STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

Omni Insurance Company,)
)
Plaintiff,)
)
-vs-)
)
Christopher Wright,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

Case No. 12-CP-11-61

AMENDED ORDER SUPERSEDING ORDER OF OCTOBER 25, 2012

In this declaratory judgment action, Omni Insurance Company seeks a judgment finding that the defendant, Christopher Wright, is entitled to no underinsured motorist benefits under Omni's policy of insurance. The defendant Wright moves for judgment on the pleadings. Finding that the defendant is an insured under the underinsurance provisions of the policy, and that none of the policy provisions relied upon by Omni applies here, the Court grants judgment on the pleadings to the defendant.

Christopher Wright was a passenger in the insured vehicle driven by Jennifer Barron, the daughter of Omni's named insured, Anthony Barron. Jennifer lost control of the car, which left the road and struck a guard rail, severely injuring Wright.

The Omni insurance policy issued to Mr. Barron extends five types of insurance coverage: (1) Liability Coverage (in Part A of the policy); (2) Medical Payments Coverage (in Part B); (3) Uninsured Motorists Coverage (in Part C1); (4) Underinsured Motorists Coverage (in Part C2); and (5) Coverage for Damage to Your Auto (in Part D). Each Part contains its own definition of who is insured. With respect to underinsurance:

> **Insured** as used in this Part [*i.e.*, Part C2 – UNDERINSURED MOTORISTS COVERAGE] means:
>
> 1. **You** or any family member.
> 2. *Any other person occupying your covered auto.*

Omni policy, PART C2, ¶ A.1. & A.2. (emphasis added). Since Wright was a "person occupying [the] covered auto," he was an insured under Part C2 — underinsured

motorist coverage. This much is beyond dispute.

In response to Wright's negligence claim against Jennifer, Omni paid to Wright its Part A liability limit of $25,000.00. Because Wright's damages allegedly exceed the amount paid under the liability provisions of the Omni policy, Wright made an additional claim under the underinsured motorist coverage. Omni contends that it cannot owe coverage to Wright under both Part A, liability insurance, and Part C2, underinsurance. Omni contends that nothing is owed, on account of three policy provisions. The first two provisions were alleged in Omni's complaint, filed in April 2011. The third provision was added soon before the hearing of defendant's motion by way of an amended complaint.[1]

The issue of this case implicates no statutes and no public policy. This is a case of contract interpretation. Familiar rules and principles of contract interpretation apply here. Foremost among these is the polestar which always guides the Court in discerning what the parties meant: their contractual intent is first sought in the plain meaning of the words they used. This maxim applies to insurance policies as well as to all other contracts. Much of what our Court of Appeals had to say in the case of *South Carolina Farm Bureau Ins. Co. v. Kennedy,* 390 S.C. 125, 700 S.E.2d 258 (Ct. App. 2010), applies here. For example:

> The general rules of contract construction apply to insurance policies. *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency,* 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct.App.1999). "[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together." *Id.* "Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so." *Id.* "This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning." Id. at 548-49, 520 S.E.2d at 823." An insurer's obligation under a policy of

[1] Omni's complaint originally alleged that the Barron policy contained terms not found in the policy. This error led to Wright's bad faith counterclaim. The error was corrected in the amended complaint. The Court has not been asked to rule upon the claim of bad faith asserted in the counterclaim.

> insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." *Id.* "[A]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Id.* "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Id.*

Id. at 261. The search for contractual intention begins with the plain meaning of the words used.

1. Paragraph A of the LIMIT OF LIABILITY provisions of Part A.

The policy limit for each of the five types of insurance is set forth in the manner often used in insurance policies. The carrier begins by promising to pay whatever damages or losses are the subject of the coverage. Later, in a separate paragraph styled "LIMIT OF LIABILITY," the upper limit of that obligation is set forth. For example, in Part A, the liability insurance section, the carrier begins by promising:

> We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.

Part A, page 3. This promise would be open-ended if not for the limit of that promise, found two pages later:

> LIMIT OF LIABILITY
> A. The limit of liability shown in the Declarations for each person for Bodily Injury Liability is our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one auto accident. . . .

The carrier's unconditional promise to pay, followed later by a "LIMIT OF LIABILITY" paragraph, is done in the same fashion in each of the five types of insurance granted by this policy. Thus, the LIMIT OF LIABILITY paragraph of each policy Part applies to the type of insurance granted in that specific Part.

In paragraph 29 of its amended complaint, Omni disclaims underinsurance coverage in reliance upon the provision quoted above, found in Part A of its policy.

Part A is entitled: "LIABILITY COVERAGE". $25,000 is the limit for the type of

insurance granted in Part A, the "LIABILITY COVERAGE" part of the policy. Omni contends that the Bodily Injury Limit of its liability coverage is the most it could ever owe to anyone.

