM Review/Entry **********

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 03:07 PM | Findley, Danny | CAROLINA | GA-SC | 123 |

********** TM Review/Entry **********

Reviewed ILTC, cal file to complete the Phase 1 conference. C 10/20/10 CSA: burn a copy of "045/Litigation/P. Paden-Adams", match w/ILTC and mail to Tom McKinney.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 02:40 PM | Smith, Lindsay | CAROLINA | GA-SC | 122 |

Danny-ILTC in images. Custom Group 045/LITIGATION/P.Paden-Adams to be burned to CD for DA. Suit NOW OIE'd. CSA needs to print CSR and estimate for IV. Please also see SIR in log 118

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 02:31 PM | Findley, Danny | CAROLINA | GA-SC | 121 |

********** TM Review/Entry **********

Lindsay, we do not open suit records involving a suit under UIM, please close suit records as "OIE", then resend to me.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 12:53 PM | Smith, Lindsay | CAROLINA | GA-SC | 120 |

Danny-ILTC in images. Custom Group 045/LITIGATION/P.Paden-Adams to be burned to CD for DA. Suit open in system. CSA needs to print CSR and estimate for IV. Please also see SIR in log 118

AUTO
Claim number
40-8515-072

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 11:31 AM | Smith, Lindsay | CAROLINA | GA-SC | 118 |

********** Serious Injury Report **********
Agent:Dennis Harrington
Policy Limits:100/300/50 3 at home policies w/ the same
Location of Loss: Rock Hill SC
Brief Facts & Liability Analysis: Plaintiff indicates she lost control of vehicle due to loose aggregate in roadway, went off road and struck tree.

Claimant & Injury:Phyllis Paden-Adams-quadriplegia
In Suit (Y/N):Y
Service Date:10/5/2010
Plaintiff Attorney:Keith Martens
PLUP/CLUP:No

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 10:07 AM | Smith, Lindsay | CAROLINA | GA-SC | 117 |

I was aware of our service thru DOI
10/11

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-13-10 | 09:15 AM | Findley, Danny | CAROLINA | GA-SC | 116 |

********** TM Review/Entry **********
Lindsay, are you aware that we have been served thru the DOI, DOS was 10/5/10. I have the file up today for an ILTC that is due today.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-11-10 | 03:24 PM | Smith, Lindsay | CAROLINA | GA-SC | 115 |

copy of answer in images.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-27-10 | 09:32 AM | Smith, Lindsay | CAROLINA | GA-SC | 111 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-21-10 | 02:59 PM | Smith, Lindsay | CAROLINA | GA-SC | 109 |

Danny-It appears Insd atty is going to press the issue on this claim and is moving forward with putting us on notice of UIM. Just a reminder, atty is stating the vehicles that repaved roadway are underinsured vehicles. we have informed atty of our position.

AUTO
claim number
40-8515-973

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-21-10 | 10:12 AM | Smith, Lindsay | CAROLINA | GA-SC | 108 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-20-10 | 01:33 PM | Hannus, Rob | CAROLINA | GA-SC | 107 |

C:

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-20-10 | 12:31 PM | Hannus, Rob | CAROLINA | GA-SC | 105 |

LINDSAY - see suit papers in images. Faxed to DA T. McKinney.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 09-20-10 | 12:31 PM | Hannus, Rob | CAROLINA | GA-SC | 104 |

C: rec'd suit papers in images.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 07-13-10 | 05:05 PM | Findley, Danny | CAROLINA | GA-SC | 101 |

********** TM Review/Entry **********

Let's give this one a little more time, then we will close if no activity.
C 90

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 07-09-10 | 11:02 AM | Smith, Lindsay | CAROLINA | GA-SC | 100 |

No change in status. no new contact from insd after letter sent in May

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 06-22-10 | 02:02 PM | Smith, Lindsay | CAROLINA | GA-SC | 99 |

Ltr to atty sent out on 5/14/10

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 05-17-10 | 02:12 PM | Findley, Danny | CAROLINA | GA-SC | 98 |

********** TM Review/Entry **********

C 60

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 05-13-10 | 03:19 PM | Findley, Danny | CAROLINA | GA-SC | 97 |

********** TM Review/Entry **********

Discussed claim with CR Smith. The additional policies listed by atty Martens were listed in her husband's name and that is the reason we missed those as Phyllis Paden-Adams versus Alonzo Adams did not show up on the H/H search. CR Smith sent Cert of Coverage on the additional policies, and I requested that she also send a letter to the atty stating that our position has not changed, and that this accident does not qualify as a UIM claim, nor do the vehicles that the atty mentioned do not qualify as a motor vehicleas defined in the UM/UIM section of the policy.

AUTO
claim number:
40-8515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 05-13-10 | 09:55 AM | Smith, Lindsay | CAROLINA | GA-SC | 96 |

Danny-see ltr in images from IA dated 4/30 regarding there position on UIM

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-19-10 | 03:40 PM | Smith, Lindsay | CAROLINA | GA-SC | 93 |

C; called atty and left message to call back. also advised this claim doesnt qualify for UIM as SCDOT is not a motor veh.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-19-10 | 03:35 PM | Findley, Danny | CAROLINA | GA-SC | 92 |

********** TM Review/Entry **********

Lindsay, let's call the atty and let him/her know our position. C 30

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-08-10 | 03:06 PM | Findley, Danny | CAROLINA | GA-SC | 91 |

********** TM Review/Entry **********

Reviewed response.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-08-10 | 08:24 AM | Smith, Lindsay | CAROLINA | GA-SC | 90 |

Rev'd response-I am on same page w/ you now and agree completely. will contact atty to discuss.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-07-10 | 03:32 PM | Findley, Danny | CAROLINA | GA-SC | 89 |

********** TM Review/Entry **********

Reviewed response, that's not an underinsured motor vehicle, but the SCDOT. I'm not be argumentative, I just want to understand the basis for letting us know that they are presenting a UIM claim on her client's behalf.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-07-10 | 03:27 PM | Smith, Lindsay | CAROLINA | GA-SC | 88 |

Danny-See log 81..atty suing SCDOT for liability-improper resurfacing of road.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 04-07-10 | 03:18 PM | Findley, Danny | CAROLINA | GA-SC | 87 |

********** TM Review/Entry **********

Reviewed PR, Lindsay, why does the atty think she can present a UIM claim whe this was a single car accident? UIM becomes involved when the insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle. There is no other vehicle involved. You may want to call and ask, unless I am missing something.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|

AUTO
claim number
40-8515-078

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| | | | CAROLINA | GA-SC | 85 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| | | | CAROLINA | GA-SC | 83 |

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| | | | CAROLINA | GA-SC | 82 |

********** TM Review/Entry **********

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-23-10 | 01:04 PM | Smith, Lindsay | CAROLINA | GA-SC | 81 |

Danny-Rec'd letter from insd atty.. appears they have filed suit against SCDOT for this loss. They are also putting us on notice of UIM. Just FYI as letter is addressed to you. I will send ack ltr to atty

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-23-10 | 01:00 PM | Smith, Lindsay | CAROLINA | GA-SC | 80 |

Claim Rep Error & Review completed for Q0105 created on 03-23-10 at 11:48 AM for Smith, Lindsay.
Q0105 Referral closed in EMEDSC , SC. Complete review.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-23-10 | 11:48 AM | Marston, Cherrie | EMEDSC | GA-SC | 79 |

A Claim Rep Review message has been created for Smith, Lindsay
Q0105 Referral closed in EMEDSC , SC. Complete review.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-23-10 | 08:09 AM | Smith, Lindsay | CAROLINA | GA-SC | 78 |

Claim Rep Error & Review completed for Q0047 created on 03-23-10 at 08:02 AM for Smith, Lindsay.
Q0047 This claim was automatically reopened due to the reopen of the referral in Emedical SC , GA-SC

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-19-10 | 09:22 AM | Smith, Lindsay | CAROLINA | GA-SC | 76 |

Claim closed. Subrogation not pursued.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-19-10 | 09:22 AM | Smith, Lindsay | CAROLINA | GA-SC | 75 |

Claim Rep Error & Review completed for Q0105 created on 03-19-10 at 08:54 AM for Smith, Lindsay.
Q0105 Referral closed in EMEDSC , SC. Complete review.

AUTO
claim number
40-8515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-19-10 | 08:54 AM | Marston, Cherrie | EMEDSC | GA-SC | 74 |

A Claim Rep Review message has been created for Smith, Lindsay
Q0105 Referral closed in EMEDSC , SC. Complete review.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-10-10 | 03:07 PM | Atkins, Carmen | CAROLINA | GA-SC | 73 |

Image notification was transferred from office CAROLINA GA-SC to EMEDSC GA-SC . Doc id: 3336359430, Domain: ce27cmb
Doc type: File documentation

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-09-10 | 03:38 PM | Knight, Cheryl | CAROLINA | GA-SC | 71 |

Emed file reopened.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 03-09-10 | 03:37 PM | Knight, Cheryl | CAROLINA | GA-SC | 70 |

Claim Rep Error & Review completed for Q0047 created on 03-09-10 at 03:34 PM for Smith, Lindsay.
Q0047 This claim was automatically reopened due to the reopen of the referral in Emedical SC , GA-SC

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 02-03-10 | 09:52 AM | Knight, Cheryl | CAROLINA | GA-SC | 68 |

Claim closed. Subrogation not pursued.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-12-10 | 08:11 AM | Burke, Jill | EMEDSC | GA-SC | 66 |

[Category] Claim Note [Participants] PHYLLIS L. PADEN-ADAMS [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PIP
**BE turned on in DP**

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-11-10 | 03:39 PM | Marston, Cherrie | EMEDSC | GA-SC | 65 |

[Category] CSA Activity [Subcategory] Create [Participants] PHYLLIS L. PADEN-ADAMS [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PIP [Fill-In Notes]
( ) Print ( ) Fax #: To: ( ) Letter ( ) Form ( ) Images ( ) Other
Mark Benefits exhausted

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-11-10 | 03:38 PM | Marston, Cherrie | EMEDSC | GA-SC | 64 |

[Category] Claim Note [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PIP
ATTORNEY PIP LIMITS EXHAUSTED-No excess - Not Medicare entitled
CLOSING PIP

AUTO

Claim Number
40-85-15-072

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-07-10 | 03:43 PM | Brown, Jennifer | CAROLINA | GA-SC | 63 |

C: V1 SOS is complete.
403- paid
501- paid
T: 050- pends EMED
S: No

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 01-04-10 | 09:38 AM | Findley, Danny | CAROLINA | GA-SC | 61 |

********** T/M Review/Entry **********
Reviewed ECF, 403 salvage has been sold, E-med only pends, C 150.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-28-09 | 01:27 PM | Xiong, Steven | TOTAL | GA-SC | 60 |

NICB Salvage Report (Insured) sent regarding 2004 HOND ACC

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-28-09 | 01:12 PM | Xiong, Steven | TOTAL | GA-SC | 59 |

C: REC'D 403 PROCEED/UPDATED CSR;CLSD ASR/NICB NOTIF
S: NO

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-09-09 | 10:38 AM | Federick, SE6M x41 | TCGASC | GA-SC | 58 |

Sent ok to sell on veh 01, via fax

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-09-09 | 10:20 AM | Knight, Cheryl | CAROLINA | GA-SC | 57 |

C: Recd VMM from Atty Cox asking for call back concerning location of IV and wishing for pics of IV; message to Lindsey to review and advise/call Atty concerning her request.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-08-09 | 04:01 PM | Findley, Danny | CAROLINA | GA-SC | 56 |

********** T/M Review/Entry **********
TCF atty Cox, she wamted to know when she was getting her Cert copy of the policy, I sent her to CR Smith to handle.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-08-09 | 10:27 AM | Mozingo, Dina | TCGASC | GA-SC | 54 |

Referral and assignment info for servicing office TCGASC GA-SC 27-380 was deleted
Unit/Rep Id F3 XCTC

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-08-09 | 10:27 AM | Mozingo, Dina | TCGASC | GA-SC | 53 |

Salvage Document Review complete, NMVTIS not applicable, Veh # 01

AUTO
claim number
40-55Y5-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-08-09 | 10:25 AM | Mozingo, Dina | TCGASC | GA-SC | 52 |

Claim Rep Error & Review completed for The a created on 12-07-09 at 02:36 PM for Rep, Title Coordinat.
The all title requirement box in ASR was checked for vehicle: 01

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-07-09 | 02:35 PM | Findley, Danny | CAROLINA | GA-SC | 50 |

********** Title Compliance Review **********
(X) Veh #1 Reviewed - Proper Salvage Title Rec'd

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-07-09 | 10:16 AM | Brown, Jennifer | CAROLINA | GA-SC | 49 |

C: Reviewed V1 BT in images. Routed Title Compliance Macro to TM Findley.
T: 403- pends SOS
V: V1/IAA of Charlotte # 6110439 SF Fire/Rebuildable/Coll

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 12-07-09 | 10:15 AM | Brown, Jennifer | CAROLINA | GA-SC | 48 |

GA/SC FIELD TITLE COMPLIANCE REVIEW
Vehicle Number: V1
Vehicle Year/Make/Model: 2004 Honda Accord
VIN: 1HGCM56304A061897
Original State: SC
Disposal State: NC
Cross-State Analysis: Both states are equally restrictive
Company Name: ( ) SF Mutual (x) SF Fire ( ) Other:
Branded title: (x) Salvage ( ) Salvage Fire ( ) Salvage Flood
Vendor Name / Confirmation #: V1/IAA of Charlotte # 6110439
Other Info:

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-13-09 | 12:58 PM | Smith, Lindsay | CAROLINA | GA-SC | 44 |

COC completed and being r/TM for signature

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-13-09 | 10:15 AM | Knight, Cheryl | CAROLINA | GA-SC | 43 |

Lindsay- please see log 42.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-13-09 | 08:20 AM | Marston, Cherrie | EMEDSC | GA-SC | 42 |

Referred to CAROLINA GA-SC 27-142
Referral Type Message print
Attn: Cheryl Knight - please see LOR in images and address the second paragraph regaring declaration page/endorsements concerning this accident.
E-Med handling PIP with atty.

AUTO
claim number
40-8515-078

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-13-09 | 08:13 AM | Marston, Cherrie | EMEDSC | GA-SC | 41 |

[Category] Claim Note [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PIP ATTORNEY PIP KIT
Sending Dec page to atty.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-06-09 | 09:58 AM | Findley, Danny | CAROLINA | GA-SC | 40 |

********** T/M Review/Entry **********
C 60 for 403 SOS.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-03-09 | 03:45 PM | Smith, Lindsay | CAROLINA | GA-SC | 39 |

403 pends salv
050 pends emed

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-03-09 | 12:33 PM | Susan Curtis, x418 | TOTAL | GA-SC | 38 |

C: REC'D IV TITLE/LETTER TO VENDOR FOR SALVAGE TITLE
T: 403- CTLU to process title p/w to vendor.
V: V1/IAA of Charlotte # 6110439 SF Fire/Rebuildable/Coll

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 11-02-09 | 03:03 PM | Sizemore, Su0F X41 | TOTAL | GA-SC | 37 |

C - REC IV SIGNED TITLE/FILING IN VENDOR DRAWER
T: 403- CTLU to process title p/w to vendor.
V: V1/IAA of Charlotte # 6110439 SF Fire/Rebuildable/Coll

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-30-09 | 09:34 AM | Knight, Cheryl | CAROLINA | GA-SC | 36 |

C: 403- Recd OT in imaging.
T: 403- CTLU to process title p/w to vendor.
V: V1/IAA of Charlotte # 6110439 SF Fire/Rebuildable/Coll

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-27-09 | 03:10 PM | Hefley, Jennifer | CAROLINA | GA-SC | 34 |

C: Met w/ NI. Exchanged draft for properly signed title. Mailed doc to CTLU. Task complete.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-27-09 | 10:33 AM | Mason, Brent | TCGASC | GA-SC | 33 |

Set SDMU cal, veh 01

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 01:23 PM | Hefley, Jennifer | CAROLINA | GA-SC | 32 |

C: Rec'd lobby task. Prep'd, left in lobby drawer.

AUTO
Claim number:
40-8515-973

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 12:00 PM | Smith, Lindsay | CAROLINA | GA-SC | 30 |

IV is rebuildable

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 11:48 AM | Knight, Cheryl | CAROLINA | GA-SC | 29 |

********** MAR/LOBBY - TOTAL LOSS **********
CUSTOMER CONTACT INFORMATION
Name: Mr NI - Alonzo Adams
PREFERRED MEETING LOCATION (full address)
FCO: Rock Hill CSO
TOTAL LOSS DOCUMENTS
VIN: 1HGCM56304A061897 2004 Honda Accord
Have customer(s) sign TITLE exactly as: title reads
DRAFT INSTRUCTIONS
( x ) Draft Payable To: NIs $ 8485.00 501-1 $ 110.00
403-1 $ 8375.00
MISCELLANEOUS: (reference log # if needed) *** Jennifer - give me a call when you get this assignment **** need to advise you of something.
WHEN ASSIGNMENT COMPLETED, PLEASE FWD ALL DOCUMENTS TO: Rte signed title to CIOS/Attn: Shawn Oneal.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 11:45 AM | Knight, Cheryl | CAROLINA | GA-SC | 28 |

T: 403- Mr NI to go by CSO w/ title for settlement.
V: V1/IAA of Charlotte # 6110439 SF Fire

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 11:45 AM | Knight, Cheryl | CAROLINA | GA-SC | 27 |

Lindsay - please advise if IV is rebuildable or sold for parts?

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 11:34 AM | Knight, Cheryl | CAROLINA | GA-SC | 26 |

C: 403- Called NI; reviewed t/l figures w/ him. He has title and will take title by CSO tomorrow for settlement. NI did not rent; will pay $110 LOU. Got PTM IV; NI will call shop to release.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 11:18 AM | Smith, Lindsay | CAROLINA | GA-SC | 25 |

phone message forwarded to CP

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 10:18 AM | Reed, Donna | TCGASC | GA-SC | 24 |

Claim being updated by CYUR in CAROLINA GA-SC . View access granted.

