

APPELLANT'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 29691

CATHERINE DAVIS,
Plaintiff and Appellee,

v.

RICHARD OTTEN,
Defendant,

and

MEEMIC INSURANCE COMPANY,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
Circuit Court Judge

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Petition For Intermediate Appeal Filed June 30, 2021. Order
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	*	
Plaintiff and Appellee,	*	
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v.	*	NO. 29691
	*	
RICHARD OTTEN,	*	
	*	
Defendant,	*	
	*	
And	*	
	*	
MEEMIC INSURANCE COMPANY,	*	
	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

Citations to the settled record will be referred to as "SR, followed by the page number. The transcript of the May 18, 2021 Motion to Dismiss hearing will be referred to as "T". The page number of the transcript cite will follow the hearing designation. The Defendant/Appellant Meemic Insurance Company will be referred to as "Meemic". The Plaintiff/Appellee Catherine Davis will be referred to as "Davis". The Defendant Richard Otten will be referred to as "Otten".

JURISDICTIONAL STATEMENT

This is an appeal of the written Order dated May 24, 2021,

entered by the Honorable Michelle K. Comer in the Circuit Court for the Fourth Judicial District, Case No. 40CIV21-000039, denying Meemic's SD Codified L §15-6-12(B)(2) and §15-6-12(b)(5) Motion to Dismiss Plaintiff's Complaint. SR 93; Appendix A. Judge Comer made a similar, verbal ruling upon the conclusion of the May 18th, 2021, hearing on the Meemic's Motion to Dismiss. T, 21; Appendix K.

On June 24, 2021, Davis filed a Notice of Entry of Order, SR 94; Appendix F. On June 30, 2021, Meemic filed directly with this Court a "Petition for Permission to Take Discretionary Appeal". Appendix C. Davis did not file any response or resistance to that Petition. On August 6, 2021, this Court entered an Order granting Meemic's "Petition for Allowance of Appeal from Intermediate Order". SR 97; Appendix E. Therefore, this Court possesses jurisdiction of this matter pursuant to SD Codified L §15-26A-3(6) which permits appeals from an intermediate order made before trial and as allowed by this Court.

LEGAL ISSUES

I. DID MEEMIC HAVE MINIMUM CONTACTS WITH THE STATE OF SOUTH DAKOTA IN ORDER TO ALLOW THE TRIAL COURT TO EXERCISE PERSONAL JURISDICTION OVER APPELLANT?

The trial court apparently determined Meemic did have the necessary minimum contacts, although the trial court's

Order denying Meemic's Motion to Dismiss made no specific findings of such. SR 93; Appendix A.

Meemic contends it completely lacked the necessary, minimum contacts with the State of South Dakota as required by South Dakota's long-arm statute, SD Codified L §15-7-2, Appendix K, and by case law. Likewise, no minimum contacts existed that would allow the trial court to exercise specific, personal jurisdiction over Meemic *Kustom Cycles v Bowyer*, 2014 S.D. 87, 857 N.W.2d 402; *Marschke v. Wraitislaw*, 2007 S.D.125, 743 N.W.2d 420, 405; *Ford Motor Co. v Montana Eight Judicial Dist.Court*, et al.,141 S. Ct. 1-17 (Case No. 19-368)(2021); *Ford Motor Co. v. Bandemer*, 141 S. Ct. 1017 (Case No. 19-369)(2021). Therefore, the trial court lacked personal jurisdiction over Meemic, requiring dismissal of Davis' Complaint.

II. IF THE TRIAL COURT LACKED PERSONAL JURISIDCTION OVER MEEMIC, DID DAVIS' COMPLAINT THERFORE LACK A NECESAARY ELEMENT FOR A VIABLE BREACH OF CONTRACT CAUSE OF ACTION, THEREBY SUBJECTING THE COMPLAINT TO DISMISSAL PURSUANT TO SD CODIFIED L §15-6-12(b)(5)FOR FAILING TO STATE A CAUSE OF ACTION?

The trial court denied this section of Meemic's Motion, although neither findings of fact nor grounds for denial were stated in the Order. SR 93; Appendix A. Meemic contends that Davis failed to prove that Meemic had the required minimum contacts with the State of South Dakota to

allow the trial court to exercise personal jurisdiction over Meemic. Likewise, Davis failed to establish the long-arm statute applied. The trial court erred in failing to enumerate in its Order of May 24th, 2021, SR 93; Appendix A, what evidence existed of Meemic's minimum contacts with South Dakota which would allow the trial court to exercise jurisdiction over Meemic based on the long-arm statute or specific personal jurisdiction. Accordingly, because the South Dakota long-arm statute didn't apply, nor did Meemic have minimum contacts with South Dakota to create specific personal jurisdiction, Davis' Complaint lacked the necessary, jurisdictional element needed to state a viable cause of action for breach of contract. Therefore, it failed to state a cause of action upon which relief may be granted. *Richardson v. Richardson*, 2017 S.D. 92, 906 N.W.2d 369; *Fodness v. City of Sioux Falls*, 2020 S.D. 43, 947 N.W.2d 619; *State v. Medicine Eagle*, 2013 S.D. 60, 835 N.W.2d 886.

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This is an action for personal injury against Defendant Otten, and for breach of contract against Meemic. This appeal arises from the Circuit Court, Fourth Judicial Circuit, and an order entered May 24, 2021 by the Honorable

Michelle K. Comer, SR 93, Appendix A, denying Meemic's Motion to Dismiss, SR 15, Appendix G, for the trial court's want of personal jurisdiction over Meemic.

STATEMENT OF FACTS

Meemic is a property and casualty insurance company SR 1,12; Appendix D, Appendix H, organized under the laws of the State of Michigan SR 83, ¶4; Appendix H. As part of its business, Meemic offers automobile insurance coverage which complies with Michigan law in terms of personal injury protection, property protection, residual liability coverage, and uninsured/underinsured coverages. SR 1, ¶4, Appendix D. Meemic is not authorized to write insurance in the State of South Dakota SR 83, ¶6, Appendix H. Likewise, at all times relevant to this lawsuit, Meemic argues it has not met any of the fourteen components existing under South Dakota's long-arm statute, SD Codified L §15-7-2, Appendix I, that would authorize the trial court to exercise statutory long-arm jurisdiction over the it. SR 83, ¶5 & ¶6, Appendix H.

Meemic issued to Davis, a resident of Peck, Michigan, SR 1, ¶1, Appendix D, an automobile insurance policy, policy no. PAP0855455 (the "Policy") SR 83, ¶7, Appendix H. Meemic issued the Policy in Michigan and the Policy included coverage for Michigan statutory uninsured and underinsured

claims, subject to policy language, terms and conditions. The Policy was in effect on July 28, 2019 SR1, ¶13, Appendix D; SR 83, ¶7; Appendix H.

On July 28, 2019, Davis sustained personal injuries near Sturgis, Lawrence County, South Dakota while riding as a passenger on a motorcycle owned by William Laeder. SR 1, ¶6, Appendix D. Davis claims Defendant Otten caused the accident on July 28, 2019, and further claims Otten qualifies as an underinsured motorist, thereby entitling Davis to indemnification for underinsured motorist coverage benefits under the Policy SR 1, ¶14-17, Appendix D.

Davis presented a claim to Meemic for benefits under the Policy. On July 24, 2020, Meemic denied Davis' claim for indemnity coverage under the Policy for personal injury protection benefits. SR 86; Appendix B. Thereafter, Davis filed her lawsuit against Meemic and Otten in the South Dakota Circuit Court, Fourth Judicial Circuit, alleging that Otten caused her personal injuries, and that Meemic breached the contractual language and terms of the Policy. SR 1, ¶20, Appendix D. In the Complaint, Davis alleged the trial court had personal jurisdiction over Meemic pursuant to SD Codified L §15-5-2(venue where cause of action arose) and SD Codified L §15-5-8 (venue for

personal injury where cause of action arose). SR 1, ¶5, Appendix D.

Pursuant to SD Codified L §15-6-12(b)(2) and (5), Appendix J, and South Dakota case law, Meemic filed its Motion to Dismiss, SR 15, Appendix G, challenging the trial court's personal jurisdiction over Meemic. Because no personal jurisdiction existed, Meemic argued Davis' Complaint against Meemic should have been dismissed. Absent the trial court's personal jurisdiction over Meemic, Davis' Complaint was also subject to dismissal under SD Codified L §15-6-12(b)(5) for failing to state a cause of action upon which relief may be granted.

On May 18th, 2021, the trial court, Honorable Michelle K. Comer, held a hearing on Meemic's Motion to Dismiss. T, 1-21, Appendix K. After receipt of evidence from Meemic, and following oral arguments, Judge Comer verbally denied Meemic's Motion to Dismiss followed by a written Order on May 24, 2021. T, 21 Appendix K; SR 93, Appendix A. Neither the trial court's verbal or written Order made any findings of fact nor cited any legal basis for the ruling. T, 21. Appendix K; SR 93, Appendix A. Thereafter, and with permission from this Court, Meemic filed this intermediate appeal of the trial court's May 24, 2021 Order. Appendix C; SR 97, Appendix E.

Meemic contends neither a factual nor a legal basis exists for the trial court's order denying Meemic's Motion to Dismiss. Davis offered no evidence at the May 18th, 2021 hearing upon which the trial court could rely in order to find Meemic had any contacts, let alone minimal contacts, needed to establish the trial court's jurisdiction over Meemic. T, 1-21, Appendix K; Clerk's Certificate filed September 1, 2021. The only evidence offered and received at the hearing came from Meemic: Exhibit 1, Appendix H: Exhibit 2, Appendix B: and Exhibit 3. T, 2-4, Appendix K; Clerks' Certificate dated September 1, 2021. At the hearing, Davis only made verbal arguments and representations. T, 1-21, Appendix K. Meemic also contends the vast weight of legal authority backs its position that it lacked the minimum contacts with South Dakota needed to establish the trial court's personal jurisdiction over it. That legal authority is set forth both in the brief presented to the trial court in support of the Motion to Dismiss, SR 17, and to this Court in this appeal brief.

ARGUMENT

I. BECAUSE MEEMIC HAS NO MINIMUM CONTACTS WITH THE STATE OF SOUTH DAKOTA, THE TRIAL COURT CANNOT EXERCISE PERSONAL JURISDICTION OVER IT.

Generally speaking, when reviewing a motion to dismiss, the trial court must "treat as true all facts

properly pled in the complaint and resolve all doubts in favor of the pleader." *Kustom Cycles v. Bowyer*, 2014 S.D. 87, 857 N.W.2d 402, citing *Marschke v. Wraitislaw*, 2007 S.D.125, 743 N.W.2d 402,405.

In determining a court's jurisdiction over a non-resident party, the amount and kind of activity which must be carried on in a forum state to subject a foreign corporation or a non-resident individual to jurisdiction of that state are to be determined in each case. *Ventling v. Kraft*, 83 S.D. 465, 161 N.W.2d 29 (1968). The party asserting personal jurisdiction has the burden of establishing a prima facie case; the burden does not shift to the party challenging jurisdiction. *Burke v. Roughrider, Inc.*, 507 F.Supp.2d 1040(S.D. Central Div. 2007). In order for a South Dakota court to have personal jurisdiction over a non-resident defendant, a court must make two inquiries. The first inquiry determines if the state legislature granted the state courts jurisdiction over a defendant who does not meet a traditional basis for personal jurisdiction. This is done through the application of the South Dakota long-arm statute, SD Codified L §15-7-2. Appendix I. The second inquiry focuses on whether "the assertion of jurisdiction comport[s] with federal due process requirements." *Kustom Cycles*, supra. Meemic

contends Davis' allegations that this Court has personal jurisdiction over Meemic fails both inquiries.

A. Meemic Does Not Meet the "Minimum Contacts" Condition of the South Dakota Long-Arm Statute, SD Codified L §15-7-2.

SD Codified L §15-7-2 provides:

15-7-2. Acts within the state subjecting persons to jurisdiction of the courts.

Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary, of any of the following acts:

- (1) The transaction of any business within the state;
- (2) The commission of any act which results in accrual within this state of a tort action;
- (3) The ownership, use, or possession of any property, or of any interest therein, situated within this state;
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (5) Entering into a contract for services to be rendered or for materials to be furnished in this state by such person;
- (6) Acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state,

or as personal representative of any estate within this state;

(7) Failure to support a minor child residing in South Dakota;

(8) Having sexual intercourse in this state, which act creates a cause of action for the determination of paternity of a child who may have been conceived by that act of intercourse;

(9) With respect to any action for divorce, separate maintenance, or spousal support the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of an act giving rise to the claim, subject to the provisions of § 25-4-30;

(10) Entering into negotiations with any person within the state with the apparent objective of contracting for services to be rendered or materials to be furnished in this state;

(11) Commencing or participating in negotiations, mediation, arbitration, or litigation involving subject matter located in whole or in part within the state;

(12) Doing any act for the purpose of influencing legislation, administrative rule-making or judicial or administrative decision-making by any local, state, or federal official whose official function is being performed

within the state, providing that an appearance to contest personal jurisdiction shall not be within this subsection;

(13) The commission of any act which results in the accrual of an action in this state for a violation of the antitrust laws of the United States or chapter 37-1;

(14) The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States.

Between the facts pled in Davis' Complaint and Meemic's offered Exhibit 1, the affidavit of Meemic's General Counsel Frank C. White, Jr., SR 83, Appendix H, it's clear that at no time did Meemic meet any one of the fourteen (14) possible conditions set out in SD Codified L §15-7-2 that would allow the trial court to exercise personal jurisdiction over Meemic under South Dakota's long arm statute. Most relevant to Davis' breach of insurance contract claim against Meemic would be subparagraphs 1, 3, 4, 5, 6, or 11 of the long-arm statute. However, as specifically stated by Mr. White in Exhibit 1, SR 83, Appendix H, subparagraphs 1, 3, 4, 5 and 6 don't apply because Meemic, *inter alia*: didn't and doesn't conduct business in South Dakota; doesn't own property in South Dakota; isn't authorized to write insurance in South Dakota; didn't contract to insure any person in South

Dakota at the time of contracting with Davis on the Policy; didn't solicit South Dakota business; and is a Michigan corporation organized under the laws of Michigan, not South Dakota, and didn't have an office or agency in South Dakota. It's only contact with South Dakota in this case is that it contracted in Michigan to write a policy of insurance issued in Michigan for a Michigan resident, who later happened to be riding as a passenger on a motorcycle in South Dakota on July 28, 2019, and sustained injuries in a motorcycle accident on a date that fell within the Meemic insurance policy coverage period.

Subparagraph 11 of the long-arm statute states a condition that could allow a court to exercise personal jurisdiction over a non-resident defendant: participation in a lawsuit in the forum state if the subject matter of the suit is located in the forum state. However, this section of the statute doesn't apply for two reasons:

1. Meemic is not "participating" in Davis' South Dakota lawsuit as it has not filed any answer nor taken any other action in the lawsuit other than seeking to divest the trial court of purported jurisdiction of this case; and
2. The subject matter of Davis' claim involves an alleged breach of an insurance contract for underinsured or uninsured benefits, but the contract in question was

entered into in Michigan between Michigan residents and necessarily requires application and interpretation of Michigan insurance law. Therefore, the "subject matter" of Davis' claim against Meemic concerns the Michigan insurance contract, not the South Dakota accident.

In arguing Davis' position at the hearing on the Motion to Dismiss, her counsel attempted to demonstrate to the trial court how the long-arm statute might apply.

First, Davis argued section (1) of the statute applied because Meemic allegedly transacted business in South Dakota by "virtue...of selling insurance policies". T, 13, Appendix K. However, except for making that blanket statement, Davis' counsel presented no evidence to the trial court that Meemic transacted the sale of the Policy issued to Davis within South Dakota. To the contrary, Meemic presented evidence to the trial court that the sale of the Policy did not take place in South Dakota, but instead occurred in Michigan between two residents of Michigan. SR 83, ¶7, Appendix H.

Next, Davis argued section (2) of SD Codified L §15-7-2 applied. That section of the long-arm statute comes into play if the person allegedly coming under the statute commits "any act which results in accrual within this state of a tort action." Davis argued to the trial court that

just because a motor vehicle accident occurred in South Dakota, and because South Dakota has jurisdiction over such a tort action, then somehow that translates into Meemic having committed an "act which results in accrual...of a tort action." T, 13-14, Appendix K. However, Meemic didn't commit any tort in South Dakota, nor cause a tort to accrue in South Dakota: it only sold a policy of insurance in Michigan to a Michigan resident. Davis' Complaint doesn't even allege a tort action against Meemic, only a breach of contract action. SR 1, Appendix D. Therefore, Davis neither presented nor offered any evidence to the trial court that Meemic committed any act which caused a tort action to accrue in South Dakota. Section (2) does not apply to confer a court's jurisdiction over Meemic.

Davis next argued section (4) of the statute conferred trial court jurisdiction. That section states jurisdiction exists if a party contracts "to insure any person, property, or risk located within this state at the time of contracting". This section simply does not apply. In order for this section to be applicable, the contract of insurance must insure "person or property" located within South Dakota "at the time of contracting." Meemic sold the Policy to Davis, effective February 19, 2019, (SEE: SR 86, Appendix B Meemic letter with "Policy Term" in heading.)

Therefore, the "the time of contracting", occurred on February 19, 2019, and the transaction took place in Michigan, not South Dakota. SR 83, ¶7, Appendix H. SD Codified L §15-7-2(4) does not apply.

Finally, Davis argued that SD Codified L §15-7-2(11) conferred jurisdiction on the court in this case because the motorcycle accident occurred in South Dakota and the trial court has jurisdiction over the accident. T, 13-14, Appendix K. Davis also suggests that because damages must be determined in the tort action against Otten over which the trial does have jurisdiction, then South Dakota jurisdiction also exists over Meemic's "participation" in the same lawsuit. T, 14, Appendix K. As noted above, though, Meemic contends it is not "participating" in this litigation at this stage because its sole purpose in responding to the Davis' Complaint is divesting the trial court of jurisdiction. Further, and more importantly, Davis' stated cause of action against Meemic is based in contract, not tort. SR 1, page 6, ¶20, Appendix D. As Meemic made very clear to Davis upon denying her claim, Michigan law controls the interpretation of the Policy language, and the Policy will be enforced pursuant to Michigan law. SR 86, pages 1-4, Appendix B. The breach of contract action Davis brought against Meemic is based on a

Michigan insurance contract, not a South Dakota motor vehicle tort action. SD Codified L §15-7-2(11) confers jurisdiction on a trial court only if the litigation involves subject matter "located in whole or in part" within South Dakota. In this case, Davis' cause of action against Meemic involves a Michigan insurance contract entered into in Michigan, between Michigan residents, and is a contract which will be interpreted and enforced pursuant to Michigan law. These facts clearly do not bestow jurisdiction over Meemic upon a South Dakota court as no part of the formation, interpretation or application of the Michigan insurance contract is "located in whole or part" in South Dakota.

Therefore, in the absence of any evidence that South Dakota's long-arm statute applies to confer upon the trial court personal jurisdiction over Meemic, the trial court erred in not sustaining Meemic's Motion to Dismiss.

B. Even if the South Dakota Long Arm Statute Applies, Constitutional Due Process Requirements For Personal Jurisdiction Cannot Be Met.

As previously noted, South Dakota courts must make two inquiries to determine if personal jurisdiction exists over a Defendant: meeting the requirements of the long arm statute, and/or inquiring whether "the assertion of

jurisdiction comport[s] with federal due process requirements." *Kustom Cyle*, supra. Meemic states the fact South Dakota's long-arm statute, SD Codified L §15-7-2, doesn't apply is dispositive of Davis' Complaint because no personal jurisdiction exists over Meemic. However, even if the long-arm statute applies, the trial court still lacks personal jurisdiction over Meemic because this Court must yet make the second inquiry this Court: does Meemic have the "minimum contacts" with the State of South Dakota needed to satisfy Constitutional due process requirements? The answer is resoundingly "No".

The "minimum contacts" test is well-established in American jurisprudence. Very recently, the United States Supreme Court verified the applicability of this standard in questions arising on personal jurisdiction of a court over a non-resident defendant.

In *Ford Motor Company v. Montana Eighth Judicial District Court*, et al, 141 S. Ct. 1017 (Case No. 19-368)(2021), and *Ford Motor Company v. Bandemer*, 141 S. Ct. 1017 (Case No. 19-369)(2021)(published March 25, 2021) the United States Supreme Court reviewed cases from Montana and Minnesota state courts in which those state courts found they had personal jurisdiction over Ford. In affirming the state court decisions, the U.S. Supreme Court recited its

prior holdings on the necessity for minimum contacts of a non-resident party in order to meet the U.S. Constitution Fourteenth Amendment Due Process Clause. The Supreme Court noted the "canonical decision" of *International Shoe v. Washington*, 326 U.S. 310 (1945) and the findings in that case that a defendant's contacts with a forum state must exist in order to satisfy our judicial system's "traditional notions of fair play and substantial justice." *International Shoe*, supra. The Court further noted a court must focus on the nature and extent of "the defendant's relationship to the forum State.", citing *Bristol-Meyers Squib v. Superior Court of Cal., San Francisco City*, 137 S. Ct.827, 2017 WL 215867. That focus, in turn, led the Supreme Court to recognize two kinds of personal jurisdiction: general and specific jurisdiction, citing *Goodyear Dunlop Tires Operation S.A v. Brown*, 564 U.S. 915 (2011). As explained by the U.S. Supreme Court, general jurisdiction exists only when a defendant is "essentially at home" in the State. *Goodyear*, supra. Even then, a select "set of affiliations with a forum" must yet exist to expose the defendant to general, personal jurisdiction. *Daimler AG v. Bauman*, 571 U.S.117, 137 (2014).

In contrast to general jurisdiction, specific jurisdiction in a personal jurisdiction question covers

defendants "less intimately connected with a State" and in those cases a defendant must exhibit "purposeful availment" of contacts with that State. *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 475 (1985). "The defendant must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Dencklau*, 357 U.S. 235,253 (1958). Such contacts cannot be "random, isolated or fortuitous." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Further, the plaintiff's claims in a specific, personal jurisdiction setting "must arise out of or relate to the defendant's contacts" with the forum. *Ford*, supra, quoting *Daimler*, 571 U.S at 127. The significance of the distinction between general and specific jurisdiction? According to the Supreme Court: "The law of specific jurisdiction thus seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford*, supra, citing *Bristol-Myers*,supra.

The Supreme Court of South Dakota recognizes the difference between general and specific personal jurisdiction when looking at personal jurisdiction scenarios. In *Marschke v. Wratislaw*, 2007 S.D. 125, 743 N.W.2d 402, the South Dakota Supreme Court cited the "venerable" U.S. Supreme Court case of *International Shoe*,

supra, et al, as construing the difference between the two different types of personal jurisdiction: general and specific. *Marschke*, supra ¶12. In the words of the South Dakota Supreme Court:

A Court asserts general jurisdiction over a non-resident defendant when [the defendant] has continuous activities in the forum and the activities are substantial enough to make reasonable the court's jurisdiction over [the defendant] for a cause unrelated to those activities. (citations omitted). When the nonresident defendant does not have continuous contact with the forum, but only sporadic activity or an isolated act, a court is said to assert specific jurisdiction over [the defendant] when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act.

Marschke, supra ¶12, citing *International Shoe*, supra and *Burger King Corp.*, supra.

In reviewing a party's actions in order to exercise specific personal jurisdiction, a court must determine if "minimum contacts" for due process have been met. *State v. American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D.1985); *Zhang v. Rasmus*, 2019 SD 46, 932 N.W.2d 153. Establishing due process "requires a showing that a non-resident defendant had minimum contacts with South Dakota so that the assertion of personal jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Frankenfeld v. Crompton Corp.*, 2995 S.D., 697 N.W. 2d 378,

¶10, citing *International Shoe*, supra. The South Dakota Supreme Court "explained the limits of due process" in the following terms:

There must also be some act by which the defendant purposefully availed himself of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. This 'purposeful availment' requirement ensures that a defendant will not be haled into a court of the forum solely as a result of 'random', 'fortuitous' or 'attenuated' contacts... Moreover, the defendant's conduct and connection with the forum must be such that he could reasonably anticipate being haled into a forum court.

Khang, supra, ¶20, citing *Marschke*, supra, at 406 (internal quotations and citations omitted.)

From these "guiding principles" *Zhang*, supra, ¶21, the South Dakota Supreme Court developed a three part test "to assist courts in determining whether a non-resident defendant's actions provide sufficient minimum contacts to support the Plaintiff's assertion of specific, personal jurisdiction: First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one."

Khang, supra, ¶21, citing *Marschke*, 2007 S.D.125, ¶15, 743 N.W.2d at 407 (other citations omitted).

Clearly, the evidence presented by Meemic establishes it does not have the "continuous contacts" with the State of South Dakota noted by the *Marschke* holding to allow the trial court in this case to exercise general, personal jurisdiction over Meemic. Therefore, the trial court's inquiry should have been, and this Court's inquiry must be, on whether Meemic has the minimal contacts needed to establish a court's specific personal jurisdiction over Meemic. Based on the wording of Davis' Complaint, SR 1, Appendix D, and on the affidavit of Meemic's general counsel, Frank C. White, Jr., SR 83, Appendix H, not a single allegation in the Complaint nor other fact exists that meets any of the three requirements set forth in the *Marschke* decision needed to establish the requirement of meeting due process considerations for specific personal jurisdiction.

As previously noted, the burden of proof to establish jurisdiction is on Davis, not Meemic. *Burke v. Roughrider, Inc.*, 507 F.Supp.2d 1040(S.D. Central Div. 2007. In regards to the three requirement of the *Marschke* test for proving sufficient minimum contacts exist to find specific personal jurisdiction, Davis' fails to meet that burden.

The first *Marschke* test requires a party availing itself of the privilege of acting in the forum state. In the present lawsuit, though, Davis' Complaint does not even allege Meemic acted in any way within the state lines of South Dakota. SR1, Appendix D. Further, Meemic's general counsel affirmatively establishes Meemic conducted no business at all within South Dakota. SR 83, ¶5, Appendix H. Davis fails the first *Marschke* test.

Likewise, Davis fails to prove the second prong of the test: she doesn't identify or allege any activity Meemic specifically "directed" at South Dakota. Again, Meemic's general counsel's affidavit establishes the exact opposite: Meemic had no business dealings in South Dakota. SR 83, ¶5, Appendix H. It didn't "target" South Dakota as it is not licensed to write insurance in South Dakota, it didn't sell insurance in South Dakota, and it didn't place or issue any insurance policies in South Dakota. SR 83, ¶6, Appendix H.

Finally, Davis flunks the third prong of the *Marschke* test. The third test looks for the party's "substantial" connections to the forum state in order to make jurisdiction "reasonable". *Marschke*, supra, at 407. A look at Davis' Complaint reveals it makes no allegation that Meemic had any connection with South Dakota, let alone a "substantial" one. The only allegation in Davis' Complaint

that "connects" Meemic to South Dakota is the fact Davis, a Meemic insured, travelled in South Dakota at the time of her accident. SR 9, ¶6, Appendix D. Davis did not offer any evidence at the hearing on the Motion to Dismiss which demonstrated a "substantial connection" between Meemic and South Dakota. T, 1-21, Appendix K. Clearly, a Michigan-based insurance company issuing an insurance policy under Michigan law, in the State of Michigan to a Michigan resident, does not demonstrate the "substantial connection" needed to satisfy the third part of the *Marschke* test. Davis did not, and cannot, prove Meemic acted "purposefully" to avail itself of the benefits and protections of South Dakota law, so specific, personal jurisdiction does not exist.

As noted above, the question of specific, personal jurisdiction must be answered in order "...to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy." *Ford*, supra, citing *Bristol-Myers*, supra. In this case, South Dakota, with little or no interest in this controversy concerning contractual indemnity benefits in a Michigan insurance company's insurance policy, cannot be allowed to encroach on the State of Michigan, a State that has the most legitimate and compelling interest in the

interpretation of an insurance contract formed and issued in that State, and made between residents of that State.

Further, and of particular note, is the requirement that a defendant "purposefully" avails itself of contacts with the forum state. In *Frankenfeld v. Crompton Corp.*, 2005 SD 55, 607 N.W.2d 378, the South Dakota Supreme Court elaborated on this concept of purposeful action, and highlighted the fact the "purposeful" contact must originate by the defendant's actions, not the actions of a third-party:

Where a suit arises out of a defendant's contacts with a forum, the defendant's activities must be 'purposefully directed' toward the forum for personal jurisdiction to attach. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182, 85 L.Ed.2d at 528. It is not enough that it is foreseeable that a defendant's activities may cause injury in a forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S. Ct. 559, 566, 62 L.Ed.2d 490 (1980). ... Thus, the unilateral activity of a third party with some relationship to a nonresident defendant cannot suffice to establish personal jurisdiction. See *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Instead, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.*

In *World-Wide Volkswagen*, *supra*, the plaintiff purchased a car from a State of New York dealer, drove the car to Oklahoma, and then sustained injuries in an accident

that occurred in Oklahoma. The Plaintiff attempted to sue the New York car dealer in Oklahoma, but various courts, including the United States Supreme Court, determined that due process concerns dictated an Oklahoma court could not exercise personal jurisdiction over the New York car dealer because the dealer's mere act of selling the car to the Plaintiff in New York did not constitute a "purposeful availment" by the New York car dealer of the rights and benefits of Oklahoma law, nor did such a sale create an expectation the car dealer would be "haled" into an Oklahoma court.

The same argument applies to the facts of this case. Meemic, a Michigan insurance company, sold and issued in Michigan an insurance policy to Davis, a Michigan resident. Davis then travelled to South Dakota and was involved in an accident. Nothing Meemic did in Michigan created a "purposeful availment" by it to subject itself to South Dakota laws, nor did its action of selling an insurance policy in Michigan to a Michigan resident create an expectation that it would be "haled" into a South Dakota court. As the South Dakota Supreme Court stated in *Frankenfeld*: "As World- Wide Volkswagen recognized, due process prevents personal jurisdiction based on the unilateral activity of a third party. Because [defendants]

did not act to purposefully avail themselves of the laws and benefits of South Dakota, the exercise of personal jurisdiction over these defendants would violate due process." *Frankenfeld*, supra, at ¶25. The unilateral act of Davis riding on a motorcycle in South Dakota should not subject Meemic, a Michigan resident, to South Dakota jurisdiction.

The due process considerations which courts repeatedly adhere to and cite are simply not met in this case. Clearly, Meemic took no action in South Dakota, nor towards any resident of South Dakota, in an attempt to "avail" itself of any right, duty or benefit bestowed by South Dakota laws or courts. No "substantial connection" exists between Meemic and South Dakota. It took no action that could have reasonably led it to believe it would be "haled" into a South Dakota court based on the "random, fortuitous, attenuated" contact it had with South Dakota, a "contact" which arose through no action of its own. Instead, the "contact" with South Dakota surfaced only because of the unilateral actions of Davis in travelling to South Dakota.

For the foregoing reasons, this Court lacks specific personal jurisdiction over Meemic, and Davis' Complaint must be dismissed for want of jurisdiction.

II. BECAUSE THE TRIAL COURT LACKS PERSONAL JURISIDCTION OVER MEEMIC, DAVIS' COMPLAINT LACKS A NECESSARY ELEMENT OF A BREACH OF CONTRACT CAUSE OF ACTION. THEREFORE, DAVIS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED UNDER SD CODIFIED L §15-6-12(b)(5).

As stated by the South Dakota Supreme Court in *Ghrulke v. Sioux Empire Federal Credit Union*, 2008 S.D. 89, 756 N.W.2d 399:

A motion to dismiss tests the legal sufficiency of the pleadings ...*Elkjer v. City of Rapid City*, 2005 SD 45, ¶ 6, 695 N.W.2d 235, 238. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." *Sisney v. Best*, 2008 SD 70, ¶ 7, 754 N.W.2d 804 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (internal citations omitted)). The rules "'contemplate [a] statement of circumstances, occurrences, and events in support of the claim presented....' " *Id.* ¶ 7 (quoting *Bell Atlantic*, 550 U.S. at ----, 127 S.Ct. at 1965 n. 3, 167 L.Ed.2d 929 (quoting 5 Wright & Miller Fed Prac & Pro: Civ3d § 1202 at 94, 95)). Ultimately, the complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. *Bell Atlantic*, 550 U.S. at ----, 127 S.Ct. at 1965, 167 L.Ed.2d 929. ..."

Gruhlke, supra at ¶17.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the pleading, not the facts which support it. *Richardson v. Richardson*, 906 N.W.2d 369, 2017 S.D. 92. Further, a complaint should not be dismissed for failure to state a

claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle Plaintiff to relief. *Fodness v. City of Sioux Falls*, 947 N.W.2d 619, 2020, S.R. 43. However, if a court determines it lacks personal jurisdiction over a non-resident defendant, then that court may take no further action against that defendant because no cause of action exists. *Boyko v. Robinson*, 321 Fed. App. 526, 2009 WL 961513 (8th Cir.). citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (without personal jurisdiction a district court is powerless to proceed to adjudication.)

In this lawsuit, because this Court lacks personal jurisdiction over Meemic, and because "beyond doubt" Davis cannot remedy this defect in her pleadings, she cannot maintain an action in a court which has no jurisdiction over Meemic. "To properly hear a case, a circuit court must have personal jurisdiction over the defendant. ..." *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900. As argued above, in the absence of personal jurisdiction over Meemic, Davis' Complaint fails to state a cause of action against Meemic and must be dismissed pursuant to SD Codified L §15-6-12(b)(5).

CONCLUSION

Despite the trial court stating it found as "very compelling" Meemic's argument on its lack of contact with South Dakota, T,20, it nonetheless overruled Meemic's Motion to Dismiss. The trial court did not state any reason for its decision, nor did it cite to any case law or factual findings for its ruling. T, 21, Appendix K; SR 93, Appendix A. Meemic presented to the trial court ample facts, statutes and case law, though, to support its position the trial court lacked personal jurisdiction over it.

For the reasons set forth in this Brief, and pursuant to SD Codified L §15-6-12 (b)(2) and §15-6-12(b)(5), Appellant Meemic Insurance Company respectfully requests this Court reverse the trial court decision and remand the case to the trial court with a mandate to dismiss the Appellee Catherine Davis' Complaint against Meemic for want of personal jurisdiction.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests it be granted twenty (20) minutes to present oral argument on this appeal.

Dated: December 16, 2021

/s/ Earl G. Greene, III
Susan B. Meyer (#3420)
Earl G. Greene, III (#5326)
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Meemic Insurance Company*

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SD Codified L §15-26A-66(b) using Courier New typeface in 12 point type. Appellant's Brief contains 6,460 words.
2. I certify the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 16th day of December, 2021.

/s/ Earl G. Greene, III
Earl G. Greene, III
Attorney for Meemic Insurance
Company

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PROOF OF SERVICE

It is hereby certified that, on December 16, 2021, a true and correct copy of the foregoing document has been served upon all parties via email as properly addressed below:

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/s/ Earl G. Greene
Earl G. Greene

STATE OF SOUTH DAKOTA)
COUNTY OF LAWRENCE)ss)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,)
Plaintiff,)

FILE NO. 40CIV21-000039

vs.)

ORDER DENYING DEFENDANT MEEMIC
INSURANCE COMPANY'S SDCL 15-6-
12(B)(2) AND 12(B)(5) MOTION TO
DISMISS

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

This Matter, having come before the Court on the Defendants' Motion to Dismiss for Want of Personal Jurisdiction, having held a hearing in the matter and upon the consideration of the arguments, briefs, affidavits submitted, and the file in support of and in opposition thereto, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant Meemic's Motion to Dismiss for Want of Personal Jurisdiction is DENIED on May 18, 2021.