This Court cannot agree with Omni's contention. The liability insurance granted in Part A applies to "damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident." PART A – LIABILITY COVERAGE, ¶ A, page 3. Thus, $25,000.00 is Omni's "maximum limit of liability for all damages . . ." The "damages" here are those damages "for which any insured becomes legally responsible to pay because of an auto accident." Part A, ¶ A, page 3. The Part A (liability) limit applies to liability insurance coverage and nothing else. Each of the other four types of insurance has its own separately stated limit. Underinsured motorist coverage is not liability coverage, and has its own and different limit. The limit for underinsured motorist coverage is as follows:

> LIMIT OF LIABILITY
> A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
> 1. Our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident is the sum of the limits of liability shown in the Declarations for each person for Bodily Injury Liability Underinsured Motorists Coverage. (*sic*)

Part C2, page 15. Thus, Omni's "limit of liability" for UIM coverage is the *sum* of two "limits of liability shown in the Declarations," not a single number as is the case with the limit upon liability coverage.

The five separate limits found in this policy — and the type of insurance coverage to which each one applies — are unambiguous. Determining whether a policy provision is ambiguous requires examining "the context of the entire integrated agreement . . . ." *Hansen v. United Services Auto. Assoc.*, 350 S.C. 62, 68, 565 S.E.2d 114, 117 (Ct. App. 2002). As the index to the policy shows, there is a LIMIT OF LIABILITY provision in Part A – "LIABILITY COVERAGE", and a separate and different

LIMIT OF LIABILITY provision in each of the other four parts. Part C2 — "UNDERINSURED MOTORISTS COVERAGE" has its own limit, quoted above.

If the provision relied upon by Omni applied to both liability and underinsured motorist coverage, the policy would say so clearly. On the contrary, no two of the five limits are the same. If Part A's limit were transposed to Part C2, then Part C2's limit would be displaced. This would amount to re-writing the policy, something which the Court may not do.

Even if the Court were to deem the limits ambiguous, however, there is no doubt as to how that ambiguity would be resolved. South Carolina law requires any ambiguity to be resolved in favor of the insured. *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420, 423 (1969) ("It is settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy."); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455, 459 (2004) ("Where the words of an insurance policy are capable of two reasonable interpretations, the construction most favorable to the insured should be adopted."); *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 187, 399 S.E.2d 770, 772 (1990) ("Where language used in an insurance contract is ambiguous, . . . that construction which is most favorable to the insured will be adopted.").

For these reasons the LIMIT OF LIABILITY which applies to the liability insurance coverage of Part A does not apply to the UIM coverage of Part C2.

2. Paragraph B.2. of the LIMIT OF LIABILITY provisions of Part A.

In paragraph 30 of its amended complaint, Omni relies upon a second provision

found in the LIMIT OF LIABILITY provisions of Part A of its policy, the liability coverage. This provision is found at page 6 of the policy and reads in material part as follows:

> B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage [*i.e.*, liability coverage] and:
> 1. Part **B** or Part **C** of this policy; or
> 2. Any Underinsured Motorists Coverage provided by this policy.

Omni contends that Wright would be receiving "duplicate payments for the same elements of loss" if he received both liability coverage and UIM coverage.

If this provision were intended to prohibit anyone from receiving *both* liability insurance payments *and* underinsured motorist payments in any case, it would say so clearly. But the only thing narrowly prohibited by this provision is a liability payment which *duplicates* underinsurance payments. Conversely, liability payments which do *not* duplicate underinsurance payments are foreseen and allowed.

This provision, found in the LIMIT OF LIABILITY section of PART A – LIABILITY COVERAGE, is a limit on "*this* coverage" — *liability* coverage — not underinsured motorists coverage. In other words, *liability* insurance payments may not duplicate *underinsured motorists* payments. Although not identified in its amended complaint, in its motion to reconsider Omni has pointed out that a similar provision is found in the UIM part of the policy. There, the limitation is upon UIM payments which "duplicate" liability payments, medical expense payments, UM payments, other UIM payments, or property damage payments. No payment under *any* underinsured motorists coverage ever "duplicates" any payment made under any liability coverage. By definition, UIM coverage only applies where liability coverage and payments made thereunder are insufficient to compensate the claimant for his loss. Hence, underinsurance payments never duplicate liability payments. If Mr. Wright's UIM claim "duplicated" his liability claim, then by definition he would have no valid UIM claim. No amount paid in UIM coverage would "duplicate" the previous $25,000 liability payment under Part A "for the

same elements of loss".

