

23174

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 20 2017

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable L. Casey Manning, Circuit Court Judge

Civil Action No. 2015-CP-40-07254
Appellate Case No. 2016-001710

Andrew P. Neumayer..... Respondent,

v.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn Knox
DeMartelare, and Asia N. Partman..... Defendants,

Of Whom Philadelphia Indemnity Insurance Company is Appellant.

RECORD ON APPEAL

Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111
Attorneys for Appellant

Phillip E. Reeves, Esquire
PO Box 10589
Greenville SC 29603
(864) 271-9580

Attorney for Appellant

John S. Nichols, S.C. Bar No. 4210
Blake A. Hewitt, S.C. Bar No. 73674
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Street (29201)
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
Attorneys for Respondent

Gerald E. Reardon, S.C. Bar No. 13739
The Law Office of Jerry Reardon
1722 Main Street, Suite 302 (29201)
Post Office Box 7464
Columbia, SC 29201
(803) 602-5242
Attorney for Respondent

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

CASE NUMBER: 2015CP4007254

Andrew P Neumayer

Philadelphia Indemnity Insurance Company

Primary Colors Care Center

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge: _____

Judge Code 2061

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of June, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Rowland P. Alston III

Gerald Eugene Reardon

Curtis W. Dowling

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.,

Philadelphia Indemnity Insurance Company,
Primary Color Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-7254

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
AND DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
JUN 13 PM 3:18
HEITE W. MCBRIDE
C.C.P. & G.S.

I. INTRODUCTION

This is a declaratory judgment action. This matter came before the Court upon the Plaintiff's Motion for Summary Judgment, as well as Defendant Philadelphia Indemnity Insurance Company's Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. A hearing was held before me at the Richland County Judicial Center on May 18, 2016. Rowland P. Alston III and Jerry Reardon appeared on behalf of the Plaintiff. Curtis Dowling appeared on behalf of the Defendant Philadelphia Indemnity Insurance Company ("Philadelphia"). After carefully considering the arguments of counsel, I hereby GRANT Plaintiff's Motion for Summary Judgment, and DENY Philadelphia's Motion for Summary Judgment.

II. STATEMENT OF THE CASE

On January 25, 2013, Plaintiff Andrew P. Neumayer ("Plaintiff") was a pedestrian on Julius Felder Street in Cayce, South Carolina, when he was struck by a bus operated by Defendant Asia N. Partman ("Partman") and owned by Defendant Primary Colors Child

SCANNED

Care Center ("Primary Colors"). He sustained very significant personal injury, and his medical specials totaled over \$122,000.00.

On November 8, 2013, Plaintiff filed suit against Partman and Primary Colors, alleging negligence against Partman in the operation of the bus and against Primary Colors for the acts of its agent Partman. (See Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center, 2013-CP-40-6839; hereinafter "Tort Action.") Primary Colors did not answer or appear in the Tort Action, and went into default. A damages hearing was held before the Hon. James R. Barber on April 3, 2014. Primary Colors was given notice and did not appear. After considering the testimony and evidence, the Court entered judgment against defendants in the amount of \$622,500.00 on April 7, 2014.

Defendant Philadelphia, a liability carrier, issued an automobile liability policy ("Policy") with Primary Colors as the named insured that was in effect on the date of the accident and that provided coverage with limits of \$1,000,000.00. When Plaintiff presented the judgment to Philadelphia, Philadelphia refused to satisfy the judgment in full for the Tort Action based on alleged lack of cooperation from Primary Colors in failing to provide timely notice of the suit.

Plaintiff then filed this declaratory judgment action as a result on December 4, 2015, seeking an order that Philadelphia satisfy the judgment in full.

III. FINDINGS OF FACT/CONCLUSIONS OF LAW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*. When "the evidence is

susceptible to only one reasonable interpretation, summary judgment may be granted.” Brooks v. Northwood Little League, Inc., 489 S.E.2d 647 (S.C. Ct.App. 1997). And, “when the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law.” S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 730 S.E.2d 862, 864 (S.C. 2012).

The central issue in this case is whether or not Philadelphia can properly reduce the available coverage to the statutory minimum through a cooperation provision in the Policy. Philadelphia admits that the Tort Action contains covered claims. However, Philadelphia contends that it is only responsible for the first \$25,000.00 of the judgment, equal to the minimum automobile insurance liability limits under S.C. Code §38-77-140. In support of this denial of full coverage, it cites a provision in the Policy that places duties on an insured to cooperate in providing notice of suit and to send copies of any related legal papers. Because Primary Colors allegedly violated this provision, Philadelphia claims it is proper to reduce the available coverage to the statutory minimum limits.

Contrary to Philadelphia’s position, the Court finds that the law of automobile insurance in South Carolina significantly changed in 1999 when S.C. Code §38-77-142 became effective. This statute mandates that automobile insurance policies are required to have provisions affording coverage for named insureds and their permissive operators, and, that any relevant policy provision which effectively reduces coverage is void. The statute reads in part:

§ 38-77-142. Policies or contracts of bodily injury or property damage liability insurance covering liability; required provisions.

(C) Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void.

Philadelphia's application of a policy provision that reduces coverage is a clear violation of this statute. This is supported by a plain reading of the statute, and the Court's understanding of the case of Williams v. GEICO, 762 S.E.2d 705 (S.C. 2014). There, a provision that reduced coverage for family members violated the public policy of the State as codified in §38-77-142 and was found to be void. The Court stated that "it is the face amount of the coverage that is relevant under §38-77-142, not the statutory minimum limits of liability coverage set forth in §38-77-140, which are not even mentioned in the statute." *Id.*, at 714. Further, it found that "the clear terms of section 38-77-142 are controlling of this state's public policy and justify the result we reach today." *Id.*, at 716.

Here, Philadelphia is not claiming that it does not have a duty to indemnify or provide coverage. Rather, it claims that coverage only extends to the limit of the statutory minimum because of a provision in the Policy, reducing the available coverage from \$1,000,000.00 to \$25,000.00. But, under the plain language of §38-77-142 and in Williams, coverage in auto liability policies cannot be reduced by this or any such provision, and the statutory minimum is irrelevant. If Philadelphia admits to coverage and a duty to indemnify, then its obligation extends to the limits of coverage on the Policy.

Philadelphia cites USAA v. Markosky, 530 S.E.2d 660 (S.C. Ct.App. 2000) for the proposition that coverage may be reduced to the statutory minimum in these circumstances. However, as the Court noted in Williams, that case involved an accident that occurred prior to March 1, 1999, the effective date of §38-77-142, and was not controlling. *See Williams, supra*, at 714. Thus, it is also not controlling in this case.

Where the terms of a statute are clear, the Court must apply those terms according to their literal meaning. Collins v. Doe, 574 S.E.2d 739 (S.C. 2002) (where a statute's

language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to look for or impose other meaning). And, "statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." Nakatsu v. Encompass Indemnity Co., 700 S.E.2d 283, 287 (S.C. Ct.App. 2010), quoting State Farm Mut. Auto. Ins. Co. v. Calcutt, 530 S.E.2d 896, 897 (S.C. Ct.App. 2000).

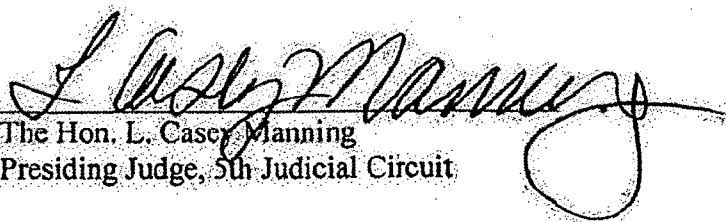
A plain reading of §38-77-142 (C) clearly mandates that any relevant provision in any automobile insurance policy attempting to reduce the coverage available is void. After admitting coverage, Philadelphia rests upon such a provision and one that effectively does just that. But that provision is unavailable to Philadelphia and is void as a matter of law in this case. Section 38-77-142 (C) prevails.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is GRANTED, and Philadelphia's Motion for Summary Judgment is DENIED.

AND IT IS SO ORDERED.

Columbia, South Carolina

June 7, 2016


The Hon. L. Casey Manning
Presiding Judge, 5th Judicial Circuit

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

CASE NUMBER: 2015CP4007254

Andrew P Neumayer

Philadelphia Indemnity Insurance Company

Primary Colors Care Center

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

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Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 day of May, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Rowland P. Alston III

Gerald Eugene Reardon

Curtis W. Dowling

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

SCANNED

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COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Color Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-7254

AMENDED ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT, AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

RICHLAND COUNTY
FILED
AUG -2 PM 12:29
J. E. N. BRIDGE
C.P. & G.S.

I. INTRODUCTION

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Plaintiff then filed this declaratory judgment action as a result on December 4, 2015, seeking an order that Philadelphia satisfy the judgment in full.

After granting Plaintiff summary judgment and entering an order, Philadelphia timely served a motion to alter or amend. This Amended Order is entered in response to that motion.

III. FINDINGS OF FACT/CONCLUSIONS OF LAW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*. When "the evidence is susceptible to only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 489 S.E.2d 647 (S.C. Ct.App. 1997). And, "when the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 730 S.E.2d 862, 864 (S.C. 2012).

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Here, Philadelphia is not claiming that it does not have a duty to indemnify or provide coverage at all. Rather, it claims that coverage only extends to the limit of the statutory minimum because of a provision in the Policy, reducing the available coverage from \$1,000,000.00 to \$25,000.00. But, under the plain language of §38-77-142 and in Williams, coverage in auto liability policies cannot be reduced by this or any such provision, and the statutory minimum is irrelevant. If Philadelphia has an indemnification obligation, then its obligation extends to the limits of coverage on the Policy.

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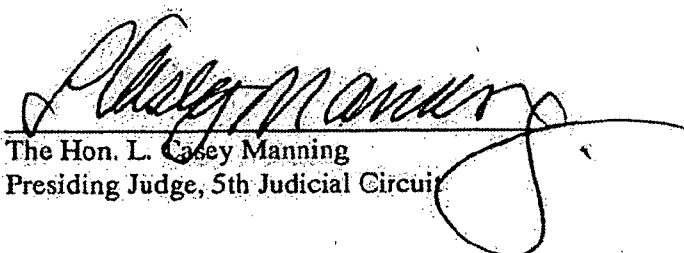
WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is GRANTED, and Philadelphia's Motion for Summary Judgment is DENIED.

AND IT IS SO ORDERED.

Columbia, South Carolina

July 26, 2016

2015-CP-40-7254


The Hon. L. Casey Manning
Presiding Judge, 5th Judicial Circuit

SCANNED
5 of 5

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer

Plaintiff(s)

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn Knox
DeMartelare, and Asia N. Partman

Defendant(s)

Submitted By: Rowland P. Alston III

Address: The Sullivan Firm LLC, 907 Calhoun St.,
Columbia, SC 29201

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 40-

254

SC Bar #: 69932

Telephone #: 803-252-3663

Fax #: 803-254-5798

Other:

E-mail: rowlandalston@scrr.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/
Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☒ Other (199) D.J. | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured
Settlement Payment Rights
Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers
Compensation Settlement
Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in
an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature: 

Date: December 4, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

15

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-_____

SUMMONS

JEANNETTE W. MCBRIDE
C.C.P. & G.S.

2015 DEC -4 AM 10:57

RICHLAND COUNTY
FILED

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer this Complaint, a copy of which is hereby served upon you. You are required to serve a copy of your Answer to this Complaint upon the undersigned, at the address shown below, within 30 days after service hereof, exclusive of the day of service. And if you fail to answer this Complaint, judgment by default will be rendered against you for the relief demanded in this Complaint.

THE SULLIVAN FIRM, LLC



Rowland P. Alston III
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663
Attorney for the Plaintiff

Columbia, South Carolina
December 4, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-40-_____

COMPLAINT

(Declaratory Judgment -- Non Jury)

RICHLAND COUNTY
FILED
2015 DEC -4 AM 10:57
JEANETTE W. HEBRID
C.C.P. & G.S.

The Plaintiff, complaining of the Defendants herein, alleges that:

1. The Plaintiff is a citizen and resident of Berkeley County, South Carolina.
2. Philadelphia Indemnity Insurance Company ("Philadelphia"), is a liability insurer and corporation organized and existing under and by virtue of the laws of Pennsylvania, and is authorized and does conduct business in the state of South Carolina.
3. Upon information and belief, the Defendant Primary Colors Child Care Center ("Primary Colors") is a business organized and domiciled in South Carolina, and conducts business in Richland County, South Carolina.
4. Upon information and belief, the Defendant Jocelyn Knox DeMartelare is a resident of Richland County, South Carolina, and is an owner of Primary Colors.
5. Upon information and belief, the Defendant Asia Partman ("Partman") is a resident of Richland County, South Carolina, and, at all times relevant herein, was an employee or agent of Primary Colors.
6. Jurisdiction and venue is proper in this Court.

7. Philadelphia issued a policy of liability insurance ("Policy") bearing policy number #PHPK 1081876 with coverage in effect on or about January 25, 2013, and with Primary Colors as the Named Insured. The Policy was written and delivered in South Carolina, and South Carolina law controls its interpretation.

8. On or about January 25, 2013, Plaintiff was a pedestrian on Julius Felder Street in Lexington County, South Carolina, and was struck by a bus owned and operated by Primary Colors and driven by Partman.

9. Plaintiff sustained serious injury as a result of the accident, and on November 8, 2013, filed suit sounding in tort in the Richland County Court of Common Pleas against Primary Colors and Partman. The tort action is Andrew P. Neumayer vs. Asia N. Partman and Primary Colors Child Care Center, C/A No. 2013-CP-40-6839 (hereinafter "Tort Action"). The Tort Action contains claims and causes of action covered by the Policy.

10. Plaintiff obtained a judgment in the Tort Action against Primary Colors in the amount of \$622,500.00, and said judgment was entered on April 7, 2014. A copy of the judgment is attached hereto and incorporated herein by reference.

11. The judgment is, *inter alia*, a covered loss under the Policy. Philadelphia is obligated to indemnify Primary Colors and satisfy the judgment in full.

12. Plaintiff submitted the judgment to Philadelphia for the indemnification of its insured, Primary Colors, and for satisfaction of the judgment. Philadelphia has refused to indemnify Primary Colors or satisfy the judgment.

13. This is an action for declaratory judgment pursuant to Section 15-53-10 *et seq.* of the South Carolina Code of Laws for the purpose of determining a question in controversy between the parties as more fully described below.

14. A demand has been made on Philadelphia to satisfy the judgment attached hereto.

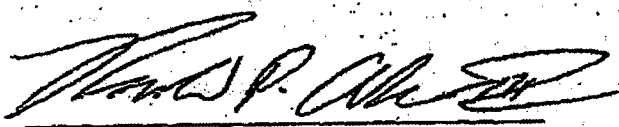
15. This court should inquire into this matter, which is a proper subject for declaratory judgment under Section 15-53-10 *et seq.* of the 1976 South Carolina Code, as amended, and issue its order declaring that Philadelphia is obligated for the judgment, including, but not limited to, indemnification for Primary Colors and satisfaction of the judgment in full for the Tort Action.

WHEREFORE, the Plaintiff demands that the Court inquire into this matter and issue its order and judgment declaring that:

- a. Philadelphia is obligated for the judgment entered in the Tort Action; and
- b. Philadelphia is obligated to indemnify Primary Colors and satisfy the judgment in full for the Tort Action, including any pre-judgment and post-judgment interest and costs; and
- c. The Court grant such other and further relief as may be just and proper.



GERALD E. REARDON
Attorney for Plaintiff
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201
(803) 978-6114



ROWLAND P. ALSTON III
Attorney for Plaintiff
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663

December 4, 2015
Columbia, South Carolina

20
STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4006839

Andrew P Neumayer

Asia N Partman

PLAINTIFF(S)

Primary Colors Child Care Center

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

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

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

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on 7th day of April, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 7th day of April, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Gerald Eugene Reardon

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court, Jeanette McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2013-CP-40-06839

ANDREW P. NEUMAYER,
PLAINTIFF.

-VS-

**ASIA N. PARTMAN and PRIMARY
COLORS CHILD CARE CENTER,
DEFENDANT.**

ORDER FOR DAMAGES AGAINST DEFENDANTS

2014 APR -7 PM 2
C.C.P. & G.S.

This matter was before me on April 3, 2014, for a hearing to determine damages as a result of injuries suffered in an auto accident which occurred on January 25, 2013. Plaintiff is represented by Gerald E. Reardon and Rowland Alston. Plaintiff testified at the hearing. Defendants were notified of the hearing and did not appear.

STATEMENT OF FACTS

On January 25, 2013, Plaintiff was walking on Julius Felder Street. Defendant Partman while driving on Julius Felder Street in a bus owned by Defendant Primary Colors Child Care Center caused the bus to strike Plaintiff. Plaintiff was taken by EMS to Lexington Medical Center where he was diagnosed with a ruptured spleen, broken left ribs, left humerus fracture, left pneumothorax, and a punctured lung. Plaintiff underwent extensive medical care including a splenectomy, exploratory laparotomy, an open reduction internal fixation of the left humerus with hardware, and multiple CT scans. Plaintiff was admitted on January 25, 2013 and discharged February 1, 2013. The out-of-pocket expenses incurred by Plaintiff are set forth below:

<u>Medical Facility</u>	<u>Cost</u>
Lexington County EMS	\$574.00
Lexington Medical Center	\$113,393.89
Lexington Radiology	\$1,580.00
Lexington Orthopaedics	\$2,162.00
Southern Surgical	\$4,114.00
Columbia Nephrology	\$294.00
TOTAL:	\$122,117.89

TESTIMONY

Plaintiff testified that he has undergone substantial pain, suffering, mental anguish, emotional distress, loss of enjoyment of life, loss of activities, and sustained permanent injuries. Plaintiff stated his injuries were so severe that he was forced to move into his parents' home to recover. Plaintiff has significant pain, loss of range of motion, and severe reduction in use of his left arm due to the accident. He is now limited to lifting less than twenty five pounds. He is no longer able to play sports or hobbies as a result of his left arm injury.

