IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30732

DAVID H. EARLL and MARCIA R. EARLL, individually and as co-personal representatives of the ESTATE OF REBECCA A. EARLL,

Plaintiffs and Appellants,

VS.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA,

Defendant and Appellee.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL R. RASMUSSEN
CIRCUIT COURT JUDGE

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page numbers. This includes any citations to the transcript of the June 3, 2024 hearing on the competing motions for summary judgment that is paginated within the settled record. Citations to the Appendix are designated as "App." and the page number.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under SDCL 15-26A-3(1), (2) and/or (4).

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. THE "OWNED BUT NOT INSURED" EXCLUSION PURPORTS TO NEGATE MANDATORY UNDERINSURED MOTORIST COVERAGE BASED ON THE LOCATION OF THE INSURED WHEN SHE IS INJURED. DOES THIS EXCLUSION VIOLATE SOUTH DAKOTA PUBLIC POLICY?

Citing the *Pourier* decision, the circuit court held it does not.

- *Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, 694 N.W.2d 238
- *DeSMet Ins. Co. of South Dakota v. Pourier*, 2011 S.D. 47, 802 N.W.2d 447
- *Wheeler v. Farmers Mutual Ins. Co. of Nebraska*, 2012 S.D. 83, 824 N.W.2d 102
- *Streff v. State Farm Mut. Auto. Ins. Co.*, 2017 S.D. 83, 905 N.W.2d 319

II. DOES THE FARMERS MUTUAL POLICY SOLD TO THE EARLLS PROVIDE AVAILABLE UNDERINSURED MOTORIST COVERAGE UP TO ITS $250,000 LIMITS FOR UNCOMPENSATED DAMAGES ARISING OUT OF THE ACCIDENT THAT KILLED THEIR DAUGHTER?

As a result of the "owned but not insured" exclusion, the circuit court held it does not.

- SDCL 58-11-9.4
- SDCL 58-11-9.5
- *Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, 694 N.W.2d 238
- *MGA Ins. Co., Inc. v. Goodsell*, 2005 S.D. 118, 707 N.W.2d 483

STATEMENT OF THE CASE

Following denial of underinsured motorist (UIM) coverage under their motor vehicle liability policy issued by Farmers Mutual Insurance Company of Nebraska ("Farmers Mutual"), David and Marcia Earll brought this declaratory judgment action seeking UIM benefits arising out of the December 31, 2022 accident that killed their daughter, Rebecca. (R. 2).

The Earlls contended that the "owned but not insured" exclusion violates South Dakota public policy and is not enforceable to deny their UIM claim. Farmers Mutual contended that the exclusion does not violate South Dakota public policy and may be enforced to deny the UIM claim. (R. 2-3).

The parties entered into a stipulation of the undisputed facts. (R. 37). In agreement that the material facts were undisputed, the parties then brought competing motions for summary judgment. (R. 76, 79).

In presenting their arguments in written briefing to the lower court, the Earlls respectfully suggested that the decision in *DeSMet Ins. Co. of South Dakota v. Pourier*, 2011 S.D. 47, 802 N.W.2d 447, should be overruled or, in the alternative, distinguished from the circumstances of their case, which also implicates later decisions, such as *Streff v. State Farm Mut. Auto. Ins. Co.*, 2017 S.D. 83, 905 N.W.2d 319. (R. 124).

A hearing on the competing summary judgment motions was held before the Honorable Rachel R. Rasmussen at the Lincoln County Courthouse on June 3, 2024. (R. 172).

On June 11, 2024, the circuit court entered its final order denying the Earlls' summary judgment motion and granting the summary judgment motion filed by Farmers Mutual. (R. 172; App. 1). The circuit court's decision respectfully applied this Court's controlling decision in *Pourier*.

This appeal followed.

STATEMENT OF THE FACTS

The Earlls

David and Marcia Earll live in Canton, South Dakota. (R. 37). They are the natural parents of their deceased daughter, Rebecca Earll. (R. 37). On January 31, 2023, the Earlls were issued Letters of Personal Representative by the Lincoln County Clerk of Courts to serve as Co-Personal Representatives of the Estate of Rebecca A. Earll. (R. 37, 42).

The Farmers Mutual policy

Farmers Mutual Insurance Company of Nebraska ("Farmers Mutual") is an insurer duly authorized and licensed to do business in the State of South Dakota. (R. 37). Farmers Mutual is the liability insurer of Policy No. AU338388, issued to the Earlls, that provided underinsured motorist (UIM) benefits. (R. 38, 43). The Earlls' policy with Farmers Mutual was in force from November 15, 2022 through May 15, 2023. (R. 38).

The collision that killed Rebecca

On or about December 31, 2022, in Lincoln County, South Dakota, Rebecca was killed as the result of a motor vehicle collision. (R. 38). At the

time she was struck and killed by another vehicle, Rebecca was occupying her own 2012 Subaru Forester. (R. 105, 115). The at-fault and negligent driver who caused the collision was William Pigg, who was intoxicated and fleeing from the police in his 2007 Saturn SUV. (R. 38, 110, 113).

Pigg ran a stop sign while traveling at a speed of 97 miles per hour and crashed into the car being driven by Rebecca, who had the right of way. (R. 38, 117). Rebecca was not at fault for the accident. (R. 38). The collision and the resulting death of Rebecca were proximately caused by the negligence of Pigg, an underinsured motorist under South Dakota law. (R. 38).

Pigg was an underinsured driver

Pigg had an automobile liability policy with Progressive Insurance with limits of $25,000. (R. 38). Progressive tendered the $25,000 limits to the Estate of Rebecca Earll. (R. 38). Farmers Mutual gave its permission to settle that claim without jeopardizing the UIM claims. (R. 38). The Estate also recovered $75,000 in UIM benefits under Rebecca's own motor vehicle liability policy with Farmers Mutual, a different policy from the one at issue in this action. (R. 39).

Rebecca was an insured under Farmers Mutual Policy Number AU338388

Rebecca lived with her parents at the time of the collision and her resulting death. (R. 39). There is no dispute that she qualifies as an insured under the UIM coverage provided by policy number AU338388 purchased by her parents. The UIM coverage provisions define an "insured" to include a

"relative." (R. 39, 54-55 - Section V, Coverage K at Page 10-11 of 14). Under the policy definitions, further, "relative" is defined as "a person related to you or your spouse by blood . . . who lives with you." (R. 39, 47 - Page 3 of 14). As part of the policy issued to the Earlls, they paid a separate premium to purchase UIM motorist coverage for themselves as well as any relatives with whom they lived. (R. 39).

The "owned but not insured" exclusion

As co-personal representatives of their daughter's estate, as well as individually as her wrongful death beneficiaries under South Dakota law, the Earlls sought UIM benefits under their Farmers Mutual policy number AU338388. Farmers Mutual denied coverage on the basis of an exclusion in the policy called an "owned but not insured" exclusion. (R. 39, 106-07). The "owned but not insured" exclusion at issue provides as follows:

> **EXCLUSIONS FOR UNDERINSURED MOTOR VEHICLE COVERAGE**
>
> There is no coverage for: . . .
>
> 2. **bodily injury** to any **insured** while **occupying**, or through being struck by, a motor vehicle or trailer of any type owned by **you**, **your spouse**, or a **relative** if it is not insured for this coverage under this policy.

(R. 39-40, 55 - Page 11 of 14). Under its plain language, this exclusion withdraws otherwise mandatory UIM coverage for injuries to an insured based solely on: (1) her *location* when she happens to be injured – "while

occupying" a category of vehicles; or (2) based on the *vehicle* that happens to injure her – "through being struck by . . ." ((R. 39-40, 55 - Page 11 of 14).

Following denial of coverage, the Earlls filed this declaratory judgment action seeking underinsured motorist benefits arising out of the December 31, 2022 accident under their Farmers Mutual policy (policy number AU338388). (R. 40). The Earlls contend the "owned but not insured" exclusion violates South Dakota public policy and is not enforceable to deny the UIM claim. (R. 40). Farmers Mutual contends the exclusion does not violate South Dakota public policy and may be enforced to deny the UIM claim. (R. 40).

STANDARD OF REVIEW

This Court reviews a circuit court's entry of summary judgment de novo. *See Bohn v. Bueno*, 2024 S.D. 6, ¶ 12, 3 N.W.3d 441, 448; *State Farm Mut. Auto. Ins. Co. v. Grunewaldt*, 2023 S.D. 61, ¶ 7, 998 N.W.2d 361, 364. Interpretation of statutes and their application to insurance policies present legal questions reviewed de novo. *See Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, ¶ 7, 694 N.W.2d 238, 241; *Streff v. State Farm Mut. Auto. Ins. Co.*, 2017 S.D. 83, ¶ 9, 905 N.W.2d 319, 322 & n. 3. "Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments related to the same subject." *Id.* (citation omitted). Questions regarding insurance coverage are especially suitable for resolution under the Declaratory Judgment Act. SDCL §§ 21-34-3, -14; *see also North Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 911-12 (S.D. 1992).

INTRODUCTION

Plaintiffs David and Marcia Earll, parents of their late daughter Rebecca Earll, respectfully seek a declaration that they are entitled to recover up to the $250,000 limits of their underinsured motorist (UIM) coverage for the automobile crash that killed Rebecca under policy number AU338388 issued to them by Defendant Farmers Mutual Insurance Company of Nebraska ("Farmers Mutual"). When she was killed in the motor vehicle accident, Rebecca was occupying her Subaru Forester, a vehicle not listed in the declarations of her parents' policy.

Declaratory judgment is necessary because, even though it is undisputed that Rebecca is an insured under the policy in question because she lived in her parents' household, Farmers Mutual denied UIM coverage to the Earlls for the uncompensated damages resulting from her death on the basis of an "owned but not insured" exclusion in the policy. As explained in a leading treatise:

> As a counterpoint to regular use exclusions applicable to automobile liability coverage, standard uninsured motorist and uninsured motorist coverage contain a similar exclusion that precludes coverage where the insured is occupying an owned but uninsured vehicle at the time of the accident. Initially, this exclusion was upheld. A minority of courts continue to uphold the exclusion. *However, the majority view has found that similar exclusions violate the public policy underlying their respective state uninsured motorist statutes.*

Plitt, *Practical Tools for Handling Insurance Cases* § 11:22 (Nov. 2022 update) (emphasis supplied). The Earlls seek a declaration that the "owned

but not insured" exclusion, which this Court has unanimously held violates public policy in the uninsured motorist (UM) context, similarly violates public policy in the underinsured motorist (UIM) context, a view thus far rejected by a majority of this Court.