Signed: 5/24/2021 9:07:07 AM

BY THE COURT:

Michelle Comer

Honorable Michelle Comer
Fourth Judicial Circuit Court Judge

ATTEST:

CAROL LATUSECK
Clerk of Courts
BY:

KRISTIE GIBBENS
Deputy Clerk

[SEAL]





July 24, 2020

First Class Mail and
Via email: faust@moorefaust.com

Moore-Faust Law Group
Attn: Dean Faust
924 Quincy St.
Rapid City, SD 57701

FILED

MAY 18 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Re: Your Client:	Catherine Davis
Date of Loss:	July 28, 2019
Claim Number:	01895668
Named Insured:	Cathy Davis
Underwriting Company:	Meemic Insurance Company ("Meemic")
Policy Number:	PAP0855455 ("Policy")
Policy Term:	02/19/2019-08/19/2019
Coverage Part:	Part II Michigan No-Fault Coverages

Dear Mr. Faust,

This letter will respond to the claim filed on behalf of your client, Ms. Cathy Davis by your office under this policy, received by Meemic Insurance Company ("Meemic"), requesting Personal Injury Protection ("PIP") benefits, under Part II, of the Policy. As discussed below, Meemic is denying indemnity coverage under Part II, of the Policy, for your client's claim, as well as specifically and generally reserving its rights.

I. The Loss.

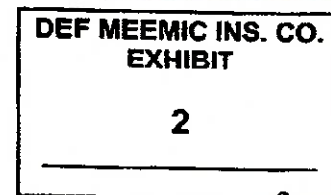
Meemic's investigation has determined that, on July 28, 2019, your client was a passenger on a Harley Davidson FLHTCU owned and operated by William Laeder traveling south on US Highway 14A in Lawrence, South Dakota. The vehicle your client was on was struck by a Harley Davidson, owned and operated by Richard Otten, who was traveling west and failed to negotiate a turn. Your client claim injuries as a result of the loss.

II. The Policy.

All references will be to policy form NF 101-8 (5/2012), unless otherwise stated.

A.

Part II, Insuring Agreement, Sections 1.A. and 1.B, provide,





We agree to pay only as set forth in the Code the following benefits to or for an Insured person [or, in the case of his/her death, to or for the benefit of his/her dependent survivor(s)] who suffers accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

A. MEDICAL BENEFITS (ALLOWABLE EXPENSES). *All reasonable charges incurred for reasonably necessary products, services and accommodations for an insured person's care, recovery or rehabilitation.*

B. WORK LOSS BENEFITS. *Loss of income from work the insured person would have performed if that person had not been injured. We will pay expenses, not to exceed the dollar limit established by the Code, reasonably incurred in obtaining ordinary and necessary services an insured person would have performed not for income but for the benefit of that person or dependents.*

Part II, Definitions, Section 1, provides,

Motor Vehicle means a vehicle, including a trailer, with more than two wheels, required to be registered in Michigan. The motor vehicle must be operated, or designed for operation, upon a public highway by power other than muscular power. Motor Vehicle does not include: a motorcycle, moped, vehicle designed for off-road use; or a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan Vehicle Code.

Part II, Definitions, Section 2, provides,

Motorcycle means a vehicle having a saddle or seat for use of the rider, designed to travel on not more than three wheels and with a motor that exceeds 50 cubic centimeters piston displacement. Motorcycle does not include a moped.

Your client was a passenger on a Harley Davidson FLHTCU motorcycle struck by another Harley Davidson motorcycle. Each of the involved vehicles qualifies as a **motorcycle**. Therefore, neither qualifies as a **motor vehicle**. As such, the Part II, Insuring Agreement, is not fulfilled and Meemic denies indemnity under Part II, of the Policy for your claim.

B.

Part II, Insuring Agreement, Sections 1.A. and 1.B, are quoted above. Definitions, Section 6, provides,

Code means Chapter 31 of the Michigan Insurance Code, the Michigan No-Fault Law.

The Code, Section 3105(1), in pertinent part, provides,

Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

The Code, Section 3101(2), in pertinent part, provides,

(g) "Motorcycle" means a vehicle that has a saddle or seat for the use of the rider, is designed to travel on not more than 3 wheels in contact with the ground, and is equipped with a motor that exceeds 50 cubic centimeters piston displacement. For purposes of this subdivision, the wheels on any attachment to the vehicle are not considered as wheels in contact with the ground. Motorcycle does not include a moped or an ORV.

(i) "Motor vehicle" means a vehicle, including a trailer, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels. Motor vehicle does not include any of the following:

(i) A motorcycle.

Your client was a passenger on a Harley Davidson FLHTCU motorcycle struck by another Harley Davidson motorcycle. Each of the involved vehicles qualifies as a motorcycle under 3101(2)(g). Therefore, neither qualifies as a motor vehicle under 3101(2)(i). As such, the requirements of the code are not fulfilled and Meemic denies indemnity under Part II, of the Policy for your claim.

C.

Notwithstanding the denial of coverage stated above Meemic also reserves its rights as follows:

- 1) As to whether any request for benefits involves reasonably necessary products and services to the insured person's care, recovery and rehabilitation in connection with the loss and thus fulfills Part II, Insuring Agreement, Sections 1.A. and 1.B, are quoted above;
- 2) As to whether any request for benefits involves reasonably necessary products and services to the injured person's care, recovery and rehabilitation in connection with the loss and thus fulfills MCL500.3107;
- 3) As to whether your client has complied with her health insurance plan and thus fulfills Part II, Limits of Liability, Section 1.A.3, as amended by Form MI AMD (01/19); and,
- 4) As to whether your client has complied with her health insurance plan and thus fulfills MCL 500.3109a.

D.

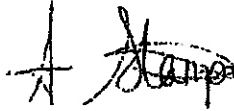
The Policy was issued by a Michigan insurance company to a Michigan Resident. Your client is a resident of Michigan. Part II, of the Policy, is based upon a statutory scheme provided under Michigan law. It is Meemic's position that all claims under the Policy are controlled by Michigan law. Any suit under the policy should be resolved by the Michigan Courts.

E.

The grounds for our disclaimer of coverage asserted herein are set out to inform you of our current coverage position. Meemic reserves the right to supplement, modify and amend this letter as new facts are learned or allegations are made. Meemic does not waive any coverage defenses available, either under the policy or the law by failing to expressly set those out in this letter.

If you have any questions regarding our coverage position, or take exception to it, please advise the undersigned immediately of the basis for the disagreement. If there are additional facts, which you feel should alter our coverage position, please advise us promptly, so that we may reevaluate our coverage position.

Sincerely,

A handwritten signature in black ink, appearing to read "Amber Stamps". The signature is stylized with a large initial "A" and a cursive "Stamps".

Amber Stamps
Mecmic Insurance
800-231-5700 x 32479 P
800-231-5780 F

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Civ. No. 21-000039

CATHERINE DAVIS

PLAINTIFF AND RESPONDENT,

VS.

MEEMIC INSURANCE COMPANY,

DEFENDANT AND PETITIONER,

AND

RICHARD OTTEN,

DEFENDANT.

PETITION FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
CIRCUIT COURT JUDGE

**DEFENDANT MEEMIC INSURANCE COMPANY'S PETITION FOR PERMISSION
TO TAKE DISCRETIONARY APPEAL**

GORDON & REES, LLP

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*Order Filed on May, 24, 2021
Notice of Entry served on June 24, 2021*



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ATTACHMENTS

1. Order denying motion to dismiss (May 24, 2021).
2. Notice of entry of order denying motion to dismiss (June 24, 2021).
3. Plaintiff's Complaint.
4. Affidavit of Frank C. White.

STATEMENT OF THE FACTS

Meemic Insurance Company ("Meemic") is a property and casualty insurance company (Plaintiff's Complaint, ¶3) organized under the laws of the State of Michigan. (Affidavit of Frank C. White, ¶ 4). As part of its business, Meemic offers automobile insurance coverage which complies with Michigan law in terms of personal injury protection, property protection, residual liability coverage, and uninsured/underinsured coverages (Plaintiff's Complaint, ¶4). Meemic is not authorized to write insurance in the State of South Dakota (Affidavit of Frank C. White, Jr., ¶ 6), and contends it has not engaged in any activity which would bring it under the auspices of the South Dakota long-arm statute, SDCL 15-7-2. (Affidavit of Frank C. White, Jr., ¶5 & ¶6).

Meemic issued to the Plaintiff, a resident of Peck, Michigan, (Plaintiff's Complaint, ¶1) an automobile insurance policy, policy no. PAP0855455 (the "Policy") (Affidavit of Frank C. White, Jr., ¶7). Meemic issued the Policy in Michigan and it included coverage for uninsured and underinsured claims, subject to policy language, terms and conditions. The Policy was in effect on July 28, 2019 (Plaintiff's Complaint ¶13, Affidavit of Frank C. White, Jr., ¶7).

On July 28, 2019, Plaintiff sustained personal injuries near Sturgis, Lawrence County, South Dakota while riding as a passenger on a motorcycle owned by William Laeder (Plaintiff's Complaint, ¶6). Plaintiff claims Defendant Richard Otten ("Otten") caused the accident on July 28, 2019, and further claims Otten qualifies as an underinsured motorist, entitling Plaintiff to indemnification for underinsured motorist coverage benefits under the Policy (Plaintiff's Complaint ¶14-17).

After Plaintiff presented a claim to Meemic for benefits under the Policy, Meemic denied Plaintiff's claim on July 24, 2020, for indemnity coverage under the Policy for

personal injury protection benefits. Thereafter, Plaintiff filed the above-captioned lawsuit against Meemic in the South Dakota Circuit Court, Fourth Judicial District, alleging Meemic breached the contractual language and terms of the Policy. (See, generally, Plaintiff's Complaint). In the Complaint, Plaintiff alleges the lower court has personal jurisdiction over Meemic pursuant to SDCL 15-5-2(venue where cause of action arose) and SDCL 15-5-8 (venue for personal injury where cause of action arose). (Plaintiff's Complaint, ¶5).

Pursuant to SDCL 15-6-12(b)(2) and South Dakota case law, Meemic filed a Motion to Dismiss in the lower court challenging that court's personal jurisdiction over Meemic. Absent the lower court's personal jurisdiction over Meemic, Plaintiff's Complaint was also subject to dismissal under SDCL 15-6-12(b)(5) for failing to state a cause of action upon which relief may be granted.

The lower court heard Meemic's Motion to Dismiss on May 18, 2021. At the conclusion of the hearing, the Honorable Judge Michelle K. Comer denied Meemic's Motion to Dismiss but did not explain her reasoning. Judge Comer asked Plaintiff's counsel to prepare an order for her signature. Plaintiff counsel did so, and Judge Comer signed that Order on May 24, 2021. The signed Order contains no explanation, memorandum opinion, nor rationale for the Court's decision. The Notice of Entry of Order was filed June 24, 2021.

STATEMENT OF THE QUESTIONS

1. Whether the lower court incorrectly denied Meemic's Motion to Dismiss by finding it had personal jurisdiction over Meemic?

RELIEF SOUGHT

Meemic respectfully requests that its Petition for Intermediate Appeal be granted and the Order denying its Motion to Dismiss be reversed and remanded with instructions that the lower court dismiss Plaintiff's Complaint for lack of personal jurisdiction over Meemic, and/or for failing to state a cause of action upon which relief may be granted.

STATEMENT OF APPLICABLE LAW

I. Lower Court Lacks Personal Jurisdiction Over Meemic

Generally speaking, when reviewing a motion to dismiss, this Court must "treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Kustom Cycles v. Bowyer*, 2014 S.D. 87, 857 N.W.2d 402, citing *Marschke v. Wraitislaw*, 2007 S.D.125, 743 N.W.2d 402,405.

In determining a court's jurisdiction over a non-resident party, the amount and kind of activity which must be carried on in a forum state to subject a foreign corporation or a nonresident individual to jurisdiction of that state are to be determined in each case. *Ventling v. Kraft*, 83 S.D. 465, 161 N.W.2d 29 (1968). The party asserting personal jurisdiction has the burden of establishing a prima facie case; the burden does not shift to the party challenging jurisdiction. *Burke v. Roughrider, Inc.*, 2007, 507 F.Supp.2d 1040 (S.D. Central Div.) In order for a South Dakota court to have personal jurisdiction over a non-resident defendant, a court must make two inquiries. The first inquiry determines if the state legislature granted the state courts jurisdiction over a defendant who does not meet a traditional basis for personal jurisdiction. This is done through the application of the South Dakota long-arm statute, SDCL 15-7-2, and a determination if

the defendant met any of the fourteen statutorily defined acts. If, in this case, Meemic does not fit within any of the fourteen defined acts, then the lower court lacked personal jurisdiction over Meemic. However, even if SDCL 15-7-2 applies, a court must then also inquire whether "the assertion of jurisdiction comport[s] with federal due process requirements." *Kustom Cycles*, supra. In so doing, a court must find the existence of a party's "minimum contacts" with the forum state in order to exercise personal jurisdiction.

The "minimum contacts" test is well-established in American jurisprudence. Recently, in *Ford Motor Company v. Montana Eighth Judicial District Court*, et al, 141 S. Ct. 1017 (Case No. 19-368)(2021), and *Ford Motor Company v. Bandemer*, 141 S. Ct. 1017 (Case No. 19-369)(2021)(published March 25, 2021) the United States Supreme Court reviewed cases from Montana and Minnesota state courts in which those state courts found they had personal jurisdiction over Ford. In affirming the state court decisions, the Supreme Court recited its prior holdings on the necessity for minimum contacts of a non-resident party in order to satisfy the U.S. Constitution Fourteenth Amendment Due Process Clause. The Supreme Court noted the "canonical decision" of *International Shoe v. Washington*, 326 U.S. 310 (1945) and the findings in that case that a defendant's contacts with a forum state must exist in order to satisfy our judicial system's "traditional notions of fair play and substantial justice." *International Shoe*, supra. The Court further noted a court must focus on the nature and extent of "the defendant's relationship to the forum State.", citing *Bristol-Meyers Squib v. Superior Court of Cal., San Francisco City*, 137 S. Ct.827, 2017 WL 215867. That focus, in turn, led the Supreme Court to recognize two kinds of personal jurisdiction: general and specific jurisdiction, citing *Goodyear Dunlop Tires Operation S.A v. Brown*, 564 U.S. 915 (2011). As explained

by the Court, general jurisdiction exists when a defendant is “essentially at home” in the State. *Goodyear*, *supra*. Nonetheless a select “set of affiliations with a forum” must yet exist to expose the defendant to such jurisdiction. *Daimler AG v. Bauman*, 571 U.S.117, 137 (2014).

In contrast, specific jurisdiction in a personal jurisdiction question covers defendants “less intimately connected with a State” and in those cases a defendant must exhibit “purposeful availment” of contacts with that State. *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 475 (1985). “The defendant must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State.” *Hanson v. Dencklau*, 357 U.S. 235,253 (1958). Such contacts cannot be “random, isolated or fortuitous.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Further, the plaintiff’s claims in a specific, personal jurisdiction setting “must arise out of or relate to the defendant’s contacts” with the forum. *Ford*, *supra*, quoting *Daimler*, 571 U.S at 127. The significance of the distinction between general and specific jurisdiction? According to the Supreme Court: “The law of specific jurisdiction thus seeks to ensure that States with ‘little legitimate interest’ in a suit do not encroach on States more affected by the controversy.” *Ford*, *supra*, citing *Bristol-Myers*,*supra*.

The Supreme Court of South Dakota recognizes the dichotomy of general and specific jurisdiction when looking at personal jurisdiction scenarios. In *Marschke v. Wratishlaw*, 2007 S.D. 125, 743 N.W.2d 402, the South Dakota Supreme Court cited the “venerable” U.S. Supreme Court case of *International Shoe*, *supra*, et al, as construing the two different types of personal jurisdiction: general and specific. *Marschke*, *supra* ¶12. In its words:

A Court asserts general jurisdiction over a non-resident defendant when [the defendant] has continuous activities in the forum and the activities are substantial enough to make reasonable the court's jurisdiction over [the defendant] for a cause unrelated to those activities. (citations omitted). When the nonresident defendant does not have continuous contact with the forum, but only sporadic activity or an isolated act, a court is said to assert specific jurisdiction over [the defendant] when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act.

Marschke, supra ¶12, citing *International Shoe*, supra and *Burger King Corp.*, supra.

In reviewing a defendant's actions in order to exercise specific personal jurisdiction, then, a court must determine if "minimum contacts" for due process have been met. *State v. American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D.1985); *Zhang v. Rasmus*, 2019 SD 46, 932 N.W.2d 153. Establishing due process "requires a showing that a non-resident defendant had minimum contacts with South Dakota so that the assertion of personal jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Frankenfeld v. Crompton Corp.*, 295 S.D., 697 N.W. 2d 378, ¶10, citing *International Shoe*, supra. The South Dakota Supreme Court "explained the limits of due process" in the following terms:

There must also be some act by which the defendant purposefully availed himself of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. This 'purposeful availment' requirement ensures that a defendant will not be haled into a court of the forum solely as a result of 'random', 'fortuitous' or 'attenuated' contacts.... Moreover, the defendant's conduct and connection with the forum must be such that he could reasonably anticipate being haled into a forum court.

Zhang, supra, ¶20, citing *Marschke*, supra, at 406 (internal quotations and citations omitted.)

From these "guiding principles" *Zhang*, supra, ¶21, the South Dakota Supreme Court developed a three part test "to assist courts in determining whether a non-resident defendant's actions provide sufficient minimum contacts to support the Plaintiff's assertion of specific, personal jurisdiction:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Zhang, supra, ¶21, citing *Marschke*, 2007 S.D.125, ¶15, 743 N.W.2d at 407 (other citations omitted).

Of particular note is the requirement that a defendant "purposefully" avails itself of contacts with the forum state. In *Frankenfeld v. Crompton Corp.*, 2005 SD 55, 607 N.W.2d 378, the South Dakota Supreme Court elaborated on this concept of purposeful action, and highlighted the fact the "purposeful" contact must originate by the defendant's actions, not the actions of a third-party. Where a suit arises out of a defendant's contacts with a forum, the defendant's activities must be "purposefully directed" toward the forum for personal jurisdiction to attach. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182, 85 L.Ed.2d at 528.

II. In the Absence Of Personal Jurisdiction, Plaintiff's Complaint Fails To State A Cause Of Action For Which Relief May Be Granted

As stated by the South Dakota Supreme Court in *Ghrulke v Sioux Empire Federal Credit Union*, 2008 S.D. 89, 756 N.W.2d 399:

A motion to dismiss tests the legal sufficiency of the pleadings ...*Elkjer v. City of Rapid City*, 2005 SD 45, ¶ 6, 695 N.W.2d 235, 238. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." *Sisney v. Best*, 2008 SD 70, ¶ 7, 754 N.W.2d 804 (citing *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted)).

Gruhlke, *supra* at ¶17.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the pleading, not the facts which support it. *Richardson v. Richardson*, 906 N.W.2d 369, 2017 S.D. 92. Further, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle Plaintiff to relief. *Fodness v. City of Sioux Falls*, 947 N.W.2d 619, 2020 S.D. 43. However, if a court determines it lacks personal jurisdiction over a non-resident defendant, then that court may take no further action against that defendant because no cause of action exists. *Boyko v. Robinson*, 321 Fed. App. 526, 2009 WL 961513 (8th Cir.), citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (without personal jurisdiction a district court is powerless to proceed to adjudication.) “To properly hear a case, a circuit court must have personal jurisdiction over the defendant. ...” *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900.

REASONS FOR GRANTING THE PETITION

- 1. Because of Meemic’s lack of contacts with the State of South Dakota, the lower court lacks personal jurisdiction over Meemic.**

The lower court’s ruling states no basis for its finding it has personal jurisdiction over Meemic. Meemic cannot point this Court to any specific holding or rationale of the trial court in reaching its decision because none were stated. Meemic notes, though, SDCL 15-7-2 does not apply because Meemic does not fall within any of the fourteen acts designated in that statute which would allow the “long-arm” of a South Dakota court to

exercise jurisdiction over Meemic (Affidavit of Frank C. White ¶¶5-6). Further, under both South Dakota and federal law, Meemic lacks the necessary "minimum contacts" with South Dakota needed for the lower court's to exercise personal jurisdiction over Meemic. In the absence of those "minimum contacts", the necessary due process requirements are not met, either.

- 2. Without a discretionary appeal, the lower court's incorrect legal analysis will substantially prejudice Meemic because it will be required to defend itself in a state in which it has no contacts, did not anticipate being haled into, and necessarily must argue for the application of Michigan underinsurance statutes and case law in a South Dakota forum.**

An intermediate appeal is necessary because the lower court's incorrect ruling that it has personal jurisdiction over Meemic forces Meemic to litigate a case in a forum completely foreign to it and the underinsured policy it provided to the Plaintiff. As noted above, Meemic does not meet the "minimum contacts" with South Dakota test required by both South Dakota and federal law. When Meemic, a Michigan corporation, contractually insured the Plaintiff, a Michigan resident, with an underinsured motorist policy issued in Michigan, a policy with language and provisions specifically controlled by a Michigan statutory scheme (MCL 500.3105, et. seq.), it never anticipated being "haled" into a South Dakota courtroom simply because its insured, a Michigan resident, rode on a motorcycle in South Dakota. The State of Michigan statutory underinsured motorist provisions will apply in this case, and given the lack of contact by Meemic with South Dakota, a Michigan court is the better forum to adjudicate what will undoubtedly be issues of Michigan insurance law.

CONCLUSION

For these reasons, Meemic Insurance Company respectfully requests that this Honorable Court grant its petition for permission to take discretionary appeal.

Dated this 30th day of June, 2021.

GORDON & REES, LLP

By /s/Susan B. Meyer
Susan B. Meyer (#3420)
E-mail: smeyer@grsm.com
1601 Mt. Rushmore Rd., Suite 3-227
Rapid City, SD 57701
Telephone: 605-737-0133

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing and all attachments was served by electronic mail upon the following this 30th day of June, 2021:

Dean Faust
924 Quincy Street
Rapid City, SD 57701
faust@moorefaust.com
Attorney for Catherine Davis

Courtney R. Clayborne
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Phone: (605) 721-1517
cclaybornelaw@aol.com
Attorney for Richard Otten

/s/Susan B. Meyer
Susan B. Meyer

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,)
Plaintiff,)

FILE NO. 40CIV21-_____

vs.)

COMPLAINT

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

40CIV21-000039

Plaintiff, for her causes of action against the Defendants, states and alleges the following:

1. That Plaintiff, Catherine Davis, is currently a resident of Peck, Sanilac County, Michigan, and was such at the time of motor vehicle collision discussed below.

2. That Defendant, Richard Otten, to the best information and belief of the Plaintiff, was a resident of Sturgis, Meade County, South Dakota, at the time of the motor vehicle collision.

3. Defendant Meemic Insurance Company is engaged in the business of selling liability, uninsured, underinsured, no-fault and other motor vehicle insurance coverages. To the best of Plaintiff's information and believe, Defendant Meemic Insurance Company is based in the state of Michigan and its corporate address is listed as 1685 North Opdyke Rd., PO Box 217019, Auburn Hills, MI 48321-7019.

4. At all times pertinent to this action, Catherine Davis had in effect a



contract of insurance with Defendant Meemic Insurance Company, including but not limited to Underinsured Motorist coverage; No-Fault Coverages including Personal Injury Protection Full Medical and Full Work Loss Property Protection Insurance; Michigan Catastrophic Claims Association (MCCA) no-fault coverage including medical expenses; and other coverages on the policy.

5. That the location of the motor vehicle collision described herein, and the subject of this action took place in Lawrence County, South Dakota. Jurisdiction is proper based upon location of the incident pursuant to SDCL 15-5-2 and 15-5-8.

6. That on or about July 28, 2019, Plaintiff Catherine Davis, was a motorcycle passenger on William Laeder's 2009 Harley Davidson traveling eastbound on US Highway 14A, Lawrence County, South Dakota. At the same time, Defendant Richard Otten was on his 2012 Harley Davidson traveling with a group of riders going westbound on US Highway 14A. Unfortunately for Plaintiff Davis, Defendant Otten negligently failed to negotiate the curve and negligently crossed into the oncoming traffic lane, colliding head on with the motorcycle Plaintiff Davis was a passenger on, causing substantial injuries and damages to Plaintiff Davis.

7. That Defendant Richard Otten owed a duty to Plaintiff to exercise reasonable care and skill in operation of Defendant's vehicle.

8. That Defendant Richard Otten was negligent in that he failed to use due

care in the operation of the motor vehicle he was driving and was negligent in the operation thereof in a number of ways, including failure to yield to the oncoming traffic, failing to stay in his lane of traffic on the roadway, failing to keep a proper lookout, speeding, exceeding a safe speed, and failing to operate his motor vehicle in a reasonable and prudent manner so as not to endanger the safety or health of other drivers including Plaintiff Catherine Davis on the same roadways.

9. Plaintiff is free from contributory negligence and all of Plaintiff's losses were, are, and will be due to the negligence of Defendant Richard Otten.

10. Defendant Richard Otten's acts of failing to obey the rules of the road as herein set forth were in direct violation of South Dakota law and Defendant Richard Otten is therefore negligent as a matter of law. Such negligence is the direct and proximate cause of the damages suffered by Plaintiff.

11. That as a direct result of Defendant Richard Otten's negligence, Plaintiff Catherine Davis has sustained significant injuries and damages that include, but are not limited to, past and future medical expenses, past and future pain and suffering, temporary and permanent impairment and disability, past and future loss of wages and loss of earning capacity, diminished ability to enjoy the ordinary pursuits of life, past and future emotional and psychological distress and mental anguish, loss of quality and enjoyment of life, and other injuries and damages. For these damages, Plaintiff is entitled to recovery from Defendants.

12. At this time, Plaintiff Catherine Davis has incurred in excess of \$330,000 in medical billings, has been unable to work since the collision, is still receiving medical care and evaluation, in addition to other injuries and damages.

13. On or about July 28, 2019, the date of the motor vehicle collision discussed herein, Plaintiff Catherine Davis was insured, and as an insured of Meemic Insurance Company, had an insurance policy which provided Catherine Davis with protection against underinsured motorists in the amount of \$100,000.00, no-fault insurance coverages including Personal Injury Protection, Full Medical, Full Work Loss, Property Protection Insurance in the amount of \$1,000,000.00; Michigan Catastrophic Claims Association (MCCA) no-fault coverage including medical expenses; and other coverages on the policy.

14. Said policy of insurance with Defendant Meemic Insurance Company was in full force and effect on or about July 28, 2019, the date of the collision discussed herein. The underinsured motorists' provisions of the policy provided that Defendant Meemic Insurance Company would pay to the insured such sums as the insured might be legally entitled to recover as damages for bodily injuries and other claims arising out of an event caused by an uninsured or underinsured motorist.

15. Said policy of insurance with Defendant Meemic Insurance Company was in full force and effect on or about July 28, 2019, the date of the collision discussed

herein. The no-fault insurance coverages including Personal Injury Protection, Full Medical, Full Work Loss, Property Protection Insurance motorists' provisions of the policy provided that Defendant Meemic Insurance Company would pay to the insured such sums as the insured might be legally entitled to recover as damages for lost income, medical expenses, and other losses arising out of a collision event such as the collision subject of this action.

16. Defendant Richard Otten, upon Plaintiff's information and belief, is an underinsured motorist with policy limits of Twenty-Five Thousand Dollars (\$25,000) through State Farm, which were offered as settlement on September 20, 2019 with confirmation of these policy limits being provided by State Farm, which information was also provided to Meemic Insurance Company as part of the claims submitted under the Meemic Insurance Policy by Plaintiff Catherine Davis.

17. Plaintiff Catherine Davis has put Defendant Meemic Insurance Company on notice of an underinsured motorist claim under the terms of the policy since Richard Otten is underinsured and does not have sufficient liability coverage to compensate Plaintiff Catherine Davis for the damages caused by him, with no payments having been made by Meemic. Plaintiff Catherine Davis is thus entitled to recovery from Defendant Meemic Insurance Company for underinsured motorist benefits.

18. Plaintiff Catherine Davis has put Defendant Meemic Insurance Company on notice of her claims for no-fault insurance coverages including, but not limited to,

Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy with no payments having been made by Meemic. Plaintiff Catherine Davis is thus entitled to recovery from Defendant Meemic Insurance Company for no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss.

19. As a direct result of Richard Otten's negligence, Plaintiff Catherine Davis has sustained damages that include, but not limited to, past and future medical expenses, past and future pain and suffering, temporary and permanent injury and disability, loss of wages and loss of earning capacity, diminished ability to enjoy the ordinary pursuits of life, and other damages. Plaintiff Catherine Davis' damages exceed the Twenty-Five Thousand Dollars (\$25,000) liability limits of Richard Otten. For these damages, Plaintiff Catherine Davis is entitled to recovery from Defendant Meemic Insurance Company under the underinsured motorist coverage and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy with no payments having been made by Meemic.

20. Defendant Meemic Insurance Company has breached the contract of insurance entered into with Plaintiff Catherine Davis inasmuch as it has neglected, refused, or has otherwise failed to pay Plaintiff Catherine Davis, by virtue of the underinsured motorist coverage and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms

of the Meemic Insurance Policy afforded to her and to the extent of monies due her as a result of extensive medical bills incurred, lost income, and other damages sustained with additionally Richard Otten not having adequate insurance coverage to fully compensate Plaintiff Catherine Davis, for the damages alleged herein.

21. Plaintiff requests the Court to allow the jury, in its discretion, to award Plaintiff interest on the entire amount of her losses commencing on July 28, 2019, as allowed by SDCL 21-1-13.1

WHEREFORE, Plaintiff prays for judgment against Defendants for damages due to Defendant Richard Otten's negligence and demands judgment against Defendant Meemic Insurance Company as follows:

22. That Defendant Richard Otten be found liable for Plaintiff's damages;
23. That coverage for underinsured motorist insurance and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy be found with Meemic Insurance Company being found liable and obligated under the insurance policy for payment of Plaintiff's damages from the collision arising herein;
24. For general and special damages in an amount to be determined by the jury, plus prejudgment and post-judgment interest thereon;
25. For Plaintiff's costs and disbursements herein; and
26. For such other and further relief as the Court deems just and equitable in the

premises.

27. Trial by Jury is hereby demanded.

TRIAL BY JURY IS HEREBY DEMANDED

Dated this 18th day of February, 2021.

A P.E.C. MOORE-FAUST LAW GROUP

by



Dean Faust

Attorney for Plaintiff

924 Quincy Street

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PO Box 2471

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Phone: 605-348-2471

Fax: 605-343-0247

faust@moorefaust.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG 06 2021

Shirley A. Johnson
Clerk

Catherine Davis,
Plaintiff and Respondent,

vs.

RICHARD OTTEN,
Defendant,

and

MEEMIC INSURANCE COMPANY,
Defendant and Petitioner.

ORDER GRANTING PETITION FOR
ALLOWANCE OF APPEAL FROM
INTERMEDIATE ORDER

#29691

Petitioner having served and filed a petition for allowance of appeal from an intermediate order of the Circuit Court of the Fourth Judicial Circuit within and for the County of Lawrence, South Dakota, filed June 30, 2021, and no response having been served and filed thereto, and the Court having considered the petition and being fully advised in the premises, now, therefore, it is

ORDERED that the petition for allowance of appeal from said intermediate order be and it is hereby granted.

IT IS FURTHER ORDERED that the order for transcript, if any, be made upon receipt of this order and the schedule for briefing follow the schedule set forth in SDCL 15-26A-75, provided, however, that if no order for transcript is made, the forty-five day period for service and filing of appellant brief shall commence to run as of the date of this order.

EXHIBIT

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100-100000

IT IS ORDERED THAT the writ of habeas corpus be granted to the petitioner, and that he be released from custody. The writ shall be returnable at the County Jail, where the petitioner is now confined, on the 15th day of August, 1961. The writ shall be returnable to the County Jail, where the petitioner is now confined, on the 15th day of August, 1961.

IT IS FURTHER ORDERED that all further proceedings in the matter be and they are hereby dismissed with costs to the petitioner.

WITNESSED my hand and the seal of the Court at Chicago, Illinois, this 14th day of August, 1961.

BY THE COURT:


Honorable Judge, District Court


Honorable Judge, District Court

RECORDED. Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Nyren

STATE OF SOUTH DAKOTA)
COUNTY OF LAWRENCE)ss
)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS)
Plaintiff,)

FILE NO. 40CIV21-000039

vs.)

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that an ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS was entered in the above entitled action and filed in the office of the Clerk of Courts, Lawrence County, Deadwood, South Dakota on the 24th day of May 2021. A copy of said Order is attached hereto and incorporated by this reference.

Dated this 24th day of June, 2021.

A P.L.C. Moore-Faust law Group

By:



Dean Faust

Attorney for Plaintiff

PO Box 2471

Rapid City, SD 57709-2474

Telephone: 605-348-2471

Email: faust@moorefaust.com



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the undersigned date, he forwarded a true and correct copy of the foregoing ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS to the persons herein next designated, all on the date below shown, by placing the same in the service indicated, addressed as follows:

Attorney Earl G. Green, III
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
301 South 13th Street, Ste. 400
Lincoln, NE 68508

Attorney Courtney Clayborne
Attorney for Defendant Richard Otten
Clayborne, Loos & Sabers, LLP
PO Box 9129
Rapid City, SD 57709-9129


Attorney Susan B. Meyer
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
1601 Mt. Rushmore Road, Suite 3-227
Rapid City, SD 57701

- ☒ US mail, postage prepaid
☐ Federal Express
☐ Hand-delivery
☐ Facsimile
☐ Email
☒ Odyssey File & Serve
☐ Other: _____

which are the last addresses of the addressees known to the subscriber.

Dated this 24th day of June, 2021.

A P.L.C. MOORE-FAUST LAW GROUP

by 
Dean Faust
Attorney for Plaintiff Catherine Davis
924 Quincy Street
Rapid City, SD 57701
PO Box 2471
Rapid City, SD 57709
Phone: 605-348-2471
Fax: 605-343-0247
faust@moorefaust.com

Dated: April 9, 2021

MEEMIC INSURANCE COMPANY,
Defendant,

By s/Susan B. Meyer
Susan B. Meyer (#3420)
E-mail: smeyer@grsm.com
GORDON & REES, LLP
1601 Mt. Rushmore Rd., Suite 3-227
Rapid City, SD 57701
Telephone: 605-737-0133
*Attorney for Defendant Meemic
Insurance Company*

CERTIFICATE OF SERVICE

It is hereby certified that on this 9th day of April, 2021, the above and foregoing was filed with the Clerk of Court, which sent electronic notification of the filing to the following:

Dean Faust
924 Quincy Street
Rapid City, SD 57701
faust@moorefaust.com
Attorney for Plaintiff

Courtney R. Clayborne
CLAYBORNE, LOOS & SABERS, LLP
2834 Jackson Blvd., Suite 201
Rapid City, SD 57709-9129
Phone: (605) 721-1517
cclaybornelaw@aol.com
Attorney for Defendant Richard Otten

s/Susan B. Meyer
Susan B. Meyer

STATE OF SOUTH DAKOTA
COUNTY OF LAWRENCE

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)

IN CIRCUIT COURT
FOURTH JUDICIAL DISTRICT

40CIV21-

CATHERINE DAVIS,

Plaintiff,

vs.

RICHARD OTTEN and MEEMIC INSURANCE
COMPANY,

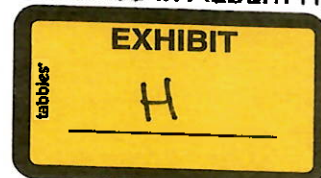
Defendants.