Plaintiff stated his health diminished and his immune system has decreased since the accident due to the injuries to his lungs, spleen, and ribs. Plaintiff stated he sustained significant memory loss and recall. He has been diagnosed with PTSD, depression, and anxiety.

Plaintiff lost a job as a result of the accident and missed ten month of wages. He sustained a loss of approximately Fifteen Thousand Dollars (\$15,000.00) in wages due to his injuries.

After review of the documents entered into evidence and a reflection upon the testimony of

the Plaintiff, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On January 25, 2013 while walking on Julius Felder Street, Plaintiff was hit by a bus driven by Defendant Partman and owned and maintained by Defendant Primary Colors Child Care Center.

2. Plaintiff sustained serious injuries to his spleen, lungs, left arm, head, body, and limbs. He has sustained scarring on the stomach, left arm, and chest due to injuries and surgeries.

3. Plaintiff underwent substantial medical treatment including lung, spleen, and left arm surgeries, all which were reasonable, necessary, and proximately related to the injuries he suffered as a result of the accident with Defendants.

4. Plaintiff has undergone PTSD, depression, and anxiety as a result of the accident with Defendants.

5. Plaintiff testified he sustained substantial pain, suffering, mental anguish, emotional distress, loss of enjoyment of life, and loss of activities as a result of the accident with Defendants. Plaintiff testified he continues to suffer daily physical and emotional problems as a result of the accident with Defendants. Plaintiff stated his left arm injury is permanent in nature and will need future care.

6. Plaintiff testified his recovery has been very slow due to the numerous injuries sustained in the accident with Defendants.

7. Plaintiff incurred medical expenses in the amount of One Hundred Twenty-Two Thousand One Hundred Seventeen and 89/100 Dollars (\$122,117.89).

8. Plaintiff's demeanor was straightforward and his testimony was extremely credible.

CONCLUSIONS OF LAW

1. Plaintiff's medical treatment was reasonable, necessary, and proximately related to his injuries sustained in the accident with Defendant.

2. Plaintiff's medical expenses in the amount of One Hundred Twenty-Two Thousand One Hundred Seventeen and 89/100 Dollars (\$122,117.89) are all directly related to the accident with Defendants.

3. Plaintiff sustained substantial pain, suffering, emotional distress, mental anguish, loss of activities, and permanent physical and emotional injuries as a result of the accident with Defendants.

4. Proper notice of the hearing to determine the damages was given to Defendants.

5. As a direct and proximate result of the injuries and damages sustained in the accident on January 25, 2013 Plaintiff has suffered damages in the amount of \$ 622,500.00 *QW*

THEREFORE, IT IS HEREBY ORDERED that the Plaintiff is awarded actual damages in the amount of \$ 622,500.00 *QW* to be paid by Defendant.

AND IT IS SO ORDERED.

James R. Barber
 JAMES R. BARBER
 FIFTH JUDICIAL CIRCUIT

Columbia, South Carolina

April 4, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Andrew P. Neumayer,

Plaintiff,

v.

Philadelphia Indemnity Insurance Company;
Primary Colors Child Care Center; Jocelyn
Knox DeMartelare; and Asia N. Partman,

Defendants.

Philadelphia Indemnity Insurance Company,

Counter-Plaintiff,

v.

Andrew P. Neumayer,

Counter-Defendant.

Philadelphia Indemnity Insurance Company,

Cross-Claimant,

v.

Primary Colors Child Care Center, Inc.;
Jocelyn Knox DeMartelare; and Asia N.
Partman,

Cross-Defendants.

Civil Action No. 2015-CP-40-07254

ANSWER, COUNTERCLAIM, AND
CROSS-CLAIM OF PHILADELPHIA
INDEMNITY INSURANCE COMPANY

The Defendant/Counter-Plaintiff/Cross-Claimant, Philadelphia Indemnity Insurance Company ("Philadelphia"), hereby answers the Complaint, asserts a counterclaim against the

Plaintiff/Counter-Defendant, and asserts a cross-claim against the Co-Defendants/Cross-Defendants, stating that it will respectfully show unto the Court as follows:^{1,2,3}

ANSWER

FOR A FIRST DEFENSE (Responses to the Allegations of the Complaint)

1. Philadelphia denies each and every allegation of the Complaint except those hereinafter specifically admitted, qualified, or explained.
2. Paragraph 1 is admitted upon information and belief.
3. Paragraph 2 is admitted to the extent it alleges Philadelphia is an insurance business corporation organized and existing under and pursuant to the laws of the Commonwealth of Pennsylvania and which is licensed to conduct insurance business in South Carolina. Any remaining allegations of paragraph 2 are denied as stated.
4. Paragraphs 3, 4, and 5 are admitted upon information and belief.
5. The allegations of paragraph 6 constitute conclusions of law that Philadelphia neither admits nor denies. To the extent these allegations are deemed to be allegations of fact, they are admitted.
6. Paragraph 7 is admitted to the extent it alleges Philadelphia issued an insurance policy to Primary Colors Child Care Center as the Named Insured which was written and delivered in the State of South Carolina. The allegation that South Carolina law controls the

¹ Any and all inconsistent material is pled in the alternative pursuant to Rule 8(c), SCRCP, and such other law as is applicable. Such inconsistent material may or may not be specifically designated as such.

² To the extent material appearing herein is inconsistent with existing law, Philadelphia respectfully requests to argue in good faith for the extension, modification, or reversal of existing law or the establishment of new law. Nothing pled in any portion of this Answer, Counterclaim, and Cross-Claim is to be deemed a waiver of any claim or defense available to Philadelphia.

³ To the extent material appearing in one defense is applicable to another defense and not inconsistent with the other defense, the material is to be deemed incorporated into the other defense.

interpretation of the policy constitutes a conclusion of law that Philadelphia neither admits nor denies. To the extent that allegation is deemed to be an allegation of fact, it is admitted. The remaining allegations of paragraph 7 are denied. Philadelphia would show it issued Commercial Lines Policy No. PHPK928536 (the "Policy") to Primary Colors Child Care Center effective from September 30, 2012 to September 30, 2013.

7. Philadelphia lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 8 and, therefore, denies them.

8. Paragraph 9 is admitted, upon information and belief, to the extent it alleges the Plaintiff/Counter-Defendant, Andrew P. Neumayer ("Neumayer"), filed a lawsuit in the Richland County (South Carolina) Court of Common Pleas captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839 (the "Tort Action") on or about November 8, 2013. Philadelphia admits that the Tort Action contained claims and causes of action covered by the Policy up to the mandated minimum limit set forth in S.C. Code Ann. § 38-77-140(A)(1), but denies the Policy covers the claims and causes of action in excess of that limit. Philadelphia lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Neumayer sustained serious injury and, therefore, denies it.

9. Paragraph 10 is admitted upon information and belief.

10. Paragraph 11 is denied as stated. Philadelphia would show that its indemnification obligation is limited to \$25,000.00.

11. Paragraph 12 is denied as stated. Philadelphia would show that counsel for Neumayer faxed certain documents regarding the judgment in the Tort Action (the "Judgment").

to Philadelphia on October 21, 2015, that this was the first notice Philadelphia received of the Tort Action or the Judgment, and that Philadelphia declined to pay the Judgment in full.

12. Paragraph 13 is admitted to the extent it alleges the existence of a dispute between Philadelphia and Neumayer regarding the coverage available under the Policy. Any remaining allegations of paragraph 13 are denied as stated.

13. Paragraph 14 is admitted.

14. Paragraph 15 is admitted to the extent it alleges the South Carolina Uniform Declaratory Judgments Act is applicable in this action. As to the remaining allegations of paragraph 15, Philadelphia denies Neumayer is entitled to the declaration and/or adjudication requested therein.

15. Philadelphia denies Neumayer is entitled to the relief requested in the prayer of the Complaint.

FOR A SECOND DEFENSE

(Rule 12(b)(6), SCRC—Failure to State a Cause of Action)

16. Each and every response contained above is hereby realleged as fully as if repeated herein verbatim.

17. Philadelphia would further show, upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action and should, therefore, be dismissed.

FOR A THIRD DEFENSE

(Waiver)

18. Each and every response contained above is hereby realleged as fully as if repeated herein verbatim.

19. Philadelphia would further show, upon information and belief, that the Complaint is barred, in whole or in part, by the doctrine of waiver.

FOR A FOURTH DEFENSE

(Estoppel)

20. Each and every response contained above is hereby realleged as fully as if repeated herein verbatim.

21. Philadelphia would further show, upon information and belief, that the Complaint is barred, in whole or in part, by the doctrine of estoppel.

FOR A FIFTH DEFENSE

(Laches)

22. Each and every response contained above is hereby realleged as fully as if repeated herein verbatim.

23. Philadelphia would further show, upon information and belief, that the Complaint is barred, in whole or in part, by the doctrine of laches.

FOR A SIXTH DEFENSE

(Unclean Hands)

24. Each and every response contained above is hereby realleged as fully as if repeated herein verbatim.

25. Philadelphia would further show, upon information and belief, that the Complaint is barred, in whole or in part, by the doctrine of unclean hands.

AS TO FURTHER DEFENSES

26. Philadelphia places Neumayer on notice that it will subsequently move to amend this Answer, Counterclaim, and Cross-Claim to assert additional defenses should it appear through discovery or continued fact investigation that any additional defenses are available.

COUNTERCLAIM AND CROSS-CLAIM

27. To the extent relevant, the allegations of the above paragraphs are realleged as fully as if repeated herein verbatim.

PARTIES, JURISDICTION, AND VENUE

28. Philadelphia is an insurance business corporation organized and existing under and pursuant to the laws of the Commonwealth of Pennsylvania with its principal place of business in Montgomery County, Pennsylvania.

29. Upon information and belief, Neumayer is a citizen and resident of Berkeley County, South Carolina.

30. Upon information and belief, the Co-Defendant/Cross-Defendant, Primary Colors Child Care Center, Inc. ("Primary Colors"), is a corporation organized and existing under and pursuant to the laws of the State of South Carolina with its principal place of business in Lexington County, South Carolina.

31. Upon information and belief, the Co-Defendant/Cross-Defendant, Jocelyn Knox DeMartelare ("DeMartelare"), is a citizen and resident of Richland County, South Carolina and is an owner and/or officer of Primary Colors.

32. Upon information and belief, the Co-Defendant/Cross-Defendant, Asia N. Partman ("Partman"), is a citizen and resident of Richland County, South Carolina and, at all times relevant to this action, was an employee and/or agent of Primary Colors.

33. This Court has jurisdiction over the parties hereto and subject matter hereof, and venue is proper in Richland County.

FACTUAL ALLEGATIONS

34. In September 2012, Philadelphia issued the Policy to Primary Colors effective from September 30, 2012 to September 30, 2013. The Policy provided multiple coverages including commercial property coverage, commercial general liability coverage, commercial auto coverage, professional liability coverage, and abuse liability coverage. Copies of the

Common Policy Declarations, Business Auto Declarations, Business Auto Coverage Form, and all pertinent endorsements of the Policy are attached hereto as Exhibit A and incorporated herein by reference.

35. Upon information and belief, on or about November 8, 2013, Neumayer filed the Tort Action, which was captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839, in the Richland County (South Carolina) Court of Common Pleas.

36. Upon information and belief, the Tort Action alleged that, on or about January 25, 2013, Neumayer was a pedestrian on Julius Felder Street in Lexington County, South Carolina when he was struck by a bus owned by Primary Colors and operated by Partman. Upon information and belief, the Tort Action alleged Primary Colors and Partman were liable to Neumayer for injuries he suffered as a result of the accident.

37. Upon information and belief, Primary Colors and Partman failed to answer or otherwise respond to the Tort Action, and defaults were entered against them.

38. Upon information and belief, a damages hearing was held before this Court on or about April 3, 2014, and an Order for Damages Against Defendants was entered on or about April 7, 2014, awarding Neumayer damages against Primary Colors and Partman in the amount of \$622,500.00 and entering the Judgment in the same amount.

39. Philadelphia did not receive notice of the Tort Action or the Judgment until October 21, 2015 (nearly two years after the Tort Action was filed and over 18 months after the Judgment was entered), when counsel for Neumayer faxed certain documents regarding the Judgment to Philadelphia.

40. Philadelphia declined to pay the Judgment in full on the grounds that it was not timely notified of the Tort Action or the service thereof upon Primary Colors and Partman and, as such, was never provided the opportunity to investigate or defend against Neumayer's claims, all in violation of the applicable terms and conditions of the Policy.

41. Philadelphia suffered substantial prejudice as a result of the failure by Primary Colors and Partman to comply with the applicable terms and conditions of the Policy.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment—Coverage)

42. To the extent relevant, the allegations of the above paragraphs are realleged as fully as if repeated herein verbatim.

43. Philadelphia is informed and believes that an actual controversy exists between Philadelphia, Neumayer, Primary Colors, DeMartelare, and Partman regarding the coverage available under the Policy.

44. Philadelphia is informed and believes that Neumayer, Primary Colors, DeMartelare, and Partman maintain Philadelphia is obligated to pay the Judgment in full.

45. Philadelphia maintains that, while the Tort Action contained claims and causes of action covered by the Policy up to the mandated minimum limit set forth in S.C. Code Ann. § 38-77-140(A)(1), the Policy does not cover the claims and causes of action in excess of that limit.

46. The Policy's Business Auto Coverage Form (CA 00 01 03 10) contains the following provisions relevant to this action:

SECTION IV – BUSINESS AUTO CONDITIONS

* * *

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss." ...

* * *

- b. Additionally, you and any other involved "insured" must:

* * *

- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".

47. Though S.C. Code Ann. § 56-9-20(5)(b) contains mandatory policy provisions stating that the liability of an insurance carrier with respect to the insurance required by Chapter 9 of Title 56 is absolute whenever injury or damage covered by the applicable policy occurs and that no violation of the policy shall defeat or void the policy, those provisions do not apply to coverage in excess of the mandated minimum limits set forth in S.C. Code Ann. § 38-77-140 pursuant to S.C. Code Ann. § 56-9-20(5)(d).

48. While coverage for the Tort Action is not defeated or voided due to the failure by Primary Colors and Partman to comply with Section IV(2) of the Policy's Business Auto Coverage Form up to the mandated minimum limit set forth in S.C. Code Ann. § 38-77-140(A)(1), coverage for the Tort Action in excess of that limit is so defeated or voided.

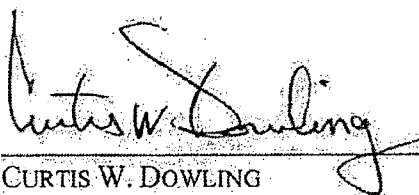
49. Philadelphia requests a declaratory judgment, pursuant to S.C. Code Ann. § 15-53-10 et seq., Rule 57, SCRCF, and other applicable law relating to declaratory judgments, inquiring into the scope and extent of the coverage provided by the Policy and holding that Philadelphia's indemnification obligation with respect to the Judgment is limited to \$25,000.00.

AS TO FURTHER CLAIMS

50. Philadelphia places Neumayer, Primary Colors, DeMartelare, and Partman on notice that it will subsequently move to amend this Answer, Counterclaim, and Cross-Claim to assert additional claims should it appear through discovery or continued fact investigation that any additional claims are available.

WHEREFORE, having fully answered the Complaint, having asserted a counterclaim against the Plaintiff/Counter-Defendant, and having asserted a cross-claim against the Co-Defendants/Cross-Defendants, the Defendant/Counter-Plaintiff/Cross-Claimant, Philadelphia Indemnity Insurance Company, prays for the following relief:

1. That the Complaint and all claims asserted therein be dismissed with prejudice or that judgment be entered against the Plaintiff/Counter-Defendant on the Complaint and in favor of Philadelphia on its counterclaim;
2. That judgment be entered against the Co-Defendants/Cross-Defendants and in favor of Philadelphia on its cross-claim;
3. An Order holding that, pursuant to S.C. Code Ann. §§ 38-77-140(A)(1) and 56-9-20(5)(d), Philadelphia's indemnification obligation with respect to the Judgment is \$25,000.00 due to the failure by Primary Colors and Partman to comply with Section IV(2) of the Policy's Business Auto Coverage Form; and
4. That Philadelphia be awarded the costs of this action, including reasonable attorneys' fees to the extent allowed by law, and such additional relief as the Court deems just, equitable, and proper.