ARGUMENT

I. THE "OWNED BUT NOT INSURED" EXCLUSION VIOLATES SOUTH DAKOTA PUBLIC POLICY FOR BOTH UNINSURED MOTORIST (UM) AND UNDERINSURED MOTORIST (UIM) BENEFITS.

A. UM and UIM Coverage under South Dakota law.

1. UIM coverage is mandatory.

"In South Dakota, automobile insurance providers must provide underinsured motorist coverage in their policies." *Gloe*, 2005 S.D. 29, ¶ 8, 694 N.W.2d at 241 (quoting *Nelson v. Farmers Mut. Ins. of Nebraska*, 2004 SD. 86, ¶ 8, 684 N.W.2d 74, 77). This mandate is enforced by statute.

South Dakota's *uninsured* motorist (UM) statute was originally enacted in 1966 as part of the modern Insurance Code. *See Leuning v. Dornberger*, 250 N.W.2d 675, 677 (S.D. 1977). The current version of the UM statute provides, in part:

> No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle may be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, except for snowmobiles, unless coverage is provided therein or supplemental thereto in limits for bodily injury or death equal to the coverage provided by such policy for bodily injury and death, for the protection of persons insured

> thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.
>
> However, the coverage required by this section may not exceed the limits of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident, *unless additional coverage is requested by the insured*. . . .

SDCL 58-11-9 (emphasis supplied). South Dakota's *underinsured* motorist (UIM) statutes similarly provide:

> No motor vehicle liability policy of insurance may be issued or delivered in this state with respect to any motor vehicle registered or principally garaged in this state, except for snowmobiles, unless underinsured motorist coverage is provided therein at a face amount equal to the bodily injury limits of the policy.
>
> However, the coverage required by this section may not exceed the limits of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident, *unless additional coverage is requested by the insured*. . . .

SDCL 58-11-9.4 (emphasis supplied).[1]

> *Subject to the terms and conditions of such underinsured motorist coverage*, the insurance company agrees to pay *its own insured* for uncompensated damages *as its insured may recover* on account of bodily injury or death arising out of an automobile

[1] When enacted in 1975, SDCL 58-11-9.4 required only that UIM coverage be offered or "made available" with a motor vehicle liability policy. In 1986, the Legislature strengthened the mandate to require that UIM coverage be "provided" in every motor vehicle liability policy.

> accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon.
>
> Coverage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.

SDCL 58-11-9.5 (emphasis supplied). By operation of law, these statutes are part of the contract between the Earlls and Farmers Mutual. *See Kremer v. American Family Mut. Ins. Co.*, 501 N.W.2d 765, 768-69 (S.D. 1993).

2. The purpose of mandatory UIM coverage is to protect and fully compensate insureds with uncompensated damages resulting from the negligence of underinsured motorists.

South Dakota law establishes a public policy "strongly 'favoring monetary protection and compensation for the benefit of those injured through the negligent operation of a household vehicle.'" *MGA Ins. Co., Inc. v. Goodsell*, 2005 S.D. 118, ¶ 10, 707 N.W.2d 483, 485 (citation omitted). Specifically, "[u]nderinsured motorist coverage is intended to protect injured insureds who are legally entitled to recover damages." *De Smet Ins. Co. of South Dakota v. Pourier*, 2011 S.D. 47, ¶ 8, 802 N.W.2d 447, 450; *see also Gloe*, 2005 S.D. 30, ¶ 12, 694 N.W.2d at 257 (holding that UIM statutes enforce our public policy "to provide protection to insured motorists against underinsured motorists"). This Court has instructed that provisions of the UM/UIM statutes "are construed liberally in favor of coverage." *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 755 (S.D. 1994).

3. Mandatory UIM coverage is portable and follows the insured, not any specific vehicle.

South Dakota law requires motor vehicle liability policies to issue UIM coverage that follows the insureds under the policy, not the vehicle. *See Pourier*, 2011 S.D. 47, ¶ 6, 802 N.W.2d at 449; 7 *Blashfield Automobile Law and Practice* § 316:29 (Aug. 2023 update) ("Uninsured and underinsured motorist coverage is considered to be personal to the insured and not dependent on the vehicle the insured was using when he or she was injured"). Indeed, an insured need not even be in a vehicle to be protected by UIM coverage. *See Streff*, 2017 S.D. 83, ¶ 5, 905 N.W.2d at 321. As explained in one treatise:

> Under this undiluted form of insuring agreement it is a truism that coverage is operable whether the insured was in an automobile, afoot or on horseback, or occupying the rocking chair on his front porch at the time the accident occurred.

Schermer, 2 *Automobile Liability Insurance* 4th § 25:8 (Oct. 2023 update).

The Earlls respectfully suggest that a motor vehicle liability insurer therefore violates South Dakota public policy when it excludes UIM coverage for its insureds simply because they are occupying or struck by specific categories of vehicles when they are injured or killed. Such exclusions abrogate statutorily mandated coverage that is personal to each insured. They are not acceptable "terms and conditions" placed on UIM coverage, but rather devices sought to be utilized by insurers to entirely negate statutory UM/UIM coverage in contravention of public policy.

B. This Court should hold that the "owned but not insured" exclusion is not enforceable to deny UIM coverage in this case and, in any event, violates South Dakota public policy as expressed in the UIM statutes.

This Court has grappled in recent years with the scope of the Legislature's mandate when it enacted laws requiring that both UM and UIM coverage be provided with every motor vehicle policy sold in the State of South Dakota. *See Wheeler v. Farmers Mutual Ins. Co. of Nebraska*, 2012 S.D. 83, ¶¶ 32-35, 824 N.W.2d 102, 110-12 (Zinter, J., concurring specially).

1. The Gloe decision

In *Gloe v. Union Ins. Co.*, 2005 S.D. 29, 694 N.W.2d 238, an insured under an auto policy sought a declaratory judgment that he was entitled to UIM benefits for the wrongful deaths of his parents, even though they did not reside in his household. The legal question was whether an exclusion limiting UIM coverage to bodily injury suffered by an insured under the policy was enforceable under South Dakota public policy. This Court held that the exclusion was enforceable because neither of the persons who sustained bodily injuries that raised the claim for UIM coverage was an "insured" under the policy.

First, this Court observed that "[e]ven though the UM and UIM statutes were passed nine years apart, we do not believe the slight difference in [the] language of the statutes suggests that the Legislature had different purposes and goals in enacting each provision." *Gloe*, 2005 S.D. 29, ¶ 11, 694 N.W.2d at 242 n.7. As a result, the UM/UIM statutes should be construed

together and case law considering that coverage applied interchangeably. *See id.*, 2005 S.D. 29, ¶ 11, 694 N.W.2d at 242.

The insurer argued that the limitation in the policy to bodily injury suffered by an insured under the policy was authorized on the basis of the "subject to the terms and conditions" language appearing in SDCL 58-11-9.5. Although this Court ultimately upheld the exclusion, it squarely rejected that specific argument:

> However, the "subject to the terms and conditions" language of SDCL 58–11–9.5 was not intended to permit any restriction an insurer may wish to create.
>
> It was only intended to allow limitations on coverage to the extent that they do not violate the public policy expressed in the statutes. We have specifically stated that "the conditions and limitations imposed by the insurance company must be consistent with public policy...."
>
> On the other hand, "[p]olicy language ... is not *automatically* void as against public policy simply because it narrows the circumstances under which coverage applies."
>
> This Court has concluded that some restrictions violate public policy and some do not.
>
> Therefore, the "subject to" language does not automatically resolve this matter, and we must return to the ultimate question whether the Iowa Mutual language is prohibited by the public policy of this state.

Gloe, 2005 S.D. 29, ¶ 16, 694 N.W.2d at 244. This Court then reiterated the public policy underlying South Dakota's UM/UIM statutes:

> Most significant to this appeal, our cases have noted that the purpose of UM/UIM coverage is to protect the *insured* party *who is injured* in an automobile accident by the negligence of an uninsured/underinsured motorist:

> The purpose of uninsured [and therefore underinsured] motorist statutes is to provide the same insurance protection to the *insured party* who is *injured by* an Uninsured [or Underinsured] or unknown *motorist* that *would have been available to him had he* been *injured* as a result of the *negligence of a motorist* covered by the minimum amount of liability insurance.

Gloe, 2005 S.D. 29, ¶ 17, 694 N.W.2d at 245 (quoting *Clark v. Regent Ins. Co.*, 270 N.W.2d 26, 29 (S.D.1978)) (emphasis supplied).

As this Court held, "we believe that the Legislature intended to mandate coverage for the protection of the *insured* for the *insured's bodily injuries or death* caused by the negligence of an uninsured/underinsured motorist." *Id.* Specifically, under the UM-UIM statutes, "wrongful death claims are covered if the person killed is an insured." *Gloe*, 2005 S.D. 29, ¶ 21, 694 N.W.2d at 246.

Because the bodily injuries giving rise to the claims in *Gloe* were not suffered by insureds, the exclusion was valid under South Dakota law since there was no connection between the injured persons and the policy in question: "Because we reiterate that the purpose of these statutes is to protect the *insured* party *who is injured in an accident*, we agree with the reasoning of the clear majority of courts that have found no mandated UM or UIM coverage for the wrongful death of *one not insured* under the claimant's policy." *Gloe*, 2005 S.D. 29, ¶ 27, 694 N.W.2d at 249 (emphasis supplied).

Thus, the crucial point in *Gloe* was that the pedestrians killed by an underinsured driver in the accident for which coverage was sought were not

"insureds" under the policy. Rather, they were parents of the policyholder who did *not* reside with him. *See id.* at ¶ 10, 694 N.W.2d at 242. In the present case, of course, it is stipulated that the bodily injury giving rise to the claim *was* suffered by an insured under the Farmers Mutual policy: the Earlls' daughter, Rebecca, who *did* live with them at the time of the accident.

2. The Pourier decision

Six years later, in *De Smet Ins. Co. of S.D. v. Pourier*, 2011 S.D. 47, 802 N.W.2d 447, this Court held, in a 3 to 2 decision, that an "owned but not insured" exclusion in an underinsured motorist (UIM) policy did not violate public policy and was enforceable. First, the majority decision acknowledged that UIM coverage "is generally portable: it follows the insured rather than the vehicle." *Id.*, 2011 S.D. 47, ¶ 6, 802 N.W.2d at 449. The decision then stated: "We have never ruled on the validity of an owned-but-not-insured provision. Many courts from other jurisdictions have, however, and the majority of those courts have found the exclusion valid and enforceable."[2]

In *Pourier*, 2011 S.D. 47, ¶ 8, 802 N.W.2d at 450, the majority decision upheld the exclusion because the insured was occupying a vehicle that was not declared in the insurance policy. As this Court stated:

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[2] *Id.* at ¶ 7. Even if accurate at one time, this statement is no longer viable. *See* Schermer, 2 *Automobile Liability Insurance* 4th, § 25:8 & n.27 (explaining that courts approving the exclusion constitute a "waning minority" and "at least 25 state courts have declared the exclusion offensive to both the language and the intent of the legislation") (collecting cases).