AFFIDAVIT OF FRANK C. WHITE, JR.

STATE OF CONNECTICUT

COUNTY OF MIDDLESEX

1. My name is Frank C. White, Jr. I am over 21 years of age and otherwise competent to make the statements set forth herein. I give this affidavit voluntarily for use in the above-captioned case.
2. I have personal knowledge of all matters contained in this affidavit.
3. I act as general counsel for Meemic Insurance Company tasked with overseeing the defense of suits against Meemic Insurance Company, outside of Michigan.
4. Meemic Insurance Company is a corporation organized under the laws of the State of Michigan. Its principal place of business is located in Auburn Hills,



Michigan.

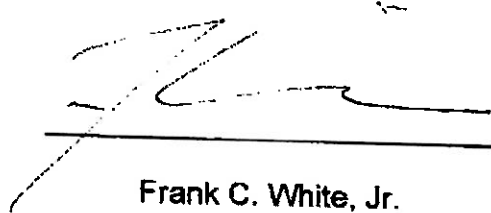
5. At all times relevant to the above-captioned litigation Meemic Insurance Company did not:

- a. operate, conduct, engage in, or carry on a business or business venture in the State of South Dakota;
- b. commit any tortious act in the State of South Dakota;
- c. own, use, possess, or hold a mortgage or other lien on any real property within the State of South Dakota;
- d. contract to insure any person, property, or risk located within the State of South Dakota at the time of contracting;
- e. engage in or solicit service activities within the State of South Dakota;
- f. breach a contract in South Dakota by failing to perform acts required by the contract to be performed in South Dakota;
- g. engage in any substantial (not isolated) activity within the State of South Dakota;
- h. have an office or agency in the State of South Dakota;

6. Meemic Insurance Company is not authorized to write insurance policies in the State of South Dakota. It does not sell insurance in South Dakota, nor did it issue or deliver any insurance policies in the State of South Dakota.

7. Meemic Insurance Company did issue Policy Number PAP00855455 to Catherine Davis, a resident of Peck, Michigan, which was in effect on July 28, 2019. This policy of insurance was issued in Michigan.

FURTHER AFFIANT SAYETH NOT.


Frank C. White, Jr.

STATE OF Connecticut)
COUNTY OF Middlesex) ss. East Hampton

Personally appeared before me, the undersigned notary public in and for said State and County, Frank C. White, Jr., the within named individual, being first duly sworn upon oath, and with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and deposes and states that he is the individual in the above-captioned matter, that he has read the above and foregoing document, knows the contents thereof and the facts therein contained are true, as he verily believes.

SUBSCRIBED AND SWORN TO before me this 9 day of April,
2020.



PATRICIA A. BURNHAM
NOTARY PUBLIC
MY COMMISSION EXPIRES APRIL 30, 2024

Notary Public In and For Said County and State

S.D. Codified Laws § 15-7-2

Section 15-7-2 - Acts within the state subjecting persons to jurisdiction of the courts

Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary, of any of the following acts:

- (1) The transaction of any business within the state;
- (2) The commission of any act which results in accrual within this state of a tort action;
- (3) The ownership, use, or possession of any property, or of any interest therein, situated within this state;
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (5) Entering into a contract for services to be rendered or for materials to be furnished in this state by such person;
- (6) Acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state;
- (7) Failure to support a minor child residing in South Dakota;
- (8) Having sexual intercourse in this state, which act creates a cause of action for the determination of paternity of a child who may have been conceived by that act of intercourse;
- (9) With respect to any action for divorce, separate maintenance, or spousal support the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of an act giving rise to the claim, subject to the provisions of § 25-4-30;
- (10) Entering into negotiations with any person within the state with the apparent objective of contracting for services to be rendered or materials to be furnished in this state;
- (11) Commencing or participating in negotiations, mediation, arbitration, or litigation involving subject matter located in whole or in part within the state;
- (12) Doing any act for the purpose of influencing legislation, administrative rule-making or judicial or administrative decision-making by any local, state, or federal official whose official function is being performed within the state, providing that an appearance to contest personal jurisdiction shall not be within this subsection;
- (13) The commission of any act which results in the accrual of an action in this state for a violation of the antitrust laws of the United States or chapter 37-1;
- (14) The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States.

SDCL 15-7-2

: SL 1965, ch 163, § 2; SL 1978, ch 146, §§ 1, 2; SL 1983, ch 156, § 1; SL 1984, ch 190, § 48; SL 1986, ch 162.



S.D. Codified Laws § 15-6-12(b)

Section 15-6-12(b) - Manner of presenting defenses and objections

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Insufficiency of process;
- (4) Insufficiency of service of process;
- (5) Failure to state a claim upon which relief can be granted;
- (6) Failure to join a party under § 15-6-19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

SDCL 15-6-12(b)

: SDC 1939 & Supp 1960, § 33.1002; SD RCP, Rule 12 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; as amended by Sup. Ct. Order No. 2, March 31, 1969, effective July 1, 1969; SL 2006, ch 285 (Supreme Court Rule 06-11), eff. July 1, 2006.



STATE OF SOUTH DAKOTA)
)
 COUNTY OF LAWRENCE)

IN CIRCUIT COURT
 FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,

Plaintiff,

vs.

**RICHARD OTTEN and MEEMIC
 INSURANCE COMPANY,**

Defendants.

Motions Hearing

40CIV21-39

BEFORE: **THE HONORABLE MICHELLE K. COMER**
 Circuit Court Judge
 Deadwood, South Dakota
 May 18, 2021, at 1:30 p.m.

APPEARANCES:

For the Plaintiff: **MR. DEAN J. FAUST**
 Moore & Faust
 P.O. Box 2471
 Rapid City, SD 57709

For the Defendant
 Richard Otten:
 (By Telephone) **MR. COURTNEY R. CLAYBORNE**
 Clayborne, Loos & Sabers, LLP
 P.O. Box 9129
 Rapid City, SD 57709

For the Defendant
 Meemic Insurance
 Company:
 (By Telephone) **MS. SUSAN B. MEYER**
 and
MR. EARL G. GREENE
 Gordon & Rees
 40 Calhoun Street, Ste. 350
 Charleston, SC 29401

EXHIBIT

K

1 (WHEREUPON, the following proceedings were duly
2 had:)

3 **THE COURT:** Good afternoon. This is Judge Comer and you
4 are in open court. Who do I have on the line?

5 **MS. MEYER:** Good afternoon, Your Honor. This is Susan
6 Meyer from Gordon Rees and with me is my colleague, Earl
7 Greene, also known as "Chip," and we represent Meemic
8 Insurance.

9 **THE COURT:** Very good. Thank you.

10 **MR. CLAYBORNE:** Courtney Clayborne also, Your Honor.

11 **THE COURT:** Thank you, Mr. Clayborne.

12 All right. In court I have -- Mr. Faust is present
13 personally, so let me just get my computer up.

14 This is the time and place set for hearing in Civil
15 File 21-39, Catherine Davis versus Richard Otten and Meemic
16 Insurance. I have already went through all of the parties
17 present.

18 I believe Meemic has made a motion to dismiss and so
19 it's their motion. I will let either you, Ms. Meyer, or
20 Mr. Greene proceed.

21 **MR. GREENE:** Your Honor, Chip Greene here. Okay. Thank
22 you. I'll go ahead with our argument, Your Honor.

23 **THE COURT:** Thank you.

24 **MR. GREENE:** Your Honor, I would start by offering the
25 exhibits we have presented to the Court. It starts with

1 Exhibit 1, which is the declaration of Frank Write, the --
2 or White, the general counsel for Meemic.

3 **THE COURT:** I have Exhibit 1 in front of me.

4 **MR. GREENE:** Okay. I would also offer Exhibit 2, which is
5 a letter from last year from Meemic to Mr. Faust.

6 **THE COURT:** All right. Let me stop you there, then. I
7 have Exhibits 1 and 2.

8 Mr. Clayborne, any objection to Exhibit 1 or 2?

9 **MR. CLAYBORNE:** (No response.)

10 **THE COURT:** Mr. Clayborne?

11 **MR. CLAYBORNE:** I have no objection, Your Honor.

12 **THE COURT:** Mr. Faust, any objection to 1 or 2?

13 **MR. FAUST:** No, Your Honor.

14 **THE COURT:** Okay. 1 and 2 are both received.

15 Go ahead and continue, Mr. Greene.

16 **MR. GREENE:** And then, Your Honor, on an oversight on my
17 part, we submitted another exhibit, I believe, Monday,
18 yesterday, which we marked as Exhibit 4, and that is the
19 declaration of Charles Billings. I inadvertently skipped
20 Exhibit 3, so if the Court wishes to renumber that as
21 Exhibit 3, I certainly have no objection to that, but I
22 also would offer that exhibit.

23 **THE COURT:** On page 2 of the declaration it does say
24 Exhibit 3, so I'll just --

25 **MR. GREENE:** Oh.

1 **THE COURT:** I will leave it as Exhibit 3.

2 Any objection, Mr. Faust?

3 **MR. FAUST:** If it was offered yesterday, I would object as
4 it being untimely.

5 **THE COURT:** Well, I'll consider that.

6 Mr. Clayborne, I'm assuming you don't have any
7 objection.

8 **MR. CLAYBORNE:** I do not, Your Honor.

9 **THE COURT:** Okay. I am going to receive Exhibit 3 as well,
10 just so that I have a full picture of the facts. If we run
11 into an issue with it, I can give you time to respond,
12 Mr. Faust.

13 All right. So I have Exhibits 1, 2, and 3,
14 Mr. Greene.

15 **MR. GREENE:** Thank you, Your Honor. That would conclude
16 our offer of exhibits at this time and I can proceed with
17 argument, if the Court is ready.

18 **THE COURT:** Yes, please.

19 **MR. GREENE:** I don't know, Your Honor, if you generally
20 like to have the arguments recorded. I don't know that
21 it's necessary that it be recorded, but if that's your
22 preference, I'm fine doing so.

23 **THE COURT:** I typically do, yes.

24 **MR. GREENE:** Okay. Great.

25 Well, I'll try very hard not to simply regurgitate to

1 the Court what I have set forth in my brief, but there are
2 a few points that I do want to highlight for the Court on
3 this motion to dismiss and its concurrent -- the motion
4 both to dismiss for lack of personal jurisdiction and for
5 failure to seek a cause of action upon which relief can be
6 granted.

7 First of all, on a matter that was not briefed by us,
8 but which Plaintiff's counsel has raised in his brief in
9 resistance, is the matter of whether or not this case is
10 settled. We submit to the Court that it is not settled.

11 My clients made an offer of settlement last
12 November 23rd, communicated that offer of settlement to
13 Mr. Faust, did not receive a reply from Mr. Faust in
14 regards to that offer, so on December 2nd, 2020, a phone
15 call was made to Mr. Faust's office. A message was left
16 for him asking whether or not the offer was being accepted.
17 No response was made at that time. Another phone call was
18 made, I believe, on January 23rd of 2021 and a message was
19 left with his receptionist to please have Mr. Faust call to
20 discuss the settlement offer, and no response was made. In
21 fact, Meemic did not hear anything further from Mr. Faust
22 until Meemic was served with a summons in this lawsuit that
23 he filed in February of 2021.

24 The filing of the lawsuit to me certainly seems like a
25 pretty unequivocal rejection of the settlement offers made

1 by Meemic, and, in fact, some of the relief sought by
2 Plaintiff's counsel in the lawsuit, in the complaint, could
3 be considered counteroffers to that settlement demand of --
4 or the settlement offer that Meemic previously made.

5 So I think, Your Honor, clearly there's not been a
6 meeting of the minds in this case and I think all of that
7 information I just related to the Court is set forth in
8 Mr. Billings' declaration, which is before the Court marked
9 as Exhibit 3. So, I guess, just to start things off, we do
10 not believe there's any settlement, so this matter is ripe
11 for the Court to hear on the issue of personal jurisdiction
12 over Meemic.

13 Now, in that regard, as we've set forth in our brief,
14 the burden of proof is on the Plaintiff in this case,
15 Ms. Davis and her counsel, to prove this court has personal
16 jurisdiction over Meemic. It's important for the Court to
17 note, as Mr. White put forth in his declaration, Exhibit 1,
18 that Meemic is a Michigan-based corporation, Michigan-based
19 insurance company. It issued a contractual policy of
20 insurance to the Plaintiff who, herself, is a resident of
21 Michigan. That contract was entered into in Michigan. So
22 all of the facts surrounding the contractual relationship
23 between the Plaintiff and Meemic Insurance arose in the
24 state of Michigan. The only contact with the state of
25 South Dakota is the fact that the Plaintiff was the

1 passenger on a motorcycle that was driven in South Dakota
2 that was involved in an accident in South Dakota in July of
3 2019.

4 So in order for this court to have personal
5 jurisdiction over Meemic, one of two situations has to
6 occur: The Court has to find that the South Dakota
7 long-arm statute allows this court to exercise personal
8 jurisdiction over Meemic.

9 Now, I've set forth in our brief a fairly detailed
10 analysis of the long-arm statute and the 14 components of
11 that statute and why none of those components are met in
12 this case and the long-arm statute doesn't apply and this
13 court cannot exercise personal jurisdiction over Meemic
14 under that statute.

15 In the absence of the long-arm statute applying, this
16 court then has to decide if exercising personal
17 jurisdiction over Meemic meets federal law due process
18 requirements. This involves looking at if Meemic has
19 minimum contacts with the state of South Dakota, and it has
20 to look at the nature and extent of any relationship Meemic
21 has with South Dakota.

22 There are two types of personal jurisdiction the Court
23 can exercise in this case: General and specific, as I know
24 the Court is aware. Clearly, this is not a general
25 personal jurisdiction case. Meemic does not have any type

1 of presence in South Dakota nor -- basically, it's not a
2 resident of South Dakota, so the Court has to look to
3 whether or not it can establish specific personal
4 jurisdiction over Meemic. And in order to do that this
5 court has to find that Meemic purposefully availed itself
6 of contact with South Dakota, and we believe those contacts
7 are totally lacking in this case as South Dakota case law
8 has said that a contact with the State can be random,
9 isolated or fortuitous, and, if they are, personal
10 jurisdiction doesn't exist.

11 So the South Dakota Court has also enumerated a
12 three-part test that must be met in order to find specific
13 personal jurisdiction and all three components of this test
14 have to be met. It's not one out of three or two out of
15 three, all three have to be present, and those three parts
16 are, again: Purposeful availment by Meemic by conducting
17 activity in the state of South Dakota; the claim indicates
18 it must arise from Meemic's activities in the state of
19 South Dakota, that's the second component; and then the
20 third component is that Meemic must have a substantial
21 connection with South Dakota in order for this court to
22 make its exercise of personal jurisdiction reasonable.
23 And, again, as we've set out in our brief in argument, none
24 of those three factors are met in this case.

25 So all in all, Your Honor, I really would rely back to

1 our -- or rely on our brief. This court simply lacks
2 personal jurisdiction over Meemic. Meemic had no contact
3 with the state of South Dakota. It's not licensed to write
4 insurance in South Dakota, it doesn't write insurance, it
5 has no offices anywhere in South Dakota, it does not have
6 any agents in South Dakota. There's a simple random,
7 fortuitous act that occurred in South Dakota, that being
8 the Plaintiff riding on the back of a motorcycle that was
9 involved in an accident in South Dakota, and that is not
10 any type of purposeful availment made by Meemic that would
11 allow this court to exercise personal jurisdiction over
12 Meemic Insurance Company.

13 Now, I would also just quickly point out that in
14 Plaintiff's brief, Mr. Faust makes comment repeatedly that,
15 well, what is really before this court is an issue of the
16 damages sustained by Plaintiff and those damages occurred
17 in South Dakota and, therefore, South Dakota law should
18 apply to this and the Court has jurisdiction to
19 determine -- or to have a court case determining those
20 damages.

21 Well, I would suggest to the Court that that's putting
22 the cart before the horse because the bigger issue in this
23 case is going to be not damages but coverage, and there are
24 several significant coverage issues that are going to have
25 to be determined before we ever get to an issue of damages

1 in this case, not the least of which is there are
2 exclusions for injuries -- personal injuries arising out of
3 riding -- being a passenger on motorcycles. Clear
4 exclusion in the policy on that. There's also a statute of
5 limitations issue.

6 So because of these coverage issues, again, we're
7 dealing with a Michigan insurance policy between a Michigan
8 resident, so that's going to take application of Michigan
9 law, and I would suggest to the Court that a Michigan court
10 is much better suited to handle questions of Michigan law
11 on a Michigan insurance policy than is a South Dakota
12 court. The meaningful contacts just are not there and this
13 court truly lacks personal jurisdiction over Meemic.

14 **THE COURT:** Mr. Greene, can I interrupt you for a second?

15 **MR. GREENE:** The Court lacks personal jurisdiction. The
16 complaint filed by the Plaintiff fails to state a cause of
17 action for which relief may be granted, so on both bases,
18 then, we would ask the Court to dismiss the Plaintiff's
19 complaint.

20 **THE COURT:** So, Mr. Greene, is it your position, then, that
21 he should have started two lawsuits?

22 **MR. GREENE:** I believe he should have filed a lawsuit in
23 Michigan to seek benefits under Michigan law for
24 underinsured benefits under the Michigan insurance policy.
25 And, to me, it's first determining is there coverage before

1 a lawsuit should be filed in South Dakota determining
2 damages.

3 So, you know, maybe those both could be determined in
4 an action in Michigan, but clearly the application of
5 Michigan law to a Michigan contract should take place in
6 Michigan. I can't say whether or not two lawsuits should
7 be filed or not, Your Honor, I just believe the one in
8 Michigan -- South Dakota shouldn't have been filed.

9 **THE COURT:** Thank you.

10 Mr. Faust?

11 **MR. FAUST:** Thank you, Your Honor.

12 First, as stated in the brief, our position is that
13 the underinsured motorist carrier Meemic made an offer of
14 settlement, never revoked the offer of settlement, the
15 offer of settlement was still open up until the time it was
16 accepted by the Plaintiff, and so our position, first of
17 all, is that the underinsured motorist claim was settled.

18 Secondly, it's a new argument now being brought up by
19 Meemic that suddenly coverage is an issue for the Court and
20 I would argue that coverage is not an issue currently
21 properly before the Court. This motion is for whether or
22 not there's jurisdiction over Meemic. I would assert
23 coverage is a separate issue to be decided separately and
24 is not the issue for this court hearing and has not been
25 briefed by any of the parties and is a new argument that

1 should not be considered.

2 Thirdly, as stated in the brief, I would argue that
3 Meemic has multiple contacts with South Dakota that meet
4 the minimum contact threshold to be part of this case and
5 this cause of action.

6 The motor vehicle collision that took place clearly
7 was in South Dakota. Meemic sells insurance policies that,
8 per the policy, is valid in all 50 states, including South
9 Dakota, and so Meemic sits there and says we only provide
10 insurance -- well, we only have contacts in Michigan where
11 the policy was issued, yet they sell policies where they
12 know people are going to drive in all 50 states, including
13 South Dakota, where motor vehicle collisions are going to
14 take place, which did take place here involving one of
15 their insureds.

16 Nextly, to my knowledge, Meemic has never given
17 written permission for Plaintiff to settle the liability
18 claim against the negligent driver personally under the
19 generally-acknowledged Schmidt versus Clothier process in
20 South Dakota, and, as stated in the brief and the
21 accompanying affidavit, the liability carrier has offered
22 policy limits of their driver, which would trigger under
23 the Meemic policy and underinsured motorist claim.

24 Nextly, that this lawsuit against Meemic is needed and
25 should be allowed, as well as against the negligent driver,

1 because it's needed to set damages due Plaintiff under the
2 underinsured motorist coverage. There hasn't been anything
3 established or set by the Court that would set damages for
4 what would be owed Plaintiff under the underinsured
5 motorist coverage.

6 The Defendant who caused this collision resides in
7 South Dakota, the collision occurred in South Dakota, and
8 South Dakota has jurisdiction only -- I don't know of any
9 other jurisdictions that would have jurisdiction over the
10 Defendant personally for purposes of establishing damages
11 against the Defendant, as well as under the underinsured
12 motorist claim.

13 The long-arm statute in South Dakota, 15-7-2, I would
14 assert under a number of those provisions does provide
15 sufficient contacts. Under subsection 1: The transaction
16 of any business within the state. By virtue of Meemic
17 selling insurance policies, those policyholders they know
18 will leave their home state and will at times be involved
19 in motor vehicle collisions such as what occurred here in
20 South Dakota, and where the underlying case would have
21 jurisdiction in this state where the tort took place,
22 including to set damages, in Plaintiff's assertion to the
23 Court, is a minimum contact.

24 Part 2: The commission of any act which results in
25 accrual within this state of a tort action. Again, the

1 collision resulted in a tort action here in South Dakota
2 with this court having exclusive jurisdiction on that tort
3 action being necessary to set the value of damages on the
4 injuries under Meemic's underinsured motorist claim.

5 Under part 4: Contracting to insure any person,
6 property, or risk located within this state at the time of
7 contracting. Again, Meemic, per the policy language and
8 per the definitions, covers all states, including South
9 Dakota. Meemic contracted to insure Catherine Davis and
10 the risk of her being involved in a collision while in
11 South Dakota involving an underinsured motorist, which is
12 clearly what happened here. And so I would argue to the
13 Court that that risk is located within the state of South
14 Dakota, Meemic knows that, as they issue policies, and
15 provides a minimum contact.

16 Part 11: Commenced -- I'm sorry. Commencing or
17 participating in negotiations, mediation, arbitration, or
18 litigation involving the subject matter located in whole or
19 in part within the state. Again, the collision took place
20 in South Dakota. This court has exclusive jurisdiction on
21 that tort action, which is, again, necessary to set the
22 value of the damages under the underinsured coverage,
23 providing minimum contacts.

24 And essentially those same factors, I would argue to
25 the Court, meet the three-part due process test as set

1 forth in the South Dakota Supreme Court case of Marschke
2 versus Wratislaw, W-R-A-T-I-S-L-A-W:

3 First: That the defendant purposefully avails
4 themselves of the privilege of acting in the forum state,
5 thus invoking the benefits and the protections of its laws.
6 I would argue that, again, by selling policies, providing
7 insurance coverage in all 50 states, including South
8 Dakota, that underinsured motorist coverage where the value
9 of damages is set by the underlying claim against the
10 defendant driver, that Meemic purposefully avails
11 themselves to such lawsuit and jurisdiction of the court
12 here to set damages.

13 Second factor: The cause of action must arise from
14 the defendant's activities directed at the forum state. I
15 would argue that, again, by selling these underinsured
16 policies and that the damages being due under that policy
17 are required to be established by the tort claim against
18 the defendant driver, that this meets the second part of
19 the test.

20 And thirdly: That the acts of the defendant must have
21 substantial connection with the forum state to make the
22 exercise of jurisdiction over the defendant a reasonable
23 one.

24 Again, these same factors of the underlying tort claim
25 and underlying lawsuit against the negligent driver,

1 needing to set the value of the damages for the
2 underinsured coverage, all have a substantial connection
3 with the forum state for jurisdiction, and I would thus
4 argue to the Court that these factors are all met. It's
5 jurisdiction for purposes of this case to set damages under
6 the underinsured policy that Meemic sold and knew that
7 would be available coverage in all 50 states, including
8 South Dakota, that happened here, and I would ask the
9 Court -- there's some other arguments in my brief -- to
10 consider the brief in full and let me know if the Court has
11 any questions, or I'd be happy to further brief anything
12 that the Court requested.

13 **THE COURT:** Thank you, Mr. Faust.

14 **MR. FAUST:** Thank you.

15 **THE COURT:** Any rebuttal to that, Mr. Greene or Ms. Meyer?

16 **MR. GREENE:** Yes, Your Honor.

17 Briefly, under the South Dakota long-arm statute that
18 Mr. Faust mentioned, I think, are all clearly -- we can
19 make a distinction on those. 15-7-2, subparagraph 1, the
20 transaction of any business within the state. There was no
21 business transacted within the state of South Dakota. The
22 entire contractual relationship that arose between Meemic
23 and the Plaintiff, Ms. Davis, took place in Michigan where
24 Meemic is located and the same state in which Ms. Davis is
25 a resident. She's a resident of Peck, Michigan. That's

1 P-E-C-K, Michigan.

2 Secondly, the commission of any act which results in
3 accrual within the state of a tort action -- and that's
4 subparagraph 2 of 15-7-2 -- I believe that statute, when
5 you look at case law involved with it, the commission of
6 any act, they're referring to an act by the party against
7 whom the action is being brought. So that has to be an act
8 by Meemic which results in accrual within the state of a
9 tort action. There is no cause of action, no -- I'm
10 sorry -- no tort cause of action against Meemic arising out
11 of this accident. The tort action is against Mr. Otten,
12 not against Meemic.

13 Subparagraph 4 of that statute, contracting to insure
14 any person, property, or risk located within the state at
15 the time of contracting. At the time of contracting it was
16 all done, again, in Michigan and I don't believe that you
17 can extend the long-arm statute to say, well, it's, you
18 know, possible that an accident may have happened in a
19 state in which we don't write insurance nor do we transact
20 any business. Meemic had no idea that it would be haled
21 into a court in South Dakota based on a policy it wrote in
22 Michigan.

23 Now, Mr. Faust just said, well, you know, regardless
24 of the long-arm statute, the other three -- the three
25 factors of the due process test set forth by the South

1 Dakota Supreme Court have been met in this case, but I
2 would point out to the Court the quote that we provided in
3 our brief coming from the case of Frankenfeld,
4 F-R-A-N-K-E-N-F-E-L-D, v. Crompton, C-R-O-M-P-T-O-N,
5 Corporation, 2005 S.D. 55, 697 N.W.2d 378. The South
6 Dakota Supreme Court looks specifically at what constitutes
7 a purposeful action. Did a defendant truly try to avail
8 itself of the benefits of doing business in a state, and it
9 makes a very telling statement that I quote in the brief on
10 page 12. The South Dakota Supreme Court stated, quote:
11 "Thus, the unilateral activity of a third party with some
12 relationship to a nonresident defendant cannot suffice to
13 establish personal jurisdiction."

14 That's exactly what we have here, Judge. The
15 unilateral activity of the Plaintiff in riding as a
16 passenger on a motorcycle, she has a relationship with
17 Meemic because of a contract created in Michigan, but that
18 unilateral activity of the Plaintiff riding as a passenger
19 in South Dakota is not enough to create personal
20 jurisdiction over Meemic in this case, and we again renew
21 our request for the Court to dismiss this action.

22 **THE COURT:** I just keep coming back to the fact -- and
23 maybe you're correct, I need to think of coverage first,
24 but I keep coming back to the fact of a lawsuit -- I mean,
25 if I buy into your argument, any time there's a lawsuit

1 with these same set of facts, they'd have to start two
2 lawsuits, one where the person that caused the action lives
3 or where the tort occurred, and then where they have their
4 own insurance, where the Plaintiff may be insured in their
5 own home state, and I just don't see that as being
6 realistic.

7 **MR. GREENE:** Well, maybe not, Your Honor, but that doesn't
8 really get around the requirement of personal jurisdiction,
9 and in this instance, when Meemic has absolutely no
10 contacts with the state of South Dakota, I honestly don't
11 see how the Court gets around that just because the
12 Plaintiff was injured in South Dakota. I think that's
13 something the Plaintiff should have thought through, where
14 do I really need to bring this lawsuit to get the benefit
15 of this underinsured policy that was written in Michigan?
16 And the lawsuit could have been filed in Michigan. It may
17 have even been a federal court action based on diversity
18 and if the damages are greater than 75,000, in which case
19 the South Dakota procedural law would apply to the lawsuit
20 while the Michigan substantive law would apply to the issue
21 of coverage. That's something that all should have been
22 thought out ahead of time, I think, Your Honor, rather than
23 filing this lawsuit in South Dakota just because the
24 accident happened there.

25 **THE COURT:** Mr. Faust, what do you have to say about that?

1 I mean, because he is -- he makes a very compelling
2 argument on contacts.

3 **MR. FAUST:** Well, I mean, I would disagree on the contacts
4 because, you know, Meemic sells these policies, per their
5 policy language, that they know are valid in all 50 states.
6 They know people like Ms. Davis are going to get in
7 collisions in states, which is exactly what happened here,
8 and the Plaintiff has the right to file where they wish to
9 file, and the collision happened in South Dakota, the
10 Court -- this court has jurisdiction over the Defendant,
11 and it's this Court's role to set the damages, which
12 thereby trigger the damages that would be allowed under the
13 underinsured motorist coverage, because that coverage isn't
14 set to a dollar amount because there hasn't been a
15 rendering of an amount.

16 I mean, even though I would say that the case is
17 settled with the underinsured, but if it's not settled with
18 the underinsured, I would say this is the proper forum.
19 The Plaintiff can be in this forum if the Plaintiff chooses
20 and I think it's unfair to the Plaintiff to require the
21 Plaintiff to file a lawsuit at the desire of Meemic and
22 have costs and expenses and things like that that aren't
23 right to expect the Plaintiff to bear. The Plaintiff can
24 pick what forum they wish to have the case and the
25 Plaintiff picked this one.

1 **THE COURT:** Anything else, Mr. Clayborne? I don't think
2 you had anything. I mean, I don't know that you have any
3 dog in the race, do you?

4 **MR. CLAYBORNE:** Well, not really, Your Honor. I think,
5 from our perspective, we're in the litigation in South
6 Dakota and I think the Court is right to ask that question,
7 and, I guess, in my humble opinion, whatever the verdict is
8 out of the personal injury case would bind Meemic. If they
9 choose not to participate, then they would have their
10 contractual action wherever that home state is, Michigan or
11 what have you, but for right now we're just along for the
12 ride.

13 **THE COURT:** Right. Okay. I am -- I'm going to deny the
14 motion to dismiss at this point, so, Mr. Faust, if you
15 would prepare an order for the Court's signature.

16 **MR. FAUST:** Yes, Your Honor.

17 **THE COURT:** Anything else that you want to make a record
18 of?

19 **MR. GREENE:** Nothing from the Defendant at this time,
20 Defendant Meemic, Your Honor.

21 **THE COURT:** All right. Thank you, Mr. Greene. Thank you,
22 Ms. Meyer. Thank you, Mr. Clayborne. We'll disconnect.

23 **MR. CLAYBORNE:** Thank you, Your Honor.

24 **THE COURT:** You're welcome.

25 (Hearing recessed at 2:03 p.m.)

1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF LAWRENCE) SS. CERTIFICATE
 3

4 I, SANDRA C. SEMERAD, RMR, CRR, an Official Court
 5 Reporter and Notary Public in the State of South Dakota,
 6 Fourth Judicial Circuit, do hereby certify that I reported
 7 in machine shorthand the proceedings in the above-entitled
 8 matter and that Pages 1 through 21, inclusive, are a true
 9 and correct copy, to the best of my ability, of my
 10 stenotype notes of said proceedings had before the
 11 HONORABLE MICHELLE K. COMER, Circuit Court Judge.

12 Dated at Deadwood, South Dakota, this 22nd day of
 13 October, 2021.

14
 15
 16
 17
 18 /s/ Sandra C. Semerad
 19 SANDRA C. SEMERAD, RMR, CRR
 20 Registered Merit Reporter
 My Commission Expires: 3/7/24
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APPELLEE'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 29691

CATHERINE DAVIS,
Plaintiff and Appellee,

v.

RICHARD OTTEN,
Defendant,

and

MEEMIC INSURANCE COMPANY,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
Circuit Court Judge

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6, 2021.

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IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

CATHERINE DAVIS,	*	
Plaintiff and Appellee,	*	
v.	*	NO. 29691
RICHARD OTTEN,	*	
Defendant,	*	
And	*	
MEEMIC INSURANCE COMPANY,	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

For the purposes of this brief, the Plaintiff and Appellee Catherine Davis will be referred to as "Plaintiff". The Defendant and Appellant Meemic Insurance Company will be referred to as "Defendant Meemic". The Defendant tortfeasor Richard Otten will be referred to as "Defendant Otten". Exhibits are referred to as "Ex." and their respective number. The Transcript of the Hearing for the Motion to Dismiss on May 18, 2021 will be referred to as "T".

JURISDICTIONAL STATEMENT

Appellant Meemic is appealing the circuit court's written Order Denying Defendant Meemic Insurance Company's SDCL 15-6-12(b) (2) and 12(b) (5) Motion to Dismiss dated May 24, 2021 entered by the Honorable Michelle K. Comer in the Circuit Court for the Fourth Judicial District, Case No. 40CIV21- 000039, denying Meemic's SDCL §15-6-12(B) (2) and §15-6-12(b) (5) Motion to Dismiss Plaintiff's Complaint following a hearing on May 18, 2021 regarding Defendant Meemic's Motion to Dismiss Plaintiff's Complaint. (Ex. 1 and 2). Appellee Davis filed and served Notice of Entry of Order Denying Defendant Meemic Insurance Company's SDCL 15-6-12(b) (2) and 12(b) (5) Motion to Dismiss on June 24, 2021. (Ex. 3). Defendant Meemic filed a Petition for Permission to Take Discretionary Appeal on June 30, 2021. (Ex. 4).

BRIEF STATEMENT OF THE CASE AND THE FACTS

On July 28, 2019 Plaintiff Catherine Davis was a passenger on a motorcycle that was struck by Defendant Richard Otten, who was cited for violating SDCL 32-24-8

Careless Driving and SDCL 32-26-1 Driving on the Wrong Side of the Road. (Ex. 5, Affidavit of Dean Faust). Due to the collision Plaintiff Davis has suffered numerous serious and permanent injuries, including incurred medical bills at this time in excess of \$329,558. (Ex. 5). That the liability carrier State Farm Insurance has a liability policy of \$25,000 and the Underinsured Motorist Carrier Meemic has an underinsured motorist limit of \$100,000. (Ex. 5). That Defendant Meemic upon being notified by Plaintiff of this \$25,000 liability policy limit pending settlement to Plaintiff's knowledge has not provided written permission to accept the liability limits offered of \$25,000 thereby consenting to further pursuit of a claim under the underinsured motorist policy pursuant to the "Schmidt v. Clothier" accepted release and underinsured motorist claim consent and process. (Ex. 5). That Defendant Meemic has offered \$75,000 as settlement which was accepted by Plaintiff thus resolving this claim and all issues with Meemic. (Ex. 5). However, the Attorney for Meemic is now contesting that this matter was settled.

ARGUMENT OF LEGAL ISSUES

I. MEEMIC INSURANCE HAD AN OPEN OFFER OF SETTLEMENT ON THE UNDERINSURED MOTORIST CLAIM BEING MADE IN THE AMOUNT OF \$75,000 WHICH WAS ACCEPTED BY THE PLAINTIFF, THUS RESOLVING THE UNDERINSURED MOTORIST CLAIM WITH MEEMIC

Defendant Meemic had made an offer of settlement in the amount of \$75,000 following lengthy negotiations which was still open and never rescinded. This offer of settlement was accepted by Plaintiff (Ex. 5). With this settlement offer being accepted it resolves the underinsured motorist dispute with Meemic, and with the settlement being accepted secondarily the State Farm policy limits offer of \$25,000 may then be accepted thus resolving the lawsuit. With the underinsured motorist claim being resolved with Meemic there is no need to proceed with the Motion to Dismiss Meemic or other actions involving Meemic on the underinsured motorist claim as the issue is resolved. Plaintiff asks the Court to uphold this settlement acceptance.