AUTO

claim number
90-8515-073

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-26-09 | 09:15 AM | Buggs, Angie | AUFTGASC | GA-SC | 23 |

*** PHONE MESSAGE ***
TO: Alonzo Adams( NID's Husband
FROM: Betty from Dennis Harrington's agency (Rock Hill)
PHONE #: 803-417-4107
MESSAGE: Plz call asap. NI is in intensive care and Mr insured do not know what to do about claim. Need CRP to call him to talk about the claim.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-23-09 | 11:24 AM | Knight, Cheryl | CAROLINA | GA-SC | 22 |

C: 403- Ran value of IV thru NADAb2b.com. Mailed contact ltr to NI;
**** 2004 Honda Accord **** (115,441 miles)
$ 9050.00 ACV
300.00 tax
~~25.00 tag~~
$ 9375.00
-1000.00 deductible
$ 8375.00
T: 403- Call pends from NI; need to review t/l figures; need PTM IV; Lien? Lien/LOU?
V: V1/Carolina Coll in Rock Hill

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-23-09 | 11:11 AM | Knight, Cheryl | CAROLINA | GA-SC | 21 |

Underwriting Review sent
Settlement Info - Total loss

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-23-09 | 11:11 AM | Knight, Cheryl | CAROLINA | GA-SC | 20 |

Referred to TCGASC GA-SC 27-380
Referral type Title review Vech No. 01

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-23-09 | 11:02 AM | Atkins, Carmen | CAROLINA | GA-SC | 18 |

Cheryl - IV appears to be a total loss and is located at Carolina Collision in Rock Hill. It appears from log entries that the NI is in the hospital with serious injuries.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-22-09 | 06:58 PM | Atkins, Carmen | CAROLINA | GA-SC | 17 |

Estimate review completed
on ADP estimate
for vendor estimate key 160867671
for 04 HONDA ACCORD SEDAN

AUTO

claim number
40-S515-078

ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-22-09 | 10:03 AM | Marston, Cherrie | EMEDSC | GA-SC | 13 |

[Category] Autopay [Participants] PHYLLIS L. PADEN-ADAMS
Autopay turned ON for PHYLLIS PADEN-ADAMS.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-22-09 | 09:47 AM | Marston, Cherrie | EMEDSC | GA-SC | 12 |

[Category] Contact [ClaimantLine] PHYLLIS L. PADEN-ADAMS / 050 - PIP
PIP KIT/PPACT
P: P8 $1,000.00 no excess no prior
P: Phyllis Adams-Paden NID 55 yrs old neck back-PING
A: NID hit tree-IV not drivable
C: Called 5156 and LM also LM 3395-sending forms
T: Diary for call back and bills

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-22-09 | 08:28 AM | Smith, Lindsay | CAROLINA | GA-SC | 11 |

SELS assignment
contact from insd.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-21-09 | 05:47 PM | Marcia Harris, x41 | CLMCENTA | GA-SC | 8 |

Moved to CAROLINA GA-SC 27-142
move to fco, serious inj, have not made contact with ni.

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-21-09 | 05:46 PM | Marcia Harris, x41 | CLMCENTA | GA-SC | 7 |

**NEW CLAIM:
P - A 100/300/50,P8 1,000,D1000,G1000,H,R1 80%/500,U 100/300/50,
W 100/300/50
C - desc
I - i/d
E - none
O - none
P-POLICY FORM #99403
PRIOR CLAIMS: none
**********
F - i/d went off road hit a tree.
A - 403/501
POT -
C - called #4107 a/m not set up, #3955 lmom, #1952 wk
ss assign was sent to bs, mailed rental ltr.
serious injuries, move to fco.
T- 403 ss fb
501 avail
qfc with ni, pip, any pass, dmg to tree?
S- no

AUTO
Claim number:
40-8515-078

## ACTIVITY LOG

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-21-09 | 05:43 PM | Marcia Harris, x41 | CLMCENTA | GA-SC | 6 |

Referred to EMEDSC GA-SC 27-740
Referral Type Handle COL Loss Codes 050
i/d has injuries

| date | time | entered by | office | region | no |
|---|---|---|---|---|---|
| 10-21-09 | 04:00 PM | BARONE, C | Agency | GA-SC | 1 |

Agent's Remarks
PHYLLIS IS IN CAROLINA MEDICAL CENTER WITH SEVERE INJURIES. SHE WILL HAVE SURGERY IN THE MORNING

## SYSTEM GENERATED LOG

total system log entries: 63

| date | time | office | region | no |
|---|---|---|---|---|
| 02-14-11 | 11:37 AM | CAROLINA | GA-SC | 207 |

File Documentation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 02-09-11 | 03:10 PM | CAROLINA | GA-SC | 201 |

Litigation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-24-11 | 02:13 PM | CAROLINA | GA-SC | 199 |

File Documentation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-17-11 | 08:38 AM | CAROLINA | GA-SC | 197 |

Litigation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-12-11 | 02:34 PM | CAROLINA | GA-SC | 194 |

File Documentation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-12-11 | 01:50 PM | CAROLINA | GA-SC | 193 |

Incoming Correspondence selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-07-11 | 02:44 PM | CAROLINA | GA-SC | 192 |

Litigation selected from work queue by Lindsay Smith

| date | time | office | region | no |
|---|---|---|---|---|
| 01-06-11 | 12:29 PM | CAROLINA | GA-SC | 189 |

File Documentation selected from work queue by Lindsay Smith

SOUTH CAROLINA VEHICLE REGISTRATION

06/23/2000 00000000
PERM. 2.00 S078023

2FTRF17Z1YCA72457
FORD | TRK | RCAB | 2000

5 | 4Q 042( SQ

SC DEPT OF TRANSP

955 PARK ST 9 3 369

COLUMBIA SC 29202
NEW T-O S 06/14/2000
CHK
7.00 D/C 8837148
~~4.00~~ 000B

S.C. DOCUMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES

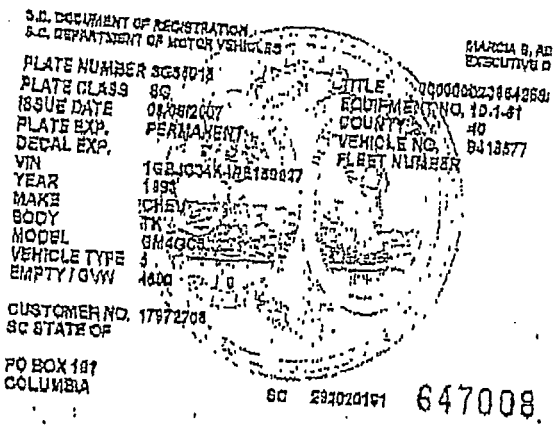
MARCIA S. ADAMS
EXECUTIVE DIRECTOR

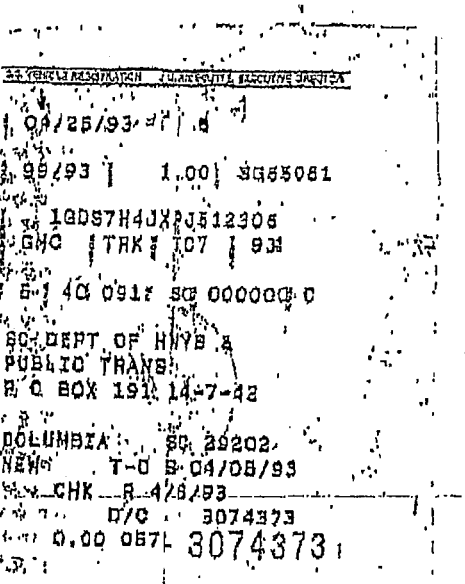
PLATE NUMBER SG67139
PLATE CLASS SG
ISSUE DATE 08/29/2008
PLATE EXP. PERMANENT
DECAL EXP.
VIN 1FTNF205X8ED98102
YEAR 2008
MAKE FORD
BODY TK
MODEL F250
VEHICLE TYPE 6
EMPTY / GVW 6271 / 0

TITLE 77300018169231SA
EQUIPMENT NO. 9-3-455
COUNTY 40
VEHICLE NO. 18813314
FLEET NUMBER

CUSTOMER NO. 14811021
SC DEPARTMENT OF TRANSPORTATION

955 PARK ST
COLUMBIA SC 292013050 64701645


S.C. DEPARTMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES
PLATE NUMBER SG39018
PLATE CLASS SG
ISSUE DATE 04/06/2007
PLATE EXP. PERMANENT
DECAL EXP.
VIN 1GBJC34K1RE159847
YEAR 1994
MAKE CHEV
BODY TK
MODEL GM4GC
VEHICLE TYPE 3
EMPTY / GVW 4400
CUSTOMER NO. 17972708
SC STATE OF
PO BOX 191
COLUMBIA
SC 292020191
TITLE
EQUIPMENT NO. 10-1-61
COUNTY 40
VEHICLE NO. 9413577
FLEET NUMBER
647008


04/25/93
1.00
1GDS7H4JXPJ512306
GMC
THK
TC7
93
SC DEPT OF HWYS &
PUBLIC TRANS
P O BOX 191
COLUMBIA
SC 29202
NEW
T-D 04/08/93
CHK 4/26/93
D/C
3074373
0.00
3074373

S.C. DOCUMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

| | | | |
|---|---|---|---|
| PLATE NUMBER | SGG2517 | TITLE | 770579113051136A |
| PLATE CLASS | SG | EQUIPMENT NO. | 14-1-134 |
| ISSUE DATE | 05/21/2010 | COUNTY | 40 |
| PLATE EXP. | PERMANENT | VEHICLE NO. | 16994471 |
| DECAL EXP. | | FLEET NUMBER | |
| VIN | 1GBGSBE4C9SF916801 | | |
| YEAR | 2003 | | |
| MAKE | CHEV | | |
| BODY | TP | | |
| MODEL | C0506 | | |
| VEHICLE TYPE | 8 | | |
| EMPTY / GVW | 13735 / 0 | | |

CUSTOMER NO. 14811017
SC DEPARTMENT OF TRANSPORTATION

955 PARK ST
COLUMBIA SC 292013959

66487750

S.C. DEPARTMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

PLATE NUMBER SG76173
PLATE CLASS SG
ISSUE DATE 04/02/2007
PLATE EXP. PERMANENT
DECAL EXP.
VIN 1GBS7H4C0XJ109844
YEAR 1999
MAKE CHEV
BODY MED
MODEL C8R7H3
VEHICLE TYPE 5
EMPTY / GVW 13100 / 0

TITLE 0060000313191140
EQUIPMENT NO. 14-1-31
COUNTY 40
VEHICLE NO. 72344067
FLEET NUMBER

CUSTOMER NO. 17677140
SC STATE OF

856 PARK ST S J 360
COLUMBIA

SC 292020000 64700851

S.C. DOCUMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

| | | | |
|---|---|---|---|
| PLATE NUMBER | SCB2543 | TITLE | 770870113139133A |
| PLATE CLASS | SG | EQUIPMENT NO. | 14-1-137 |
| ISSUE DATE | 09/21/2010 | COUNTY | 40 |
| PLATE EXP. | PERMANENT | VEHICLE NO. | 16987762 |
| DECAL EXP. | | FLEET NUMBER | |
| VIN | 1GBT6B1C3BF310290 | | |
| YEAR | 2003 | | |
| MAKE | CHEV | | |
| BODY | TK | | |
| MODEL | CC8C065 | | |
| VEHICLE TYPE | 6 | | |
| EMPTY / GVW | 14313 / 0 | | |

CUSTOMER NO. 14311017
SC DEPARTMENT OF TRANSPORTATION

955 PARK ST
COLUMBIA SC 292013959

66487749

S.C. DOCUMENT OF REGISTRATION
S.C. DEPARTMENT OF MOTOR VEHICLES

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

PLATE NUMBER 8G87987
PLATE CLASS SG
ISSUE DATE 02/08/2007
PLATE EXP. PERMANENT
DECAL EXP.
VIN 1HTWGAAR07J316881
YEAR 2007
MAKE INTL
BODY TK
MODEL 7400 S
VEHICLE TYPE 5
EMPTY / GVW 13817 / 0

TITLE 77600017104301A
EQUIPMENT NO. 14-4117
COUNTY 40
VEHICLE NO. 19738879
FLEET NUMBER

CUSTOMER NO. 14311021
SC DEPARTMENT OF TRANSPORTATION

954 PARK ST
COLUMBIA SC 292013989

64701905

2009-04-30 11:15:22

# THE SOUTH CAROLINA STATE BUDGET AND CONTROL BOARD

OFFICE OF INSURANCE RESERVE FUND
POST OFFICE BOX 11066
COLUMBIA, SOUTH CAROLINA 29211

Phone: (803) 737-00

| POLICY NUMBER | POLICY PERIOD FROM | TO | TYPE OF INSURANCE | DATE PRINTED |
|---|---|---|---|---|
| L111210010 | 04/24/2009 | 04/24/2010 | AUTOMOBILE LIABILITY | 28 APR 2009 |

COVERAGE PROVIDED UNDER THIS POLICY PART IS SUBJECT TO THE FOLLOWING FORMS:
CD-12 CD-20

| NAMED INSURED AND ADDRESS | CONTACT PERSON AND PHONE | FORM # | PAGE |
|---|---|---|---|
| DEPARTMENT OF TRANSPORTATION<br>POST OFFICE BOX 191<br>COLUMBIA, SC 29202 | JOHN WHITE<br>(803)737-6675 | | 88 OF 9 |
| | TYPE OF ACTIVITY<br>*** RENEWAL DECLARATION *** | | ACTIVITY<br>001 |

1 OF 1

EFFECTIVE 12:01 AM STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

| NUMBER OF VEHICLES | RATE PER VEHICLE | PREMIUM |
|---|---|---|
| 2990 | 320.00 | 956,800.00 |

COVERAGE

LIMIT OF LIABILITY
600,000 COMBINED SINGLE LIMIT EACH ACCIDENT

MEDICAL PAYMENTS
1,000 EACH PERSON

UNINSURED MOTORISTS COVERAGE - BASIC LIMITS

SOUTH CAROLINA BUDGET AND CONTROL BOARD
OFFICE OF INSURANCE RESERVE FUND
POST OFFICE BOX 11333
COLUMBIA, SOUTH CAROLINA 29211

# AUTOMOBILE INSURANCE POLICY

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

## PART I - WORDS AND PHRASES WITH SPECIAL MEANING - READ THEM CAREFULLY

The following words and phrases have special meaning through this policy and appear in boldface type when used.

A. "You" and "your" mean the organization shown in the Declarations.

B. "We", "us" and "our" mean the State Budget and Control Board, Office of Insurance Reserve Fund providing the insurance.

C. "Accident" includes continuous or repeated exposure to the same conditions resulting in bodily injury or property damage the insured neither expected nor intended.

D. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include mobile equipment.

E. "Bodily injury" means bodily injury, sickness or disease including death resulting from any of these.

F. "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation.

G. "Insured" means any person or organization qualifying as an insured in the WHO IS INSURED section of the applicable insurance. Except with respect to our limit of liability, the insurance afforded applies separately to each insured who is seeking coverage or against whom a claim is made or suit is brought.

H. "Loss" means direct and accidental damage or loss.

I. "Mobile equipment" means any of the following type of land vehicles:

1. Specialized equipment such as: Bulldozers; Power shovels; Rollers; Graders or scrapers; Farm machinery; Cranes; Street sweepers or other cleaners; Diggers; Forklifts; Pumps; Generators; Air Compressors; Drills; Other similar equipment.
2. Vehicles designed for use principally off public roads.
3. Vehicles maintained solely to provide mobility for such specialized equipment when permanently attached.
4. Vehicles not required to be licensed.
5. Autos maintained for use solely on your premises or that part of roads or other accesses that adjoin your premises.

J. "Property damage" means damage to or loss of use of tangible property.

K. "Trailer" includes semitrailer.

## PART II - WHICH AUTOS ARE COVERED AUTOS

A. The Declarations show the number of autos that are covered autos for each of your coverages.

B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS

1. You have coverage for autos acquired during the policy period until the policy ends.
2. Newly acquired autos are covered for liability coverages only. Comprehensive and collision coverages are automatically extended to newly acquired autos only if:
   a. We already insure all autos that you own for that coverage or it replaces an auto you previously owned that had that coverage; and
   b. You tell us within 60 days after you acquire it that you want us to insure it for that coverage.

C. CERTAIN TRAILERS AND MOBILE EQUIPMENT

If the policy provides liability insurance, the following types of vehicles are covered autos for liability insurance:

1. Trailers designed primarily for travel on public roads while being towed by a covered auto.
2. Mobile equipment while being carried or towed by a covered auto.

D. PHYSICAL DAMAGE COVERAGE FOR LEASED, HIRED, RENTED, OR BORROWED AUTOS.

In the absence of a physical damage policy, the named insured is provided physical damage insurance only on those autos you lease, hire, rent, or borrow for a period of no more than 60 consecutive days. This does not include any auto you lease, hire, rent, or borrow from any of your employees or members of their households. Such insurance, however, is not applicable if there is any other valid and collectable insurance covering that auto.

Losses will be paid in accordance with Part VII, Physical damage insurance of your automobile policy. A $200 deductible is applicable to each loss.

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## PART III - WHERE AND WHEN THIS POLICY COVERS

We cover accidents or losses which occur during the policy period.

A. In the United States of America, its territories or possessions, Puerto Rico or Canada; or

B. While the covered auto is being transported between any of these places.

## PART IV - LIABILITY INSURANCE

A. WE WILL PAY

1. We will pay all sums the Insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto.

2. We have the right and duty to defend any suit asking for these damages. However, we have no duty to defend suits for bodily injury or property damage not covered by this policy. We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle.

B. WE WILL ALSO PAY

In addition to our limit of liability, we will pay for the Insured:

1. Up to $250 for cost of all bail bonds (including bonds for related traffic law violations) required because of an accident we cover. We do not have to furnish these bonds.

2. Premiums on appeal bonds in any suit we defend.

3. Premiums on bonds to release attachments in a suit we defend but only for bonds up to our limit of liability.

4. All costs taxed to the Insured in a suit we defend.

5. All interest accruing after the entry of the judgment in a suit we defend. Our duty to pay interest ends when we pay or tender our limit of liability.

6. Other reasonable expenses incurred at our request.

C. WE WILL NOT COVER - EXCLUSIONS

This insurance does not apply to:

1. Liability assumed under any contract or agreement.

2. Any obligation for which the Insured or his or her insurer may be held liable under any workers' compensation or disability benefits laws or under any similar law.

3. Any obligation of the Insured to indemnify another for damages resulting from bodily injury to the Insured's employee.

4. Bodily injury to any fellow employee of the Insured arising out of and in the course of his or her employment.

5. Bodily injury to any employee of the Insured arising out of and in the course of his or her employment by the Insured.

6. Property damage to property owned or transported by the Insured or in the Insured's care, custody or control.

7. Bodily injury or property damage resulting from the handling of property:

   a. Before it is moved from the place where it is accepted by the Insured for movement into or onto the covered auto, or

   b. After it is moved from the covered auto to the place where it is finally delivered by the Insured.

8. Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.

9. Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.

D. WHO IS INSURED

1. You are an Insured for any covered auto.

2. Anyone else is an Insured while using with your permission a covered auto you own, hire or borrow except:

   a. Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos.

   b. Anyone other than your employees, a lessee or borrower or any of their employees, while moving property to or from covered auto.

3. Anyone liable for the conduct of an Insured described above is an Insured but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an Insured only if that auto is a trailer connected to a covered auto you own.

4. An employee operating a privately owned auto is provided our limit of liability provided such operation is in the performance of and within the scope of the employee's official duties. Such insurance, however, is excess of any other valid and collectible insurance covering that auto.

E. OUR LIMIT OF LIABILITY

1. Regardless of the number of covered autos, Insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the LIABILITY INSURANCE limit shown on the certificate of insurance. However, for any action or claim brought

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under the provisions of Chapter 78 of the South Carolina Code of Laws cited as the "South Carolina Tort Claims Act", the liability of the Fund shall not exceed the following limits:

(1) No person shall recover in any one action or claim a sum exceeding 300,000 dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(2) The total sum recovered arising out of a single occurrence shall not exceed 600,000 dollars regardless of the number of agencies or political subdivisions involved.

Liability limits in excess of $600,000 dollars per occurrence shall apply only in actions or claims to which Chapter 78 does not apply.