CURTIS W. DOWLING
MATTHEW G. GERRALD
BARNES, ALFORD, STORK & JOHNSON, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, South Carolina 29202
803.799.1111 (Office)
803.254.1335 (Fax)
curtis@basjlaw.com
matt@basjlaw.com
Attorneys for Philadelphia Indemnity Insurance
Company

January 15, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

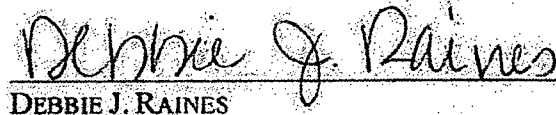
I, the undersigned attorney of the law offices of Barnes, Alford, Stork & Johnson, LLP, attorneys for Defendant Philadelphia Indemnity Insurance Company, do hereby certify that I am serving this date all counsel of record in this action with the documents hereinbelow specified by mailing copies of the same by United States Mail, postage prepaid, to the following address(es):

Documents: Answer, Counterclaim, and Cross-Claim

Counsel Served: Gerald E. Reardon, Esquire
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201

Rowland P. Alston III, Esquire
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201

J. Carolyn Stringer, Esquire
Post Office Box 25345
Columbia, SC 29224


DEBBIE J. RAINES

January 15, 2016
Columbia, South Carolina



PHILADELPHIA
INSURANCE COMPANIES

A Member of the Tokio Marine Group

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One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

Philadelphia Indemnity Insurance Company

Commercial Lines Policy

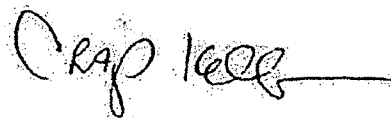
THIS POLICY CONSISTS OF:

- DECLARATIONS
 - COMMON POLICY CONDITIONS
 - ONE OR MORE COVERAGE PARTS. A COVERAGE PART CONSISTS OF:
 - ONE OR MORE COVERAGE FORMS
 - APPLICABLE FORMS AND ENDORSEMENTS
-

IN WITNESS WHEREOF, we have caused this policy to be executed and attested, and, if required by state law, this policy shall not be valid unless countersigned by our authorized representative.

A handwritten signature in cursive script, appearing to read "Sean P. Sweeney".

President

A handwritten signature in cursive script, appearing to read "Chris Lee".

Secretary



PHILADELPHIA
INSURANCE COMPANIES

A Member of the Tokio Marine Group

One Bala Plaza, Suite 100
Bala Cynwyd, Pennsylvania 19004
610.617.7900 Fax 610.617.7940
PHLY.com

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Philadelphia Indemnity Insurance Company
COMMON POLICY DECLARATIONS

Policy Number: PHPK928536

Named Insured and Mailing Address:

Primary Colors Child Care Center
PO Box 1854
Columbia, SC 29202-1854

Producer: 28430

Smoak Insurance Agency
PO Box 9125
Columbia, SC 29290

Policy Period From: 09/30/2012 **To:** 09/30/2013

at 12:01 A.M. Standard Time at your mailing
address shown above.

Business Description: Day Care

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS
POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS
INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

Commercial Property Coverage Part

Commercial General Liability Coverage Part

Commercial Crime Coverage Part

Commercial Inland Marine Coverage Part

Commercial Auto Coverage Part

Businessowners

Workers Compensation

Professional Liability

Sexual/Physical Abuse

PREMIUM

INCLUDED

Total

\$

Total Includes Federal Terrorism Risk Insurance Act Coverage

FORM (S) AND ENDORSEMENT (S) MADE A PART OF THIS POLICY AT THE TIME OF ISSUE
Refer To Forms Schedule

*Omits applicable Forms and Endorsements if shown in specific Coverage Part/Coverage Form Declarations.

CPD- PIIC (01/07)

Countersignature Date

Authorized Representative

Philadelphia Indemnity Insurance Company

POLICY NUMBER: PHPK928536

COMMERCIAL AUTO
CA DS 03 03 10**BUSINESS AUTO DECLARATIONS****ITEM ONE****Named Insured and Mailing Address:**Primary Colors Child Care Center
PO Box 1854
Columbia, SC 29202-1854**Policy Period****From:** 09/30/2012**To:** 09/30/2013

At 12:01 AM Standard Time at your mailing address shown above

Previous Policy Number: PHPK779746**Form Of Business:** CORPORATION

In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.

Premium shown is payable at inception: \$**Audit Period (If Applicable):**☐

Annually

☐

Semiannually

☐

Quarterly

☐

Monthly

Endorsements Attached To This Policy**See Schedule Attached****Countersignature Of Authorized Representative****Name:****Title:****Signature:****Date:**

ITEM TWO**Schedule Of Coverages And Covered Autos**

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos". "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the Covered Autos Section of the Business Auto Coverage Form next to the name of the coverage.

Coverages	Covered Autos	Limit	Premium
Liability	07	\$ 1,000,000 CSL	\$ [REDACTED]
Personal Injury Protection (Or Equivalent No-fault Coverage)		Separately Stated In Each Personal Injury Protection Endorsement Minus \$ Deductible	\$
Added Personal Injury Protection (Or Equivalent Added No-fault Coverage)		Separately Stated In Each Added Personal Injury Protection Endorsement	\$
Property Protection Insurance (Michigan Only)		Separately Stated In The Property Protection Insurance Endorsement Minus \$ Deductible For Each Accident	\$
Auto Medical Payments		\$	\$
Medical Expense And Income Loss Benefits (Virginia Only)		Separately Stated In The Medical Expense And Income Loss Benefits Endorsement	\$
Uninsured Motorists	07	\$ 1,000,000 CSL	\$ [REDACTED]
Underinsured Motorists (When Not Included In Uninsured Motorists Coverage)	07	\$ 1,000,000 CSL	\$ [REDACTED]

ITEM TWO

Schedule Of Coverages And Covered Autos (Cont'd)

Coverages	Covered Autos	Limit	Premium
Physical Damage Comprehensive Coverage	07	Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ SCHEDULE Deductible For Each Covered Auto, But No Deductible Applies To Loss Caused By Fire Or Lightning See Item Four for Hired or Borrowed Autos.	\$ [REDACTED]
Physical Damage Specified Causes Of Loss Coverage		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ 25 Deductible For Each Covered Auto For Loss Caused By Mischief Or Vandalism See Item Four for Hired or Borrowed Autos.	\$ [REDACTED]
Physical Damage Collision Coverage	07	Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ SCHEDULE Deductible For Each Covered Auto See Item Four for Hired or Borrowed Autos.	\$ [REDACTED]
Physical Damage Towing And Labor		\$ For Each Disablement Of A Private Passenger Auto	\$ [REDACTED]
Terrorism	All	Per Coverage Endorsement	\$ [REDACTED]
Premium For Endorsements			\$ [REDACTED]
Estimated Total Premium*			\$ [REDACTED]
*This policy may be subject to final audit.			

ITEM THREE

Schedule Of Covered Autos You Own

Covered Auto Number:					
Town And State Where The Covered Auto Will Be Principally Garaged:					SEE SCHEDULE ATTACHED
Covered Auto Description					
Year:	Model:			Trade Name:	
Body Type:				Serial Number (S):	
Vehicle Identification Number (VIN):					
Purchased					
Original Cost New:		\$			
Actual Cost New Or Used:		\$		☐ New	☐ Used
Classification					
Radius Of Operation	Business Use s=service r=retail c=commercial	Size GVW, GCW Or Vehicle Seating Capacity	Age Group	Secondary Rating Classification	Code
	SEE SCHEDULE ATTACHED				
Except For Towing, All Physical Damage Loss Is Payable To You And The Loss Payee Named Below According To Their Interests In The Auto At The Time Of The Loss: SEE SCHEDULE(S)					

ITEM THREE

Schedule Of Covered Autos You Own (Cont'd)

Coverages – Premiums, Limits And Deductibles (Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding Item Two column applies instead.)		
Coverages	Limit	Premium
Liability	\$ SEE SCHEDULE ATTACHED	\$
Personal Injury Protection	Stated In Each Personal Injury Protection Endorsement Minus Deductible	\$
Added Personal Injury Protection	Stated In Each Added Personal Injury Protection Endorsement	\$
Property Protection Insurance (Michigan Only)	Stated In The Property Protection Insurance Endorsement Minus Deductible	\$
Auto Medical Payments	\$	\$
Medical Expense And Income Loss Benefits (Virginia Only)	Stated In The Medical Expense And Income Loss Benefits Endorsement For Each Person	\$
Comprehensive	Stated In Item Two Minus Deductible	\$
Specified Causes Of Loss	Stated In Item Two Minus \$ 25 Deductible	\$
Collision	Stated In Item Two Minus Deductible	\$
Towing And Labor	\$ Per Disablement	\$

Total Premiums	SEE SCHEDULE ATTACHED
Liability	\$
Personal Injury Protection	\$
Added Personal Injury Protection	\$
Property Protection Insurance (Michigan Only)	\$
Auto Medical Payments	\$
Medical Expense And Income Loss Benefits (Virginia Only)	\$
Comprehensive	\$
Specified Causes Of Loss	\$
Collision	\$
Towing And Labor	\$

ITEM FOUR

Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums

Liability Coverage – Cost Of Hire Rating Basis For Autos Used In Your Motor Carrier Operations (Other Than Mobile Or Farm Equipment)		
Liability Coverage	Estimated Annual Cost Of Hire For All States	Premium
Primary Coverage	\$ SEE SCHEDULE, IF APPLICABLE	\$
Excess Coverage	\$ SEE SCHEDULE, IF APPLICABLE	\$
Total Premium		\$

For "autos" used in your motor carrier operations, cost of hire means:

- (a) The total dollar amount of costs you incurred for the hire of automobiles (includes "trailers" and semitrailers), and if not included therein;
- (b) The total remunerations of all operators and drivers' helpers, of hired automobiles whether hired with a driver by lessor or an "employee" of the lessee, or any other third party; and
- (c) The total dollar amount of any other costs (i.e., repair, maintenance, fuel, etc.) directly associated with operating the hired automobiles whether such costs are absorbed by the "insured", paid to the lessor or owner, or paid to others.

Liability Coverage – Cost of Hire Rating Basis For Autos NOT Used In Your Motor Carrier Operations (Other Than Mobile Or Farm Equipment)			
Liability Coverage	State	Estimated Annual Cost Of Hire For Each State	Premium
Primary Coverage		\$ SEE SCHEDULE, IF APPLICABLE	\$
Excess Coverage		\$ SEE SCHEDULE, IF APPLICABLE	\$
Total Premium			\$

For "autos" **NOT** used in your motor carrier operations, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

ITEM FOUR

Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums (Cont'd)

Physical Damage Coverages – Cost of Hire Rating Basis For All Autos (Other Than Mobile Or Farm Equipment)				
Coverage	State	Limit Of Insurance	Estimated Annual Cost Of Hire For Each State (Excluding Autos Hired With A Driver)	Premium
Comprehensive		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered Auto, But No Deductible Applies To Loss Caused By Fire Or Lightning	\$ See Schedule, If Applicable	\$
Specified Causes Of Loss		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered Auto For Loss Caused By Mischief Or Vandalism	\$	\$
Collision		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered Auto	\$	\$
Total Premium				\$
For Physical Damage Coverages, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for any "auto" that is leased, hired, rented or borrowed with a driver.				

ITEM FOUR

Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums (Cont'd)

Cost Of Hire Rating Basis For Mobile Or Farm Equipment – Other Than Physical Damage Coverages					
Coverage	State	Estimated Annual Cost Of Hire For Each State		Premium	
		Mobile Equipment	Farm Equipment	Mobile Equipment	Farm Equipment
Liability – Primary Coverage		\$	\$	\$	\$
Liability – Excess Coverage		\$	\$	\$	\$
Personal Injury Protection		\$	\$	\$	\$
Medical Expense Benefits (Virginia Only)		\$	\$	\$	\$
Income Loss Benefits (Virginia Only)		\$	\$	\$	\$
Auto Medical Payments		\$	\$	\$	\$
Total Premiums				\$ See Schedule, If Applicable	
Cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.					

ITEM FOUR

Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums (Cont'd)

Cost Of Hire Rating Basis For Mobile Or Farm Equipment – Physical Damage Coverages						
Coverage	State	Limit Of Insurance	Estimated Annual Cost Of Hire For Each State (Excluding Autos Hired With A Driver)		Premium	
			Mobile Equipment	Farm Equipment	Mobile Equipment	Farm Equipment
Comprehensive		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Ded. For Each Covered Auto, But No Deductible Applies To Loss Caused By Fire Or Lightning	\$	\$	\$	\$
Specified Causes Of Loss		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Ded. For Each Covered Auto For Loss Caused By Mischief Or Vandalism	\$	\$	\$	\$
Collision		Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Ded. For Each Covered Auto	\$	\$	\$	\$
Total Premiums					\$ See Schedule, If Applicable	

For Physical Damage Coverages, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for any auto that is leased, hired, rented or borrowed with a driver.

ITEM FOUR

Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums (Cont'd)

Rental Period Rating Basis For Mobile Or Farm Equipment					
Coverage	Town and State Where The Job Site Is Located	Estimated Number Of Days Equipment Will Be Rented		Premium	
		Mobile Equipment	Farm Equipment	Mobile Equipment	Farm Equipment
Liability – Primary Coverage				\$	\$
Liability – Excess Coverage				\$	\$
Personal Injury Protection				\$	\$
Medical Expense Benefits (Virginia Only)				\$	\$
Income Loss Benefits (Virginia Only)				\$	\$
Auto Medical Payments				\$	\$
Total Premiums				\$	\$

ITEM FIVE

Schedule For Non-ownership Liability

Named Insured's Business	Rating Basis	Number	Premium
Other Than Garage Service Operations And Other Than Social Service Agencies	Number Of Employees		\$
	Number Of Partners (Active and Inactive)		\$
Garage Service Operations	Number Of Employees Whose Principal Duty Involves The Operation Of Autos		\$
	Number Of Partners (Active and Inactive)		\$
Social Service Agencies	Number Of Employees		\$
	Number Of Volunteers Who Regularly Use Autos To Transport Clients		\$
	Number Of Partners (Active and Inactive)		\$
Total Premium			\$

ITEM SIX

Schedule For Gross Receipts Or Mileage Basis

Address Of Business Headquarters Location:	
Type Of Risk (Check one):	☐ Public Autos ☐ Leasing Or Rental Concerns
Rating Basis (Check one):	☐ Gross Receipts (Per \$100) ☐ Mileage (Per Mile)
Estimated Yearly (Gross Receipts Or Mileage):	
Premiums	
Liability	\$
Personal Injury Protection	\$
Added Personal Injury Protection	\$
Property Protection Insurance (Michigan Only)	\$
Auto Medical Payments	\$
Medical Expense And Income Loss Benefits (Virginia Only)	\$
Comprehensive	\$
Specified Causes Of Loss	\$
Collision	\$
Towing And Labor	\$

ITEM SIX

Schedule For Gross Receipts Or Mileage Basis (Cont'd)

Address Of Business Headquarters Location:	
Type Of Risk (Check one):	☐ Public Autos ☐ Leasing Or Rental Concerns
Rating Basis (Check one):	☐ Gross Receipts (Per \$100) ☐ Mileage (Per Mile)
Estimated Yearly (Gross Receipts Or Mileage):	
Premiums	
Liability	\$
Personal Injury Protection	\$
Added Personal Injury Protection	\$
Property Protection Insurance (Michigan Only)	\$
Auto Medical Payments	\$
Medical Expense And Income Loss Benefits (Virginia Only)	\$
Comprehensive	\$
Specified Causes Of Loss	\$
Collision	\$
Towing And Labor	\$

Address Of Business Headquarters Location:	
Type Of Risk (Check one):	☐ Public Autos ☐ Leasing Or Rental Concerns
Rating Basis (Check one):	☐ Gross Receipts (Per \$100) ☐ Mileage (Per Mile)
Estimated Yearly (Gross Receipts Or Mileage):	
Premiums	
Liability	\$
Personal Injury Protection	\$
Added Personal Injury Protection	\$
Property Protection Insurance (Michigan Only)	\$
Auto Medical Payments	\$
Medical Expense And Income Loss Benefits (Virginia Only)	\$
Comprehensive	\$
Specified Causes Of Loss	\$
Collision	\$
Towing And Labor	\$

When used as a premium basis:

FOR PUBLIC AUTOS

Gross receipts means the total amount earned by the named insured for transporting passengers, mail and merchandise.

Gross receipts does not include:

- A. Amounts paid to air, sea or land carriers operating under their own permits.
- B. Advertising revenue.
- C. Taxes collected as a separate item and paid directly to the government.
- D. C.O.D. collections for cost of mail or merchandise including collection fees.

Mileage means the total live and dead mileage of all revenue producing "autos" during the policy period.

FOR RENTAL OR LEASING CONCERNS

Gross receipts means the total amount earned by the named insured for the leasing or renting of "autos" to others without drivers.

Mileage means the total live and dead mileage of all "autos" you leased or rented to others without drivers.

