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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-16-00036

Melissa Baird and Chasity Baird

Omni Insurance Company

<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
Submitted by: Gary I. Finklea	Attorney for: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

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

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

IT IS ORDERED AND ADJUDGED:  See attached order  Statement of Judgment by the Court

**ORDER INFORMATION**

This order  ends  does not end the case.  
 Additional Information for the Clerk: Order denies Defendant's Motion to Reconsider and Alter or Amend  
 Order

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Melissa Baird and Chasity Baird	Omni Insurance Company	n/a
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

TRUE CERTIFIED COPY.  
*Scott B. Suggs*  
 CLERK OF COURT/AMC  
 DARLINGTON COUNTY, S.C.

FILED  
 2019 MAR 13 AM 11:06  
 SCOTT B. SUGGS  
 CLERK OF COURT/AMC  
 DARLINGTON COUNTY, S.C.





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PLAINTIFF(S) DEFENDANT(S)

Submitted by: Gary I. Finklea	Attorney for :
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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : Order allows Plaintiffs to Pursue Underinsured Motorist Coverage

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Melissa Baird and Chasity Baird	Omni Insurance Company	n/a
		\$
		\$

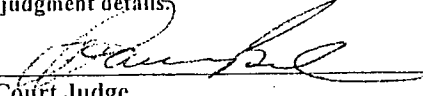
If applicable, describe the property, including tax map information and address, referenced in the order:

2013 FEB - 5 PM 2:32  
CLERK OF COURT/RMG  
DARLINGTON COUNTY, S.C.

FILED

TRUE CERTIFIED COPY,  
*Scott B. Suggs*  
CLERK OF COURT/RMG  
DARLINGTON COUNTY, S.C.

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

  
Circuit Court Judge

2048  
Judge Code

1/31/13  
Date

**For Clerk of Court Office Use Only**

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

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

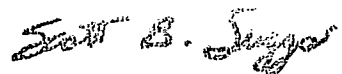
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CLERK OF COURT

**Court Reporter:**

**FILED**

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SCOTT B. SUGGS  
CLERK OF COURT/R.O.D.  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY  
  
CLERK OF COURT/RMG  
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

) IN THE COURT OF COMMON PLEAS  
) FOURTH JUDICIAL CIRCUIT  
) C/A # 2012-CP-16-00036  
)  
)  
)

Melissa Baird and Chasity Baird,  
Plaintiff,

Vs.

Omni Insurance Company,  
Defendant.

ORDER ALLOWING PLAINTIFFS  
TO PURSUE UNDERINSURED  
INSURED MOTORIST COVERAGE

2013 FEB -5 PM 2:32  
SCOTT B. SUGGAR  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

FILED

In this Declaratory Judgment action the Plaintiffs seek to recover Underinsured (hereinafter "UIM") benefits under the Policy at issue after recovering the liability proceeds under the same policy but the liability proceeds were allegedly not sufficient to compensate Plaintiffs for the full value of their claims.

**BACKGROUND**

The parties have agreed upon a stipulated statement of facts and the other facts are not at issue, only the conclusion to be drawn from interpretation the policy provision seeking to limit payment of UIM. Omni insured a 1999 Ford Explorer owned by Shasta Atkinson for a policy period spanning from December 1, 2007 to June 1, 2008, bearing Policy number 3126604 ("Policy"). The Policy provides liability coverage in the amount of \$25,000 per claim and \$50,000 per accident for bodily injury. Atkinson also opted and paid for UIM coverage under this Policy in an amount equal to the liability coverage. Atkinson is the only named insured on this Policy.

On May 7, 2008, within the Policy period, Atkinson was involved in a motor vehicle accident while operating the covered vehicle. In addition to the Plaintiffs, there were 6 other claimants. The Plaintiffs were guest passengers in the Atkinson vehicle and are relatives of Ms. Atkinson but do not reside in the same household and therefore

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*Scott B. Suggar*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

Class II insureds. As a result of the accident, the passengers in the Atkinson vehicle, along with individuals in the other vehicle involved in the accident filed personal injury claims against Ms. Atkinson for her alleged negligent operation of the motor vehicle. Since there were multiple claimants and minimum coverage, the liability proceeds were prorated and paid under a Covenant not to Execute. Melissa Baird's medical expenses were \$32,294.29 and she received a total of \$12,000.00 and Chastity Baird's medical expenses were \$524.63 and she received a total of \$265.00.

