THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2011-211567

Omni Insurance Group,
Appellant,

v.

La'Rissa Tidwell
and Bristol West Insurance Company,

Respondents.

FINAL BRIEF OF RESPONDENT LA'RISSA TIDWELL

John S. Nichols, SC Bar No. 4210
Bluestein Nichols Thompson & Delgado
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 (803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Melissa García Mosier
McWhirter, Bellinger & Associates, P.A.
119 East Main Street
Lexington, SC 29072
(803) 359-5523 phone
(803) 996-9080 fax
Melissam@mcwhirterlaw.com
Attorney for Respondent La'Rissa Tidwell

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2. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT THE OMNI POLICY'S LIMITING PROVISIONS ARE IN CONFLICT WITH THE UNDERINSURED MOTORIST STATUTE AND THUS VOID AS A MATTER OF LAW?

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STATEMENT OF THE CASE

The facts of this case are undisputed. Omni Insurance Group (hereinafter "Omni") insured a vehicle owned by Wendy Williams and operated by Ajaranesh Williams, a family member. The Omni policy provides liability coverage in the amount of $25,000 and underinsured coverage in the same amount.

On April 2, 2010, the Williams vehicle was involved in a wreck in Charleston County when the Williams vehicle hit the vehicle in front of it. Respondent Tidwell, six (6) months pregnant at the time, was a passenger in the vehicle and suffered injuries. The cost of Tidwell's medical treatment alone totals $23,878.50. Respondent Tidwell made a claim for damages against the Williams vehicle. Omni tendered its $25,000 liability limits in exchange for a Covenant Not to Execute, but denies the applicability of underinsured motorist benefits to Respondent Tidwell. The parties agree that Tidwell is a permissive user and an insured under the policy and an insured as defined by Section 38-77-30(7). (R. p. 128, lines 12-19).

Part C2 of the Omni policy speaks to underinsured motorist coverage and provides that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under this coverage [underinsured motorist] and Part A [liability], Part B, Part C1 and Part D of this policy." (R. p. 45, lines 1-4, second column).

On June 9, 2011, Omni filed a Declaratory Judgment action asking the court to enforce policy limitations that prohibit Tidwell from collecting both liability and underinsured motorist benefits under Omni's policy. Tidwell notified her at-home automobile insurance carrier, Bristol West Insurance Company (hereinafter "Bristol"), that Omni contested its responsibility to pay underinsured motorist benefits. Bristol moved to intervene and filed an Intervener's Complaint. The parties agreed to allow Bristol to intervene without the need of a hearing by way of consent order. (R. p. 77-79).

Both Omni and Tidwell filed Answers to Bristol's complaint. In its Answer to Bristol's Complaint, Omni agreed that Respondent Tidwell is a Class II insured, an insured under the policy, and that if Omni's underinsured motorist coverage applies to Respondent Tidwell, its coverage is primary and Bristol's underinsured motorist coverage is secondary. (R. p. 87, lines 1-2.)

Bristol and Tidwell filed motions for summary judgment. On January 18, 2012, Judge DeAndrea G. Benjamin heard oral arguments. She issued an order granting Bristol and Tidwell's motions on March 20, 2012, finding that "[a]n award in excess of $25,000 would not require a 'duplicate payment' from Omni, but would merely attempt to make Tidwell whole." (R. p. 8, lines 15-17). The Court also held that "the Omni provisions that seek to prevent an insured, Class I or Class II, from recovering both liability and UIM benefits arising out of the same accident, are void as a matter of law." (R. p. 10, lines 10-12).

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), *SCRCP. Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), *SCRCP.* When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Id.*

ARGUMENTS

I. Because Omni did not appeal the Circuit Court's holding with regard to duplicate payments, the unappealed ruling as to this issue is the law of the case.