Philadelphia Indemnity Insurance Company

Form Schedule – Commercial Auto

Policy Number: PHPK928536

Forms and Endorsements applying to this Coverage Part and made a part of this policy at time of issue:

Form	Edition	Description
CADS03	0310	Business Auto Declarations
Auto Schedule	0100	Business Auto Schedule
CA0001	0310	Business Auto Coverage Form
CA0150	0306	South Carolina Changes
CA0230	0410	South Carolina Changes - Cancellation and Nonrenewal
CA2119	0306	South Carolina Uninsured Motorists Coverage
CA2188	0306	South Carolina Underinsured Motorists Coverage

BUSINESS AUTO SCHEDULE

POLICY NUMBER: PHPK928536

SCHEDULE OF COVERED AUTOS YOU OWN

Covered Auto No.	DESCRIPTION								TERRITORY		
	Year Model; Trade Name; Body Type Serial Number (S); Vehicle Identification Number (VIN)								Town or City & Zip where the Covered Auto will be principally garaged		
1	1996 DODGE GRAND CARAVAN, 2B4GP2438TL610889								191 Columbia, SC 29205		
2	1987 FORD COWLSB600F, 1FDNJ65P6HBA66658								191 Columbia, SC 29205		
3	1996 GMC Mini Bus, 1GDHG314Y6TF505994								191 Columbia, SC 29205		
Covered Auto No.	CLASSIFICATION								PURCHASED		
	Radius of Operation	Business Use S = service r = retail c = comm.	Size GVW, CGW or Vehicle Seating Capacity	Age Group	Primary Rating Factor		Sec. Rating Factor		Code	Original Cost New	Stated Amount
					Liab.	Phy. Dam.	Liab.	Phy. Dam.			
1	LOCAL		30	12	1.500	0.500	0.250		6253	17,825	
2	LOCAL		30	12	1.500		0.250		6253	17,825	
3	LOCAL		15	12	1.500	0.500	0.100		6252	41,000	
Total Premium											
Covered Auto No.	LIABILITY		AUTO. MED.		MEDICAL EXPENSE AND INCOME LOSS BENEFITS (VA ONLY)						
	Limit (in thousands)	Premium	Limit	Premium	Limit Stated in Each Med. Exp. And Inc. Loss Ben. End. For Each Person		Premium				
1	1,000		NONE								
2	1,000		NONE								
3	1,000		NONE								
Total Premium											
Covered Auto No.	PERSONAL INJURY PROTECTION		P.P.I. (Mich. Only)		UNINSURED/UNDERINSURED						
	Limit stated in each P.I.P. end.	Premium	Limit stated in each P.P.I. end.	Premium	Limit (in thousands)	Premium	UM	UIM			
1					1,000		X	X			
2					1,000		X	X			
3					1,000		X	X			
Total Premium											

BUSINESS AUTO SCHEDULE

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POLICY NUMBER: PHPK928536

SCHEDULE OF COVERED AUTOS YOU OWN (Cont'd)

Covered Auto No.	COMPREHENSIVE		SPEC. CAUSES OF LOSS Premium	COLLISION	
	Deductible	Premium		Deductible	Premium
1	500			1,000	
2					
3	500			1,000	
Total Premium					
Covered Auto No.	TOWING & LABOR		Except for towing, all physical damage loss is payable to you and the loss payee named below as interests may appear at the time of the loss.	TOTAL	
	Limit per disablement	Premium		Premium	
1					
2			See Schedule(s)		
3					
Total Premium					

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any "Auto"	
2	Owned "Autos" Only	Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-fault	Only those "autos" you own that are required to have no-fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have no-fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

19	Mobile Equipment Subject To Compulsory Or Financial Responsibility Or Other Motor Vehicle Insurance Law Only	Only those "autos" that are land vehicles and that would qualify under the definition of "mobile equipment" under this policy if they were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where they are licensed or principally garaged.
----	--	---

B. Owned Autos You Acquire After The Policy Begins

1. If Symbols 1, 2, 3, 4, 5, 6 or 19 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol 7 is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
 - a. We already cover 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 30 days after you acquire it that you want us to cover it for that coverage.

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

If Liability Coverage is provided by this coverage form, the following types of vehicles are also covered "autos" for Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto".
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. "Loss"; or
 - e. Destruction.

SECTION II – LIABILITY COVERAGE

A. Coverage

We will pay all sums an "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".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:

- (1) The owner or anyone else from whom you hire or borrow a covered "auto".

This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

- (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
 - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
 - (4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
 - (5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. Coverage Extensions

a. Supplementary Payments

We will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$2,000 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" against the "insured" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$250 a day because of time off from work.
- (5) All court costs taxed against the "insured" in any "suit" against the "insured" we defend. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the "insured".
- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out-of-state Coverage Extensions

While a covered "auto" is away from the state where it is licensed we will:

- (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

3. Workers' Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

4. Employee Indemnification And Employer's Liability

"Bodily injury" to:

- a. An "employee" of the "insured" arising out of and in the course of:
 - (1) Employment by the "insured"; or
 - (2) Performing the duties related to the conduct of the "insured's" business; or
- b. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the coverage form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

5. Fellow Employee

"Bodily injury" to:

- a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
- b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

6. Care, Custody Or Control

"Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

7. Handling Of Property

"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. Movement Of Property By Mechanical Device

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto".

9. Operations

"Bodily injury" or "property damage" arising out of the operation of:

- a. Any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment"; or
- b. Machinery or equipment that is on, attached to or part of a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

10. Completed Operations

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion, your work means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in Paragraph a. or b. above.

Your work will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed.
- (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

11. Pollution

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above of this exclusion do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

12. War

"Bodily injury" or "property damage" arising directly or indirectly out of:

- a. War, including undeclared or civil war;
- b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- c. Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

13. Racing

Covered "autos" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. This insurance also does not apply while that covered "auto" is being prepared for such a contest or activity.

C. 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 the total of all damages and "covered pollution cost or expense" combined resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

All "bodily injury", "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one "accident".

No one will be entitled to receive duplicate payments for the same elements of "loss" under this coverage form and any Medical Payments Coverage endorsement, Uninsured Motorists Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

SECTION III – PHYSICAL DAMAGE COVERAGE

A. Coverage

1. We will pay for "loss" to a covered "auto" or its equipment under:

- a. **Comprehensive Coverage**

From any cause except:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

- b. **Specified Causes Of Loss Coverage**

Caused by:

- (1) Fire, lightning or explosion;
 - (2) Theft;
 - (3) Windstorm, hail or earthquake;
 - (4) Flood;
 - (5) Mischief or vandalism; or
 - (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto".

- c. **Collision Coverage**

Caused by:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

2. **Towing**

We will pay up to the limit shown in the Declarations 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.

3. **Glass Breakage – Hitting A Bird Or Animal – Falling Objects Or Missiles**

If you carry Comprehensive Coverage for the damaged covered "auto", we will pay for the following under Comprehensive Coverage:

- a. Glass breakage;
 - b. "Loss" caused by hitting a bird or animal; and

- c. "Loss" caused by falling objects or missiles.

However, you have the option of having glass breakage caused by a covered "auto's" collision or overturn considered a "loss" under Collision Coverage.

4. Coverage Extensions

- a. **Transportation Expenses**

We will pay up to \$20 per day to a maximum of \$600 for temporary 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 Causes Of Loss Coverage. We will pay for temporary 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".

- b. **Loss Of Use Expenses**

For Hired Auto Physical Damage, we will pay expenses for which an "insured" becomes legally responsible to pay for loss of use of a vehicle rented or hired without a driver under a written rental contract or agreement. We will pay for loss of use expenses if caused by:

- (1) Other than collision only if the Declarations indicate that Comprehensive Coverage is provided for any covered "auto";
 - (2) Specified Causes Of Loss only if the Declarations indicate that Specified Causes Of Loss Coverage is provided for any covered "auto"; or
 - (3) Collision only if the Declarations indicate that Collision Coverage is provided for any covered "auto".

However, the most we will pay for any expenses for loss of use is \$20 per day, to a maximum of \$600.

B. Exclusions

1. We will not pay for "loss" caused by or resulting from any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".

- a. **Nuclear Hazard**

- (1) The explosion of any weapon employing atomic fission or fusion; or
 - (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

b. War Or Military Action

- (1) War, including undeclared or civil war;
 - (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
 - (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.
2. We will not pay for "loss" to any covered "auto" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. We will also not pay for "loss" to any covered "auto" while that covered "auto" is being prepared for such a contest or activity.
3. We will not pay for "loss" due and confined to:
- a. Wear and tear, freezing, mechanical or electrical breakdown.
 - b. Blowouts, punctures or other road damage to tires.
- This exclusion does not apply to such "loss" resulting from the total theft of a covered "auto".
4. We will not pay for "loss" to any of the following:
- a. Tapes, records, discs or other similar audio, visual or data electronic devices designed for use with audio, visual or data electronic equipment.
 - b. Any device designed or used to detect speed-measuring equipment such as radar or laser detectors and any jamming apparatus intended to elude or disrupt speed-measurement equipment.
 - c. Any electronic equipment, without regard to whether this equipment is permanently installed, that reproduces, receives or transmits audio, visual or data signals.
 - d. Any accessories used with the electronic equipment described in Paragraph c. above.
5. Exclusions 4.c. and 4.d. do not apply to equipment designed to be operated solely by use of the power from the "auto's" electrical system that, at the time of "loss", is:
- a. Permanently installed in or upon the covered "auto";

b. Removable from a housing unit which is permanently installed in or upon the covered "auto";

c. An integral part of the same unit housing any electronic equipment described in Paragraphs a. and b. above; or

d. Necessary for the normal operation of the covered "auto" or the monitoring of the covered "auto's" operating system.

6. We will not pay for "loss" to a covered "auto" due to "diminution in value".

C. Limit Of Insurance

1. The most we will pay for "loss" in any one "accident" is the lesser of:
 - a. The actual cash value of the damaged or stolen property as of the time of the "loss"; or
 - b. The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality.
2. \$1,000 is the most we will pay for "loss" in any one "accident" to all electronic equipment that reproduces, receives or transmits audio, visual or data signals which, at the time of "loss", is:
 - a. Permanently installed in or upon the covered "auto" in a housing, opening or other location that is not normally used by the "auto" manufacturer for the installation of such equipment;
 - b. Removable from a permanently installed housing unit as described in Paragraph 2.a. above or is an integral part of that equipment; or
 - c. An integral part of such equipment.
3. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total "loss".
4. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

D. Deductible

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 in the Declarations does not apply to "loss" caused by fire or lightning.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions

1. Appraisal For Physical Damage Loss

If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser, and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss". Include:
 - (1) How, when and where the "accident" or "loss" occurred;
 - (2) The "insured's" name and address; and
 - (3) To the extent possible, the names and addresses of any injured persons and witnesses.
- b. Additionally, you and any other involved "insured" must:
 - (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
 - (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".
 - (4) Authorize us to obtain medical records or other pertinent information.

- (5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

c. If there is "loss" to a covered "auto" or its equipment you must also do the following:

- (1) Promptly notify the police if the covered "auto" or any of its equipment is stolen.
- (2) Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
- (3) Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
- (4) Agree to examinations under oath at our request and give us a signed statement of your answers.

3. Legal Action Against Us

No one may bring a legal action against us under this coverage form until:

- a. There has been full compliance with all the terms of this coverage form; and
- b. Under Liability Coverage, we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

4. Loss Payment – Physical Damage Coverages

At our option we may:

- a. Pay for, repair or replace damaged or stolen property;
- b. Return the stolen property, at our expense. We will pay for any damage that results to the "auto" from the theft, or
- c. Take all or any part of the damaged or stolen property at an agreed or appraised value.

If we pay for the "loss", our payment will include the applicable sales tax for the damaged or stolen property.

5. Transfer Of Rights Of Recovery Against Others To Us

If any person or organization to or for whom we make payment under this coverage form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

B. General Conditions**1. Bankruptcy**

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this coverage form.

2. Concealment, Misrepresentation Or Fraud

This coverage form is void in any case of fraud by you at any time as it relates to this coverage form. It is also void if you or any other "insured", at any time, intentionally conceal or misrepresent a material fact concerning:

- a. This coverage form;
- b. The covered "auto";
- c. Your interest in the covered "auto"; or
- d. A claim under this coverage form.

3. Liberalization

If we revise this coverage form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

4. No Benefit To Bailee – Physical Damage Coverages

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 coverage form.

5. Other Insurance

- a. For any covered "auto" you own, this coverage form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this coverage form 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 coverage form provides for the "trailer" is:

- (1) Excess while it is connected to a motor vehicle you do not own.
- (2) Primary while it is connected to a covered "auto" you own.

- b. For Hired Auto Physical Damage Coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

- c. Regardless of the provisions of Paragraph a. above, this coverage form's Liability Coverage is primary for any liability assumed under an "insured contract".

- d. When this coverage form and any other coverage form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our coverage form bears to the total of the limits of all the coverage forms and policies covering on the same basis.

6. Premium Audit

- a. The estimated premium for this coverage form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospective premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.
- b. If this policy is issued for more than one year, the premium for this coverage form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

7. Policy Period, Coverage Territory

Under this coverage form, we cover "accidents" and "losses" occurring:

- a. During the policy period shown in the Declarations; and

- b. Within the coverage territory.

The coverage territory is:

- (1) The United States of America;
- (2) The territories and possessions of the United States of America;
- (3) Puerto Rico;
- (4) Canada; and
- (5) Anywhere in the world if:

- (a) A covered "auto" of the private passenger type is leased, hired, rented or borrowed without a driver for a period of 30 days or less; and

- (b) The "insured's" responsibility to pay damages is determined in a "suit" on the merits, in the United States of America, the territories and possessions of the United States of America, Puerto Rico or Canada or in a settlement we agree to.

We also cover "loss" to, or "accidents" involving, a covered "auto" while being transported between any of these places.

8. Two Or More Coverage Forms Or Policies Issued By Us

If this coverage form and any other coverage form or policy issued to you by us or any company affiliated with us applies to the same "accident", the aggregate maximum Limit of Insurance under all the coverage forms or policies shall not exceed the highest applicable Limit of Insurance under any one coverage form or policy. This condition does not apply to any coverage form or policy issued by us or an affiliated company specifically to apply as excess insurance over this coverage form.

SECTION V - DEFINITIONS

A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".

B. "Auto" means:

1. A land motor vehicle, "trailer" or semitrailer designed for travel on public roads; or
2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these:

D. "Covered pollution cost or expense" means any cost or expense arising out of:

1. Any request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
2. Any claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants".

a. That are, or that are contained in any property that is:

- (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
- (2) Otherwise in the course of transit by or on behalf of the "insured"; or
- (3) Being stored, disposed of, treated or processed in or upon the covered "auto".

b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or

c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraph 6.b. or 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
 - (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.
- E. "Diminution in value" means the actual or perceived loss in market value or resale value which results from a direct and accidental "loss".
- F. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- H. "Insured contract" means:
- 1. A lease of premises;
 - 2. A sidetrack agreement;
 - 3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - 4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - 5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;
 - 6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your "employees", of any "auto". However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your "employees" to pay for "property damage" to any "auto" rented or leased by you or any of your "employees".

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
 - b. That pertains to the loan, lease or rental of an "auto" to you or any of your "employees", if the "auto" is loaned, leased or rented with a driver; or
 - c. That holds a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.
- I. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
- J. "Loss" means direct and accidental loss or damage.
- K. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
- 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - 2. Vehicles maintained for use solely on or next to premises you own or rent;
 - 3. Vehicles that travel on crawler treads;
 - 4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. Power cranes, shovels, loaders, diggers or drills; or
 - b. Road construction or resurfacing equipment such as graders, scrapers or rollers;
 - 5. Vehicles not described in Paragraph 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well-servicing equipment; or
 - b. Cherry pickers and similar devices used to raise or lower workers; or

6. Vehicles not described in Paragraph 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

a. Equipment designed primarily for:

- (1) Snow removal;
- (2) Road maintenance, but not construction or resurfacing; or
- (3) Street cleaning;

b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well-servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

L. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

M. "Property damage" means damage to or loss of use of tangible property.

N. "Suit" means a civil proceeding in which:

1. Damages because of "bodily injury" or "property damage"; or
2. A "covered pollution cost or expense", to which this insurance applies, are alleged.

"Suit" includes:

- a. An arbitration proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the "insured" must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the insured submits with our consent.

O. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

P. "Trailer" includes semitrailer.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

A. Concealment, Misrepresentation Or Fraud,
General Condition 2., does not apply to **Section II**
– **Liability Coverage.**

B. The Business Auto, Truckers and Motor Carrier
Coverage Forms are changed as follows:

The **Expected Or Intended Injury** Exclusion is replaced by the following:

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured". However, this exclusion does not apply for amounts up to the limits of liability required by the South Carolina Financial Responsibility Act.

C. The Garage Coverage Form is changed as follows:

1. Changes In Liability Coverage

Paragraph **a.2.(d)** of the **Who Is An Insured** Provision in **Section II – Liability Coverage** is replaced by the following:

Your customers. However, those customers are "insureds" up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.

2. The Expected Or Intended Injury Exclusion is
replaced by the following:

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured". However this exclusion does not apply:

- a. For amounts up to the limits of liability required by the South Carolina Financial Responsibility Act.
- b. To "bodily injury" resulting from the use of reasonable force to protect persons or property, for "garage operations" other than covered "autos".

D. Physical Damage Coverage is changed as follows:

No deductible applies to auto safety glass. All other Physical Damage Coverage provisions will apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SOUTH CAROLINA CHANGES – CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
BUSINESS AUTO PHYSICAL DAMAGE COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to the coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

A. The Cancellation Common Policy Condition is amended as follows:

1. Paragraph 2. is replaced by the following:

We will mail or deliver to you and your agent written notice of cancellation, stating the reason(s) for cancellation, at the addresses shown in the policy, at least:

- a. 15 days before the effective date of cancellation if cancellation is for nonpayment of premium;
- b. 30 days before the effective date of cancellation if cancellation is for any other reason.

2. The following is added to Paragraph 4.:

If this policy is canceled during the first 60 days, and is not a renewal or a continuation policy, the cancellation will be effective only on or after the 61st day of the policy period. However, if this policy is canceled for nonpayment of premium, the cancellation will become effective only on or after the 31st day of the policy period.

3. The following is added:

If this policy has been in effect for more than 90 days, we may cancel this policy only for the following reasons:

- a. Nonpayment of premium;

- b. Material misrepresentation of fact, which if known to us would have caused us not to issue the policy;

- c. Substantial change in the risk assumed, except to the extent that we should have reasonably foreseen the change or contemplated the risk in writing the policy;

- d. Substantial breach of contractual duties, conditions or warranties; or

- e. Loss of our reinsurance covering all or a significant part of the particular risk insured, or where continuation of the policy would imperil our solvency or place us in violation of the laws of South Carolina.

B. Nonrenewal

If we decide not to renew or continue this policy, we will mail to you and your agent written notice, stating the reason(s) for nonrenewal, at the addresses shown in the policy, at least 30 days before the end of the policy period.