> Of course, we agree with the dissent that the "subject to the terms and conditions language" does not mean that an insurer has unfettered authority to create restrictions against coverage.
>
> Concededly, we have stated that generally, the purpose of UM/UIM coverage is to protect the insured party injured by the negligence of an uninsured/underinsured motorist. *Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, ¶ 17, 694 N.W.2d 238, 245.
>
> But the public policy expressed in SDCL 58–11–9.5 is not violated by owned-but-not-insured clauses because the statute contemplates that mandated UIM coverage is limited to the *coverage* purchased for the *insured vehicle*. Although the statute requires the insurance companies to provide UIM insurance, it specifically limits coverage "to the underinsured motorist's *coverage limits on the vehicle* of the party recovering...."[3]
>
> In this case, there were no coverage limits on the vehicle of the party seeking to recover because no coverage of any kind was purchased. Therefore, the language of SDCL 58–11–9.5 itself reflects that owned-but-not-insured clauses do not violate the public policy expressed in the statute.

Id. at n.4 (emphasis in original).

The *Pourier* majority's rationale in this regard was both incomplete and incorrect, at least in the context of a wrongful death claim resulting from the death of an insured caused by an underinsured driver. First, SDCL 58-11-9.4 requires every automobile liability policy sold in the state to provide UIM coverage "at a face amount equal to the bodily injury limits of the policy" without any statutory exception based on the vehicle in which the insured

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[3] SDCL 58-11-9.5 is misquoted here. The statute does not say that coverage is limited to the "underinsured *motorist's* coverage limits on the vehicle of the party recovering," but rather that coverage is limited to the underinsured *motorist* coverage limits on vehicle of the party recovering." SDCL 58-11-9.5.

happens to be, or whether the insured is occupying any vehicle at all, as in the case of an insured pedestrian.

And second, SDCL 58-11-9.5 provides that the insurer "agrees to pay *its own insured* for uncompensated damages *as its insured may recover* on account of bodily injury or death arising out of an automobile accident" against the owner of an underinsured vehicle. It then states that "[c]overage shall be limited to the underinsured motorist coverage limits on the vehicle of *the party recovering*" less amounts already paid. Within the context of a wrongful death claim, "the party recovering" is the wrongful death beneficiary (or beneficiaries), in this case David and Marcia Earll, who (like Rebecca) are insureds under the policy they purchased. *See Nelson*, 2004 S.D. 86, ¶ 8, 684 N.W.2d at 77 (holding that insured whose two parents were killed by underinsured motorist had two claims for damages each subject to the $100,000 UIM limit).

As a result, the Earlls, as "the part[ies] recovering" on the UIM claim under SDCL 58-11-9.5, have UIM coverage mandated by statute for the bodily injury suffered by their daughter, an insured under the policy, up to the UIM limit of their vehicles insured by Farmers Mutual, which is $250,000. (R. 38, 44 - Page 2 of Declarations).

The *Pourier* majority also sought to justify the "owned-but-not-insured" exclusion issued in contravention of the statutory UIM mandate "as a way to prevent insureds from purchasing insurance for one car only, and then

attempting to apply the underinsured coverage from that insured vehicle to an accident occurring in an uninsured vehicle or from a vehicle insured by a different company." *Pourier*, 2011 S.D. 47, ¶ 7, 802 N.W.2d at 449. In other words, as the majority explained, "[t]o mandate that Pourier recover underinsured motorist benefits from De Smet would allow her (or her parent) to *increase the underinsured coverage on a vehicle* not insured by De Smet without purchasing additional underinsured coverage." *Id.* at ¶ 12, 451-52 (emphasis supplied).

Once again, respectfully, that statement is just not correct. UIM coverage provides coverage to an insured *person*, wherever she is, even if she is a pedestrian walking down the street. It does not provide *any* "coverage on a vehicle." Rather, UIM establishes coverage for insured individuals that is required by law to be provided *with* motor vehicle liability policies not *for* or "on" specific cars, and thus as a matter of law cannot "increase the underinsured coverage on a vehicle[.]" *Id.*

Even so, most courts examining the so-called "free rider" rationale for allowing this exclusion have rejected the theory as too attenuated and hypothetical to justify contravening a statutory mandate for UIM coverage. *See* Schermer, 2 *Automobile Liability Insurance* 4th, § 25:8 (explaining that "even if a legitimate business purpose justifying the use of the exclusion can be recognized, it does not have public policy dimensions" and that "the

exclusion has little or no relationship to the premium charged for insurance").

As explained by one court:

> The rate is a flat one, and coverage is available to everyone at the same rate. The rate is not related to risk. ... [T]he importance or value of the imputed business purpose for this exclusion seems tenuous as applied to the purchaser who owns more than one vehicle.
>
> Acquisition of insurance for a second vehicle, especially with premiums that are not risk-related is relatively inexpensive; therefore, permitting the insured to withhold coverage for the small return seems of dubious merit.

Jacobson v. Implement Dealers Mutual Ins. Co., 640 P.2d 908, 911-12 (Mont. 1982).

As can be seen on page two of the Declarations to the Earlls' policy, Farmers Mutual charges $11.00 per year, or about the cost of a sandwich, for UIM coverage of $250,000 per person and $500,000 per occurrence. (R. 38, 44 - Page 2 of Declarations). Allowing an insurer to unilaterally withdraw UIM coverage mandated by the South Dakota Legislature for uncompensated bodily injuries suffered by an insured based on an unsubstantiated theory that an insured might seek to avoid paying eleven dollars by declining purchase insurance—required by law—on another vehicle negates South Dakota public policy as expressed by the UIM statutes.

If statutes expressly designed and enacted to protect the public from underinsured motorists are to be permitted to be entirely nullified based on speculation about such tiny sums, that nullification must be enacted by the Legislature, not inserted into policies by insurance companies.

And of course, there is zero evidence or indication in the present case that the Earlls were somehow trying to shave eleven dollars off their insurance premium. David and Marcia Earll did not own the 2012 Subaru Forester that their daughter, an insured under their policy, was occupying at the time she was killed. Rebecca owned it. (R. 115, 105). Faulting the Earlls for not insuring a particular vehicle they did not own is hardly a valid justification for invalidating the coverage mandated by the UIM statutes that is supposed to apply equally to Rebecca, an insured under the Earlls' policy, no matter where she is when injured (or killed) by an underinsured driver.

3. The Pourier dissent

Justice Meierhenry, joined by Justice Severson, authored a persuasive dissent from the *Poirier* decision, holding that UIM coverage mandated by the Legislature "should attach under this statute because Pourier was the insurer's 'own insured' who had 'uncompensated damages.'" *Pourier*, 2011 S.D. 47, ¶ 16, 802 N.W.2d at 452-53 (Meierhenry, J., dissenting). As Justice Meierhenry further explained:

> ... De Smet focuses on the first clause of SDCL 58–11–9.5, which it claims provides the ability not only to limit but also to nullify the Legislature's main requirement to pay its insured for uncompensated damages. I disagree.
>
> The language "[s]ubject to the terms and conditions of such underinsured motorist coverage" should not be used to deny coverage to an insured because the vehicle she was in was not insured by De Smet.
>
> This is a point that we have already recognized in *Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, ¶ 16, 694 N.W.2d 238, 244, wherein

> we stated that the "'subject to the terms and conditions' language of SDCL 58–11–9.5 [is] not intended to permit any restriction an insurer may wish to create" and that any "conditions and limitations imposed by the insurance company must be consistent with public policy."
>
> Therefore, I would conclude that the Legislature did not intend to allow De Smet to avoid paying its own insured in such a restrictive manner.
>
> Pourier's father paid premiums to cover her in the event she was injured by an underinsured driver. That is exactly what happened here. Underinsured coverage is intended to protect the insured.
>
> Further, there is no indication that De Smet's insurance obligation is actuarially impacted simply because Pourier was driving a vehicle owned and insured by her mother. Pourier could have been a passenger in a friend's car, in which case De Smet would have had to provide underinsured coverage.
>
> Furthermore, De Smet's attempt to avoid coverage based on the premise that its exclusion is reasonable to avoid extending coverage to other non-insured vehicles has no application here. Pourier was not attempting to insure one vehicle to get coverage on another.
>
> Rather, Pourier was in the common position of having divorced parents who both listed her as an insured driver. This situation should not be contorted to prevent coverage. I would hold that De Smet's insurance policy's exclusion violates SDCL 58–11–9.5 and is void as against public policy.

Id. at ¶¶ 17-18 (cleaned up). It would not be long before at least a partial retreat from the sharply divided *Pourier* decision would begin.

4. The Wheeler decision

One year later, in *Wheeler v. Farmers Mutual Ins. Co. of Nebraska*, 2012 S.D. 83, 824 N.W.2d 102, this Court held in a unanimous decision that an "owned but not insured" exclusion in an uninsured (UM) policy violated

South Dakota public policy and was not enforceable. First, this Court announced that its holding that UM and UIM case law should be used interchangeably was limited to the circumstances in *Gloe*. *See Wheeler*, 2012 S.D. 83, ¶¶ 17-19, 824 N.W.2d at 107-08.

This Court then distinguished the case from the *Pourier* decision based on the slightly different language of the UM statute and one of the two UIM statutes. It held that while SDCL 58-11-9.5 expressly allowed UIM coverage to be issued "subject to the terms and conditions" in the policy—which it construed as authorizing the exclusion negating coverage—the UM statute contained no such language. "Thus, although SDCL 58–11–9.5 expressly allows an insurer to limit coverage, SDCL 58–11–9 does not." *Wheeler*, 2012 S.D. 83, ¶ 22, 824 N.W.2d at 109.