2. All bodily injury and property damage resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one accident.

F. OUT OF STATE EXTENSIONS OF COVERAGE

1. While a covered auto is away from the state where it is licensed we will:

   a. Increase this policy's liability limits to meet those specified by a compulsory or financial responsibility law in the jurisdiction where the covered auto is being used.

   b. Provide the minimum amounts and types of other coverages, such as "No-Fault", required of out state vehicles by the jurisdiction where the covered auto is being used.

2. We will not pay anyone more than once for the same elements of loss because of these extension.

G. ADDITIONAL DEFINITION

Covered auto in the auto liability part means any auto owned, leased, hired or borrowed by the named insured.

## PART V - MEDICAL PAYMENTS

A. WE WILL PAY

We will pay reasonable expenses incurred for necessary medical and funeral services to or for an insured who sustains bodily injury caused by accident. We will pay only those expenses incurred within three years from the date of the accident.

B. WHO IS AN INSURED

1. You while occupying or, while a pedestrian, when struck by an auto.

2. If you are an individual, any family member while occupying or, while a pedestrian, when struck by any auto.

3. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.

C. EXCLUSIONS

The insurance does not apply to any of the following:

1. Bodily injury sustained by an insured while occupying a vehicle located for use as a premises.

2. Bodily injury sustained by you or any family member while occupying or struck by any vehicle (other than a covered auto) owned by you or furnished or available for your regular use.

3. Bodily injury sustained by any family member while occupying or struck by any vehicle (other than a covered auto) owned by or furnished or available for the regular use of any family member.

4. Bodily injury to your employee arising out of and in the scope of his or her official duties for you.

5. Bodily injury to an insured while working in a business of selling, servicing, repairing or parking autos unless that business is yours.

6. Bodily injury caused by declared or undeclared war or insurrection or any of their consequences.

7. Bodily injury to anyone using a vehicle without a reasonable belief that the person is entitled to do so.

D. LIMIT OF INSURANCE

Regardless of the number of covered autos, insureds, premiums paid, claims made or vehicles involved in the accident, the most we will pay for bodily injury for each insured injured in any one accident, shall not exceed $1,000.

E. CHANGES IN CONDITIONS

The CONDITIONS are changed for AUTO MEDICAL PAYMENTS COVERAGE as follows:

1. The TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Condition does not apply.

2. The reference in OTHER INSURANCE to other collectible insurance applies only to other collectible auto medical payments insurance.

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

1. "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

2. "Occupying" means in, upon, getting in, on, out or off.

3. "Pedestrian" means a person on foot or while using a wheelchair or a non-motorized bicycle.

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## PART VI - UNINSURED MOTORISTS

### A. WE WILL PAY

We will pay in accordance with the South Carolina Uninsured Motorists Law all sums the insured is legally entitled to recover as damages from the owner or driver of an uninsured motor vehicle. The damages must result from bodily injury sustained by an insured or property damage caused by an accident. The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the uninsured motor vehicle.

### B. WHO IS AN INSURED

1. You, the organization shown on the certificate of insurance.
2. Anyone else "occupying" a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss or destruction.
3. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured.

### C. EXCLUSIONS

This coverage does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
3. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.
4. The first $200 of the amount of property damage to the property of each insured as the result of any one accident.
5. That part of property damage for which an insured has been compensated by insurance or otherwise.

### D. OUR LIMIT OF LIABILITY

1. Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the Declarations.
2. The maximum recovery under this uninsured motorists coverage shall not exceed the limit of coverage for any one covered auto. Coverage on any other autos under this policy or under any other applicable policies shall not be added or stacked.
3. Any amount payable under this insurance shall be reduced by:
   a. All sums paid or payable under any workers' compensation, disability benefits or similar law, and
   b. All sums paid by or for anyone who is legally responsible, including all sums paid under the policy's LIABILITY INSURANCE.
4. Any amount paid under this insurance will reduce any amount an insured may be paid under the policy's LIABILITY INSURANCE.
5. No one will be entitled to receive duplicate payments for the same elements of loss.

### E. CHANGES IN CONDITIONS

The CONDITIONS of the policy are changed for UNINSURED MOTORISTS INSURANCE as follows:

1. OTHER INSURANCE is replaced by the following:
   a. Where an insured sustains bodily injury while occupying a covered auto, this policy provides primary uninsured motorists coverage.
   b. Where an insured sustains bodily injury while not occupying a covered auto, this policy provides no uninsured motorists coverage, unless there is no other collectible uninsured motorists coverage.
   c. The maximum recovery under this uninsured motorists coverage shall not exceed the limit of coverage for any one covered auto. Coverage on any other autos under this policy or under any other applicable policies shall not be added or stacked.
   d. For property damage, this insurance is excess to all collectible insurance of any kind.
2. YOUR DUTIES AFTER ACCIDENT OR LOSS are changed by adding the following:
   a. Promptly notify the police if a hit-and-run driver is involved, and
   b. Promptly send us copies of the legal papers if a suit is brought.
3. OUR RIGHT TO RECOVER FROM OTHERS is changed by adding the following:
   a. If the insured has prosecuted to judgment any suit against anyone responsible we will be entitled to any assignment of the judgment to the extent of payment under this insurance.
   b. We will pay our proportionate part of any reasonable costs and expenses incurred for any recovery, including reasonable attorney's fees. However, we reserve the right to retain an attorney of our choice to pursue a claim instead of reasonable attorney's fees.
   c. 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 the claim until the insured has assigned us the rights to the compensation, to the extent of payment under this insurance.
   d. If we make any payment and the insured recovers from another party, the insured shall hold the proceeds in trust for us and pay us back in the amount we have paid.

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4. The following Condition is added:

CONFORMITY TO STATUTE

This endorsement is intended to be in full conformity with the South Carolina Uninsured Motorists Law. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

F. ADDITIONAL DEFINITIONS

The following are added to the DEFINITIONS Section:

1. Family member means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

2. Occupying means in, upon, getting in, on, out or off.

3. Property damage means injury to or destruction of the property of an insured.

4. Uninsured motor vehicle means a land motor vehicle or trailer:

   a. For which neither a liability bond or policy nor cash or securities deposited with the State Treasurer provides at least the amounts required by the South Carolina Motor Vehicle Financial Responsibility Act;

   b. That is a hit-and-run vehicle whose operator or owner cannot be identified and that hits or that causes an accident resulting in bodily injury or property damage without hitting your covered auto. The facts of the accident must be corroborated by competent evidence of an eyewitness other than the owner or operator of the covered auto. The eyewitness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit.

   c. For which an insuring or bonding company successfully denies coverage, is or becomes insolvent, is in delinquency proceedings, suspension or receivership, or is proven unable to respond to a judgment.

   However, uninsured motor vehicle does not include any vehicle:

   a. Owned by any governmental unit or agency unless a cause of action against that governmental unit or agency is barred by the South Carolina Tort Claims Act, S. C. Code Ann. § 15-78-10, et seq., or by other applicable statute.

   b. Designed for use mainly off public roads while not on public roads.

## PART VII - PHYSICAL DAMAGE INSURANCE

A. WE WILL PAY

1. We will pay for loss to a covered auto or its equipment under:

   a. Comprehensive Coverage. From any cause except the covered auto's collision with another object or its overturn.

   b. Collision Coverage. Caused by the covered auto's collision with another object or its overturn.

2. Towing

   We will pay up to $25 for towing and labor costs incurred each time a covered auto of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

B. WE WILL ALSO PAY

We will also pay up to $10 per day to a maximum of $300 for transportation expense incurred by you because of the total theft of a covered auto of the private passenger type. We will pay only for those covered autos for which you carry either Comprehensive or Specified Perils Coverage. We will pay for transportation expenses incurred during the period beginning 48 hours after the theft and ending, regardless of the policy's expiration, when the covered auto is returned to use or we pay for its loss.

C. WE WILL NOT COVER - EXCLUSIONS

This insurance does not apply to:

1. Wear and tear, freezing, mechanical or electrical breakdown unless caused by other loss covered by this policy.

2. Blowouts, punctures or other road damage to tires unless caused by other loss covered by this policy.

3. Loss caused by declared or undeclared war or insurrection or any of their consequences.

4. Loss caused by the explosion of a nuclear weapon or its consequences.

5. Loss caused by radioactive contamination.

6. Loss to tape decks or other sound reproducing equipment not permanently installed in a covered auto.

7. Loss to tapes, records or other sound reproducing devices designed for use with sound reproducing equipment.

8. Loss to any sound receiving equipment designed for use as a citizens' band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the auto manufacturer for the installation of a radio.

D. HOW WE WILL PAY FOR LOSSES - THE MOST WE WILL PAY

1. At our option we may:

   a. Pay for, repair or replace damaged or stolen property; or

   b. Return the stolen property, at our expense. We will pay for any damage that results to the auto from the theft.

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2. The most we will pay for loss is the smaller of the following amounts:

   a. The actual cash value of the damaged or stolen property at the time of loss.

   b. The cost of repairing or replacing the damaged or stolen property with other of like kind or quality.

3. For each covered auto, our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the Declarations. Any Comprehensive Coverage deductible shown on the Certificate of Insurance does not apply to loss caused by fire or lightning.

E. GLASS BREAKAGE - HITTING A BIRD OR ANIMAL - FALLING OBJECTS OR MISSILES

We will pay for glass breakage, loss caused by hitting a bird or animal or by falling objects or missiles under Comprehensive Coverage if you carry Comprehensive Coverage for the damaged covered auto. However, you have the option of having glass breakage caused by a covered auto's collision or overturn considered a loss under Collision Coverage.

F. ADDITIONAL DEFINITION

Covered auto in the auto physical damage part means:

1. Autos that are specifically scheduled and for which a premium charge is shown in the Declarations.

## PART VII - CONDITIONS.

The insurance provided by this policy is subject to the following conditions:

A. YOUR DUTIES AFTER ACCIDENT OR LOSS

1. You must promptly notify us or our agent of any accident or loss. You must tell us how, when and where the accident or loss happened. You must assist in obtaining the names and addresses of any injured persons and witnesses.

2. Additionally, you and other involved insureds must:

   a. Cooperate with us in the investigation, settlement or defense of any claim or suit.

      No insured shall, except at his or her own cost, voluntarily make any payment, assume any obligation or incur any expense.

   b. Immediately send us copies of any notices or legal papers received in connection with the accident or loss.

   c. Submit at our expense and as often as we require to physical examinations by physicians we select.

   d. Authorize us to obtain medical reports and other pertinent medical information.

3. Additionally, to recover for loss to a covered auto or its equipment you must do the following:

   a. Permit us to inspect and appraise the damaged property before its repair or disposition.

   b. Do what is reasonably necessary after loss at our expense to protect the covered auto from further loss.

   c. Submit a proof of loss when required by us.

   d. Promptly notify the police if the covered auto or any of its equipment is stolen.

B. OTHER INSURANCE

1. For any covered auto you own, this policy provides primary insurance. For any covered auto you don't own, the insurance provided by the policy is excess over any other collectible insurance. However, while a covered auto which is a trailer is connected to another vehicle the liability coverage this policy provides for the trailer:

   a. Is excess while it is connected to a motor vehicle you don't own.

   b. Is primary while it is connected to covered auto you own.

2. When two or more policies cover on the same basis either excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis.

C. OUR RIGHT TO RECOVER FROM OTHERS

If we make any payment, we are entitled to recover what we paid from other parties. Any person to or for whom we make payment must transfer to us his or her rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.

D. CANCELLING THIS POLICY

(a) This policy may be cancelled by the named insured by mailing to the Fund a 60 day written advance notice stating when thereafter the cancellation shall be effective. A political subdivision may cancel all policies with the Fund by mailing to the Fund a 60 day written advance notice as provided in §15-78-140 of the South Carolina Code of Laws.

(b) The Fund may cancel this policy for non-payment of premium by mailing a notice of cancellation giving not less than 30 days' notice of the cancellation as provided in §15-78-160 of the South Carolina Code of Laws.

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(c) If the policy is cancelled in accordance with (a) or (b) above, earned premium shall be computed in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

E. LEGAL ACTION AGAINST US

No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under LIABILITY INSURANCE, no legal action may be brought against us until we agree in writing that the Insured has an obligation to pay or until the amount of that obligation has been finally determined by judgment after trial. No person or organization has any right under this policy to bring us into any action to determine the liability of the Insured.

F. INSPECTION

At our option we may inspect your property and operations at any time. These inspections are for our benefit only. By our right to inspect or by our making any inspection we make no representation that your property or operations are safe, not harmful to health or comply with any law, rule or regulation.

G. CHANGES

This policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us. If a change requires a premium adjustment, we will adjust the premium as of the effective date of change. If we revise the policy form to provide more coverage without additional premium charge your policy will automatically provide the additional coverages as of the day the revision is effective.

H. TRANSFER OF YOUR INTEREST IN THIS POLICY

Your rights and duties under this policy may not be assigned without our written consent.

I. NO BENEFIT TO BAILEE - PHYSICAL DAMAGE INSURANCE ONLY

We will not recognize any assignment or grant any coverage for the benefit of any person or organization holding, storing or transporting property for a fee regardless of any other provision of this policy.

J. APPRAISAL FOR PHYSICAL DAMAGE LOSSES

1. If you and we fail to agree as to the amount of loss either may demand an appraisal of the loss. In such event you and we shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss, and, failing to agree, shall submit their difference to the umpire. An award in writing of any two shall determine the amount of loss. You and we shall each pay the chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

2. We shall not be held to have waived any of our rights by any act relating to appraisal.

K. TWO OR MORE POLICIES ISSUED BY US

If this policy and any other policy issued to you by us applies to the same accident, the aggregate maximum limit of liability under all the policies shall not exceed the highest applicable limit of liability under any one policy. This condition does not apply to any policy issued by us or an affiliated company specifically to apply as excess insurance over this policy.

OFFICE OF INSURANCE RESERVE FUND

Office Director

CERTIFIED TRUE COPY

21 Sept 2010

ATHENA S. WESTBREEN, CPCU
UNDERWRITING DEPARTMENT
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Fax: (888) 870-0317

April 28, 2010

Christi Cox @ Hamilton Martens & Ballou Atty @ Law
P O Box 10940
Rock Hill, SC 29731

RE: Claim Number: 40-8515-073
Date of Loss: October 21, 2009
Our Insured: Phyllis L Paden-Adams
Your Client: Phyllis L Paden-Adams

Dear Christi:

This is to confirm our conversation on Wednesday, April 28th, in which I informed you that this claim does not appear to qualify as an underinsured claim. This is based on the knowledge that no vehicle was involved in this accident other than Mrs. Paden-Adams. The SCDOT does not qualify as an underinsured motor vehicle. Please advise us of your thoughts.

Sincerely,

Lindsay R. Smith
Claim Representative
877-859-1846 Ext 9353540

State Farm Fire and Casualty Company

COPY

South Carolina Operation Center
P. O. Box 10003
Duluth, GA 30096-9403
Fax: (888) 870-0317

May 14, 2010

Christi Cox @ Hamilton Martens & Ballou Atty @ Law
P O Box 10940
Rock Hill, SC 29731

RE: Claim Number: 40-8515-073
Date of Loss: October 21, 2009
Our Insured: Phyllis L Paden-Adams
Your Client: Phyllis L Paden-Adams

Dear Christi:

We have received and reviewed your letter dated April 30, 2010. Out position stands as previously indicated. This claim does not appear to qualify as an underinsured motor vehicle claim. Please see page 20 of the policy where motor vehicle is defined. The trucks you mention in your letter are not designed for use on public roads.

Sincerely,

Lindsay R. Smith
Claim Representative
877-859-1846 Ext 9353540

State Farm Fire and Casualty Company

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | ) | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY,<br><br>Plaintiff,<br><br>v. | ) | C/A No. 2011-CP-46-0021<br><br>MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS,<br><br>Defendants. | ) | |

Defendants Phyllis and Alonzo Adams submit the following memorandum in opposition to Plaintiff's motion for summary judgment.

## STATEMENT OF THE CASE

This is a UIM coverage dispute in which the Defendants have also counterclaimed for bad faith claims handling and refusal to pay insurance benefits. Defendant Phyllis Adams was rendered quadriplegic as a result of a car accident on Craig Road. Ms. Adams contends SCDOT, through the negligent use maintenance and operation of its motor vehicles[1] caused the accident and her resulting damages. After receiving the statutory liability limits from SCDOT, the Adams now seek coverage from their own insurance carrier, State Farm, pursuant to the UIM coverage in their policies.

State Farm contends that is not required to pay UIM coverage to the Adams, on the sole basis that the SCDOT vehicles which caused Ms. Adams' accident were not geographically present or in within "eyesight" at the exact moment Ms. Adams' vehicle crashed. The Adams contend that State Farm's basis for denying the claim is meritless and is not supported by the

[1] Specifically the truck identified as Equipment # 014-01-1067, which had mounted upon it an asphalt sprayer.

terms of the policy or any relevant South Carolina case law. Furthermore, Defendants submit that State Farm's refusal to timely investigate the claim, its delay in asserting its declaratory judgment action, its refusal to admit liability in the underlying action when it is the reasonable thing to do, and its refusal to pay benefits constitute bad faith.

FACTUAL BACKGROUND

~~**State Farm's Memorandum only provides some of the "undisputed" facts relevant to the~~ **collision and the issues it presents in its motion for summary judgment. Because State Farm is unwilling to stipulate to any facts (in this case or the underlying liability case) which State Farm deems not relevant to its summary judgment motion, but which are undisputed by SCDOT in the underlying action, the Defendants submit the motion for summary judgment is premature. Rather than be required to establish facts twice, the Defendants, prior to State Farm's filing of the summary judgment motion, filed a motion to consolidate this case with the underlying liability action in an effort to streamline the case and avoid duplicative costs and court resources. In effort to respond to the Plaintiff's Summary Judgment Motion, the Defendants have filed numerous documents and evidence which is applicable to this case as well as the underlying liability action, which it requests the Court consider in both motions presently before the Court.**

On October 8, 2009, an SCDOT work crew carried out a resurfacing project, called "chip sealing" along Craig Road in York County, South Carolina.[2] SCDOT's crew used a 2003 Chevy truck, mounted with an asphalt sprayer to apply a layer of emulsion binder to Craig Road for its chip seal project. Essentially, while the truck was being driven down the road, the nozzles on the front of the truck sprayed emulsion on the road. The amount of emulsion sprayed was controlled by the driver of the truck, while the driver was simultaneously driving down Craig Road.

[2] By way of information, chip sealing is an asphalt surface treatment process that consists of a layer of asphalt emulsion binder topped by a layer of embedded aggregate. Affidavit of J. Cloyce Darnell, P.E. at ¶ 3. The asphalt binder is typically applied to the road surface using a truck equipped with an asphalt tank, pump, and spray bar. The truck is driven down the road and is designed to spray a uniform layer of asphalt emulsion at a specified application rate onto the road surface. Id. ¶ 4. In order to ensure a successful chip seal, it is critical that the truck be operated so that a sufficient quantity of binder is applied at a uniform rate across the road's surface. Id. ¶ 5. Otherwise, the chip seal will fail, and aggregate can become easily dislodged from the road's surface. Id. ¶ 6. In severe cases, the loose aggregate can create a hazard to motorists. Id.