POLICY NUMBER: PHPK928536

COMMERCIAL AUTO
CA 21 19 03 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**SOUTH CAROLINA UNINSURED
MOTORISTS COVERAGE**

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Named Insured: Primary Colors Child Care Center	
Endorsement Effective Date: 09/30/2012	
Countersignature Of Authorized Representative	
Name:	
Title:	
Signature:	
Date:	

SCHEDULE

Limit Of Insurance:	\$ 1,000,000	Each "Accident"
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

A. Coverage

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

If the Named Insured is designated in the Declarations as:

1. An individual, then the following are "insureds":
 - a. The Named Insured and any "family members".
 - b. 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. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
 - a. Anyone "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.
 - b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
 - c. The Named Insured for "property damage" only.

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.

6. "Bodily injury" or "property damage" arising directly or indirectly out of:

- a. War, including undeclared or civil war;
- b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- c. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

D. Limit Of Insurance

1. Regardless of the number of covered "autos", "insureds", premiums paid, 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 Coverage shown in the Schedule. If the "bodily injury" or "property damage" is sustained by an individual Named Insured or any "family member" while "occupying" a covered "auto", our limit is the sum of:

- a. The limit of insurance shown in the Schedule for this coverage as applicable to a covered "auto"; and
- b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".

2. Subject to the maximum limit of insurance for all damages:

- a. 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" or "property damage" sustained in an "accident" by an "insured" other than an individual Named Insured or any "family member", is that "insured's" pro rata share of the limit shown in the Schedule for this coverage that applies to the vehicle that "insured" was "occupying" at the time of the "accident".
- b. The individual Named Insured or any "family member" who sustains "bodily injury" or "property damage" in that "accident" will also be entitled to a pro rata share of the limit described in Paragraph a. above.

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

3. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" or "property damage" is sustained by an individual Named Insured or any "family member" while not "occupying" any "auto", the most we will pay for all damages resulting from that "accident" is the sum of:
 - a. The highest limit of insurance for this coverage applicable to any one of such Named Insured's covered "autos"; and
 - b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".
4. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" or "property damage" is sustained in an "accident" by an individual Named Insured or any "family member" while "occupying" a vehicle not owned by that Named Insured or any "family member", the most we will pay for all damages resulting from the "accident" will be the highest limit of insurance for this coverage that applies to any one of such Named Insured's covered "autos".
5. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" or "property damage" is sustained by an "insured" other than an individual Named Insured or any "family member" in an "accident" in which neither such Named Insured nor any "family member" sustained "bodily injury" or "property damage", the most we will pay for all damages resulting from that "accident" is the limit of insurance shown in the Schedule for this coverage that applies to the vehicle that "insured" was "occupying" at the time of the "accident".
6. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage Endorsement or Underinsured Motorists Coverage Endorsement attached to this Coverage Part.

We will not make a duplicate payment under this coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

E. Changes In Conditions

1. **Other Insurance** in Business Auto and Garage Coverage Forms and **Other Insurance – Primary And Excess Insurance Provisions** in the Truckers and Motor Carrier Coverage Forms is replaced by the following:

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

FIRST PRIORITY	The policy affording Uninsured Motorists Coverage to the vehicle the "insured" was "occupying" at the time of the "accident".
SECOND PRIORITY	Any policy affording Uninsured Motorists Coverage to a Named Insured or a family member, if the Named Insured is an individual.

- (1) If there is no applicable insurance available under the first priority, the maximum recovery under all policies in the second priority shall not exceed the highest applicable limit for any one vehicle under any one policy.

- (2) If there is applicable insurance available under the first priority:

- (a) The limit of insurance applicable to the vehicle the "insured" was "occupying", under the policy in the first priority, shall first be exhausted; and
- (b) The maximum recovery in the second priority shall not exceed the highest limit for any one vehicle under any one policy in the second priority.
- b. We will pay only our share of the loss, not to exceed our share of the maximum recovery. Our share is the proportion that our limit of insurance bears to the total of all applicable limits in the same level of priority.
- c. For "property damage", this insurance is excess to all collectible insurance of any kind.
- d. Except for "property damage", the reference to "other collectible insurance" applies only to other collectible uninsured motorists insurance.

2. **Duties In The Event Of Accident, Claim, Suit Or Loss** is 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. Transfer Of Rights Of Recovery Against Others To Us is replaced by the following:

- a. If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us to the extent of such payment that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act. That person or organization must do everything necessary to secure our rights and must do nothing after the "accident" or loss to impair them.
- b. If an "insured" has prosecuted to judgment any "suit" against anyone responsible, we will be entitled to an assignment of the judgment to the extent of payment under this insurance that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act.
- c. We will pay our proportionate part of any reasonable costs and expenses incurred for any recovery, including reasonable attorneys' fees. However, we reserve the right to retain an attorney of our choice to pursue a claim instead of reasonable attorneys' fees.
- d. 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 that does not exceed the minimum limits specified by the South Carolina Motor Vehicle Financial Responsibility Act.

4. Two Or More Coverage Forms Issued By Us does not apply to Uninsured Motorists Coverage.

5. The following Condition is added:

CONFORMITY TO STATUTE

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

F. Additional Definitions

As used in this endorsement:

1. "Family member" means a person related to an individual Named Insured by blood, marriage or adoption who is a resident of such Named Insured's 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. For which neither the operator nor owner can be identified and that hits or that causes an "accident" resulting in "bodily injury" or "property damage" without hitting an individual Named Insured or a "family member", a vehicle that an individual Named Insured or any "family member" are "occupying", the Named Insured's covered "auto" or any of such Named Insured's property.

The facts of the "accident" must be corroborated by competent evidence of an eyewitness other than the owner or operator of the vehicle that an individual Named Insured or any "family member" were "occupying" at the time of the "accident". 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.
 - d. For which the owner has not qualified as a self-insurer in accordance with the applicable provisions of the South Carolina Insurance Laws.
- However, "uninsured motor vehicle" does not include any vehicle:
- a. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer which is or becomes insolvent.
 - b. Owned by any governmental unit or agency unless a cause of action against that governmental unit or agency is barred by the Tort Claims Act, South Carolina Laws 1986, Ratification No. 514, Subsection 15-78-60, or by other applicable statute.
 - c. Designed for use mainly off public roads while not on public roads.

POLICY NUMBER: PHPK928536

COMMERCIAL AUTO
CA 21 88 03 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**SOUTH CAROLINA UNDERINSURED
MOTORISTS COVERAGE**

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Named Insured: Primary Colors Child Care Center	
Endorsement Effective Date: 09/30/2012	
Countersignature Of Authorized Representative	
Name:	
Title:	
Signature:	
Date:	

SCHEDULE

Limit Of Insurance: \$ 1,000,000	Each "Accident"
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Coverage

1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured 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 arise out of the ownership, maintenance, or use of the "underinsured motor vehicle".
2. We will pay under this coverage only after any liability bonds or policies have been exhausted by payment of judgments or settlements.

B. Who Is An Insured

If the Named Insured is designated in the Declarations as:

1. An individual, then the following are "insureds":
 - a. The Named Insured and any "family members".
 - b. 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. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
 - a. Anyone "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.
 - b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
 - c. The Named Insured for "property damage" only.

C. Exclusions

This coverage does not apply to any of the following:

1. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
2. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.

3. That part of "property damage" for which an "insured" has been compensated by insurance or otherwise.
4. "Bodily injury" or "property damage" arising directly or indirectly out of:
 - a. War, including undeclared or civil war.
 - b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents, or
 - c. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

D. Limit Of Insurance

1. Regardless of the number of covered "autos", "insureds", premiums paid, 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 Underinsured Motorists Coverage shown in the Schedule. If the "bodily injury" is sustained by any "insured" while "occupying" a covered "auto", or if the Named Insured's covered "auto" sustains "property damage" in an "accident", our limit is the sum of:
 - a. The limit of insurance shown in the Schedule for this coverage applicable to a covered "auto", and
 - b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".
2. Subject to the maximum limit of insurance for all damages:
 - a. 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" sustained in an "accident" by an "insured" other than an individual Named Insured or any "family member" is that "insured's" pro rata share of the limit shown in the Schedule for this coverage that applies to the vehicle that "insured" was "occupying" at the time of the "accident".
 - b. An individual Named Insured or any "family member" who sustains "bodily injury" or "property damage" in that "accident" will also be entitled to a pro rata share of the limit described in Paragraph a. above.

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

3. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" is sustained by an individual Named Insured or any "family member" while not "occupying" any "auto", the most we will pay for all damages resulting from that "accident" is the sum of:
 - a. The highest limit of insurance for this coverage applicable to any one of such Named Insured's covered "autos", and
 - b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".
4. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" is sustained in an "accident" by an individual Named Insured or any "family member", while "occupying" a vehicle not owned by that Named Insured or any "family member" the most we will pay for all damages resulting from that "accident" will be the highest limit of insurance for this coverage that applies to any one of such Named Insured's covered "autos".
5. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage Endorsement, or Uninsured Motorists Coverage Endorsement attached to this Coverage Form. We will not make a duplicate payment under the Coverage Form for any element of "loss" for which payment has been made by or for anyone who is legally responsible. We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of loss under any workers' compensation, disability benefits or similar law.

E. Changes In Conditions

1. **Other Insurance** in the Business Auto and Garage Coverage Forms and **Other Insurance - Primary And Excess Insurance Provisions** in the Truckers and Motor Carrier Coverage Forms are replaced by the following:
 - a. If an "insured" sustains "bodily injury" while "occupying" a vehicle not owned by that person or while not "occupying" any vehicle, the following priorities of coverage apply:

First Priority	The policy affording Underinsured Motorists Coverage to the vehicle the "insured" was "occupying" at the time of the "accident".
Second Priority	Any policy affording Underinsured Motorists Coverage to a Named Insured or a family member, if the Named Insured is an individual.

- (1) If there is no applicable insurance available under the first priority, the maximum recovery under all policies in the second priority shall not exceed the highest applicable limit for any one vehicle under any one policy.
- (2) If there is applicable insurance available under the first priority:
 - (a) The limit of insurance applicable to the vehicle the "insured" was "occupying", under the policy in the first priority, shall first be exhausted, and
 - (b) The most we will pay in the second priority shall not exceed the highest limit for any one vehicle under any one policy in the second priority.
- b. We will pay only our share of the loss, not to exceed our share of the maximum recovery. Our share is the proportion that our limit of insurance bears to the total of all applicable limits on the same level of priority.
- c. For "property damage", this insurance is excess to all collectible insurance of any kind.
- d. For "bodily injury" this insurance is excess to any other collectible Underinsured Motorists Coverage.
2. **Duties In The Event Of Accident, Claim, Suit Or Loss** is changed by adding the following:
Promptly send us copies of the legal papers if a "suit" is brought.
3. **Transfer Of Rights Of Recovery Against Others To Us** does not apply to Underinsured Motorists Coverage.
4. **Two Or More Coverage Forms Issued By Us** does not apply to Underinsured Motorists Coverage.
5. The following provision is added:
CONFORMITY TO STATUTE
This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

F. Additional Definitions

As used in this endorsement:

1. "Family member" means a person related to an individual Named Insured by blood, marriage or adoption who is a resident of such Named Insured's household, including a ward or foster child.
2. "Occupying" means in, upon, getting in, on, out or off.
3. "Property damage" as used in this endorsement means injury to or destruction of the Named Insured's covered "auto". However, "property damage" does not include damage to property owned by the "insured" while contained in the Named Insured's covered "auto".
4. "Underinsured motor vehicle" means a land motor vehicle or "trailer" of any type to which a liability bond or policy applies at the time of the "accident" in limits equal to or greater than the minimum limit for liability specified by the South Carolina Financial Responsibility Act, but the limits of that bond or policy provide a limit that is less than the amount the "insured" is legally entitled to recover as damages caused by the "accident".

However, "underinsured motor vehicle" does not include any vehicle or equipment designed for use mainly off public roads while not on public roads.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-40-7254

REPLY

The Plaintiff, in reply to the Defendant Philadelphia Insurance Company's Answer and Counterclaim, and pursuant to Rule 10 (c), *SCRCP*, hereby re-alleges and incorporates by reference the allegations set forth in all of his prior pleadings in this action as fully as if said allegations were set forth herein verbatim, and would respectfully allege as follows:

FOR A FIRST DEFENSE

1. Except as is hereinafter specifically admitted, each and every allegation contained in the Defendant's Answer and Counterclaim is denied.

2. Upon information and belief, Paragraphs 1 through 27 of Defendant's Answer and Counterclaim do not require a response from Plaintiff. However, should it be interpreted that said paragraphs assert disputed allegations against Plaintiff, said allegations are denied.

3. Plaintiff admits the allegations of Paragraphs 28 through 33 of Defendant's Answer and Counterclaim.

4. With respect to the allegations of Paragraph 34 of Defendant's Answer and Counterclaim, Plaintiff admits only that Defendant issued an insurance policy referenced in the Complaint herein that provides coverage for the claims asserted in the underlying tort action and

the resulting judgment. Plaintiff is without sufficient information or belief to admit the remaining allegations therein, and therefore denies the same and demands strict proof thereof.

5. Plaintiff admits the allegations of Paragraphs 35 through 38 of Defendant's Answer and Counterclaim.

6. Plaintiff denies the allegations of Paragraph 39 of Defendant's Answer and Counterclaim.

7. With respect to the allegations of Paragraph 40 of Defendant's Answer and Counterclaim, Plaintiff admits only that Defendant has refused to indemnify its insured and satisfy the judgment in the underlying tort action. The remaining allegations therein are denied and Plaintiff demands strict proof thereof.

8. Plaintiff denies the allegations of Paragraph 41 of Defendant's Answer and Counterclaim.

9. With respect the Paragraph 42 of Defendant's Answer and Counterclaim, Plaintiff incorporates the prior paragraphs of this Reply.

10. With respect to the allegations of Paragraph 43 of Defendant's Answer and Counterclaim, no reply is required.

11. With respect to the allegations of Paragraph 44 of Defendant's Answer and Counterclaim, no reply is required. However, Plaintiff admits that Plaintiff is seeking a court order commanding Defendant to satisfy the judgment of the tort action in full.

12. Plaintiff denies the allegations of Paragraph 45 of Defendant's Answer and Counterclaim.

13. With respect to the allegations of Paragraph 46 of Defendant's Answer and Counterclaim, Plaintiff admits only that Defendant issued an insurance policy referenced in the

Complaint herein that provides coverage for the claims asserted in the underlying tort action and the resulting judgment. Plaintiff is without sufficient information or belief to admit the remaining allegations therein, and therefore denies the same and demands strict proof thereof.

14. The allegations contained in Paragraphs 47 through 48 of the Defendant's Answer and Counterclaim call for a legal conclusion, and therefore Plaintiff can neither admit nor deny the same. However, should it be interpreted that said paragraph asserts allegations against the Plaintiff, said allegations are denied.

15. Plaintiff denies the allegations of Paragraph 49 of Defendant's Answer and Counterclaim.

16. Upon information and belief, Paragraph 50 of Defendant's Answer and Counterclaim does not require a response from Plaintiff. However, should it be interpreted that said paragraph asserts allegations against Plaintiff, said allegations are denied.

17. With respect to the unnumbered Paragraph containing Defendant's prayer for dismissal, judgment, order, and costs against Plaintiff, Plaintiff denies that Defendant is entitled to any dismissal, judgment, order, costs and/or relief of any nature, of any kind, and/or to any extent whatsoever.

FOR A SECOND DEFENSE

18. Plaintiff realleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

19. That the Answer and Counterclaim fails to state facts sufficient to constitute a cause of action against Plaintiff, and therefore should be dismissed.

FOR A THIRD DEFENSE

20. Plaintiff realleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

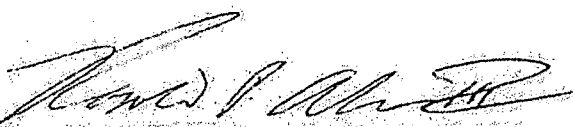
21. That causes of action asserted against Plaintiff are barred by the Doctrines of Laches, Estoppel and/or Waiver.

FOR A FOURTH DEFENSE

22. Plaintiff realleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

23. Plaintiff reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully replied to Defendant's Answer and Counterclaim, Plaintiff demands that the Counterclaim of Defendant be dismissed, with costs and for all attorney's fees, and expenses incurred by and/or on behalf of Plaintiff as a result of this litigation; and for such other and further relief as this Court deems just and proper.



for GERALD E. REARDON
Attorney for Plaintiff
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201
(803) 978-6114



ROWLAND P. ALSTON III
Attorney for Plaintiff
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663

January 30, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-7254

CERTIFICATE OF SERVICE

I do hereby certify that on February 1, 2016, I have served the foregoing Plaintiff's Reply to Defendant Philadelphia Indemnity Insurance Company's Answer and Counterclaim, in the above-captioned case, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to the attorneys of record as indicated below:

Curtis W. Dowling, Esq.
Barnes Alford
P.O. Box 8448
Columbia, SC 29202



Rowland P. Alston III
Attorney for Plaintiff

February 1, 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer

☐ Plaintiff

v.

Philadelphia Indemnity Insurance Company et al.

☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.
2015-CP-40-07254MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: , Bar No. Address: phone: fax: e-mail: other:	Defendant's Attorney: Curtis W. Dowling, Bar No. Address: Barnes, Alford, Stork & Johnson, LLP Post Office Box 8448, Columbia, SC 29202 phone: 803-799-1111 fax: 803-254-1335 e-mail: curtis@basjlaw.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Summary Judgment Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted: <u>April 1, 2016</u>	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Andrew P. Neumayer,

Civil Action No. 2015-CP-40-07254

Plaintiff,

v.