Thereafter the Plaintiffs sought to recover underinsured benefits on the Omni vehicle since they were guests in Atkinson's vehicle and their damages allegedly exceeded the policy limits of the liability policy. Plaintiffs do not have UIM coverage of their own, do not own a car, and do not reside with anyone who owns a car. The Defendant advised by letter dated December 14, 2010 that plaintiffs were "not eligible to receive payment from both the Liability coverage and Underinsured Motorist coverage" since "the Limits of Liability section of Part C2- Underinsured Motorist Coverage states 'No one will be entitle to receive duplicate payments of the same elements of loss under this coverage and Part A, Part B, Part C, or Part D of this policy.'" Therefore Plaintiffs initiated a claim for Defendant Atkinson's underinsured motorist ("UIM") coverage by filing a suit for damages on February 4, 2011 in case number 2011-CP-16-070. On February 11, 2012 this Declaratory Judgment action was filed to address the coverage dispute. The parties have agreed to stay the underlying tort action while this Declaratory Judgment action is pending.

#### APPLICABLE LAW

An "Insured" is defined as "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor

The general rules of interpreting words and phrases within insurance contracts is reviewed in Beaufort County School District v. United National Insurance Company, 709 S.C. 506, 709 S.E. 2d 85 (Ct.App. 2011):

Insurance policies are subject to the general rules of contract construction. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). " Courts must enforce, not write, contracts of insurance..." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting Sloan Constr. Co. v. Central Nat'l Ins. Co., 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect. *Id.* An insurance contract is read as a whole document so that " one may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). However, an insurance contract which is " in any respect ambiguous or capable of two meanings must be construed in favor of the insured." Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968).

The primary purpose of UIM is to provide coverage for an insured **when the liability limits are not enough**. See Cobb v. Benjamin, 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct.App. 1997). The UIM statute should be construed liberally to affect the purpose intended. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6, 10-11 (S.C. 2005). "Statutory provisions relating to an insurance contract are part of the contract as a matter of law. To the extent a policy provision conflicts with an applicable statutory provision, the statute prevails." Nakatsu v. Encompass Indemnity Co., 390 S.C. 172, 700 S.E.2d 283 (S.C.App. 2010), *citing* State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct.App.2000). "[UIM] coverage is controlled by and subject to our [UIM] act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy." *Id.* at 179, *citing* Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676,

678 (Ct.App. 2002). Burgess v. Nationwide Mut. Ins. Co., 361 SC 196, 603 S.E.2d 861 (Ct.App. 2004) specifically holds that Section 38-77-160 “does not allow an insurer to limit or exclude basic UIM in any way. An insurance policy issued pursuant to a statute may give more coverage than the statute requires but not less. Belk v. Nationwide Mut. Ins. Co., 271 S.C. 24, 244 S.E.2d 744 (1978). Once UIM is offered and accepted, the coverage cannot be retracted. See Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 72, 310 S.E.2d 814, 816 (1983).”

### FINDINGS OF FACT

1. Omni Insurance Company (“Defendant”) insured a 1999 Ford Explorer bearing VIN 1FMZU32E6XUA82823 (“Vehicle”) belonging to Shasta Atkinson for a policy period spanning from December 1, 2007, to June 1, 2008, bearing Policy number 3126604.

2. The Policy provides liability coverage in the amount of \$25,000 per person and \$50,000 per accident for bodily injury. Shasta Atkinson also opted and paid for UIM coverage under this Policy. Shasta Atkinson is the named insured on this Policy.

3. On May 7, 2008, Melissa Baird and Chasity Baird along with Cory Atkinson and Gracie Suggs were travelling in the Vehicle driven by Shasta Atkinson, when an auto wreck occurred. Plaintiffs do not reside with Shasta Atkinson.

4. Plaintiffs asserted claims against Shasta Atkinson alleging that she caused the accident and they were injured. Plaintiffs sought the Policy limits. The Plaintiffs executed Covenants not to Execute in exchange for the applicable liability coverage limits.

5. Plaintiffs allege that damages were incurred that exceed the available

liability coverage, so they served Defendant with notice of their intent to assert a claim for underinsured motorist ("UIM") coverage.

