

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM COLLETON COUNTY

**S.C. Supreme Court**

Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2011-193846

Opinion No. 175 (S.C. Ct. App. filed April 18, 2011)

Thomas M. Carter, Debra Carter, and Christopher Michael Carter..... Respondents,

v.

The Standard Fire Insurance Company and Frank L. Siau Agency, Inc .....Defendants,

Of whom

The Standard Fire Insurance Company is the .....Petitioner.

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**BRIEF OF PETITIONER**

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## QUESTION PRESENTED FOR REVIEW

- I. **Did the Court of Appeals err in reversing the circuit court's grant of summary judgment to The Standard Fire Insurance Company based on the Court of Appeals' recent decision in *Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010), in that *Nakatsu* was, it is respectfully submitted, wrongly decided; is inconsistent with this Court's decision in *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007); and should be overruled?**

### STATEMENT OF THE CASE

On November 11, 2006, Michael Carter was occupying his 2006 Dodge Charger, the title to which was in both his and his mother's names, when it was involved in a collision resulting in grievous injuries to Michael Carter. (R. p. 57, ¶ 6; p. 38, ¶ 3; pp. 280-299). Thereafter, he brought suit in Florence County against the estate of Bernie Collins, in which he alleged that Mr. Collins was driving a 2006 Dodge automobile belonging to Michael Carter at the time of the accident in a negligent and reckless manner, proximately causing the collision and his injuries. (R. pp. 38-39). Michael Carter's Dodge was insured by Allstate. (R. pp. 57-58, ¶ 7; R. p. 210, lines 4 – 6). Allstate settled with Michael on behalf of the estate of the alleged driver, Bernie Collins, by paying the available limit of liability coverage (\$250,000), as well as another \$100,000 in liability coverage under a policy that Allstate had issued to Mr. Collins, in exchange for a covenant not to execute. (R. p. 57, ¶ 7 – p. 58, ¶ 9 ; p. 220, lines 6-11). In addition, as the insurer of Michael Carter's Dodge Charger, which he occupied at the time of the accident, Allstate paid him \$500,000 in UIM coverage (\$250,000 on the vehicle involved in the accident and \$250,000 on another of Michael Carter's vehicles insured under his Allstate policy) for a total of \$850,000. (R. p. 57, ¶ 7 – p. 58, ¶ 9; p.

220, lines 11-20; p. 206, line 22 – p. 208, line 19).

The Standard Fire Insurance Company (hereinafter “Standard Fire”) issued an automobile insurance policy to Michael’s parents, Thomas M. Carter and Debra Carter, for the period from February 11, 2006 to February 11, 2007, covering three Chevrolet vehicles. (R. pp. 364 - 67). That policy never covered Michael’s Dodge Charger. (R. p. 210, lines 4 – 6). The Standard Fire policy included UIM bodily injury coverage of \$250,000 per person and \$500,000 per accident on each of the three vehicles listed on the policy. (R. pp. 364 - 67). After settling with Allstate, the Carters sought UIM coverage in the amount of \$750,000 (\$250,000 coverage on three vehicles) from Standard Fire. (R. p. 58, ¶ 10; p. 59, ¶ 14).

The Standard Fire policy contains the following exclusion:

#### **EXCLUSIONS**

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

1. While “occupying” . . . any motor vehicle owned by you or any “family member” which is not insured for this coverage under this policy. . . .

(R. p. 338). The policy defines “family member” as “a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.” (R. p. 310). The policy also provides that “you” and “your” refer to: 1. “[t]he ‘named insured’ shown in the Declarations; and 2. [t]he spouse if a resident of the same household.” (R. p. 310).

Michael Carter resided with his parents, Thomas M. Carter and Debra Carter, throughout the policy period in question. (R. p. 206, lines 11-21). Ms. Carter removed

Michael as a driver from her and her husband's Standard Fire policy prior to the subject accident, and helped him get his own policy covering his Dodge Charger, in order for him to assume responsibility for his own policy and to get a lower premium. (R. p. 200, lines 6-16; p. 201, lines 6-23; p. 209, lines 3-7; p. 210, line 7 – p. 211, line 19; p. 172, lines 21-24; p. 179, line 3 – p. 180, line 1).

The Carters brought this action against Standard Fire and Frank L. Siau Agency, Inc. (hereinafter "Siau Agency") alleging, among other things, that Standard Fire breached its insurance contract with Thomas and Debra Carter by failing to provide UIM coverage for their son, Michael Carter, for serious injuries sustained as a result of an automobile accident, and that Siau Agency negligently failed to procure insurance for them. (R. p. 63, ¶ 29; p. 66, ¶ 39). The summons and complaint were filed on October 26, 2007 and timely served on Standard Fire and Siau Agency, both of which timely served and filed their answers.

The complaint alleged, among other things, that at the time of Michael's accident, Thomas Carter and Debra Carter were named insureds on an automobile insurance policy issued by Standard Fire insuring three (3) vehicles, with single person UIM bodily injury coverage of \$250,000 each. (R. p. 59, ¶¶ 11, 12). It also alleged that Michael Carter should be able to stack UIM coverage under their policy for a total of \$750,000 (R. p. 59, ¶ 14), and that Standard Fire breached its contract to provide UIM coverage. (R. p. 66, ¶ 39).

In its answer, Standard Fire, among other things, denied that UIM coverage is available under the policy it issued to Thomas and Debra Carter, which clearly excludes UIM coverage for "'bodily injury' . . . sustained by any person . . . [w]hile 'occupying' . . .

. any motor vehicle owned by you or any 'family member' which is not insured for [UIM] coverage" under the policy. (R. p. 79, ¶ 22; pp. 81-82, ¶ 43). The answer further alleged that the Carters nevertheless chose to insure the aforementioned Dodge Charger under a policy issued by Allstate, as a result of which UIM coverage is not available to Michael Carter under the Standard Fire policy. (*Id.*).

In its answer, Siau Agency also admitted that Michael Carter sustained the aforementioned spinal cord injuries in the accident, but denied that he was riding as a passenger in his Dodge Charger and denied that it was negligent in failing to procure insurance for the Carters. (R. pp. 86-87)

All parties filed summary judgment motions. In their motion, the Carters argued that the aforementioned exclusion of UIM coverage is void because it conflicts with S.C. Code Ann. § 38-77-160 (2002) and that, as a result, they are entitled to stack UIM coverage, and that Michael Carter is entitled to coverage under said endorsement. (R. pp. 95-96). In its motion, Standard Fire maintained, among other things, that (1) its policy specifically excludes UIM coverage for any person injured while occupying a motor vehicle owned by that person or a family member that is not insured under the policy; and (2) said exclusion has been sanctioned by the South Carolina Supreme Court in *Burgess v. Nationwide Mutual Insurance Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). (R. pp. 97-98). In its motion, Siau Agency alleged that (1) it had no duty to advise the Carters regarding the insurance policies in question; (2) even if it had such a duty, it was not negligent and did not breach it; and (3) the exclusion in question had been added by an endorsement, of which Debra and Thomas Carter were given notice. (R. pp. 93-94.)