Philadelphia Indemnity Insurance Company;
Primary Colors Child Care Center; Jocelyn
Knox DeMartelare; and Asia N. Partman,

Defendants.

Philadelphia Indemnity Insurance Company,

Counter-Plaintiff,

v.

Andrew P. Neumayer,

Counter-Defendant.

Philadelphia Indemnity Insurance Company,

Cross-Claimant,

v.

Primary Colors Child Care Center, Inc.;
Jocelyn Knox DeMartelare; and Asia N.
Partman,

Cross-Defendants.

**PHILADELPHIA INDEMNITY
INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
FILED
2015 APR -1 PM 4:05
JEANNETTE W. HOBSON
C.C.P. & C.S.

TO: THE PLAINTIFF/COUNTER-DEFENDANT AND HIS ATTORNEYS, GERALD E. REARDON, ESQUIRE AND ROWLAND P. ALSTON III, ESQUIRE, AND THE DEFENDANTS/CROSS-DEFENDANTS PRIMARY COLORS CHILD CARE CENTER, INC., JOCELYN KNOX DEMARTELARE, AND ASIA N. PARTMAN AND THEIR ATTORNEY, J. CAROLYN STRINGER, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Defendant/Counter-Plaintiff/Cross-Claimant, Philadelphia Indemnity Insurance Company ("Philadelphia"), through its undersigned counsel, hereby moves for summary judgment on the Complaint's cause of action against Philadelphia as well as on the cause of action asserted in Philadelphia's Answer, Counterclaim, and Cross-Claim. This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as well as other applicable law, and on the ground that there is no genuine issue as to any material fact regarding the coverage provided by the policy at issue in this matter. Accordingly, and as set forth in more detail herein, Philadelphia is entitled to judgment as a matter of law.

INTRODUCTION

In September 2012, Philadelphia issued Commercial Lines Policy No. PHPK928536 (the "Policy") to Primary Colors Child Care Center, Inc. ("Primary Colors") effective from September 30, 2012 to September 30, 2013. The Policy provided multiple coverages including commercial property coverage, commercial general liability coverage, commercial auto coverage, professional liability coverage, and abuse liability coverage. Copies of the pertinent portions of the Policy were attached to Philadelphia's Answer, Counterclaim, and Cross-Claim as Exhibit A and are incorporated herein by reference.

On or about November 8, 2013, the Plaintiff/Counter-Defendant, Andrew P. Neumayer ("Neumayer"), filed a lawsuit in the Richland County (South Carolina) Court of Common Pleas captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839 (the "Tort Action"). In the Tort Action, Neumayer alleged that, on or about January 25, 2013, he was a pedestrian on Julius Felder Street in Lexington County, South Carolina when he was struck by a bus owned by Primary Colors and operated by Asia N. Partman ("Partman"), an employee of Primary Colors. Neumayer further alleged that

Primary Colors and Partman were liable for injuries he suffered as a result of the accident.

Primary Colors and Partman failed to answer or otherwise respond to the Tort Action and defaults were entered against them. A damages hearing was subsequently held before this Court on or about April 3, 2014, after which an Order for Damages Against Defendants was entered on or about April 7, 2014, awarding Neumayer damages against Primary Colors and Partman in the amount of \$622,500.00 and entering a judgment in the same amount.

Over 18 months later, on October 21, 2015, Philadelphia received its first notice of the Tort Action and the judgment entered therein when counsel for Neumayer faxed certain documents regarding the judgment to Philadelphia. Philadelphia declined to pay the judgment in full on the grounds that it was not timely notified of the Tort Action or the service thereof upon Primary Colors and Partman and, as such, was never provided the opportunity to investigate or defend against Neumayer's claims, all in violation of the applicable terms and conditions of the Policy. Because Philadelphia suffered substantial prejudice as a result of the failure by Primary Colors and Partman to comply with the applicable terms and conditions of the Policy, Philadelphia's indemnification obligation under the Policy is limited to \$25,000.00, which is the mandated minimum limit set forth in S.C. Code Ann. § 38-77-140(A)(1).

STANDARD OF REVIEW

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings" but "must present specific facts showing

a genuine issue for trial.” Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 558-59, 671 S.E.2d 79, 85 (Ct. App. 2008) (citations and quotations omitted). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Accordingly, “when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). *See also* CEL Products, LLC v. Rozelle, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct. App. 2004) (noting that Rule 56(c) “mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial”) (citations and quotations omitted).

“Under South Carolina law the construction and interpretation of an insurance policy should be determined as a matter of law by the court.” Allstate Ins. Co. v. Best, 728 F. Supp. 1263, 1266 (D.S.C. 1990) (citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969)). *See also* Grossberg v. Travelers Indem. Co. of Am., 825 F. Supp. 2d 717, 721 (E.D. Va. 2011) (“Summary judgment is particularly well-suited for resolution of insurance coverage disputes because the construction of insurance contracts is a legal question.”). “In a declaratory judgment action, an insurance carrier may appropriately move for summary judgment to determine whether it is obligated to provide coverage to an insured, where, as here, there are no material ambiguities in the policy.” St. Paul Reinsurance Co. v. Ollie’s Seafood Grille & Bar, LLC, 242 F.R.D. 348, 352 (D.S.C. 2007).

Insurance policy language must be given its “plain, ordinary, and popular meaning.” B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). There is no need to employ rules of construction if the contract language is clear and unambiguous.

See, e.g., Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."). Rather, when presented with unambiguous contract language, the court's only job is to apply the contract as written. See, e.g., Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning . . . and give effect to it.") (citations and quotations omitted). The court must not rewrite or distort the plain meaning of unambiguous contractual language. See, e.g., Stewart, 341 S.C. at 151, 533 S.E.2d at 601 ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

ARGUMENT

Philadelphia concurs with Neumayer that the Tort Action contained claims and causes of action covered by the Policy. However, unlike Neumayer, who asserts Philadelphia is obligated to pay the full amount of the judgment he obtained in the Tort Action, Philadelphia asserts the Policy and South Carolina law only obligate it to pay \$25,000.00, which is the amount of the mandated minimum limit set forth in Section 38-77-140(A)(1), and that the Policy provides no coverage for the Tort Action in excess of that limit.

The Policy's Business Auto Coverage Form (CA 00 01 03 10) contains the following relevant provisions:

SECTION IV – BUSINESS AUTO CONDITIONS

* * *

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of “accident”, claim, “suit” or “loss”, you must give us or our authorized representative prompt notice of the “accident” or “loss”.

* * *

- b. Additionally, you and any other involved “insured” must:

* * *

- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or “suit”.

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”.

S.C. Code Ann. § 56-9-20(5)(b) contains mandatory policy provisions stating that the liability of an insurance carrier with respect to the insurance required by Chapter 9 of Title 56 is absolute whenever injury or damage covered by the applicable policy occurs and that no violation of a policy shall defeat or void the policy. However, those provisions do not apply to coverage in excess of the mandated minimum limits set forth in Section 38-77-140. See Section 56-9-20(5)(d) (providing that coverage granted by a policy in excess of or in addition to the coverage mandated by Section 38-77-140 is not subject to the provisions of Chapter 9 of Title 56). Moreover, where an insured fails to comply with the policy’s notice provisions and such failure results in substantial prejudice to the insurer, the policy provides no coverage in excess of the statutory minimum limit. United Servs. Auto. Ass’n v. Markosky, 340 S.C. 223, 230-31, 530

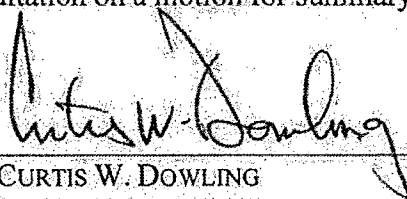
S.E.2d 660, 664 (Ct. App. 2000). Therefore, while coverage for the Tort Action is not entirely defeated or voided due to the failure by Primary Colors and Partman to comply with Section IV(2) of the Policy's Business Auto Coverage Form up to the mandated minimum limit set forth in Section 38-77-140(A)(1), coverage for the Tort Action in excess of that limit is so defeated or voided because Philadelphia suffered substantial prejudice when it was denied any opportunity to investigate or defend against Neumayer's claims in the Tort Action. See, e.g., Factory Mut. Liab. Ins. Co. of Am. v. Kennedy, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971) ("The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured."); Evans v. Am. Home Assur. Co., 252 S.C. 417, 420, 166 S.E.2d 811, 813 (1969) ("[I]t is settled law with us that a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy only when the breach has been material and has resulted in substantial prejudice to the insurer."). Philadelphia is thus entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth herein, Philadelphia respectfully requests that the Court enter an Order: (1) awarding summary judgment to Philadelphia with respect to the both the Complaint and the cause of action asserted in Philadelphia's Answer, Counterclaim, and Cross-Claim; and (2) holding that Philadelphia's indemnification obligation with respect to the judgment entered in the Tort Action is limited to \$25,000.00 due to the failure by Primary Colors and Partman to comply with Section IV(2) of the Policy's Business Auto Coverage Form.

This motion is further supported by the pleadings in this action, the Affidavit of Kevin P. Gray attached hereto, any additional affidavits which may be subsequently submitted, any memoranda of law which may be subsequently submitted, all applicable statutes and case authority, the applicable Rules of Civil Procedure, and such other evidence and authority as the Court may find acceptable.

The undersigned counsel certifies, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, that there is no duty of consultation on a motion for summary judgment.



CURTIS W. DOWLING
MATTHEW G. GERRALD
BARNES, ALFORD, STORK & JOHNSON, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, South Carolina 29202
803.799.1111 (Office)
803.254.1335 (Fax)
curtis@basjlaw.com
matt@basjlaw.com
Attorneys for Philadelphia Indemnity Insurance
Company

April 1, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Barnes, Alford, Stork & Johnson, LLP certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

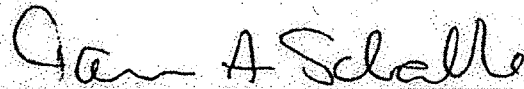
- **PHILADELPHIA INDEMNITY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT**

PERSON(S) SERVED:

Gerald E. Reardon, Esquire
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201

Rowland P. Alston III, Esquire
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201

J. Carolyn Stringer, Esquire
Post Office Box 25345
Columbia, SC 29224



TAMI A. SCHAIBLE

April 1, 2016

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND)

CASE NO.: 2015-CP-40-7254

ANDREW P. NEUMAYER)

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff,)

vs.)

PHILADELPHIA INDEMNITY)
INSURANCE COMPANY, PRIMARY)
COLORS CHILD CARE CENTER,)
JOCELYN KNOX DEMARTELARE, AND)
ASIA N. PARTMAN)

Defendant.)

Plaintiff's Attorney:

Rowland P. Alston III, Bar No. 69932

Address:

907 Calhoun Street, Columbia, SC 29201

Phone: 803-252-3663 Fax 803-254-5798

E-mail: rowlandalston@sc.rr.com Other:

Defendant's Attorney:

Curtis W. Dowling, Bar No. _____

Address:

PO Box 8448, Columbia, SC 29202

Phone: 803-799-1111 Fax 803-254-1335

E-mail: curtis@basjlaw.com Other:

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

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion for Summary Judgment

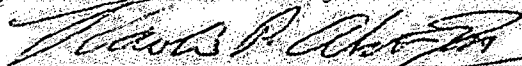
Estimated Time Needed: 45 min.

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

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

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

April 14, 2016

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____☐ EXEMPT:

(check reason)

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

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-7254

**PLAINTIFF'S NOTICE OF MOTION,
MOTION FOR, AND MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT**

TO: THE DEFENDANT PHILADELPHIA INDEMNITY INSURANCE COMPANY
AND ITS ATTORNEY CURTIS W. DOWLING, ESQ., THE DEFENDANT
PRIMARY COLORS CHILD CARE CENTER AND ITS ATTORNEY J.
CAROLYN STRINGER, ESQ., AND THE OTHER DEFENDANTS

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorneys, will move before the presiding judge in the Richland County Court of Common Pleas, on the tenth day after service hereof or at such time and place as is convenient to the Court and counsel for an Order granting Plaintiff summary judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as to the within action for the reason that there is no genuine issue of material fact and the Plaintiff is entitled to judgment in his favor as a matter of law.

This motion is based upon the grounds that all the evidence in the case, even when taken in a light most favorable to the Defendant Philadelphia Indemnity Insurance Company, establishes that said Defendant is obligated to satisfy an underlying judgment in full. This motion is further based upon the pleadings, the South Carolina Code of Laws, specifically S.C. Code § 38-77-142, related case law, the memorandum in support as set forth below, and any other additional matter accepted by this Court.

INTRODUCTION

On January 25, 2013, Plaintiff Andrew P. Neumayer ("Plaintiff") was a pedestrian on Julius Felder Street in Cayce, South Carolina, when he was struck by a bus operated by Defendant Asia N. Partman ("Partman") and owned by Defendant Primary Colors Child Care Center ("Primary Colors"). He sustained a ruptured spleen, broken ribs, humerus fracture, and a punctured lung. He underwent a splenectomy, laparotomy, internal fixation of the humerus with hardware, and extensive radiology. His medical specials totaled over \$122,000.00.

On November 8, 2013, Plaintiff filed suit against Partman and Primary Colors, alleging negligence against Partman in the operation of the bus and against Primary Colors for the acts of its agent Partman. (See Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center, 2013-CP-40-6839; hereinafter "Tort Action.") Primary Colors was properly served with process, did not answer or appear in the Tort Action, and went into default. A damages hearing was held before the Hon. James R. Barber on April 3, 2014. Primary Colors was given proper notice of this hearing, and did not appear. After considering the testimony and evidence, the Court entered judgment against defendants in the amount of \$622,500.00 on April 7, 2014. (See "Order for Damages," attached to Plaintiff's Complaint.)

Defendant Philadelphia Indemnity Insurance Company ("Philadelphia"), a liability carrier, issued an automobile liability policy ("Policy") with Primary Colors as the named insured that was in effect on the date of the accident and that provided coverage with limits of \$1,000,000.00. (See Answer of Philadelphia at ¶6, and the Policy attached thereto.) When Plaintiff presented the judgment to Philadelphia, Philadelphia refused to satisfy the

judgment in full for the Tort Action based on alleged lack of cooperation from Primary Colors in failing to provide timely notice of the suit.

Plaintiff then filed this declaratory judgment action as a result, seeking an order that Philadelphia satisfy the judgment in full. Philadelphia answered, counterclaimed, and cross-claimed. Plaintiff filed a timely Reply.

ARGUMENT

A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), *SCRCP*. When “the evidence is susceptible to only one reasonable interpretation, summary judgment may be granted.” *Brooks v. Northwood Little League, Inc.*, 489 S.E.2d 647 (S.C. Ct.App. 1997). And, “when the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law.” *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 730 S.E.2d 862, 864 (S.C. 2012).

The central issue in this case is whether or not Philadelphia can properly reduce the available coverage to the statutory minimum through a cooperation provision in the Policy. Philadelphia admits that the Tort Action contains covered claims. (*See Answer at ¶8.*) However, Philadelphia contends that it is only responsible for the first \$25,000.00 of the judgment, equal to the minimum automobile insurance liability limits under S.C. Code §38-77-140. *Id.*, at ¶¶8, 10, 49. It bases this contention on its allegation that it was not “timely notified” of the Tort Action. *Id.*, at ¶40. In support of this denial of full coverage, it cites a provision in the Policy that places duties on an insured to cooperate in providing

"prompt notice" of suit and to "immediately send" copies of any related legal papers. (See "Section IV – Business Auto Conditions," in Answer of Philadelphia, at ¶¶ 46, 48, and Policy attached thereto.) Because Primary Colors allegedly violated this provision, Philadelphia claims it is proper to reduce the available coverage to the statutory minimum limits.

Squarely undermining Philadelphia's position, the law of automobile insurance in South Carolina significantly changed in 1999 when S.C. Code §38-77-142 became effective. This statute mandates that automobile insurance policies are required to have provisions affording coverage for named insureds and their permissive operators, and, that any relevant policy provision which effectively reduces coverage is void. The statute reads:

§ 38-77-142. Policies or contracts of bodily injury or property damage liability insurance covering liability; required provisions.

(A) No policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of the vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle that is principally garaged, docked, or used in this State unless the policy contains a provision insuring the named insured and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured against liability for death or injury sustained or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the vehicle by the named insured or by any such person. Each policy or contract of liability insurance, or endorsement to the policy or contract, insuring private passenger automobiles principally garaged, docked, or used in this State, that has as the named insured an individual or husband and wife who are residents of the same household and that includes, with respect to any liability insurance provided by the policy, contract, or endorsement for use of a nonowner automobile a provision requiring permission or consent of the owner of the automobile for the insurance to apply.

(B) No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle may be issued or delivered in this State to the owner of a vehicle or may be issued or delivered by an insurer licensed in this State upon a motor vehicle principally garaged or used in this State without an endorsement or provision insuring the named insured, and any

other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other person. If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

Where the insurer has elected to provide a defense to its insured under such circumstances and files responsive pleadings in the name of its insured, the insured is not subject to sanctions for failure to comply with discovery pursuant to the South Carolina Rules of Civil Procedure unless it can be shown that the suit papers actually reached the insured, and that the insurer has failed after exercising due diligence to locate its insured, and as long as the insurer provides such information in response to discovery as it can without the assistance of the insured.

(C) Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void. (Emphasis added.)

Philadelphia's application of the aforementioned provision of the Policy is a clear violation of this statute, specifically subsection (C), as shown in a recent Supreme Court case.