6. Defendant asserts that Policy provisions limit Plaintiffs' ability, as third party claimants who are not resident relatives, to bring both a liability claim and a UIM claim against the same Policy for damages arising from the same accident. Plaintiffs assert that they are insureds entitled to UIM coverage under Atkinson's Policy.

7. Plaintiffs have no other underinsured coverage as they do not own a car, nor reside with anyone who does.

8. The parties believe the value of the Plaintiffs' claims may exceed the amount of liability coverage tendered.

#### **OPINION AND CONCLUSIONS OF LAW**

Omni contends that the Policy does not provide UIM coverage because of the following provision in the Policy's liability section:

No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and . . . [a]ny Underinsured Motorists Coverage provided by the policy.

Omni's position is contrary to South Carolina law in two respects. First, the provision in question is ambiguous and must be interpreted in Defendants' favor because there is no evidence before the Court that Defendants are seeking "duplicate payments for the same elements of loss." The fact that the damages derive from the same incident does not mean, as a matter of law, that the "same elements of loss" are being claimed, and at the very least, further claims proceedings as to damages are necessary to make this determination. Second, in the alternative, even if the provision is unambiguous, it cannot be interpreted to exclude UIM coverage in this case because such an interpretation would be contrary to applicable South Carolina law.

I. **THE PROVISION IS AMBIGUOUS AND MUST BE CONSTRUED TO PROVIDE UIM COVERAGE FOR CLASS II INSUREDS.**

Resolution of this case is dictated by familiar principles of South Carolina law. Ambiguous terms must be interpreted in a manner that favors the insured. In Gordon v. Fidelity & Casualty Co. of New York, 238 S.C. 438, 120 S.E. 2d 509 (1961), the Court explained:

It is a well settled rule that the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of a policy are ambiguous, or where they are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured.

*Id.* at 444, 120 S.E. 2d at 512.

In addition, UIM provisions must be interpreted liberally so as to accomplish the legislature's purpose. In Floyd v. Nationwide Mutual Insurance Co., 367 S.C. 253, 626 S.E.2d 6 (2005), the court observed:

The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. Cobb v. Benjamin, 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct.App.1997). The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature.

*Id.* at 260, 626 S.E.2d at 10.

Under South Carolina law, UIM coverage is intended to provide "excess" coverage. That is, UIM coverage is designed to compensate an insured for damages that are in excess of the applicable liability coverage:

Underinsured motorist coverage is optional coverage provided when the insured sustains damages in excess of the at-fault driver's liability coverage, recovery being in addition to any recovery from the at-fault motorist, the total recovery not to exceed the damages sustained.

Kizer v. Kinard, 361 S.C. 68, 71, 602 S.E.2d 783, 785 (Ct. App. 2004); *See also* Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 287-88, 403 S.E.2d 662, 665 (Ct.

App. 1991).<sup>1</sup> The legislature's intention is to ensure that an injured person whose damages exceed the available liability coverage will be made whole. Sweetser v. S.C. Dep't of Ins. Reserve Fund, 390 S.C. 632, 637, 703 S.E.2d 509, 511-12 (2010).

With these principles in mind, it is readily apparent that the Policy provision upon which Omni relies is ambiguous, and that it may reasonably be interpreted to provide both liability and UIM coverage to all insureds (Class I and Class II) as long as the total Policy proceeds paid to an insured do not exceed that insured's total damages, up to Policy's maximum limits.

The Policy's terms do not expressly distinguish between UIM coverage for Class I and Class II insureds. In fact, the Policy's UIM coverage, on its face, would apply equally to both classes of insureds. The relevant Policy provisions of Part C2 (UIM coverage) state as follows:

#### INSURING AGREEMENT

- A. We will pay damages which an Insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of:
1. Bodily injury sustained by an insured and caused by an accident; and
  2. Property damage caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the underinsured motor vehicle.

We will pay under this coverage only after the limits of liability under any liability bonds or policies applicable to the underinsured motor vehicle have been exhausted by payment of judgments or settlements.

Insured as used in this Part means:

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<sup>1</sup> South Carolina Code Section 38-77-30 provides:  
"Underinsured motor vehicle" means a motor vehicle as to which there is bodily injury liability insurance or a bond applicable at the time of the accident is in an amount of at least that specified in section 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds' damages.

1. You or any family member
2. Any other person occupying your covered auto.

....

Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident in limits equal to or greater than the minimum limit for liability specified by the South Carolina Financial Responsibility Act, but the limits of that bond or policy are not enough to pay the full amount the insured is legally entitled to recover as damages.

(Policy pt. C2, at 14 of 37.)

Under the literal terms of these provisions, passengers who occupy a covered vehicle may recover damages to which they are legally entitled from the owner or operator of an underinsured motor vehicle “after the limits of liability **under any liability bond or policies** applicable to the vehicle have been exhausted. (Emphasis added.) This language literally includes **any** applicable liability policy, and since there is liability coverage under the Omni Policy, the Policy literally provides UIM coverage for any insured (whether Class I or II) whose damages exceed the Policy’s liability limits. Therefore, the provisions quoted above do provide UIM coverage to Defendants.

The clause upon which Omni relies does not negate this interpretation of the Policy’s UIM provisions. Simply put, Defendants are not seeking “duplicate payments” for the same elements of loss. Instead, they are seeking “additional payments” for injuries and damages that are left uncompensated after exhaustion of the available liability coverage. The evidence does not establish that Defendants are seeking any “duplicate” or double recovery; rather, they are seeking to be made whole for their injuries.

If Omni’s interpretation of the “duplicate payments” clause were correct as to Class II insureds, then the clause would apply equally to Class I insureds, because the

clause prohibits duplicate payments to all persons whether Class I or II. Omni of course dare not make that argument and in fact has not made that argument.

The ambiguity in the Policy's "duplicate payments" clause is akin to the ambiguity in a policy that was construed in Bowan v. General Security Indemnity Co. of Arizona, 174 S.W.3d 1 (Mo. Ct. App. 2005). In that case, a business automobile policy stated that "[n]o one will be entitled to received duplicate payments for the same elements of 'loss' under this Coverage Form and any ... Underinsured Motorist Coverage Endorsement[.]" Id. at 7. Ruling that this provision was ambiguous and that it would not preclude recovery of benefits under both the liability and UIM coverages, the court explained:

In Home Ins. Co. of New York vs. Smith, 235 Mo.App. 552, 140 S.W.2d 64, 67 (E.D.1940), a case dealing with the subrogation right of an insurance company, the court noted in dicta that "where the aggregate of both sums recovered amounts only to payment of the loss in full, there is no double recovery by the insured for the one loss he has sustained...." However, that case involved the interaction of an insured, the insured's insurance company, and a third party tortfeasor. In this case, the interaction at issue is between the language in the business auto policy and the UIM endorsement of the policy. It is unclear whether "duplicate payments" as used in relation to the interplay of these policy provisions can be given the same meaning as in the *Smith* case.

We find that the use of the term "duplicate payments" in the business auto policy and its UIM endorsement is ambiguous. It could mean that the insured cannot receive payments under both the business auto policy and its UIM endorsement or it could be interpreted to mean tat the insured cannot, through collection under different policies or endorsements, receive more than the entire amount of the judgment to which he was entitled.

Interpreting this ambiguity in the manner most favorable to the insured requires us to find that Bowan would not receive duplicate payments if she recovered from both the business auto policy and its UIM endorsement. Bowan will not receive more than the full amount of damages she is entitled to under the trail court's judgment under any one policy. Therefore, she did not receive "duplicate payments" under the different policies.

Therefore, the trial court did not err in finding that the CGL insurance policy and the business auto liability policy and its UIM endorsement all provided coverage for the judgment.

*Id.* At 8; See also Murley v. Hanover Ins. Co., 927 A.2d 485, 488-89 (N.H. 2007) (prohibition against duplicate payments for same element of loss under medical payments and liability coverages was void).

In the present case, this Court concludes that the Policy is ambiguous and can reasonably be construed to allow Class I and Class II insureds to recover both liability and UIM payments until the insured is made whole or until the maximum UIM limit is reached. Unless an insured receives more compensation than the total amount of his damages, there is no duplicate or double recovery.

## II. THE POLICY'S "DUPLICATE PAYMENTS" CLAUSE IS VOID BECAUSE IT VIOLATES SOUTH CAROLINA LAW.

As is noted in Part I above, the legislature's intent in enacting UIM statutes was to provide insureds with "excess" coverage to provide compensation when the insured's damages exceed the amount of available liability coverage, and policies are liberally construed to carry out this goal. Kizer, 361 S.C. at 71, 602 S.E.2d at 785; Purvis, 304 S.C. at 287-88, 403 S.E.2d at 665; Sweetser, 390 S.C. at 637, 703 S.E.2d at 511-12; Floyd, 367 S.C. at 260, 626 S.E.2d at 10.

