2011-193846

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner The Standard Fire Insurance Company ("Standard Fire") certifies that the Petition for Rehearing was made and ruled on by the Court of Appeals on May 31, 2011.

QUESTION PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reversing the circuit court's grant of summary judgment to Petitioner 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 reversed?

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, lines 9-15; p. 38, lines 7-13; pp. 280-299). Thereafter, he bought 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). The Dodge was insured by Allstate; it was never insured by Standard Fire. (R. p. 57, line 16-p.58, line 2; R. p. 210, lines 4 – 6). Allstate settled with Mr. Carter on behalf of the estate of the alleged driver, Bernie Collins, by paying the available limit of liability coverage ($250,000.00), as well as another $100,000.00 in liability coverage under a policy that Allstate had issued to Mr. Collins, in exchange for a covenant not to execute. (R. p. 57,

line 16 – p. 58, line 18; p. 220, lines 6-11). In addition, as the insurer of the vehicle occupied by Michael Carter 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, line 16 – p. 58, line 12; p. 220, lines 11-20; p. 206, line 22 – p. 208, line 19).

Petitioner 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, which he occupied at the time of the accident (R. p. 210, lines 4 – 6). The Standard Fire policy included UIM bodily injury coverage of $250,000.00 per person and $500,000.00 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 from Standard Fire. (R. p. 210, lines 4 – 6).

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 Standard Fire 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, lines 18-19).

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, lines 12-18; p. 81, line 20 – p. 82, line 7). The answer further alleges 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. (R. p. 79, lines 12-18; p. 81, line 20 – p. 82, line 7).

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 section 38-77-160 of the South Carolina Code (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 Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). (R. pp. 95-96).

After a hearing, 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 Mut. Ins. 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).

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 ruling on the summary judgment motion in a *per curiam* opinion. (Appendix pp. A2-A4). In its opinion, the Court of Appeals relied on *Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 178-81, 700 S.E.2d 283, 287-88 (Ct. App. 2010), reh'g denied (Oct. 29, 2010), and the following holdings: (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*. With this petition, timely filed on August 1, 2011, Standard Fire prays that this Honorable Court grant *certiorari* to review the Court of Appeals' decision.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO PETITIONER 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 REVERSED.**

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; before *Nakatsu*, no South Carolina appellate court case had held that a Class I insured must be allowed to stack UM or UIM coverage that had been validly excluded.

In *Nakatsu v. Encompass Indemnity Company*, the case relied upon by the Court of Appeals, a vehicle driven by Zunita Mattison struck Meagan Nakatsu's vehicle, injuring Ms. Nakatsu. 390 S.C. 172, 175, 700 S.E.2d 283, 285 (Ct. App. 2010). Nakatsu collected the available bodily injury liability coverage ($25,000) from Mattison's automobile insurance policy. *Id.* She also collected $25,000 in UIM coverage from her policy on her car involved in the accident. *Id.* Nakatsu 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). *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 Nataksu 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. *Id.* at 177, 700 S.E.2d at 286. Both parties moved for summary judgment. *Id.* The circuit

court granted Encompass's motion based on *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). *Id.*

On appeal, Nakatsu argued that the exclusion was invalid because it was inconsistent with section 38-77-160 and that *Burgess* was inapplicable. *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. *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. *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.

Stacking Statute and *Burgess*

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. *Id.* at 181, 700 S.E.2d at 288. 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.

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. *S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham*, 304 S.C. 442, 405 S.E.2d 396 (1991); *Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 473, S.E.2d 843 (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. Standard Fire does not dispute that section 38-77-160, as interpreted by our appellate courts, provides that, in a stacking situation, the insured stacks the amount of coverage on the vehicle involved in the accident. However, section 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.

Section 38-77-160 does not require stacking of UIM coverage that is not available by virtue of a valid exclusion. The cases indicate that Michael Carter can stack any UIM coverage that is available to him, but the amount stackable is limited to the amount of UIM coverage he had on the vehicle involved in the accident ($250,000). However, he cannot stack UIM coverage that is not available.