As established by the evidence in the underlying case, the driver of the truck did not properly operate the vehicle to deliver a uniform and adequate layer of emulsion. Darnell Aff. ¶ 7. As a result, the amount of emulsion the driver sprayed upon the road was not uniform and was significantly less than the amount required by SCDOT's own specifications. Id. Consequently, the aggregate layer of the chip seal, which was deposited on the road by SCDOT's own dump trucks did not adhere to the emulsion, and a substantial quantity of loose and easily dislodged rocks were left on the roadway. Darnell Aff. ¶ 9.

On October 21, 2009, Phyllis Adams was driving down Craig Road when her vehicle (2004 Honda Accord) struck a patch of the loose/dislodged rocks on the roadway. Ms. Adams lost control of her car, spun off the road, struck an embankment, and severed her spinal cord. Ms. Adams has described the moments before she lost control of her vehicle as feeling like she was "driving on marbles." Id. As a result of her injuries, Ms. Adams' was rendered a quadriplegic.

Ms. Adams and her husband brought suit against SCDOT, alleging negligence and gross negligence. In November 2010, SCDOT settled Ms. Adams' claims by tendering statutory limits under the South Carolina Tort Claims Act. Ms. Adams' medical bills alone at the time of tender totaled more than $500,000, which greatly exceed the amount she recovered from SCDOT in settlement. State Farm assumed the defense of SCDOT, under the UIM provision of Ms. Adams' policy. State Farm also brought this action, seeking a declaratory judgment that it was not liable under the Policy's UIM provision.

ADAMS' UIM COVERAGE WITH STATE FARM

State Farm issued several policies of insurance to Phyllis Paden-Adams and Alonzo Adams, all with identical terms. Of specific relevance, under the terms of the underinsured motorist coverage provisions of the policy State Farm agreed to:

> We [State Farm] will pay damages for **bodily injury**[3] or **property damage** an insured:
>
> 1. is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**; or
>
> 2. would have been legally entitle to collect except for the existence of any damages cap or limitation imposed by statute.
>
> The **bodily injury** or **property damage** must be caused by accident arising out of the operation or ownership of the **underinsured motor vehicle**.

ARGUMENT

I. *Because the question of coverage submitted by State Farm depends on questions of fact which have yet to be determined, State Farm's motion for summary judgment should be denied.*

Actions for declaratory judgment under an insurance policy are generally matters of contract interpretation, which are submitted to the court on established, admitted or stipulated facts. South Carolina's courts have held that a determination of a right to indemnity (as in the case of insurance) "is based on the evidence and the facts found by the fact finder." Jourdan v. Boggs/Vaughn Contracting, Inc., 324 S.C. 309, 313-14, 476 S.E.2d 708, 711 (Ct. App. 1996)(citing Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990)).[4] In fact, each of the declaratory judgment decisions cited by State Farm in its memorandum were decided

[3] In this memorandum, as in Ms. Adams' policy, defined policy terms are set forth in bold. Relevant policy definitions are set forth verbatim in the attached Exhibit A.

[4] Neither Jourdan nor Griffin addressed the precise issue of whether an insurer had a duty to indemnify its insured. Jourdan dealt with a claim for indemnity between a general contractor and its subcontractor. Griffin involved a claim for indemnity by the seller of a home against an exterminator who had provided a false wood infestation report in connection with sale of the home.

either on stipulated facts, or upon a full factual record decided by trial on the merits in the underlying liability dispute. As with any case, summary judgment should be denied where there are disputed issues of material fact, or where further inquiry into the facts is necessary.

The specific issue presented by State Farm is whether Mrs. Adams suffered "bodily injury that was caused by accident arising out of the operation or ownership of the underinsured motor vehicle."[5] To render a decision, at the very least, the Court needs to know facts about: the bodily injury suffered by Ms. Adams, the accident that occurred, and the identity and "use maintenance and operation" of the vehicles which Defendants contend caused the accident.

In support of its motion, State farm submits *some* undisputed facts in this case—rather, *some* of the undisputed facts in the underlying liability case which the Defendants, in good faith, have admitted in discovery *in this case*.[6] However, State Farm unreasonably refuses to respond in kind. In fact, State Farm refuses to stipulate or even provide substantive discovery responses regarding *other* undisputed facts in the underlying liability case, which although equally relevant to the coverage issue are not perhaps helpful to State Farm's theory of the case and therefore "not relevant"—at least to State Farm.[7] In fact, State Farm refuses to even admit that the vehicles involved in the chip-seal on October 8, 2009 were motor vehicles used by SCDOT.

Additionally and as this court is aware, State Farm has assumed the defense of Ms. Adams' liability lawsuit against SCDOT. Even though SCDOT's own witnesses have testified in the underlying case that they are not aware of any evidence of comparative or intervening negligence, SCDOT (through State Farm) continues to defend that case, deny liability, and assert

[5] State Farm's Brief in opposition to consolidation at page 5, wherein State Farm asserts the issues relevant to both
[6] State Farm's argument depends on interrogatory responses and admissions by Defendants which concern undisputed facts in the underlying liability case. See p.12provided
[7] See State Farm's responses to Defendants' Requests for Admissions, Tabs 4 and 5 of Defendants Notice of Filing Affidavit and Discovery Responses, at ¶¶7, 8, 9, 10, 13, 20, 21, 22, 23, and 24.

those defenses, albeit without having conducted any discovery or doing anything substantive in the liability case for close to an entire year.

Both the liability case and this case hinge on common questions of fact and determinations of proximate cause, and in both cases the questions of fact should be determined by a jury. For that reason, and in an effort to avoid inconsistent factual findings, Ms. Adams believes that it would be most efficient to consolidate the two cases. Once a jury has made findings of fact upon the evidence presented at trial, this court could then apply those same factual findings to determine State Farm's contractual liability for UIM benefits.

Of course, State Farm has attempted to "short circuit" that process by filing a motion for summary judgment in this case. While many facts relevant to State Farm's motion are undisputed, there is ample evidence in the record by which a reasonable juror could find that UIM coverage is available under the terms of Ms. Adam's policy. For that reason, State Farm's motion for summary judgment should be denied in its entirety.

*II. There is evidence that Ms. Adams' injuries were caused by an accident arising out of the operation or maintenance of an underinsured motor vehicle.*

Based upon the plain language of State Farm's policy, there can be no question that SCDOT's trucks fall squarely within the Policy's definition of "underinsured motor vehicle." They are, after all, "self-propelled vehicles designed for use on public roads," making it a "motor vehicle" under the terms of the Policy. Nor can there be any serious dispute that Ms. Adams' damages greatly exceed "any damages cap or limitation imposed" by the Tort Claims Act, which makes the emulsion distributor vehicle an "underinsured motor vehicle" as defined by the parties' contract. The real question is whether Ms. Adams' severe personal injuries were "caused by accident arising out of the operation or ownership" of the emulsion distribution

vehicle. At the very least, there are disputed issues of fact which preclude this court from deciding, as a matter of law, that Ms. Adams may not recover UIM benefits.

As established by the evidence in the underlying case, SCDOT carried out a chip-sealing project along Craig Road on October 8, 2009. There is evidence that SCDOT's emulsion truck operator "did not properly operate the distributor vehicle" in connection with that work. Darnell Aff. ¶ 7. As a result of that improper operation, "aggregate applied over the [emulsion binder] was easily dislodged by traffic, including Ms. Adams' car." Id. at 9. Ms. Adams lost control of her vehicle and wrecked when she encountered the loose aggregate and hazardous condition that SCDOT left behind.

State Farm apparently contends that it has no obligation to provide UIM coverage because "no vehicle or other equipment of the SCDOT was being used for transportation purposes on Craig Road at the time and place of Phyllis Adams' injury." Plaintiff's Brief at 2; Plaintiff's Answer to Int. 11. However, nothing in the plain language of Ms. Adams' policy limits UIM coverage in the manner State Farm now contends.

By its very terms, the Policy excludes from the definition of "underinsured motor vehicle" any motor vehicle "while located for use as premises." Policy at 19. The policy also expressly excludes "traction engines, road rollers, farm tractors, tractor cranes, power shovels, well drillers and electric trolleys" from the definition of "motor vehicles." Id. at 19. Thus, it is clear that State Farm was capable of defining, expressly and with great specificity, the circumstances where coverage would, and would not, be available under the UIM provision of its policy. However, *nowhere* does the policy require that an underinsured vehicle must be "involved" in an accident in order to trigger coverage. Nor does the policy require that an underinsured motor vehicle must have "been used for transportation at the time of the accident in

question" to trigger coverage. Those contractual limitations simply do not exist, and this court has "no authority to torture the meaning of the policy language to extend or defeat coverage that was never intended by the parties." Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995).

The UIM provision of State Farm's policy stands in stark contrast to the Personal Injury Protection provision of that same policy. Unlike the UIM provision, PIP benefits are available only to an insured who is "occupying or . . . struck by a land motor vehicle or trailer" at the time of loss. Policy at 13 (underlining added). Clearly, had State Farm intended to limit UIM benefits to those circumstances where an underinsured vehicle was "involved" in an injury-causing accident (as it did in the PIP provision), it could have drafted its policy to accomplish that objective. State Farm's assertion that an underinsured vehicle must be "involved" in an accident, or "used for transportation at the time of the accident," to trigger UIM benefits is not supported by the language of its own insurance contract. Ms. Adams is entitled to benefits, provided her injuries "are caused by accident arising out of the operation or ownership of [an] underinsured motor vehicle." There is clearly sufficient evidence to present that question to a jury.

*III. There is evidence by which any reasonable fact-finder could determine that Ms. Adams' accident arose out of SCDOT's "operation or ownership " of underinsured motor vehicles.*

South Carolina has adopted a three prong test for determining when a plaintiff's injuries are caused by an accident "arising out of the ownership, operation or maintenance" of an (under)insured motor vehicle. First, the "party seeking coverage must establish a causal connection between the vehicle and the injury." State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)(citing Wausau Underwriters Ins. Co. v. Howser, 309 S.C.

269, 422 S.E.2d 106 (1992)). Second, "there must exist no act of independent significance breaking the causal link." Id. Finally, the vehicle must have been used for transportation "at the time of the assault." State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998) (citing Canal Ins. Co. v. Insurance Co. of North Am., 315 S.C. 1, 431 S.E.2d 577 (1993)). In this case, there is plain evidence by which a fact-finder could determine that Ms. Adams satisfies each prong, and is entitled to UIM benefits.

A. There is evidence of a causal connection between SCDOT's operation of its underinsured motor vehicles and Ms. Adams' injuries.

South Carolina's courts have found a "causal connection" between ownership, operation or use a vehicle and a claimant's injuries where the vehicle is an "active accessory" to the injury; where the vehicle was "something less than the proximate cause but more than the mere site of the injury;" and where "the injury was foreseeably identifiable with the normal use of the vehicle." Peagler v. USAA Ins. Co., 368 S.C. 153, 161, 628 S.E.2d 475, 479 (2006)(citing Aytes). Applying this standard, South Carolina's Supreme Court found a "causal connection" between an insured vehicle and a claimant's injuries where a bottle thrown from the vehicle struck a farmer working his fields. Home Ins. Co. v. Towe, 314 S.C. 105, 108, 441 S.E.2d 825, 827 (1994). In another case, the Supreme Court found a causal connection between a claimant's gunshot wounds and an unidentified motor vehicle that an assailant used in his assault. Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 273, 422 S.E.2d 106, 108 (1992). In that case, the court reasoned:

> [I]t is apparent that the unknown vehicle was an active accessory to the assault. This is not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting . . . . Nor is it a case where an assailant, happened, incidentally, to be sitting in a stationary vehicle at the time of the attack. Only through use of his vehicle was the assailant able to closely pursue [the claimant], thereby enabling him to carry out the pistol assault. The gunshot

> was the culmination of an ongoing assault, in which the vehicle played an essential and integral part. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape. Thus, we find a sufficient causal connection between the use of the assailant's vehicle and [the claimant's] injuries.

Howser at 269, 422 S.E.2d at 108. These cases make clear that the focus of inquiry is whether a vehicle "played an essential and integral part" in causing a claimant's injuries. There is certainly evidence by which a fact-finder could determine that Ms. Adams' claim meets this threshold.

SCDOT used a number of registered motor vehicles to carry out "chip seal" operations on Craig Road in October 2009. *See* SCDOT Work Order for 10/8/09 and Vehicle Registration Certificates. Among those vehicles, SCDOT operated a self-propelled emulsion truck, which included a distributor bar intended to spread a uniform layer of emulsion at a specified thickness across the roadway. Id.; *see also* Darnell Aff. ¶ 4. The emulsion truck was followed by an "aggregate spreader," which deposited gravel on the roadway and wet emulsion. By design, the aggregate was intended to adhere to the emulsion and bond to the roadway. Darnell Aff. ¶ 3. A failure to apply emulsion at a proper rate or in a uniform layer would result in loose gravel, and could result in hazardous driving conditions. Id. ¶ 6. This is precisely the condition that Ms. Adams contends caused her to lose control of her vehicle on October 21, 2009, as she traveled Craig Road. Thus, there is plainly evidence that SCDOT's vehicles were operated in such a manner that they "played an essential and integral part" in causing Ms. Adams' injuries.

This is not, as State Farm argues, a situation where SCDOT simply used motor vehicles to transport equipment and personnel to the job site. Rather, the motor vehicles were an essential component of SCDOT's work, which *could not have been completed* without SCDOT *driving its emulsion distributor truck* from one end of Craig Road to the other, as it distributed emulsion.

Clearly, there is evidence that the operation of that truck "played an essential and integral part" in causing Ms. Adams' injuries.

Under facts similar to those presented here, and employing a similar analysis, Mississippi's Supreme Court held that a motorist's fatal accident resulted from the "ownership, maintenance, or use" of a county dump truck when the motorist struck piles of dirt that the truck had left in the roadway. Jackson v. Daley, 739 So. 2d 1031, 1042 (Miss. 1999). That court reasoned that "where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use and operation until broken by [an intervening event] . . . and until an [intervening] event . . . transpires the liability under the policy exists." Id. at 1041; *see also* Merchants Co. v. Hartford Acc. & Indem. Co., 188 So. 571 (1939).[8]

Given the facts in the underlying case, there is clearly evidence that SCDOT's vehicles were "active accessories" in creating "a dangerous situation causing injury" to Ms. Adams. SCDOT operated its distributor truck and aggregate spreader in such a way that a large quantity of loose gravel was left on the surface of Craig Road. Likewise, there is evidence that the hazard Ms. Adams' faced was a reasonably foreseeable consequence of SCDOT failing to properly operate its vehicles. Darnell Aff. ¶ 6. State Farm has failed to demonstrate the absence of a triable issue of fact on these issues.

[8] Large poles were used to remove a truck from a ditch, and then left upon the highway. When a motorist later struck the poles, court found that motorist's resulting injuries arose out of "ownership, maintenance or use" of the truck. 188 So. 571.

B. SCDOT has not demonstrated any act of independent significance broke the causal link between SCDOT's negligent operation of its vehicles and Ms. Adams' injuries.

Once a causal connection between the "operation, maintenance, or use" of a motor vehicle and a claimant's injuries is established, the next consideration is whether the claimant's injuries arose from the "use, operation or maintenance" of the motor vehicle, or were instead "directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile." Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986). Here, Ms. Adams' claim easily clears that hurdle.

State Farm can point to no actual evidence of an "independent act or intervening cause" of Ms. Adams' injuries. Instead, State Farm asserts, with no authority, that "a 13-day gap between the alleged use of the motor vehicle and the injury is in itself an act of independent significance to break the causal link." State Farm Mem. at 13. State Farm's position is simply untenable.

As an initial matter, the passage of a few days' time is not an intervening act. State Farm has introduced no evidence to suggest other motorists, weather, Ms. Adams' own conduct or any other intervening act "wholly dissociated from, independent and remote" from SCDOT's operation of its motor vehicles caused any portion of Ms. Adams' injuries. *See also* Jackson v. Daley, 739 So. 2d 1031, 1042 (county employees' failure to remove dirt piles from roadway was not "intervening cause" of plaintiff's injuries, and did not break causal chain between operation of dump truck and plaintiff's injuries.

Furthermore, whether an intervening act has occurred is generally a question of fact. Small v. Pioneer Mach., Inc., 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1998). "For an

intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated." Id. As much as State Farm might like, the passage of a few days' time did not, as a matter of law, break the "causal link" between SCDOT's vehicular operations and Ms. Adams' injuries.

C. The underinsured vehicles were being used in their intended manner by SCDOT at the time they acted to cause injury to Ms. Adams.

The final consideration of whether claimant's injuries arose from the "ownership, use or operation" of a motor vehicle is whether the vehicle was being used for its intended purpose at the time of the injury-causing act. *Compare* Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E.2d 475 (2006)(finding no coverage for accidental injury while unloading gun from vehicle) *to* Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992)(finding coverage where assailant fired shots from vehicle). While some cases have "shorthanded" this analysis as whether the vehicle was being used for "transportation," Peagler makes clear that the focus of inquiry is really whether "a particular activity is a covered use as required by statute or a policy provision." 368 S.C. at 160, 628 S.E.2d at 479. Provided a vehicle is being used for its intended (or, more importantly, its insured) purpose, this third prong is satisfied.

In this case, there can be no question that SCDOT's trucks were being used for their intended, and insured, purpose at all relevant times. In particular, SCDOT's emulsion spreader is in service for the sole purpose of transporting and spreading emulsion. Under no stretch of the imagination could one seriously argue that the emulsion truck was being used in an "unauthorized," "unintended" or "unexpected" manner by SCDOT.

In denying Ms. Adams' claim, State Farm apparently places great weight on the fact that SCDOT's underinsured motor vehicles were "not in operation and were not being used for

transportation at the time of the accident in question." Answer to Int. 22. However, State Farm grossly over-simplifies the issue.

The vast majority of South Carolina cases considering whether an injury arose out of the "ownership, maintenance or use" of a motor vehicle involve intentional assaults, not accidents. *See* Peagler v. USAA Ins. Co., 368 S.C. 153, 160, 628 S.E.2d 475, 478 n. 3 (2006)(noting that, with one exception, all cases dealing with issue arose from intentional assaults). The other case, Canal Ins. Co. v. Insurance Co. of North Am., 315 S.C. 1, 431 S.E.2d 577 (1993), concerned a truck-mounted crane that collapsed and caused damage to a nearby building. In Canal Ins. Co., the Supreme Court concluded that to trigger coverage, a vehicle must have been used for transportation at the time of the "accident." Id. at 4, 431 S.E.2d at 580. Significantly, every reported South Carolina case to consider whether a plaintiff's injuries "arose out of the use, operation or maintenance" of a motor vehicle was based upon a factual record where the alleged act giving rise to injury caused instantaneous injury (i.e. – injury by gun shot, injury by bottle thrown from passing car, property damage caused by falling crane). However, State Farm has not identified a single South Carolina decision where coverage was denied, simply because the vehicle that caused injury by accident was no longer "on the scene" when the injury was suffered.