3. The LIMIT OF LIABILITY provision of Part C2.

Omni amended its complaint to add a third policy provision in support of its contention that it owes nothing in UIM coverage. This provision is found in Part C2 – UNDERINSURED MOTORISTS COVERAGE. Therefore, this provision does apply to Wright's UIM claim, unlike the two provisions of PART A — liability coverage — quoted above. Omni relies upon the following provision of Part C2, the UIM coverage:

> LIMIT OF LIABILITY
> A. If bodily injury is sustained in an accident by any insured while occupying your covered auto . . . :
> 1. Our maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident is the sum of the limits of liability shown in the Declarations for each person for Bodily Injury Liability Underinsured Motorists Coverage.

The limit in question is **the sum of** "limits of liability shown in the Declarations". In this context, **"the sum of"** can only mean:

> **sum** • n. . . . **2. (the sum of)** the total amount resulting from the addition of two or more numbers or amounts.

THE CONCISE OXFORD DICTIONARY 1434 (10th ed. 1999). The use of the phrase "**the sum of**" indicates a clear intent that two or more limits — *plural* — were to be added together to create the "maximum limit" of monetary exposure for the insurer. The limits to be added together are "shown in the Declarations". Inexplicably, there is nothing called a "Bodily Injury Liability Underinsured Motorists Coverage" in the Declarations or anywhere else in the policy. Even if such a thing existed, it would be only one of the numbers to be summed. The defendant plausibly suggests that the word "and" was omitted from this phrase. The phrase would make sense if it reads: "Bodily Injury Liability **and** Underinsured Motorists Coverage", the limits of which are to be summed. The Declarations show a Bodily Injury Liability Limit of $25,000 per person and an Underinsured Motorist Bodily Injury Limit of $25,000 per person. The clear intent is that

the limit of liability coverage was to be added to the limit of underinsurance coverage to define the insurer's overall "maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in that accident. . . ." The sum of these two limits — $50,000 — is the only **sum** which makes sense.

When a typographical error is apparent in an insurance policy or other contract, the court can and should correct the error. *See, e.g., Sphere Drake Ins. Co. v. Litchfield,* 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). It is essential to supply the missing word "and"; otherwise, the quoted provision would be meaningless. It would call for the "sum" of a single nonexistent number — nonsensical twice over.

Omni denies any typographical error, but cannot point to a "Bodily Injury Liability Underinsured Motorists Coverage" number or to any two numbers on the Declarations page to be summed.

4. Underinsured motorist coverage as voluntary insurance.

Omni makes the point that UIM coverage is voluntary, not mandatory, so that the carrier has much discretion in fashioning the scope of coverage. That is true, and in this instance Omni has chosen to extend the UIM coverage offered by this policy to third parties who did not pay for it. The same is true of the medical payments coverage provided in Part B.

This is not a stacking case. The many stacking decisions cited by Omni have nothing to say about the construction of Omni's insurance policy. The determination of underinsurance coverage is one of contract interpretation. It requires only a reading of the policy provisions to determine whether Wright is an insured under the UIM coverage of Part C2 and, if he is, then whether his receipt of the limits under Part A, the liability coverage, precludes a claim in any amount under the UIM coverage. As a passenger in

the insured vehicle, he clearly is an insured under the UIM provisions. Omni has chosen to offer its customers an insurance product enhanced in this way. The parties to an insurance contract can agree to whatever coverage they wish as long as their agreement is not inconsistent with legislative mandate.

None of the three provisions relied upon by Omni preclude UIM coverage to this insured on account of Omni's previous liability coverage payment.

5. Fraud in the insurance application.

Omni alleges in its complaint that its policyholder, Mr. Barron, failed to name his daughter Jennifer as an "Additional Driver," thereby affecting the premium. Omni does not seek to void the policy for fraud in the application. Rather, it offers this fact as what it describes as an "additional sustaining ground" for a declaration that it owes nothing to Wright in UIM coverage. No authority is cited and no basis is offered for the contention that the named insured's failure in this regard is a ground to deny UIM coverage or, for that matter, to affect any provision of the policy.

CONCLUSION

Omni asks the Court to read its policy in such a way that an insured guest passenger can never receive *UIM* benefits when he has received the limit of *liability* coverage. To read the policy provisions in that way would be to render the UIM coverage illusory in the case of a guest passenger injured by the negligence of the driver.

The two provisions upon which Omni relied when it began this action apply to liability coverage, not underinsured motorist coverage. The recently added third provision refers to the **sum** of two coverage limits, and can only mean that Omni's total responsibility for liability and UIM coverage cannot exceed the **sum** of its liability limit and its UIM limit. If it does not mean that, then it is meaningless.

Accordingly:

IT IS ORDERED:

(1) That the defendant's motion for judgment on the pleadings is granted,; and

(2) That underinsured motorists coverage exists in favor of the defendant to the limit of $25,000.00.

J. Mark Hayes, II
Presiding Judge, Seventh Judicial Circuit

Spartanburg, South Carolina

11-28-12, 2012.