Stacking has been defined as "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). 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. *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."). Thus, UIM coverage on the Standard Fire policy issued to Michael's parents was not "available."

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 invalid, or 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 is 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. Thus, while Michael Carter has received liability coverage paid on behalf of Mr. Collins' estate, as well as 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.

A similar limitation on UIM coverage was upheld by this Court in *Burgess*:

> 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.

373 S.C. 37, 39-43, 644 S.E.2d 40, 42-43.

Noting that neither section 38-77-160 of the South Carolina Code 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. *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 relative but not insured under the subject policy.

b. UIM coverage is entirely voluntary and not statutorily required, and insurance companies therefore may exclude UIM coverage even when the insured would otherwise be able to stack it.

Thus, this Court made it clear in *Burgess* that UIM coverage is "entirely voluntary." *Id.* at 42, 644 S.E.2d at 43 ("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."). However, in *Nakatsu*, the Court of Appeals cited much older case law for the proposition that UIM coverage is "statutorily required" since it is "required to be offered." 390 S.C. 172, 179, 700 S.E.2d 283, 287.

Standard Fire respectfully submits that *Burgess* implicitly overruled *Ruppe v. Auto–Owners Ins. Co.,* 329 S.C. 402, 496 S.E.2d 631 (1998), to the extent that *Ruppe* held that UIM coverage is "statutorily required." Moreover, in *Nakatsu*, on which the Court of Appeals relied in its opinion in the within appeal, the Court of Appeals not only overlooked or misapprehended this Court's opinions in *Burgess* and *Ruppe*, but also in *Howell v. U.S. Fidel. & Guar. Ins. Co.*, 370 S.C. 505, 636 S.E.2d 626 (2006); and *Jackson v. State Farm Mut. Auto. Ins. Co.*, 288 S.C. 335, 342 S.E.2d 603 (1986) (*distinguished and expanded upon by Ruppe*). These cases do not prohibit an insurer from utilizing a valid exclusion of UIM coverage in a stacking situation and, in fact, *Burgess* sanctioned a restriction on such coverage similar to the Standard Fire exclusion at issue.

In addition, the Court of Appeals' opinions in *Kay v State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 562 S.E.2d 676 (Ct. App. 2002); *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (Ct. App. 2000) (*overruled by Sweetser v. S.C.*

Dept. of Ins. Reserve Fund, 390 S.C. 632, 637, 703 S.E.2d 509, 512 (2010), to the extent it conflicts with *Sweetser's* interpretation of section 38–77–220); and *Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 473 S.E.2d 843 (Ct. App. 1996) are distinguishable and do not require stacking of UIM coverage that is unavailable by virtue of a valid exclusion.

Other than *Nakatsu*, no South Carolina case has held that an exclusion similar to the provision at issue in *Burgess* or in the Standard Fire policy is invalid in what would otherwise be a stacking situation. Thus, 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 an exclusion of UIM coverage "when the insured has a vehicle involved in the accident." 373 S.C. 37, 42, 644 S.E.2d 40, 43. Michael Carter had a vehicle involved in the accident, and the exclusion quoted above from 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. *State Farm Mut. Auto. Ins. Co. v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993); *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) (*distinguished and expanded upon by Ruppe*).

c. 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 case of *South Carolina Farm Bureau Mutual Insurance Company v. Mooneyham*, 304 S.C. 442, 443, 405 S.E.2d 396, 396 (1991), cited by the Court of

Appeals in *Nakatsu*, 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. 304 S.C. 442, 443, 405 S.E.2d 396, 397. The question presented on appeal was whether the following sentence from section 38-77-160, relied upon by plaintiffs 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. *Id.* at 445, 405 S.E.2d at 398. In other words, "the amount of coverage which may be stacked from policies on vehicles not involved in an accident is limited to an amount no greater than the coverage on the vehicle involved in the accident." *Id.* at 445, 405 S.E.2d at 398 (internal citation omitted). The insurer's argument that section 38-77-160 prohibits the insured from stacking when the vehicle involved in the accident has excess UIM coverage was rejected. *Id.* at 446, 405 S.E.2d at 398. The insurer did not argue that the UIM coverage on the vehicles not involved in the accident had been excluded. *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.*