All parties' motions for summary judgment were heard on December 18, 2008 by The Honorable Clifton Newman. On February 11, 2009, Judge Newman entered an order granting Standard Fire's motion on the grounds, among others, that (1) the Carters' Standard Fire policy's exclusion of UIM coverage for anyone occupying a motor vehicle owned by him or any family member that was not insured for UIM coverage under the policy is valid, by virtue of *Burgess v. Nationwide Mutual Insurance Co.*; (2) because said exclusion is valid, UIM coverage is not available to Michael Carter, in that the Carters chose to insure the Dodge Charger involved in the accident with Allstate, and not under the Standard Fire policy; (3) because UIM coverage was validly excluded, UIM coverage under the Standard Fire policy is not available to be stacked on top of the UIM coverage that Michael Carter already received from the Allstate policy covering the vehicle involved in the accident; and (4) the language of the endorsement in the Standard Fire policy is clear and unambiguous, and the Carters are bound by it. (R. pp. 1-24).

Siau Agency's motion was granted on the grounds that Siau Agency had no duty to advise the Carters regarding any exclusions or other provisions in their policy, and there is no evidence that it undertook to do so; that Siau Agency had provided a quote for coverage for Michael Carter under the Standard Fire policy, but that the Carters elected to purchase a cheaper policy; that there was no course of dealing between Siau Agency and the Carters for the Carters to rely upon at the time the Standard Fire policy was purchased; and that there was no special relationship between Siau Agency and the Carters. (R. pp. 27-36).

Both orders were entered on February 11, 2009, and filed on February 18, 2009. The Carters timely served their notice of appeal from both orders on February 27, 2009.

After all parties served and filed briefs, the Court of Appeals reversed and remanded the trial court's order granting Standard Fire's summary judgment motion in a *per curiam* opinion. (Appendix pp. A2-A4). In its opinion, the Court of Appeals relied on the following from *Nakatsu v. Encompass Indemnity Co.*, 390 S.C. 172, 178-81, 700 S.E.2d 283, 287-88 (Ct. App. 2010), reh'g denied (Oct. 29, 2010): (1) "To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails" and (2) "The policy provision conflicts with section 38-77-160 because it does not allow a Class I insured to stack UIM coverage up to the limits of the vehicle in the accident in certain situations, such as the one here. Accordingly, that provision of the policy is void." (Appendix pp. A2-A4). The Court of Appeals did not rule on the remaining issues presented in the appeal and determined its holding with regard to the validity of the exclusion dispositive of the remaining issues on appeal. (Appendix pp. A3-A4).

A Petition for Rehearing was timely filed and denied by the Court of Appeals on May 31, 2009. (Appendix pp. A5-A15). Standard Fire was granted an extension until August 1, 2011 to file its Petition for a Writ of *Certiorari*. Standard Fire's petition, timely filed and served on August 1, 2011, was granted by Order of this Court on October 3, 2012. Standard Fire obtained extensions of time to file its brief and copies thereof, as well as the required additional copies of the Appendix, until January 2, 2013.

## ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO THE STANDARD FIRE INSURANCE COMPANY BASED ON THE COURT OF APPEALS' RECENT DECISION IN *NAKATSU v. ENCOMPASS INDEMNITY CO.*, 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010), IN THAT *NAKATSU* WAS, IT IS RESPECTFULLY SUBMITTED, WRONGLY DECIDED; IS INCONSISTENT WITH THIS COURT'S DECISION IN *BURGESS v. NATIONWIDE MUT. INS. CO.*, 373 S.C. 37, 644 S.E.2d 40 (2007); AND SHOULD BE OVERRULED.

a. Section 38-77-160, on which the Court of Appeals relied in *Nakatsu*, does not require stacking of UIM coverage that is unavailable by virtue of a valid exclusion; rather, it merely prohibits stacking when the insured does not have a vehicle involved in the accident.

In *Nakatsu v. Encompass Indemnity Co.*, the case relied upon by the Court of Appeals, a vehicle driven by Zunita Mattison struck Meagan Nakatsu's vehicle, injuring Ms. Nakatsu. *See Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 175, 700 S.E.2d 283, 285 (Ct. App. 2010), reh'g denied (Oct. 29, 2010). Nakatsu collected the available bodily injury liability coverage (\$25,000) from Mattison's automobile insurance policy. *See id.* She also collected \$25,000 in UIM coverage from her policy on her car involved in the accident. *See id.* She sought to stack UIM coverage of \$25,000 on each of three vehicles insured under a policy issued by Encompass Indemnity Company to her sister and brother-in-law (the Buckners). *See id.* at 177, 700 S.E.2d at 286.

Under the UIM provisions of the Encompass policy, a "Covered Person" included family members "[e]xcept while occupying, or when struck by, a vehicle owned by you or that person which is not insured for this coverage under this policy." *Id.* at 176, 700 S.E.2d at 285. Although Nakatsu was operating the vehicle that she owned and which

was not insured under the Buckners' policy, she argued that she was entitled to stack UIM coverage under that policy because the aforementioned provision was invalid. *See id.* at 177, 700 S.E.2d at 286. Both parties moved for summary judgment. *See id.* The circuit court granted Encompass's motion based on *Burgess v. Nationwide Mutual Insurance Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). *See id.*

On appeal, Nakatsu argued that the exclusion was invalid because it was inconsistent with section 38-77-160 and that *Burgess* was inapplicable. *See id.* at 178, 700 S.E.2d at 286. The Court of Appeals agreed and found *Burgess*, in which stacking was not an issue, distinguishable, since Nakatsu sought to stack UIM coverage. *See id.* at 181, 700 S.E.2d at 288. Further, the Court of Appeals held that the Encompass policy provision conflicted with section 38-77-160 because it would preclude a Class I insured from stacking UIM coverage up to the limits on the vehicle involved in the accident. *See id.* It is respectfully submitted that, in *Nakatsu*, on which the Court of Appeals relied in reversing the circuit court's grant of summary judgment to Standard Fire, the Court of Appeals too narrowly interpreted certain key holdings in *Burgess*, and too broadly interpreted the stacking cases.