5. Justice Zinter's Wheeler concurrence

Justice Zinter appended a perceptive concurrence to *Wheeler*, identifying the elephant in the analytical room, and asking the critical question:

> Today we point out that uninsured and underinsured motorist coverage statutes are generally similar and appear to have similar purposes.
>
> Yet, there are subtle differences. Because of one such difference, we conclude that insurers may not exclude "owned-but-not-insured" autos from the mandated uninsured motorist coverage, but they may exclude such autos from the mandated underinsured motorist coverage.
>
> *Is this really what the Legislature intended?*

Id. at ¶ 31 (Zinter, J., dissenting) (citation omitted) (emphasis supplied). As Justice Zinter recognized, the strained and asymmetrical dichotomy created by *Pourier* and *Wheeler* does not align with the rest of South Dakota jurisprudence involving the UM/UIM statutes:

> But court rules of interpretation are not infallible, and they may lead to what some may conclude is an inconsistent result.
>
> For example, applying the reasoning we utilize today, one would expect that other exclusions and limitations in uninsured motorist policies would not be permitted under the uninsured motorist coverage statute.
>
> They would not be permitted because the uninsured motorist coverage statute has no language providing that coverage may be subject to the terms and conditions of the policy.
>
> But that is not always the case. . . .
>
> Thus, South Dakota's statutes and cases permit inconsistencies between mandated uninsured and underinsured motorist coverage as well as inconsistencies within each type of coverage.

Id. at ¶¶ 33-34 (collecting cases). The Earlls respectfully suggest that the solution is to correct the mistakes made in the outlier *Pourier* majority decision to align with the otherwise unbroken chain of logic reflected in *Gloe*, *Wheeler*, and *Streff*.

6. Judge Salter's decision in Streff

In 2015, three years after *Wheeler*, Jody Streff, who was an insured under a State Farm auto policy, made a claim for UIM benefits for uncompensated damages she suffered as the result of an underinsured police car negligently causing an accident that caused her to be struck by a second

car while she was crossing the street as a pedestrian. State Farm denied UIM coverage on the basis of an exclusion it had written into the policy for injuries caused by government-owned vehicles.

Just like the Earlls in this case, Streff brought an action asking the circuit court to declare that the exclusion violated South Dakota public policy mandated by the UIM statutes. Just like Farmers Mutual in this case, State Farm asked the court to hold that the exclusion was authorized by the "terms and conditions" language in SDCL 58-11-9.5.

Judge Salter, then the circuit court judge in Minnehaha County to whom the case was assigned, swiftly rejected State Farm's argument. In his memorandum decision, Judge Salter first held that "[b]oth the statutory requirement for mandatory coverage and the overarching aim of providing coverage to insureds who are injured by underinsured motorists support a broad public policy which favors allowing insureds the opportunity to seek recovery from their underinsured carrier." (R. 94; App. 7). As Judge Salter further recognized, "State Farm's 'terms and conditions' argument, however, does little more than beg the public policy question because our Supreme Court has held that the 'terms and conditions' provision cannot apply if it is contrary to public policy[.]" (R. 95; App. 8, citing *Gloe*, 2005 SD 29, ¶ 16, 694 N.W.2d at 244).

Judge Salter then held that the exclusion must be invalidated as violating South Dakota public policy because, rather than placing certain

terms and conditions on coverage, it categorically excluded an entire class of vehicles:

> Therefore, this court determines that the public policy of South Dakota does not permit State Farm to categorically exclude government-owned vehicles from its definition of Underinsured Motor Vehicles in the automobile policy.
>
> By doing so, State Farm has done more than simply narrow coverage according to certain "terms and conditions."
>
> It has, instead, effectively failed to comply with SDCL § 58-11-9.4 by not providing the Streffs with the underinsured motorist coverage the statute unquestionably requires.

(R. 97; App. 10). State Farm did not appeal from that exceedingly sound holding and instead simply issued a check to the Streffs for the limits of their UIM coverage in their auto liability policy. *See Streff*, 2017 S.D. 83, ¶ 8, 905 N.W.2d at 322.

Judge Salter's decision further held that the government-owned vehicle exclusion *could* be enforced with regard to the UIM coverage in the Streff's umbrella policy. (R. 101-03; App. 14-16). It was that separate holding which was appealed by the Streffs to this Court.

7. The Streff decision

In *Streff v. State Farm Mut. Auto. Ins. Co.*, 2017 S.D. 83, 905 N.W.2d 319, this Court held that the "government-owned vehicle" exclusion violated South Dakota public policy and was unenforceable to deny UIM benefits in both the underlying liability policy and umbrella policy issued by State Farm. As this Court framed the question:

> The question on appeal is whether the public policy recognized by this Court regarding UIM coverage obtained in a "motor vehicle liability policy," *see* SDCL 58-11-9.4, extends to the insured's request for "additional [UIM] coverage" as indicated in SDCL 58-11-9.4.
>
> In other words, if our public policy dictates that an insurer cannot exclude UIM coverage in a "motor vehicle liability policy" for accidents involving government vehicles, does not that same public policy apply when, under SDCL 58-11-9.4, the insured requests additional UIM coverage through a supplemental umbrella policy?
>
> Although insurance coverage is generally a matter of contract, UIM coverage is mandated under this State's public policy as set forth in SDCL 58-11-9.4.

Streff, 2017 S.D. 83, ¶ 9, 905 N.W.2d at 322. This Court held that the mandate expressed in SDCL 58-11-9.4 meant that the exclusion could not be enforced as a matter of law in either circumstance:

> The Streffs were cautious enough to purchase additional coverage to protect themselves if damaged by an uninsured or underinsured motorist beyond their underlying policy limit of $250,000 per person and $500,000 per accident. They also paid additional premiums to cover such an event through their umbrella policy, up to $1 million.
>
> Because SDCL 58-11-9.4 does not limit UM/UIM coverage to primary policies and contemplates additional UM/UIM coverage, the statute contemplates umbrella policies that include UM/UIM coverage.
>
> *Therefore, umbrella policies are subject to the same public policy prohibition invalidating an exception from coverage for accidents involving government owned vehicles.*
>
> *Indeed, had the Streffs been struck by a privately owned vehicle instead of a government owned vehicle, they would have unquestionably been further compensated by the additional uninsured motorist coverage obtained in their umbrella policy.*

Id. at ¶ 16 (emphasis supplied). Justice Zinter and Justice Kern dissented regarding UIM coverage afforded under the *umbrella* policy. *See id.* at ¶ 21. Significantly, however, the dissenting Justices did *not* express disagreement with this Court's holding that the "government-owned vehicle" exclusion violated South Dakota law and public policy and could not be enforced as a "term or condition" of the Streffs' motor vehicle *liability* policy.

The *Streff* decision thus stands for the logical proposition that a vehicle-based exclusion cannot be inserted by a motor vehicle liability insurer to nullify UIM benefits under the policy mandated by South Dakota law for uncompensated bodily injuries sustained by an insured that were caused by an underinsured driver.

8. The Larimer decision

In *Larimer v. American Family Mutual Ins. Co.*, 2019 S.D. 21, 926 N.W.2d 472, this Court was asked to overrule the *Pourier* decision pursuant to a notice of review filed by an insured who prevailed in circuit court on different grounds. This Court affirmed the circuit court's decision and did not reach the question raised by the notice of review, explaining that "[h]aving concluded that the language of the policy is ambiguous and that underinsured motorist coverage applied, we need not address whether the owned but not insured exclusion from underinsured motorist coverage violates public policy." *Id.*, 2019 S.D. 21, ¶ 13, 926 N.W.2d at 476-77.

Although one certainly cannot read anything into the omission, it is hard not to notice that this Court did not cite to *Pourier* in dispensing with the issue.

9. Justice Severson's Larimer concurrence

Retired Justice Severson, however, did utilize the occasion to remark upon *Pourier*. One of the original dissenting Justices in *Pourier*, his concurrence faithfully traced this Court's interpretation of the UIM statutes and called for *Pourier* to be overruled as inconsistent with their requirements, observing that the anomalous differentiation made between UIM coverage in *Pourier* and UM coverage in *Wheeler* "only augments the injustice." *Larimer*, 2019 S.D. 21, ¶ 22, 926 N.W.2d at 478 (Severson, R.J., concurring). As he concluded:

> To be clear, the statutes mandating underinsured and uninsured motorist coverage reflect Legislative intent to protect an insured when that insured is injured by an at-fault underinsured or uninsured driver. SDCL 58-11-9; SDCL 58-11-9.4, -9.5.
>
> As such, I would find that all owned but not insured exclusions violate public policy, or at the very least, that American Family's "exclusion violates SDCL 58-11-9.5 and is void as against public policy."

Id. at ¶ 23 (citing *Pourier*, 2011 S.D. 47, ¶ 19, 802 N.W.2d at 453 (Meierhenry, R.J., dissenting). That is the essence of the declaratory relief that the Earlls are asking this Court to enforce regarding the "owned but not insured" exclusion in the automobile liability policy that they purchased from Farmers Mutual to cover this UIM claim.

C. So what does the "terms and conditions" language in SDCL 58-11-9.5 mean?

The "terms and conditions" language appearing in SDCL 58-11-9.5 is in no sense unique to South Dakota and is fairly common in UM/UIM statutes across the country.[4] As the noted by Justice Zinter in *Wheeler* and recognized by this Court in unanimously voiding the vehicle-based exclusion for motor vehicle liability policies in *Streff*, such language surely was *not* intended by the Legislature to create a nebulous framework with no discernable limiting principle in which insurers are permitted to nullify mandatory UM/UIM coverage for insureds with flat exclusions by christening them as mere "terms and conditions" that ought to allow them to void what the law plainly requires.

In construing a statute similar to SDCL 58-11-9.5 and invalidating a government-owned vehicle exclusion, the Massachusetts Supreme Court has provided a cogent explanation of the "subject to terms and conditions" phraseology:

> We are cognizant of the language in G.L. c. 175, § 113L(1), stating that, "*subject to the terms and conditions of such [UM] coverage*, such coverage shall include an insured motor vehicle where the liability insurer thereof [has become insolvent]" (emphasis added).

---

[4] *See, e.g.*, AR ST. § 23-890-401 (Arkansas); AZ ST § 20-259.01 (Arizona); DE ST. TI 18 § 3901 (Delaware); FL ST. § 627.727 (Florida); IL ST. CH 215 § 5/143a (Illinois); IN ST. 27-7-5-4 (Indiana); KY ST. §§ 304.20-020 and 304.39-320 (Kentucky); LA R.S. 22:1295 (Louisiana); ME ST. T. 24-A § 2902 (Maine); MA ST. 175 § 113L (Massachusetts); MO ST. 379.203 (Missouri); OK ST. § 3636 (Oklahoma); WA ST. 48.22.040 (Washington); WV ST. § 33-6-31 (West Virginia).