In Williams v. GEICO, 762 S.E.2d 705 (S.C. 2014), the Court was evaluating the propriety of a family "step-down" provision in an auto liability policy with face amount of coverage in excess of the statutory minimum. A husband and wife were killed in an auto accident. The liability carrier admitted that coverage was owed, but contended that a provision in the policy effectively reduced coverage to the statutory minimum for injured family members.

The Court found that the provision violated the public policy of the State as codified in §38-77-142, and was therefore void. It found that "it is *the face amount of the*

coverage that is relevant under §38-77-142, not the statutory minimum limits of liability coverage set forth in §38-77-140, which are not even mentioned in the statute.” *Id.*, at 714. (Emphasis added.) Further, it found that “the clear terms of section 38-77-142 are controlling of this state’s public policy and justify the result we reach today.” *Id.*, at 716.

Today in South Carolina, when a judgment is rendered in a suit against an insured based upon an occurrence under the policy and the automobile insurer admits that coverage is owed, the automobile insurer is obligated to satisfy the judgment in full if the judgment is within the limits of coverage. The Court in *Williams* aptly stated:

The General Assembly, in considering section 38-77-142, contemplated how automobile insurance is actually marketed. It realized that the actual policy containing any exclusions or limitations is not provided contemporaneously with the entering of the insurance agreement. As a result, the General Assembly specifically included language in section 38-77-142 (C) prohibiting provisions in the policy that limit or reduce coverage.

Id., at 714.

Here, Philadelphia is not claiming that it does not have a duty to indemnify or provide coverage. Rather, it claims that coverage only extends to the limit of the statutory minimum because of a provision in the Policy, effectively reducing the available coverage from \$1,000,000.00 to \$25,000.00. But, under the plain language of §38-77-142 and the recent interpretation of it in *Williams*, coverage in auto liability policies cannot be reduced by this or any such provision, and the statutory minimum is irrelevant. “Coverage” as used in this statute is the level of protection afforded by a policy. *Id.*, at n.6. If Philadelphia admits to coverage and a duty to indemnify, then its obligation extends to the limits of coverage on the Policy. And here, it has more than enough coverage to satisfy the judgment entered.

To address a potential concern with this statute in regards to Plaintiff's argument, §38-77-142 (B), *supra*, does contain the following:

If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

This clause only applies to the relationship between an insurer and its insured. It is not to be understood that if actual notice by an insured of suit is not given to an insurer, then a cooperation clause is enforceable against a third party. (*See Cowan v. Allstate Ins. Co.*, 594 S.E.2d (S.C. 2004).) Section 38-77-142 (C) is not compromised by prior subsections.

Section 38-77-142 (C) stands on its own. It clearly mandates that no provision can reduce available coverage. There are no exceptions, no conditions, and no qualifiers to the language. If there is any such provision that attempts to reduce coverage available, that provision is void. That is the case here. The coverage defenses and claims made by Philadelphia are based upon a policy provision that is void under statute as applied.

Philadelphia claims that the cooperation provision is a condition-precedent to coverage. But, whatever Philadelphia calls the provision in this circumstance is irrelevant. It is the effect that matters. If the insurer admits the claim is covered under the policy, then coverage up to the face amount of the stated limits—the coverage that the insured bargained for in liability claims—must be available to an injured party.

Philadelphia cites *USAA v. Markosky*, 530 S.E.2d 660 (S.C. Ct.App. 2000) for the proposition that coverage may be reduced to the statutory minimum in these circumstances. However, as the Court noted in *Williams*, that case involved an accident that occurred prior to March 1, 1999, the effective date of §38-77-142, and was not

controlling. See Williams, supra, at 714. Thus, it is also not controlling here, and arguably is now no longer good law.

The Policy provision at issue states that there is no coverage if an insured fails to notify. Philadelphia alleges in its pleading that it has a duty to indemnify only in the amount of \$25,000.00. Neither is correct here. Under the facts and the plain language of South Carolina statutory law, the full \$1,000,000.00 face amount is available to satisfy the judgment and indemnify Primary Colors. Should the Court be concerned with any issues of fairness in this outcome, Plaintiff respectfully argues that this is not solely a matter of equity, but of law and the application of statute. It should be the province of the General Assembly to change the plain language of the statute, should it produce any effect unintended by its legislators.

Where the terms of a statute are clear, the Court must apply those terms according to their literal meaning. Collins v. Doe, 574 S.E.2d 739 (S.C. 2002) (where a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to look for or impose other meaning). And, "statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." Nakatsu v. Encompass Indemnity Co., 700 S.E.2d 283, 287 (S.C. Ct.App. 2010), quoting State Farm Mut. Auto. Ins. Co v. Calcutt, 530 S.E.2d 896, 897 (S.C. Ct.App. 2000).

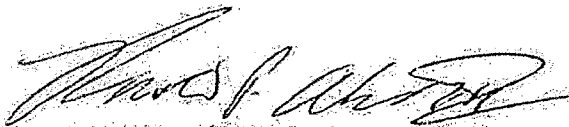
A plain reading of §38-77-142 (C) clearly mandates that any relevant provision in any automobile insurance policy attempting to reduce the coverage available is void. After admitting coverage, Philadelphia rests upon such a provision and one that effectively does

just that. And that provision is unavailable to Philadelphia and is void as a matter of law in this case. Section 38-77-142 (C) prevails.

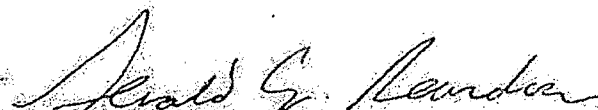
CONCLUSION

The plain reading of our statute compels the finding that coverage for the full amount of the judgment is available. Because Philadelphia admits that the claims in the Tort Action are covered claims, and violates our statute in attempting to reduce coverage through a policy provision, there are no genuine issues of material fact to support coverage only up to the statutory minimum. Consequently, Plaintiff is entitled to summary judgment as a matter of law. The Court should issue an order that Philadelphia is obligated to satisfy the full amount of the judgment entered in the Tort Action, with all applicable interest.

Respectfully submitted,



ROWLAND P. ALSTON III
Attorney for Plaintiff
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663



GERALD E. REARDON
Attorney for Plaintiff
1722 Main St.
Suite 302
Columbia, SC 29201
(803) 602-5242

By 

Columbia, South Carolina
April 14, 2016

Columbia, South Carolina
April 14, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer,

Plaintiff,

vs.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn
Knox DeMartelare, and Asia N. Partman,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-40-7254

CERTIFICATE OF SERVICE

2016 APR 14 PM 1:44
JAMES W. MCBRIDE
CLERK OF COURT

I do hereby certify that on April 14, 2016, I have served the foregoing Plaintiff's Notice of Motion and Motion for Summary Judgment, in the above-captioned case, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to the attorneys as indicated below:

Curtis W. Dowling, Esq.
Barnes Alford
P.O. Box 8448
Columbia, SC 29202

J. Carolyn Stringer, Esq.
P.O. Box 25345
Columbia, SC 29224



Rowland P. Alston III
Attorney for Plaintiff

April 14, 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Andrew P. Neumayer

☐ Plaintiff

v.

Philadelphia Indemnity Insurance Company et al.

☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-40-07254

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

105

Plaintiff's Attorney: Bar No: Address: phone: fax: e-mail: other:		Defendant's Attorney: Curtis W. Dowling, Bar No. Address: Barnes, Alford, Stork & Johnson, LLP Post Office Box 8448, Columbia, SC 29202 phone: 803-799-1111 fax: 803-254-1335 e-mail: curtis@basjlaw.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Alter or Amend Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☐ Defendant		Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE: CODE: Date:	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Andrew P. Neumayer,

Plaintiff,

v.

Philadelphia Indemnity Insurance Company;
Primary Colors Child Care Center; Jocelyn
Knox DeMartelare; and Asia N. Partman,

Defendants.

Philadelphia Indemnity Insurance Company,

Counter-Plaintiff,

v.

Andrew P. Neumayer,

Counter-Defendant.

Philadelphia Indemnity Insurance Company,

Cross-Claimant,

v.

Primary Colors Child Care Center, Inc.;
Jocelyn Knox DeMartelare; and Asia N.
Partman,

Cross-Defendants.

Civil Action No. 2015-CP-40-07254

RICHLAND COUNTY
FILED
2016 JUN 23 PM 4:29
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

MOTION TO ALTER OR AMEND

TO: THE HONORABLE L. CASEY MANNING AND THE PLAINTIFF/COUNTER-
DEFENDANT AND HIS ATTORNEYS, GERALD E. REARDON, ESQUIRE AND
ROWLAND P. ALSTON III, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Defendant/Counter-Plaintiff/Cross-Claimant, Philadelphia Indemnity Insurance Company ("Philadelphia"), through its undersigned counsel, hereby moves for the alteration or amendment of the Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment (the "Order"). The Order was entered on June 13, 2016 and received by the undersigned on June 14, 2016. This motion is made pursuant to Rule 59(e), SCRCP, and on the grounds set forth herein.

Philadelphia requests that the Order be altered or amended to clarify Philadelphia's coverage position. Page 3 of the Order states, "Philadelphia admits that the Tort Action contains covered claims"; page 4 of the Order states, "Philadelphia is not claiming that it does not have a duty to indemnify or provide coverage" and "If Philadelphia admits to coverage and a duty to indemnify ..."; and page 5 of the Order states, "After admitting coverage, Philadelphia rests" These statements do not reflect the nuance of Philadelphia's position. Philadelphia does not simply "admit" that the insurance policy provides coverage for the underlying claims. Rather, Philadelphia's position is that a plain reading of the policy indicates that it provides no coverage at all, but that the legal principle set forth in Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993), and its progeny—that mandatory minimum coverage under a motor vehicle liability insurance policy may not be voided for an innocent third party due to an insured's breach of a cooperation clause—nevertheless requires Philadelphia to provide coverage up to the amount of the mandatory minimum limit set forth in S.C. Code Ann. § 38-77-140(A)(1), which is currently \$25,000.00. Accordingly, Philadelphia respectfully requests that the Court alter or amend the Order to reflect the nuance of Philadelphia's coverage position rather than make blanket statements that Philadelphia "admits" coverage exists under the policy.

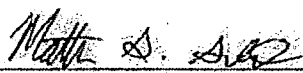
In addition, it is not readily apparent from the face of the Order that the Court considered all of Philadelphia's arguments, to wit:

- The Order does not address the uncontested fact that Primary Colors Child Care Center, Inc. ("Primary Colors") and Asia N. Partman ("Partman") failed to comply with the policy's cooperation clause;
- The Order does not address the uncontested fact that Philadelphia suffered substantial prejudice as a result of the failure of Primary Colors and Partman to comply with the policy's cooperation clause;
- The Order does not address Philadelphia's argument that S.C. Code Ann. § 38-77-142(C) and Williams v. Government Employees Insurance Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014), are not applicable in this case because the failure of Primary Colors and Partman to comply with the policy's cooperation clause meant that coverage under the policy was never triggered in the first place;
- The Order does not address Philadelphia's argument that it is not trying to "reduce" coverage available under the policy but rather that the failure of Primary Colors and Partman to comply with the policy's cooperation clause meant that coverage under the policy was never triggered in the first place;
- The Order does not address Philadelphia's argument that the only reason there is any coverage available under the policy at all is the legal principle set forth in Shores and its progeny that mandatory minimum coverage under a motor vehicle liability insurance policy may not be voided for an innocent third party due to an insured's breach of a cooperation clause; and
- The Order does not address Philadelphia's argument that nothing in Section 38-77-142 or Williams affected the validity of cooperation clauses and, accordingly, that it remains the law, pursuant to United Servs. Auto. Ass'n v. Markosky, 340 S.C. 223, 230-31, 530 S.E.2d 660, 664 (Ct. App. 2000,) that where an insured fails to comply with such a clause and the failure results in substantial prejudice to the insurer, the policy provides no coverage in excess of the mandatory minimum limit.

Philadelphia respectfully requests that the Order be altered or amended to address, if not sustain, these arguments.

This motion is supported by the pleadings in this action, any affidavits which may be subsequently submitted, any memoranda of law which may be subsequently submitted, all applicable statutes and case authority, the applicable Rules of Civil Procedure, and such other evidence and authority as the Court may find acceptable.

The undersigned counsel certifies, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, that prior to the filing of this motion, he attempted to confer with opposing counsel in a good faith attempt to resolve the matters contained in the motion.


CURTIS W. DOWLING
MATTHEW G. GERRALD
BARNES, ALFORD, STORK & JOHNSON, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, South Carolina 29202
803.799.1111 (Office)
803.254.1335 (Fax)
curtis@basjlaw.com
matt@basjlaw.com
Attorneys for Philadelphia Indemnity Insurance
Company

June 23, 2016

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Barnes, Alford, Stork & Johnson, LLP certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

- **MOTION TO ALTER OR AMEND**

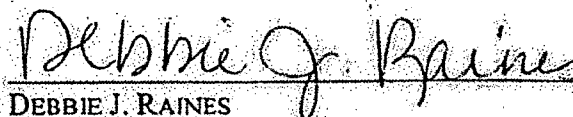
PERSON(S) SERVED:

The Honorable L. Casey Manning
Post Office Box 192
Columbia, SC 29202

Gerald E. Reardon, Esquire
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201

Rowland P. Alston III, Esquire
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201

RICHLAND COUNTY
FILED
2016 JUN 23 PM 4:29
JEANNETTE W. MCBRIDE
C.C.P. & G.S.


DEBBIE J. RAINES

June 23, 2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Andrew P. Neumayer,

Civil Action No. 2015-CP-40-07254

Plaintiff,

v.

Philadelphia Indemnity Insurance Company;
Primary Colors Child Care Center; Jocelyn
Knox DeMartelare; and Asia N. Partman,

Defendants.

Philadelphia Indemnity Insurance Company,

Counter-Plaintiff,

v.

Andrew P. Neumayer,

Counter-Defendant.

Philadelphia Indemnity Insurance Company,

Cross-Claimant,

v.

Primary Colors Child Care Center, Inc.;
Jocelyn Knox DeMartelare; and Asia N.
Partman,

Cross-Defendants.

**AFFIDAVIT OF
KEVIN P. GRAY**

PERSONALLY APPEARED BEFORE ME Kevin P. Gray who, being duly sworn,

deposes and states as follows:

1. My name is Kevin P. Gray. I am a resident of the State of New Jersey, over the

age of eighteen (18) years, and competent to give this affidavit. Unless otherwise stated, each statement contained herein is of my own personal knowledge.

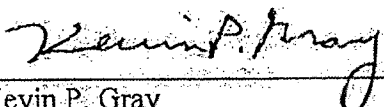
2. I am a Vice President of Claims for Philadelphia Indemnity Insurance Company ("Philadelphia"). I have supervisory responsibility for the claim asserted against Philadelphia in this lawsuit, which stems from a demand by counsel for Andrew P. Neumayer ("Neumayer") that Philadelphia pay the full amount of the judgment entered in a lawsuit filed in the Richland County (South Carolina) Court of Common Pleas captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839 (the "Tort Action") under Commercial Lines Policy No. PHPK928536 (the "Policy").

3. Philadelphia first received notice of the Tort Action and the judgment entered therein on October 21, 2015, when counsel for Neumayer faxed certain documents regarding the judgment to Philadelphia. Philadelphia was not aware of the existence of the Tort Action or the judgment entered therein prior to that date.

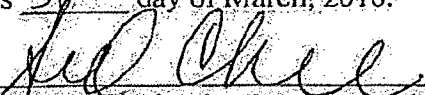
4. Section IV(2) of the Policy's Business Auto Coverage Form required, as a condition precedent to coverage for the Tort Action, that the insured defendants promptly notify Philadelphia of the claim, immediately send Philadelphia copies of the Summons and Complaint, and cooperate with Philadelphia in the investigation or settlement of the Tort Action. However, the insured defendants never notified Philadelphia regarding the Tort Action or sent the Summons and Complaint to Philadelphia. Instead, they went into default and allowed a judgment to be entered against them.

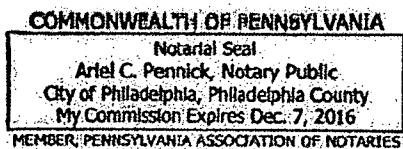
5. As a result of the insured defendants' failure to comply with Section IV(2) of the Policy's Business Auto Coverage Form, Philadelphia was deprived of its right to conduct a reasonable investigation of Neumayer's allegations and defend against the Tort Action.

FURTHER AFFIANT SAYETH NOT.


Kevin P. Gray

Sworn to and subscribed before me
this 31st day of March, 2016.


Notary Public for the Commonwealth of Pennsylvania
My Commission Expires: 12/7/16



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Andrew P. Neumayer,

Civil Action No. 2015-CP-40-07254

Plaintiff,

v.

Philadelphia Indemnity Insurance Company;
Primary Colors Child Care Center; Jocelyn
Knox DeMartelare; and Asia N. Partman,

Defendants.

Philadelphia Indemnity Insurance Company,

Counter-Plaintiff,

v.

Andrew P. Neumayer,

Counter-Defendant.

Philadelphia Indemnity Insurance Company,

Cross-Claimant,

v.

Primary Colors Child Care Center, Inc.;
Jocelyn Knox DeMartelare; and Asia N.
Partman,

Cross-Defendants.

2016 MAY 13 PM 12:47
CLERK OF COURT
JULIA G. BAKER
MEMORANDUM IN SUPPORT OF
PHILADELPHIA INDEMNITY
INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

The Defendant/Counter-Plaintiff/Cross-Claimant, Philadelphia Indemnity Insurance Company ("Philadelphia"), through its undersigned counsel, submits the following memorandum in support of its Motion for Summary Judgment and in opposition to the Plaintiff/Counter-Defendant's Motion for Summary Judgment.