In *Nakatsu*, the Court of Appeals held that policy language eliminating UIM coverage in a situation similar to that presented in the case at bar was invalid because it conflicts with section 38-77-160, as interpreted in several South Carolina appellate court cases. *See id.* The portion of section 38-77-160 that purportedly mandates stacking in this situation is as follows:

If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If

none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

S.C. Code Ann. § 38-77-160 (2002). The above-quoted language has been interpreted to mean that, in a stacking situation, the insured cannot stack UIM coverage in an amount greater than the UIM limit on the vehicle involved in the accident. *See S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 445, 405 S.E.2d 396, 398 (1991); *Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 211, 473 S.E.2d 843, 845 (Ct. App. 1996). However, none of the South Carolina appellate court cases that have held that a Class I insured can stack UM or UIM coverage involved coverage that had been validly excluded. Moreover, it is respectfully submitted that none has held that section 38-77-160 requires stacking.

The first case to address stacking of UIM coverage after the enactment of S.C. Code Ann. § 56-9-831 (recodified as § 38-77-160 in 1987) was *Gambrell v. Travelers Insurance Companies*. *See Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983), *holding modified by Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985). In answering a certified question from the United States Court of Appeals for the Fourth Circuit, this Court held that “under the present circumstances”, the insured “may stack” UIM coverage, since § 56-9-831 specifically prohibited stacking in only two situations, neither of which was applicable. The Court then said:

We interpret the first exception to allow an insured to stack any underinsured motorist coverage he maintains up to, but not in excess of the basic liability limits of 15-30-5 . . . .

*Id.* at 73, 310 S.E.2d at 817. The Court also observed that the second exception in section 56-9-831 dealt with the situation where none of an insured’s vehicles is involved in the accident, which was not the case. *See id.* The Court concluded by holding that the

insured was “entitled to stack her underinsured motorist coverage for her two vehicles.” *Id.* at 74, 310 S.E.2d at 817.

Unlike the case bar, no exclusion of UIM coverage was at issue. Since the statute’s two prohibitions against stacking did not apply, and the insured had purchased UIM coverage on two vehicles, she was “entitled” to stack. *See id.* at 73-74, 310 S.E.2d at 817. This Court did not hold that the statute **required** stacking. *See id.* The insured was entitled to stack because (1) the statute did not prohibit it and (2) she paid for two coverages. *See id.*

Only a month later, in *Garris v. Cincinnati Insurance Co.*, this Court again addressed UIM stacking – this time on certified questions from the United States District Court for the District of South Carolina. *See Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984), *superseded by statute*, S.C. Code Ann. § 38-77-30(14), *as recognized in State Farm Mut. Auto. Ins. Co. v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991). First, the Court considered the definition of UIM coverage, concluding that, “[t]he language of [§ 56-9-831] clearly indicates underinsured motorist coverage is optional coverage provided by an automobile insurance carrier for instances where damages are sustained by an insured in excess of the liability limits of the at-fault driver.” *Id.* at 153, 311 S.E.2d at 725-26. Second, when addressing the questions of how and to whom UIM coverage must be offered, the Court reiterated the optional nature of UIM coverage, observing that “unlike liability insurance and uninsured motorist coverage, underinsured motorist coverage is not mandatory.” *Id.* at 154, 311 S.E.2d 2d at 726 (citations omitted).

The third question was whether “basic” UIM limits could be stacked. *See id.* at 154-55, 311 S.E.2d at 726-27. Citing *Gambrell*, the Court noted that the legislature, by expressly stating that UIM coverage in excess of the basic limit (then 15/30/5) cannot be stacked, made it clear that UIM coverage not exceeding the basic limit “can be” stacked. *See id.* at 155, 311 S.E.2d at 727. Before addressing each claimant’s situation, the Court said that basic UIM coverage on each vehicle on an insurance policy “can generally be stacked.” *See id.* Since the insureds in question did not have a vehicle involved in the subject accident, they were deemed to be Class II insureds prohibited by § 56-9-831 from stacking. *See id.* at 156, 311 S.E.2d at 727.

For purposes of this appeal, the significance of *Garris* is that the Court emphasized the optional nature of UIM coverage and that the statute specifically prohibited stacking, and observed that UIM coverage not exceeding the basic limit “can be” stacked. *See id.* at 725-27, 311 S.E.2d at 153-56.

This Court addressed stacking in the context of uninsured motorist (UM) coverage in *Nationwide Mutual Insurance Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985). The Court noted that, in *Gambrell* and *Garris*, it had interpreted § 56-9-831 to “allow” stacking of UIM coverage up to, but not in excess of, the basic limits. *See id.* at 9, 339 S.E.2d at 503. The Court then clarified *Gambrell* and *Garris*, indicating that, while the statute sets a cap on stacking in the amount of the basic limits, it does not prohibit stacking in excess of the basic limits to the extent of that cap. *See id.*

The four policies at issue each contained provisions whereby UM payments were to be reduced by any UM coverage applicable to the vehicle involved in the accident. *See id.* at 11, 339 S.E.2d at 504. The Court held these provisions to be void, observing that

“any limiting language in an insurance contract which has the effect of providing less protection than made obligatory by the statute is contrary to public policy and is of no force and effect.” *Id.* at 11-12, 339 S.E.2d at 504 (citation omitted). Of course, unlike UIM coverage, basic UM coverage is mandatory. *Nationwide* is therefore distinguishable from the situation presented in the case at bar. Moreover, like *Gambrell* and *Garris*, *Nationwide* does not say that the statute requires that Class I insureds be allowed to stack. On the contrary, the Court observed that *Gambrell* and *Garris* interpreted the statute to “allow” stacking. *Id.* at 9, 339 S.E.2d at 503.

In *Fireman's Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 295 S.C. 538, 370 S.E.2d 85 (1988), this Court reiterated the distinctions between Class I and Class II insureds, then said, “Preliminarily, the issue to be resolved is within which class is stacking permitted.” *Id.* at 544, 370 S.E.2d at 88. (It is noteworthy that the Court did not describe the issue to be resolved as “within which class is stacking required.”) The Court also said, “In *Nationwide*, we held that stacking of uninsured motorist coverage was **allowed** when the insured comes within Class I . . . .” *Id.* at 545, 370 S.E.2d at 89 (emphasis added).

Thus, *Gambrell*, *Garris*, *Nationwide*, and *Fireman's* indicate that when it comes to stacking of UIM and UM coverages, the question is not whether the statute requires it, but whether, stacking being generally permitted, the statute prohibits it. These cases made it clear that Class I insureds (who have a vehicle involved in the accident) may stack, but Class II insureds (who do not have a vehicle involved in the accident) are specifically prohibited from stacking by the second exception in the statute. See S.C. Code Ann. § 38-77-160 (2002) (“If none of the insured’s or named insured’s vehicles is

involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.”).

There are cases, some of which are discussed below, in which the Court refers to the insured as being “entitled” to stack or having a “right” to stack. However, it is respectfully submitted that a close reading of these cases reveals that, while stacking is generally permitted, the UIM statute has not been interpreted so as to require it.