> *However, the complete prohibition on UM coverage for municipally owned vehicles does not constitute a term or condition of UM coverage because it wholly denies the very existence of such coverage. In other words, terms and conditions of coverage refer to the parameters of coverage, not the fact of coverage.*
>
> *The standard automobile policy contains myriad terms and conditions of UM coverage, including the financial limits of protection, the specific individuals covered under the policy, and the manner by which damages are to be determined.*
>
> *Subject to these provisions*, UM coverage under the standard automobile policy encompasses insured motor vehicles where the insurer thereof has become insolvent.

Massachusetts Insurers Insolvency Fund v. Premier Ins. Co., 869 N.E.2d 576, 584 (Mass. 2007) (emphasis supplied).

The categorical exclusion of damages resulting from bodily injuries to an insured when occupying owned-uninsured vehicles—or any vehicle—from UIM coverage is not a permissible term and condition of such coverage. Rather than addressing true terms and conditions of coverage such as "the financial limits of protection, the specific individuals covered under the policy, and the manner by which damages are to be determined," such an exclusion "wholly denies the existence of such coverage" for the insureds who purchased it to cover themselves and family members with whom they reside. *Id.*

This common-sense view that "terms and conditions" of coverage refers to the parameters of coverage, rather than the fact of coverage, and does not encompass categorical exclusions nullifying mandated coverage

finds logical support in this Court's recent decision in *Kaiser Trucking, Inc. v. Liberty Mutual Fire Ins. Co.*, 2022 S.D. 64, 981 N.W.2d 645, which explained the distinction between *conditions* for coverage and *exclusions* from coverage in insurance policies:

> A condition precedent, a concept derived from contract law, "refers to an act or event that must exist or occur before there is a right to performance under a contract." Wright & Miller, 5A Federal Practice & Procedure § 1303 (4th ed.); *see Terra Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 383 F.3d 754, 759 (8th Cir. 2004) (distinguishing between conditions precedent and exclusions as applied to insurance policies).
>
> Generally, when an insured party confronts a condition precedent, the insured must demonstrate that he or she "substantially complied with this condition or that noncompliance was excused, waived, or did not prejudice the insurer. Otherwise, the insurer does not have to indemnify the insured for damages awarded against him [or her]."
>
> Conditions precedent in an insurance policy are different from exclusions, which "carve out some particular events from a coverage that is otherwise general, and the insurer has the burden of proving them."

Id. at ¶ 15, 981 N.W.2d at 651 (quoting *Terra Indus.*, 383 F.3d at 759).

As recognized in *Streff* and by courts in the majority of jurisdictions, non-statutory vehicle-based exclusions on portable UM/UIM coverage violate the statutes that mandate such coverage. *See, e.g., Castillo v. Clearwater Ins. Co.*, 8 A.3d 1177, 1181-82 (Del. 2010); *DeHerrera v. Sentry*, 40 P.3d 167, 176 (Colo. 2001) ("We hold that the language of the UM/UIM statute and the purpose of that statute required that UM/UIM insurance apply to an insured person when injured by a financially irresponsible

motorist, irrespective of the vehicle the injured insured occupies at the time of injury"); *Calvert v. Farmers Ins. Co. of Arizona*, 697 P.2d 684, 687 (Ariz. 1985) ("Consequently, because of the strong public policy mandating coverage for innocent victims from tragic negligent acts of uninsureds, we will not construe the uninsured motorist statute to reduce coverage when it is silent on "other vehicle" exclusions. This conclusion is in accord with the vast majority of jurisdictions that have dealt with the issue").

The "owned but not insured" exclusion is no more allowed under South Dakota law than would be an exclusion removing mandated UIM coverage for insureds who are injured by or while occupying government-owned vehicles, electric vehicles, vehicles owned by private corporations, vehicles painted yellow, or vehicles manufactured outside the United States. South Dakota does not permit insurers to evade the laws enacted to protect its citizens so readily.

CONCLUSION

As acknowledged by Justice Zinter in his *Wheeler* concurrence, the *Pourier* decision has resulted in an arbitrary framework lacking discernible or reliable guiding principles, in which "South Dakota's statutes and cases permit inconsistencies between mandated uninsured and underinsured motorist coverage as well as inconsistencies within each type of coverage." *Wheeler*, 2012 S.D. 83, ¶ 34, 824 N.W.2d at 111.

In other words, the *Pourier* rationale "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Loper Bright Enterprises v. Raimondo*, 2024 WL 3208360 at *20 --- U.S. --- (June 28, 2024) (quoting *Janus v. American Fed. of State, County, and Mun. Employees*, 585 U.S. 878, 927 (2018)). The Earlls therefore very respectfully suggest that this Court should restore its original understanding that "[e]ven though the UM and UIM statutes were passed nine years apart, we do not believe the slight difference in [the] language of the statutes suggests that the Legislature had different purposes and goals in enacting each provision." *Gloe*, 2005 S.D. 29, ¶ 11, 694 N.W.2d at 242 n.7.

In so doing, this Court should turn the page on *Pourier*'s flawed rationale and reject Farmers Mutual's attempt to characterize the "owned but not insured" exclusion as a permissible term or condition of UIM coverage. Instead, this Court should hold that it violates South Dakota public policy—just as it plainly does in the UM context—and cannot be enforced to deny UIM coverage to the Earlls in the policy that Farmers Mutual sold to them. Our statutes mandating UM/UIM coverage for an insured's uncompensated injuries cannot be circumvented on the arbitrary basis of where or in what vehicle the injuries caused by the uninsured or underinsured driver happened to occur.

Moreover, the *Streff* decision, issued after *Gloe*, *Pourier* and *Wheeler*, stands for the principle that when an insurer inserts a location-based or

vehicle-based exclusion that denies mandatory UIM coverage to an insured, who is supposed to be covered by UIM benefits wherever she may be, such an exclusion is not an acceptable "term and condition" permitted to nullify mandatory UIM coverage and that "terms and conditions of coverage refer to the *parameters* of coverage, not the *fact* of coverage." *Massachusetts Insurers Insolvency Fund*, 869 N.E.2d at 584 (emphasis supplied).

This view is further supported by *Kaiser Trucking*, in which this Court perceptively distinguished *conditions* of insurance coverage from blanket *exclusions* that negate or entirely withdraw coverage. Such decisions provide a sound basis on which to recognize that the rationale of the three-Justice majority in *Pourier* has already been effectively abrogated by subsequent decisional law.

The Earlls, individually and as Co-Personal Representatives of the Estate of Rebecca A. Earll, should be entitled to available benefits under the UIM coverage of the policy Farmers Mutual sold to them for uncompensated damages sustained in the fateful collision on the final day of 2022.

WHEREFORE, David and Marcia Earll respectfully request that this Honorable Court reverse the order granting summary judgment in favor of the defendant and remand with instructions to grant their motion for summary judgment and enter declaratory relief that:

1. The Farmers Mutual policy provides available UIM coverage for the claims arising out of the accident under the policy it sold to the Earlls up to its $250,000 UIM coverage policy limits; and

2. The Farmers Mutual policy's purported "owned but not insured" exclusion seeking to negate mandatory UIM coverage for uncompensated damages suffered by an insured that were caused by an underinsured driver violates South Dakota law and public policy and is therefore unenforceable.

Respectfully submitted this 2nd day of July, 2024.

JOHNSON JANKLOW & ABDALLAH LLP

BY: *<u>/s/ Ronald A. Parsons, Jr.</u>*

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 8,504 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS and the APPENDIX were served via Odyssey File and Serve upon the following:

Justin T. Clarke jclarke@dehs.com

on this 2nd day of July, 2024.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

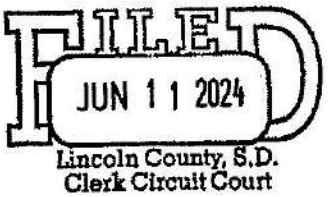
APPENDIX

Page

STATE OF SOUTH DAKOTA) :SS COUNTY OF LINCOLN)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DAVID H. EARLL and MARCIA R. EARLL, Individually and as Co-Personal Representatives of the ESTATE OF REBECCA A. EARLL, Plaintiffs, vs. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, Defendant.	41CIV23-918 ORDER ON SUMMARY JUDGMENT MOTIONS

This matter came before the Court on June 3, 2024, on the parties' cross-Motions for Summary Judgment. The Plaintiffs were represented by Ronald A. Parsons, and the Defendant was represented by Justin T. Clark. Upon review of the file and arguments at the hearing, the Court hereby finds as follows:

1. This case is appropriate for summary judgment because the parties have stipulated to the facts and therefore there is no genuine issue as to any material fact in dispute and the Court accepts those facts as true. See SDCL § 15-6-56(c).
2. The legal issue presented is whether Defendant can deny paying benefits to Plaintiffs based on an "owned but not insured" exclusion to the Plaintiffs' underinsured motorist ("UIM") coverage.
3. "The purpose of UM/UIM coverage is to protect the insured party who is injured in an automobile accident by the negligence of an uninsured/underinsured motorist." *Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, ¶ 11, 694 N.W.2d 238, 242 (quoting *Jones v. AIU Ins. Co.*, 51 P.3d 1044, 1045 (Colo. Ct. Ap. 2001)).



4. Similar to *Wheeler v. Farmers Mut. Ins. Co. of Nebraska*, "[w]ho the uninsured motorist statute and underinsured motorist statute were intended to protect [is] not at issue in this case." 2012 S.D. 83, ¶ 19, 824 N.W.2d 102, 108.
5. An "owned-but-not-insured" exclusion is treated differently between uninsured and underinsured situations because the limiting language of "subject to the terms and conditions" present in the underinsured statute is not present in the uninsured statutes. *See, generally, id.* at ¶¶ 17-24, 107-09 and SDCL §§ 58-11-9 and 58-11-9.5.
6. "Nothing in SDCL § 58-11-9.5 requires an insurer to pay underinsured motorist benefits in every circumstance." *De Smet Ins. Co. of S. Dakota v. Pourier*, 2011 S.D. 47, ¶ 12, 802 N.W.2d 447, 451.
7. The Defendant's "owned-but-not-insured" exclusion is a valid limitation on underinsured coverage under the plain language of SDCL 58-11-9.5 and relevant precedent argued by the Parties at the summary judgment motion hearing and in their respective filings.

Based upon the foregoing, the Court hereby DENIES Plaintiffs' motion for summary judgment, and hereby GRANTS Defendant's motion for summary judgment.

Dated this 11th day of June, 2024.