INTRODUCTION

In September 2012, Philadelphia issued Commercial Lines Policy No. PHPK928536 (the "Policy") to Primary Colors Child Care Center, Inc. ("Primary Colors") effective from September 30, 2012 to September 30, 2013. The Policy provided multiple coverages including commercial property coverage, commercial general liability coverage, commercial auto coverage, professional liability coverage, and abuse liability coverage. Copies of the pertinent portions of the Policy were attached to Philadelphia's Answer, Counterclaim, and Cross-Claim as Exhibit A and are incorporated herein by reference.

On or about November 8, 2013, the Plaintiff/Counter-Defendant, Andrew P. Neumayer ("Neumayer"), filed a lawsuit in the Richland County (South Carolina) Court of Common Pleas captioned *Andrew P. Neumayer v. Asia N. Partman and Primary Colors Child Care Center*, Civil Action No. 2013-CP-40-06839 (the "Tort Action"). In the Tort Action, Neumayer alleged that, on or about January 25, 2013, he was a pedestrian on Julius Felder Street in Lexington County, South Carolina when he was struck by a bus owned by Primary Colors and operated by Asia N. Partman ("Partman"), an employee of Primary Colors. Neumayer further alleged that Primary Colors and Partman were liable for injuries he suffered as a result of the accident.

Primary Colors and Partman failed to answer or otherwise respond to the Tort Action and defaults were entered against them. A damages hearing was subsequently held before this Court on or about April 3, 2014, after which an Order for Damages Against Defendants was entered on or about April 7, 2014, awarding Neumayer damages against Primary Colors and Partman in the amount of \$622,500.00 and entering a judgment in the same amount.

Over 18 months later, on October 21, 2015, Philadelphia received its first notice of the Tort Action and the judgment entered therein when counsel for Neumayer faxed certain documents regarding the judgment to Philadelphia. Philadelphia declined to pay the judgment in full on the grounds that it was not timely notified of the Tort Action or the service thereof upon Primary Colors and Partman and, as such, was never provided the opportunity to investigate or defend against Neumayer's claims, all in violation of the applicable terms and conditions of the Policy. Because Philadelphia suffered substantial prejudice as a result of the failure by Primary Colors and Partman to comply with the applicable terms and conditions of the Policy, and as set forth herein, Philadelphia's indemnification obligation is limited to \$25,000.00, which is the mandatory minimum limit established by S.C. Code Ann. § 38-77-140(A)(1).

STANDARD OF REVIEW

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC; Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings" but "must present specific facts showing a genuine issue for trial." Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 558-59, 671 S.E.2d 79, 85 (Ct. App. 2008) (citations and quotations omitted). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Accordingly, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). See also CEL Products, LLC v. Rozelle, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct.

App. 2004) (noting that Rule 56(c) “mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial”) (citations and quotations omitted).

“Under South Carolina law the construction and interpretation of an insurance policy should be determined as a matter of law by the court.” Allstate Ins. Co. v. Best, 728 F. Supp. 1263, 1266 (D.S.C. 1990) (citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969)). See also Grossberg v. Travelers Indem. Co. of Am., 825 F. Supp. 2d 717, 721 (E.D. Va. 2011) (“Summary judgment is particularly well-suited for resolution of insurance coverage disputes because the construction of insurance contracts is a legal question.”). “In a declaratory judgment action, an insurance carrier may appropriately move for summary judgment to determine whether it is obligated to provide coverage to an insured, where, as here, there are no material ambiguities in the policy.” St. Paul Reinsurance Co. v. Ollie’s Seafood Grille & Bar, LLC, 242 F.R.D. 348, 352 (D.S.C. 2007).

Insurance policy language must be given its “plain, ordinary, and popular meaning.” B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). There is no need to employ rules of construction if the contract language is clear and unambiguous. See, e.g., Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000) (“When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.”). Rather, when presented with unambiguous contract language, the court’s only job is to apply the contract as written. See, e.g., Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007) (“Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning . . . and give effect to it.”) (citations and quotations omitted). The court must not rewrite or distort the plain meaning of unambiguous contractual language.

See, e.g., Stewart, 341 S.C. at 151, 533 S.E.2d at 601 ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

ARGUMENT

Philadelphia concurs with Neumayer that the Tort Action contained claims and causes of action covered by the Policy pursuant to South Carolina law.¹ However, unlike Neumayer, who asserts Philadelphia is obligated to pay the full amount of the judgment he obtained in the Tort Action, Philadelphia asserts the Policy and applicable law only obligate it to pay \$25,000.00, which is the amount of the mandatory minimum limit set forth in Section 38-77-140(A)(1), and that the Policy provides no coverage for the Tort Action in excess of that limit.

The Policy's Business Auto Coverage Form (CA 00 01 03 10) contains the following relevant provision:

SECTION IV – BUSINESS AUTO CONDITIONS

* * *

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss."

* * *

- b. Additionally, you and any other involved "insured" must:

* * *

¹ This is only the case, however, due to the principle set forth in Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993), and its progeny that mandatory minimum coverage may not be voided for an innocent third party due to an insured's breach of a cooperation clause. As explained herein, coverage for the Tort Action was not actually triggered pursuant to the terms of the Policy.

- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".

Neumayer does not dispute that Primary Colors and Partman failed to comply with this provision or that Philadelphia suffered substantial prejudice as a result. Indeed, it would be impossible for Neumayer to dispute those facts because this case presents a textbook example of substantial prejudice in that Philadelphia was unquestionably denied any opportunity whatsoever to investigate or defend against Neumayer's claims in the Tort Action. See, e.g., Factory Mut. Liab. Ins. Co. of Am. v. Kennedy, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971) ("The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured."). Cf. Evans v. Am. Home Assur. Co., 252 S.C. 417, 420, 166 S.E.2d 811, 813 (1969) ("[I]t is settled law with us that a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy only when the breach has been material and has resulted in substantial prejudice to the insurer.").

His apparent concession of the substantial prejudice suffered by Philadelphia notwithstanding, Neumayer nevertheless argues that Philadelphia must pay the full amount of the judgment he obtained in the Tort Action. In so arguing, he relies exclusively on S.C. Code Ann. § 38-77-142(C) and a 2014 Supreme Court opinion applying that statute, Williams v. Government Employees Insurance Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014). Section 38-77-142(C) provides that "[a]ny endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by [S.C. Code Ann. § 38-77-142(A) and (B)] is void," while Williams

applied the statute to invalidate a so-called “family step-down” provision which lowered the available coverage from the face amount of the policy to the mandatory minimum limit for bodily injury to the insured or a relative of the insured living in his or her household. Neither are pertinent to the analysis in this case.

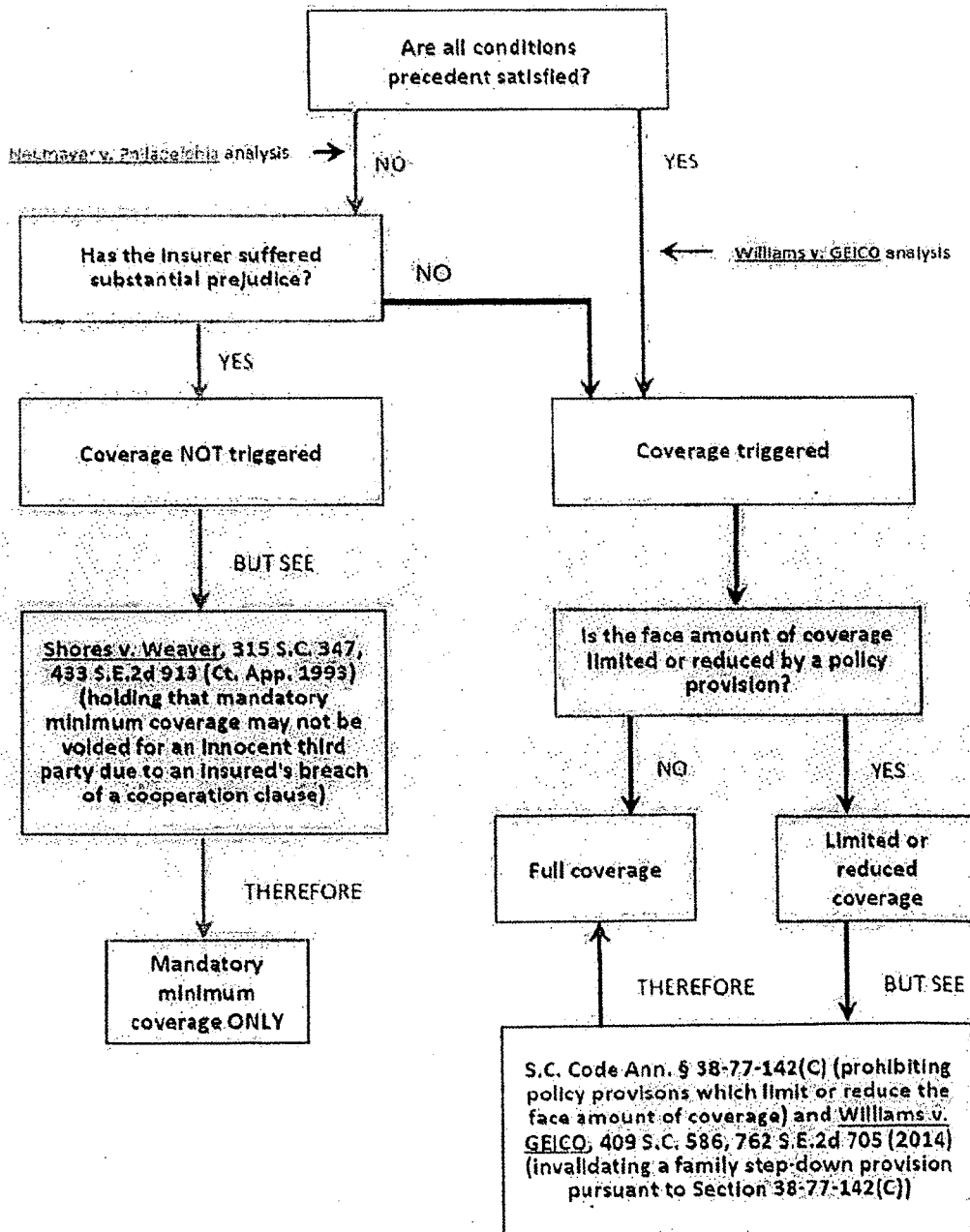
Though their wording varies slightly, Sections 38-77-142(A) and (B) require more or less the same thing, i.e. that insurance policies issued or delivered in South Carolina or covering motor vehicles primarily used in South Carolina must insure the named insured and permissive users against liability “within the coverage of the policy” (which was held in Williams to mean the face amount of coverage). Neumayer does not contend that the Policy fails to comply with this requirement. He contends instead that Philadelphia is attempting to use a provision allegedly prohibited by Section 38-77-142(C)—Section IV(2) of the Policy’s Business Auto Coverage Form—to unlawfully “reduce” the \$1 million in coverage available under the form to the mandatory minimum limit of \$25,000.00. But that contention represents a fundamental misunderstanding of Philadelphia’s position, which is that the failure of Primary Colors and Partman to comply with Section IV(2) of the Policy’s Business Auto Coverage Form means that *coverage under the Policy was never triggered in the first place*. Recall the first sentence of that section: “**We have no duty to provide coverage under this policy unless there has been full compliance with the following duties . . .**” (emphasis added). According to this very plain and clear language, coverage under the Policy *is not triggered at all* unless the insured (a) gives Philadelphia prompt notice of the “accident” or “loss” and (b) immediately sends Philadelphia copies of any documents concerning the claim or “suit” and cooperates with Philadelphia with respect to the claim or “suit.” As previously noted, it is uncontested in this case that Primary Colors and Partman failed to comply with these duties and that Philadelphia suffered substantial prejudice as a result. Therefore, looking solely to the terms of the Policy, there is no coverage—not even \$25,000.00—for the Tort Action, and thus there is no liability “within the coverage of

the policy” under Sections 38-77-142(A) and (B) which could potentially be limited or reduced by a provision prohibited by Section 38-77-142(C). Section 38-77-142(C) is thus wholly inapplicable under these circumstances.

The only reason there is \$25,000.00 in coverage available under the Policy is the legal principle, initially established in Shores and reaffirmed in later cases such as Cowan v. Allstate Insurance Co., 357 S.C. 625, 594 S.E.2d 275 (2004), that an insured’s violation of a cooperation clause does not void a motor vehicle liability insurance policy as to an innocent third party to the extent the policy provides mandatory minimum limits coverage. Philadelphia acknowledges that Shores and its progeny require it to pay \$25,000.00—the mandatory minimum limit set forth in Section 38-77-140(A)(1)—as a result of the judgment Neumayer obtained in the Tort Action. But neither the Policy nor South Carolina law require it to pay more.

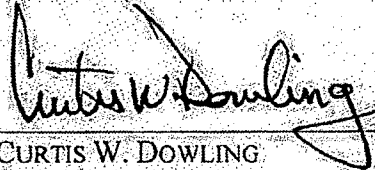
Williams is also inapplicable here. In that case, the declarations page of the motor vehicle policy at issue indicated the policy provided up to \$100,000.00 in bodily injury liability coverage, but the policy form contained a “family step-down” provision reducing the amount of available coverage to the mandatory minimum limit (which at the time was \$15,000.00) for claims of bodily injury to the insured or a relative of the insured living in his or her household. In other words, the policy initially gave the insured a limit of \$100,000.00 for bodily injury claims but subsequently reduced the limit to \$15,000.00 under certain circumstances. The Supreme Court found this contravened the requirement in Sections 38-77-142(A) and (B) that motor vehicle policies must insure the named insured and permissive users against liability “within the coverage of the policy” and understandably invalidated the family step-down provision pursuant to Section 38-77-142(C), holding that “once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage.” Williams, 409 S.C. at 604, 762 S.E.2d at 715. However, this holding and the analysis that led to it have no relevance in this case because, unlike in

Williams, coverage for the Tort Action was never initially triggered due to the failure of Primary Colors and Partman to comply with Section IV(2) of the Policy's Business Auto Coverage Form. That failure, and the resultant substantial prejudice suffered by Philadelphia, meant there was no liability "within the coverage of the policy" to begin with, and no "face amount of coverage" to be effectively retracted in violation of Section 38-77-142(C). Williams, which had nothing at all to say about the validity of cooperation clauses, is thus inapposite as depicted in the flow chart below.



CONCLUSION

Neumayer more or less concedes that if this case were being litigated in 1996 as opposed to 2016, Philadelphia would prevail. However, he asserts that "the law of automobile insurance in South Carolina significantly changed in 1999 when S.C. Code § 38-77-142 became effective." That assertion may be true in some contexts, but not as it pertains to this dispute because nothing in Section 38-77-142 or Williams—one of two primary cases interpreting the statute²—affected the validity of cooperation clauses. Accordingly, it remains the law that where an insured fails to comply with such a clause and the failure results in substantial prejudice to the insurer, the policy provides no coverage in excess of the mandatory minimum limit. United Servs. Auto. Ass'n v. Markosky, 340 S.C. 223, 230-31, 530 S.E.2d 660, 664 (Ct. App. 2000). Philadelphia is thus entitled to judgment as a matter of law and reiterates its request that the Court enter an Order: (1) awarding summary judgment to Philadelphia with respect to the both the Complaint and the cause of action asserted in Philadelphia's Answer, Counterclaim, and Cross-Claim; and (2) holding that Philadelphia's indemnification obligation with respect to the judgment entered in the Tort Action is limited to the mandatory minimum limit of \$25,000.00.



CURTIS W. DOWLING
 MATTHEW G. GERRALD
 BARNES, ALFORD, STORK & JOHNSON, LLP
 1613 Main Street (29201)
 Post Office Box 8448
 Columbia, South Carolina 29202
 803.799.1111 (Office)
 803.254.1335 (Fax)
 curtis@basjlaw.com
 matt@basjlaw.com
 Attorneys for Philadelphia Indemnity Insurance
 Company

May 11, 2016

² The other is Cowan, which likewise did not affect the validity of cooperation clauses and in fact reaffirmed the aforementioned principle first announced in Shores.

CERTIFICATE OF SERVICE

The undersigned employee of Barnes, Alford, Stork & Johnson, LLP certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

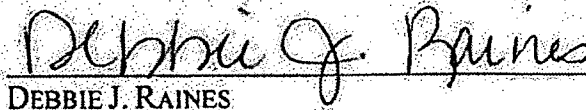
MEMORANDUM IN SUPORT OF PHILADELPHIA INDEMNITY
INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PERSON(S) SERVED:

Gerald E. Reardon, Esquire
The Law Office of Jerry Reardon
1239 Blanding Street
Columbia, SC 29201

Rowland P. Alston III, Esquire
The Sullivan Firm LLC
907 Calhoun Street
Columbia, SC 29201

J. Carolyn Stringer, Esquire
Post Office Box 25345
Columbia, SC 29224


DEBBIE J. RAINES

May 11, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Civil Action No. 2015-CP-40-07254
Appellate Case No. 2016-001710

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SC Court of Appeals

Andrew P. Neumayer.....Respondent,

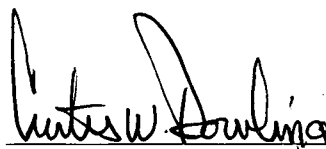
v.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn Knox
DeMartelare, and Asia N. Partman.....Defendants,

Of Whom Philadelphia Indemnity Insurance Company is Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111
Attorneys for Appellant

March 15, 2017