For example, in *American Security Insurance Co. v. Howard*, Mr. Howard was injured while driving his motorcycle, which was insured by American Security Insurance Company under a policy that included \$15,000 in UIM coverage, which American Security paid. *See Am. Sec. Ins. Co. v. Howard*, 315 S.C. 47, 49, 431 S.E.2d 604, 606 (Ct. App. 1993), *overruled on other grounds by Concrete Servs., Inc. v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 498 S.E.2d 865 (1998). Mr. Howard’s wife, with whom he resided, insured three vehicles under a policy issued by South Carolina Insurance Company (SCIC). *See id.* Because SCIC’s offer of UIM coverage was inadequate, the Court required reformation of the policy to include UIM coverage on each vehicle. *See id.* at 52, 431 S.E.2d at 608. However, the policy contained an exclusion of such coverage to a person occupying a motor vehicle owned by the named insured or any family member which was not insured under the policy. *See id.* Citing *Nationwide Mutual Insurance Co. v. Howard* for the proposition that a policy provision cannot limit UIM coverage to the use of the insured vehicle, the Court held the exclusion to be invalid. *See id.* at 53, 431 S.E.2d at 608.

Although the Court also held that, as a Class I insured, Mr. Howard was “entitled” to stack the UIM coverages from his wife’s policy, its invalidation of the exclusion was

not based on Mr. Howard's ability to stack, nor did the Court hold that § 38-77-160 required that he be allowed to stack. *See id.* at 55, 431 S.E.2d at 610. Rather, the Court's invalidation of the exclusion was based on the concept of portability. *See id.* at 52-53, 431 S.E.2d at 608. However, in *Burgess*, this Court held that "public policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at-home' UIM coverage when the insured has a vehicle involved in the accident." *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 43, 644 S.E.2d 40, 42 (2007). Thus, *American Security Insurance Co. v. Howard* is distinguishable and not controlling.

Moreover, in reaching its conclusion, the Court relied in part on *McAlister v. State Farm Mutual Automobile Insurance Co.*, in which the insured, Mr. McAlister, was injured while driving his truck, which was insured under a State Farm policy with no UIM coverage. *See McAlister v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 113, 114, 390 S.E.2d 383, 384 (Ct. App. 1990). He sought \$25,000 in UIM coverage under a separate policy issued to him by State Farm on his car; however, that policy limited UIM coverage to \$15,000 if the insured was not driving the vehicle listed on the policy at the time of the accident. *See id.* State Farm argued that it should be able to rely on its policy language when the insured is injured while driving an owned vehicle with no UIM coverage, and that even a provision completely excluding UIM coverage under such circumstances would be permissible. *See id.* at 115, 390 S.E.2d at 384. Citing *Gambrell* for the proposition that, "the only restriction recognized by the statute is that an insured may not have a greater amount of underinsured motorist coverage than he has liability coverage", the Court rejected State Farm's argument. *Id.* However, as a result of this Court's *Burgess* decision, the precedential value of *McAlister*, and therefore of *American Security*

*Insurance Co.*, is extremely limited.

The genesis of the concept that stacking is “generally permitted” appears to be *Gambrell*, in which the Court held that, “under the circumstances” the insured could stack UIM coverage on the ground that the applicable statute (then § 56-9-831) specifically prohibited it in only two situations, neither of which was applicable. See *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 73, 310 S.E.2d 817, 817 (1983), holding modified by *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985). Thus, it appears that, when an insured is allowed to stack UIM coverages, it is because the statute does not prohibit it – not because the statute requires it.

**b. Although stacking is “generally permitted”, it may be proscribed by statute or a valid policy provision.**

The question of whether liability coverage on non-owned vehicles could be stacked was at issue in *Jackson v. State Farm Mutual Automobile Insurance Co.*, 288 S.C. 335, 342 S.E.2d 603 (1986), declined to be followed by *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998). In *Jackson*, the Court expounded on the notion that stacking is “generally permitted”:

Stacking is generally permitted unless limited by statute or by a valid policy provision. 7 Am.Jur.2d, *Automobile Insurance*, Section 326. See also, *Gambrell v. Travelers Insurance Companies*, 280 S.C. 69, 310 S.E.2d 814 (1983). The test is how many additional coverages the insured has contracted for and purchased. *Esler v. United Services Automobile Association*, 273 S.C. 259, 255 S.E.2d 676 (1979).

*Id.* at 336, 342 S.E.2d at 604. The Court then held that, since coverage for non-owned vehicles is not required by statute, but rather by a voluntary contract in which the parties may choose their own terms, policy provisions limiting the amount stackable were valid. See *id.* at 337, 342 S.E.2d at 604-05. The Court also observed that the provision in

question (limiting the amount of coverage that could be stacked) would be unenforceable as to coverage required by statute. *See id.* at 337, 342 S.E.2d at 605.

Not only does it appear that *Gambrell* permitted UIM stacking – not because the statute required it, but because it did not prohibit it – but also that the rule that stacking is “generally permitted” originated in *Jackson*, which cited American Jurisprudence (Second) for the proposition. *See id.* at 336, 342 S.E.2d at 604. Thus, while stacking is generally permitted, it may be limited by statute (as in *Garris*) or by a valid policy provision (as in *Jackson*).

- c. **Because § 38-77-160 does not require that Class I insureds be allowed to stack, the exclusion in The Standard Fire policy is valid and enforceable.**

This Court again addressed stacking of liability coverage in *Giles v. Whitaker*, 297 S.C. 267, 376 S.E.2d 278 (1989). Citing *Jackson*, the Court said:

Stacking is defined as the insured’s recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met. An insurance policy provision which attempts to limit stacking of statutorily-required coverage is invalid. *Jackson v. State Farm Mutual Automobile Ins. Co.*, 288 S.C. 335, 342 S.E.2d 603 (1986).

\* \* \*

Because there is no statutory requirement that State Farm provide liability coverage for vehicles other than one described in the policy, the policy provisions limiting stacking of liability insurance were valid. . . .

*Id.* at 268-69, 376 S.E.2d at 279-80.