The Circuit Court held that "[a]n award in excess of $25,000 would not require a 'duplicate payment' from Omni, but would merely attempt to make Tidwell whole." (Order p.6). Omni fails to address the Circuit Court's holding as to the applicability of its "duplicate payment" provision, which is a separate issue from whether the entire limiting provision[1] is void. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atlantic Coast Builders & Contractors, L.L.C. v. Lewis,* Op. No. 27044 (S.C. Sup.Ct. filed May 16, 2012) (Shearhouse Adv. Sh. No. 17 at 2). Accordingly, the Circuit Court's unappealed ruling regarding the applicability of the "duplicate payment" provision is the law of the case.

In reaching its holding as to the duplicate payment provision, the Court noted that there is no risk of double recovery here because Omni's responsibility to pay underinsured motorist benefits to Tidwell will only result if a factfinder determines that Tidwell's damages exceed $25,000. (R. p. 8, lines 11-17). In other words, Omni is entitled to a setoff as to the $25,000 liability limits it has already paid. *Id.* Therefore, the possibility of "duplicate payment" or double recovery is a nonissue.

II. This Court's decision in *Bratcher v. National Grange Ins. Co.*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) is controlling.

At the heart of this declaratory judgment action is the underinsured motorist statute. The statute provides that automobile carriers must offer underinsured motorist coverage "[i]n the event that damages are sustained in excess of the liability limits carried

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[1]The limiting provision at issue provides that "No one will be entitled to receive duplicate payments for the same elements of loss under this [underinsured motorist] coverage and Part A [liability coverage]."

by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute." S.C. Code Ann. Section 38-77-160.

The plain language of the underinsured motorist statute contains two important components: first, that underinsured motorist coverage protects an insured against insufficient liability limits carried by an at fault insured or an underinsured driver. Second, the underinsured motorist statute does not differentiate between a Class I and a Class II insured's ability to seek and collect underinsured motorist benefits. *Id.*

Omni's policy language at issue in this case provides that "No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A [liability coverage], Part B, Part C1 or Part D of this policy." (R. p. 45, lines 1-4, second column). In other words, "no one is entitled to receive payments under the liability and UIM." (R. p. 124, lines 6-8).

Bratcher v. National Grange Ins. Co., 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) is on all fours with the present case. Franklin Bratcher was a passenger in his father, Welton Bratcher's vehicle, but the Court never mentioned whether he was a Class I or a Class II insured. Omni assumes that Franklin Bratcher was a Class I insured. (App. Br. p. 8). Franklin Bratcher was seriously injured in the wreck and his father was determined to be at fault. Franklin Bratcher sought to obtain the liability limits in the amount of $50,000 and underinsured motorist benefits in the same amount from his father's at-fault vehicle in which he was a passenger. National Grange filed a declaratory judgment action disputing the applicability of the underinsured motorist benefits as to Franklin Bratcher, arguing that a policy provision excluded vehicles owned by Welton Bratcher from the definition of an underinsured motor vehicle. This Court noted that the then-underinsured motorist statute, Section 56-9-831, authorized automobile insurance carriers to restrict the amount of underinsured motorist coverage to the limits of liability coverage, but held that the statute did not authorize any other restriction on underinsured

motorist coverage. *Bratcher,* 292 S.C. 332-33, 356 S.E.2d at 152-53. This Court held that further limitation or exception to the policy was invalid as a matter of law. *Id.* In so holding, this Court permitted a passenger to collect both liability and underinsured motorist coverage. This is exactly what Tidwell is attempting to do in this case.

Bratcher did not address whether the passenger was a Class I or a Class II insured, and it did not have to because the underinsured motorist statute provided that all insureds – Class I and Class II – are entitled to the underinsured motorist coverage from the car they are driving or in which they are a passenger. Notably, the underinsured motorist statute relied on in *Bratcher* has been recodified verbatim. Therefore, the *Bratcher* decision readily translates to the present case.

In reaching its conclusion, this Court observed that "[i]n the interpretation of statutes our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature. We must do this based upon the words of the statutes themselves. To do otherwise is to legislate, not interpret. The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts." *Bratcher,* 292 S.C. at 333, 356 S.E.2d 153.