While State Farm dismissively concludes that is has no responsibility unless negligent operation of an underinsured vehicle and injury are instantaneous and geographically proximate, this court should not reach that conclusion. South Carolina's courts have regularly found liability where a defendant's negligent conduct creates a dangerous condition that later causes injury to another. Furthermore, South Carolina's UIM statute requires that Ms. Adams' policy must insure her "against loss from the liability imposed by law for damages arising out of the

ownership, maintenance or use" of an underinsured motor vehicle. S.C. Code Ann. § 38-77-140 (Law. Co-op. 2002). To limit coverage to that instant in time where an underinsured vehicle is *physically present* would impose artificial limitations of temporal and physical proximity that neither Ms. Adams' policy nor the UIM Statute contemplated. It makes no sense that SCDOT would be liable for injuries resulting from its negligent operation of motor vehicles, but that State Farm could avoid compensating Ms. Adams for those same injuries because SCDOT's negligently operated vehicles were no longer "on the scene" when Ms. Adams sustained her injuries.

A more reasoned approach is that followed by Mississippi's Supreme Court in Jackson v. Daley, 739 So. 2d 1031 (Miss. 1999). In that case, Mississippi's Supreme Court recognized that where negligently operated motor vehicle set in motion a foreseeable chain of events causing later injury to another, the resulting injuries arose from the "ownership, maintenance or use" of the negligently operated vehicle. As that court reasoned, "where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use and operation until broken by [an intervening event] . . . and until an [intervening] event . . . transpires the liability under the policy exists." Jackson v. Daley, 739 So. 2d 1031, 1042 (Miss. 1999). Because South Carolina's appellate courts have not yet addressed a scenario of "delayed injury" resulting from the negligent use, operation or maintenance of a motor vehicle, this court should be guided by the Mississippi Supreme Court's reasoning in Jackson.

Here, it is undisputed that SCDOT used motor vehicles (as defined by State Farm's policy) to carry out a chip-sealing project on Craig Road. Those vehicles were used by SCDOT in their intended (and insured) manner, and those vehicles were negligently operated to create a

"dangerous situation" that caused Ms. Adams to suffer severe personal injuries when she later encountered that dangerous situation. The "accident" that gave rise to Ms. Adams' injuries was SCDOT's negligent operation of its motor vehicles. Clearly those vehicles were present at the time of the accident, and Ms. Adams' claim for benefits satisfies the third prong of the Aytes analysis.

*IV. The court should deny State Farm's motion as to the Adams' counterclaims, because there is evidence by which a reasonable juror could find that State Farm failed to exercise good faith in considering and paying Ms. Adams' claim for UIM benefits.*

Obviously, if this court were to decide as a matter of law that no UIM benefits are available to Ms. Adams, then Defendants' counterclaims also fail. However, State Farm has advanced arguments that inherently raise issues of fact. For that reason, unless this court is prepared to decide as a matter of law that no UIM coverage is available to Ms. Adams, the court should deny State Farm's motion for summary judgment as to each of the Adams' counterclaims.

As shown by State Farm's discovery responses in this action, State Farm first had notice of Ms. Adams' accident and injuries in October 2009, and had notice of her intention to pursue UIM benefits by March 23, 2010. State Farm Activity Log (Bates SF0293 & SF0300). Between that date and October 29, 2010, State Farm did nothing to investigate Ms. Adams' accident, or her claim for benefits. State Farm did not interview Ms. Adams or any other witness (Pl.'s Admission # 6); it did not visit the accident scene (Answer to Int. 5(a)); it did not seek to determine or ascertain the cause of her accident; and it did not conduct any legal research concerning State Farm's potential liability. Answer to Int. 20. Instead, State Farm relief upon its "general understanding" of South Carolina law, and dismissively rejected Ms. Adams' claim for benefits, referring Adams' counsel to the Policy's definition of "motor vehicle" and stating "the trucks you mention in your letter are not designed for use on public roads." May 14, 2010 Letter

from Lindsay R. Smith. In fact, there is evidence which is directly contrary to that position, but State Farm did *nothing* to ascertain that information. On April 5, 2011, State Farm even contradicted itself by stating that "it could not admit or deny" whether SCDOT's vehicles were intended for use on public roads. Response to RFA 10. How, in good faith, could State Farm base its denial for benefits upon facts that it could neither "admit nor deny" a year later?

As State Farm points out in its brief, whether an insurer acted "reasonably" is the crux of a bad faith claim. That question is inherently a question of fact, particularly in light of the evidence in this case – no factual investigation; no witness interviews; no legal research; and an apparent refusal to respond to Ms. Adams' claims in a forthright manner. Unless this court is prepared to rule, as a matter of law, that Ms. Adams is not entitled to UIM benefits under her policy, Ms. Adams must be allowed to pursue her bad faith claims and have a jury decide whether State Farm acted reasonably and in good faith when it refused to pay those benefits.

## CONCLUSION

There is plain evidence in the record supporting Ms. Adams' claim for UIM benefits. There is evidence that Ms. Adams' injuries were caused by SCDOT's negligent use, operation or maintenance of its motor vehicles; State Farm has introduced no evidence of an "independent or intervening" act to break the causal chain; and there is evidence that SCDOT's vehicles were being operated within the normal and anticipated scope of operation. State Farm may not avoid Ms. Adams' legitimate claim, simply because Ms. Adams suffered injuries at a later time. There is evidence that Ms. Adams sustained injuries "arising from the ownership, maintenance or use" of SCDOT's underinsured motor vehicles, and that she is entitled to UIM benefits under her policy.

There is also considerable evidence that State Farm acted in bad faith, by failing to investigate Ms. Adams' claim, failing to consider anything other than the most restrictive and self-serving interpretation of its own policy provisions, and by offering varied and inherently conflicting responses to reasonable requests for information and admissions.

This court should deny State Farm's motions for summary judgment, consolidate this action with the Underlying Case, and stay any determination as to coverage and State Farm's bad faith until a jury has made factual findings as to proximate cause, liability and damages.

August 29, 2011



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ATTORNEYS FOR DEFENDANTS

Exhibit A

Relevant State Farm Policy Definitions

1. **Bodily Injury** – means bodily injury to a person and sickness, disease or death which results from it.

2. **Insured** – means you [i.e. - the policy holder], your spouse and relatives.

3. **Underinsured Motor Vehicle** – means a **motor vehicle**, as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in the **Financial Responsibility Act** and:

   1. the amount of the insurance or bond is less than the amount of the **insured's** damages; or
   2. the **insured's** damages exceed any damages cap or limitation imposed by statute.

An **underinsured motor vehicle** does not include any **motor vehicle** while located for use as premises.

4. **Motor Vehicle** – means a self-propelled vehicle or trailer designed for use on the public roads.

A **motor vehicle** does not include:

1. traction engines;
2. road rollers;
3. farm tractors;
4. tractor cranes;
5. power shovels;
6. well drillers; or
7. electric trolleys.

4833-2948-8905, v. 1

# State Farm Insurance Companies

South Carolina Operation Center
P. O. Box 10003
Duluth, GA 30096-9403
Fax: (888) 870-0317

May 14, 2010

Christi Cox @ Hamilton Martens & Ballou Atty @ Law
P O Box 10940
Rock Hill, SC 29731

RE: Claim Number: 40-8515-073
Date of Loss: October 21, 2009
Our Insured: Phyllis L Paden-Adams
Your Client: Phyllis L Paden-Adams

Dear Christi:

We have received and reviewed your letter dated April 30, 2010. Out position stands as previously indicated. This claim does not appear to qualify as an underinsured motor vehicle claim. Please see page 20 of the policy where motor vehicle is defined. The trucks you mention in your letter are not designed for use on public roads.

Sincerely,

Lindsay R. Smith
Claim Representative
877-859-1846 Ext 9353540

State Farm Fire and Casualty Company

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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | MOTION FOR RECONSIDERATION |
| vs. | ) | |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendants. | ) | |

Pursuant to SCRCP 59(e) the plaintiff moves for reconsideration of the order of Judge John C. Hayes, III dated September 2, 2011 and received by counsel for the plaintiff on September 6, 2011. The ground for the motion for reconsideration is that the Court's order of September 2, 2011 contains a factual and legal error in that it states that State Farm's policy offers more coverage than is required under § 38-77-140 because the policy provides coverage for "operation" of an underinsured motor vehicle. (pp. 2, 3 of September 2, 2011 order) Under South Carolina law "use" of motor vehicles is a broader term than the "operation" of a motor vehicle. One who operates a motor vehicle obviously uses it, but one can use a motor vehicle without operating it. Hite v. Hartford Accident & Indemnity Company, 344 S.E.2d 173, 175 (S.C. App. 1986) Additionally, in State Farm Mutual Automobile Insurance Company v. Bookert, 499 S.E.2d 480 (S.C. App. 1997), the State Farm policy, as in the present case, provided coverage for an accident arising out of the "operation or ownership" of the underinsured motor vehicle. The trial court reformed the policy to substitute "ownership, maintenance, or use" for the policy term of "operation or ownership" and granted summary

judgment in favor of the insured. 499 S.E.2d at 482, 483 In other words, the trial court expanded coverage by using the language in the statute, rather than the language in the State Farm policy. In affirming the trial court, the Court of Appeals cited Hite for the distinction between "use" and "operation," finding the former provided more coverage than the latter. 499 S.E.2d at 483 In reversing the Court of Appeals the Supreme Court did not reverse the "use" - "operation" distinction, but simply referred to Aytes to reverse the Court of Appeals. State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999) Therefore, if case law interpreting the word "use" in § 38-77-140 would require the Court to grant State Farm's motion for summary judgment, as the Court states on page 3 of its order, then the use of the word "operation" in the State Farm policy provides no greater coverage and does not change the requirement that State Farm's motion for summary judgment be granted.

State Farm further requests that the Court rule on its motion for summary judgment on the defendants' counterclaims for breach of contract and bad faith. These issues were raised in State Farm's motion for summary judgment and its memorandum in support of that motion but were not ruled upon in the Court's order of September 2, 2011.

This motion is based upon SCRCP 59(a) and upon appellate court decisions in South Carolina.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

September 13, 2011

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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK ) | |
| State Farm Fire and Casualty Co., ) | Case No.: 2011-CP-46-0021 |
| ) | |
| Plaintiff, ) | |
| ) | |
| v. ) | **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION** |
| ) | |
| Phyllis Paden-Adams and Alonzo Adams, ) | |
| ) | |
| Defendants. ) | |

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DAVID HAMILTON
C.C.P.&S.
YORK COUNTY, SC

State Farm's motion for reconsideration misapprehends the bases for the trial court's decision, and wrongly focuses upon semantic distinctions that have little or no bearing on the issues before this court. State Farm continues to ignore that its policy provides UIM coverage where an insured suffers injuries that result from an "accident arising out of the ownership, use, maintenance or operation of a motor vehicle," while South Carolina's UIM statute provides that a policy must provide coverage for "injuries arising from the use, maintenance or ownership" of a motor vehicle. As the trial court recognized, the scope and breadth of State Farm's policy language is different from, and provides greater protection to an insured, than the statutorily mandated language. Order at 4.

This case does not hinge upon an interpretation of South Carolina's UIM statute. It hinges upon an interpretation of State Farm's policy. *See* Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., S.C. Sup. Ct. Op. No. 26909, at 8 (Aug. 22, 2011)("We begin with the basic principle that insurance policies are contracts to be interpreted in accord with contract law"). Consequently, Aytes and its progeny,

which are factually dissimilar and which interpret the UIM statute, are not controlling. Order at 2; *see also* Johnson v. Johnson, 194 S.C. 115, 8 S.E.2d 351, 352 (1940)(when faced with a novel issue, the court is "at liberty to adopt that rule which . . . best conforms to the principles of equity and which will tend to the furtherance of justice."); Brown v. Anderson Co. Hosp. Ass'n., 268 S.C. 479, 486, 234 S.E.2d 873, 876 (1977)(holding superseded by statute)(*stare decisis* is not intended to effect "petrifying rigidity" in the law); BLACK'S LAW DICTIONARY (6th ed. 1990)("Stare Decisis: Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, *where facts are substantially the same.*")(emphasis added).

As the court recognized, the factual posture of this case is not similar to Aytes, Bookert, or any other reported South Carolina decision. Furthermore, unlike Aytes and Bookert, this case is not before the court upon stipulated facts, admitted liability, or a fully established factual record. Consequently, *stare decisis* does not dictate a particular result.

State Farm's reliance upon Hite v. Hartford Accident & Indemnity Company and State Farm Mutual Automobile Insurance Company v. Bookert, is simply misplaced. In Hite, the Court of Appeals considered whether an insured's employee qualified as a "second class insured" so as to recover *uninsured* motorist benefits. A "second class insured" as defined by statute and interpreted by the court only provides coverage for permissive users/guests "while using, or a guest in, the motor vehicle to which the policy

applies."[1] Because the employee was standing 50 feet away from the insured vehicle at the time he was injured, the court concluded the employee was not using the vehicle at the time of the injury and was therefore not a second class insured. Hite, 288 S.C. 616, 621, 344 S.E.2d 173, 177 (Ct. App. 1986). Hite is clearly not applicable to this case. This is an underinsured motorist coverage case; the Adams are named insureds; and the Hite Court did not even consider the issue before this court - whether a claimant suffered injuries as a result of an accident "arising out of the ownership or maintenance of a motor vehicle."

Bookert dealt with an intentional assault. Not surprisingly, the Supreme Court ultimately held that the Claimant's injury (a gunshot wound) was not "foreseeably identifiable with the normal use of an automobile." State Farm Mut. Auto Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (2000). In this case, SCDOT operated its emulsion truck for one purpose, and one purpose only – to spread emulsion on roadways. Ms. Adams' accident was easily a foreseeable consequence of SCDOT's negligent use, maintenance or operation of that vehicle. At the very least, there is a question of fact as to that issue which precludes summary judgment.

Furthermore, in Bookert, the Court of Appeals considered only whether a trial court erred when it reformed State Farm's policy language. Because the Bookert trial judge found that State Farm's policy, as drafted, provided less coverage than statutorily mandated, the Court of Appeals held that the trial judge did not err in reforming the policy. Bookert, 330 S.C. 221, 229, 499 S.E.2d 480, 484 (Ct. App. 1999). In this case,

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[1]As noted by the Court, named insureds (first class insureds) are covered "while in a motor vehicle or otherwise, i.e.at all times." Id. At 619. It is undisputed that the Adams are named insureds, and they would most likely have been covered under the facts of Hite.

the trial court found that the State Farm policy, as drafted, provides *greater* protection for its insured than is statutorily mandated. Order at 4. The Court of Appeals' decision in Bookert focused solely upon the statutory term "use" in comparison to the policy provision "operation." Neither the Court of Appeals nor the Supreme Court considered whether Mr. Bookert might have a claim under his policy for injuries caused by accident arising from the "ownership" or "maintenance" of the assailant's vehicle, and it is not clear whether those terms were even brought to either courts' attention by the litigants. Those claims are very much available to Ms. Adams, and have been asserted by her in this case. Finally, because the Supreme Court reversed the Court of Appeals' decision without comment, it is not at all clear whether any of Court of Appeals' decision survived so as to constitute binding authority on this court's decision, especially on the novel facts presented.

As the trial court held in denying State Farm's motion for summary judgment, Aytes and its progeny are not controlling precedent. The question before this court is not whether Ms. Adams is entitled to benefits under South Carolina's UIM Statute. Instead, this court must decide whether State Farm's policy, as drafted, or as reformed to meet the statutory mandate,[2] provides UIM benefits to Ms. Adams. That question is best decided on a full factual record. The trial court properly denied State Farm's motion for summary judgment, and should not reconsider its order.

State Farm's request for reconsideration and/or for a more specific ruling on the issue of bad faith should also be denied. Evidence exists in the record that State Farm has

[2] Obviously, State Farm has not treated the Court of Appeals' decision in Bookert as controlling precedent. Otherwise, it is inconceivable that State Farm would not have amended its policy language in the ten years between the Court of Appeals' decision in Bookert and Ms. Adams' accident.

improperly interpreted its own policy and did nothing to investigate Ms. Adams' claim, or seek a judicial determination of its responsibility until well over a year after the accident. As the Court correctly points out in its Order, there are genuine issues of material fact presented as to whether the Defendants are entitled to coverage, therefore precluding summary judgment on any basis, including the issue of bad faith. Order at 4. It is well settled that "an insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002)(citing Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 498, 473 S.E.2d 52 (1996)). Furthermore, and as State Farm is well aware, an insurer's failure to properly interpret its own policy does not constitute reasonable grounds for its failure to pay a claim. Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 450 S.E.2d 582 (1994)(citing Futrell v. Premiere Life Ins., 526 So.2d 1382 (La.Ct.App.1988)).

## Conclusion

The trial court properly denied summary judgment because there are material issues of fact in dispute, and because there is no binding precedent that would preclude Ms. Adams from recovering the benefits she seeks. The trial court also properly denied summary judgment as to Ms. Adams' bad faith counterclaims because there is evidence in the record by which a reasonable juror could conclude that State Farm acted improperly in investigating and challenging Ms. Adams' claim. The court properly analyzed the existing statutory and common law authority, and should alter or amend its prior order.

September 22, 2011

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY,<br><br>Plaintiff,<br><br>vs.<br><br>PHYLLIS PADEN-ADAMS and ALONZO ADAMS,<br><br>Defendants. | Civil Action No. 2011-CP-46-0021<br><br>PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR RECONSIDERATION |

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DAVID HAMILTON
C.P.&GS
YORK COUNTY, SC

The defendants' memorandum misquotes the State Farm policy. Page one of the defendants' memorandum asserts the State Farm policy provides coverage for an accident arising out of the "ownership, use, maintenance or operation of a motor vehicle." In fact, the wording of the State Farm policy is "operation or ownership." The Court can ascertain this fact by referencing paragraph 32 of the defendants' answer and counterclaim which quotes language from the State Farm policy.

The defendants' position that State Farm Fire and Casualty Company v. Aytes, 503 S.E.2d 744 (S.C. 1998), "and its progeny are not controlling precedent" (Defendants' memorandum, pp, 1, 4) is inconsistent with a position previously taken by the defendants. Specifically, paragraph 19 of State Farm's declaratory judgment action alleges that the defendants' counsel cited both Aytes and State Farm Mutual Automobile Insurance Company v. Bookert, 523 S.E.2d 181 (S.C. 1999) as authority that the SCDOT equipment and vehicles qualified as underinsured motor vehicles. The defendants' answer to paragraph 19 of the declaratory judgment complaint states in part that the defendants "further admit to citing

specific case law and providing citations and references to the insurance policies in support of their request for investigation and/or payment." (Defendants' answer to plaintiff's counterclaim - ¶ 15) The pleadings therefore establish that counsel for the defendants cited Aytes and the decision in Bookert in support of their position, yet they now take the position that these cases "are not controlling" (Defendants' memorandum, p. 2) and "are not controlling precedent." (Defendants' memorandum, p. 4) In this regard, any allegations, statements or admissions contained in pleading are conclusive against the pleader and a party cannot subsequently take a contrary or inconsistent position. Charleston County School District v. Laidlaw Transit, 559 S.E.2d 362, 364 (S.C. App. 2001)

Finally, the defendants continue to conflate the concept of proving causation in the context of a tort with the concept of proving causation for purposes of coverage under an automobile insurance policy. Page three of the defendants' memorandum argues Mrs. Adams' accident was an easily foreseeable consequence of the SCDOT's negligent use, maintenance or operation of the vehicle and therefore a question of fact exists precluding summary judgment. (Defendants' memorandum, p. 3) However, as explained in the plaintiff's memorandum the question of proximate cause in proving a tort by the SCDOT is distinct from proving causation in the context of automobile insurance coverage. (See, footnote 2 in State Farm's memorandum in opposition to the defendants' motion to consolidate)

State Farm respectfully requests that its motion for reconsideration be granted and that its motion for summary judgment be granted.