Rachel R. Rasmussen, Circuit Court Judge

Attest:
Brittan Anderson,
Clerk of Court

By: JM Baker
Deputy Clerk

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
JODY STREFF and KEVIN STREFF, **Plaintiffs,** **vs.** **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND STATE FARM FIRE AND CASUALTY COMPANY,** **Defendants.**	**CIV 15-1889** **MEMORANDUM OPINION AND ORDER**

This matter is before the court upon the motions of the parties seeking summary judgment on Count 1 of the Plaintiffs' complaint seeking declaratory relief. The Plaintiffs seek a declaration that the limits of underinsured motorist coverage obtained through insurance policies issued by the Defendants are available to satisfy their claim for damages. The Defendants resist the effort and seek a declaration that they have no obligation under the insurance policies to pay underinsured motorist benefits to the Plaintiffs under the circumstances presented in this case.

After carefully considering the parties' arguments, reading all of their written submissions and the relevant authorities, the court grants the Plaintiffs' motion for summary judgment in part and denies it in part. It also grants the Defendants' motion for summary judgment in part and denies it in part.

EXHIBIT A

BACKGROUND[1]

Jody and Kevin Streff ("the Streffs") live in Wentworth, South Dakota. As is relevant to this case, the Streffs contracted with State Farm Mutual Insurance Company for automobile insurance that includes underinsured motorist benefits in the amounts of $250,000 per person and $500,000 per occurrence. The Streffs also obtained underinsured motorist coverage up to $1,000,000 through a personal liability umbrella policy ("PLUP") issued by State Farm Fire and Casualty Company. Both carriers are referenced singularly and collectively as "State Farm."

Jody Streff was injured while in Alamosa, Colorado, on July 23, 2102, as she walked across a street and was struck by an Alamosa police car. The officer driving the patrol car failed to stop for a red traffic light while responding to a call, colliding with another vehicle before hitting Jody Streff. The police officer was cited for careless driving and pled guilty to the offense. The parties agree that Jody Streff does not bear any fault for the incident.

The Streffs pursued a claim for damages against the Alamosa Police Department. Colorado law limits the amount of damages to $150,000 per person for each single occurrence. *See* Colo. Rev. Stat. § 24–10–114.[2] The Streffs resolved their claim with the Alamosa Police Department for $120,000 in July of 2013 after advising State Farm of their intent to preserve their claim for underinsured benefits. State Farm waived its right of subrogation for medical payments

[1] The parties have entered into a stipulated statement of undisputed material facts.
[2] The Colorado Legislature amended § 24-10-114 in 2013, increasing the maximum recovery involving single party and single occurrence claims against public entities to $350,000. *See* Colo. Sess. Laws 2013, Ch. 134, § 1, eff. July 1, 2013.

reimbursement and agreed to allow the Streffs to execute a full and final release of their claims against the Alamosa Police Department. State Farm also reserved its right to invoke any applicable policy provisions and to assert any offsets against the Streffs' anticipated claim for underinsured motorist benefits.

The current declaratory judgment proceeding centers on a dispute between the parties regarding the availability of underinsured motorist benefits under the State Farm polices. At issue is whether government-owned vehicle exclusions found in the State Farm automobile policy and the PLUP violate the public policy of the State of South Dakota.

The automobile policy, in this regard, provides that the definition of an Underinsured Motor Vehicle "does not include a land motor vehicle...[o]wned by, registered to, leased to or rented to any government or any of its political subdivisions or agencies." Stipulated Statement of Undisputed Material Facts ("Stipulated Facts") at ¶ 21. The underinsured coverage endorsement for the PLUP contains an identical definition of Underinsured Motor Vehicle. *Id.* at ¶ 22.

Additional facts contained within the record will be included as necessary.[3]

AUTHORITIES AND ANALYSIS

I. Summary judgement in insurance coverage cases.

The standard for a trial court's determination of summary judgment is well settled:

[3] State Farm has not asserted that Jody Streff's damages are less than $250,000 and has sought summary judgment on the PLUP coverage question based upon the merits of its claim.

> Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15–6–56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15–6–56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp., 2014 SD 97, ¶ 11, 857 N.W. 2d 865, 869 (quotations and embedded citations omitted).

The questions presented here involve purely legal issues relating to public policy and insurance contracts which are well-suited to determination under the provisions of Rule 56 and the procedures for declaratory relief. In this regard, South Dakota's enactment of the Uniform Declaratory Judgment Act authorizes a court to "declare rights, status and other legal relations[.]" SDCL § 21-24-1. Section 21-24-3 further provides specific authority for a court to determine rights under a contract:

> Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

SDCL § 21-24-3; *see also North Star Mutual Insurance Co. v. Kneen*, 484 N.W.2d 908, 911 (S.D. 1992) ("[A] declaratory judgment action is the proper vehicle to resolve the coverage question prior to trial of the underlying action.").

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II. State Farm's government-owned vehicle exception to underinsured motorist coverage violates public policy.

"The public policy of this state is set forth in its statutes and cases." *Gloe v. Iowa Mut. Ins. Co.*, 2005 SD 29, ¶ 16, 694 N.W.2d 238, 244-245 (citing *American Family Mut. Ins. Co. v. Merrill*, 454 N.W.2d 555, 559 (S.D.1990)). At the heart of the coverage issue here is the Legislature's public policy determination, requiring that insurers include underinsured motorist coverage in the automobile policies they issue or deliver in South Dakota:

> No motor vehicle liability policy of insurance may be issued or delivered in this state with respect to any motor vehicle registered or principally garaged in this state, except for snowmobiles, unless underinsured motorist coverage is provided therein at a face amount equal to the bodily injury limits of the policy. However, the coverage required by this section may not exceed the limits of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident, unless additional coverage is requested by the insured. Any policy insuring government owned vehicles may not be required to provide underinsured motorist coverage.

SDCL § 58-11-9.4.

Our Supreme Court has held that the "purpose of [underinsured motorist] coverage is to protect an insured party who is injured in an automobile accident by the negligence of an ... underinsured motorist[.]" *Gloe*, 2005 SD 29, ¶ 17, 694 N.W.2d at 245 (citing *Clark v. Regent Ins. Co.*, 270 N.W.2d 26, 29 (S.D.1978)) (omitting emphasis of *Gloe* Court). Both the statutory requirement for mandatory coverage and the overarching aim of providing coverage to insureds who are injured by underinsured motorists support a broad public policy which favors allowing insureds the opportunity to seek recovery from their underinsured carrier.

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Despite the breadth of this public policy, State Farm argues that it may restrict underinsured motorist coverage by excepting all government-owned vehicles from the its definition of Underinsured Motor Vehicle as one of the "terms and conditions" of its coverage. The claim rests upon the opening phrase of SDCL § 58-11-9.5:

> Subject to the terms and conditions of such underinsured motorist coverage, the insurance company agrees to pay its own insured for uncompensated damages as its insured may recover on account of bodily injury or death arising out of an automobile accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon. Coverage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.

SDCL § 58-11-9.5.

State Farm's "terms and conditions" argument, however, does little more than beg the public policy question because our Supreme Court has held that the "terms and conditions" provision cannot apply if it is contrary to public policy:

> [T]he "subject to the terms and conditions" language of SDCL 58–11–9.5 was not intended to permit any restriction an insurer may wish to create. It was only intended to allow limitations on coverage to the extent that they do not violate the public policy expressed in the statutes... On the other hand, "[p]olicy language ... is not automatically void as against public policy simply because it narrows the circumstances under which coverage applies." *London v. Farmers Ins. Co. Inc.*, 63 P.3d 552, 555 (Okla.Civ.App. 2002) (considering a similar UM dispute)... This Court has concluded that some restrictions violate public policy and some do not. Therefore, the "subject to" language does not automatically resolve this matter, and we must return to the ultimate question whether the Iowa Mutual language is prohibited by the public policy of this state.

Gloe, 2005 SD 29, ¶ 16, 694 N.W.2d at 244.

In other words, State Farm cannot prevail here simply by invoking the "terms and conditions" provision of SDCL § 58-11-9.5. The underinsured motorist coverage restriction it seeks to enforce must be consistent with public policy. In this regard, State Farm points to the final sentence of SDCL § 58-11-9.4 which allows insurers to issue automobile policies insuring government-owned vehicles without including underinsured motorist coverage. State Farm contends this text supports its position because means that "governments are financially solvent entities and can be relied upon to provide adequate liability protection for their agents and employees." State Farm summary judgment brief at 8. The court has difficulty accepting this argument.

The statutory exception from required underinsured coverage for government-owned vehicles is not the same as State Farm's attempt to exclude government-owned vehicles from its definition of an underinsured motor vehicle. The two involve distinct concepts. Section 58-11-9.4's exception means simply that an insurer does not have to include underinsured motorist coverage for automobile "polic[ies] insuring government-owned vehicles." SDC § 58-11-9.4. However, State Farm's exception has nothing to do with *insuring* the government-owned vehicle – it means simply that a government-owned vehicle can never be an underinsured motor vehicle. Any inference that the last sentence of SDCL § 58-11-9.4 means that a vehicle owned by a governmental entity would necessarily provide sufficient liability protection to address injuries to third-party claimants is unsustainable. It is not difficult to envision a situation, maybe even this one involving Jody Streff, in

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which recovery from a public entity is restricted by limitations upon the waiver of sovereign immunity.

Therefore, this court determines that the public policy of South Dakota does not permit State Farm to categorically exclude government-owned vehicles from its definition of Underinsured Motor Vehicles in the automobile policy. By doing so, State Farm has done more than simply narrow coverage according to certain "terms and conditions." It has, instead, effectively failed to comply with SDCL § 58-11-9.4 by not providing the Streffs with the underinsured motorist coverage the statute unquestionably requires.[4]

This conclusion finds support among the majority of states whose courts have considered similar issues under similar statutory schemes. *See* 58 A.L.R.5th 511 (Originally published in 1998) (majority view includes Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin). This court has specifically reviewed the decisions of the North Dakota and Montana Supreme Courts, as well as the Minnesota Court of Appeals and, though based upon each state's unique statutory schemes, finds them to be helpful and persuasive. *See Gabriel v. Minnesota Mut. Fire & Cas*, 506 N.W.2d 73 (N.D. 1993); *Bartell v. Am. Home Assur. Co.*, 2002 MT 145, 49 P.3d 623; *Ronning v. Citizens Sec. Mut. Ins. Co.*, 557 N.W.2d 363 (Minn. Ct. App. 1996).

[4] There is no dispute that the Streffs' State Farm policies related to "any vehicle registered or principally garaged in this state[.]"

III. The government-owned vehicle exception is unenforceable to the limits of the underinsured motorist coverage available under the Streffs' automobile policy.