UIM coverage is optional and “entirely voluntary.” *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). Limitations on the portability of even basic “at-home” UIM coverage when the insured has a vehicle involved in the accident therefore do not offend public policy. *See id.* The applicable statute (now § 38-

77-160) only prohibits stacking where none of the insured's vehicles is involved in the accident. Neither the statute nor the cases (with the exception of *Nakatsu*), however, **require** that Class I insureds be allowed to stack UIM coverage that is subject to an otherwise valid exclusion, as in the case at bar. On the contrary, the cases indicate that stacking is generally permitted (*Jackson*); that the coverages that may be stacked are those that are "available" to the insured (*Giles*); and that public policy permits a restriction on UIM coverage where the insured has chosen to insure the vehicle involved in the accident with a different insurer, as in the case at bar. (*Burgess*)

The case of *South Carolina Farm Bureau Mutual Insurance Co. v. Mooneyham* is also instructive. See *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 405 S.E.2d 396 (1991). Ms. Mooneyham, a Class I insured, was injured in an automobile accident. See *id.* at 443, 405 S.E.2d at 396-97. She had three automobile policies with Farm Bureau. See *id.* The one covering the vehicle involved in the accident included bodily injury UIM coverage of \$25,000 per person, but the other two policies' UIM limits were only \$15,000 per person. See *id.* This Court held that "when the car involved in the accident has underinsured motorist coverage in excess of the basic limits, the insured is entitled to stack underinsured motorist coverage from other policies in an amount equal to the coverage on the car involved in the accident."- *Id.* at 445, 405 S.E.2d at 398. Although the opinion indicates that the insured was "entitled" to stack, it is apparent that this "entitlement" is based on the fact that the Mooneyhams had purchased three UIM coverages from Farm Bureau, and, since Ms. Mooneyham had a vehicle involved in the accident, the statute did not prohibit her from stacking. See *id.* at 445-46, 405 S.E.2d at 397-98. This Court said:

In *Nationwide*, we stated that the statute “sets a cap on stacking in the amount of basic limits, and does not proscribe stacking of policies with coverage in excess of basic limits to the extent of this cap.” 288 S.C. at 9, 339 S.E.2d at 503. The “cap” that *Nationwide* refers to comes from the language of the statute which states that the insured “is protected only to the extent of the coverage he has on the car involved in the accident.” Thus, this language “limits the amount of coverage which may be stacked from policies on vehicles not involved in an accident to an amount no greater than the coverage on the vehicle involved in the accident.” 288 S.C. at 11, 339 S.E.2d at 504. . . .

We reject Farm Bureau’s argument that the statute prohibits an insured from stacking when the car involved in the accident has excess underinsured coverage.

*Id.* at 445-46, 405 S.E.2d at 398. Once again, a valid exclusion of UIM coverage was not an issue. The issue was whether the statute prohibited stacking in the situation presented. The Court held that it did not. *See id.* It did not, however, hold that Ms. Mooneyham’s ability to stack in this situation was conferred by statute. This is not surprising, since “[s]tacking is generally permitted unless limited by statute or by a valid policy provision.” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 336, 342 S.E.2d 603, 604 (1986), *declined to be followed by* *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998); *see also* *Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 73, 310 S.E.2d 814, 817 (1983), *holding modified by* *Nationwide Mut. Ins. Co. v. Howard*, 288 S.C. 5, 339 S.E.2d 501 (1985). That is, the “right” to stack UIM coverage is conferred as a matter of public policy – not by statute – and it may therefore be restricted by a valid policy provision, such as that at issue in *Burgess* and in the case at bar.

Support for this proposition may be found in *Brown v. Continental Insurance Co.*, 315 S.C. 393, 434 S.E.2d 270 (1993). Mr. Brown sought to stack both UIM and UM benefits on two vehicles covered by his policy with Continental. *See id.* at 394, 434 S.E.2d at 271. However, neither of those vehicles was involved in the accident. *See id.*

The Court held that, notwithstanding a 1987 change in the statute (when § 56-9-831 was recodified as § 38-77-160), the statute still “clearly restricts stacking by providing for coverage from ‘any one’ vehicle.” *Id.* at 395, 434 S.E.2d at 271-72. The Court observed that the policy also prohibited stacking. *See id.* at 395-96, 434 S.E.2d at 272. The insureds argued that such restrictions on stacking were invalid by virtue of *Jackson* and *Giles*. *See id.* at 396, 434 S.E.2d at 272. In response, the Court said:

In *Jackson* and *Giles*, we held that a policy provision which attempts to limit stacking of “statutorily required coverage” is invalid. In *Jackson*, we specifically noted that required coverage includes coverage that is required to be provided *or required to be offered*. 342 S.E.2d at 604, n. 1. Thus, the Browns correctly assert that UM and UIM qualify as “statutorily required coverage.”

*Jackson* and *Giles*, however, involved liability insurance which is not subject to a *statutory* restriction on stacking. Here, § 38-77-160 prohibits stacking of UM and UIM when an insured vehicle is not involved in the wreck. The policy restriction merely tracks the statutory restriction and is therefore valid.

*See id.*

With regard to the case at bar, *Brown* is significant for two reasons. First, citing *Jackson*, the Court indicated that UIM coverage was “statutorily required” because it is “required to be offered.” *See id.* Second, the Court held that, because Mr. Brown did not have a vehicle involved in the accident, he was prohibited by both the statute and the policy provision from stacking. *See id.* at 395-96, 434 S.E.2d at 272. The first point is addressed in subsection d. below. The second point supports Standard Fire’s construction of the statute and the cases interpreting it, i.e., that UIM stacking is generally allowed unless prohibited by statute or a valid policy provision, but it is not statutorily required.

- d. ***Burgess* implicitly overruled older cases holding that UIM coverage is “statutorily required” because it is “required to be offered”, as a result of which the exclusion in the Carters’ Standard Fire policy is valid and enforceable.**

*Nakatsu*, on which the Court of Appeals relied in the case at bar, held that an exclusion similar to the provision at issue in *Burgess* and in the Standard Fire policy is invalid in what would otherwise be a stacking situation. However, *Nakatsu* is largely premised on the proposition that UIM coverage is “statutorily required” since it is “required to be offered.” *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 179, 700 S.E.2d 283, 287 (Ct. App. 2010), reh’g denied (Oct. 29, 2010). The opinion relies on *Ruppe v. Auto–Owners Insurance Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998) for this proposition.

In *Ruppe*, as in *Jackson* and *Giles*, the issue was whether liability coverage was stackable. See *Ruppe v. Auto–Owners Ins. Co.*, 329 S.C. 402, 403-04, 496 S.E.2d 631, 631 (1998). Citing *Jackson*, the Court reiterated that, “Generally, stacking of additional coverage for which the insured has contracted is permitted unless limited by statute or a valid policy provision.” *Id.* at 404, 496 S.E.2d at 631-32. The Ruppes argued that a policy provision limiting the stacking of statutorily required liability coverage is invalid. See *id.* at 404, 496 S.E.2d at 632. Citing *Brown*, the Court said that “Statutorily required coverage is that which is required to be offered or provided.” *Id.* at 404-05, 496 S.E.2d at 632. The Court then observed that:

Dicta in *Jackson*, *supra*, states the rule that stacking of statutorily required coverage cannot be contractually prohibited. A review of current stacking cases, however, indicates the statement is an oversimplification of our stacking law and we decline to apply it here.