An uninsured motorist endorsement that is contrary to the mandates of South Carolina's statutes is invalid. Davidson v. E. Fire & Cas. Ins. Co., 245 S.C. 472, 475, 141 S.E.2d 135, 136 (1965). Statutory provisions are incorporated into insurance policies as matter of law, and "any limiting language in an insurance contract policies as a matter of law, and "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." Nationwide Mut. Ins. Co. v. Howard, 288 S.C. 5, 11-12, 339 S.E.2d 501, 504 (1985). If a policy provision that excludes coverage is in conflict

with a statutory requirement, the statute controls the rights of the parties. Hogan v. Home Ins. Co., 260 S.C. 157, 160, 194 S.E.2d 890, 891 (1973).

Assuming, arguendo, that the Policy's "duplicate payments" clause unambiguously bars Class II insureds from recovering any UIM benefits, the Court finds that the clause is void because it is contrary to South Carolina law. Such a clause is inconsistent with the very purpose of UIM coverage under section 38-77-160, which is "to provide coverage where the insured party's damages exceed the liability limits of the at-fault motorist." State Farm Mut. Auto. Ins. Co. v. Horry, 304 S.C. 165, 167, 403, S.E.2d 318, 319 (1991) (internal quotation marks omitted).

In this Court's view, Bratcher v. National Grange Mutual Insurance Co., 292 S.C. 330, 356, S.E.2d 151 (1987) is applicable to the Court's reasoning herein. In Bratcher, Franklin Bratcher was riding as a passenger in a car owned and being driving by his father, Welton Bratcher. An accident occurred, for which Welton Bratcher was at fault. The car was insured under a policy issued to Welton by National Grange. The policy purported to exclude UIM coverage for "any vehicle owned by or furnished by or available for the regular use of [Welton Bratcher] or any family member[.]" *Id.* At 331, 356 S.E.2d at 152.

National Grange settled Franklin Bratcher's claim under the policy's liability coverage, but denied his claim for UIM benefits, relying on the exclusion. Relying on the mandate of South Carolina Code Section 56-9-831, which was the predecessor to section 38-77-160, the Court explained:

Our Supreme Court has adopted a policy of construing motor vehicle insurance statutes strictly against insurers. Pennsylvania National Mutual Casualty Insurance Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App.1984).

“[W]here an insurance policy is issued pursuant to a statute which authorizes an exception to the coverage, all other exceptions are excluded.” McDonald v. State Farm Mutual Automobile Insurance Co., 287 S.C. 40, 44, 336 S.E.2d 492, 494 (Ct.App.1985).

Section 56-9-831 authorizes insurance carriers to restrict the amount of underinsured motorist coverage to the limits of the liability coverage but does not authorize any other restriction of the underinsured motorist coverage. See Gambrell v. Travelers Insurance Companies, 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983) (“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.”).

For these reasons, we hold that the exception from coverage which National Grange included in its policy is invalid.

National Grange argues that to allow recovery under both the liability and the underinsured motorist coverages of the policy will effectively transform underinsured motorist coverage to match the cost of the presently more expensive liability coverage. Some courts have embraced this argument in refusing to allow a dual recovery. E.G., Miller’s Casualty Insurance Co. of Texas v. Briggs, 100 Wash.2d 1, 665 P.2d 891 (1983). However, we must decline to do so under principles articulated in Busby v. State Farm Mutual Automobile Insurance Co., 280 S.C. 330, 337, 312 S.E.2d 716, 720 (Ct.App.1984):

In 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.

The legislature can amend its statute so as to authorize the exception which National Grange included in its policy, but this Court cannot.

Id. At 332-34, 356 S.E.2d at 152-153 (some citation omitted).

As the Bratcher court explained, an insurer cannot place any restriction of UIM coverage other than to set the maximum limit of UIM coverage. Therefore, an insurer cannot lawfully restrict recovery of UIM benefits so that only Class I insureds can recover under both the liability and UIM coverages.