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By: _____

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Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

September 23, 2011

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF YORK<br><br>State Farm Fire and Casualty Co.,<br><br>Plaintiff,<br><br>v.<br><br>Phyllis Paden-Adams and Alonzo Adams<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT<br>Case No.: 2011-CP-46-0021<br><br>MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT PURSUANT TO S.C. RULE 59(e) |

The Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams") hereby move for reconsideration and for alteration or amendment of the Court's Order dated October 24, 2011, which although not yet recorded, was received by undersigned counsel on October 25, 2011.

The Adams understand that this Court has already once reconsidered and reversed its decision regarding State Farm's motion for summary judgment and is unlikely to do so again. However, because the Court's Order reverses its previous decision and now operates as a final judgment adverse to the Adams, it is incumbent upon the Adams to file this motion in an effort to comply with the provisions of S.C. Rule 59(e). The primary purpose of this motion is to ensure that there are sufficient factual findings to "permit meaningful appellate review", to clarify the issue decided by the court and to ensure that all relevant facts and issues are preserved for appeal. Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). The Adams file this Motion on the following bases:

I. The trial court's order granting summary judgment to State Farm does not contain sufficient factual findings to permit meaningful appellate review.

"On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record." Bowen v. Lee Process Co., 342 S.C. 232, 235, 536 S.E.2d 86, 87-88 (Ct. App. 2000). For that reason, "a

trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review" and "include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Id. at 89, 536 S.E.2d at 237-38.

The trial court's order of September 2, 2011, which denied State Farm's motion for summary judgment, contains a very brief factual summary of the case. However, the trial court's order of October 24, 2011, which grants summary judgment to State Farm, contains virtually no factual findings. In order to ensure "meaningful appellate review" of this case, the Adams request that the trial court amend its October 24, 2011 order to include more detailed factual findings. Borrowing from the Court's summary of facts in its first order, and construing the evidence in a light most favorable to the non-moving party, the Adams believe that the following facts are established by the record in this case and therefore should be contained in the trial court's order:

1. On October 8, 2009, SCDOT carried out a "chip seal" road resurfacing project along Craig Road in York County, South Carolina.
2. There is evidence that during the chip seal project SCDOT vehicles were operated and/or maintained in a negligent manner, resulting in an insufficient layer of emulsion (tack) being applied to the road. (Affidavit of Cloyce Darnell, P.E., ¶¶ 1-9) There is evidence that, due to the negligent operation of the SCDOT vehicles, the gravel failed to adhere to the road bed, resulting in excess loose gravel on Craig Road. (Id. at ¶¶ 7-9.)
3. There is evidence that on October 21, 2009, Phyllis Paden Adams lost control of her automobile as a result of the exposed emulsion and loose gravel on Craig Road and struck an embankment. Id. at ¶ 9. As a result of the accident, Ms. Adams suffered severe personal injuries, including quadriplegia. (State Farm Complaint at ¶ 10.)

4. It is undisputed that the SCDOT vehicles were not being used for transportation purposes on Craig Road at the time Ms. Adams' injuries occurred. (Adams Responses to State Farm's Request for Admissions).

5. Although disputed, there is evidence in the record that SCDOT vehicles were being used for transportation purposes at the time the negligent event which allegedly caused Ms. Adam's accident. (Adams Responses to Request for Admission; Affidavit of Cloyce Darnell.)

II. In granting summary judgment to State Farm, the trial court focused too narrowly upon cases interpreting South Carolina's UIM statute, and did not fully consider whether Ms. Adams is entitled to coverage under the contractual terms of her policy.

The trial court's order granting summary judgment considers only whether Ms. Adams might be entitled to "underinsured motorist coverage under § 38-77-140." Oct. 24, 2011 Order at 2. The court did not consider whether the contractual provisions of Ms. Adams' policy, in and of themselves, might entitle her to benefits.

Courts must enforce insurance contracts as they are written and have "no authority to torture the meaning of the policy language to extend or defeat coverage that was never intended by the parties." Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). Furthermore, any ambiguities must be resolved strongly against the insurer and in liberally in favor of coverage. Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 309 S.C. 141, 420 S.E.2d 511 (Ct..App. 1992).

The Adams believe that SCDOT's vehicles used to carry out the chip seal project on Craig Road fall squarely within the policy's definition of underinsured motor vehicles. Furthermore, there is evidence in the record by which a reasonable juror could find that Ms. Adams' accident and resulting injuries were "caused by accident arising out of the operation or ownership" of SCDOT's vehicles. Nothing in State Farm's policy requires that an underinsured

motor vehicle must be present or "involved in" an accident to trigger coverage. By granting summary judgment to State Farm, the trial court focused too narrowly upon cases interpreting South Carolina's UIM statute and did not adequately consider the policy's provisions under general principals of contract construction.

III. The trial court failed to consider evidence creating genuine issue of material fact as to whether Ms. Adams suffered injuries caused by an "accident arising out of the ownership or operation of an underinsured motor vehicle."

As this court noted in its September 2, 2011 order, South Carolina's appellate courts have never considered in a reported opinion the issue presented by this case – specifically, is UIM coverage available where an "accident arising out of ownership or operation of an underinsured motor vehicle" is not concurrent with the causative "ownership or operation," but instead occurs at some later point in time? Such novel questions should not be decided "without full development of the facts." Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003). This is particularly true where, as here, "there are . . . factual issues which may be relevant to the issues which have not been fully developed." Sep. 2, 2011 Order at 2. The Adams should be afforded a full and fair opportunity to develop their factual record. While the trial court acknowledged these principals in its September 2 order, it subsequently granted summary judgment without affording the Adams an opportunity to fully develop the factual record.

The question of whether Ms. Adams' accident and resulting injuries "arose out of the ownership or operation" of an underinsured motor vehicle is inherently a factual question. The Adams presented evidence by which a reasonable juror could resolve that question in the Adams' favor. *See* Affidavit of Cloyce Darnell ¶¶7-9; *see also* S.C. DOT Daily Work Report for Oct. 8, 2009 (Tab 3 to Defendants' Submissions). "Even when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment should be denied." Schmidt v. Courtney 357 S.C. 310, 318-19, 592 S.E.2d 326, (Ct. App. 2003). In

granting summary judgment to State Farm, the trial court overlooked evidence creating genuine issues of material fact.

IV. In granting summary judgment to State Farm, the trial court erred in concluding that coverage was barred as a matter of law by existing South Carolina caselaw.

The doctrine of stare decisis is not intended to effect "petrifying rigidity" in the law. Brown v. Anderson Co. Hosp. Ass'n., 268 S.C. 479, 486, 234 S.E.2d 873, 876 (1977)(holding superseded by statute). The doctrine applies only where appellate courts have "laid down a principle of law as applicable to a certain state of facts," and the facts of the case to be decided are "substantially the same." BLACK'S LAW DICTIONARY (6th ed. 1990). The facts underlying the Adams' claim for UIM benefits are not "substantially the same" as those of any prior published South Carolina decision.

In *every* reported South Carolina decision considering a claim for UIM benefits, the underlying tortious act (whether it be an intentional assault or negligent act) and the resulting injuries were instantaneous (primarily injury by gunshot). Neither Aytes nor any other reported South Carolina decision has ever considered a coverage issue where, as here, the insured's injuries, although arguably arising out of the use of a vehicle—did not occur instantaneous with the tortious act. Because the facts of this case are not "substantially the same" as those of any reported South Carolina decision, *stare decisis* does not dictate a particular result.

Apparently, the Court's decision granting summary judgment hinges largely, if not solely, upon its interpretation that the Aytes test, as clarified by Peagler, bars coverage. The Adams agree with the Court's assessment that the focus of the use of the vehicle should be at the time of the tortious conduct—not the resulting injury. The Adams further submit that the Aytes test, even as clarified by Peagler v. USAA Insurance Company, 368 S.C. 153, 628 S.E.2d 475 (S.C. 2006), does not bar coverage in this case. Because there is evidence in the record that the

SCDOT's emulsion truck was being used for transporation purposes at the time of the negligent event which caused Mr.Adams' injuries, the Adams submit summary judgment is improper.

To the extent Aytes/Peagler bar coverage under the terms of the UIM statute, the Adams submit that such interpretation is beyond the plain meaning of the statute as intended by the legislature and results in less coverage than that provided by the terms of the State Farm policy. The policy promises to pay an insured for damages caused by an accident, which arises out of ownership or operation of an underinsured vehicle—not injuries which occur while a vehicle is being used for transportation purposes. Because the terms of State Farm's policy are different from and broader than the Court's interpreted scope of coverage under the UIM statute, the Court should deny summary judgment.

Finally, the Adams submit that the trial court's order focuses solely upon the alleged "operation" of SCDOT's motor vehicles, and does not consider whether Ms. Adams might be entitled to benefits as a result injuries caused by accident arising from SCDOT's ownership or maintenance of underinsured motor vehicles. Because there is evidence in the record of negligent maintenance of the SCDOT vehicles, summary judgment should be denied.

V. The trial court's order did not address the Adams' counterclaims for breach of contract, bad faith or attorney's fees, and should clarify its order to deny State Farm's motion for summary judgment as to each of those counterclaims.

As discussed above, the trial court's order focused solely upon the statutory provisions of S.C. Code §§ 38-77-140 and 38-77-160. The trial court did not consider whether State Farm had breached its contractual duties to the Adams when it refused to recognize the Adams' claim for benefits.[1] Nor did the trial court consider whether State Farm had breached its duty of good faith by failing to reasonably investigate the Adams' claim for benefits or by refusing to timely pay

[1] See Argument II, sup

benefits in accordance with the terms of the Adams' policy. Because there is evidence in the record supporting each of those claims, and because the parties have not been able to complete discovery on this issue, the trial court should reconsider its prior order and deny summary judgment as to the Adams' counterclaims for breach of contract, bad faith and attorney's fees.

VI. The Court should allow discovery to be completed prior to issuing its decision on coverage.

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); see also Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) ("Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery'.") Because the underlying liability case has not been determined, and because the parties were unable to agree to a set of stipulated facts showing the entire circumstances of the accident, the need for discovery to be complete prior to summary judgment is critical.

## CONCLUSION

For the reasons set forth in this motion, the Adams request that the court reconsider its position, deny State Farm's Motion for Summary Judgment, and allow the Adams to complete discovery prior to rendering a final decision on the merits.

[SIGNATURE PAGE ATTACHED]

November 4, 2011

W. Keith Martens

W. Keith Martens
Christi P. Cox
HAMILTON MARTENS & BALLOU, LLC
Post Office Box 10940
Rock Hill, South Carolina 29731
Phone: 803/329-7672
Fax: 803/329-7678

ATTORNEYS FOR DEFENDANTS
PHYLLIS PADEN ADAMS and
ALONZO ADAMS

4834-5590-1709, v. 1

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendants. | ) | |

None of the arguments advanced in the defendants' motion for reconsideration warrant reversal of this Court's October 24, 2011 Order granting the plaintiff's motion for reconsideration and granting the plaintiff's motion for summary judgment. Accordingly, the plaintiff respectfully requests that the defendants' motion for reconsideration be denied.

## I. THE TRIAL COURT'S ORDER OF OCTOBER 24, 2011 IS SUFFICIENT TO ALLOW FOR MEANINGFUL APPELLATE REVIEW.

The defendants argue in Part I of their motion that this Court's Order of October 24, 2011 is deficient in that it "contains virtually no factual findings." The defendants request that the Court amend its Order to include "more detailed factual findings." (Defendants' Motion for Reconsideration, p. 2) This argument misperceives the nature of an Order granting summary judgment. An Order granting summary judgment need not make "factual findings." Instead, an Order granting summary judgment need only conclude that based upon the record presented to the Court there are no genuine issues of material fact. The appellant is then free to argue on appeal anything from the record presented to the Court which, when construed most strongly in favor of the non-moving party, creates a genuine issue of material fact.

Accordingly, if, as argued by the defendants, certain facts are established by the record in the case and those facts should preclude summary judgment, the defendants are free to make that argument on appeal. It is therefore unnecessary that the matters contained in numbered paragraphs 1 through 5 on pages 2 and 3 of the defendants' motion be incorporated into the Court's Order. All that is necessary for the defendants to properly preserve issues for appeal is that these matters be included in the record presented to the trial Court and in the Record on Appeal to the South Carolina Court of Appeals.

In any event, this Court's Order of October 24, 2011 is sufficiently specific to permit a meaningful appellate review. The Order cites several cases and explains that the defendants cannot satisfy one of several elements to prove entitlement to underinsured motorist coverage – that the underinsured vehicle was being used for transportation purposes at the time of the injury. Although the plaintiff believes there are numerous other reasons to grant the plaintiff's motion for summary judgment beyond those stated in this Court's Order of October 24, 2011, it is not necessary that an order granting summary judgment specifically address each of the grounds of summary judgment as an appellate court may pursuant to SCACR 220(c) affirm a judgment upon any ground appearing in the record. State v. Byers, 710 S.E.2d 55, 59 (footnote 1) (S.C. 2011)

An order granting summary judgment will be deemed deficient as precluding meaningful appellate review only when the trial court fails to articulate the reasons for its actions on the record or enter a written order outlining its rationale. Carey v. Snee Farm Community, 694 S.E.2d 244, 245 (S.C. App. 2010) This Court's Order of October 24, 2011 specifically sets forth the reasons for granting the plaintiff's motion for summary judgment.

Even in an action tried upon the facts without a jury appellate courts do not require lower courts to set out findings on all of the myriad factual questions arising in a particular case. Instead, the findings must be merely sufficient to allow an appellate court to insure the law is faithfully executed below. Church v. McGee, 705 S.E.2d 481, 487 (S.C. App. 2011) Again, this Court's order complies with this standard.

In any event, the grounds of the plaintiff's motion for summary judgment are such that an extensive, detailed exploration of the facts is not necessary. The undisputed facts gathered from the allegations in the defendants' counterclaim and in the defendants' answers to the plaintiff's interrogatories as set forth on pages 2 and 3 of the plaintiff's memorandum in support of its motion for summary judgment are more than sufficient to warrant a finding as a matter of law that the defendants are not entitled to underinsurance motorist coverage for Phyllis Adams' accident of October 21, 2009.

## II. THE CONTRACTUAL TERMS OF THE POLICY DO NOT ENTITLE THE DEFENDANTS TO COVERAGE FOR PHYLLIS ADAMS' OCTOBER 21, 2009 ACCIDENT.

Part II of the defendants' motion for reconsideration appears to concede that under cases interpreting § 38-77-140 the defendants are not entitled to underinsurance motorist coverage. Instead, the defendants now argue they are entitled to coverage under the State Farm policy. The defendants even cite case law that any ambiguities in a policy must be resolved strongly against the insurer without explaining what is ambiguous about the State Farm policy.

Part II of the defendants' motion for reconsideration is the same argument initially advanced by the defendants in opposition to State Farm's motion for summary judgment. Page 6 of the defendants' August 29, 2011 memorandum opposing State Farm's

motion for summary judgment argued that "based upon the plain language of State Farm's policy, there can be no question that SCDOT's trucks fall squarely within the policy's definition of 'underinsured motor vehicle.'" The defendants now make the same argument in Part II of their motion for reconsideration by again claiming that they believe "the SCDOT's vehicles used to carry out the chip seal project on Craig Road fall squarely within the policy's definition of underinsured motor vehicles." (Defendants' Motion for Reconsideration, p. 3) This argument was expressly considered and rejected in this Court's Order of October 24, 2011 granting the plaintiff's motion for reconsideration and the plaintiff's motion for summary judgment. That order states that language used in the policy does not expand coverage beyond that required by § 38-77-140. Consequently, if the cases interpreting § 38-77-140 require that the plaintiff's motion for summary judgment be granted, the defendants can seek no relief in the wording of State Farm's policy which if anything provides more narrow coverage than that required by the statute.

## III. IT IS NOT NECESSARY TO FURTHER DEVELOP THE FACTUAL RECORD IN ORDER TO GRANT THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Part III of the defendants' motion for reconsideration argues this Court should not have granted summary judgment "without affording the Adams an opportunity to fully develop the factual record." Exactly what specific discovery the defendants contemplate in order to create a factual issue concerning their entitlement to underinsurance motorist coverage is not explained. Additionally, the defendants could have requested that the summary judgment hearing on September 2, 2011 be continued so that the defendants could engage in discovery to contest the plaintiff's motion for summary judgment. No such request for a continuance was made.

It is incumbent upon a party defending a summary judgment motion to move for a continuance if discovery is not complete. Mixson v. American Loyalty Insurance Company, 562 S.E.2d 659, 663 (S.C. App. 2002) A non-moving party to a summary judgment motion must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition. Summary judgment is warranted to avoid prolonging litigation where there is a mere possibility that the defendant might obtain some helpful information from a deposition. CEL Products v. Rozell, 591 S.E.2d 643, 646 (S.C. App. 2004) Here, the defendants not only failed to request a continuance, but they have also not specified exactly how they need to further develop the factual record and what specific discovery might create a question of fact. As stated by counsel for the plaintiff at the hearing on the plaintiff's motion for summary judgment on August 29, 2011, the parties can take 50 depositions and that is not going to change the fact that the chip seal project was completed October 8, 2009, that Mrs. Adams' accident was 13 days later on October 21, 2009 and that no vehicle of the SCDOT was being used for transportation purposes on Craig Road at the time of Mrs. Adams' accident.

## IV. THE CASES CITED IN THE COURT'S ORDER OF OCTOBER 24, 2011 GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT ARE APPLICABLE TO THE UNDISPUTED FACTS AND WARRANT GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT.

Part IV of the defendants' motion for reconsideration is really an appellate court argument that the cases cited in this Court's Order granting State Farm's motion for summary judgment are inapposite to the facts of this case. The defendants argue that South Carolina appellate court decisions concerning entitlement to underinsurance motorist coverage are not binding because the defendants' case presents a unique set of facts.

To some extent, every case presents a unique set of facts. It is extremely rare for there to be an appellate court decision which has facts identical in all respects to the case under consideration. Instead, appellate court decisions offer principles to guide trial courts in resolving disputes where, as here, the critical facts are not in dispute. Here, for example, in Peagler v. USAA Insurance Company, 628 S.E.2d 475 (S.C. 2006), the Supreme Court, referencing the Aytes case, held that an element to establish entitlement to insurance coverage is that the vehicle must be used for transportation purposes at the time of the injury. As the defendants cannot contest the fact that no SCDOT vehicle was being used on Craig Road at the time of Mrs. Adams' injury, they must necessarily argue that Peagler does not mean what it says. This is not a sufficient basis to justify reconsideration of an order granting summary judgment.

In Part IV of the defendants' motion for reconsideration they continue to argue that the terms of State Farm's policy are broader than the Court's interpreted scope of coverage under the UIM statute. In fact, as explained in the plaintiff's motion for reconsideration, the statute - § 38-77-140 – provides broader language concerning coverage than under the State Farm policy. See, Hite v. Hartford Accident & Indemnity Company, 344 S.E.2d 173 (S.C. App. 1986) that "use" of motor vehicles is a broader term than "operation" of a motor vehicle.