*Id.* at 405, 496 S.E.2d at 632. The Court then distinguished the statute mandating liability coverage on the ground that such coverage, while statutorily required, is limited to the vehicle for which it is purchased, and held that a policy provision prohibiting stacking of such coverage is consistent with the statute mandating such coverage. *See id.* at 405-06, 496 S.E.2d at 632-33. The Court said:

The guiding principle to be gleaned from our current stacking law is that stacking may be prohibited by contract if such a prohibition is consistent with statutory insurance requirements.

*Id.* at 406, 496 S.E.2d at 633. It is respectfully submitted that the proposition that Class I insureds' ability to stack UIM coverage cannot be restricted because such coverage is "statutorily required" is, as in *Ruppe*, "an oversimplification of our stacking law", especially in light of this Court's 2007 *Burgess* decision, and that, as in *Ruppe*, it should not be applied here. *See id.* at 405, 496 S.E.2d at 632.

In *Burgess*, this Court said, "UIM coverage is entirely voluntary, and permits insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages." *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). This language directly contradicts *Ruppe*, *Brown* and *Jackson*, in which UIM coverage was, as set forth above, described as "statutorily required" because it "is required to be offered or provided." *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404-05, 496 S.E.2d 631, 632 (1998); *Brown v. Continental Ins. Co.*, 315 S.C. 393, 396, 434 S.E.2d 270, 272 (1993); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 337, 342 S.E.2d 603, 604 n. 1 (1986), *declined to be followed by Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998). This is significant because "statutorily

required coverage cannot be contractually prohibited.” *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 405, 496 S.E.2d 631, 632 (1998). *Burgess* made it very clear that UIM coverage is “entirely voluntary,” as a result of which restricting the portability of UIM coverage where the insured was injured in an owned vehicle not described in the policy does not violate public policy and is therefore permissible. *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). Standard Fire respectfully submits that *Burgess* implicitly overruled *Ruppe* and its predecessors to the extent that they held that UIM coverage is “statutorily required.”

Due to space limitations, it is not practical to address all of the UIM stacking cases. As discussed above, there are cases that say that an insured is “entitled” to stack or has a “right” to stack. *See Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 211, 473 S.E.2d 843, 845-46 (Ct. App. 1996); *American Sec. Ins. Co. v. Howard*, 315 S.C. 47, 54-55, 431 S.E.2d 604, 609-10 (Ct. App. 1993); *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 445-46, 405 S.E.2d 396, 398 (1991). It is respectfully submitted, however, that they do not hold that § 38-77-160, or its predecessor, or any other statute, requires stacking. Rather, stacking of all available coverages is “generally permitted,” unless prohibited by statute or a valid policy provision. *See Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 336, 342 S.E.2d 603, 604 (1986), *declined to be followed by Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998). That is, the insured could be said to have a “right” to stack, or to be “entitled” to stack – not based on any statute, but on the proposition that stacking is “generally” permitted unless prohibited by statute or a valid policy provision. Section 38-77-160 does not prohibit Class I insureds from stacking; therefore, unless there is a valid policy provision prohibiting it,

such insureds are “entitled” to stack. With the exception of *Nakatsu*, the stacking cases have not involved a valid policy exclusion. (*American Security Insurance Co.* involved a similar policy exclusion that was held to be invalid – not because it would prevent the insured from stacking – but largely based on *McAlister*, in which the outcome was inconsistent with *Burgess*. See discussion *infra* pp. 13 - 15.) Where the statute does not prohibit stacking and no policy exclusion is at issue, the insured can be said to have a “right” to stack, or to be “entitled” to stack, since stacking is, after all, “generally permitted” in the absence of these two factors.

The exclusion in the Standard Fire policy is a valid policy provision by virtue of *Burgess*. Therefore, Michael Carter cannot stack UIM coverage from his parents’ policy. This outcome is consistent with the rule that stacking is generally permitted unless limited by statute or a valid policy provision.

- e. **The cases on which the Court of Appeals relied in *Nakatsu* are distinguishable and do not require stacking under the circumstances presented in this case.**

The *Nakatsu* Court also relied on *Mooneyham*. However, *Mooneyham* is distinguishable, as are all the South Carolina stacking cases, because the UIM coverage held to be stackable was not the subject of a valid exclusion, as in the case at bar. In *Mooneyham*, the insured had \$25,000 in UIM coverage on the vehicle that was involved in the accident, but only \$15,000 in UIM coverage on vehicles covered under two other policies. See *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 443, 405 S.E.2d 396, 397 (1991). The question presented on appeal was whether the following sentence from § 38-77-160, relied upon by Respondents in the case at bar, prohibited *Mooneyham* from stacking the UIM coverage on the vehicles not involved in the accident:

If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident.

*Id.* at 444, 405 S.E.2d at 397.

The Court held that, even when the car involved in the accident has UIM coverage in excess of the basic limits, the insured is still entitled to stack, but only in an amount equal to the coverage on the vehicle involved in the accident. *See id.* at 445-46, 405 S.E.2d at 398. The insurer had argued that section 38-77-160 prohibits the insured from stacking when the vehicle involved in the accident has excess UIM coverage. *See id.* at 446, 405 S.E.2d at 397-98. The insurer did not argue that the UIM coverage on the vehicles not involved in the accident had been excluded. *See id.* Thus, the issue of whether or not an insurer may exclude UIM coverage if the insured is injured while occupying a vehicle that he or a family member owns but does not insure under the policy was not before the Court. *See id.*

*Mooneyham* therefore does not stand for the proposition that an insured with excess UIM coverage on the vehicle involved in the accident must be allowed to stack UIM coverages from other policies regardless of whether such coverage has been validly excluded. Standard Fire does not dispute that, if UIM coverage were available under its policy, Michael Carter would be entitled to stack it. However, *Burgess* makes it clear that there is no such UIM coverage available to stack because the policy contains a valid exclusion of such coverage when the insured is, at the time of the accident, occupying a vehicle that he or a family member owns but does not insure under the policy in question.