The case of Smith v. Church Mutual Insurance Co., 375 F. Supp. 2d 451 (D.S.C. 2005), is also similar to the present case, and it illustrates the principle that Class II insureds can recovery both liability and UIM benefits under a policy that insures an at-fault driver. In Smith, a business automobile policy was issued to a church (Trinity AME), and several Class II insureds<sup>2</sup> were injured while riding as passengers in a vehicle owned by the church and driven by a church employee (Halmon). The passengers contended that they could recover UIM benefits to the extent that the damages in the underlying suits against the church exceeded a statutory damages cap for charitable organizations. The church's policy had \$1 million in liability coverage and \$1 million in UIM coverage, but UIM coverage was triggered "only after liability bonds or policies have been exhausted by payments of judgments or settlements." *Id.* at 453. The Smith court noted that it was undisputed that the passengers were "insureds", and ruled that \$1 million in UIM coverage "must be offered" if the damages in the underlying liability suits exceeded the \$600,000 cap. *Id.* at 455. The court reasoned as follows:

Section 38-77-160 provides:

Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried 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 (2002) (emphasis added). The statute plainly provides that UIM coverage must be offered "to provide coverage in the event that damages are sustained in excess of ... any damages cap or limitation imposed by statute." *Id.* Baring the joinder of Halmon, there is a damages cap of \$600,000 in this case. Therefore, \$1,000,000 in UIM coverage must be offered if the damages received in the underlying

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<sup>2</sup> The passengers were Class II insureds because an entity such as a church or corporation has no spouses or family members who could be considered as Class I insureds. *Concrete Servs., Inc., v. U.S. Fid. & Guar. Co.*, 331 S.C. 506, 511-12, 498 S.E.2d 865, 867-68(1998); *Nationwide Mut. Ins. Co. v. Smith*, 376 S.C. 60, 64 n.3, 654S.C.2d 837, 839 n.3 (Ct.App.2007)

liability suits exceed the cap. The plaintiffs, moreover, are not required to exhaust the statutory cap of \$600,000 before seeking UIM coverage. To the extent the plaintiffs follow such course, however, Church Mutual is entitled to a setoff for the amount of the liability coverage not exhausted under the statutory cap. See Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589, 597 (1997).

Based on the foregoing, the policy should be reformed to delete the requirement that the \$1,000,000 liability limits of the policy must be exhausted before UIM coverage is available. In its place, Section 38-77-160 is inserted in its entirety.

*Id.* at 456.

As is mandated by Section 38-77-160, Omni must provide UIM coverage to Defendants in the event that Defendants prove damages in excess of the liability coverage that applies under the Policy. The statute does not permit any restriction on UIM coverage other than setting a limit on the amount of UIM coverage equal to the liability coverage limit. Bratcher, 292 S.C. at 332, 356 S.E.2d at 152. Omni cannot lawfully prohibit Class II insureds from recovering UIM benefits if their damages exceed the available liability coverage, even if the “duplicate payments” clause unambiguously purports to do so.


In summary, this Court concludes that the Policy provides UIM benefits for the Defendants because (1) the exclusions and definitions in other sections of the policy are not necessarily applicable to the section concerning UIM benefits; (2) the Defendants in this case are covered persons for UIM purposes; (3) the policy exclusions’ attempts to prevent “duplicate payments” or “double recovery” for the same damages are not dispositive here, as there is no proof that the same damages are being claimed; and (4) the policy exclusions limiting total recovery to the amount of liability coverage only is not consistent with the statutory scheme for UIM coverage, for which the offer of coverage is mandated. Once purchased, this coverage is remedial in nature, and public policy

dictates that otherwise covered persons should not be prevented from receiving UIM benefits when their damages exceed liability limits due to a purported "liability limits only" policy limitation, which this court deems void under these facts and circumstances because there is no statutory authorization for such a limitation.

CONCLUSION

Based on the foregoing, the Court declares as a matter of law that the Plaintiffs are Class II insureds under the Omni Policy which must be construed to extend UIM coverage to the Plaintiffs subject to the policy's UIM limits. The relief requested by the Plaintiff's in their complaint is therefore granted and case dismissed in accordance with the factual findings and Conclusions of Law stated herein.

AND IT IS SO ORDERED.



HONORABLE PAUL M. BURCH  
CIRCUIT COURT JUDGE

January 31, 2013

Darlington, South Carolina

2013 FEB -5 PM 2:32  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

FILED

TRUE CERTIFIED COPY,

*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.