For these reasons, this Court's holding in *Bratcher,* based upon the same underinsured motorist statute at issue here, controls the outcome.

A. Underinsured motorist coverage is not subject to unilateral limitation by insurance policies.

Omni argues that the Circuit Court erred in granting Respondents' motions for summary judgment because underinsured motorist coverage is voluntary and since there is no express proscription against it, automobile insurers may impose further limitations on underinsured motorist coverage. (App. Br. p. 4).

Omni cites *Burgess v. Nationwide Mut. Ins. Co.,* 373 S.C. 37, 644 S.E.2d 40 (2007). *Burgess* is inapposite to the case at hand. *Burgess* specifically deals with a Class

I insured's ability to reach an at-home vehicle with underinsured motorist coverage when he chooses to drive an owned vehicle without underinsured motorist coverage. *Id.* at 41, 644 S.E.2d at 42. Moreover, in *Burgess,* the policy limiting provision comports with Section 38-77-160. The named plaintiff, Burgess, was injured while operating his motorcycle. He chose not to purchase underinsured motorist coverage for his motorcycle. Burgess had three vehicles at home, each carried $25,000 in underinsured motorist coverage. Burgess' automobile insurance carrier argued that Burgess could not collect underinsured motorist benefits from the three at-home vehicles under the policy because he was not driving a vehicle with underinsured motorist coverage at the time of the wreck. Burgess argued that limiting the portability of underinsured motorist coverage offended public policy. The South Carolina Supreme Court agreed with the automobile insurance carrier, observing that Burgess chose to forego underinsured motorist coverage on his motorcycle and therefore should not be permitted to seek coverage from an at-home vehicle with the desired coverage. *Id.* at 41-42, 644 S.E.2d at 4. To find in favor of portability under these circumstances, the Court opined, would encourage insureds to purchase underinsured motorist coverage on only one vehicle, yet claim coverage as to all vehicles. *Id.* at 42, 644 S.E.2d at 4.

Burgess does not support Omni's public policy argument. Section 38-77-160 permits limitation on the portability of underinsured coverage as to Class I insureds. Moreover, the public policy of encouraging the purchase of underinsured motorist coverage as expressed in *Burgess* is a nonissue in the present case for two reasons: first, there was underinsured motorist coverage on the vehicle in which Tidwell was a passenger; second, Tidwell has an at home policy with underinsured motorist coverage.

As evidenced by the limitation on stacking within Section 38-77-160, the legislature could have easily limited the applicability of underinsured motorist benefits to Class I insureds, but it chose not to do so. "What a legislature says in the text of a statute

is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

It is fundamental that "freedom of contract is subordinate to public policy[, and] agreements that are contrary to public policy are illegal." *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 169 (1961). "[I]nsurers have the right to limit their liability and impose whatever conditions they desire upon an insured, provided they are not in contravention of . . . public policy." *United Servs. Auto. Ass'n v. Markosky,* 340 S.C. 223, 226, 530 S.E.2d 660, 662 (Ct. App. 2000).

Omni argues that there is no public policy reason to protect guest passengers from at fault insured or underinsured drivers. However, Omni's limiting provision violates public policy because it conflicts with Section 38-77-30(15). *See Standard v. Shine,* 278 S.C. 337, 340, 295 S.E.2d 786, 788 (1982) ("Where no conflict with common law exists, however, this Court will not substitute its view of public policy for that of the legislature.") To remove any doubt as to what constitutes an underinsured motor vehicle, Section 38-77-30(15) defines the term "underinsured motor vehicle" and affords underinsured coverage to all insureds without regard to their status as Class I or Class II insureds. If the Legislature sought fit to treat Class II insureds differently from Class I insureds insofar as their ability to collect underinsured motorist benefits, it could have easily done so within the statute. As previously mentioned, the legislature has treated Class I and Class II insureds differently when it comes to stacking, and therefore could have easily limited the applicability of underinsured motorist coverage altogether to Class I insureds had it chosen to do so.