State Farm's alternative argument that restricts any public policy infirmity to the $100,000 per person and occurrence limit set out in SDCL § 58-11-9.4 is unsustainable. The argument seems tied to the statute's text which provides that the "coverage required by this section may not exceed the limits of one hundred thousand dollars because of bodily injury to or death of one person in any one accident[.]" SDCL § 58-11-9.4. However, State Farm's view overlooks the additional text which provides that the coverage "required by this section" may exceed the statutory limits if "additional coverage was requested by the insured." *Id.* The most logical construction of this part of the statute is simply that the limits of the underinsured motorist coverage required by law are not $100,000 where the insured requests additional coverage. In that instance, the required coverage is the amount requested and purchased.

Here, the Streffs apparently requested and paid for additional coverage, and under an uncomplicated application of SDCL § 58-11-9.4, the increased amount of coverage became "the coverage required by this section." *See Discover Bank v. Stanley*, 2008 SD 11, ¶ 15, 757 N.W.2d 756, 762 (citation omitted) ("When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed."). The Legislature could easily have drafted the statute to contemplate State Farm's argument by simply disconnecting the additional coverage election from the "coverage required" sentence or by not mentioning

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additional coverage at all. However, the statute, as drafted, sets the limit of required coverage at $100,000 or the higher amount of additional coverage where it is requested. Accordingly, the court cannot accept State Farm's textual argument.

Nor can the court accept State Farm's claim that caselaw mandates a statutory minimum limit on an insurer's underinsurance coverage. Our Supreme Court's precedent seems to support the opposite position and the construction of SDCL § 58-11-9.4 set out above:

> The purpose of the UIM statutory scheme is to provide protection to insured motorists against underinsured motorists. *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 624 (S.D.1993) (citing *Union Ins. Co. v. Stanage*, 454 N.W.2d 736, 739 (S.D.1990)). The UIM statutory scheme reflects a legislative determination that the maximum amount set forth in the statute is sufficient to protect insured motorists from underinsured motorist, as the clear intent of the legislature was to limit the amount recovered under UIM to those maximums *absent a request for additional coverage. Id.* at 625; *Union Ins. Co.*, 454 N.W.2d at 739.
>
> ******
>
> Under the statutory scheme, we compare the limits of the UIM coverage with the amount paid by the liability carrier. *Westfield Ins. Co., Inc.*, 2001 SD 87, ¶ 8, 631 N.W.2d at 177–78 (citing *Friesz v. Farm & City Ins.*, 2000 SD 152, ¶ 11, 619 N.W.2d 677, 680; *Nickerson*, 2000 SD 121, ¶ 16, 616 N.W.2d at 472; *Great West Cas. Co. v. Hovaldt*, 1999 SD 150, ¶ 11, 603 N.W.2d 198, 201; *Farmland Ins. Companies of Des Moines, Iowa*, 498 N.W.2d at 624). If the amount paid by the liability carrier on behalf of the tortfeasor "equals or exceeds the limits of the UIM coverage, no UIM benefits are payable." *Id.*

Gloe v. Union Ins. Co., 2005 SD 30, ¶ 13, 15, 694 N.W.2d 252, 257-258 (emphasis supplied).

This method is designed to prevent an insured's double recovery – not prevent an insured from obtaining the benefits she purchased through her premiums. Here, there is no discernible potential for a double recovery by the Streffs. State Farm has reserved its ability to set off the $120,000 paid by the Alamosa Police Department, still leaving a substantial amount of potential recovery up to the limits of the Streffs' underinsured motorist coverage. *See* SDCL S 58-11-9.5 ("[underinsured motorist] [c]overage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.").

Indeed, it is the particular statutory scheme relating to underinsured motorist coverage in automobile policies that distinguishes this case from *Cimarron Insurance Co. v. Croyle*, 479 N.W.2d 881 (S.D. 1992) (subsequently abrogated by statute). In *Cimarron*, the Supreme Court determined that an automobile policy's household exclusion for liability coverage was contrary to public policy but enforceable above the minimum liability limits set out in South Dakota's financial responsibility law, SDCL § 32-35-70. However, there is a critical difference between SDCL § 32-35-70 and SDCL § 58-11-9.4 – the latter expressly allows an insured to increase the amount of "required" coverage, but the former does not.

Finally, State Farm finds comfort in one of the Supreme Court's descriptions of uninsured and underinsured coverages which is similar to the excerpt set out above:

> The purpose of uninsured [and therefore underinsured] motorist statutes is to provide the same insurance protection to the insured party who is injured by an Uninsured [or Underinsured] or unknown

> motorist that would have been available to him had he been injured as a result of the negligence of a motorist covered by the minimum amount of liability insurance.

Gloe, 2005 SD 29, ¶ 17, 694 N.W.2d at 245 (quoting *Clark*, 270 N.W.2d at 29 (emphasis by *Gloe* Court omitted).

However, this statement has to be tempered with the fact that the progenitor *Clark* case was decided in 1978 at a time when uninsured and underinsured coverages were synchronized with the minimum liability limits. They no longer are. The minimum liability limits in South Dakota are $25,000 per person in any one occurrence, well below the $100,000 potential maximum "required" under SDCL § 58-11-9.4, even in the absence of a request for additional coverage. *See* SDCL § 32-35-70. Indeed, if the excerpt from *Clark* were strictly applied today, the public policy justification for underinsured motorist coverage would inexplicably end at $25,000 per person, per occurrence despite the text of SDCL § 58-11-9.4. The better course, in the court's view, is to focus on the broader public policy basis for underinsured coverage which is to allow recourse to first-party coverage when an insured is injured by the negligence of a motorist whose liability coverage is not sufficient to address the claimed damages.

IV. State Farm's government-vehicle exception to underinsured motorist coverage in the PLUP does not violate public policy.

Having determined that the government-owned vehicle exclusion from underinsured motorist coverage violates South Dakota's public policy and, further, that coverage is available up to the limits of the automobile policy, the remaining question is whether these determinations apply with equal force to the

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underinsured coverage afforded by the PLUP. The question appears to be one of first impression in South Dakota and, in the court's view, requires separate considerations not present in the preceding analysis.

Chief among them is the fact that umbrella coverage is excess coverage not required by any statute. Indeed, the requirements of SDCL § 58-11-9.4 apply by the express terms of the statute to "motor vehicle liability polic[ies] of insurance." SDCL § 58-11-9.4. The PLUP is not a motor vehicle liability policy which is defined by statute as follows:

> A motor vehicle liability policy as said term is used in this chapter shall mean an owner's policy or an operator's policy of liability insurance, certified as provided in § 32-35-65 or 32-35-66 as proof of financial responsibility for the future, and issued, except as otherwise provided in § 32-35-66 by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

SDCL § 32-35-68.

Further, although, as noted, the text of SDCL § 58-11-9.4 expressly allows an insured to increase the amount of underinsured motorist coverage, it does so only for the " coverage required by this section[.]" Whatever else can be said about the PLUP, there is no dispute that it is not required by SDCL § 58-11-9.4 or any other source of public policy.

In this regard, the PLUP coverage closely approximates the non-required excess liability coverage in *Cimarron* and prompts a similar result:

> By the statute's plain language, excess coverage is not subject to the provisions of this state's statutes on financial responsibility of motorists! Therefore, we must follow the majority rule and hold that the insurer's liability is limited to the coverage required by statute.

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Cimarron, 479 N.W.2d at 885.

The court recognizes the incongruity associated with having the Streffs' underinsured motorist insurer providing different coverages for different policies. However, the court's primary obligation is not to ensure uniformity among terms used in the two insurance policies at issue, but, rather, to determine the public policy of this State. Having the same term, Underinsured Motor Vehicle, include government-owned vehicles in an insured automobile policy but not in the PLUP is not optimal and seems likely to create confusion and dissatisfaction among insurers and their customers. However, it does not, under the circumstances presented here, violate public policy.[5]

[5] Though the parties' development of the PLUP public policy issue did not feature authority from other jurisdictions, the court notes that there is a split of state court decisions on the topic. *See Bundul v. Travelers Indem. Co.*, 753 N.W.2d 761, 766 (Minn. Ct. App. 2008) (distinguishing primary and umbrella coverages in public policy analysis and determining no-fault liability insurance act does not prevent operation of household exclusion in an umbrella policy); *compare State Farm Mutual Automobile Ins. Co., v. Marley*, 151 S.W.3d 33, 35-37 (Ky. 2004) (reaching contrary result), *but see State Farm Mutual Insurance Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 884-885 (Ky. 2013) (limiting *Marley* to no-fault liability insurance context and rejecting argument to apply its holding to "resident relative" exclusion in underinsured coverage).

ORDER

Based on the foregoing, it is hereby ordered:

1. The Streffs' motion for summary judgment is granted in part, and denied in part.

2. State Farm's motion for partial summary judgment is granted in part, and denied in part.

3. That the clerk shall provide notice of this Memorandum Opinion and Order to counsel by depositing a copy in their courthouse mailboxes, electronic message or by first-class mail.

Dated this 17th day of June, 2016.

BY THE COURT:

Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
JUN 20 2016
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30732

DAVID H. EARLL and MARCIA R. EARLL, individually and as co-personal representatives of the ESTATE OF REBECCA A. EARLL,

Plaintiffs/Appellants,

vs.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Rachel R. Rasmussen, Presiding Judge

BRIEF OF APPELLEE

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Notice of Appeal filed June 12, 2024

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JURISDICTIONAL STATEMENT

Plaintiffs David H. Earll and Marcia R. Earll, individually and as co-personal representatives of the Estate of Rebecca A. Earll (collectively, the "Earlls") appeal the Trial Court's June 11, 2024 Order on Summary Judgment Motions granting Defendant Farmers Mutual Insurance Company of Nebraska's ("Farmers Mutual") Motion for Summary Judgment and denying the Earlls' competing Motion for Summary Judgment. R. 172. Notice of Entry of the Order was given on June 12, 2024. R. 174. The Earlls filed their Notice of Appeal on June 12, 2024. R. 178.

STATEMENT OF THE ISSUES

Did the Trial Court err when it granted Farmers Mutual's Motion for Summary Judgment and denied the Earlls' competing Motion for Summary Judgment on the grounds that the "owned but not insured" insurance policy exclusion is valid under South Dakota law in the context of underinsured motorist coverage ("UIM")?

The Trial Court correctly ruled the "owned but not insured" insurance policy exclusion is a valid limitation on underinsured coverage under the plain language of SDCL § 58-11-9.5 and this Court's relevant precedent. R. 172.