## V. THE COURT'S ORDER OF OCTOBER 24, 2011 DOES CONSIDER WHETHER STATE FARM BREACHED ITS CONTRACTUAL DUTIES TO THE DEFENDANTS.

Part V of the defendants' motion for reconsideration argues the trial court did not consider whether State Farm breached its contractual duties to the defendants when State Farm refused to consider their claim for underinsurance motorist benefits. What this Court's

Order did consider is whether the defendants are entitled to underinsurance motorist coverage for Phyllis Adams' accident of October 21, 2009. In concluding that the defendants are not entitled to underinsurance motorist coverage the trial court necessarily concluded that State Farm did not breach its contractual duties to the defendants. It is too elementary to require citation that an insurer cannot breach a contract of insurance by failing to pay a claim for which there is no coverage.

The defendants also argue in Part V of their motion that this Court did not consider whether State Farm breached its duty of good faith and fair dealing by failing to reasonably investigate the defendants' claim for benefits or by refusing to timely pay the benefits in accordance with the terms of the policy. However, a finding that State Farm did not breach its duty of good faith and fair dealing is a corollary of the Court's ruling that the defendants' claim is not covered. Where it is determined a plaintiff is not entitled to recover a claim for insurance benefits the plaintiff's cause of action for bad faith refusal to pay the claim must fail. Carolina Amusement Company v. Connecticut Life Insurance Company, 437 S.E.2d 122, 127 (S.C. App. 1993) Additionally, as set forth in the plaintiff's memorandum in support of its motion for summary judgment one of the elements of a bad faith refusal to pay benefits is a refusal by the insurer to pay benefits due under the contract. Mixson v. American Loyalty Insurance Company, 562 S.E.2d 659, 661 (S.C. App. 2002); see also, additional cases cited at page 18 of the plaintiff's memorandum in support of its motion for summary judgment. Because this Court has concluded that the defendants are not entitled to underinsurance motorist benefits, it necessarily follows that the defendants cannot prove one of the elements of a cause of action for breach of the duty of good faith and fair dealing; namely, a refusal to pay benefits due under the contract.

## VI. FURTHER DISCOVERY IS NOT NECESSARY FOR THIS LAWSUIT TO BE RESOLVED ON A MOTION FOR SUMMARY JUDGMENT.

The defendants' final ground for reconsideration is that summary judgment should not be granted until the opposing party has had a full and fair opportunity to complete discovery. In response to Part III of the defendants' motion, this memorandum opposing the defendants' motion explains why no further discovery is necessary. Rather than reiterate its argument in opposition to Part III of the defendants' motion, the plaintiff refers to pages 4 and 5 of this memorandum.

## CONCLUSION

It is not necessary to further develop the facts of this case for there to be a sufficient basis for the Court to grant summary judgment. The law of South Carolina is clear that for the defendants to be entitled to underinsurance motorist coverage for Phyllis Adams' accident of October 21, 2009 a vehicle of the SCDOT must have been used for transportation purposes at the time of the injury. It is undisputed from the defendants' responses to the plaintiff's discovery that no vehicle of the SCDOT was being used for transportation purposes on Craig Road on October 21, 2009. Instead, Mrs. Adams was involved in a single car accident. The defendants' motion for reconsideration should be denied.

[SIGNATURE PAGE TO FOLLOW]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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(843) 853-5200

Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

November 9, 2011

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|---|---|
| STATE OF SOUTH CAROLINA )<br>)<br>COUNTY OF YORK ) | IN THE COURT OF COMMON PLEAS<br>SIXTEENTH JUDICIAL CIRCUIT |
| State Farm Fire and Casualty Co., )<br>)<br>Plaintiff, )<br>)<br>v. )<br>)<br>Phyllis Paden-Adams and )<br>Alonzo Adams, )<br>)<br>Defendants. ) | Case No.: 2011-CP-46-0021<br><br>**DEFENDANTS' RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** |

TO: CHARLES R. NORRIS, COUNSEL FOR PLAINTIFF:

Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams" or "Defendants") serve the following Responses to First Set of Interrogatories upon Plaintiff State Farm Fire and Casualty Co. ("State Farm").

RESPONSES TO FIRST SET OF INTERROGATORIES

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.

RESPONSE:

a. Phyllis Paden-Adams
4280 Marshall Road
Rock Hill, SC

Ms. Adams is a defendant in this action. She has knowledge concerning her automobile accident, the condition of Craig Road at the time of her accident and the

damages she and her husband have suffered as a result of the accident. Ms. Adams' deposition was taken in the underlying action.

b. Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Mr. Adams is a defendant in this action. He has knowledge concerning the condition of Craig Road at the time of Ms. Adams' accident, Ms. Adams injuries and treatment, the damages that both plaintiffs have suffered as a result of the accident, and the purchase and renewal of the policies at issue in this case. Mr. Adams' deposition was taken in the underlying action.

c. Lauren Adams
C/O Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Ms. Adams is the Adams' adult daughter. She has knowledge concerning the nature and extent of the Adams' injuries and damages. No written or recorded statements have been taken.

d. Phillip Adams
C/O Alonzo Adams
4280 Marshall Road
Rock Hill, SC

Phillip Adams is the Adams' adult son. He has knowledge concerning the nature and extent of the Adams' injuries and damages. No written or recorded statements have been taken.

e. Bradley Trout – Resident Maintenance Engineer
Clint Beaver – Assistant Resident Maintenance Engineer
Paul Elkins - Foreman
James Hardin – Emulsion Distributor Truck Operator
South Carolina Department of Transportation
P.O. Box 2932 CRS

Rock Hill, SC 29731

These individuals are employees of SCDOT, who have knowledge concerning SCDOT's chip seal operations on Craig Road in October 2009, and the use and operation of SCDOT motor vehicles to carry out that work. Each of these individuals was deposed in the underlying action.

e. Any witness identified by State Farm.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claims or defenses in the case.

RESPONSE:

a. State Farm Automobile Insurance Policy;

b. Correspondence between State Farm and Counsel for Adams regarding Adams' claim for benefits under UIM provisions of her policy, and State Farm's refusal to pay claim;

c. Deposition Transcripts of all witnesses deposed in underlying action;

d. SCDOT Daily Work Reports for Secondary Road 735 for October and November 2009;

e. SCDOT's automobile insurance policy covering vehicles used in chip seal of Craig Road on October 8, 2009;

f. SCDOT's certificates of registration for vehicles used in chip seal of Craig Road on October 8, 2009.

3. In cases involving personal injury set forth the names and address of all physicians who have treated the party and all hospitals to which the party has been

committed in connection with said injuries and also set forth a statement of all medical costs involved.

RESPONSE: While this is not a case involving personal injury, it relates to insurance coverage for personal injuries. As a result of her personal injuries, Ms. Adams received medical treatment and care from the following:

a. Ambu-Star, Inc.
P.O. Box 370
Cowpens, SC 29330

b. Carolina Rehabilitation
P.O. Box 96072
Charlotte, NC 28296-0072

c. NeuroSurgery & Spine
225 Baldwin Avenue
Charlotte, NC 28204-3109

d. Carolinas Medical Center
P.O. Box 32861
Charlotte, NC 28232-2861

e. CMC Faculty Physicians
P.O. Box 70826
Charlotte, NC 28272-0826

f. Peachtree Orthopedic
P.O. Box 105258
Atlanta, GA 30348-5258

g. CH Martin Company
Orthotics & Prosthetics
329 Marietta Street NW
Atlanta, GA 30313

h. Shepherd Center
Post Office Box 102421
Atlanta, GA 30368-0421

i. Shepherd Home Care DME
2020 Peachtree Road
Atlanta, GA 30309

j. Interim HealthCare
PO Box 890105
Charlotte, NC 28289-0105

k. Medic
P.O. Box 651547
Charlotte, NC 28265

l. Chesapeake Rehab Equipment
4347 Statesville Road
Charlotte, NC 28269

m. Ilderton Conversions
5518 Westpark Dr.
Charlotte, NC 28217

Itemized statement of medical costs for each provider is provided separately.

4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

RESPONSE: Defendants have been deprived of the underinsured motorist benefits of their policies with State Farm (either $400,000 or $500,000), plus incidental and consequential damages. The Adams' damages as a result of SCDOT's use, maintenance or operation of underinsured motor vehicles far exceeds that amount, and includes the amounts set forth below. Because State Farm has unreasonably refused to pay the Adams' claim for benefits, and unreasonably refused to investigate and adjust the claim, the Adams are entitled to sums in excess of their policy limits, including punitive damages and attorney's fees.

The Adams' damages exclusive of pain and suffering include:

a. Medical Expenses and Hospitalization to date – See attached spreadsheet.

SUBTOTAL - $ 449,579.03

b. Future Medical Expenses (present value)- $1,112,884.00 (est.)

| | | |
|---|---|---|
| c. | Destruction of Honda automobile - | $ 6,500.00 (est.) |
| d. | Cost of Toyota ramp van - | $ 20,000.00 |
| e. | Cost of wheel chair, bed and other durable medical equipment - | [Included in spreadsheet] |
| f. | Cost of modifications to home - | $5,000.00 (est.) |
| g. | Loss of earnings – | |
| | Phyllis - | $41,217.65 |
| | Alonzo - | [TBD] |
| h. | Future loss of earnings - | $1,250,000.00 |
| i. | Permanent impairment and disability | [TBD] |
| j. | Loss of enjoyment of life | [TBD] |
| k. | Attorney's fees and costs | [TBD] |
| | TOTAL - | $2,885,180.68++ |

5. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

RESPONSE:

J. Cloyce Darnell, P.E.
Centerline Consulting
P.O. Box 895
Shalimar, FL 32579

Mr. Darnell has been retained as an expert in chip seal applications and is the Adams' expert in the underlying action. To the extent expert testimony is required, Mr. Darnell can testify that SCDOT motor vehicles were "used or operated" by SCDOT for their intended purpose, but in a negligent manner in applying chip seal to Craig Road.

6. For each expert witness listed in response to interrogatory 5, set forth every opinion held by that expert concerning this litigation.

RESPONSE: Affidavit is being produced. On information and belief, Mr. Darnell has other opinions regarding the chip sealing of Craig Road, which are relevant to the underlying action, but are not relevant to this particular action.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE: See response to Interrogatory Number 1.

8. Was any vehicle or other piece of equipment of the SCDOT being used for transportation purposes at the time of Phyllis Adams' injury on October 21, 2009?

RESPONSE: Defendants object to this interrogatory on the grounds of relevance. Further responding, and subject to this objection, Defendants believe that the answer to this interrogatory is yes.

9. If the answer to interrogatory 8 is anything other than an unqualified "no," list every vehicle or other piece of equipment of the SCDOT that was being used for transportation purposes at the time of Phyllis Adams' injury on October 21, 2009 and identify the operator of that vehicle or piece of equipment.

RESPONSE: Defendants object to this interrogatory on the grounds of relevance, and further object on the grounds that the interrogatory is unduly broad and burdensome, not limited in geographic scope, and not reasonably calculated to lead to the discovery of admissible evidence. SCDOT operates vehicles on thousands, if not millions, of miles of

road throughout the state every day. Defendants could not possibly ascertain the information needed to respond to this interrogatory.

Further responding to Interrogatories 8 and 9, and subject to the stated objections, the Adams' claim for UIM benefits is based upon the fact that underinsured motor vehicles were operated by SCDOT in connection with SCDOT's chip sealing of Craig Road on October 8, 2009. Those vehicles were used, maintained and/or operated in a negligent manner and for their intended purpose, leaving the road in an unreasonably dangerous condition. Ms. Adams suffered severe personal injuries when she lost control of her vehicle while travelling the road on October 22, 2009. There were no independent acts of negligence to break the causal chain between SCDOT's negligent operation of its motor vehicles on October 8, 2009 and the resulting injuries to Ms. Adams, which were suffered on October 22, 2009. The Adams do not believe that the UIM policy, statute, or case law of this state require an underinsured vehicle to be physically present at the time a victim suffers injuries, provided the underinsured vehicle was being used in its intended manner when the negligent act occurred, and where the injuries are the natural and proximate result of the use, operation or maintenance of an underinsured vehicle. SCDOT vehicles that were being used in their intended manner when the negligent acts which gave rise to Ms. Adams' injuries occurred were:

(a) ¾ Ton Pickup Standard Cab
Equipment No.: 009-03-0369
Tag No.: SG78023

(b) ¾ Ton Utility Truck, Standard Cab
Equipment No.: 009-03-0455
Tag No.: SG87139

(c) 1 Ton Platform Truck, Standard Cab
Equipment No.: 010-01-0061

Tag No.: SG65018

(d) 16.5 Ton 3P Dump Truck (8yd)
Equipment Number: 014-07-0042
Tag No.: SG65061

(e) 16.5 Ton 2P Dump Truck (8yd)
Equipment No.: 014-01-0154
Tag No.: SG82517

(f) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-01-0031
Tag No.: SG76375

(g) 16.5 Ton Distributor Truck
Equipment No.: 014-01-0167
Tag No.: SG82543

(h) 16.5 Ton Dump Truck (8yd)
Equipment No.: 014-04-0113
Tag No.: SG87887

May 3, 2011

W. Keith Martens

Christi P. Cox
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ATTORNEYS FOR DEFENDANTS

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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | SIXTEENTH JUDICIAL CIRCUIT |
| COUNTY OF YORK ) | |
| State Farm Fire and Casualty Co., ) | Case No.: 2011-CP-46-0021 |
| ) | |
| Plaintiff, ) | |
| ) | **DEFENDANTS' RESPONSES TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES** |
| v. ) | |
| ) | |
| Phyllis Paden-Adams and ) | |
| Alonzo Adams, ) | |
| ) | |
| Defendants. ) | |

TO: CHARLES R. NORRIS, COUNSEL FOR PLAINTIFF:

Defendants Phyllis Paden-Adams and Alonzo Adams ("Adams" or "Defendants") serve the following Responses to Supplemental Interrogatories upon Plaintiff State Farm Fire and Casualty Co. ("State Farm").

RESPONSES TO SUPPLEMENTAL INTERROGATORIES

10. Was any vehicle or other piece of equipment of the SCDOT being used for transportation purposes on Craig Road on either October 21 or October 22, 2009 at the time and place of Phyllis Adams' injury?

RESPONSE: No.

11. Were any of the SCDOT vehicles or other equipment listed by the defendants in responses to the plaintiff's interrogatory 9 being used on Craig Road on either October 21 or October 22, 2009 at the time and location of Phyllis Adams' injury?

RESPONSE: No.

12. At the time of Phyllis Adams' injury on October 21 or October 22, 2009 did Phyllis Adams come into contact with any of the SCDOT vehicles or other equipment listed by the defendants in response to the plaintiff's interrogatory 9?

RESPONSE: No.

13. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams see any equipment or vehicles of the SCDOT being used on Craig Road at the site of her injury?

RESPONSE: No.

14. At the time of Phyllis Adams' injury on either October 21 or October 22, 2009 did Phyllis Adams have to take any action to avoid collision with any piece of equipment or vehicle of the SCDOT?

RESPONSE: No.

15. If it is the defendants' position that the vehicles or equipment of the SCDOT listed in response to the plaintiff's interrogatory 9 were being used on Craig Road on October 21 or October 22, 2009 at or near the site of Phyllis Adams' accident state the name of the operator or operators of those vehicles or equipment.

RESPONSE: N/A

16. State how the equipment or vehicles of the SCDOT were negligently operated by the SCDOT on Craig Road at the site of Phyllis Adams' injury on either October 21 or October 22, 2009.

RESPONSE: Defendants object to this interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. As Plaintiff and its counsel are aware, Defendants have never asserted that SCDOT vehicles or equipment

were operated in a negligent manner on October 21, 2009 or October 22, 2009. Furthermore, issues of SCDOT's negligence are not properly part of this litigation.

17. Is it the defendants' position that all 8 vehicles or equipment listed by the defendants in answer to the plaintiff's interrogatory 9 caused Phyllis Adams' injury on either October 21 or October 22, 2009?

RESPONSE: No.

18. Set forth all damages of the defendants which the defendants claim have been caused by the plaintiff, as opposed to having been caused by the SCDOT.

RESPONSE: See answers to Plaintiff's first set of interrogatories.

June 10, 2011

s/ W. Keith Martens

Christi P. Cox
W. Keith Martens
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P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672

ATTORNEYS FOR DEFENDANTS

Hamilton Martens & Ballou
ATTORNEYS AT LAW

W. Keith Martens
kmartens@hmandb.com
Dial: 803-329-7662

April 30, 2010

Lindsay R. Smith
State Farm Insurance Companies
South Carolina Operations Center
Duluth, GA 30096-9403

RE: Adams v. South Carolina DOT
C/A No. 2010-CP-46-00854
State Farm Claim Number: 40-8515-073
State Farm Policy Numbers: 113-1117-F03-40; 098 9817-B25-40D; 105 9958-A28-40A; 113 8514-F16-40A; 121 5620-D28-40A

Dear Ms. Smith:

As you know, we represent Phyllis Paden-Adams and Alonzo Adams concerning the above-named matter. I am writing concerning two issues.

First, in November 2009 my partner, Christi Cox, wrote requesting that State Farm provide "a complete copy of any and all insurance policy(ies) held by my clients on the date of the Accident." In response to that letter, State Farm provided declaration pages for two automobile policies – 1121-117-40 and 0989-817-40D. However, our clients' records indicate that there were three additional vehicles owned by our clients and insured by State Farm at the time of Ms. Adams' accident. Please immediately forward complete copies of the following additional policies and declaration pages: (a) 105-9958-A28-40A; (b) 113 8514-F16-40A; and (c) 121 5620-D28-40A. It is our understanding that these additional policies were in place, covering vehicles owned by the Adams' at the time of Ms. Adams' accident.

Second, I am writing in response to your April 28th letter, in which you indicated that UIM coverage was not available under the terms of Ms. Adams' State Farm automobile policy. In light of State Farm's position, we have thoroughly researched the availability of UIM coverage under South Carolina law. Our research leads us to the conclusion that UIM coverage *is* available to Ms. Adams under her State Farm policies.

By the terms of Ms. Adams' policy, State Farm agreed to "pay damages for bodily injury or property damage an insured: (1) is legally entitled to collect from the owner or driver of an underinsured motor vehicle; or (2) would have been legally entitled to collect except for the existence of any damages cap or limitation imposed by statute." The policy further provides "[t]he bodily injury or property damage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle." We believe that Ms. Adams' severe personal injuries fall squarely within the policy's language.

South Carolina has adopted a three-prong test to determine whether an insured's injuries arose out of the "ownership, maintenance or use" of an underinsured motor vehicle: (1) there must be a causal connection between the underinsured vehicle and the injury; (2) there must not

be any act of independent significance breaking the causal link; and (3) the underinsured vehicle was being used for transportation at the time of the act giving rise to injury. State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). A "causal connection" is established where the underinsured vehicle was an active accessory to the negligence, where the vehicle was more than the "mere site of the injury," and where the injury was "foreseeably identifiable with the normal use of the [underinsured] automobile." State Farm Mut. Auto Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999).