The *Mooneyham* case 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. In *Burgess*, this Court essentially sanctioned the exclusion relied upon by Standard Fire. 373 S.C. 37, 644 S.E.2d 40. Again, Standard Fire does not dispute that, if UIM coverages were available under its policies, Michael Carter would be entitled to stack them. However, *Burgess* makes it clear that there is no such UIM coverage available to stack because the policies contain 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 Mut. Auto. Ins. Co.*, 349 S.C. 446, 448-49, 562 S.E.2d 676, 678 (Ct. App. 2002), also relied upon by the Court of Appeals in *Nakatsu*, is distinguishable because the State Farm provision at issue there sought to limit the amount of UIM coverage that could be stacked to an amount less than the coverage on the vehicle involved in the accident. Unlike the provision in the Standard Fire policies 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 the amount of coverage on the vehicle involved in the accident. *Id.* Thus, the distinguishing factor is that, 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. The State Farm exclusion violated the stacking rules. *Id.* at 450,

562 S.E.2d at 678. In other words, 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. *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. *Id.* at 448, 349 S.E.2d at 677. Of course, 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. *Id.* at 449, 562 S.E.2d at 678 (citing *Mooneyham*).

The Standard Fire exclusion, on the other hand, has essentially been sanctioned by this Court in *Burgess*. It therefore is valid and 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.

The flip side of the situation presented in the case at bar occurred in *Ohio Cas. Ins. Co. v. Hill*, 323 S.C. 208, 473 S.E.2d 843 (Ct. App. 1996). In that case, Mr. Hill was

injured while operating a motorcycle that he owned and insured with Alpha Property and Casualty Insurance Company. *Id.* at 209-10, 473 S.E.2d at 844. He had not purchased UIM coverage on that policy, but had purchased it in the amount of $25,000/$50,000 on each of two vehicles covered under a policy issued by Ohio Casualty. *Id.* at 210, 473 S.E.2d at 844. Ohio Casualty paid him $25,000, but took the position that he could not stack the second $25,000. *Id.* The Court pointed out that previous cases had held that such an insured may not stack in an amount greater than the coverage on the vehicle involved in the accident. *Id.* at 211, 473 S.E.2d at 845. Since Mr. Hill had no UIM coverage on the vehicle involved in the accident, he could not stack at all. *Id.* at 212, 473 S.E.2d at 845. Thus, Mr. Hill received one of the UIM limits ($25,000) from the policy covering the two vehicles not involved in the accident, but he was not entitled to stack. *Id.* at 212, 473 S.E.2d 845-46. Whether UIM coverage was excluded under the policy was not an issue in the case, but apparently there was no such exclusion. Otherwise, Ohio Casualty would not have paid one of the UIM coverages, or would have raised this as an issue. If the Ohio Casualty policy had contained Standard Fire's exclusion, then Mr. Hill would not have been entitled to any UIM coverage at all, since he chose not to purchase it on the vehicle involved in the accident.

While *Burgess* did not involve stacking, the case at hand does not involve stacking either, in that UIM coverage is not available under the Standard Fire policies by virtue of the exclusion. The stacking cases indicate that a Class I insured can stack and that section 38-77-160 of the South Carolina Code limits the amount stackable to the amount of coverage on the vehicle involved in the accident; however, apparently no South Carolina case has held that an exclusion similar to that at issue in *Burgess* or in the

Standard Fire policy is invalid in what would otherwise be a stacking situation. Thus, 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*, 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. *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. *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 above-quoted 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.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant its petition for a writ of *certiorari*.

Respectfully submitted,

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