The case of *Kay v. State Farm Mutual Automobile Insurance Co.*, 349 S.C. 446, 562 S.E.2d 676 (Ct. App. 2002), also relied upon by the Court of Appeals in *Nakatsu*, is

also distinguishable. Unlike the provision in the Standard Fire policy and the one at issue in *Burgess*, the State Farm policy provision in *Kay* sought to limit the amount of UIM coverage that could be stacked to the minimum limit, rather than to the amount of coverage on the vehicle involved in the accident. *See id.* at 448-49, 562 S.E.2d at 678. That is, contrary to established law, State Farm had attempted to limit the amount stackable, whereas the Standard Fire exclusion provides that there is no UIM coverage at all under similar circumstances. *See id.* at 450, 562 S.E.2d at 678-79. The State Farm exclusion violated the stacking rules. *See id.*

In *Kay*, the State Farm policy did not exclude UIM coverage in the manner sanctioned by the Court in *Burgess*. If it had done so, then there would have been no UIM coverage available under its policy to stack. In *Kay*, UIM coverage was available to the insured under his State Farm policy. *See id.* Since it was available, and not excluded as it is in the Standard Fire policy, *Kay* could stack. *See id.* However, State Farm's policy provided that *Kay* could only stack \$15,000, rather than \$25,000, which was the amount of UIM coverage that he had purchased on the vehicle involved in the accident. *See id.* at 448, 349 S.E.2d at 677. This was clearly contrary to established law to the effect that a Class I insured can stack all UIM coverages available to him in the same amount as the UIM coverage on the vehicle involved in the accident. *See id.* at 449, 562 S.E.2d at 678 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 446, 405 S.E.2d 396, 398 (1991)).

The Standard Fire exclusion, on the other hand, is valid and enforceable by virtue of *Burgess*. It therefore does not constitute an illegal limitation on stacking. Rather, because the exclusion is valid, there is no UIM coverage available under the Standard

Fire policy to stack. The Court in *Kay* said that the insurer's "provision limiting stacking of UIM coverage to the minimum limits is invalid because it purports to limit the amount of coverage to an amount less than that available on the involved vehicle's policy." *Id.* at 449, 562 S.E.2d at 678 (emphasis added). This highlights the distinction between the two cases. Standard Fire's provision excludes UIM coverage in this situation in accordance with *Burgess*; it does not seek to limit stacking to the minimum limits or otherwise.

In *Nakatsu*, the Court of Appeals cited *State Farm Mutual Automobile Insurance Co. v. Calcutt* for the proposition that "[s]tatutory provisions relating to an insurance contract are part of the contract as a matter of law . . . [, and] [t]o the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 178, 700 S.E.2d 283, 287 (Ct. App. 2010), reh'g denied (Oct. 29, 2010) (quoting *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000), *overruled by Sweetser v. S.C. Dep't of Ins. Reserve Fund*, 390 S.C. 632, 703 S.E.2d 509 (2010)). Standard Fire does not dispute this proposition of law. However, its exclusion does not conflict with section 38-77-160 or any other statutory provision. Section 38-77-160 prohibits insureds who do not have a vehicle involved in the accident from stacking. It also restricts insureds who have vehicles involved in the accident from stacking in amounts greater than the coverage on the vehicle involved in the accident. However, as set forth above, it does not require that such insureds' policies allow them to stack coverage that is not available by virtue of a valid exclusion.

While there is indeed a factual distinction between the situation presented in *Burgess* and that presented in the case at bar, *Burgess* nevertheless applies, and the exclusion precludes coverage. In *Burgess*, this Court approved of a restriction on UIM coverage “when the insured has a vehicle involved in the accident.” *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). Michael Carter had a vehicle involved in the accident, and the exclusion in his parents’ Standard Fire policy therefore applies.

Although Standard Fire has not prohibited stacking, but merely excluded UIM coverage in a manner similar to that sanctioned in *Burgess*, it is noteworthy that this Court has held that insurance companies may prohibit the stacking of non-mandatory coverage. See *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993), *superseded by statute*, S.C. Code Ann. § 38-77-145 and S.C. Code Ann. § 38-77-290, *as recognized in Mount v. Sea Pines Co., Inc.*, 337 S.C. 355, 523 S.E.2d 464 (Ct. App. 1999); *see also Giles v. Whitaker*, 297 S.C. 267, 376 S.E.2d 278 (1989); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 342 S.E. 2d 603 (1986), *declined to be followed by Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998). Those cases involved personal injury protection (PIP) coverage, liability coverage on vehicles not involved in the accident, and non-owned vehicle liability coverage respectively. As discussed above, although in *Garris* this Court described UIM coverage as “optional” and “not mandatory”, in *Jackson*, *Brown* and *Ruppe*, “statutorily required coverage” was defined to include not only coverage that is required to be provided, but also coverage that is required to be offered which, of course, would include UIM coverage. Since, as set forth above, *Burgess* implicitly overruled these cases to the extent that they held that

UIM coverage is “statutorily required,” it is respectfully submitted that *Nakatsu* was wrongly decided, and that the case at bar is more akin to *Richardson, Giles, and Jackson*, in which prohibitions on stacking were upheld.

In summary, stacking is generally permitted, unless prohibited by statute or a valid policy provision. See *Jackson v. State Farm Mut. Ins. Co.*, 288 S.C. 335, 336, 342 S.E.2d 603, 604 (1986), *declined to be followed by Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 496 S.E.2d 631 (1998). In *Burgess*, this Court held that public policy is not offended by a restriction on the portability of UIM coverage, and that restriction was similar to that contained in the Standard Fire policy. See *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41-42, 644 S.E.2d 40, 43 (2007). The exclusion in the Carters’ Standard Fire policy is therefore valid, and there is no additional UIM coverage for Michael Carter to stack on top of the UIM coverage that he has already stacked from his own carrier, Allstate.

- f. **Even if § 38-77-160 could be said to require stacking of UIM coverage for Class I insureds, only “available” coverages may be stacked, and UIM coverage under Michael Carter’s parents’ policy is not “available” by virtue of a valid policy provision.**

Stacking is “the insured’s recovery of damages under more than policy until all of his damages are satisfied or the limits of all **available** policies are met.” *Giles v. Whitaker*, 297 S.C. 267, 268, 376 S.E.2d 278, 279 (1989) (emphasis added); see also *Continental Ins. Co. v. Shives*, 328 S.C. 470, 473, 492 S.E.2d 808, 810 (Ct. App. 1997). Thus, the very definition of stacking recognizes that the coverage must be “available” before it can be stacked. As a Class I insured, Michael Carter received a total of \$500,000 in UIM coverage from his automobile insurance carrier, Allstate, having

stacked \$250,000 in such coverage available on his other vehicle listed on the policy on top of the \$250,000 in UIM coverage on the Dodge Charger that he occupied at the time of the accident. However, by virtue of *Burgess*, insurers may restrict or even exclude UIM coverage if their insureds incur damages as a result of an accident involving a vehicle owned by the insured or a relative but not insured under the subject policy. See *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007) (“[P]ublic policy is not offended by an automobile insurance policy provision which limits the portability of basic ‘at-home’ UIM coverage when the insured has a vehicle involved in the accident.”). Because Michael owned the Dodge Charger that he occupied at the time of the accident, but chose not to insure it under his parents’ policy with Standard Fire, that policy’s exclusion applies and UIM coverage on the Standard Fire policy issued to Michael’s parents was not “available” to him.