II. MEEMIC HAS MINIMUM CONTACTS WITH THE STATE UNDER THESE FACTS FOR THIS COURT TO HAVE JURISDICTION OVER MEEMIC FOR THIS CASE

While Plaintiff asserts this underinsured motorist claim against Meemic is settled thus resolving this issue

with Meemic regarding the underinsured motorist claim, thus eliminating the need for this Motion to Dismiss, if the Court should still desire to consider the Motion to Dismiss Plaintiff offers the following.

The trial court in this matter determined Defendant Meemic had the minimum contacts sufficient for specific jurisdiction. In its consideration, the trial court commented that if it considers the argument of Defendant Meemic on the facts of this case, it would suggest the victim of a tort would be required to commence two separate lawsuits, one where the person lives or where the tort occurred, and another where they may have their insurance. (T, 18-19). The trial court noted this as not being "realistic." (T, 19). The situation involving this lawsuit involving this underinsured motorist claim is unique as to Plaintiff's knowledge Meemic has not given written consent to settle for the \$25,000 liability policy limits being offered by State Farm to thus consent to the further singular pursuit of the underinsured motorist coverage through Meemic per the policy and the general "Schmidt v. Clothier" process for pursuit of an underinsured motorist claim in South Dakota. Thus, the

lawsuit against the alleged tortfeasor Richard Otten is needed to set the damages due Plaintiff Catherine Davis for payment under the underinsured motorist coverage. Jurisdiction of the Court over Richard Otten is present here as the motor vehicle collision occurred here in South Dakota and to Plaintiff's knowledge Defendant Otten resides in South Dakota, thus the damages due Catherine Davis are properly determined by a South Dakota Court, not any other Court. As liability policy limits were offered under the terms of the Meemic policy a underinsured motorist claim was triggered, which Meemic does not deny, and as the underinsured motorist claim derives out of the action against Defendant Otten, which if those liability limits were to be accepted and Richard Otten dismissed, the lawsuit would continue against Defendant Meemic for purposes of setting the value of the damages to be paid under the underinsured motorist claim. The collision being in South Dakota, the liability limits being offered to trigger an underinsured motorist claim, and the damages needing to be determined due Plaintiff in the lawsuit establish minimum contacts in South Dakota for inclusion of Meemic in the lawsuit.

The South Dakota Supreme Court in Mier v. McCord 632 NW2d 477, 481 (SD 2001) analyzed in a motor vehicle personal injury claim the process of liability policy limits settlement, pursuit of underinsured motorist coverage, the establishing of damages do, and other requirements, stating in part:

This Court has recognized that before the liability insurer obtains a release for its insured it actively represents the same interests as the underinsurer, which is to minimize the recovery against its insured. Weimer v. Ypparila, 504 N.W.2d 333, 335 (S.D.1993). After the liability insurer obtains a complete release, the underinsurer must step in and represent its own interests. *Id.* Thus, we recognize that a release of the liability insurer's insured (generally the defendant) does not prevent the plaintiff from proceeding against the defendant for purposes of determining the amount of underinsured motorist benefits the plaintiff may recover from its own underinsurer. *Id.*

Moreover, the Meemic policy applies per the policy to all states providing "The territory includes the states" with states being defined as "20. State(s) includes District of Columbia, and any state, territory or possession of the United States, and any province of Canada." (Ex. 6 at 20 and 3). Meemic by providing underinsured motorist coverage which applies per the policy to collisions in South Dakota, with an open claim

for underinsured motorist benefits having not been settled or otherwise reduced to a judgment against the tortfeasor having exclusive jurisdiction in South Dakota has sufficient contacts to be sued in South Dakota under these facts.

Furthermore, South Dakota's Long Arm Statute is to be "construed broadly" when evaluating jurisdiction. Denver Truck & Trailer Sales v. Design & Bldg. Servs., 653 N.W.2d 88 (S.D. 2002). SDCL 15-7-2, the South Dakota Long Arm Statute provides sufficient contacts at a minimum under parts:

" (1) The transaction of any business within the state;" While Meemic may not "sell policies" in the state of South Dakota, they know legally and per their policy that they by virtue of selling numerous policies that those policyholders will leave their home state and will at times be involved in collisions, including triggering underinsured motorist coverage, where the underlying case would have jurisdiction in that state where the tort took place, thus effectively transacting business in that state as well, here being South Dakota given that the collision which triggered the coverage took place in South Dakota.

Furthermore, in State v. Am. Bankers Ins. Co., 374 N.W.2d 609, 611-12 (S.D. 1985) a corporation based in Texas was deemed to have satisfied SDCL 15-7-2(1) noting that SDCL 58-1-2(15), defines "insurance business" as "the transaction of all matters pertaining to a contract, and all matters arising out of that contract or any claim thereunder" and, in the case in particular, the collection of premiums and the payment of claims are "matters pertaining to and arising out of an insurance contract." Similar to Defendant Meemic's claims, the Texas corporation, among a variety of factors considered, had not solicited the sale of policies or entered into a contract with an individual in South Dakota, the contract in question was entered into in Texas, and the corporation did not maintain any property or offices in South Dakota, and it was still held that the corporation, by nature of the "matters pertaining to and arising out of an insurance contract" fell within SDCL 15-7-2(1) as interpreted with SDCL 58-1-2(15). State v. Am. Bankers Ins. Co., supra.

"(2) The commission of any act which results in accrual within this state of a tort action;" Plaintiff asserts that the collision resulted in a tort action here

in South Dakota, having exclusive jurisdiction on that tort action, necessary to set the value of the damages on the injuries and damages suffered by Plaintiff for the amounts due under the Meemic underinsured motorist claim. That as the underinsured motorist claim derives out of the underlying tort and the damages must be set in that claim, Meemic is a proper party as the underinsured motorist insurance coverage has been triggered by the offering of the liability \$25,000 policy limits with the damages needing to be set as the underinsured motorist claim while settled by the Plaintiff is being contested by the Defendant's attorney. The tort action against the alleged tortfeasor cannot be filed in another state as other states lack jurisdiction. In Rothluebbers v. Obee, the South Dakota Supreme Court evaluated jurisdiction with regards to Sections 1 and 2 of South Dakota Long Arm Statute to include a car collision by an out of state tour company and bus driver. 668 N.W.2d 313, 322. In its considerations, the Court determined the out of state tour company and bus driver had "transacted business in South Dakota" when the driver "committed an act in South Dakota that created these tort actions." Id.

"(4) Contracting to insure any person, property, or risk located within this state at the time of contracting;" As the Meemic policy covers all "states", including South Dakota, Meemic contracted to insure both Plaintiff Catherine Davis and the risk of her being involved in a collision while in South Dakota involving an underinsured motorist coverage at the time of entering into the contract of insurance as it was foreseeable that she may be involved in such out of state collision such as occurred here. Jurisdiction "may not be avoided merely because the defendant did not physically enter the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985). Furthermore, where non-residents derive benefit from their interstate activities, "it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." Id. at 2183. Additionally, "if the terms of the services contract create continuing obligations" personal jurisdiction can be appropriate. Kustom Cycles, Inc. v. Bowyer, 857 N.W.2d 401, 412 (S.D. 2014). In this case, the Court emphasized when analyzing Daktronics, Inc. v. LBW Tech Co., 737

N.W.2d 413 (S.D. 2007), that the contract created a "continuing obligation for the defendant in South Dakota." Kustom Cycles, Inc. v. Bowyer, supra. The Court continues to comment that it may be true in some cases, while not defining the specific instances, that a services contract can form a "continued connection between the out-of-state party and the forum" and that the performance of services within the forum may give rise to a more substantial connection. Kustom Cycles, Inc. v. Bowyer, supra at 412. Defendant represented to Plaintiff Davis in the insurance policy that underinsured motorist coverage applied in all fifty states. In this way, the policy was designed as to provide coverage for incidents in the fifty states. Defendant Meemic had a continuing obligation to fulfill the requested performance of the underinsured motorist coverage provided to Plaintiff Davis for the collision occurring in South Dakota.

"(11) Commencing or participating in negotiations, mediation, arbitration, or litigation involving subject matter located in whole or in part within the state;" Again, Plaintiff asserts that the collision resulted in a tort action here in South Dakota, having exclusive

jurisdiction on that tort action, being necessary to set the value of the damages on the injuries and damages suffered by Plaintiff for the amounts due under the Meemic underinsured motorist claim. That as the underinsured motorist claim derives out of the underlying tort and the damages must be set in that claim, Meemic is a proper party as the underinsured motorist insurance coverage has been triggered by the offering of the liability \$25,000 policy limits with the damages needing to be set as the underinsured motorist claim while settled by the Plaintiff is being contested by the Defendant's attorney. The tort action against the alleged tortfeasor cannot be filed in another state as other states lack jurisdiction. While Meemic may have not thus far participated in this above-entitled action, it nonetheless is necessary to set the value of the damages due in the underinsured motorist claim which derives from the lawsuit against Defendant Otten which must be decided in South Dakota.

These items show there are "minimum contacts" with South Dakota to also meet due process requirements. Specific jurisdiction depends on an "affiliatio[n] between the forum and the underlying controversy,"

principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). We are not looking at a private individual, but a large insurance company choosing to sell policies of insurance covering use in all 50 states knowing that coverage will be triggered by collisions in states other than where they sell policies. These above stated acts and need to set the value of the damages in the underinsured motorist claim provide specific jurisdiction for purposes of setting damages. The South Dakota Supreme Court in Marschke v. Wratishlaw stated:

A court asserts general jurisdiction over a nonresident defendant when he has continuous activities in the forum and the activities are substantial enough to make reasonable the court's jurisdiction over him for a cause of action unrelated to those activities. Int'l Shoe Co., 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. 95 (citations omitted); Helicopteros, 466 U.S. at 414-15, 104 S.Ct. at 1872, 80 L.Ed.2d 404 (citation omitted); Burger King Corp., 471 U.S. at 475-76, 105 S.Ct. at 2184, 85 L.Ed.2d 528 (citations omitted). Where the nonresident defendant does not have continuous contact with the forum, but only sporadic activity or an isolated act, a court is said to assert specific jurisdiction over him when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act. Int'l Shoe

Co., 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. 95 (citations omitted); Helicopteros, 466 U.S. at 414, 104 S.Ct. 1868 n. 8, 104 S.Ct. at 1872 n. 8, 80 L.Ed.2d 404 (citation omitted); Burger King Corp., 471 U.S. at 476, 105 S.Ct. 2174 n. 18, 105 S.Ct. at 2184 n. 18, 85 L.Ed.2d 528 (citation omitted).

Marschke v. Wratishlaw, 743 N.W.2d 402, 405-406 (S.D. 2007)

The South Dakota Supreme Court went on to state the 3-part test as follows:

Interpreting United States Supreme Court precedent regarding the due process requirements, we apply a three-step test to determine whether sufficient minimum contacts exist. Id. (citing Frankenfeld v. Crompton Corp., 2005 SD 55, ¶ 17, 697 N.W.2d 378, 384 (citing Rothluebbers v. Obee, 2003 SD 95, ¶ 26, 668 N.W.2d 313, 322)). Under this test:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Marschke at 407.

Plaintiff asserts these tests are met as 1) by selling policies providing insurance coverage in all 50 states, including South Dakota, including underinsured motorist coverage where the value of the damages is set by

the underlying claim against the defendant driver Meemic purposefully avails themselves to such lawsuit as here; 2) the insurance activities by the policies providing coverage in all 50 states, including South Dakota and the damages due under underinsured motorist coverage being thus required to be established here in South Dakota result in the cause of action to set damages being venued here in South Dakota, thus meeting the second part of the test; and 3) these same factors of the underlying tort claim, the underlying lawsuit against the alleged negligent driver, and needing to set the value of the damages under the underinsured motorist coverage all have a "substantial connection with the forum state" for jurisdiction under part 3 for Meemic.

Furthermore, "a single contact with the forum is sufficient if the plaintiff's claim arises out of that contact." Klenz v. AVI Int'l , 647 N.W.2d 734, 737 (S.D. 2002). In Klenz v. AVI Int'l, the Court held that an insurance provider, which provided insurance to a foreign exchange student who was killed in an occurrence in South Dakota, had a "substantial connection with South Dakota" as it "should have anticipated that it could be brought

into court wherever the insured foreign exchange student resided or travelled.” Id at 737. Just as the purpose of the insurance policy issued to the foreign exchange student was to provide worldwide coverage, Defendant Meemic purposefully availed themselves to the lawsuit here in South Dakota by virtue of providing Plaintiff Davis insurance coverage in all 50 states, including South Dakota. Even when considering the insurance contract itself between Defendant and Plaintiff, the Supreme Court of the United States previously stated certain factors to consider a contract as a contract including “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing -- that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985).

Defendant Meemic's continuing obligation to the underlying tort action with Defendant Meemic's policies providing coverage in all 50 states, including South Dakota and the damages due under underinsured motorist coverage being required to be established here in South

Dakota result in the cause of action. This continuing obligation also differentiates Defendant Meemic's contact with South Dakota as compared to the car dealership in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). In World-Wide Volkswagen Corp. v. Woodson, the Court discussed the New York car dealership's activity in Oklahoma noting they "perform no services there...avail themselves of none of the privileges and benefits of Oklahoma law." Id. The products-liability action in World-Wide Volkswagen Corp. v. Woodson is not the same as the underlying tort action with exclusive jurisdiction in South Dakota. As opposed to the car dealership's relationship to the petitioners in World-Wide Volkswagen Corp. v. Woodson, Defendant Meemic has a continuing obligation to provide underinsured motorist coverage to its insured for the underlying tort action occurring in South Dakota where the value of damages must be set.

The Supreme Court of the United States noted in Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, which was decided in 2021, that the Court has "never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff's claim came

about because of the defendant's in-state conduct." 141 S. Ct. 1017, 1026 (2021). Instead, the Court noted "our most common formulation of the rule demands that the suit 'arise out of or relate to the defendant's contacts with the forum.'" Id. Defendant Meemic does not need physical presence or conduct in the state of South Dakota for jurisdiction to exist. By providing underinsured motorist coverage to its insured, Plaintiff Cathy Davis, in all 50 states, including South Dakota, Defendant Meemic has sufficient minimum contacts for jurisdiction.

It is also important to note that the establishing of the damages due Plaintiff under the Meemic underinsured motorist policy is not an insurance policy language interpretation dispute, but instead a question of damages due which derive out of the tort claim against Defendant Richard Otten, which can only be brought here in South Dakota, being the only state court to determine the damages and being the substantial connection. Furthermore, in Goodyear Dunlop Tires Operations, S.A. v. Brown, an action was brought in North Carolina court for North Carolina residents who were involved in a bus accident occurring in France. 564 U.S. 915, 919 (2011). Though the

case centered on an analysis of general jurisdiction, the Court noted that “[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.” Id. Even more, a court’s determination of reasonableness for exercising jurisdiction will depend on consideration of several factors including not only the “burden on the defendant” but also “the interests of the forum State, and the plaintiff’s interest in obtaining relief.” Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 (1987). The Court must also weigh “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” Id. (quoting World-Wide Volkswagen, 444 U.S., at 292). The State of South Dakota has an interest in regulating insurance coverage for tort actions occurring in its state and provides the only forum for “efficient resolution” of the controversy with the underlying tort action occurring in South Dakota.

Additionally, the State of South Dakota has an interest in providing redress for individuals when their insurers refuse to pay claims. See McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). Furthermore, the Plaintiff's interest in obtaining relief relies on establishing damages in the underlying tort action in this exclusive forum where the action occurred in South Dakota.

Therefore, Plaintiff Davis has shown minimum contacts to satisfy SDCL 15-7-2, South Dakota's Long Arm Statute, and has met the three part test for due process for specific jurisdiction of Defendant Meemic.

CONCLUSION

The trial court in this matter held Defendant Meemic had sufficient minimum contacts for specific jurisdiction. (Ex. 1 and 2). As above stated, Plaintiff asserts that Defendant Meemic is a proper party in the above-entitled lawsuit and respectfully requests the Court uphold the trial court's decision and Defendant Meemic's Motion to Dismiss should be denied. Moreover, Plaintiff asserts that the underinsured motorist claim has been properly settled by acceptance of the offer of settlement in the amount of

\$75,000 and if disputed by Meemic asks that the Court enforce Plaintiff's acceptance of the offer. If the Court should Dismiss Meemic from this lawsuit, Plaintiff requests such dismissal be without prejudice so any and all asserted claims and causes of action against Meemic may be filed in Michigan or other Court of jurisdiction by Plaintiff.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument on this appeal.

Dated this 2nd day of March, 2022

A P.L.C. MOORE-FAUST LAW GROUP

/s/ Dean Faust
Dean Faust
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL §15-26A-66(b) using the typeface "Courier New" in 12 point type. Appellee's Brief contains 4,915 words.
2. I certify the word processing software used to prepare this brief is Microsoft Word and was used to calculate the word count stated above.

Dated this 2nd day of March, 2022

A P.L.C. MOORE-FAUST LAW GROUP

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PROOF OF SERVICE

It is hereby certified that, on March 2, 2022, a true and correct copy of the foregoing document has been served upon all parties via email and US Mail as properly addressed below:

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STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,)
Plaintiff,)

FILE NO. 40CIV21-000039

vs.)

ORDER DENYING DEFENDANT MEEMIC
INSURANCE COMPANY'S SDCL 15-6-
12(B)(2) AND 12(B)(5) MOTION TO
DISMISS

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

This Matter, having come before the Court on the Defendants' Motion to Dismiss for Want of Personal Jurisdiction, having held a hearing in the matter and upon the consideration of the arguments, briefs, affidavits submitted, and the file in support of and in opposition thereto, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant Meemic's Motion to Dismiss for Want of Personal Jurisdiction is DENIED on May 18, 2021.

Signed: 5/24/2021 9:07:07 AM

BY THE COURT:

Michelle Comer

Honorable Michelle Comer
Fourth Judicial Circuit Court Judge

ATTEST:

CAROL LATUSECK

Clerk of Courts

BY:

KRISTIE GIBBENS

Deputy Clerk

[SEAL]



PLAINTIFF'S
EXHIBIT

1

STATE OF SOUTH DAKOTA
COUNTY OF LAWRENCE

)
)SS
)

IN CIRCUIT COURT
FOURTH JUDICIAL DISTRICT

40CIV21-000039

CATHERINE DAVIS,
Plaintiff,

vs.

RICHARD OTTEN and MEEMIC INSURANCE
COMPANY,
Defendants.

DEFENDANT MEEMIC INSURANCE
COMPANY'S SDCL 15-6-12(B)(2) AND
12(B)(5) MOTION TO DISMISS

COMES NOW Defendant Meemic Insurance Company ("Meemic") and pursuant to SDCL 15-6-12(b)2 and 15-6-12(b)5 hereby moves this Court for an Order dismissing Plaintiff's Complaint against Meemic for want of personal jurisdiction, and therefore for failing to state a cause of action upon which relief may be granted.

In support of this Motion, Meemic offers the exhibits identified in the Index of Evidence, and its brief in support of the Motion.

WHEREFORE, Meemic Insurance Company respectfully requests this Court enter an Order dismissing Plaintiff's Complaint, with prejudice, all costs taxed to the Plaintiff.

[SIGNATURE ON FOLLOWING PAGE]



Dated: April 9, 2021

MEEMIC INSURANCE COMPANY,
Defendant,

By s/Susan B. Meyer
Susan B. Meyer (#3420)
E-mail: smeyer@grsm.com
GORDON & REES, LLP
1601 Mt. Rushmore Rd., Suite 3-227
Rapid City, SD 57701
Telephone: 605-737-0133
*Attorney for Defendant Meemic
Insurance Company*

CERTIFICATE OF SERVICE

It is hereby certified that on this 9th day of April, 2021, the above and foregoing was filed with the Clerk of Court, which sent electronic notification of the filing to the following:

Dean Faust
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Attorney for Plaintiff

Courtney R. Clayborne
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Attorney for Defendant Richard Otten

s/Susan B. Meyer
Susan B. Meyer

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS)
Plaintiff,)

FILE NO. 40CIV21-000039

vs.)

NOTICE OF ENTRY OF ORDER

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

NOTICE IS HEREBY GIVEN that an ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS was entered in the above entitled action and filed in the office of the Clerk of Courts, Lawrence County, Deadwood, South Dakota on the 24th day of May 2021. A copy of said Order is attached hereto and incorporated by this reference.

Dated this 24th day of June, 2021.

A P.L.C. Moore-Faust law Group

By:



Dean Faust

Attorney for Plaintiff

PO Box 2471

Rapid City, SD 57709-2474

Telephone: 605-348-2471

Email: faust@moorefaust.com

PLAINTIFF'S
EXHIBIT

3

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the undersigned date, he forwarded a true and correct copy of the foregoing ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS to the persons herein next designated, all on the date below shown, by placing the same in the service indicated, addressed as follows:

Attorney Earl G. Green, III
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
301 South 13th Street, Ste. 400
Lincoln, NE 68508

Attorney Courtney Clayborne
Attorney for Defendant Richard Otten
Clayborne, Loos & Sabers, LLP
PO Box 9129
Rapid City, SD 57709-9129

Attorney Susan B. Meyer
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
1601 Mt. Rushmore Road, Suite 3-227
Rapid City, SD 57701

☒ US mail, postage prepaid
☐ Federal Express
☐ Hand-delivery
☐ Facsimile
☐ Email
☒ Odyssey File & Serve
☐ Other: _____

which are the last addresses of the addressees known to the subscriber.

Dated this 24th day of June, 2021.

A P.L.C. MOORE-FAUST LAW GROUP

by



Dean Faust
Attorney for Plaintiff Catherine Davis
924 Quincy Street
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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Civ. No. 21-000039

CATHERINE DAVIS

PLAINTIFF AND RESPONDENT,

VS.

MEEMIC INSURANCE COMPANY,

DEFENDANT AND PETITIONER,

AND

RICHARD OTTEN,

DEFENDANT.

PETITION FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
CIRCUIT COURT JUDGE

**DEFENDANT MEEMIC INSURANCE COMPANY'S PETITION FOR PERMISSION
TO TAKE DISCRETIONARY APPEAL**

GORDON & REES, LLP

Susan B. Meyer (#3420)
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*Order Filed on May, 24, 2021
Notice of Entry served on June 24, 2021*



Appellee's 000006

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ATTACHMENTS

1. Order denying motion to dismiss (May 24, 2021).
2. Notice of entry of order denying motion to dismiss (June 24, 2021).
3. Plaintiff's Complaint.
4. Affidavit of Frank C. White.

STATEMENT OF THE FACTS

Meemic Insurance Company (“Meemic”) is a property and casualty insurance company (Plaintiff’s Complaint, ¶3) organized under the laws of the State of Michigan. (Affidavit of Frank C. White, ¶ 4). As part of its business, Meemic offers automobile insurance coverage which complies with Michigan law in terms of personal injury protection, property protection, residual liability coverage, and uninsured/underinsured coverages (Plaintiff’s Complaint, ¶4). Meemic is not authorized to write insurance in the State of South Dakota (Affidavit of Frank C. White, Jr., ¶ 6), and contends it has not engaged in any activity which would bring it under the auspices of the South Dakota long-arm statute, SDCL 15-7-2. (Affidavit of Frank C. White, Jr., ¶5 &¶6).

Meemic issued to the Plaintiff, a resident of Peck, Michigan, (Plaintiff’s Complaint, ¶11) an automobile insurance policy, policy no. PAP0855455 (the “Policy”) (Affidavit of Frank C. White, Jr., ¶7). Meemic issued the Policy in Michigan and it included coverage for uninsured and underinsured claims, subject to policy language, terms and conditions. The Policy was in effect on July 28, 2019 (Plaintiff’s Complaint ¶13, Affidavit of Frank C. White, Jr., ¶7).

On July 28, 2019, Plaintiff sustained personal injuries near Sturgis, Lawrence County, South Dakota while riding as a passenger on a motorcycle owned by William Laeder (Plaintiff’s Complaint, ¶6). Plaintiff claims Defendant Richard Otten (“Otten”) caused the accident on July 28, 2019, and further claims Otten qualifies as an underinsured motorist, entitling Plaintiff to indemnification for underinsured motorist coverage benefits under the Policy (Plaintiff’s Complaint ¶14-17).

After Plaintiff presented a claim to Meemic for benefits under the Policy, Meemic denied Plaintiff’s claim on July 24, 2020, for indemnity coverage under the Policy for

personal injury protection benefits. Thereafter, Plaintiff filed the above-captioned lawsuit against Meemic in the South Dakota Circuit Court, Fourth Judicial District, alleging Meemic breached the contractual language and terms of the Policy. (See, generally, Plaintiff's Complaint). In the Complaint, Plaintiff alleges the lower court has personal jurisdiction over Meemic pursuant to SDCL 15-5-2(venue where cause of action arose) and SDCL15-5-8 (venue for personal injury where cause of action arose). (Plaintiff's Complaint, ¶5).

Pursuant to SDCL 15-6-12(b)(2) and South Dakota case law, Meemic filed a Motion to Dismiss in the lower court challenging that court's personal jurisdiction over Meemic. Absent the lower court's personal jurisdiction over Meemic, Plaintiff's Complaint was also subject to dismissal under SDCL 15-6-12(b)(5) for failing to state a cause of action upon which relief may be granted.

The lower court heard Meemic's Motion to Dismiss on May 18, 2021. At the conclusion of the hearing, the Honorable Judge Michelle K. Comer denied Meemic's Motion to Dismiss but did not explain her reasoning. Judge Comer asked Plaintiff's counsel to prepare an order for her signature. Plaintiff counsel did so, and Judge Comer signed that Order on May 24, 2021. The signed Order contains no explanation, memorandum opinion, nor rationale for the Court's decision. The Notice of Entry of Order was filed June 24, 2021.

STATEMENT OF THE QUESTIONS

1. Whether the lower court incorrectly denied Meemic's Motion to Dismiss by finding it had personal jurisdiction over Meemic?

RELIEF SOUGHT

Meemic respectfully requests that its Petition for Intermediate Appeal be granted and the Order denying its Motion to Dismiss be reversed and remanded with instructions that the lower court dismiss Plaintiff's Complaint for lack of personal jurisdiction over Meemic, and/or for failing to state a cause of action upon which relief may be granted.

STATEMENT OF APPLICABLE LAW

I. Lower Court Lacks Personal Jurisdiction Over Meemic

Generally speaking, when reviewing a motion to dismiss, this Court must “treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader.” *Kustom Cycles v. Bowyer*, 2014 S.D. 87, 857 N.W.2d 402, citing *Marschke v. Wraitislaw*, 2007 S.D.125, 743 N.W.2d 402,405.

In determining a court's jurisdiction over a non-resident party, the amount and kind of activity which must be carried on in a forum state to subject a foreign corporation or a nonresident individual to jurisdiction of that state are to be determined in each case. *Ventling v. Kraft*, 83 S.D. 465, 161 N.W.2d 29 (1968). The party asserting personal jurisdiction has the burden of establishing a prima facie case; the burden does not shift to the party challenging jurisdiction. *Burke v. Roughrider, Inc.*, 2007, 507 F.Supp.2d 1040 (S.D. Central Div.) In order for a South Dakota court to have personal jurisdiction over a non-resident defendant, a court must make two inquiries. The first inquiry determines if the state legislature granted the state courts jurisdiction over a defendant who does not meet a traditional basis for personal jurisdiction. This is done through the application of the South Dakota long-arm statute, SDCL 15-7-2, and a determination if

the defendant met any of the fourteen statutorily defined acts. If, in this case, Meemic does not fit within any of the fourteen defined acts, then the lower court lacked personal jurisdiction over Meemic. However, even if SDCL 15-7-2 applies, a court must then also inquire whether “the assertion of jurisdiction comport[s] with federal due process requirements.” *Kustom Cycles*, supra. In so doing, a court must find the existence of a party’s “minimum contacts” with the forum state in order to exercise personal jurisdiction.

The “minimum contacts” test is well-established in American jurisprudence. Recently, in *Ford Motor Company v. Montana Eighth Judicial District Court*, et al, 141 S. Ct. 1017 (Case No. 19-368)(2021), and *Ford Motor Company v. Bandemer*, 141 S. Ct. 1017 (Case No. 19-369)(2021)(published March 25, 2021) the United States Supreme Court reviewed cases from Montana and Minnesota state courts in which those state courts found they had personal jurisdiction over Ford. In affirming the state court decisions, the Supreme Court recited its prior holdings on the necessity for minimum contacts of a non-resident party in order to satisfy the U.S. Constitution Fourteenth Amendment Due Process Clause. The Supreme Court noted the “canonical decision” of *International Shoe v. Washington*, 326 U.S. 310 (1945) and the findings in that case that a defendant’s contacts with a forum state must exist in order to satisfy our judicial system’s “traditional notions of fair play and substantial justice.” *International Shoe*, supra. The Court further noted a court must focus on the nature and extent of “the defendant’s relationship to the forum State.”, citing *Bristol-Meyers Squib v. Superior Court of Cal., San Francisco City*, 137 S. Ct.827, 2017 WL 215867. That focus, in turn, led the Supreme Court to recognize two kinds of personal jurisdiction: general and specific jurisdiction, citing *Goodyear Dunlop Tires Operation S.A v. Brown*, 564 U.S. 915 (2011). As explained

by the Court, general jurisdiction exists when a defendant is “essentially at home” in the State. *Goodyear*, supra. Nonetheless a select “set of affiliations with a forum” must yet exist to expose the defendant to such jurisdiction. *Daimler AG v. Bauman*, 571 U.S.117, 137 (2014).

In contrast, specific jurisdiction in a personal jurisdiction question covers defendants “less intimately connected with a State” and in those cases a defendant must exhibit “purposeful availment” of contacts with that State. *Burger King Corp. v Rudzewicz*, 471 U.S. 462, 475 (1985). “The defendant must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State.” *Hanson v. Dencklau*, 357 U.S. 235,253 (1958). Such contacts cannot be “random, isolated or fortuitous.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Further, the plaintiff’s claims in a specific, personal jurisdiction setting “must arise out of or relate to the defendant’s contacts” with the forum. *Ford*, supra, quoting *Daimler*, 571 U.S at 127. The significance of the distinction between general and specific jurisdiction? According to the Supreme Court: “The law of specific jurisdiction thus seeks to ensure that States with ‘little legitimate interest’ in a suit do not encroach on States more affected by the controversy.” *Ford*, supra, citing *Bristol-Myers*,supra.

The Supreme Court of South Dakota recognizes the dichotomy of general and specific jurisdiction when looking at personal jurisdiction scenarios. In *Marschke v. Wratishlaw*, 2007 S.D. 125, 743 N.W.2d 402, the South Dakota Supreme Court cited the “venerable” U.S. Supreme Court case of *International Shoe*, supra, et al, as construing the two different types of personal jurisdiction: general and specific. *Marschke*, supra ¶12. In its words:

A Court asserts general jurisdiction over a non-resident defendant when [the defendant] has continuous activities in the forum and the activities are substantial enough to make reasonable the court's jurisdiction over [the defendant] for a cause unrelated to those activities. (citations omitted). When the nonresident defendant does not have continuous contact with the forum, but only sporadic activity or an isolated act, a court is said to assert specific jurisdiction over [the defendant] when it asserts such jurisdiction in relation to a cause of action arising out of the activity or act.

Marschke, supra ¶12, citing *International Shoe*, supra and *Burger King Corp.*, supra.

In reviewing a defendant's actions in order to exercise specific personal jurisdiction, then, a court must determine if "minimum contacts" for due process have been met. *State v. American Bankers Ins. Co.*, 374 N.W.2d 609 (S.D.1985); *Zhang v. Rasmus*, 2019 SD 46, 932 N.W.2d 153. Establishing due process "requires a showing that a non-resident defendant had minimum contacts with South Dakota so that the assertion of personal jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Frankenfeld v. Crompton Corp.*, 295 S.D., 697 N.W. 2d 378, ¶10, citing *International Shoe*, supra. The South Dakota Supreme Court "explained the limits of due process" in the following terms:

There must also be some act by which the defendant purposefully availed himself of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. This 'purposeful availment' requirement ensures that a defendant will not be haled into a court of the forum solely as a result of 'random', 'fortuitous' or 'attenuated' contacts.... Moreover, the defendant's conduct and connection with the forum must be such that he could reasonably anticipate being haled into a forum court.

Zhang, supra, ¶20, citing *Marschke*, supra, at 406 (internal quotations and citations omitted.)

From these "guiding principles" *Zhang*, supra, ¶21, the South Dakota Supreme Court developed a three part test "to assist courts in determining whether a non-resident defendant's actions provide sufficient minimum contacts to support the Plaintiff's assertion of specific, personal jurisdiction:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. Second, the cause of action must arise from [the] defendant's activities directed at the forum state. Finally, the acts of [the] defendant must have substantial connection with the forum state to make the exercise of jurisdiction over [the] defendant a reasonable one.

Zhang, supra, ¶21, citing *Marschke*, 2007 S.D.125, ¶15, 743 N.W.2d at 407 (other citations omitted).

Of particular note is the requirement that a defendant "purposefully" avails itself of contacts with the forum state. In *Frankenfeld v. Crompton Corp.*, 2005 SD 55, 607 N.W.2d 378, the South Dakota Supreme Court elaborated on this concept of purposeful action, and highlighted the fact the "purposeful" contact must originate by the defendant's actions, not the actions of a third-party: Where a suit arises out of a defendant's contacts with a forum, the defendant's activities must be "purposefully directed" toward the forum for personal jurisdiction to attach. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182, 85 L.Ed.2d at 528.

II. In the Absence Of Personal Jurisdiction, Plaintiff's Complaint Fails To State A Cause Of Action For Which Relief May Be Granted

As stated by the South Dakota Supreme Court in *Ghrulke v Sioux Empire Federal Credit Union*, 2008 S.D. 89, 756 N.W.2d 399:

A motion to dismiss tests the legal sufficiency of the pleadings ...*Elkjer v. City of Rapid City*, 2005 SD 45, ¶ 6, 695 N.W.2d 235, 238. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." *Sisney v. Best*, 2008 SD 70, ¶ 7, 754 N.W.2d 804 (citing *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted)).

Gruhlke, *supra* at ¶17.

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the pleading, not the facts which support it. *Richardson v. Richardson*, 906 N.W.2d 369, 2017 S.D. 92. Further, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle Plaintiff to relief. *Fodness v. City of Sioux Falls*, 947 N.W.2d 619, 2020 S.D. 43. However, if a court determines it lacks personal jurisdiction over a non-resident defendant, then that court may take no further action against that defendant because no cause of action exists. *Boyko v. Robinson*, 321 Fed. App. 526, 2009 WL 961513 (8th Cir.). citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (without personal jurisdiction a district court is powerless to proceed to adjudication.) “To properly hear a case, a circuit court must have personal jurisdiction over the defendant. ...” *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 40, 835 N.W.2d 886, 900.

REASONS FOR GRANTING THE PETITION

1. Because of Meemic’s lack of contacts with the State of South Dakota, the lower court lacks personal jurisdiction over Meemic.

The lower court’s ruling states no basis for its finding it has personal jurisdiction over Meemic. Meemic cannot point this Court to any specific holding or rationale of the trial court in reaching its decision because none were stated. Meemic notes, though, SDCL 15-7-2 does not apply because Meemic does not fall within any of the fourteen acts designated in that statute which would allow the “long-arm” of a South Dakota court to

exercise jurisdiction over Meemic (Affidavit of Frank C. White ¶5-6). Further, under both South Dakota and federal law, Meemic lacks the necessary “minimum contacts” with South Dakota needed for the lower court’s to exercise personal jurisdiction over Meemic. In the absence of those “minimum contacts”, the necessary due process requirements are not met, either.