In sum, the public policy of this State, as expressed in the underinsured motorist statute and the definition of an underinsured motor vehicle, provides that any insured may collect underinsured motorist coverage. According to Section 38-77-30(7), the term

"insured" includes both Class I and Class II. All agree that Tidwell is an insured pursuant to Section 38-77-30(7). In sum, Omni's limiting provision violates public policy as expressed in Sections 38-77-30(15) and 38-77-160.

B. The legislature has subsequently embraced *Bratcher* by re-codifying the underinsured motorist statute and by defining an underinsured motor vehicle to include both Class I and Class II insureds.

Omni urges that *Bratcher v. National Grange Ins. Co.,* 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987) has been abrogated, and that alternatively, if any part of *Bratcher* is still controlling, the holding is limited to Class I insureds. However, *Bratcher* did not identify the passenger as a Class I or a Class II insured. This makes sense because passengers, regardless of their class status, are entitled to underinsured motorist benefits.

The underinsured motorist statute this Court construed in *Bratcher* was re-codified verbatim in the current underinsured motorist statute. 1987 Act No. 155. The legislature then amended what is now S.C. Code Ann. Section 38-77-160 (1987) in 1989 and again in 1994 without limiting or overruling *Bratcher.* 1989 Act No. 148 § 21; 1994 Act No. 461 § 7. In sum, the legislature had an opportunity to change the underinsured motorist statute in reaction to the *Bratcher* decision, but it did not.

Throughout this same time, the legislature modified or overruled other judicial decisions constructing the underinsured motorist statute. The Supreme Court, for example, held in 1987 that the statutorily-required offer of underinssured motorist coverage must be meaningful. The legislature resopnded by enacting a presumption that an offer is meaningful if the companies use a certain form. *See Floyd v. Nationwide Mut. Ins. Co.,* 367 S.C. 253, 261-62, 626 S.E.2d 6, 11-12 (2005) (describing the history of S.C. Code Ann. Section 38-77-350 (1989)).

The legislature from 1987-1989 also overruled two South Carolina Supreme Court decisions by enacting legislation that permitted insurance companies to reduce or

eliminate underinsured motorist coverage by the amount of liability coverage available from the at-fault motorist. *See State Farm Mut. Ins. Co. v. Horry,* 304 S.C. 165, 167-69, 403 S.E.2d 318, 319-320 (1991) (explaining the history of S.C. Code Ann. Section 38-77-30(15)).

The legislature could have similarly overruled or limited *Bratcher* by authorizing Omni's exclusion in whole or in part. It did not. Instead, two years after the *Bratcher* the legislature solidified the holding in *Bratcher* when it defined an underinsured motor vehicle as "a motor vehicle as to which there is bodily injury liability insurance . . . and the amount of the insurance or bond is less than the amount of the insureds' damages." Section 38-77-30(15) (emphasis added). This definition went into effect on October 1, 1989 and has been the law of this State ever since. *Bratcher* is, therefore, well-settled and, according to the legislature, consonant with public policy.

C. Even if this Court restricts the holding in *Bratcher* to Class I insureds, Omni's limiting provision still fails.

Omni asks this Court to limit *Bratcher*'s holding to Class I insureds and maintains that there is a justification for treating Class I insureds differently from Class II insureds with regard to an insured's ability to collect both liability and underinsured motorist coverage. (App. Br. p. 9.) The practical effect of narrowing the holding in *Bratcher,* as Omni desires, is that only Class I insureds could collect both liability and underinsured motorist benefits - Class II insureds could not.

Even if the Court accepts Omni's argument to restrict the holding in *Bratcher* to Class I insureds, Omni's policy is still unenforceable because Omni's policy, as written, means that "no one" - not even a Class I insured - may recover both liability and underinsured motorist benefits. Therefore, according to Omni's policy even Wendy Williams, the named insured, is unable to collect the benefits she purchased. Omni refuses to admit that its policy, as currently written, is unsupported by the South Carolina

law of insurance as embodied in the underinsured motorist statute and interpretive case law. *See Bratcher, supra.* Therefore, arguing in the alternative, Omni asks this Court to disregard the policy it drafted and rewrite it to comport with their intended holding in *Bratcher,* which, as noted, would not help them because the policy is still overly-broad.