In Ms. Adams' case, each of these elements is met. SCDOT utilized its insured spreader trucks and rolling equipment to transport and apply emulsion and aggregate to the roadway. Using those trucks and equipment, SCDOT crews negligently applied the emulsion and aggregate. SCDOT then negligently operated a "sweeper" truck the following day for the purpose of removing loose aggregate from the roadway. Even after the road was swept on October 9, a large quantity of loose gravel remained. This loose gravel created a hazardous condition, and caused Ms. Adams to wreck. There was no "intervening act of independent significance" between SCDOT's negligent operation of its spreader trucks and sweeper truck and Ms. Adams' wreck. SCDOT's trucks and equipment were being used for transportation of emulsion and aggregate and for the attempted removal of loose aggregate from the roadway. These were the precise uses for which the vehicles were placed in service. Had the vehicles been properly operated by SCDOT, the hazard which caused Ms. Adams' injuries would not have existed.

As a result of Ms. Adams' accident, she has suffered severe personal injuries including quadriplegia. Under South Carolina's Tort Claims Act, SCDOT's liability to Ms. Adams is limited to $300,000 – grossly inadequate to compensate Ms. Adams for her injuries. Thus, UIM coverage is available to Ms. Adams in accordance with the terms of her policy. Because Ms. Adams owned five insured vehicles at the time of her accident, she is entitled to recover five times the face value of her UIM coverage, or $500,000.

Please forward the requested policies and policy declarations at your earliest convenience. We will also expect State Farm to provide Ms. Adams UIM benefits in accordance with the terms of her policies.

Sincerely,

W. Keith Martens

W. Keith Martens
For the Firm

WKM/dh

cc: Phyllis Adams
Christi Cox
4830-3630-6438, v. 1

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF YORK | ) | SIXTEENTH JUDICIAL CIRCUIT |
| STATE FARM FIRE AND CASUALTY COMPANY, | ) | Civil Action No. 2011-CP-46-0021 |
| Plaintiff, | ) | |
| vs. | ) | PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES |
| PHYLLIS PADEN-ADAMS and ALONZO ADAMS, | ) | |
| Defendant. | ) | |

Pursuant to SCRCP 33 the plaintiff answers the defendants' interrogatories dated February 4, 2011 as follows:

1. Give the name and, if known, the address and telephone number of each individual likely to have discoverable information that State Farm may use to support its claims or defenses in this action, and identify with reasonable specificity the subject of the information known by each individual identified in response to this interrogatory.

ANSWER:

(a) Derek Miller, Richard D. Findley, Lindsay Smith
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

These witnesses will testify as to the plaintiff's investigation of the defendants' claim for underinsurance motorist (UIM) proceeds and the amount of UIM proceeds available should there be coverage.

(b) Ronnie Craig
Clawson & Staubes, LLC
756 Tyvola Road, Suite 130
Charlotte, NC 28217
(704) 940-9128

Mr. Craig will testify as to his communications with the defendants' attorneys regarding the defendants' claim for UIM proceeds.

(c) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry will testify as to investigation of the scene of the accident.

(d) Robert Grubbs
11350 Johns Creek Parkway
Duluth, GA 30097

Robert Grubbs will testify as to which State Farm policies were in effect at the time of the accident in question.

(e) Sherri Helms
State Farm Agent Dennis Harrington
Rock Hill, SC

Ms. Helms is a member of the staff of State Farm agent Dennis Harrington. Ms. Helms will testify concerning cancellation of a policy on a 1994 Honda Accord prior to October 21, 2009.

2. Set forth a list of photographs, plats, sketches or other prepared documents in State Farm's possession that relate to the claims or defenses in the case.

ANSWER:

(a) Claim file marked Adams SF001 to Adams SF593;

(b) Underwriting file marked Adams SF Underwriting 001 to Adams SF Underwriting 51;

(c) Certified copies of insurance policies in effect on the date of the accident in question;

3. List the names and addresses of any expert witnesses State Farm has either retained or proposes to use as a witness at the trial of the case, and provide all information required to be disclosed pursuant to S.C. Rule 26.

ANSWER: The plaintiff objects to identifying expert witnesses retained as consultants. The plaintiff will timely supplement this interrogatory should it propose to use an expert witness at trial.

4. Give the name, address, job title, and job description of each and every person employed or retained by State Farm who reviewed the claim, or who reviewed the policy in order to assess the claim. In responding to this interrogatory, also provide the date of such review, identify the nature and scope of such review, and identify all documents associated with such review.

ANSWER:

(a) Lindsay Smith – claim representative
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mrs. Smith's job is to evaluate claims.

(b) Richard D. Findley – team manager
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mr. Findley's job is to manage claim representatives who evaluate claims and determine what coverages apply to claims.

(c) Derek Miller – section manager
7 Technology Circle
Columbia, SC 29203
(803) 935-3600

Mr. Miller's job description is supervision of certain claims and determination of coverages applicable to claims.

(d) Richard J. Leigh
State Farm Insurance Company
One State Farm Plaza, B-3
Bloomington, IL 61710-0001

Richard J. Leigh is a claim consultant who considers and evaluates claims. Mr. Leigh reviewed the declaratory judgment action.

(e) Ronnie Craig
Clawson & Staubes, LLC
756 Tyvola Road, Suite 130
Charlotte, NC 28217
(704) 940-9128

Mr. Craig is an attorney with Clawson & Staubes in its Charlotte, North Carolina office and was retained by the plaintiff to file this lawsuit. The plaintiff objects on the ground of attorney work product privilege and attorney client privilege to stating the nature and scope of Mr. Craig's review and what documents he reviewed.

Mrs. Smith, Mr. Findley and Mr. Miller reviewed information on the facts of the defendants' claim.

(f) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry took photographs of the accident scene and reported to the plaintiff concerning a general description of the scene of the accident. Mr. Faulkenberry is a claim representative who investigates claims.

As for the date of review and the nature and scope of the review by Mr. Miller, Mr. Findley and Mrs. Smith, pursuant to SCRCP 33(c) the plaintiff refers to the non-privileged parts of the claim file marked Adams SF001 to Adams SF593.

5. Give the name, address, job title, job description and date(s) of inspection for each and every person employed or retained by State Farm who inspected the vehicle or the site of the collision in conjunction with the claim.

ANSWER:

(a) Haskell Faulkenberry
State Farm Mutual Automobile Insurance Company
1550 Porter Road
Rock Hill, SC 29730

Mr. Faulkenberry's job title is claim representative. His job description is investigation of insurance claims. Mr. Faulkenberry inspected the site of the collision on October 29, 20101.

6. Set forth Lindsay Smith's complete employment history with State Farm. Include the following information:

(a) Date of hire;

(b) Identify dates and description of all job positions held while employed by State Farm and basis of compensation;

(c) Identify, date(s) and description of all training courses completed while employed by State Farm;

(d) Identify, date(s) and description of any training courses started, but not completed while employed by State Farm;

(e) Amount and method of compensation and date(s) and reason(s) for any and all changes in compensation; and

(f) Date of termination, if applicable.

ANSWER:

(a) June 22, 2001

(b) Claim representative. Basis of compensation is job title, length of employment and customer service.

(c) Attached and incorporated herein is Lindsay Smith's Education and Training Record. See documents marked PADAM 013 PROD to PADAM 016 PROD.

(d) Mrs. Smith did not fail to complete any training course she started.

(e) The plaintiff objects to disclosing the amount of Mrs. Smith's compensation on the ground that this information is privileged and confidential and is not reasonably calculated to lead to the discovery of admissible evidence. Further objections set forth in response to interrogatory 7 are incorporated herein. The method of compensation is that Mrs. Smith is paid bi-monthly by direct deposit check. During Mrs. Smith's employment with the plaintiff her compensation has been increased as a result of satisfactory performance reviews.

(f) Not applicable.

7. If Lindsay Smith has received any performance-based bonus(es) or pay raises from 2005 to present, provide the following information:

(a) The date(s) of all bonus(es) or pay raise(s);

(b) The amount(s) of such bonus(es) or pay raise(s), either in dollars or as a percentage of Ms. Smith's salary;

(c) The reason(s) for such bonus(es) or pay raise(s);

(d) A detailed description of the criteria considered for each bonus or pay raise.

ANSWER: The plaintiff objects to this interrogatory as it is not reasonably calculated to lead to the discovery of admissible evidence. The plaintiff has no incentive program, goal or measure of job performance that is based on reduction of claim indemnity costs, pending claims, allocated adjustment expenses or other claim

statistics as a condition for promotion or merit pay increase. The plaintiff also objects on the ground this interrogatory seeks irrelevant personal information of an employee who is not named as a party to this litigation and is invasive of that employee's personal privacy. Reserving these objections the plaintiff answers as follows:

(a) May 2005, May 2006, May 2007, May 2008; May 2009, May 2010.

(b) The plaintiff objects to providing this information on the same ground as it objected to interrogatory 5(e) concerning the amount of Mrs. Smith's compensation.

(c) Length of employment and performance reviews.

(d) Length of employment and performance reviews.

8. If Lindsay Smith has received any job performance review(s) from 2005 to present, provide the following information regarding each review:

(a) All criteria on which Lindsay Smith's job performance was reviewed or evaluated, including any specific objective or financial goals established for Ms. Smith; and

(b) The job performance rating awarded to Ms. Smith as a result of such review.

ANSWER:

(a) As stated in response to interrogatories 7(c) and 7(d), any increases in compensation were based upon length of employment and performance reviews. Mrs. Smith has no financial goals. As for specific objectives, Mrs. Smith's job is to efficiently and fairly handle claims.

(b) Mrs. Smith's job performance rating is level II.

9. Identify the name(s), job title(s), job description(s) and primary office location(s) for Lindsay Smith's immediate supervisor or manager.

ANSWER: As of March 21, 2011 Mrs. Smith's immediate supervisor is Phyllis Eledge. Prior to March 21, 2011 and during the pendency of the defendants' claim Mrs. Smith's immediate supervisor was Richard D. Findley. Mr. Findley's job title is team manager. His job description is set forth in response to interrogatory 4. Mr. Findley's primary office location is Columbia, South Carolina.

10. Set forth in detail the policies and procedures that an employee of State Farm holding Lindsay Smith's position is required to follow prior to denying any claim for benefits under an automobile or property policy.

ANSWER: The plaintiff objects to interrogatory 10 as it is overly broad in scope, unrestricted in time frame and geography and is not reasonably calculated to lead to the discovery of admissible evidence as it seeks information far beyond that pertaining to the handling of claims in which coverage for UIM benefits is at issue. The plaintiff handles each claim according to its individual merits and unique set of circumstances as prescribed by individual state and federal law. Additionally, Lindsay Smith has not denied the defendants' claim. Notwithstanding and without waiving these objections, pursuant to SCRCP 33(c) the plaintiff refers to the following documents being produced: PADAM 018 PROD to PADAM 069 PROD.

11. Set forth in detail each and every reason the claim was denied.

ANSWER: The claim has not been denied. Instead, Lindsay Smith's letter of April 28, 2010 states the defendants' claim "does not appear to qualify as an underinsured claim." The plaintiff filed this declaratory judgment action to obtain a ruling on this issue. The plaintiff does not believe the defendants' claim qualifies as an underinsured claim as there was no UIM vehicle involved in causing the accident which

injured Phyllis Paden-Adams. Additionally, one of the policies under which the defendants claim coverage was cancelled at the defendants' request prior to the accident in question.

12. Set forth in detail each and every action taken by State Farm prior to April 28, 2010 to review the claim and/or facts and circumstances of the collision. This request specifically includes but is not limited to any efforts to: review the policy; review the collision site; inspect the vehicle; contact or interview witnesses; review legal authority; obtain/consult an expert (legal, or otherwise); request/review medical records; request/review SCDOT records; etc.

ANSWER: Pursuant to SCRCP 33(c) the plaintiff refers to the non-privileged parts of its claim file produced in conjunction with the response. The plaintiff objects on the ground of attorney client privilege and on the ground of the attorney work product privilege to revealing communications with counsel for State Farm. The plaintiff also objects to disclosing information regarding experts who have been consulted.

13. Set forth in detail any and all policies or procedures in place within State Farm which govern the review of a claim and/or the steps necessary before denying a claim for benefits under an automobile policy.

ANSWER: See response to interrogatory 10 which is incorporated herein.

14. If any internal department, committee or group reviewed State Farm's decision to deny the claim, provide the following information:

(a) The name and composition and identity of the members composing the department, committee or group;

(b) Each and every date the department, committee or group met to consider the claim, or State Farm's decision to deny the claim;

(c) Whether any minutes or notes were made during such meeting; and

(d) The content or substance of such minutes or notes.

ANSWER:

(a) The plaintiff has not denied the defendants' claim for UIM benefits. Instead, the plaintiff has initiated a declaratory judgment action for a decision on whether the circumstances of Phyllis Paden-Adams' October 2009 accident qualifies for UIM coverage. Representatives of the plaintiff do not believe that the facts and circumstances of Phyllis Paden-Adams' October 2009 accident qualify for UIM coverage, nor is it believed that even if coverage exists it exists in the amount claimed by the defendants. The persons involved in the decision to initiate a declaratory judgment action were Lindsay Smith, Richard D. Findley, Derek Miller and Richard Leigh.

(b) Pursuant to SCRCP 33(c) the plaintiff refers to the claim file being produced for communications.

(c) See answer to interrogatory 14(b).

(d) See answer to interrogatory 14(b) and 14(c).

15. Set forth State Farm's current net worth, or provide a copy of its most recent financial statement provided to its shareholders or members, or to any regulatory or licensing agency.

ANSWER: The plaintiff does not provide a financial statement to its shareholders other than financial statements contained in its Annual Statement. Attached as PADAM 009 PROD to PADAM 012 PROD is the plaintiff's Annual

Statement for the year ending December 31, 2009. The Annual Statement for the year ending December 31, 2010 is not yet available.

16. Set forth the total amount of State Farm's current invested reserves.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles a loss reserve is a liability, not a fund. No funds are transferred and no investment is made as the result of setting a reserve. The plaintiff also objects to interrogatory 16 because it is not reasonably calculated to lead to the discovery of admissible evidence.

17. For 2009, set forth the total amount of State Farm's net profits from its auto insurance lines.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles the plaintiff reports its net income or loss as an entity and does not calculate net income or loss by line of insurance or policy type.

18. For 2009, set forth the total amount of State Farm's net profits from operations within the State of South Carolina.

ANSWER: The plaintiff maintains its books and records in accordance with statutory accounting principles as required by state law. Under those principles the plaintiff reports its net income or loss as an entity and does not calculate net income or loss by state or other geographical area.

19. Cite with specificity any and all provisions of the policy upon which State Farm relied in making its April 28, 2010 and May 14, 2010 determination that the claim was not covered by the policy.

ANSWER: Lindsay Smith's letters stated the claim did not appear to qualify as an underinsured claim. See definition of motor vehicle on page 20 of Form 8403. See also, page 19 of Form 8403 that a bodily injury for purposes of UIM coverage must be caused by accident arising out of the operation or ownership of the underinsured motor vehicle.

20. Cite with specificity any and all judicial or statutory authority upon which State Farm relied in making its April 28, 2010 and May 14, 2010 determination that the claim was not covered by the policy.

ANSWER: As stated previously, the letters in question did not state that claim was not covered by the policy. Instead, the letters referenced in this interrogatory stated that the claim did not appear to qualify as an underinsured motor vehicle. In making this statement the plaintiff relied upon its general understanding of South Carolina law with regard to underinsurance motorist claims.

21. For the period of 2005 to present, if any audit, review or survey has been conducted of the claims handling practices of Lindsay Smith or of any office or region to which Lindsay Smith was assigned, provide the following information:

(a) The date(s) on which all audits, reviews or surveys were conducted;

(b) The identity of the person, office or region audited, reviewed or surveyed;

(c) The criteria by which the audit, review or survey evaluated the claims handling practices, including any specific objective or financial criteria;

(d) The results of the audit, review or survey, including any specific objective or financial findings or conclusions.

ANSWER: The plaintiff objects to interrogatory 21 because it is overly broad in scope, time and subject matter and is not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory would require the plaintiff to produce highly confidential, self evaluative materials which are immaterial, irrelevant and wholly unrelated to the handling of the defendants' claim for UIM benefits. The interrogatory also calls for the plaintiff to produce confidential, proprietary business information including information subject to the attorney work product and/or attorney client privileges. Without waiving these objections and subject to these objections see the answer to interrogatory 8(a) concerning Lindsay Smith's job and the reasons for increases in compensation.

22. Set forth all evidence (factual or otherwise) which State Farm contends as supports for and/or which State Farm relied upon in asserting its allegations contained in paragraphs 21 and 22 of its complaint, including the source of such evidence.

ANSWER: The information relied upon by the plaintiff for support of the allegation in paragraphs 21 is the SCDOT equipment and vehicles were not in operation and were not being used for transportation at the time of the accident in question. It is also questionable whether the specific equipment which allegedly caused the condition of the road constituted a motor vehicle. Pursuant to SCRCP 33(c) the plaintiff also refers to the non-privileged parts of its claim file being produced. As for

the allegations in paragraph 22 of the complaint, State Farm is agreeable to deleting from the complaint allegations pertaining to who was at fault in causing the accident.

23. There is no interrogatory 23.

24. Identify any and all claims or other lawsuits within the past 10 years in which State Farm was either involved as an uninsured or underinsured carrier, and in which SCDOT or any other governmental entity subject to the Tort Claims Act in South Carolina, was a named party.

ANSWER: The plaintiff objects to the first interrogatory 24 as it is not reasonably calculated to lead to the discovery of admissible evidence. State Farm handles each claim according to its individual merits and unique set of circumstances and information related to disparate claims and mere allegations within lawsuits arising from such claims do not prove the truth of the matter asserted in complaints in those matters or in the instant case. To the extent the first interrogatory 24 calls for information within the attorney work product or attorney client privileges such information is confidential. Additionally, the first interrogatory 24 calls upon the plaintiff to furnish the defendants with personal information of policyholders who are not parties to this litigation and who have expectations that their personal information and their personal privacy rights will be safeguarded by their insurer. Additionally, to the extent the first interrogatory 24 calls for the production of lawsuit information, this is a matter of public record which the defendants can acquire themselves. Finally, the first interrogatory 24 is objected to on the ground of burdensomeness as the plaintiff has no way of furnishing this information other than a manual review of all claims or

lawsuits in the past 10 years to determine whether the SCDOT or other governmental entity was a named party.

24. For each request to admit that was answered by anything other than an unqualified admission, set forth each and every reason for such denial.

ANSWER: Answering the second interrogatory 24 the plaintiff refers to the responses to the defendants' requests to admit.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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(843) 853-5200

Attorneys for State Farm Fire and Casualty Company

Charleston, South Carolina

April 5th, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III
Circuit Court Judge

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Case No. 2011-CP-46-00021

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State Farm Fire and Casualty Company ..... Respondents,

vs.

Phyllis Paden-Adams and Alonzo Adams..... Appellants.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 18, 2012.

W. Keith Martens

W. Keith Martens
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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III
Circuit Court Judge

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Case No. 2011-CP-46-00021

---

State Farm Fire and Casualty Company ..... Respondents,

vs.

Phyllis Paden-Adams and Alonzo Adams. ..... Appellants.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned hereby certifies that the Record on Appeal complies with the Supreme Court Order of August 13, 2007.

July 16, 2012.

W. Keith Martens

W. Keith Martens
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