- 2. Without a discretionary appeal, the lower court’s incorrect legal analysis will substantially prejudice Meemic because it will be required to defend itself in a state in which it has no contacts, did not anticipate being haled into, and necessarily must argue for the application of Michigan underinsurance statutes and case law in a South Dakota forum.**

An intermediate appeal is necessary because the lower court’s incorrect ruling that it has personal jurisdiction over Meemic forces Meemic to litigate a case in a forum completely foreign to it and the underinsured policy it provided to the Plaintiff. As noted above, Meemic does not meet the “minimum contacts” with South Dakota test required by both South Dakota and federal law. When Meemic, a Michigan corporation, contractually insured the Plaintiff, a Michigan resident, with an underinsured motorist policy issued in Michigan, a policy with language and provisions specifically controlled by a Michigan statutory scheme (MCL 500.3105, et. seq.), it never anticipated being “haled” into a South Dakota courtroom simply because its insured, a Michigan resident, rode on a motorcycle in South Dakota. The State of Michigan statutory underinsured motorist provisions will apply in this case, and given the lack of contact by Meemic with South Dakota, a Michigan court is the better forum to adjudicate what will undoubtedly be issues of Michigan insurance law.

CONCLUSION

For these reasons, Meemic Insurance Company respectfully requests that this Honorable Court grant its petition for permission to take discretionary appeal.

Dated this 30th day of June, 2021.

GORDON & REES, LLP

By /s/Susan B. Meyer
Susan B. Meyer (#3420)
E-mail: smeyer@grsm.com
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Rapid City, SD 57701
Telephone: 605-737-0133

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing and all attachments was served by electronic mail upon the following this 30th day of June, 2021:

Dean Faust
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Rapid City, SD 57701
faust@moorefaust.com
Attorney for Catherine Davis

Courtney R. Clayborne
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2834 Jackson Blvd., Suite 201
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cclaybornelaw@aol.com
Attorney for Richard Otten

/s/Susan B. Meyer
Susan B. Meyer

ATTACHMENT 1

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,
Plaintiff,

FILE NO. 40CIV21-000039

vs.

ORDER DENYING DEFENDANT MEEMIC
INSURANCE COMPANY'S SDCL 15-6-
12(B)(2) AND 12(B)(5) MOTION TO
DISMISS

RICHARD OTTEN and MEEMIC
INSURANCE COMPANY,
Defendants.

This Matter, having come before the Court on the Defendants' Motion to Dismiss for Want of Personal Jurisdiction, having held a hearing in the matter and upon the consideration of the arguments, briefs, affidavits submitted, and the file in support of and in opposition thereto, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant Meemic's Motion to Dismiss for Want of Personal Jurisdiction is DENIED on May 18, 2021.

Signed: 5/24/2021 9:07:07 AM

BY THE COURT:

Michelle Comer

Honorable Michelle Comer
Fourth Judicial Circuit Court Judge

ATTEST:

CAROL LATUSECK

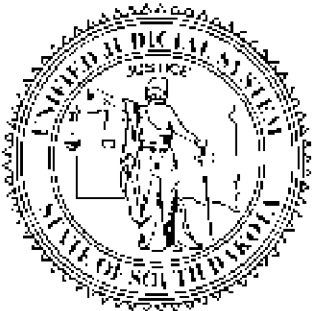
Clerk of Courts

BY:

KRISTIE GIBBENS

Deputy Clerk

[SEAL]



Appellee's 000019

ATTACHMENT 2

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS)
Plaintiff,)

FILE NO. 40CIV21-000039

vs.)

RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
Defendants.)

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that an ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS was entered in the above entitled action and filed in the office of the Clerk of Courts, Lawrence County, Deadwood, South Dakota on the 24th day of May 2021. A copy of said Order is attached hereto and incorporated by this reference.

Dated this 24th day of June, 2021.

A P.L.C. Moore-Faust law Group

By:



Dean Faust

Attorney for Plaintiff

PO Box 2471

Rapid City, SD 57709-2474

Telephone: 605-348-2471

Email: faust@moorefaust.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the undersigned date, he forwarded a true and correct copy of the foregoing ORDER DENYING DEFENDANT MEEMIC INSURANCE COMPANY'S SDCL 15-6-12(B)(2) AND 12(B)(5) MOTION TO DISMISS to the persons herein next designated, all on the date below shown, by placing the same in the service indicated, addressed as follows:

Attorney Earl G. Green, III
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
301 South 13th Street, Ste. 400
Lincoln, NE 68508

Attorney Courtney Clayborne
Attorney for Defendant Richard Otten
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Rapid City, SD 57709-9129

Attorney Susan B. Meyer
Attorney for Defendant Meemic Ins. Co.
Gordon Rees Scully Mansukhani
1601 Mt. Rushmore Road, Suite 3-227
Rapid City, SD 57701

[x] US mail, postage prepaid
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[] Other: _____

which are the last addresses of the addressees known to the subscriber.

Dated this 24th day of June, 2021.

A P.L.C. MOORE-FAUST LAW GROUP

by



Dean Faust
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Fax: 605-343-0247
faust@moorefaust.com

ATTACHMENT 3

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)ss	
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT
CATHERINE DAVIS,)	FILE NO. 40CIV21-_____
Plaintiff,)	
)	
vs.)	COMPLAINT
)	
RICHARD OTTEN and MEEMIC)	
INSURANCE COMPANY,)	40CIV21-000039
Defendants.)	

Plaintiff, for her causes of action against the Defendants, states and alleges the following:

1. That Plaintiff, Catherine Davis, is currently a resident of Peck, Sanilac County, Michigan, and was such at the time of motor vehicle collision discussed below.

2. That Defendant, Richard Otten, to the best information and belief of the Plaintiff, was a resident of Sturgis, Meade County, South Dakota, at the time of the motor vehicle collision.

3. Defendant Meemic Insurance Company is engaged in the business of selling liability, uninsured, underinsured, no-fault and other motor vehicle insurance coverages. To the best of Plaintiff's information and believe, Defendant Meemic Insurance Company is based in the state of Michigan and its corporate address is listed as 1685 North Opdyke Rd., PO Box 217019, Auburn Hills, MI 48321-7019.

4. At all times pertinent to this action, Catherine Davis had in effect a

contract of insurance with Defendant Meemic Insurance Company, including but not limited to Underinsured Motorist coverage; No-Fault Coverages including Personal Injury Protection Full Medical and Full Work Loss Property Protection Insurance; Michigan Catastrophic Claims Association (MCCA) no-fault coverage including medical expenses; and other coverages on the policy.

5. That the location of the motor vehicle collision described herein, and the subject of this action took place in Lawrence County, South Dakota. Jurisdiction is proper based upon location of the incident pursuant to SDCL 15-5-2 and 15-5-8.

6. That on or about July 28, 2019, Plaintiff Catherine Davis, was a motorcycle passenger on William Laeder's 2009 Harley Davidson traveling eastbound on US Highway 14A, Lawrence County, South Dakota. At the same time, Defendant Richard Otten was on his 2012 Harley Davidson traveling with a group of riders going westbound on US Highway 14A. Unfortunately for Plaintiff Davis, Defendant Otten negligently failed to negotiate the curve and negligently crossed into the oncoming traffic lane, colliding head on with the motorcycle Plaintiff Davis was a passenger on, causing substantial injuries and damages to Plaintiff Davis.

7. That Defendant Richard Otten owed a duty to Plaintiff to exercise reasonable care and skill in operation of Defendant's vehicle.

8. That Defendant Richard Otten was negligent in that he failed to use due

care in the operation of the motor vehicle he was driving and was negligent in the operation thereof in a number of ways, including failure to yield to the oncoming traffic, failing to stay in his lane of traffic on the roadway, failing to keep a proper lookout, speeding, exceeding a safe speed, and failing to operate his motor vehicle in a reasonable and prudent manner so as not to endanger the safety or health of other drivers including Plaintiff Catherine Davis on the same roadways.

9. Plaintiff is free from contributory negligence and all of Plaintiff's losses were, are, and will be due to the negligence of Defendant Richard Otten.

10. Defendant Richard Otten's acts of failing to obey the rules of the road as herein set forth were in direct violation of South Dakota law and Defendant Richard Otten is therefore negligent as a matter of law. Such negligence is the direct and proximate cause of the damages suffered by Plaintiff.

11. That as a direct result of Defendant Richard Otten's negligence, Plaintiff Catherine Davis has sustained significant injuries and damages that include, but are not limited to, past and future medical expenses, past and future pain and suffering, temporary and permanent impairment and disability, past and future loss of wages and loss of earning capacity, diminished ability to enjoy the ordinary pursuits of life, past and future emotional and psychological distress and mental anguish, loss of quality and enjoyment of life, and other injuries and damages. For these damages, Plaintiff is entitled to recovery from Defendants.

12. At this time, Plaintiff Catherine Davis has incurred in excess of \$330,000 in medical billings, has been unable to work since the collision, is still receiving medical care and evaluation, in addition to other injuries and damages.

13. On or about July 28, 2019, the date of the motor vehicle collision discussed herein, Plaintiff Catherine Davis was insured, and as an insured of Meemic Insurance Company, had an insurance policy which provided Catherine Davis with protection against underinsured motorists in the amount of \$100,000.00, no-fault insurance coverages including Personal Injury Protection, Full Medical, Full Work Loss, Property Protection Insurance in the amount of \$1,000,000.00; Michigan Catastrophic Claims Association (MCCA) no-fault coverage including medical expenses; and other coverages on the policy.

14. Said policy of insurance with Defendant Meemic Insurance Company was in full force and effect on or about July 28, 2019, the date of the collision discussed herein. The underinsured motorists' provisions of the policy provided that Defendant Meemic Insurance Company would pay to the insured such sums as the insured might be legally entitled to recover as damages for bodily injuries and other claims arising out of an event caused by an uninsured or underinsured motorist.

15. Said policy of insurance with Defendant Meemic Insurance Company was in full force and effect on or about July 28, 2019, the date of the collision discussed

herein. The no-fault insurance coverages including Personal Injury Protection, Full Medical, Full Work Loss, Property Protection Insurance motorists' provisions of the policy provided that Defendant Meemic Insurance Company would pay to the insured such sums as the insured might be legally entitled to recover as damages for lost income, medical expenses, and other losses arising out of a collision event such as the collision subject of this action.

16. Defendant Richard Otten, upon Plaintiff's information and belief, is an underinsured motorist with policy limits of Twenty-Five Thousand Dollars (\$25,000) through State Farm, which were offered as settlement on September 20, 2019 with confirmation of these policy limits being provided by State Farm, which information was also provided to Meemic Insurance Company as part of the claims submitted under the Meemic Insurance Policy by Plaintiff Catherine Davis.

17. Plaintiff Catherine Davis has put Defendant Meemic Insurance Company on notice of an underinsured motorist claim under the terms of the policy since Richard Otten is underinsured and does not have sufficient liability coverage to compensate Plaintiff Catherine Davis for the damages caused by him, with no payments having been made by Meemic. Plaintiff Catherine Davis is thus entitled to recovery from Defendant Meemic Insurance Company for underinsured motorist benefits.

18. Plaintiff Catherine Davis has put Defendant Meemic Insurance Company on notice of her claims for no-fault insurance coverages including, but not limited to,

Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy with no payments having been made by Meemic. Plaintiff Catherine Davis is thus entitled to recovery from Defendant Meemic Insurance Company for no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss.

19. As a direct result of Richard Otten's negligence, Plaintiff Catherine Davis has sustained damages that include, but not limited to, past and future medical expenses, past and future pain and suffering, temporary and permanent injury and disability, loss of wages and loss of earning capacity, diminished ability to enjoy the ordinary pursuits of life, and other damages. Plaintiff Catherine Davis' damages exceed the Twenty-Five Thousand Dollars (\$25,000) liability limits of Richard Otten. For these damages, Plaintiff Catherine Davis is entitled to recovery from Defendant Meemic Insurance Company under the underinsured motorist coverage and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy with no payments having been made by Meemic.

20. Defendant Meemic Insurance Company has breached the contract of insurance entered into with Plaintiff Catherine Davis inasmuch as it has neglected, refused, or has otherwise failed to pay Plaintiff Catherine Davis, by virtue of the underinsured motorist coverage and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms

of the Meemic Insurance Policy afforded to her and to the extent of monies due her as a result of extensive medical bills incurred, lost income, and other damages sustained with additionally Richard Otten not having adequate insurance coverage to fully compensate Plaintiff Catherine Davis, for the damages alleged herein.

21. Plaintiff requests the Court to allow the jury, in its discretion, to award Plaintiff interest on the entire amount of her losses commencing on July 28, 2019, as allowed by SDCL 21-1-13.1

WHEREFORE, Plaintiff prays for judgment against Defendants for damages due to Defendant Richard Otten's negligence and demands judgment against Defendant Meemic Insurance Company as follows:

22. That Defendant Richard Otten be found liable for Plaintiff's damages;
23. That coverage for underinsured motorist insurance and no-fault insurance coverages including, but not limited to, Personal Injury Protection, Full Medical, and Full Work Loss under the terms of the Meemic Insurance Policy be found with Meemic Insurance Company being found liable and obligated under the insurance policy for payment of Plaintiff's damages from the collision arising herein;
24. For general and special damages in an amount to be determined by the jury, plus prejudgment and post-judgment interest thereon;
25. For Plaintiff's costs and disbursements herein; and
26. For such other and further relief as the Court deems just and equitable in the


premises.

27. Trial by Jury is hereby demanded.

TRIAL BY JURY IS HEREBY DEMANDED

Dated this 18th day of February, 2021.

A P.E.C. MOORE-FAUST LAW GROUP

by 
Dean Faust
Attorney for Plaintiff
924 Quincy Street
Rapid City, SD 57701
PO Box 2471
Rapid City, SD 57709
Phone: 605-348-2471
Fax: 605-343-0247
faust@moorefaust.com

ATTACHMENT 4

Michigan.

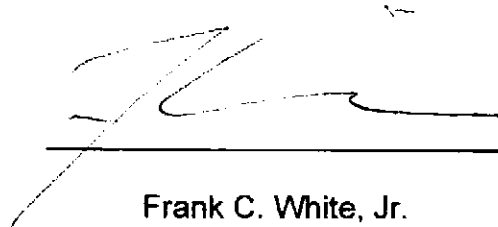
5. At all times relevant to the above-captioned litigation Meemic Insurance Company did not:

- a. operate, conduct, engage in, or carry on a business or business venture in the State of South Dakota;
- b. commit any tortious act in the State of South Dakota;
- c. own, use, possess, or hold a mortgage or other lien on any real property within the State of South Dakota;
- d. contract to insure any person, property, or risk located within the State of South Dakota at the time of contracting;
- e. engage in or solicit service activities within the State of South Dakota;
- f. breach a contract in South Dakota by failing to perform acts required by the contract to be performed in South Dakota;
- g. engage in any substantial (not isolated) activity within the State of South Dakota;
- h. have an office or agency in the State of South Dakota;

6. Meemic Insurance Company is not authorized to write insurance policies in the State of South Dakota. It does not sell insurance in South Dakota, nor did it issue or deliver any insurance policies in the State of South Dakota.

7. Meemic Insurance Company did issue Policy Number PAP00855455 to Catherine Davis, a resident of Peck, Michigan, which was in effect on July 28, 2019. This policy of insurance was issued in Michigan.

FURTHER AFFIANT SAYETH NOT.


Frank C. White, Jr.

STATE OF Connecticut)
) ss. East Hampton
COUNTY OF Middlesex)

Personally appeared before me, the undersigned notary public in and for said State and County, Frank C. White, Jr., the within named individual, being first duly sworn upon oath, and with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and deposes and states that he is the individual in the above-captioned matter, that he has read the above and foregoing document, knows the contents thereof and the facts therein contained are true, as he verily believes.

SUBSCRIBED AND SWORN TO before me this 9 day of April,
2020.


PATRICIA A. BURNHAM
NOTARY PUBLIC
MY COMMISSION EXPIRES APRIL 30, 2024

Notary Public In and For Said County and State

STATE OF SOUTH DAKOTA
IN THE SUPREME COURT

CATHERINE DAVIS,

Plaintiff and Respondent,

vs.

MEEMIC INSURANCE COMPANY,

Defendant and Petitioner,

and

RICHARD OTTEN,

Defendant.

PROOF OF SERVICE

It is hereby certified that a true and correct copy of Meemic Insurance Company's Petition for Permission to Take Discretionary Appeal has been e-filed with the Clerk of Court and served upon all parties via E-Mail as properly addressed below this 30th day of June, 2021:

Dean Faust
924 Quincy Street
Rapid City, SD 57701
faust@moorefaust.com
Attorney for Catherine Davis

Courtney R. Clayborne
CLAYBORNE, LOOS & SABERS, LLP
2834 Jackson Blvd., Suite 201
Rapid City, SD 57709-9129
Phone: (605) 721-1517
cclaybornelaw@aol.com
Attorney for Richard Otten

/s/Susan B. Meyer
Susan B. Meyer

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

CATHERINE DAVIS,)
 Plaintiff,)
)
vs.)
)
RICHARD OTTEN and MEEMIC)
INSURANCE COMPANY,)
 Defendants.)

FILE NO. 40CIV21-000039

AFFIDAVIT OF DEAN FAUST IN
OPPOSITION TO DEFENDANT MEEMIC'S
MOTION TO DISMISS

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PENNINGTON)

COMES NOW the AFFIANT, Dean Faust, being first duly sworn, and states upon his oath as follows:

(1) I am the attorney for Plaintiff Catherine Davis in the above-captioned matter, and make this affidavit in support of PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT MEEMIC'S MOTION TO DISMISS.

(2) Attached as *Exhibit 1* is a true and correct copy of the State of South Dakota Investigator's Motor Vehicle Accident Report.

(3) Attached as *Exhibit 2* is a true and correct copy of State Farm's correspondence offer of policy limits in the amount of \$25,000.

(4) Attached as *Exhibit 3* is a true and correct copy of the Defendant's, Meemic Insurance, Declarations Page showing the underinsured motorist coverage of \$100,000.

(5) Attached as *Exhibit 4* is a true and correct copy of Plaintiff's correspondence to Meemic, notifying Meemic of the liability policy limits offer, notifying Meemic of the underinsured motorist claim, and requesting if Meemic will consent to the liability settlement or be substituting a draft for the liability policy limits offer.



(6) That to affiant's knowledge, Meemic has not officially provided correspondence specifically stating if Meemic will consent to Plaintiff's settlement and signing a release with Richard Otten, and specifically allowing an underinsured motorist claim to separately proceed complying under the Meemic insurance policy, if provided affiant has no knowledge of receiving it.

(7) Attached as *Exhibit 5* is a true and correct copy Meemic's email offering \$75,000.

(8) Attached as *Exhibit 6* is a true and correct copy of affiant's correspondence to Meemic and Meemic's attorney accepting the offer of \$75,000 settling the underinsured motorist claim with Meemic.

FURTHER AFFIANT SAYETH NOT.

Dated this 7th day of May, 2021.

A.P.L.C. MOORE-FAUST LAW GROUP

by 

Dean Faust

Attorney for Plaintiff Catherine Davis

924 Quincy Street

Rapid City, SD 57701

PO Box 2471

Rapid City, SD 57709

Phone: 605-348-2471

Fax: 605-343-0247

faust@moorefaust.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the undersigned date, he forwarded a true and correct copy of the foregoing AFFIDAVIT OF DEAN FAUST IN OPPOSITION TO DEFENDANT MEEMIC'S MOTION TO DISMISS to the persons herein next designated, all on the date below shown, by placing the same in the service indicated, addressed as follows:

Attorney Earl G. Green, III
Attorney for Defendant Meemic Insurance Company
Gordon Rees Scully Mansukhani
301 South 13th Street, Suite 400
Lincoln, NE 68508

Attorney Courtney Clayborne
Attorney for Defendant Richard Otten
Clayborne, Loos & Sabers, LLP
PO Box 9129
Rapid City, SD 57709-9129

Attorney Susan B. Meyer
Attorney for Defendant Meemic Insurance Company
Gordon Rees Scully Mansukhani
1601 Mt. Rushmore Road, Suite 3-227
Rapid City, SD 57701

☒ US mail, postage prepaid
☐ Federal Express
☐ Hand-delivery
☐ Facsimile
☐ Email
☒ Odyssey File & Serve
☐ Other: _____

which are the last addresses of the addressees known to the subscriber.

Dated this 7th day of May, 2021.

A P.L.C. MOORE-FAUST LAW GROUP

by


Dean Faust

Attorney for Plaintiff Catherine Davis
924 Quincy Street
Rapid City, SD 57701
PO Box 2471
Rapid City, SD 57709
Phone: 605-348-2471
Fax: 605-343-0247
faust@moorefaust.com

*Providing Insurance and Financial Services
Home Office, Bloomington, IL*



September 20, 2019

Moore & Faust Law Group
924 Quincy St
Rapid City SD 57701-2608

State Farm Claims
PO Box 106171
Atlanta GA 30348-6171

RE: Claim Number: 41-B010-9Z4
Date of Loss: July 28, 2019
Our Insured: Richard Otten
Your Client: Catherine Ann Davis

To Whom It May Concern:

This will confirm our settlement offer in the amount of \$25,000.00 on September 20, 2019.

Please discuss this offer with your client and contact us at your convenience so we may bring this claim to a conclusion.

This settlement offer is inclusive of all damages, known and unknown, and any liens, assignments or statutory rights of recovery.

Thank you for your assistance.

Sincerely,

Jaela Mintz
Claim Specialist
(615) 692-3578
Fax: (855) 820-6318

State Farm Mutual Automobile Insurance Company

SEP 23 2019 040
Appel

A PROFESSIONAL LAW CORPORATION
MOORE-FAUST LAW GROUP

DEAN FAUST
ATTORNEY AT LAW
faust@moorefaust.com

ROBERT MOORE
OF COUNSEL
moore@moorefaust.com

October 9, 2019

Meemic
ATTN: Schrisse Murray
1685 North Opdyke Road
Auburn Hills, MI 48326

RE:	Our Client:	Catherine Davis
	Your Insured:	Catherine Davis
	Claim Number:	01895668
	Date of Loss:	July 28, 2019

Adjuster Murray:

As you know, our office represents Catherine Davis relating to injuries and damages she suffered in the July 28, 2019 motor vehicle collision. I again attach the South Dakota Police Report showing Ms. Davis was a passenger on a motorcycle owned and operated by, William Laeder. Richard Otten while operating his motorcycle approaching from the other direction crossed the center line causing a violent collision and serious injuries and damages to be suffered by Catherine Davis. Richard Otten was insured by State Farm Insurance having a \$25,000 policy, which is currently being offered as settlement.

At this time we have received and attach medical bills in excess of \$231,000 with medical treatment ongoing. Among the damages suffered, Ms. Davis has been unable to return to work due to the extensive nature of her injuries. All things considered, Ms. Davis's injury claim exceeds the applicable insurance held by the negligent driver, Richard Otten, through State Farm. Moreover, the motorcycle Ms. Davis was a passenger on had a minimal policy of coverage not providing applicable underinsured motorist coverage. Therefore, due to the serious nature and extent of Ms. Davis's injuries and damages exceeding the applicable liability insurance held by the negligent driver through State Farm we make claim under her policy with your company for any and all coverages available including, but not limited to, underinsured motorist coverage, medical payments coverage, personal injury protection (PIP), disability/lost income, and any other eligible coverages. We would request your confirmation of what coverages under your policy are applicable, and if you assert a policy exclusion or denial the written rationale and applicable policy language you rely upon.

If you should need any additional information regarding claims made under your insurance policy please let us know.

Sincerely,

A handwritten signature in dark ink, appearing to be 'D. Faust', written in a cursive style.

Dean Faust

DF/kb

Enclosures



Myra Niederman <niederman@moorefaust.com>

Fwd: additional authority for Catherine Davis - meemic claim #1895668

1 message

Dean Faust <faust@moorefaust.com>

Fri, May 7, 2021 at 10:54 AM

To: Myra Niederman <niederman@moorefaust.com>

Dean Faust
Attorney at Law
A PLC Moore-Faust Injury Law Group
924 Quincy Street
PO Box 2471
Rapid City, SD 57709-2471
Phone: 605-348-2471
Fax: 605-343-0247
faust@moorefaust.com

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, or exempt from disclosure under applicable federal or state law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, please immediately notify the sender and destroy or return all copies of this email and all attachments.

----- Forwarded message -----

From: **Kenneth M. Williams** <Kenneth.Williams@meemic.com>

Date: Mon, Nov 23, 2020 at 1:21 PM

Subject: additional authority for Catherine Davis - meemic claim #1895668

To: Dean Faust <faust@moorefaust.com>

Good Afternoon Dean,

I received additional authority from management for Catherine Davis. My authority has been increased up to \$75,000 for settling under UIM.

Ken Williams

Bodily Injury Claims Specialist

Meemic Insurance Company

1685 N Opdyke Rd . Auburn Hills . MI 48326

Office: (800) 231-5770x32417

Email: kenneth.williams@meemic.comwww.Meemic.comwww.MeemicFoundation.org

Appellee's 000043

*Meemic proudly gives back to the educational community through The Meemic Foundation
for the Future of Education. Find out more: [MeemicFoundation.org](https://www.meemicfoundation.org)*

MOORE-FAUST LAW GROUP

DEAN FAUST
ATTORNEY AT LAW
faust@moorefaust.com

ROBERT MOORE
ATTORNEY AT LAW
moore@moorefaust.com

Sent also via email to kenneth.williams@meemic.com and egggreen@grsm.com
May 5, 2021

Meemic
ATTN: Charles Billings
PO Box 217019
Auburn Hills, MI 48323

Gordon Rees Scully Mansukhani, LLP
ATTN: Earl G. Green, III
301 S 13th Street, Suite 400
Lincoln, NE 68508


RE:	Our Client:	Catherine Davis
	Your Insured:	Catherine Davis
	Claim No:	1895668
	Date of Loss:	July 28, 2019

Dear Adjuster Billings and Attorney Green:

This is to confirm our agreement that the above referenced underinsured motorist claim of Catherine Davis has been settled with Meemic for \$75,000 currently offered as Catherine Davis hereby accepts Meemic's offer of settlement. Pursuant to this settlement, please send the applicable release for completion. If you cannot comply with our reasonable request for promptness in issuing the checks, please advise us immediately. Checks should be issued as follows:

1. \$75,000 made payable to Catherine Davis and A P.L.C. Moore-Faust Law Group, tax identification number 46-0347397.

As this case is settled with Meemic, I would request you notify the Court and cancel the upcoming hearing scheduled. Thank you for your cooperation. Thank you also for the courtesies extended to our office in the amicable resolution of this claim.

Sincerely,

Dean Faust
DF/kb
Enc.

Tel: (605) 348-2471 - Fax: (605) 343-0247 - info@moorefaust.com - www.moorehelp.com
Physical: 924 Quincy Street, Rapid City, SD 57701 - Mailing: PO Box 2471, Rapid City, SD 57709-2471

Appellee's 000045

Policy Number: PAP0855455

Policy Period:

08/19/19 to 02/19/20

12:01 A.M. Standard Time



Meemic

Meemic Insurance Company
P.O. Box 217019
Auburn Hills, MI 48321-7019
www.Meemic.com 1-888-463-3642

DECLARATIONS PAGE

ATTACH TO POLICY

Policy Type:

AUTOMOBILE Renewal

Policyholder Since: 2014

Date Mailed: 07/17/19

Change Effective: 08/19/19

Named Insured:

CATHY DAVIS
5314 SANDUSKY RD
PECK MI 48466-9791

Representative: (810) 479-5494

PRESNELL INS AGY LLC
2924 PINE GROVE AVE
PORT HURON MI 48060

Vehicles Covered:

Veh. #	Vehicle Year	Vehicle Description	Vehicle I.D. Number	Assigned Driver #	Territory	Vehicle Symbol	Class
1	2005	DODG NEON SXT	1B3AS56C95D164037	2	239	18/18	025W2
2	2012	CHEV IMPALA	2G1WG5E3XC1300748	1	239	13/20	055W2
3	2012	DODG AVENGER	1C3CDZAB6CN325236	3	239	18/32	025W2

Coverages and Limits of Liability				Premiums		
				Veh. 1	Veh. 2	Veh. 3
LIABILITY COVERAGES						
Bodily Injury	\$100,000/300,000**			67.00	65.00	67.00
Property Damage	\$100,000*			9.00	9.00	9.00
NO-FAULT COVERAGES						
Personal Injury Protection				345.00	352.00	345.00
Full Medical, Full Work Loss	Deductible \$ 0					
Property Protection Insurance	\$1,000,000*			9.00	9.00	9.00
UNINSURED MOTORIST	\$100,000/300,000**			9.00	9.00	9.00
UNDERINSURED MOTORIST	\$100,000/300,000**			11.00	11.00	11.00
CAR DAMAGE INSURANCE COVERAGES - Actual Cash Value						
Minus Deductibles By Auto: Veh. 1 Veh. 2 Veh. 3						
Comprehensive Deductible	\$100	\$100	\$100			
MCCA				111.00	180.00	202.00
OTHER STATUTORY ASSESSMENT				18.00	111.00	111.00
TOTAL PREMIUM PER AUTO				579.00	764.00	781.00
*Coverage is per occurrence				Total Term Premium: 2,124.00		
**Coverage is per person/per occurrence				Total If Pay In Full: 1,923.00		

INSURANCE IS PROVIDED WHERE PREMIUM IS SHOWN AND ONLY IN AMOUNTS OF COVERAGE UP TO THE LIMIT OF LIABILITY SET FORTH ABOVE

Drv.#	Driver(s)	Points	Drv.#	Driver(s)	Points
1	CATHY DAVIS	0			
2	JACOB HENSHAW	0			
3	KARA HENSHAW	0			

Veh.#	Lienholder(s)	Address	City, State and Zip Code
-------	---------------	---------	--------------------------

Veh.#	Additional Insured(s)	Address	City, State and Zip Code
-------	-----------------------	---------	--------------------------

Policy Number: PAP0855455



Meemic

Meemic Insurance Company

P.O. Box 217019

Auburn Hills, MI 48321-7019

www.Meemic.com 1-888-463-3642

PAGE 2 of 2

DECLARATIONS PAGE

Policy Type:

AUTOMOBILE

NAMED INSURED:

CATHY DAVIS

POLICY FORMS AND ENDORSEMENTS

FORM NUMBER	DESCRIPTION
NF101-8(05/12) MI AMD(01/19)	AUTO INSURANCE POLICY AUTO AMENDATORY ENDORSEMENT

ADDITIONAL RATING INFORMATION

ANTI-THEFT DISCOUNT YOUR INSURANCE SCORE: 758(14) LOYALTY REWARDS PROGRAM MULTI-POLICY DISCOUNT SAFE DRIVER DISCOUNT
--

**STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR
VEHICLE TRAFFIC ACCIDENT REPORT**

Mail to: Office of Accident Records, 118 W. Capitol
Ave., Pierre, SD 57501

Form DPS - AR1 12/12/2014

Is this only a Wild Animal Hit Report?		Agency Name SD HIGHWAY PATROL	TraCS ID: 153913-061	TraCS Sequence: 1907280047
Reporting Officer Last Name ERICKSON		Reporting Officer First Name PAIGE	Agency Use HP19003879CR	Report Type HP19003879CR
		Date of Accident 07/28/2019	Time of Accident 18:18 Hrs.	
		Reporting Officer Middle Name	Reporting Officer # 061-153913	

L O C A T I O N	Location Description ON US HWY 14A AT (MRM 050.00 + .158)					
	Latitude 44.402156			Longitude -103.573976		
	County 41	County Name 41 - LAWRENCE		City or Rural 0000 - Rural	Roadway Surface Condition 01 - Dry	
	On Road, Street, or Highway US HWY 14A				Roadway Surface Type 02 - Asphalt (Blacktop)	
	At Intersection with				Roadway Align/Grade 04 - Curve and level	
	Distance 0.1584	Units Miles/Tenths	Direction of East	MRM (milepost) 050.00	Relation to Junction 00 - Non-junction	
	Distance	Units	Direction and	Distance	Units	Direction of
	Junction or Intersecting Street			Name of Junction, Road, Street, or Highway		

Appellee's 000048

UNIT 001	Unit Type 01 - Motor vehicle in transport with driver				Hit and Run 02 - No	
	Driver's Name - Last OTTEN			First RICHARD	Middle	
	Address 3220 LAZELLE ST LOT 225			Address (Line 2)		
	City STURGIS		State SD	Zip 57785	Date of Birth 07/11/1959	Sex 1 - Male
				Non - Motorist Location 96 - Not Applicable		
	Phone 2065502717	DL State SD	DL Class 2	Non - Motorist Action 96 - Not Applicable		
	DL Status 01 - Normal within restrictions			Non - Motorist Contributing Circumstances (Up to Two) 96 - Not Applicable		
	Driver Contributing Circumstances (Up to Two) 04 - Exceeded posted speed limit, 07 - Wrong side or wrong way			Drug Use 00 - None used		
	Vision Contributing Circumstance 00 - None			Drug Test 02 - Test not given		
				Alcohol Use 00 - None used		
				Alcohol Test 00 - .00 NONE		
	Injury Status 02 - Incapacitating injury			Ejection 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)		
	Saftey Equipment 00 - None used			Citation Charge? 01 - Yes		
	Seating Position 01 - Operator			Citation #1 32-24-8 - CARELESS DRIVING.		
	Air Bag Deployed 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)			Citation #2 32-26-1 - DRIVING ON WRONG SIDE OF ROAD		
	Transported To STURGIS REGIONAL HOSPITAL			Citation #3		
	Source of Transport 01 - EMS			Citation #4		
	Is Driver the Owner Yes					
	Owner's Name - Last OTTEN			First RICHARD	Middle	
	Address 3220 LAZELLE ST LOT 225			Address (Line 2)		
	City STURGIS		State SD	Zip 57785	Red Tag A504982	
	Year 2012	Make Harley Davidson - HAR	Model REBUILD	VIN SD14337MC12		
	License Plate # WRPNY1		State SD	Year 2020	Estimated Travel Speed 55	Speed - How Estimated? 04 - Witness Statement
	Speed Limit 45	Total Occupants 1		Damage Extent 03 - Disabling Damage		
			Vehicle Towed 01 - Yes			
Damage Amount (Vehicle and Contents) 5000			Insurance Co. Name 25151 - STATE FARM GENERAL INSURANCE COMPANY			
Insurance Policy # 0562179F0941			Effective Date 06/09/2019	Expiration Date 06/09/2020		
Emergency Vehicle Use? 02 - No			Vehicle Configuration 09 - Motorcycle			
Trailer Type 00 - No trailer/attachment			Cargo Body Type 00 - No cargo body			

Direction of Travel Before Crash 04 - Westbound		Trailer LP # Attached to Power Unit		State	Year
Initial Point of Impact 12 - Position 12	Most Damaged Area 12 - Position 12	Trailer 2 License Plate #		State	Year
Underride/Override 00 - No underride or override		Trailer 3 License Plate #		State	Year
Traffic Control Device Type 06 - Warning sign			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 01 - Straight ahead			Road Contributing Circumstance 00 - None		
First Event 05 - Cross median/centerline			Second Event 25 - Motor vehicle in transport		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
Does the accident involve one or more of the following: <ul style="list-style-type: none"> • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver 			<input type="checkbox"/> Did the accident result in one or more of the following: <ul style="list-style-type: none"> • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardious Material Class Code	Hazardous Materials Description		