Like the automobile insurance carrier in *Bratcher,* Omni is attempting to circumvent its responsibility to fulfill its obligations under the policy it drafted by relying on an overly-broad policy limitation. Because the policy limitation is in irreconcilable conflict with South Carolina's automobile insurance laws, the Circuit Court properly voided the limiting provision *in toto.*

III. The Circuit Court properly refused to rewrite Omni's policy.

"Insurance policies are subject to general rules of contract construction." *Sloan Constr. Co., Inc., v. Central Nat'l Ins. Co. Of Omaha,* 269 S.C. 183, S.E.2d 818, 819 (1977). It is the province of courts to "enforce, not write, contracts of insurance and ... give policy language is plain, ordinary and popular meaning ... not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." *Torrington Co., v. The Aetna Cas. & Surety Co., et al.,* 264 S.C. 636, 216 S.E.2d 547 (1975).

Statutory provisions relating to an insurance contract are part of the contract as a matter of law. *Jordan v. Aetna Cas. & Sur. Co.,* 264 S.C. 294, 214 S.E.2d 818 (1975). To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails. *Id.* In other words, the applicability and effect of underinsured motorist coverage is subject to the underinsured motorist statute, and any insurance policy provisions inconsistent with the statute are void, and the relevant statutory provisions replace the void terms. *Ferguson v. State Farm Mutual Automobile Ins. Co.,* 261 S.C. 96, 198 S.E.2d 522 (1973). "[A] policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended." *Hamrick v. State Farm Mut. Auto. Ins. Co.,* 270 S.C. 176, 179, 241 S.E.2d 548, 549 (1978).

An insurer's obligation is defined by the policy, and cannot be enhanced by judicial construction. In other words, "courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *MGC Mgmt. Of Chalreston, Inc., v. Kinghorn Ins. Agency,* 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999).

In *Kay v. State Farm Mut. Auto. Ins. Co.,* 349 S.C. 446, 449, 562 S.E.2d 676, 678 (Ct. App. 2002), the policy at issue attempted to limit stacking of underinsured motorist coverage to the minimum limits, which was less than the amount of coverage available on the involved vehicle's policy. The Court held that the policy afforded less coverage than that required by Section 38-77-160 and therefore replaced the void language with the statutory language. *Id.* at 450, 562 S.E.2d at 678 (emphasis added). In so holding, the Court relied on *Kinghorn, infra,* when it decided to replace void language with the statute.

Omni cites *Garris v. Cincinnati Ins. Co.,* 280 S.C. 149, 311 S.E.2d 723 (1984), however *Garris* does not offer support to its argument. In fact, *Garris* is in harmony with *Kay. Id.* at 153, 311 S.E.2d at 726 ("Underinsured motorist coverage is controlled by and subject to our underinsured motorist act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy[]") citing *Ferguson v. State Farm Mut. Auto. Ins. Co.,* 261 S.C. 96, 198 S.E.2d 522 (1973).

The Court also rested its holding in *Kay* on a clause of the disputed policy which provided that if any terms conflicted with South Carolina statutes, "they are amended to conform to those statutes." *Id.* Omni's policy contains a similar clause which provides that "This Part [underinsured motorist coverage] is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this Part conflicts with that law, it is changed to comply with the law." (Policy, p. 36.) Omni's policy contemplates changing the policy to come into compliance with the law of this State. The only way to rectify the policy

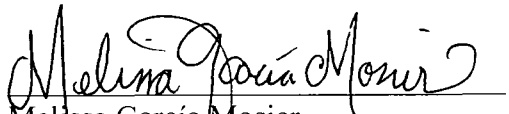
to comply with the law is to strike down Omni's limiting provision.[2] This was the remedy that Tidwell sought and the Circuit Court properly granted.