While *Burgess* did not involve stacking, the case at bar does not involve stacking either, in that UIM coverage is not available under the Standard Fire policies by virtue of the exclusion. While there is a factual distinction between the situation presented in *Burgess* and that presented in the case at bar, *Burgess* nevertheless applies and the exclusion precludes coverage. In *Burgess*, Mr. Burgess had chosen to insure his motorcycle under a different policy than that which insured his other vehicles, all of which were insured by Nationwide. See *id.* at 39, 644 S.E.2d at 41. Similarly, the Carters chose to insure the vehicle that was involved in the accident under a policy issued by Allstate, rather than under the Standard Fire policy issued to Mr. and Mrs. Carter. In *Burgess*, the insured chose not to purchase any UIM coverage on the vehicle that was involved in the accident. See *id.* The Carters chose to purchase UIM coverage on the

vehicle involved in the accident under a policy issued by Allstate to Michael Carter. Because the Carters chose not to insure that vehicle under the Standard Fire policy, the exclusion applies.

The language of the endorsement is clear. UIM coverage is excluded for any person while occupying any vehicle owned by a named insured or “family member” that is not insured for UIM coverage under the policy. Michael Carter was, at the time of the accident, occupying a vehicle that he owned and which was not listed or insured at all under the Standard Fire policy. Rather, the Carters chose to insure it with Allstate.

Reading the South Carolina stacking cases and *Burgess* together, it is apparent that Class I insureds may stack any coverage that is available to them, but the amount stackable is limited to the amount of coverage on the vehicle involved in the accident, if any. There is no requirement, however, that they be allowed to stack in the amount of coverage on the vehicle involved in the accident where the coverage otherwise available from other policies has been properly excluded. *Burgess* held that an “owned auto” exclusion similar to that in the Standard Fire policy is valid and enforceable. Thus, there is no coverage to be stacked.

Even if it could be said to require that Class I insureds be allowed to stack, § 38-77-160 does not require stacking of UIM coverage that does not exist. It says in part that “the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident . . . .” Michael Carter was indeed protected to the extent of the UIM coverage he had on his Allstate policy covering his Dodge Charger and his other vehicle. He stacked \$250,000 from each vehicle, for a total of \$500,000 in UIM coverage under his policy with Allstate.

Standard Fire agrees that, if the Carters had chosen to insure the Dodge Charger on the Standard Fire policy, the exclusion would not apply, and Michael Carter would be able to stack UIM coverage on all vehicles listed on the policy. Standard Fire also agrees that, if the exclusion that applies when an owned vehicle is insured with a different insurer were not included in the policy, Michael Carter could also stack UIM coverage from the three vehicles on his parents' policy in the same amount as the UIM coverage he had with Allstate on his Dodge Charger. However, (1) the Carters did choose to insure the Charger under a cheaper policy issued by Allstate; (2) their Standard Fire policy does include an exclusion of UIM coverage in that situation; and (3) that exclusion is valid by virtue of *Burgess*.

As set forth above, the Standard Fire policy excludes UIM coverage for bodily injury or property damage sustained by any person:

While "occupying" . . . any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy. . . . .

(R. p. 338).

This exclusion applies because the Dodge Charger involved in the accident was owned by Michael Carter at the time of the accident, and it is undisputed that he qualifies as a "family member" because he was living with his parents at that time. (R. p. 206, lines 11-21). Thus, while Michael Carter has received liability coverage paid on behalf of Mr. Collins' estate and has stacked UIM coverage under his own policy with Allstate, he is not entitled to UIM coverage under his parents' policy with Standard Fire, since his Dodge Charger was not insured under that policy.

The limitation on UIM coverage that was upheld by this Court in *Burgess*

provided that:

If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:

\* \* \*

- b) be excess if the involved vehicle is not your auto described in this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.

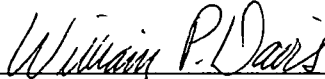
*Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 39, 644 S.E.2d 40, 41 (2007).

Noting that neither S.C. Code Ann. § 38-77-160 nor precedent is on point, this Court held that, because UIM is entirely voluntary, a policy provision limiting basic UIM portability when the insured is involved in an accident while in a vehicle that he owns but does not insure under the policy does not violate public policy. *See id.* at 42, 644 S.E.2d at 43. Thus, by virtue of *Burgess*, insurers are allowed to restrict or even exclude UIM coverage if their insureds incur damages as a result of an accident involving a vehicle owned by the insured or a resident relative but not insured under the subject policy.

#### CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Standard Fire submits that the Court of Appeals' opinion in the within action should be reversed, and that *Nakatsu* should be overruled.

Respectfully submitted,



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*Attorneys for Petitioner*

January 2, 2013

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

APPEAL FROM COLLETON COUNTY

JAN 2 2013

Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2011-193846  
Opinion No. 175 (S.C. Ct. App. filed April 18, 2011)

Thomas M. Carter, Debra Carter, and Christopher Michael Carter..... Respondents,

v.

The Standard Fire Insurance Company and Frank L. Siau Agency, Inc. .... Defendants,

Of whom

The Standard Fire Insurance Company is the ..... Petitioner.

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**PROOF OF SERVICE**

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I, William P. Davis, attorney for Petitioner The Standard Fire Insurance Company, do hereby certify that I have this 2<sup>nd</sup> day of January 2013 served all counsel of record with copies of **Petitioner's Brief and Proof of Service Thereof** by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following addresses:

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January 2, 2013

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## HAND DELIVERY

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: Thomas M. Carter, Debra Carter and Christopher Michael Carter,  
Respondents v. The Standard Fire Insurance Company and Frank L. Siau  
Agency, Inc., Defendants, of whom The Standard Fire Insurance Company is  
the Petitioner.

Appellate Case No.: 2011-193846

Our File No.: 7746.1470.2

Dear Mr. Shearouse:

Pursuant to Rule 242(i), SCACR, enclosed for filing in the above-captioned matter are the original and fourteen (14) copies of the Brief of Petitioner The Standard Fire Insurance Company and thirteen (13) additional copies of the Appendix. Pursuant to Rule 267(d), SCACR, one copy of each is unbound. Also enclosed for filing is Proof of Service thereof.

I have enclosed eight (8) extra copies of the brief and one (1) extra copy of the Appendix, which I would appreciate your clocking in and returning to me via the courier delivering same.

By copy hereof, pursuant to Rule 242(i), SCACR, I am serving same upon other counsel of record.

Thank you very much.

Sincerely yours,

William P. Davis

WPD:sr

Enclosures

cc: Robert Hill, Esquire (w/enclosure)  
William P. Hatfield, Esquire (w/enclosure)  
Wesley D. Peel, Esquire (w/enclosure)

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