UNIT 002	Unit Type 01 - Motor vehicle in transport with driver				Hit and Run 02 - No	
	Driver's Name - Last LAEDER		First WILLIAM	Middle PAUL		
	Address 579 SLEEPY HOLLOW			Address (Line 2)		
	City SANDUSKY	State MI	Zip 48471	Date of Birth 12/02/1960	Sex 1 - Male	
				Non - Motorist Location 96 - Not Applicable		
	Phone 8103101062 DL State MI DL Class A2			Non - Motorist Action 96 - Not Applicable		
	DL Status 01 - Normal within restrictions			Non - Motorist Contributing Circumstances (Up to Two) 96 - Not Applicable		
	Driver Contributing Circumstances (Up to Two) 00 - None			Drug Use 00 - None used Drug Test 02 - Test not given		
	Vision Contributing Circumstance 00 - None			Alcohol Use 00 - None used Alcohol Test 00 - .00 NONE		
	Injury Status 02 - Incapacitating injury			Ejection 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)		
	Saftey Equipment 05 - Eye protection only					
	Seating Position 01 - Operator			Citation Charge? 02 - No		
	Air Bag Deployed 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)			Citation #1		
	Transported To STURGIS HOSPITAL			Citation #2		
	Source of Transport 01 - EMS			Citation #3		
	Is Driver the Owner Yes			Citation #4		
	Owner's Name - Last LAEDER		First WILLIAM	Middle PAUL		
	Address 579 SLEEPY HOLLOW			Address (Line 2)		
	City SANDUSKY	State MI	Zip 48471	Red Tag A544333		
	Year 2009	Make Harley Davidson - HAR	Model FLHTCUI	VIN 1HD1FC4169Y682855		
	License Plate # FB698	State SD	Year 2020	Estimated Travel Speed 45	Speed - How Estimated? 02 - Driver Statement	
	Speed Limit 45	Total Occupants 2	Damage Extent 03 - Disabling Damage		Vehicle Towed 01 - Yes	
	Damage Amount (Vehicle and Contents) 8000			Insurance Co. Name 42994 - PROGRESSIVE CLASSIC INS CO		
	Insurance Policy # 928263496			Effective Date 04/01/2019	Expiration Date 04/01/2020	
	Emergency Vehicle Use? 02 - No			Vehicle Configuration 09 - Motorcycle		
	Trailer Type 00 - No trailer/attachment			Cargo Body Type 00 - No cargo body		
	Direction of Travel Before Crash 03 - Eastbound		Trailer LP #	Attached to Power Unit	State	Year
	Initial Point of Impact 09 - Position 9	Most Damaged Area 09 - Position 9	Trailer 2 License Plate #	State	Year	
Underride/Override 00 - No underride or override		Trailer 3 License Plate #	State	Year		

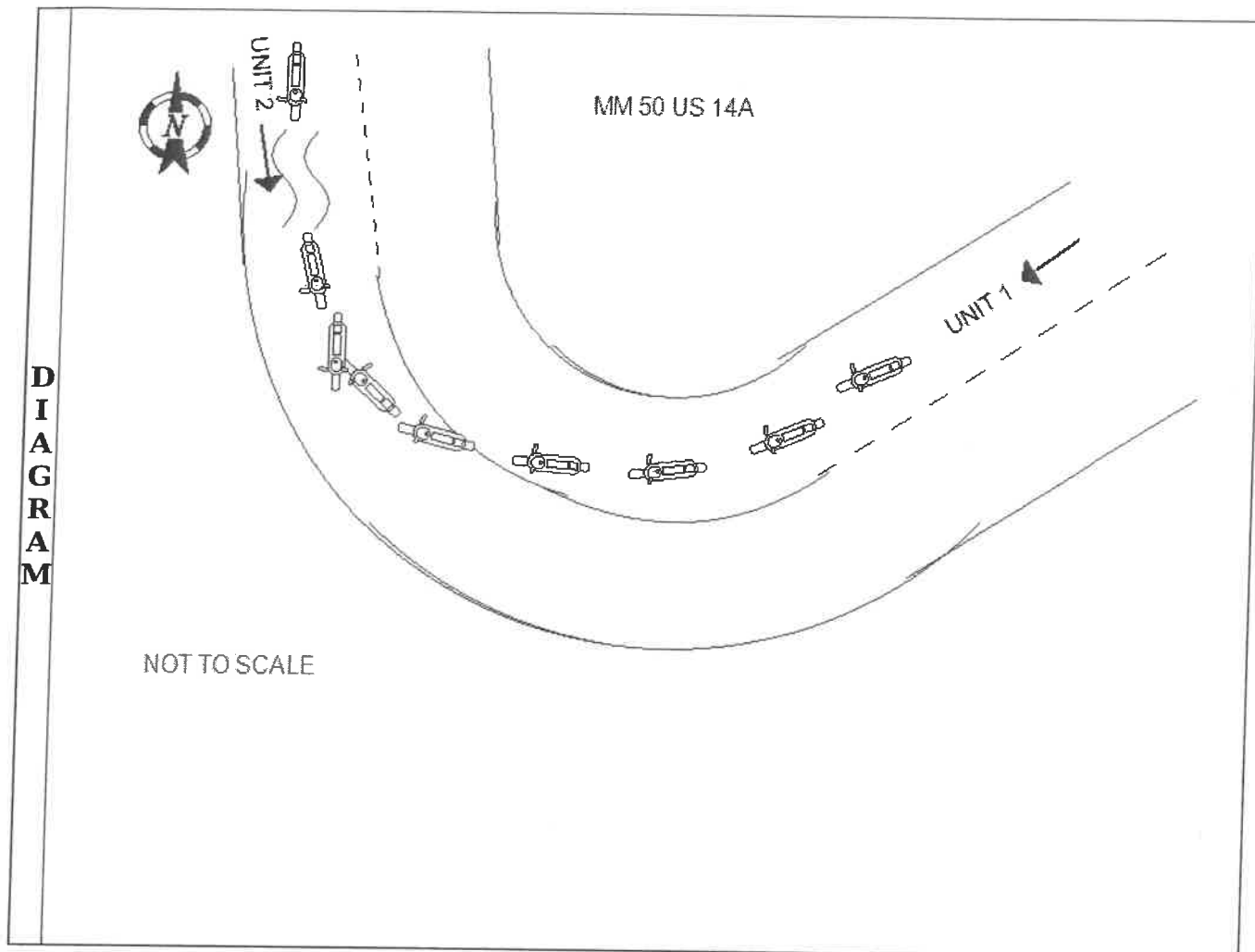
Appellee's 000051

Traffic Control Device Type 06 - Warning sign			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 01 - Straight ahead			Road Contributing Circumstance 00 - None		
First Event 25 - Motor vehicle in transport			Second Event		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
Does the accident involve one or more of the following: <ul style="list-style-type: none"> a truck having a GCWR of 10,001 or more pounds; OR a vehicle displaying a hazardous material placard; OR a vehicle designed to transport 9 or more people, including driver 			Did the accident result in one or more of the following: <ul style="list-style-type: none"> a fatality; OR an injury requiring transportation for immediate medical attention; OR a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

Work Zone Related? 02 - No	First Harmful Event? 25 - Motor vehicle in transport
Workers Present?	Location of First Harmful Event 01 - On roadway
Work Zone 96 - Not Applicable	Trafficway Description 01 - Two-way, not divided
Work Zone Location 96 - Not Applicable	Light Condition 01 - Daylight
Manner of Collision 03 - Angle	Weather Conditions (up to two) 01 - Clear
School Bus Related? 00 - No	

D A M A G E D O B J E C T	Damaged Object (Property Other Than Vehicles)		Estimate of Damage
	Owner's Full Name - Last	First Name	Middle Name
	Address		Address (Line 2)
	City	State	Zip

I N J U R Y R E C O R D	Unit # 2	Last Name DAVIS	First Name CATHERINE	Middle Name ANN	
	Address 5314 SANDUSKY RD		Address (Line 2)		
	City PECK	State MI	Zip 48466	Date of Birth 05/12/1960	Sex 2 - Female
	Injury Status 02 - Incapacitating injury		Ejection 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)		
	Seating Position 17 - Motorcycle passenger		Safety Equipment 05 - Eye protection only		
	Air Bag Deployed 96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)		Source of Transport 01 - EMS		
	Transported to RAPID CITY REGIONAL		EMS Trip # 19-991		



NARRATIVE

UNIT 1, A 2012 REBUILT HARLEY DAVIDSON, DRIVEN BY RICHARD OTTEN, WAS TRAVELING WITH A GROUP OF RIDERS WESTBOUND ON US HIGHWAY 14A. UNIT 2 WAS A 2009 HARLEY DAVIDSON DRIVEN BY WILLIAM LAEDER, AND PASSENGER CATHERINE DAVIS, WERE TRAVELING EASTBOUND ON US HIGHWAY 14A. UNIT 1 ENTERED A RIGHT HAND CURVE IN BOULDER CANYON NEAR THE COUNTY LINE AT MM 50. THE DRIVER STATED HE "WAS GOING TO FAST INTO THE CURVE" AND ESTIMATED 45MPH. THE WARNING SIGN SUGGESTED SPEED 35 MPH. HE FAILED TO NEGOTIATE THE CURVE, AND CROSSED INTO ONCOMING TRAFFIC GOING HEAD ON WITH UNIT 2. THERE WERE NO SKIDS INDICATING THAT UNIT 1 ATTEMPTED TO SLOW DOWN. UNIT 2 WAS UNABLE TO AVOID BEING STRUCK BY UNIT 1. THE GROUP OF RIDER'S THAT WERE TRAVELING WITH UNIT 1, STATED HE WAS STARTING TO PULL AWAY FROM THE GROUP AND THEY ESTIMATED HIS SPEED TO BE AROUND 55MPH. HE WAS CITED CARELESS AND DRIVING ON THE WRONG SIDE OF THE ROAD.

W I T N E S S	Last Name EDLUND		First Name DANA		Middle Name
	Address 1406 BLACKTAIL DR				
	Address (Line 2)				
	City STURGIS	State SD	Zip 57785	Phone # 6054909672	

W I T N E S S	Last Name WEST JR		First Name GLENN		Middle Name OTTIS
	Address 1530 SOPHIA CT				
	Address (Line 2)				
	City OXNARD	State CA	Zip 93030	Phone # 8057948451	

W I T N E S S	Last Name WHEELER		First Name STEPHEN		Middle Name C
	Address 4524 BENTON AVE NW				
	Address (Line 2)				
	City ALBUQUERQUE	State NM	Zip 87114	Phone # 5053104281	

Date Notified 07/28/2019	Time Notified 18:18 Hrs.	Date Arrived 07/28/2019	Time Arrived 18:24 Hrs.
Agency Type 01 - Highway patrol	Investigation Made at Scene? 01 - Yes	Photos Taken? Y	Date Approved 08/07/2019
Approval Officer	Last Name ALBERTSON	First Name TODD	Middle Name



Meemic Insurance Company

MICHIGAN AUTO INSURANCE POLICY

1685 North Opdyke Rd. - P.O. Box 217019 - Auburn Hills, MI 48321-7019 - 1-888-4MEEMIC

GENERAL INSURING AGREEMENT

In exchange for the premium deposit, or premium payment and compliance with all applicable provisions of this policy, **we** agree with the **Named Insured** to provide insurance for the Coverages and Limits of Liability stated on the Declarations Page made a part of this Policy. This agreement is subject to all the terms of this Policy which is issued in reliance upon the declarations made in this application and contained on the Declarations Page. The Declarations Page together with the policy form and endorsements completes the Policy. If this policy form is revised, it will be amended or replaced at the beginning of the next Policy Term.

WHAT MUST BE DONE IN CASE OF CAR ACCIDENT OR LOSS

NOTICE

In the event of an accident, occurrence or **loss**, **you** (or someone acting for **you**) must inform **us** or **our** authorized agent promptly. The time, place and other facts must be given, to include the names and addresses of all involved persons and witnesses.

OTHER DUTIES

1. A person claiming any coverage under this Policy must:
 - A. cooperate and assist **us** in any matter concerning a claim or suit;
 - B. promptly send **us** copies of any notice or legal papers received in connection with an accident or **loss**;
 - C. provide any written Proofs of Loss **we** request;
 - D. submit to examinations under oath in matters that relate to the **loss** or claim as often as **we** reasonably request. If more than one person is examined, **we** have the right to examine and receive statements separately from each person and not in the presence of any other insured;
 - E. assist in the conduct of suits. This includes being at trials and hearings;
 - F. cooperate with **us** to enforce the right of recovery or indemnification against all parties who may be liable to an insured for the injury or damage;
 - G. assist **us** in the securing of and giving of evidence; and
 - H. assist **us** in obtaining the attendance of all witnesses at all related proceedings requiring their attendance.
2. A person claiming Personal Injury Protection Insurance, Underinsured Motorist Coverage or Uninsured Motorist Coverage must:
 - A. give **us** written notice of any injury;
 - B. submit to physical and mental examinations at **our** request by doctors **we** select as often as **we** may reasonably require;

- C. authorize **us** to obtain medical, wage and other records;
- D. give **us** a copy of any legal papers served in connection with any lawsuit started by **you**, or anyone claiming under this policy, or their legal representative, to recover damages for **bodily injury** against a person or organization who may be liable;
- E. under Uninsured Motorist Coverage report a hit-and-run accident within 24 hours to the police.
- F. file with **us**, within 30 days, written notice of the hit-and-run accident.
- G. Under Uninsured Motorist Coverage, allow **us** to inspect the **car occupied** by the **insured person** if the **car** is within the possession and control of the insured or his representative.

If it is shown that it is not reasonably possible to give such notice within the prescribed time, notice must be given as soon as reasonably possible.

3. A person claiming Car Damage Insurance Coverages must:
 - A. immediately report theft, attempted theft or vandalism of the **insured car** to the police;
 - B. when required, prior to payment of a claim for damages caused by fire, submit a report to the fire department in the locale where the fire occurred;
 - C. promptly report a hit-and-run accident to the police;
 - D. take reasonable steps to protect the **insured car** from further **loss**. If the **loss** is covered by Car Damage Insurance Coverage, **we** will pay all reasonable expenses incurred by **you**. **We** will not pay for further damage if **you** fail to protect the **insured car**;
 - E. report the **loss** to **us** in a prompt manner as soon as is reasonably possible after its occurrence;
 - F. allow **us** to inspect and appraise the damaged **insured car** before its repair or disposal.

4. A person claiming Underinsured Motorist Coverage must notify **us** in writing of a tentative settlement between an **insured person** and the insurer of the **underinsured motor vehicle** and allow **us** 30 days to advance payment to that **insured person** in an amount equal to the tentative settlement to preserve **our** rights against the insured, owner or operator of such **underinsured motor vehicle**.
5. A person who claims Bodily Injury Liability Coverage or Property Damage Liability Coverage must promptly notify us;
 - a. How the accident or loss happened.

- b. Where and when the accident or loss occurred.
- c. Include the names and addresses of any injured persons; and
- d. Include the names and addresses of any witnesses.

Your notice to our authorized representative is considered notice to us. Failure to give any notice required by this paragraph shall not invalidate any claim made by a person seeking coverage if it shall be shown not to have been reasonably possible to give such notice promptly and that notice was given as soon as was reasonable possible.

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DEFINITIONS USED THROUGHOUT THIS POLICY

DEFINED WORDS ARE SHOWN IN BOLD BLACK TYPE. IN EACH PART, THERE ARE ADDITIONAL DEFINITIONS FOR THAT PART ONLY.

1. **Additional Car** means a **car**, other than a **replacement**, acquired by **you** after the effective date of this Policy if **we** insure all **cars** owned by **you** and **we** are notified within 30 days of such acquisition. If **we** are not notified of an **additional car** within 30 days of its acquisition, no coverage is provided under this Policy.
2. **Additional Insured** means any person listed as an **additional insured** on the Declarations Page.
3. **Bodily Injury** means injury, sickness, disease or death of any person.
4. **Car** means a vehicle of the same type as the one described on the Declarations page with four wheels or more that is a private passenger, stationwagon or jeep-type **car**. Its wheel base must be 56 inches or more. It must be a **car** licensed, registered, and designed for use on public highways.
5. **Car Business** means the business or occupation of selling, repairing, servicing, storing or parking motor vehicles including road testing and delivery.
6. **Code** means Chapter 31 of the Michigan Insurance Code, the Michigan No-Fault Law.
7. **Insured Car** means:
 - a) **your car** which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number. **Your car** also includes a **replacement car**, a **temporary substitute car**, an **additional car**, and a **trailer** owned by **you**; and
 - b) **other car**, which is any **car** that **you** or any resident of **your** household does not own, lease for 31 days or more, or have furnished or available for frequent or regular use.
8. **Lessee** means a person renting a motor vehicle under a lease for a period that is greater than 30 days.
9. **Lienholder** means **lienholder** or other loss-payee named on the Declarations Page. For General Condition 21, Loss Payable, **lienholder** also means lessor and **additional insured**.
10. **Loss** is defined in Part V - Car Damage Insurance Coverages.
11. **Occassional** is defined as infrequent, relating to a special event, or only from time to time.
12. **Occupying** and/or **Occupied** means in, getting into or getting out of.
13. **Permanently Attached** means installed in such a way as to require the use of hand tools to remove.
14. **Property Damage** means damage to, or destruction of, tangible property, including loss of its use.
15. **Replacement Car** means a **car**, ownership of which is acquired by **you** after the effective date of this Policy when it replaces the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number. **We** must be told about it within 30 days after acquisition or no coverage is afforded under this Policy for any accident or **loss**.
16. **Resident relative** means a person who is a resident of **your** household related to **you** by blood, marriage or adoption, or is **your** foster child. **Resident relative** also includes **your** unmarried child engaged in a full-time course of study at a school away from home. Full-time course of study is determined by the educational institution attended. In (Part II) - Michigan No-Fault Insurance Coverages, **relative** includes **spouse**.
17. **Special Equipment** means equipment, devices, accessories, enhancements, and changes, **permanently attached to your car**, other than those which are original manufacturer installed, which alter the appearance or performance of the **car**. This includes any electronic equipment, antennas, and other devices used exclusively to send or receive audio, visual or data signals, or play back recorded media, other than those which are original manufacturer installed, that are **permanently attached to your car** using bolts or brackets. Radar and laser detectors are not covered.
18. **Spouse** means **your** husband or wife if a resident of **your** household. If **your spouse** ceases to be a resident of your household during the term of this policy, he or she will be considered a resident **spouse** under this policy until the end of the policy term, unless he or she is named as an insured on another policy effective before the end of this policy term.
19. **Student** means someone who attends a school, college or university for the purpose of obtaining an education, diploma or a degree.
20. **State(s)** includes the District of Columbia, and any state, territory or possession of the United States, and any province of Canada.
21. **Temporary Substitute Car** means a **car** or **trailer**, not owned by **you** or any resident of **your** household, used when **your car** or **trailer** is out of use because of its breakdown, repair, servicing, **loss** or destruction.
22. **Titleholder** means a person who holds legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by a **lessee** for a period that is greater than 30 days.
23. **Trailer** means a vehicle owned by **you** without motive power designed for carrying property and designed to be towed only by a private passenger **car**.
24. **War** means war, including undeclared or civil war, insurrection, rebellion, revolution, usurped power, or

action taken by governmental authority in hindering or defending against any of these.

25. **We, us, our(s)** means MEEMIC Insurance Company (MEEMIC).
26. **You, your(s), Named Insured** means any person or organization listed as a **Named Insured** on the Declarations Page as:

- a) assigned driver, but only for the specific vehicle when so named. It includes the **spouse** of the assigned driver;
- b) an Other Named Insured, but only for the specific vehicle when so named, as their interest may appear.

PART I - BODILY INJURY AND PROPERTY DAMAGE LIABILITY COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s)** means:
- A. For **your car**;
- (1.) **You**;
- (2.) **Your resident relatives**;
- (3.) Or other persons using **your car** with **your** permission;
- B. For **Other Cars**, used with the permission of a person having the right to grant it and if **your car** is a private passenger **car**;
- (1.) **You**, if an individual;
- (2.) **Your resident relative** who does not own a private passenger **car**;
- C. Any other person who does not own or hire, but is legally responsible for the use of, any **insured car** operated by an **insured person**.

The Limits of Liability are not increased because a claim is made or suit is brought against more than one **insured person**.

BODILY INJURY LIABILITY COVERAGE

PROPERTY DAMAGE LIABILITY COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability of this Policy, **we** will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** arising out of the ownership, maintenance, or use including the loading or unloading of an **insured car**. The **insured car** means: **your car**, which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a **temporary substitute car**, an **additional car**, and a **trailer** owned by **you**; and an **other car**, which is a private passenger **car**, or **trailer** that **you** or any **resident relative** of **your** household does not own, does not lease for 31 days or more, or does not have furnished or available for frequent or regular use.
2. **We** will defend any suit with lawyers of **our** choice or settle any claim for these damages as thought appropriate by **us**. **We** will not defend or settle, however, after **we** have paid **our** Limit of Liability for this coverage.
3. **We** will pay for damages, up to the maximum established by the **Code**, to motor vehicles for which an **insured person** is legally liable because of an accident arising out of the use of the **insured car**.

ADDITIONAL PAYMENTS

1. In addition to its Limits of Liability for this coverage, as shown on the Declarations Page, **we** will also pay:
- A. all costs **we** incur in the settlement of any claim or defense of any suit;
- B. interest on damages awarded in any suit **we** defend accruing after judgment is entered and before **we** have paid, offered to pay, or deposited in court that portion of the judgment which is not more than **our** Limit of Liability. **We** will also pay pre-judgment interest as required by law on that part of the judgment which **we** pay;
- C. premiums on appeal bonds and attachment bonds required in any suit **we** defend. **We** will not pay the premium for attachment bonds for any amount beyond **our** Limits of Liability;
- D. any charge up to \$250 for a bail bond required due to a traffic law violation or auto accident causing **bodily injury** or **property damage** covered by this Part. **We** have no obligation to apply for or furnish this type of bond;
- E. loss of earnings, but not other income, up to \$100 a day when the **insured person(s)** is asked by **us** to attend trials or hearings;
- F. any other reasonable expenses incurred at **our** request that have been approved by **us**.

EXCLUSIONS

1. **PERSONS AND VEHICLES NOT COVERED.** The Liability Coverage does not cover:
- A. the United States of America and any of its agencies;
- B. a person covered by any contract of nuclear energy liability insurance;
- C. a person covered by the Federal Tort Claims Act;
- D. a named excluded driver;
- E. persons using a vehicle which is:
1. owned,
2. leased for 31 days or more, or
3. furnished or available for the frequent or regular use by **you** or any **resident relative** unless it is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a **temporary substitute car**, an **additional car**, or **trailer** owned by **you**;

Appellee's 000058
NF 101-8 (05/2012)

- F. persons using any **additional car** or **replacement car** the acquisition of which is not reported to **us** within 30 days;
 - G. persons using a vehicle without a reasonable belief that the person is entitled to do so.
2. **CARS NOT COVERED.** The Liability Coverage does not cover:
- A. **your car** if used in the course of the **car business**. **You** or a **resident relative**, however, are covered;
 - B. an **other car** if used in the course of any other business of an **insured person** except a private passenger **car** operated or **occupied by you**.
3. **BODILY INJURY AND PROPERTY DAMAGE NOT COVERED.** We will not pay for:
- A. **bodily injury** during the course of employment: To an **Insured persons** domestic employee who is entitled to Workers' Compensation; or to any other employee of an **insured person**;
 - B. **bodily injury** to an **insured person's** fellow employee while using an **insured car** in the course of employment. However, **we** will cover **you**;
 - C. **bodily injury** or **property damage** if **you** assume liability by contract or agreement;
 - D. **bodily injury** or **property damage** caused intentionally by or at the direction of the **insured person**. The determination of whether **bodily injury** or **property damage** was caused intentionally shall be determined by objective factors irrespective of the **insured person's** stated intent;
 - E. **bodily injury** or **property damage** sustained as the result of racing or speed contest activities;
 - F. **property damage** to any property owned by, in charge of, transported by or rented to an **insured person**; however, **property damage** to a residence or private garage or carport rented to an **insured person** is covered;
 - G. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any motorized vehicle having less than four wheels;
 - H. **bodily injury** or **property damage** arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee.
 - 1. This exclusion does not apply to a share-the-expense car pool or to the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.
 - 2. This exclusion does not apply to an educators **occasional** transportation of **students** to/from school or a school event.
 - I. **bodily injury**, personal injury, or **property damage** arising out of:
 - 1. toxic or pathological properties of lead, lead compounds, or lead contained in any materials;
 - 2. any cost or expense to abate, mitigate, remove or dispose of lead, lead compounds or materials containing lead;

- 3. any supervision, instruction, recommendations, warnings or advice given or which should have been given in connection with paragraphs 1) or 2) above; or
 - 4. any obligation to share damages with or repay someone else who must pay damages in connection with injury or damage as described in any subsection above.
- J. **bodily injury**, personal injury, or **property damage** arising out of:
- 1. Any "fungus" or "spore";
 - 2. Any substance, vapor or gas produced by or arising out of any "fungus" or "spore". This includes, but is not limited to, any metabolite such as a mycotoxin or a volatile organic compound; or
 - 3. any:
 - i. Material, product, building, or structure, including components thereof; or
 - ii. Concentration of water, moisture, humidity, or other liquids on or within such items in 3. (i.) above; that contains, harbors, nurtures or act as a medium for growth of any "fungus" or "spore".
- But this only applies to the extent that any of the items in 3. (i.) or 3. (ii.) above result in , cause or contribute concurrently or in any sequence to such injury or damage described in 1) or 2) above;
- 4. costs expended by anyone for testing for, monitoring, abatement, mitigation, removal, remediation or disposal of any of the items described in items 1), 2), or 3) above;
 - 5. other cause or event to the extent that it contributed concurrently or in any sequence to such injury, damage or costs described in items 1) through 4) above;
 - 6. supervision, instructions, recommendations, warnings or advice given or which should have been given in connection with items 1) through 5) above;
 - 7. obligation to share damages with or repay someone else who must pay damages because of such injury, damage, or costs described in items 1) through 6) above.

CONFORMITY WITH FINANCIAL RESPONSIBILITY

- 1. When we certify this policy as proof under any Financial Responsibility Law of any **state**, so that if the coverage and limits of liability of this policy are less than those required by that law, they shall be revised to include coverage and limits of liability required by that law.
- 2. If an exclusion in this policy is deemed void in the **state** with jurisdiction over the loss, the exclusion shall be applied or omitted to the extent required to make this policy conform with the law of the **state** with jurisdiction.

LIMITS OF LIABILITY

1. The Limits of Liability shown on the Declarations Page apply as follows:
 - A. The **bodily injury** Liability Limit for each person is the maximum amount that will be paid for **bodily injury** sustained by one person in any one occurrence. This limit includes all claims for derivative damages allowed under the law;
 - B. Subject to the **bodily injury** Liability Limit for each person, the **bodily injury** Liability for each occurrence is the maximum amount that will be paid for **bodily injury** sustained by two or more persons in any one occurrence. This limit also includes all claims for derivative damages allowed under the law;
 - C. The **property damage** Liability Limit for each occurrence is the maximum amount that will be paid for **property damage** sustained in any one occurrence;
2. **We** will pay no more than the limits shown on the Declarations Page for a **car** described and identified by a Vehicle Identification Number when the liability is due to that **car**, a **temporary substitute car**, a **replacement car**, an **additional car**, or a **trailer** owned by **you**.

3. If the liability is due to an **other car**, **we** will pay no more than the highest Limit of Liability shown on the Declarations Page for any one **car** described and identified by a Vehicle Identification Number on this and no other policy.
4. A **car** with a **trailer** attached or in use is considered one **car** with respect to the Limits of Liability in Part I.
5. The Limit of Liability shown on the Declarations Page is the most **we** will pay regardless of the number of:
 - A. **Insured persons**;
 - B. Claims made;
 - C. Vehicles or premiums shown in the Declarations; or
 - D. Vehicles involved in the auto accident.

OTHER INSURANCE

If the **car** involved in the **loss** and described on the Declarations Page is also covered by other liability insurance, **we** will pay the ratio of **our** Limit of Liability to the total applicable Liability Limit. With respect to an **other car**, **temporary substitute car**, **replacement car** or **additional car**, insurance afforded under this Part is excess over any other valid or collectible **car** liability insurance.

PART II - MICHIGAN NO-FAULT INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Motor Vehicle** means a vehicle, including a **trailer**, with more than two wheels required to be registered in Michigan. The **motor vehicle** must be operated, or designed for operation, upon a public highway by power other than muscular power. **Motor vehicle** does not include: a **motorcycle**, **moped**, vehicle designed for off-road use, or farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan Vehicle Code.
2. **Motorcycle** means a vehicle having a saddle or seat for use of the rider, designed to travel on not more than three wheels and with a motor that exceeds 50 cubic centimeters piston displacement. **Motorcycle** does not include a **moped**.
3. **Moped** means a two or three-wheeled vehicle, with operable pedals, with a motor that does not exceed 50 cubic centimeters piston displacement, produces 1.5 brake horsepower or less, and cannot propel the vehicle at a speed greater than 25 miles per hour on a level surface.
4. **Insured Motor Vehicle** means:
 - A. a **motor vehicle** described on the Declarations Page and identified by a Vehicle Identification Number, for which
 - (1.) the Liability Insurance of this Policy applies, and
 - (2.) **you** are required to maintain security under the provisions of the **Code**; or
 - B. a **motor vehicle** to which the Liability Insurance of this Policy applies, if it
 - (1.) does not have the security required by the **Code**, and
 - (2.) is operated, but not owned, by **you** or a **resident relative**;
 - C. An **additional car** or **replacement car** the acquisition of which has been reported to **us** within 30 days;
 - D. A **trailer** with more than two wheels designed for use with a private passenger **car** that is owned or used by **you** or any **resident relative** if it does not have the security required by the **Code**;
 - E. A **trailer** with less than three wheels for the purposes of Medical Benefits (Allowable Expenses) only.
5. **Insured Person(s)** means:
 - A. **You**, if an individual;
 - B. **Your spouse**;
 - C. **your resident relative**;
 - D. any other person **occupying** the **insured motor vehicle**, or any person, subject to the priorities set forth in the **Code**, injured as a result of an accident involving the **insured motor vehicle** while not **occupying** any **motor vehicle**.
6. **Dependent Survivor(s)** means:
 - A. The surviving **spouse**, if residing in the same household at the time of death, or if dependent upon the deceased at the time of death.

Dependency ends upon death or remarriage of the surviving **spouse**;

- B. any person who was dependent upon the deceased at the time of death and is:
- (1.) under the age of 18 years;
 - (2.) physically or mentally incapacitated from earning; or
 - (3.) engaged full time in a formal program of academic or vocational training.

Dependency ends upon death of the **dependent survivor**.

INSURING AGREEMENTS

1. **PERSONAL INJURY PROTECTION INSURANCE COVERAGE.** We agree to pay only as set forth in the **Code** the following benefits to or for an **insured person** [or, in the case of his/her death, to or for the benefit of his/her **dependent survivor(s)**,] who suffers accidental **bodily injury** arising out of the ownership, operation, maintenance or use of a **motor vehicle** as a **motor vehicle**.

- A. **MEDICAL BENEFITS (ALLOWABLE EXPENSES).** All reasonable charges incurred for reasonably necessary products, services and accommodations for an **insured person's** care, recovery or rehabilitation.

- B. **WORK LOSS BENEFITS.** Loss of income from work the **insured person** would have performed if that person had not been injured. We will pay expenses, not to exceed the dollar limit established by the **Code**, reasonably incurred in obtaining ordinary and necessary services an **insured person** would have performed not for income but for the benefit of that person or dependents.

- C. **SURVIVORS' LOSS BENEFITS.** Contributions of tangible things of economic value that the **dependent survivor(s)** of the deceased at the time of death would have received for support. We will pay expenses, not to exceed the dollar limit established by the **Code**, reasonably incurred by these **dependent survivors** in obtaining ordinary and necessary services the deceased would have performed for their benefit.

2. **PROPERTY PROTECTION INSURANCE COVERAGE.** We agree to pay in accordance with the **Code** for **property damage** caused by accident and arising out of the ownership, operation, maintenance or use of an **insured motor vehicle** as a **motor vehicle**. The accident must happen in the State of Michigan.

EXCLUSIONS

1. **BODILY INJURY NOT COVERED.** This insurance does not apply to **bodily injury** to:
- A. any person using a **motor vehicle** or **motorcycle** taken unlawfully unless that person reasonably believes that there was permission to take and use that **motor vehicle** or **motorcycle**;

- B. any person, other than **you** or any **resident relative**, not **occupying** a **motor vehicle** if the accident occurs outside the State of Michigan;
- C. **you** while **occupying**, or through being struck by while not **occupying**, a **motor vehicle** owned or registered by **you** and which is not an **insured motor vehicle**;
- D. **you** while **occupying** or through being struck by while not **occupying** an **additional car** or **replacement car** owned or registered by **you** the acquisition of which is not reported to **us** within 30 days;
- E. a **resident relative** while **occupying**, or through being struck by while not **occupying**, a **motor vehicle**, if the **resident relative** is the owner or registrant of that **motor vehicle** and has failed to maintain security required by the **Code** on that **motor vehicle**;
- F. any person arising out of the ownership, operation, maintenance or use, including loading or unloading, of a parked **motor vehicle**, unless:
- (1.) the **motor vehicle** was parked in such a way as to cause unreasonable risk of the **bodily injury** which occurred, or
 - (2.) **bodily injury** was a direct result of physical contact with
 - (a.) equipment permanently mounted on the **motor vehicle** while the equipment was being operated or used, or
 - (b.) property being lifted onto or lowered from the **motor vehicle** in the loading and unloading process, or
 - (3.) the person was **occupying** the **motor vehicle**;
- G. any person while **occupying** a **motor vehicle** located for use as a residence or premises;
- H. any person while **occupying** a **motor vehicle** operated in the business of transporting passengers for which security is maintained as required by the **Code**, unless the **motor vehicle** is an **insured motor vehicle** or the person is a passenger in:
- (1.) a school bus;
 - (2.) a bus operated as a common carrier;
 - (3.) a bus operated under a government sponsored transportation program;
 - (4.) a bus operated by or providing service to a non-profit organization; or
 - (5.) a **motor vehicle** operated by a livery, including but not limited to a canoe or other watercraft, bicycle or horse livery, used only to transport passengers to or from a destination point; or
 - (6.) a taxicab;

- I. **you** or any **resident relative** while **occupying** a **motor vehicle** owned or registered by **your** employer or their employer for which security is maintained as required under the provisions of the **Code**;
 - J. any **resident relative** entitled to Personal Protection Insurance Benefits as a person named under the terms of any other policy;
 - K. any person, other than **you** or any **resident relative**, entitled to Personal Protection Insurance Benefits under the terms of any other policy;
 - L. the owner or registrant of a **motor vehicle** or **motorcycle** involved in the accident who has failed to maintain security on that **motor vehicle** or **motorcycle** as required by the **Code**;
 - M. any non-resident of this **state** while **occupying** a **motor vehicle** or **motorcycle** not registered in this **state** and not insured by an insurer which has filed a certification in compliance with the **Code**;
 - N. any person involved in racing or speed contest activities.
2. **BODILY INJURY AND PROPERTY DAMAGE NOT COVERED.** This insurance does not apply to **bodily injury** or **property damage** suffered intentionally or caused intentionally by a person claiming benefits.
3. **PROPERTY DAMAGE NOT COVERED.** This insurance does not apply to **property damage**:
- A. to any vehicle and its contents, including **trailers**, designed for operation on a public highway by power, other than muscular power, unless the vehicle is parked so as not to cause unreasonable risk of the **property damage** which occurred;
 - B. to any property owned by **you** or a **resident relative**;
 - C. to the property of any person who is using the **insured motor vehicle** without **your** express or implied consent;
 - D. to any utility transmission lines, wires, or cables arising from the failure of a municipality, utility company, or cable television company to comply with the requirements of Michigan law;
 - E. to any vehicle and its contents involved in racing or speed contest activities.