As made clear in its own policy, Omni never intended to extend both liability and underinsured motorist benefits to any insured. Despite this, Omni asks this Court to disregard its policy's clear intent to preclude anyone from collecting both liability and underinsured motorist benefits and also asks this Court to re-write the insurance policy to substitute "Class II insured" for "no one." In light of *Kay, supra, Kinghorn, supra,* and Omni's own policy language, Respondent urges this Court to decline Omni's invitation to rewrite the policy, which is in clear contravention of the law of this State, and sustain the Circuit Court's ruling.

CONCLUSION

For all the reasons above-stated, Respondent Tidwell respectfully urges this Court to sustain the grant of summary judgment in favor of Respondents and dismiss this appeal.

Respectfully submitted,



Melissa García Mosier
McWhirter, Bellinger & Associates, P.A.
119 East Main Street
Lexington, SC 29072
(803) 359-5523 phone
(803) 996-9080
Melissam@mcwhirterlaw.com
Attorney for Respondent La'Rissa Tidwell

[2]"The limiting provision at issue states: "No one will be entitled to receive duplicate payments for the same elements of loss under this [underinsured motorist] coverage and Part A [Liability] coverage ... of this policy." (R. p. 34, lines 1-4, second column).

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Melissa G. Mosier
McWhirter, Bellinger and Associates, P.A.
119 East Main Street
Lexington, SC 29072
(803) 359-5522
(803) 359-1248 Facsimile
Attorney for Respondent La'Rissa Tidwell

September 6, 2012

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PROOF OF SERVICE OF RESPONDENT TIDWELL'S FINAL BRIEF

I certify that I have served Respondent Tidwell's Final Brief on Appellant Omni Insurance Group, by mailing it to the attorney of record, Douglas E. Leadbitter, Douglas E. Leadbitter, LLC, P.O. Box 945, Blythewood, SC 29016; and Respondent Bristol West Insurance Company by mailing a copy of it to the attorneys of record, Charles O. Williams, Weston Adams, III and Helen Hiser, all of McAngus Goudelock & Courie, P.O. Box 12519, Columbia, SC 29211.

Lischer G. Nanney
Legal Assistant to Melissa G. Mosier
McWhirter, Bellinger and Associates, P.A.
119 East Main Street
Lexington, SC 29072
(803) 359-5522
(803) 359-1248 Facsimile
Attorney for Respondent La'Rissa Tidwell

September 5, 2012

LAW OFFICES
MCWHIRTER, BELLINGER & ASSOCIATES, P.A.
119 EAST MAIN STREET,
LEXINGTON, SOUTH CAROLINA 29072
(803) 359-5523
FAX (803) 359-1248
mail@mcwhirterlaw.com

H. PATTERSON McWHIRTER
THOMAS P. BELLINGER
GARLAND P. McWHIRTER
STACEY TARTE MEYER
JOSEPH R. DASTA
JENNIFER N. WILLIAMS

L. LISA McPHERSON
ELIZABETH McMAHON PENTZ
RICHARD W. SIMMONS, II
J. TYLER LEE, JR.
MELISSA G. MOSIER
JOHN P. MEADORS

September 5, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211
via hand delivery

RE: Omni Insurance Group v. La'Rissa Tidwell
Appellate Case Number 2012-211567

Dear Ms. Kitchings:

Enclosed you will find for filing with the Court the following documents:

1. Fifteen (15) copies of the Final Brief of Respondent La'Rissa Tidwell, plus one unbound original;
2. Proof of Service of the Final Brief of Respondent Tidwell on attorneys of record;
3. Rule 211(b) Certificate.

If you have any questions, please call.

Sincerely yours,

Melissa G. Mosier

Enc.

cc: Douglas E. Leadbitter
Douglas E. Leadbitter, LLC
P.O. Box 945
Blythewood, SC 29016

Charles O. Williams
Weston Adams, III
Helen Hiser
McAngus Goudelock & Courie
P.O. Box 12519
Columbia, SC 29211