LIMITS OF LIABILITY

1. **PERSONAL INJURY PROTECTION INSURANCE.** Our liability for Personal Injury Protection Insurance Benefits payable to or on behalf of any one person who sustains **bodily injury** in any one **motor vehicle** accident is limited as set out below.
- A. 1. **MEDICAL BENEFITS (ALLOWABLE EXPENSES)** shall include reasonable and customary charges for semi-private hospital accommodations except when the **insured person** requires special care;

- 2. Funeral and burial expenses of not less than \$1,750 nor more than \$5,000 which are reasonably incurred;
 - 3. If the Declarations Page shows Excess Medical Benefits [Excess A (med.)], **you** or any **resident relative** must first obtain benefits from any other health or accident insurance or plan prior to making a claim for benefits under this Policy. **We** will pay Medical Benefits in excess of any valid limitations as to amount or duration of benefits under the other plan. **We** will pay Medical Benefits for services or accommodations not available from the other plan or insurance only if:
 - a. they are reasonably necessary for the injured person's care, recovery or rehabilitation as required by the Code, and;
 - b. there is no provider within the other health or accident insurance or plan qualified and competent to render comparable services or accommodations.
1. **WORK LOSS BENEFITS** shall include payment for **loss** which occurs during the life of the **insured person** and within three years of the date of the accident; loss of services benefits not to exceed \$20 per day, or as amended by the **Code**.
2. Benefits payable for loss of income from work shall be reduced by 15%. If the **insured person's** income tax advantage is less than 15%, the actual percentage shall apply.
3. After the application of the above limits, the combined total amount payable for Work Loss in any 30-day period and the income earned shall not exceed the maximum amount established under the **Code**.
4. If the Declarations Page shows Excess Work Loss Benefits [Excess B (wage)], sums paid or payable to **you** or any **resident relative** for loss of income from work shall be reduced by any amount paid or payable under any valid and collectible: Individual, blanket, group accident or disability insurance; salary or wage continuation plan; Workers' Compensation Law, disability law of a similar nature, or any other **state** or federal law.
- B. 1. **SURVIVORS' LOSS BENEFITS** shall include payment for **loss** which occurs after the death of the **insured person** and within three years of the date of the accident; loss of services benefits not to exceed \$20 per day, or as amended by the **Code**.
 - 2. After the application of the above limits, the combined total amount payable in any 30-day period for Survivors' Loss shall not exceed the maximum amount established under the **Code**.

2. **GOVERNMENTAL BENEFITS SET-OFF.** From the benefits otherwise payable under this coverage, **we** will subtract benefits provided or required to be provided under any Workers' Compensation Law, disability benefits law of a similar nature or any other **state** or federal law. It is **your** obligation to apply for and reasonably pursue any benefits provided or required to be provided by the above laws.
3. **PROPERTY PROTECTION INSURANCE.** Regardless of vehicles insured or policies held, the Limit of **our** Liability under this coverage for all **property damage** from one accident is \$1,000,000. Payment is limited to the lesser of reasonable repair costs less depreciation and, where applicable, the value of loss of use.

OTHER INSURANCE

1. **PERSONAL INJURY PROTECTION INSURANCE.**
 - A. An **insured person** shall recover under all applicable policies no more than the amount payable under the policy providing the highest dollar limit.
 - B. If the accident causing injury occurs outside Michigan, this insurance shall be excess over that provided under No-Fault Automobile Insurance Laws of any other **state**.
 - C. Under no circumstances may an **insured person** recover duplicate similar benefits payable under the **Code**.
 - D. An **insured person, occupying a motorcycle**, who sustains **bodily injury** in an accident involving a **motor vehicle** shall claim Personal Injury Protection Insurance Benefits from insurers in the following order of priority:
 - (1.) the insurer of the owner or registrant of the **motor vehicle** involved in the accident;
 - (2.) the insurer of the operator of the **motor vehicle** involved in the accident;
 - (3.) the **motor vehicle** insurer of the operator of the **motorcycle** involved in the accident;
 - (4.) the **motor vehicle** insurer of the owner or registrant of the **motorcycle** involved in the accident.
2. **PERSONAL INJURY PROTECTION INSURANCE AND PROPERTY PROTECTION INSURANCE.**
 - A. If two or more insurers are in the same order of priority, the insurer paying benefits is entitled to a pro-rata payment from the other insurer(s) including a pro-rata amount of expenses incurred.
 - B. If **we** are in the same order of priority with other insurer(s), **our** obligation to
 - (1.) pay benefits, or
 - (2.) make reimbursement to other insurer(s),shall be prorated on the basis of the number of insurers in the same order of priority rather than the number of policies in the same order of priority.

REIMBURSEMENT AND TRUST AGREEMENT

1. In the event of payment to any person under Personal Injury Protection Insurance and Property Protection Insurance:
 - A. **we** shall be entitled (to the extent of that payment) to the proceeds of any settlement or judgment from the exercise of any right of recovery of that person against any person or organization legally responsible for the **bodily injury** or **property damage**. **We** shall have a lien to the extent of its payment;
 - B. that person shall:
 - (1.) hold in trust for **our** benefit all rights of recovery;
 - (2.) do nothing after **loss** to prejudice any rights of recovery;
 - (3.) execute and deliver to **us** any papers necessary to secure the rights and obligations as established by this provision.

ARBITRATION

1. If **we** do not agree with the **insured person(s)** that they are entitled to receive any benefits under this Part (No-Fault Insurance Coverages), then the **insured person(s)** and **we** may agree in writing that the issues, excluding matters of coverage, be determined by arbitration.
2. **We** and the **insured person(s)** will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.
3. The **insured person(s)** will pay the arbitrator they select. **We** will pay the arbitrator **we** select. The expenses of the third arbitrator will be shared equally. Fees paid to medical or other expert witnesses are to be borne by the party which incurs the expense.
4. Unless it is agreed otherwise, arbitration will be conducted in the county in which the **insured person** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan.
5. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the hearing shall be conducted in the county in which **we** maintain **our** principal place of business. The arbitration proceeding will be in accordance with the usual rules governing procedure and admission of evidence in courts of law. The written decision of any two arbitrators will be binding.
6. All rights, remedies, obligations and limitations of the **Code** will apply.

PART III - UNINSURED MOTORIST INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s) means:**
 - A. **You**, if an individual, and
 - B. any **resident relative**.Person(s) shall not be considered **insured person(s)** if they use a **motor vehicle** without having a reasonable belief that the use is with the permission of someone having the right to grant it.
2. **Motor Vehicle** means a land motor vehicle or **trailer**, requiring vehicle registration, but does not mean:
 - A. a vehicle used as a residence or premises;
 - B. a vehicle, whether the accident occurs on or off the highway, which is:
 - (1.) a snowmobile; or
 - (2.) operated on rails or crawler treads, or a farm-type tractor; or
 - (3.) designed for use principally off the highway; or
 - (4.) equipment designed for use principally off the highway.
3. **Uninsured Motor Vehicle** means a **motor vehicle** which is:
 - A. not insured by a **bodily injury** liability policy or bond that is applicable at the time of the accident;
 - B. a hit-and-run **motor vehicle** of which the operator and owner are unknown and which negligently makes physical contact with
 - (1.) **you** or a **resident relative**, or
 - (2.) a **motor vehicle** which an **insured person** is **occupying**;and which the accident has been reported within 24 hours to the police.
 - C. insured by a **bodily injury** liability policy or bond at the time of the accident issued by a company that is or becomes insolvent.
4. **Uninsured Motor Vehicle** does not include a **motor vehicle**:
 - A. owned by **you** or any resident of **your** household;
 - B. furnished or available for the frequent or regular use of **you** or any resident of **your** household;
 - C. self-insured within the meaning of any Financial Responsibility Law, Motor Carrier Law or similar law of any **state** in which it is registered;
 - D. owned by any governmental unit or agency.
 - E. operated on rails or crawler treads.
 - F. designated mainly for use off public roads while not on public roads.
 - G. while located for use as a residence premise.

INSURING AGREEMENT

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay damages for **bodily injury** which is:
 - A. sustained by an **insured person**;
 - B. is caused by accident; and
 - C. arises out of the ownership, operation, maintenance or use of an **uninsured motor vehicle**;
 - D. results in death, serious impairment of body function or permanent serious disfigurement; and
 - E. an **insured** is legally entitled to recover as a proximate cause of the negligence of the owner or operator of an **uninsured motor vehicle**.
2. **We** will pay under this coverage only if the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgment or settlements; or
3. **We** will not be bound by the acts of the **named insured** or anyone acting on his or her behalf in obtaining a legal judgment or entering into a settlement agreement or by any other means, that prejudices **our** ability to contest by arbitration or trial in accordance with the provisions of this policy:
 - A. whether a **named insured** is legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle**.
 - B. the amount of damages to which a **named insured** is legally entitled.
4. The **named insured** may not settle with anyone responsible for the accident without **our** written consent. **We** shall be obligated to respond within thirty (30) days of receiving a **named insured's** written request to settle. If **we** fail to respond within the 30-day period, the consent provision shall be waived.

For purposes of this Part, serious impairment of body function means an objectively manifested injury to an important body function which substantially affects an **insured person's** general ability to lead a normal life.

EXCLUSIONS

1. This coverage does not apply to **bodily injury** sustained by an **insured person**:
 - A. while **occupying** a **motor vehicle** which is owned by an **insured person** which is not insured for this coverage under this policy. This includes a **trailer** of any type used with that vehicle.;
 - B. while **occupying** a **motor vehicle** which provides the same or similar coverage for an **insured person**;
 - C. while **occupying**, or through being struck by while not **occupying**, any vehicle other than a **motor vehicle**;

- D. while **occupying** a **motor vehicle** furnished by an **insured person's** employer and operated in the course of that **insured person's** employment unless the **motor vehicle** is **your car**;
 - E. if the **named insured** or their legal representative settles or prosecutes to judgment their **bodily injury** claim with the owner, operator or other person or organization legally responsible for an **uninsured motor vehicle** without our written consent. This exclusion does not apply if the insured person makes a written request for our consent, and we fail to respond within 30 days of receipt of the written request.
 - F. which is caused intentionally by or at the direction of another person;
 - G. while **occupying your car** when it is being used as a public or livery conveyance. This exclusion does not apply to a share-the-expense car pool or to the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.
 - H. while **occupying** an **additional car** or **replacement car** the acquisition of which has not been reported to **us** within 30 days.
 - I. arising out of the participation in any prearranged, organized or spontaneous racing or speed contest or use of a track or course designed for racing or high performance driving.
2. Uninsured Motorist Coverage shall not apply to the benefit of an insurer or self-insurer under any Workers' Compensation or disability benefits law, or law providing for direct benefits without regard to fault, or any similar law.

LIMITS OF LIABILITY

- 1. **We**, under any circumstances, will not pay more than the maximums shown on the Declarations Page:
 - A. For **bodily injury** sustained by one **insured person** in one accident. This limit also includes all claims for derivative damage allowed under the law.
 - B. For damages for **bodily injury** sustained by two or more **insured persons** in one accident. This limit also includes all claims for derivative damages allowable under the law.
 - C. Regardless of the number of:
 - (1.) **Insured persons**;
 - (2.) Claims made;
 - (3.) Vehicles or premiums shown in the Declarations; or
 - (4.) Vehicles involved in the auto accident.
- 2. The Limit of Liability for Uninsured Motorist Coverage shown on the Declarations Page shall be reduced by:
 - A. payment made by the owner or operator of the **uninsured motor vehicle** or organization which may be legally liable;

- B. payment under the Liability Insurance or Uninsured Motorist Coverage of this or any other policy for the same **bodily injury**;
- C. payment made under any Medical Payments Coverage, Health and Accident Coverage, or Personal Injury Protection Coverage of this or any other policy and in the absence of which payment would be required by the **Code**;
- D. the comparative negligence of the **insured person**.

Items B. and C. above do not apply unless paid Liability and Medical Payments benefits cover the same elements of loss for which the **named insured** would receive Uninsured Motorist benefits.

- 3. Any amount payable will be excess over payment made or amount payable under any Workers' Compensation or disability benefits law, the **Code** or other law providing for direct benefits without regard to fault, or similar law.
- 4. Coverage from this Part does not apply to punitive damages, exemplary damages, or statutorily imposed treble or multiplied damages.

OTHER INSURANCE

If there is Uninsured Motorist Coverage with **us** or any other insurer for a **loss** covered by this Part, then for purposes of this coverage, damages shall be limited to the maximum amount shown on the Declarations Page for any one **insured person** and/or for two or more **insured persons**. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a vehicle the **insured person** does not own shall be excess over any other valid or collectible insurance.

ARBITRATION

- 1. If **we** do not agree with the **insured person(s)**:
 - A. that they are legally entitled to recover damages from the owner or operator of an **uninsured motor vehicle**; or
 - B. as to the amount of payment;

either they or **we** must demand, in writing, that the issues, excluding matters of coverage, be determined by arbitration. A Demand for Arbitration must be filed within three years from the date of the accident or **we** will not pay damages under this Part. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, whether or not a **motor vehicle** is an **uninsured motor vehicle** or the timeliness of a Demand for Arbitration, are not subject to arbitration and suit must be filed within three years from the date of the accident.
- 2. If arbitration occurs, **we** and the **insured person** will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.

3. The **insured person(s)** will pay their arbitrator. **We** will pay **ours**. The expenses of the third arbitrator will be shared equally. Attorneys' fees and fees paid to medical or other expert witnesses are to be borne by the party which incurs them.
4. Arbitration, unless otherwise agreed, shall be conducted in the county in which the **insured person(s)** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the

hearing shall be conducted in the county in which **we** maintain **our** principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law.

5. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.

PART IV - UNDERINSURED MOTORIST INSURANCE COVERAGES

Coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. Insured Person(s):

- A. **You**, if an individual, and
- B. any **resident relative**.

Person(s) shall not be considered **insured person(s)** if they use a **car** without having a reasonable belief that the use is with the permission of someone having the right to grant it.

2. Motor Vehicle means a land motor vehicle or trailer, requiring vehicle registration, but does not mean:

- A. a vehicle used as a residence or premises;
- B. a vehicle, whether the accident occurs on or off the highway, which is:
 - (1.) a snowmobile; or
 - (2.) operated on rails or crawler treads, or a farm-type tractor; or
 - (3.) designed for use principally off the highway; or
 - (4.) equipment designed for use principally off the highway.

3. An underinsured motor vehicle is:

- A. a **motor vehicle** which has **bodily injury** liability protection in effect and applicable at the time of the accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of Michigan, but less than the limits of liability for Underinsured Motorists Coverage shown on the Declarations page; and
- B. in which the limits of liability are less than the amount of damages the **insured person** is legally entitled to recover for **bodily injury**.

However, **underinsured motor vehicle** does not include a **motor vehicle**:

1. owned by or furnished or available for regular use to **you** or anyone living with **you**;
2. owned or operated by a self-insurer under any **motor vehicle** law;
3. owned by any governmental unit or agency;
4. located for use as a residence or premises;
5. operated on rails or crawler treads;

6. that is designed for use primarily off public roads; or
7. that is an **uninsured motor vehicle**. As defined under Part III - Uninsured Motorist Insurance of this policy.

INSURING AGREEMENT

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay compensatory damages which an **insured person** is legally entitled to recover as a proximate cause of the negligence of the owner or operator of an **underinsured motor vehicle** because of **bodily injury** which is:
 - a. sustained by an **insured person**;
 - b. is caused by accident; and
 - c. arises out of the ownership, operation, maintenance or use of an **underinsured motor vehicle**; and
 - d. results in death, serious impairment of body function or permanent serious disfigurement.
2. **We** will pay under this coverage only if:
 - A. The limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgment or settlements; or
 - B. A tentative settlement has been made between an **insured person** and the insurer of the **underinsured motor vehicle** and **we**:
 - (1.) Have been given prompt written notice of such tentative settlement; and
 - (2.) Advance payment to the **insured person** in an amount equal to the tentative settlement within 30 days after receipt of the notification.
3. **We** will not be bound by the acts of the **named insured** or anyone acting on his or her behalf in obtaining a legal judgment or entering into a settlement agreement or by any other means, that prejudices **our** ability to contest by arbitration or trial in accordance with the provisions of this policy:
 - A. whether a **named insured** is legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle**.
 - B. the amount of damages to which a **named insured** is legally entitled.
4. The **named insured** may not settle with anyone responsible for the accident without **our** written consent.

We shall be obligated to respond within thirty (30) days of receiving a **named insureds** written request to settle. If **we** fail to respond within the 30-day period, the consent provision shall be waived.

EXCLUSIONS

BODILY INJURY NOT COVERED

1. **We** do not provide Underinsured Motorists Coverage for **bodily injury** sustained:
 - A. By an **insured person** while **occupying**, or when struck by, any **car** owned by an **insured person** which is not insured for this coverage under this policy. This includes a **trailer** of any type used with that vehicle.
 - B. By any **resident relative** while **occupying**, or when struck by, any **car** owned by an **insured person** which is insured for this coverage on a primary basis under any other policy.
2. **We** do not provide Underinsured Motorists Coverage for **bodily injury** sustained by any **insured person**:
 - A. If that **insured person** or their legal representative settles the **bodily injury** claim without **our** knowledge and written consent.
 - B. While **occupying your insured car** when it is being used a public or livery conveyance. This exclusion does not apply to a share-the-expense car pool or the use of the **insured car** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.
 - C. Using a vehicle without a reasonable belief that the **insured person** has permission to do so.
 - D. While **occupying** or operating an owned motorcycle or moped.
 - E. While **occupying** a **motor vehicle** which is owned by **you** or a **resident relative** unless that **motor vehicle** is **your car**;
 - F. While **occupying**, or through being struck by while not **occupying**, any vehicle other than a **motor vehicle**;
 - G. While **occupying** a **motor vehicle** furnished by an **insured person's** employer and operated in the course of that **insured person's** employment unless the **motor vehicle** is **your car**;
 - H. if **you** or **your** legal representative settles or prosecutes to judgment **your bodily injury** claim with the owner, operator or other person or organization legally responsible for an **underinsured motor vehicle** without **our** written consent. This exclusion does not apply if **you** make a written request for **our** consent, and **we** fail to respond within 30 days of receipt of the written request;
 - I. Which is caused intentionally by or at the direction of another person;
 - J. While **occupying** an **additional car** or **replacement car** the acquisition of which has not been reported to **us** within 30 days.

K. while **occupying** a **motor vehicle** which provides the same or similar coverage for an **insured person**;

3. **We** do not provide Underinsured Motorists Coverage for punitive or exemplary damages.

LIMITS OF LIABILITY

1. **We**, under any circumstances, will not pay more than the maximums shown on the Declarations Page:
 - A. For **bodily injury** sustained by one **insured person** in one accident. This limit also includes all claims for derivative damage allowed under the law.
 - B. For damages for **bodily injury** sustained by two or more **insured persons** in one accident. This limit also includes all claims for derivative damages allowable under the law.
 - C. Regardless of the number of:
 - (1.) **Insured persons**;
 - (2.) Claims made;
 - (3.) Vehicles or premiums shown in the Declarations; or
 - (4.) Vehicles involved in the auto accident.
2. The Limit of Liability for Underinsured Motorist Coverage shown on the Declarations Page shall be reduced by:
 - A. payment made by the owner or operator of the **underinsured motor vehicle** or organization which may be legally liable;
 - B. payment under the Liability Insurance or Underinsured Motorist Coverage of this or any other policy for the same **bodily injury**;
 - C. payment made under any Medical Payments Coverage, Health and Accident Coverage, or Personal Injury Protection Coverage of this or any other policy and in the absence of which payment would be required by the **Code**;
 - D. the comparative negligence of the **insured person**.Items B. and C. above do not apply unless paid Liability and Medical Payments benefits cover the same elements of loss for which the **named insured** would receive Underinsured Motorist benefits.
3. Underinsured Motorists Coverage shall be reduced by the sum of the limits of liability under all bodily injury bonds or policies, other than this policy, applicable at the time of the accident.
4. If none of **your insured cars** are involved in the accident, Underinsured Motorists Coverage is available to the extent of coverage of any one of **your insured cars**. Coverage on any other of **your insured cars** shall not be added to that coverage.
5. No one will be entitled to receive duplicate payments for the same elements of **bodily injury** under this coverage and Part I, Part II or Part III of this policy.
6. **We** will not make a duplicate payment under this coverage for any element of **bodily injury** for which payment has been made by or on behalf of persons or organizations who may be legally responsible.

7. **We** will not pay for any element of **bodily injury** if a person is entitled to receive payment for the same element of **bodily injury** under any of the following or similar law:
 - A. Workers' Compensation law; or
 - B. Disability benefits law.
8. Any amount payable will be excess over payment made or amount payable under any Workers' Compensation or disability benefits law, the **Code** or other law providing for direct benefits without regard to fault, or similar law.

OTHER INSURANCE

If there is Underinsured Motorist Coverage with **us** or any other insurer for a **bodily injury** covered by this Part, then for purposes of this coverage, damages shall be limited to the maximum amount shown on the Declarations Page for any one **insured person** and/or for two or more **insured persons**. **Our** share is the proportion that **our** Limit of Liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a vehicle the **insured person** does not own shall be excess over any other valid or collectible insurance.

ARBITRATION

1. If **we** do not agree with the **insured person(s)**:
 - A. that they are legally entitled to recover damages from the owner or operator of an **underinsured motor vehicle**; or
 - B. as to the amount of payment;

either they or **we** must demand, in writing, that the issues, excluding matters of coverage, be determined by arbitration. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, whether or not a **car** is an **underinsured car** or the timeliness of a Demand for Arbitration, are not subject to arbitration and suit must be filed within three years from the date of the accident.
2. If arbitration occurs, **we** and the **insured person** will each select an arbitrator. The two arbitrators will select a third. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third.
3. The **insured person(s)** will pay their arbitrator. **We** will pay **ours**. The expenses of the third arbitrator will be shared equally. Attorneys' fees and fees paid to medical or other expert witnesses are to be borne by the party which incurs them.
4. Arbitration, unless otherwise agreed, shall be conducted in the county in which the **insured person(s)** resided at the time of the accident. However, in no case will the arbitration hearing be conducted outside of the State of Michigan. If the **insured person(s)** resided outside of the State of Michigan at the time of the accident, the hearing shall be conducted in the county in which **we** maintain **our** principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law.

5. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.
6. For damages caused by an **underinsured motor vehicle**:
 - A. the decision agreed to in writing by two of the arbitrators will be binding if the amount of damages determined by the arbitrators does not exceed \$50,000 for **bodily injury** to any one person or \$100,000 for **bodily injury** to two or more persons in any one motor vehicle accident. Judgment upon the award rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.
 - B. if the amount exceeds \$50,000 for **bodily injury** to any one person or \$100,000 for **bodily injury** to two or more persons then the decision of the arbitrators will not be binding and either party may demand the right to a trial, unless the parties agree otherwise by prior written agreement.

Trial shall be on all issues of the arbitrators' decision. This demand must be made within 60 days of the arbitrators' decision and suit filed in the court of proper jurisdiction within 120 days of the arbitrators' decision. If this demand is not timely made or if suit is not timely filed, the decision of the arbitrators' will be binding. Judgment upon any binding award rendered by the arbitrators may be entered in the Circuit Court in the county in which arbitration was filed.

PART V - CAR DAMAGE INSURANCE COVERAGES

A coverage from this Part applies only if a premium is listed for it on the Declarations Page.

THE DEFINITIONS FOUND ON PAGE 3 APPLY TO THIS PART AND, IN ADDITION, FOR THIS PART:

1. **Insured Person(s)** means:
 - A. For use of **your car**, which is the vehicle described on the Declarations Page and identified by a specific Vehicle Identification Number, a **replacement car**, a temporary **substitute car**, an **additional car** and a **trailer** owned by **you**:
 - (1.) **You**;
 - (2.) **your resident relatives**;
 - (3.) any other person, other than a carrier or bailee for hire, using it with **your** permission;
 - B. For **other cars**, (which is any **car** that **you** or any **resident relative** do not own, do not lease for 31 days or more, or do not have furnished or available for frequent or regular use) used with the permission of a person having the right to grant it and if **your car** is a private passenger **car**:
 - (1.) **you**, if an individual;
 - (2.) any **resident relative** who does not own a private passenger **car**.
2. **Collision** means impact of an **insured car** with an object other than a bird or animal or upset of an **insured car**.
3. **Comprehensive loss** means **loss** caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, colliding or contact with a bird or animal, operation of car-wash equipment or breakage of glass. If breakage of glass occurs together with other **loss** due to a **collision**, **you** may elect to have it treated as **loss** caused by **collision**.
4. **Diminution in Value** means the actual or perceived reduction in market or resale value which results from a direct and accidental **loss**.
5. **Loss** means direct and sudden accidental physical damage to or theft of the **insured car**, including its **equipment**. **Loss** does not include consequential damages such as **diminution in value** of the **insured car** but does include loss of use of:
 - A. A **temporary substitute car**; or
 - B. An **other car**;that **you** rent from an agency or company on a daily or weekly basis.
6. **Equipment** means **equipment** that is **permanently attached** by the manufacturer or dealer and appears on the new or used **car** purchase invoice. It also includes, while in the **car**, two tapes or two discs or two cassettes or two records used with a device for the recording or reproduction of sound.

7. **Substantially at Fault** means a person's action or inaction was 51 percent or more the cause of the accident.

COMPREHENSIVE COVERAGE

1. **We** will pay for **loss** caused by **comprehensive loss**, to an **insured car** less any deductible amount shown on the Declarations Page.
2. If there is a total theft of **your car**, and it is a private passenger **car**, **we** will pay up to \$20 per day, but no more than \$600, for the cost of transportation incurred by **you**. Payment begins 24 hours after the theft has been reported to **us** and the police and ends when **your car** is returned to use or when **we** tender or pay the **loss**. The amount to be paid for the cost of transportation is in addition to the Limit of Liability for the direct **loss** to **your car**. Payment for the cost of transportation may not exceed either the amount incurred or the actual cash value of **your car**, whichever is less.
3. **We** will pay up to \$50 for the expense **you** incur for locksmith service if **your car's** ignition key is lost, stolen, or locked in the **insured car**.
4. If **you** have a loss on school property or during a school event at the location the event is taking place, and have comprehensive coverage, the deductible will be reduced to \$25.

COLLISION COVERAGES

1. LIMITED COLLISION COVERAGE

Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay for **loss** caused by **collision** to an **insured car** when the operator of that **car** is not **substantially at fault** in the accident from which the damage arose.

2. STANDARD COLLISION COVERAGE

Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay for **loss** caused by **collision** to an **insured car** less the deductible amount shown on the Declarations Page regardless of fault.

3. BROAD COLLISION COVERAGE

Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay for **loss** caused by **collision** to an **insured car** less the deductible amount shown on the Declarations Page. **You** will not have to pay the deductible if **your car**:

- A. is a private passenger **car** and it is in a **collision** with another **car** described separately on the Declarations Page of this Policy or another policy issued by **us**; or
- B. is in a **collision** and the operator of **your car** is not **substantially at fault** in the accident from which the damage arose.

4. Pet Injury Protection

- A. We will pay up to \$500 if **your pet** sustains injury or death as a result of loss caused by collision to the **insured car** and at the time of the accident:
- (1.) Limited, Basic or Broad Collision Coverage applies to a private passenger car insured under this policy; and
 - (2.) **your pet** is inside the **insured car**.
- B. If as a result of a covered accident:
- (1.) **your pet** is injured, we will pay for reasonable and customary costs incurred by **you** or a **resident relative** for veterinary fees including medications and procedures prescribed by **your pet's** veterinarian for treatment of such covered injuries;
 - (2.) **your pet** dies, we will pay the cost to replace the deceased dog or cat with one of like kind and quality.
- C. In any event, the most we will pay as a result of any one accident is a total of \$500 regardless of the number of dogs or cats that are injured or die in the accident.

CAR RENTAL AND TRAVEL EXPENSE COVERAGE

1. Car Rental Expense

- A. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay up to the daily limit shown on the Declarations Page for rental by **you** of a **temporary substitute car** for a period of up to 30 days. This applies when **your car** (if a private passenger car)
- (1.) is withdrawn from service for more than 24 hours because of **loss**, other than by total theft, covered under this Part; and
 - (2.) if Car Rental Coverage is in effect at the time of that **loss**; and
 - (3.) the amount of the loss exceeds the deductible.
- B. If **you** are entitled to coverage for a **loss** by total theft of **your car**, the amount provided under Comprehensive Coverage for the cost of transportation will be that shown on the Declarations Page for Car Rental Coverage.
- C. Coverage will begin 24 hours after the total theft has been reported to **us** and the police, and will continue for a total time period of up to 30 days.
- D. Car Rental Coverage payment stops when:
- (1.) **your car** has been replaced, repaired if damaged, or returned to **you** if undamaged; or
 - (2.) settlement for the total **loss** of **your car** has been made or tendered; or
 - (3.) the limits of this coverage have been exhausted.
- E. In no event will payment under Car Rental Coverage exceed either the
- (1.) actual cash value of **your car**; or
 - (2.) the amount incurred for car rental, whichever is less.

2. Travel Expense

- A. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, **we** will pay up to \$400.00 for Travel Expenses incurred by **you** or a **resident relative** if **your car** is not drivable due to a **loss** which occurs more than 100 miles from home and which is payable under **your** comprehensive or collision coverages and Car Rental and Travel Expense Coverage is listed on the declarations page for the **insured car** involved on the **loss**. **We** will pay for expenses incurred by **you** or any **resident relative** for:
- (1.) Commercial transportation fares, excluding car rental, to continue to **your** destination or home;
 - (2.) Extra meals and lodging needed when the **loss** to **your car** causes a delay enroute. The expenses must be incurred between the time of the **loss** and **your** arrival at **your** destination or home or by the end of the fifth day, whichever occurs first; and
 - (3.) Meals, lodging and commercial transportation fares, excluding car rental, incurred by **you** or a person **you** choose to drive **your car** from the place of repair to **your** destination or home.

SPECIAL EQUIPMENT COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, when a **comprehensive** or **collision** coverage is applicable to a **loss**, **we** will pay not more than \$1,000.00 for **special equipment** designed for use in a **car** and in or on **your car** at the time of the **loss**. **Our** liability under this coverage shall not exceed \$1,000.00 unless **you** purchase Total **Special Equipment** Coverage described below. The deductible amount shown on the Declarations Page under the applicable **comprehensive** or **collision** coverage will be applied to the **loss**.
2. Coverage for **special equipment** shall not cause **our** Limit of Liability for **loss** to **your car** under Part V of the policy to be increased to an amount in excess of the actual cash value of **your car**.
3. **You** will be required to maintain and present proof of purchase, to include, but not limited to an original purchase receipt, and proper installation of the **special equipment** covered under the Policy as proof of **loss** for any claim under this coverage.

TOTAL SPECIAL EQUIPMENT COVERAGE

1. If **you** have purchased additional coverage on **special equipment**, the total amount of **special equipment** coverage is shown on the Declarations Page. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, **we** will pay for **loss** to **special equipment** that is designed for use in a **car** and is in or on **your car** at the time of the **loss** when **your car** is identified on the Declarations Page as having total special equipment coverage and the **special equipment** is endorsed onto the Policy. The deductible amount shown on the Declarations Page under the applicable **comprehensive** or **collision** coverage will

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be applied to the **loss**. **Our** total liability for **special equipment** shall not exceed the amount indicated on the Declarations Page.

2. Additional coverage for **special equipment** shall not cause **our** limit of liability for **loss to your car** under Part V of the Policy to be increased to an amount in excess of the actual cash value of **your car**.
3. **You** will be required to maintain and present proof of purchase, to include, but not limited to an original purchase receipt, and proper installation of the **special equipment** covered under the policy as proof of **loss** for any claim under this coverage.

ROAD SERVICE/TOWING COVERAGE

1. Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to Part V, **we** will pay the reasonable cost incurred by **you**, up to the Limit identified on the Declarations Page, for **your car** for:
 - A. mechanical labor up to one hour at the place of its breakdown;
 - B. towing to the nearest place where the necessary repairs can be made during regular business hours if it will not run;
 - C. towing it out if it is stuck on or immediately next to a public highway;
 - D. delivery of gas, oil, loaned battery, or change of tire.

We will not pay such expenses unless submitted within a reasonable time period after they are incurred.

EXCLUSIONS

LOSSES NOT COVERED

1. **We** will not pay for **loss**:
 - A. to an **other car** that is not a private passenger **car** or **trailer**; such as a rental truck or U-Haul type vehicle.
 - B. to an **other car** while used in the **car business**;
 - C. caused by **war** or radioactive contamination, discharge of a nuclear weapon (even if accidental), or any consequence of them;
 - D. to tires, unless stolen, damaged by fire or vandalism or the damage happens along with other covered **loss** to the **insured car**;
 - E. limited to wear and tear, freezing, mechanical or electrical breakdown or failure unless the damage results from the total theft of the **insured car**;
 - F. to an office, store, display or passenger **trailer** that is not described on the Declarations Page;
 - G. to an **insured car** while operated in any:
 - (1.) race;
 - (2.) hill climb
 - (3.) demonstration;
 - (4.) speed contest;
 - (5.) stunting contest; or
 - (6.) performance contest.
 - H. to a house **trailer** owned by an **insured person**, and not described on the Declarations Page;

- I. to any other type **trailer**, cap or camper unit body, owned by an **insured person**, that is not described on the Declarations Page and not attached to a vehicle specifically described on the Declarations Page at the time of **loss**;
- J. in excess of \$1,000 to any other type utility **trailer** owned by an **insured person**, that is not described on the Declarations Page when attached to a vehicle specifically described on the Declarations Page;
- K. to any commercial **trailer**;
- L. to any non-owned private utility **trailer**;
- M. to **your** personal watercraft **trailer** if covered by any other policy issued by **us**. However, **we** will pay up to \$1,000 for **your** personal watercraft **trailer** that is not described on the Declarations Page of any policy issued by **us**;
- N. to any vehicle contents;
- O. to a **replacement car** or **additional car**, the acquisition of which has not been reported to **us** within 30 days;
- P. if **you** assume liability by contract or agreement;
- Q. to an **other car** or **temporary substitute car** when the **insured person** is not covered by any other insurance that applies unless the **insured person** is legally obligated to pay for the **loss**;
- R. to any radar detection device;
- S. to **equipment** unless that **equipment** is **permanently attached** to the **insured car** in or on an area of the **insured car** normally used by the **car** manufacturer for the installation of **equipment** of that type;
- T. resulting from seizure, or confiscation or forfeiture of any **insured car** by, or surrender of an **insured car** to, any:
 - (1.) legally constituted authority; or law enforcement agent, official, officer, department or bureau.
 - (2.) **lienholder**, subrogee, assignee, or person with a superior right of ownership or possession;if upon acquisition of the **car** **you** knew or should have known that the **car** had likely been stolen or wrongfully taken away from its rightful owner or possessor;
- U. to any vehicle being used as a taxi;
- V. which is caused intentionally by a **titleholder** or **lessee** of that **car**;
- W. to an **insured car** due to **diminution in value**.
- X. to an **insured car** and its equipment while **you** or any **resident relative** or anyone driving with express or implied permission from **you** or a **resident relative**:
 - (1.) is using **your insured car** in any unlawful activity (other than a traffic violation), illicit trade or transportation; or
 - (2.) using or operating **your insured car** in an attempt to flee a law enforcement agent; and

- (3.) such person is a willing participant in such activity listed in (1.) or (2.) above.

LIMITS OF LIABILITY

1. **Our** Limit of Liability for **loss** shall not exceed the lesser of:
 - A. the actual cash value of the stolen or damaged property, an adjustment for depreciation, physical condition and obsolescence will be made in determining actual cash value at the time of **loss**; or
 - B. the amount necessary to repair or replace the property with other property of like kind and quality; or
 - (1.) **we** have the right to choose one of the following to determine the cost to repair the **insured car**:
 - (a.) the cost agreed to by both the owner of the **insured car** and **us**;
 - (b.) a bid or repair estimate approved by **us**; or
 - (c.) a repair estimate that is written based upon or adjusted to:
 - (i) the prevailing competitive price;
 - (ii) the lower of paintless dent repair pricing established by an agreement **we** have with a third party or the paintless dent repair price that is competitive in the market; or
 - (iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by **us**. If asked, **we** will identify some facilities that will perform the repairs as the prevailing competitive price. The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition.

You agree with **us** that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

 - C. for Total Special Equipment Coverage, the amount shown on the Declarations Page.- 2. A **car** with a **trailer** attached is considered separate **cars**, including any deductibles in Part V.

NO BENEFIT TO BAILEE

Car Damage Insurance Coverages shall not directly or indirectly benefit any carrier or other bailee for hire liable for **loss** to an **insured car**.

OTHER INSURANCE

If **you** have other insurance against a **loss** covered by this Part of the Policy (Part V), **we** shall not be liable under this Policy for a greater proportion of such **loss** than the applicable Limit of Liability of this Policy bears to the total

applicable Limit of Liability of all valid and collectible insurance against such a **loss**; provided, however, the insurance with respect to a **temporary substitute car** or **other car** shall be excess insurance over any other valid and collectible insurance. If the **insured car** is damaged by **collision** while parked so as not to cause unreasonable risk, subject to the applicable deductible as shown on the Declarations Page, **we** will pay for damage not recovered under the provisions for Property Protection Insurance described in the **Code**. **We** will have recovery rights under General Condition 5.

DEFENSE

If suit is brought against any **insured person** for damage to the property of another for a **loss** which would be covered under this Part, **we** will provide the same defense and Additional Payments as is provided by the Liability Insurance Coverage Part of this Policy.

APPRAISAL AND ARBITRATION

If there is a disagreement as to the amount of the **loss**, either **you** or **we** must demand Appraisal of the **loss** within 60 days after the proof of loss is filed. In such event, **you** and **we** shall each select and pay a competent and disinterested appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of **loss**, and failing to agree, shall submit their differences to the umpire. An award in writing of any two shall determine the amount of **loss**. **You** and **we** shall each bear equally the other expenses of the Appraisal and of the umpire. **We** shall not be held to have waived any of **our** rights by any act relating to Appraisal.

If there is a disagreement between **us** and **you** as to whether the operator of **your car** was **substantially at fault**, **you** or **we** shall demand in writing that the matters be settled by arbitration. Disagreements concerning insurance coverage or the insurance afforded by this coverage are not subject to arbitration except by express written consent of both parties. **You** and **we** will each select an arbitrator. The two arbitrators will select a third arbitrator. If they cannot agree upon the third arbitrator within 30 days, they may petition the Circuit Court for appointment of the third. **You** will pay the arbitrator **you** select. **We** will pay the arbitrator **we** select. The expenses of the third arbitrator shall be shared equally. Fees paid to expert witnesses are to be borne by the party which incurs the expense. Unless it is agreed otherwise, arbitration will be conducted in the county where the accident occurred. However, in the event that the accident occurred outside of the State of Michigan, the arbitration shall be conducted in the county in which **we** have **our** principal place of business. The hearing shall be conducted in accordance with the rules governing procedure and admission of evidence in courts of law. The arbitrators shall hear and determine the issues in dispute. The decision in writing of any two will be binding and judgment upon the decision rendered by the arbitrators may be entered in the Circuit Court in the county in which the arbitration was held.

PAYMENT OF LOSS

We may, at **our** option, pay for the **loss** in money, or by repairing or replacing the damaged or stolen property. **We** may, at any time before the **loss** is paid or the property replaced, return at **our** expense, any stolen property either to **you** or to the address shown on the Declarations Page. **We** may keep all or part of the property replaced, return at **our** expense, any stolen property either to **you** or to the address shown on the Declarations Page.

We may keep all or part of the property at the agreed or appraised value. The property may not be abandoned to **us**. If the **insured car** is stolen, and has not been recovered, payment will not be made before 30 days from the time notice of the theft has been given to **us** and to the police.

PART VI - ADDITIONAL CAR OPTION

The Definitions found on Page 3 also apply to this Part.

We grant an option to the **Named Insured** to purchase insurance under this policy for an **additional car** effective on the date of its acquisition if **we** insure all **cars** owned by the **Named Insured**.

Exercise of this option must be made within 30 days of the acquisition of the **additional car**. No coverage is provided under this Policy for an **additional car** the acquisition of which is not reported to **us** within 30 days. The election to exercise this option must be made under this and no other policy. The Additional Car Option shall expire at 12:01 a.m. on the 31st day after acquisition of the **additional car**.

If the **Named Insured** elects to exercise the Additional Car Option, **we** will provide Liability Insurance Coverages, Michigan No-Fault Insurance Coverages, Uninsured Motorist Coverages and Underinsured Motorist Coverages for the **additional car** identical to those coverages described on the Declarations Page for 30 days after acquisition (but in no case beyond 30 days of acquisition).

If the **Named Insured** elects to exercise the Additional Car Option for a vehicle four or less years old, as determined by the vehicle title, **we** will provide Car Damage Coverages equal to the **car** on the Declarations Page with the greatest level of Car Damage Coverage from the date of acquisition to the date the **Named Insured** notifies **us** of the **additional car** (but in no case beyond 30 days of acquisition). After the

date on which the **Named Insured** notifies **us** of an **additional car** (but in no case beyond 30 days of acquisition) the **Named Insured** must designate to **us** one of the **cars** described on the Declarations Page and the Car Damage Coverages provided for that **car** shall serve as the basis for the selection of coverages and Limits of Liability for the **additional car** insurance. The **Named Insured** may not select coverages with limits in excess of those effective for the designated **car**.

If the **Named Insured** elects to exercise the Additional Car Option for a vehicle greater than four years of age, as determined by the vehicle title, **we** will not provide Car Damage Coverages from the date of acquisition to the date that the **Named Insured** notifies **us** of the **additional car**. After the date on which the **Named Insured** notifies **us** of an **additional car** (but in no case beyond 30 days of acquisition) the **Named Insured** must designate to **us** one of the **cars** described on the Declarations Page and the insurance provided for that **car** shall serve as the basis for the selection of coverages and Limits of Liability for the **additional car** insurance. The **Named Insured** may not select coverages with limits in excess of those effective for the designated **car**.

If insurance under this Policy is issued under the Additional Car Option, coverage shall be excess over any other valid and collectible insurance.

PART VII - ADDITIONAL INSURED - TITLEHOLDER OR LESSEE

The Definitions found on Page 3 also apply to this Part.

Liability and Car Damage Insurance Coverages provided by this Policy for **your car** also apply to the **titleholder** or **lessee** named on the Declarations Page as an **additional insured**. In addition to the Definitions, Exclusions, Conditions and Limits of Liability found in the Liability and Car Damage Insurance Coverages, this insurance is subject to the following additional provisions:

1. **we** will pay damages for which the **titleholder** or **lessee** is legally liable only if the damage arises out of the ownership, maintenance or use of **your car** by **you**, a **resident relative** or any other person using **your car** with **your** permission;
2. Michigan No-Fault Insurance Coverages - Personal Injury Protection and Property Protection do not apply to the **titleholder** or **lessee** as an **additional insured**;

3. if **we** cancel or decline to renew the Policy or the **Named Insured** declines **our** offer to renew the Policy, **we** will mail notice of cancellation or non-renewal to the **additional insured** at the address shown on the Declarations Page;
4. the **additional insured** is not responsible for payment of premiums;
5. the description of the **titleholder** or **lessee** as an **additional insured** shall not increase **our** Limit of Liability.

GENERAL POLICY CONDITIONS APPLYING TO ALL PARTS OF THIS POLICY

The Definitions found on Page 3 also apply to this Part.

1. POLICY TERM, TERRITORY, USE

This Policy applies only to occurrences, accidents and **losses** during the Policy Term shown on the Declarations Page. The territory includes the **states**; Property Protection Insurance applies only in the State of Michigan. The **insured car** must be used for the purpose stated in the application for this Policy.

2. CONFORMITY WITH STATUTES

If the law of any **state** requires a non-resident to maintain **car** insurance greater than the insurance provided by this Policy, **our** limits and the coverage afforded shall be as set forth in that law while the **insured car** is used in that **state**.

3. TWO OR MORE CARS

If more than one **car** is insured under this Policy, the terms apply separately to each. A **car** with a **trailer** attached is considered

- A. one **car** as respects Limits of Liability in Part I, and
- B. separate **cars**, including any deductibles, in Part V.

4. NO DUPLICATION OR PYRAMIDING

Under no circumstances will **we** be required to pyramid or duplicate any types, amounts or limits of **motor vehicle** coverages available from **us** or any other insurance company.

5. OUR RIGHT OF RECOVERY

In the event of any payment under this Policy, **we** are entitled to all rights of recovery of the **insured person** against any other person or organization. Any person receiving payment under this Policy shall hold in trust and/or reimburse **us** to the extent of **our** payment from the proceeds of any recovery. The **insured person** must help **us** exercise **our** rights. The **insured person** shall do nothing to prejudice **our** rights.

6. TRANSFER OF POLICY

This Policy may not be transferred without **our** written consent. If **you** die, coverage will be provided for:

- A. The surviving **spouse** if a **resident** in the same household at the time of death. Coverage applies to the **spouse** as if shown on the Declarations Page; or
- B. The legal representative of the deceased person as shown on the Declarations Page. This applies only with respect to the representative's legal responsibility to maintain or use the **insured car**.

Coverage will only be provided until the end of the policy period.

7. SUIT AGAINST THE COMPANY

We may not be sued unless there is full compliance with all terms of this Policy.

We may not be sued under the Liability Coverages:

- a. Unless **we** agree an insured person is required to pay and **we** disagree on the amount of payment; or
- b. Until the amount of payment has been finally determined following completion of judicial proceedings applicable to the loss.

Unless **we** consent, no one may make **us** a party to a suit to determine the liability of an insured person. This requirement does not apply if **we** have not responded to a written demand for payment within a reasonable period of time following receipt of the written demand so as to enable **us** to investigate the facts and circumstances of the loss.

8. BANKRUPTCY

We are not relieved of any obligation under this Policy because of the bankruptcy or insolvency of any **insured person**.

9. EXCLUDED DRIVER

WARNING - WHEN A NAMED EXCLUDED PERSON OPERATES A VEHICLE ALL LIABILITY COVERAGE IS VOID-NO ONE IS INSURED. OWNERS OF THE VEHICLE AND OTHERS LEGALLY RESPONSIBLE FOR THE ACTS OF THE NAMED EXCLUDED PERSON REMAIN FULLY AND PERSONALLY LIABLE.

If an **insured car** is being operated by an individual named as an Excluded Driver, insurance under this Policy is null and void for Bodily Injury Liability Insurance Coverage, Property Damage Liability Insurance Coverage, Comprehensive Coverage, Collision Coverage, Uninsured Motorist Insurance Coverage, Underinsured Motorist Insurance Coverage, Car Rental and Travel Expense Coverage and Special Equipment Coverage.

10. CANCELLATION

This entire Policy may be cancelled upon written request of the **Named Insured**.

Coverage under this Policy for a **car** described on the Declarations Page and identified by a Vehicle Identification Number may be cancelled upon **your** request if an owner of that car, or the **named insured**. **We** will compute and keep or collect **our** pro-rata share of the premium for the period that the Policy or coverage has been in effect. **We** will refund to **you** any excess of premium for unexpired time.

Coverage under this Policy for any **car** identified on the Declarations Page, or the entire Policy, may be cancelled by **us**. **We** will mail or deliver 10 days written notice of cancellation to the **Named Insured**. This will be sent to the **Named Insured's** address last known to **us** or its authorized agent. Any unused premium will be returned to the **Named Insured** pro-rated for the unexpired time. **We** may collect any premiums due **us** prorated for the entire time the Policy was effective. For reasons other than failure to pay premium when due, **we** will mail or deliver 30 days written notice of cancellation.

If **you** have elected to use **our** Partial Payment Program, failure to pay any installment when due will result in cancellation.

Premium payments received in **our** office within 30 days after the cancellation of **your** Policy may, at **our** option, result in the reissue of **your** Policy with a lapse in coverage as reflected by the new effective dates on the Declarations Page. **We** will only pay for a **loss** or claim occurring within the policy effective dates.

Cancellation will not affect any claim that originated prior to the date of cancellation.

11. CANCELLATION BY THE COMPANY, LIMITED

After coverage under this Policy for a **car** identified on the Declarations Page has been effective for a period of 55 days; or if this Policy is designated as a renewal on that Declarations Page and that **car** had been insured by **us** for 55 days immediately preceding the renewal date; **we** shall issue a notice of cancellation when: (1) **you**, a resident of **your** household, or whomever customarily operates an **insured car**, has had their driver's license suspended or revoked during this policy term and the suspension or revocation has become final.

12. NONRENEWAL

We may decline to renew this Policy. If so, **we** will mail notice of nonrenewal to **you** at the address last known to **us** at least 20 days before the end of the policy term.

If **we** offer to renew this Policy, and **you** decline, it will automatically terminate at the end of the policy term. Payment of the required renewal premium must be received in **our** office before the due date to constitute acceptance of the offer to renew **your** policy. Payments for the renewal premium received in **our** office within 30 days after the due date will constitute an offer by **you** to renew the policy effective 12:01a.m. the day after the payment is received. The policy may, at **our** option, be renewed with new effective dates. **We** will only pay for a **loss** or claim occurring within the policy effective dates. A check or electronic funds transfer authorization which is not honored for any reason will not constitute payment or acceptance of **our** offer to renew and will not continue coverage beyond any date when such coverage will otherwise terminate for lack of payment.

13. CHANGES

This Policy and the Declarations Page include all agreements between the **Named Insured** and **us**. No change or waiver may be effected in this Policy except by endorsement issued by **us**. If a premium adjustment is necessary, **we** will make it as of the effective date of the change. **We** will collect any premium due **us**. However, if a Policy Change Endorsement results in an additional premium due **us** of \$4.99 or less, **we** will waive that additional premium due. If a Policy Change Endorsement results in an overpayment of premium, **we** will refund the overpayment of premium except that **we** will not refund an overpayment of \$4.99 or less unless requested to do so by **you**.

Coverage for changes will not apply prior to the date and hour shown on the Policy Change Endorsement form. When **we** broaden coverage during the policy term

without charge, the Policy will automatically provide the broadened coverage.

14. DUTY TO REPORT POLICY CHANGES

If the information used to develop the policy premium changes, **we** may adjust **your** premium during the policy term. The **named insured** must inform **us** within 30 days of any changes related to the following:

- a. **your** address;
- b. where **your car** is principally garaged;
- c. **your car** or how it is used, including driving distance to work annual mileage;
- d. the operators who regularly drive **your car**, including newly licensed family members;
- e. the ownership or registration of **your car**.

If **you** fail to inform **us** of these changes within 30 days, **we** may void coverage as provided under Condition 22 - **Concealment Or Fraud**.

If **we** adjust your premium during the policy term as a result of these or other changes in rating conditions, a refund or credit will be issued if the premium is decreased. A billing notice for the additional amount due will be sent if the premium is increased.

15. EFFECTIVE TIME

The policy period begins and ends at 12:01 A.M. on the date on the Declarations Page at the place where this Policy has been signed. A policy period specified as beginning March 1 shall first take effect February 29 if so requested in the application. Coverage shall not be provided for any **loss** occurring prior to the effective date shown on the policy application.

16. DECLARATIONS

By accepting this Policy **you** agree that:

- A. the statements on the Declarations Page and in the application for this Policy are **your** own;
- B. this Policy is issued in reliance upon the truth of those representations; and
- C. this Policy, including the Declarations Page and endorsements attached at the time of issuance, including all agreements existing between **you** and **us** or any of its agents relating to this insurance.

17. PREMIUM

Premium deposit or payment shall be calculated on the basis of rating conditions existing at the beginning of each policy term, except as provided in Condition 13. They shall conform to approved rates and rules then on file with the State of Michigan.

The premium deposit or payment must properly conform to that which should have been charged. **We** and the **Named Insured** agree to make any necessary adjustments in the premium deposit or payment during the term of the Policy or the twelve months succeeding.

18. CONSTITUTIONALITY

If an appellate court of Michigan or the United States enters an unappealed judgment which declares the **Code** invalid, unenforceable or unconstitutional, in whole or in part, **we** shall:

- A. have the right to recompute the premium payable for the Policy for the entire policy term on the basis of revised rates as approved by the Insurance Commissioner;
- B. have no obligation to make any further payment pursuant to the coverages contained in the Policy which were required by the **Code**;
- C. mail to **you** revised coverages to apply in the future in substitution for those coverages affected by the decision of the court at revised rates as approved by the Insurance Commissioner. **We** will mail notice of revisions in coverages and rates to **you** at least 10 days prior to their effective date. The right of cancellation and pro-rata refund will continue to apply.

19. NON-ASSESSABLE

This Policy is non-assessable. **You** are liable only for payment of the premium deposit and will not be liable for any assessment or contingent liability of any kind.

20. TRANSFER OF TITLE

If the title of a **car** described on the Declarations Page and identified by a specific Vehicle Identification Number is transferred to a person other than **you** or any **resident relative**, this Policy provides coverage only for **you** and a **resident relative** while it remains in force.

21. LOSS PAYABLE

We agree that payment for **loss** covered by this Policy and sustained by the vehicle described on the Declarations Page shall be made to the **Named Insured** and **lienholder** as interests may appear. Payment for **loss** may be made separately to each interested party. Upon **our** request (either before or after payment) the **lienholder** shall assign and transfer to **us**, to the extent of the payment **we** make to it, its right and interest in the indebtedness to which its lien or right pertains, including any instrument or security related thereto.

We agree that this endorsement shall not be invalidated as to the interest of the **lienholder** in the described vehicle by any act or neglect of any **Named Insured** or of any owner except:

- A. when that vehicle is intentionally damaged, destroyed or concealed by or at the direction of any **Named Insured** or by any owner; or
- B. when the vehicle is damaged, destroyed or concealed as a result of any other act which constitutes a breach of contract between any **Named Insured** or owner and the **lienholder**.

22. CONCEALMENT OR FRAUD

This entire Policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:

- A. This insurance;
- B. The Application for it;
- C. Or any claim made under it.

SIGNATURE CLAUSE

In witness whereof, we, MEEMIC Insurance Company, have caused this policy to be issued and to be signed by our President.



President and Chief Executive Officer

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PRINTER FRIENDLY

32-24-8. Definition of careless driving--Misdemeanor.

Any person who drives any vehicle upon a highway, alley, public park, recreational area, or upon the property of a public or private school, college, or university carelessly and without due caution, at a speed or in a manner so as to endanger any person or property, not amounting to reckless driving as defined in § [32-24-1](#), is guilty of careless driving. Careless driving is a Class 2 misdemeanor.

Source: SL 1984, ch 233, § 2; SL 1989, ch 256, § 21.



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PRINTER FRIENDLY

32-26-1. Use of right half of highway required--Slow-moving vehicles--Overtaking and passing excepted--Violation as misdemeanor.

Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing set forth in §§ [32-26-26](#) to [32-26-39](#), inclusive. A violation of this section is a Class 2 misdemeanor.

Source: SDC 1939, § 44.0309; SL 1989, ch 255, § 141.

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PRINTER FRIENDLY

15-7-2. Acts within the state subjecting persons to jurisdiction of the courts.

Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary, of any of the following acts:

- (1) The transaction of any business within the state;
- (2) The commission of any act which results in accrual within this state of a tort action;
- (3) The ownership, use, or possession of any property, or of any interest therein, situated within this state;
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (5) Entering into a contract for services to be rendered or for materials to be furnished in this state by such person;
- (6) Acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as personal representative of any estate within this state;
- (7) Failure to support a minor child residing in South Dakota;
- (8) Having sexual intercourse in this state, which act creates a cause of action for the determination of paternity of a child who may have been conceived by that act of intercourse;
- (9) With respect to any action for divorce, separate maintenance, or spousal support the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of an act giving rise to the claim, subject to the provisions of § [25-4-30](#);
- (10) Entering into negotiations with any person within the state with the apparent objective of contracting for services to be rendered or materials to be furnished in this state;
- (11) Commencing or participating in negotiations, mediation, arbitration, or litigation involving subject matter located in whole or in part within the state;
- (12) Doing any act for the purpose of influencing legislation, administrative rule-making or judicial or administrative decision-making by any local, state, or

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federal official whose official function is being performed within the state, providing that an appearance to contest personal jurisdiction shall not be within this subsection;

- (13) The commission of any act which results in the accrual of an action in this state for a violation of the antitrust laws of the United States or chapter [37-1](#);
- (14) The commission of any act, the basis of which is not inconsistent with the Constitution of this state or with the Constitution of the United States.

Source: SL 1965, ch 163, § 2; SL 1978, ch 146, §§ 1, 2; SL 1983, ch 156, § 1; SL 1984, ch 190, § 48; SL 1986, ch 162.

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58-1-2. Definition of terms.

Terms used in this title mean:

- (1) "Alien insurer," one formed under the laws of any country or jurisdiction other than the United States of America, its states, districts, territories, and commonwealths;
- (2) "Authorized insurer," one authorized, by a subsisting certificate of authority issued by the director, to engage in the insurance business in this state;
- (3) "Certificate of authority," permission granted to an insurer to issue policies or make contracts of insurance in this state;
- (4) "Director," the director of the Division of Insurance;
- (5) "Division," the Division of Insurance of the Department of Labor and Regulation;
- (6) "Domestic insurer," one formed under the laws of this state;
- (7) "Foreign insurer," one formed under the laws of any jurisdiction other than this state; except where distinguished by context, foreign insurer includes an alien insurer;
- (8) "Insurance," a contract whereby one undertakes to indemnify another or to pay or provide a specified or determinable amount or benefit upon determinable contingencies;
- (9) "Insurance business," includes the transaction of all matters pertaining to a contract of insurance, both before and after the effectuation of that contract, and all matters arising out of that contract or any claim thereunder;
- (10) "Insurer," every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance;
- (11) "License," permission granted to an agent or broker to engage in those activities permitted by such persons under this title;
- (12) Repealed by SL 2001, ch 263, § 1.
- (13) "Mechanical breakdown insurance," any contract or agreement, issued by an authorized insurer, to perform or indemnify for a specific duration the repair, replacement, or maintenance of property for operational or structural failure due to a defect in materials, workmanship, or normal wear and tear;

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- (14) "Person," an individual, insurer, company, association, organization, Lloyds, society, reciprocal or inter-insurance exchange, partnership, syndicate, business trust, corporation, and any other legal entity;
- (15) "Principal office" or "principal place of business," the office or regional home office from which the business affairs of the insurer are directed and managed;
- (16) "Producer," any person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. The terms also means an insurance agent;
- (17) "State," when used in context signifying a jurisdiction other than the State of South Dakota, a state, the District of Columbia, a territory, commonwealth, or possession of the United States of America, or a province of the Dominion of Canada; and
- (18) "Unauthorized insurer," one which does not hold a subsisting certificate of authority issued by the director to engage in the insurance business in this state.

Source: SL 1966, ch 111, ch 1, § 2; SL 1982, ch 350; SL 1988, ch 387, § 1; SL 2000, ch 233, § 2; SL 2001, ch 263, §§ 1, 2, ch 286, § 56; SL 2003, ch 272 (Ex. Ord. 03-1), § 27; SL 2004, ch 295, § 1; SL 2011, ch 1 (Ex. Ord. [11-1](#)), § 162, eff. Apr. 12, 2011.

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 29691

CATHERINE DAVIS,
Plaintiff and Appellee,

v.

RICHARD OTTEN,
Defendant,

and

MEEMIC INSURANCE COMPANY,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE COMER
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Petition For Intermediate Appeal Filed June 30, 2021. Order
Granting Petition for Appeal, August 6, 2021.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CATHERINE DAVIS,	*	
	*	
Plaintiff and Appellee,	*	
	*	
v.	*	NO. 29691
	*	
RICHARD OTTEN,	*	
	*	
Defendant,	*	
	*	
And	*	
	*	
MEEMIC INSURANCE COMPANY,	*	
	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

In Appellee's brief, Appellee counsel raised an argument not addressed in Appellant's brief: that Appellant and Appellee reached a settlement agreement, thereby making moot the issue of jurisdiction raised by Appellant in its Motion to Dismiss. (Appellee's Brief, page 8). Appellant did not address this topic in its appeal brief because the trial court did not rule on this part of Appellee's argument. Therefore, Appellant now addresses this issue in its Reply Brief.

References to the Transcript will be identified by the letter "T", followed by the page number, References to the transcript of the May 18, 2021 hearing will be identified by the letters "TH", followed by the page number.

I. NO SETTLEMENT AGREEMENT EXISTS BETWEEN APPELLANT AND APPELLEE.

At least three reasons exist why Appellee's mootness argument fails:

A. Appellee failed to present any evidence to the trial court in support of this argument;

B. The trial court never ruled on this argument even though Appellee raised it for the first time in her brief in resistance to the Motion to Dismiss, and arguing it during the hearing on the Motion to Dismiss. Therefore, an issue raised by a party, but not ruled on by the trial court, cannot be addressed by this Court for the first time on appeal; and

C. Even if this Court considered this issue, the only evidence before the trial court and this Court clearly establishes Appellee rejected the offer of settlement by filing suit before purportedly accepting the offer.

- A. Appellee failed to present any evidence to the trial court in support of a settlement agreement.

Appellee argues on pages 8-9 of her brief that the Appellee and Appellant reached a settlement agreement to settle the case for \$75,000.00 (Appellee Brief, page 9). Appellee states that Appellant made an offer of settlement which Appellee accepted, and cites to "Ex. 6" as proof of the acceptance. One problem, though: Appellee never offered, and the trial court never received, any Exhibit 6 during the May 18, 2021 hearing on Appellant's Motion to Dismiss.

On September 1, 2021, the Clerk of the Circuit Court, Fourth Judicial Circuit, Lawrence County, Ms. Carol Latuseck, prepared and certified the Certificate of Transcript for this appeal. In that Certificate, the only exhibits referenced as part of the Transcript are Exhibit 1, Exhibit 2, and Exhibit 3, all offered by the Appellant (T,83, 86, 90). No record exists in the Transcript of an Exhibit 6 being offered by Appellee or received by the trial court. Notably, Appellee did not cite to the Transcript when referencing Exhibit 6 in her brief. (Appellee Brief, page 9).

Further, a review of the actual transcript of the May 18, 2021, hearing prepared by an official court reporter

for the Fourth Judicial Circuit, Sandra Semrad, shows at no time during the hearing did Appellee's counsel make any offer of any exhibit. (See, generally, TH,1-21). To the contrary, the only evidence before the trial court regarding this issue was an exhibit offered by the Appellant, Exhibit 3, a declaration from a Senior Claims Specialist for the Appellant, Mr. Charles J. Billings (T, 90). In Exhibit 3, Mr. Billings states no settlement agreement ever arose between Appellant and Appellee. (T, 90; Ex. 3, offered and received, TH, 3).

Contrary to Appellee's position evidence exists of a settlement agreement, Appellant offered the trial court the only evidence of any purported settlement agreement, and that evidence, Exhibit 3, clearly shows no settlement agreement existed. Regardless, Appellee did not present to the trial court any evidence for its consideration in support of Appellee's mootness argument.

- B. An issue not ruled on by a trial court cannot be addressed by this Court for the first time on appeal.

Despite Appellee arguing to the trial court that a settlement agreement existed (TH, 11), the trial court did not rule on this issue. The Order entered by the trial court denying Appellant's Motion to Dismiss (T, 93), only

states "ORDERED, ADJUDGED AND DECREED that Defendant Meemic's Motion to Dismiss for Want of Personal Jurisdiction is DENIED on May 18, 2021." The Honorable Judge Comer signed the Order on May 24, 2021, but makes absolutely no mention of any ruling on Appellee's argument that a settlement agreement occurred.

The South Dakota Supreme Court's position on such a situation is clear: "We have long held that issues not addressed or ruled upon by the trial court will not be addressed by this Court for the first time on appeal." City of Watertown v. Dakota Minnesota & Eastern R. Co., 551 N.W.2d 571 (S.D.1996); R.B.O. v. Priests of Sacred Heart, 807 N.W.2d 808 (2011 S.D.).

The trial court did not rule upon Appellee's argument that a settlement agreement existed between Appellee and Appellant. Therefore, Appellee cannot raise that issue on appeal before this Court.

- C. Even if this Court considered Appellee's mootness argument, no settlement agreement existed between Appellee and Appellant.

Exhibit 3 offered by Appellant at the hearing on the Motion to Dismiss T, 90; TH, 3) sets forth the time frame and communications between the parties regarding settlement. That exhibit demonstrates that Appellee

rejected Appellant's settlement offer, so no settlement occurred.

In Exhibit 3 (T, 90), Mr. Billings recites the following events and dates of occurrence:

1. On October 9, 2019, Appellee counsel sent Appellant a demand letter asking for the "uninsured policy limits". (T, 90; Ex. 3, ¶ 5).

2. On November 23, 2020, Appellant made a settlement offer of \$75,000.00 by leaving Appellee's counsel a voice mail message. (T, 90; Ex. 3, ¶6).

3. Appellee counsel did not respond to that first voice mail, so Appellant made a second call to him on December 2, 2020, with a voice mail message left repeating the offer. (T, 90; Ex. 3, ¶7)

4. Appellee counsel ignored the second offer of settlement, so a month later, on January 20, 2021, Appellant again called Appellee counsel and spoke with a receptionist. Appellant left a message with the receptionist to have Appellee counsel call Appellant. (T, 90; Ex. 3, ¶8).

5. In the three month period between the November 23, 2020 through February 23, 2021, Appellee counsel did not call, write, or make any communication to Appellant stating that Appellee accepted Appellant's settlement offer

of November 23, 2019. (T, 90; Ex. 3, ¶ 9).

6. On February 23, 2021, with no prior communication to Appellant of her intentions one way or the other, Appellee sued Appellant in the Circuit Court, Fourth Judicial Circuit, Lawrence County, South Dakota. (T,1).

As reflected in the Transcript, Appellant filed its Motion to Dismiss for Want of Jurisdiction on April 9, 2021 (T, 15), along with its Brief in Support of the Motion (T, 17). On May 6, 2021, and only after Appellant filed and briefed the jurisdiction issue did Appellee counsel then purportedly "accept" Appellant's settlement offer, an "acceptance" made over five months after the initial offer. (Ex. 3, ¶12). In that interim, Appellee had no contact with Appellant, other than to file a lawsuit against it on February 23, 2021(T, 90; Ex.3 ¶10, ¶12).

With this timeline and these established facts in mind, Appellant argues that even if this Court had the ability to consider this portion of Appellee's argument, Appellee's mootness argument fails because by filing the lawsuit, Appellee rejected the offer of settlement.

Under South Dakota law, there must be a meeting of the minds or mutual assent on all essential terms in order to form a binding contract. Pawelltzki v. Paweltzki, 964 N.W. 2d 756, 2021 S.D.52. "Mutual assent" refers to a meeting of

the minds on a specific subject and does not exist unless the parties all agree upon the same thing in the same sense." Wright v. Temple, 956 N.W.2d 436, 2021 S.D.15. An offeree's power of acceptance is terminated by a rejection of the offer, unless the offeror has manifested a contrary intention. Restatement (Second) of Contracts, sec 38(1). As stated in the Comments to that Restatement section, "If the offeror is justified in inferring from the words or conduct of the offeree, that the offeree intends not to accept the offer and not to take it under further advisement, the power of acceptance is terminated."

According to South Dakota law, when looking at the question of the existence of a contract, such existence is "judged objectively by the conduct of the parties, not by their subjective intent. The question is not what the party really meant, but what words and actions justified the other party to assume what was meant." Geraets v. Halter, 588 N.W.2d 231, (S.D.1999), citing Crinze v. Kulzer, 498 N.W.2d 55, (Minn. App. 1993).

As stated in Mr. Billings Declaration (T, 90; Ex. 3), on November 23, 2020 Appellant made an offer of settlement. Appellee counsel did not respond to that offer, nor to two follow-up phone calls made by Appellant to Appellee counsel. (T, 90; Ex. 3, ¶ 6-8). Appellee then filed a

lawsuit against Appellant on February 23, 2021 (T,1). At that point in time, three months after the initial offer of settlement, Appellee still had not communicated with Appellant about either accepting or rejecting the offer. Appellant contends that by Appellee then filing the lawsuit on February 23, 2021, Appellee officially rejected the Appellant's offer of settlement. The language from Geraets, *supra*, supports Appellant's justifiable, inferred belief that Appellee rejected the settlement offer. As Mr. Billings stated in his Declaration, "The combination of [Appellee] not responding to the offer in any fashion for four (sic) months, coupled with the fact [Appellee] filed a lawsuit against [Appellant] after [Appellant] made the settlement offers, led [Appellant] to believe [Appellee] formally and unequivocally rejected [Appellant's] settlement offer as of February 23, 2021." (T, 90; Ex. 3, ¶12).

Even after filing the lawsuit (which, by the way, did not include a cause of action based on specific performance to enforce a settlement agreement), Appellee did not attempt any contact with Appellant to discuss settlement until purportedly "accepting" the offer on May 6, 2021. (T, 90; Ex.3, ¶12). Such actions certainly demonstrated objective conduct by the Appellee that she rejected the

Appellant's settlement offer. Her words and actions justified Appellant's inference as to what she meant by filing the lawsuit: rejection of the offer. Geraets, *supra*. Accordingly, Appellant refused to treat Appellee's purported "acceptance" letter of May 6, 2021, as anything other than an attempt to settle a case after Appellee realized she faced a negative set of facts, both jurisdictionally (Appellant's Motion to Dismiss) and contractually. (See: T, 86; Ex. 2, Appellant's Letter to Appellee dated July 24, 2020, citing policy language exclusions.)

CONCLUSION

This Court should refuse consideration of Appellee's argument concerning mootness of this Appeal because: 1. Appellee did not preserve this argument for appeal; 2. this Court cannot consider an argument not ruled on by the trial court; and 3. the facts presented by Appellant demonstrate Appellee rejected Appellant's settlement offer.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests it be granted twenty (20) minutes to present oral argument on this appeal.

Dated: March 3, 2022

/s/ Earl G. Greene, III
Susan B. Meyer (#3420)
Earl G. Greene, III (#5326)
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Attorneys for Appellant
Meemic Insurance Company

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SD Codified §15-26A-66 using Courier New typeface in 12 point type. Appellant's Reply Brief contains 1,832 words.

2. I certify the word processing software used to prepare this brief is Microsoft Word 2010.

Dated: March 3, 2022

/s/ _Earl G. Greene, III._
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Insurance Company

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CATHERINE DAVIS,	*	
	*	
Plaintiff and Appellee,	*	
	*	
v.	*	NO. 29691
	*	
RICHARD OTTEN,	*	
	*	
Defendant,	*	
	*	
And	*	
	*	
MEEMIC INSURANCE COMPANY,	*	
	*	
Defendant and Appellant.	*	

It is hereby certified that a true and correct copy of Meemic Insurance Company's **Appellant's Reply Brief** has been e-filed with the Clerk of Court and served upon all parties via E-Mail as properly addressed below this 3rd day of March, 2022:

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