Gloe v. Iowa Mut. Ins. Co., 2005 S.D. 29, 694 N.W.2d 238

DeSmet Ins. Co. of South Dakota v. Pourier, 2011 S.D. 47, 802 N.W.2d 447

Wheeler v. Farmers Mutual Ins. Co. of Nebraska, 2012 S.D. 83, 824 N.W.2d 102

SDCL § 58-11-9.5

STATEMENT OF THE CASE

The Earlls appeal the Order on Summary Judgment Motions by the Second Judicial Circuit Court, Lincoln County, the Honorable Rachel R. Rasmussen, presiding.

R. 172. The Earlls brought a declaratory judgment action seeking underinsured motorist coverage ("UIM") benefits. R. 2. The parties submitted competing summary judgment motions based on stipulated facts. R. 37; R. 76; R. 79. The parties competing motions concerned whether an "owned but not insured" insurance policy exclusion is a valid and enforceable exclusion in the State of South Dakota under South Dakota codified law and the precedent of this Court. R. 65; R. 124; R.157; R. 159. A hearing on the competing motions was held before the Trial Court on June 3, 2024. R. 172. In applying this Court's controlling decision in *DeSmet Ins. Co. of South Dakota v. Pourier*, 2011 S.D. 47, 802 N.W.2d 44 and SDCL § 58-11-9.5, the Trial Court granted Farmers Mutual's Motion for Summary Judgment. R. 172. This appeal followed.

STATEMENT OF FACTS

At the Trial Court level, the parties stipulated to the following facts (R. 37-40):

The Earlls lived in Canton, South Dakota. R. 37. The Earlls are the natural parents of their deceased daughter, Rebecca A. Earll. *Id.* On January 31, 2023, the Earlls were appointed and qualified and issued Letters of Personal Representative by the Lincoln County Clerk of Courts to serve as Co-Personal Representatives of the Estate of Rebecca A. Earll. *Id.*

Defendant Farmers Mutual Insurance Company of Nebraska (hereinafter "Farmers Mutual") is an insurer duly authorized and licensed to do business in the State of South Dakota. *Id.* Farmers Mutual is the liability insurer of automobile policy AU338388 issued to the Earlls, the parents of Rebecca A. Earll, which provided underinsured motorist (UIM) benefits, a true and correct copy of which is attached and

incorporated here by this reference. R. 38; R. 43-60. The Earlls' policy with Defendant Farmers Mutual was in force from November 15, 2022 through May 15, 2023. R. 38.

On or about December 31, 2022, in Lincoln County, South Dakota, Rebecca A. Earll was killed as the result of a motor vehicle collision. *Id.* The at-fault and negligent driver who caused the collision was William Pigg, who had an automobile liability insurance policy with Progressive Insurance with limits of $25,000. *Id.* Pigg ran a stop sign and crashed into the car being driven by Rebecca Earll, who had the right of way. Rebecca Earll was not at fault for the accident. *Id.* The collision and the resulting death of Rebecca Earll were proximately caused by the negligence of William Pigg, who was an underinsured motorist under South Dakota law. *Id.*

Pigg's insurer (Progressive) tendered the $25,000 limits of Pigg's liability limits to the Estate of Rebecca Earll. *Id.* Farmers Mutual gave the Estate of Rebecca Earll permission to settle that claim without jeopardizing the Estate's UIM claims. *Id.* In addition, the Estate of Rebecca A. Earll recovered $75,000 in UIM benefits under Rebecca's own automobile insurance policy purchased from Farmers Mutual, which is a different insurance policy from the one at issue in this action. R. 39.

Rebecca A. Earll lived with her parents at the time of the collision and her resulting death. *Id.* She qualifies as an insured under the UIM coverage provided by Farmers policy number AU338388 purchased by her parents, who are the Plaintiffs in this action, because the UIM coverage provisions define an "insured" to include a "relative." *Id.* Under the policy definitions, "relative" is defined as "a person related to you or your spouse by blood . . . who lives with you." *Id.* As part of the policy issued by

Farmers Mutual to the Earlls, they paid a separate premium to purchase such UIM motorist coverage. *Id.*

As Co-Personal Representatives of the Estate of Rebecca A. Earll, the Earlls sought UIM benefits under the above-referenced Farmers policy number AU338388 purchased by her parents who are the Plaintiffs in th[e] [underlying] action. *Id.* Defendant Farmers Mutual denied coverage under an exclusion in the policy commonly called an "owned but not insured" exclusion. *Id.* The "owned but not insured" exclusion at issue provides as follows:

> **EXCLUSIONS FOR UNDERINSURED MOTOR VEHICLE COVERAGE**
>
> There is no coverage for:
>
> . . .
>
> **2.** **Bodily injury** to any **insured** while **occupying**, or through being struck by, a motor vehicle or trailer of any type owned by **you**, **your spouse**, or a **relative** if it is not insured for this coverage under this policy.

Id. The Earlls subsequently filed a declaratory judgment action on behalf of the Estate of Rebecca Earll against Farmers Mutual seeking underinsured motorist benefits arising out of the December 31, 2022 accident under their Farmers Mutual policy (policy number AU338388). R. 40. The Earlls contend that the "owned but not insured" exclusion in the Farmers Mutual policy violates South Dakota public policy and is not enforceable to deny the UIM claim. *Id.* Farmers Mutual contends that the "owned but not insured" exclusion does not violate South Dakota public policy and is enforceable to deny the UIM claim. *Id.*

STANDARD OF REVIEW

This Court "review[s] a circuit court's entry of summary judgment under the de novo standard of review." *Harvieux v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 9, 915 N.W.2d 697, 700 (citation omitted). The Court's rules for reviewing the entry "of summary judgment under SDCL § 15-6-56(c) [are] well settled." *Garrido v. Team Auto Sales, Inc.*, 2018 S.D. 41, ¶ 15, 913 N.W.2d 95, 100 (quoting *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 8, 907 N.W.2d 795, 798). "Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *McKie Ford Lincoln, Inc.*, 2018 S.D. 14, ¶ 8, 907 N.W.2d at 798).

This Court views "all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Id.* And, "[i]n addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Id.* Thus, this Court's "task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *Scotlynn Transport, LLC v. Plains Towing and Recovery, LLC*, 2024 S.D. 24, ¶ 17, 6. N.W.3d 671, 676 (quoting *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 19, 921 N.W.2d 479, 486).

ARGUMENT

This action arises out of a tragic car accident that took the life of Rebecca Earll. While the underlying facts are tragic, this case presents an issue that has been decided by

this Court before: whether "owned but not insured" insurance policy exclusions in the context of underinsured motorist ("UIM") coverage are valid and enforceable exclusions under South Dakota law. The answer to that question has been made clear by both the South Dakota Legislature and this Court: in the context of UIM coverage, such exclusions do not violate South Dakota public policy. Indeed, any argument to the contrary sidesteps the plain language of South Dakota Codified Law and recent precedent of this Court. Because this Court has explicitly held that the exclusion does not violate South Dakota public policy in the UIM context, the Trial Court properly granted Farmers Mutual's Motion for Summary Judgment and denied the Earlls' competing Motion. Accordingly, the Trial Court should be affirmed.

I. "Owned But Not Insured" Exclusions are Valid Limitations on Underinsured (UIM) Coverage in the State of South Dakota under the Plain Language of SDCL § 58-11-9.5.

"[T]he conditions and limitations imposed by the insurance company must be consistent with public policy." *AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 10, 845 N.W.2d, 918, 921 (citations omitted). As this Court has declared, "public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at ¶ 10, 845 N.W.2d at 921-22 (citation omitted). "The public policy of this State is set forth in its statutes and cases." *Gloe v. Iowa Mut. Ins. Co.*, 2005 SD 29, ¶ 17, 694 N.W.2d 238, 244-45 (citation omitted) (emphasis added).

Here, the public policy concerning UIM coverage is found in the State's UIM statute, SDCL § 58-11-9.5. That statute provides:

> Subject to the terms and conditions of such underinsured motorist coverage, the insurance company agrees to pay its own insured for uncompensated damages as its insured may recover on account of

> bodily injury or death arising out of an automobile accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon. Coverage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.

SDCL § 58-11-9.5 (emphasis added).

This language differs from South Dakota's uninsured motorist ("UM") statute. Currently, the State's UM statute (SDCL § 58-11-9) does not contain language specifying UM coverage may be issued subject to the terms and conditions of an insurance policy. Rather, SDCL § 58-11-9 fails to provide any precise proclamation concerning conditions of an insurance policy and its subsequent effect on such UM coverage. Conversely—and importantly—as set forth above, the State's UIM statute (SDCL § 58-11-9.5) does specifically allow UIM coverage to be issued "[s]ubject to the terms and conditions of such underinsured motorist coverage[.]" SDCL § 58-11-9.5. Thus, under the plain language of SDCL § 58-11-9.5, conditions, such as "owned but not insured" exclusions, are valid and enforceable in the UIM context.

Unsurprisingly, this Court has found such explicit language within the State's UIM statute to be a clear acknowledgement by the South Dakota Legislature permitting policy exclusions in the UIM context. For example, this Court held that the language of the State's UIM statute is specific "legislative recognition of the right of insurance companies to place conditions on underinsured motorist coverage." *Cimarron Ins. Co. v. Croyle*, 479 N.W.2d 881, 886 (S.D.1992) (emphasis added). Said another way, unlike the State's UM statute, the South Dakota Legislature has set forth a "clear implication [in] this [UIM statute] language [ ] that underinsured motorist coverage may be subject to certain terms and conditions[.]" *Cimarron Ins. Co.*, 479 N.W.2d at 886 (emphasis added).

Indeed, this Court recently explained the imperative differences in these two statutes (and the effect of such differences) in *Wheeler v. Farmers Mutual Insurance Company*. 2012 S.D. 83, 824 N.W.2d 102. In comparing SDCL §§ 58-11-9 and 58-11-9.5, this Court concluded that, although SDCL § 58-11-9.5 expressly allowed an insurer to limit UIM coverage, SDCL § 58-11-9 did not contain the same language or allow limitations with respect to UM coverage. This Court specifically noted:

> The potential rationale for the Legislature's omission of language from SDCL § 58-11-9 expressly allowing insurance companies to place limitations upon uninsured motorist coverage could be due to its recognition that in underinsured motorist cases, the insured has the protection of two policies (his or her own policy and the tortfeasor's policy), whereas in uninsured motorist cases, the insured does not have the benefit of recovering under the tortfeasor's policy.

Id. at ¶ 23, n. 3, 824 N.W.2d at 109 (emphasis added).

For these reasons, this Court's interpretation diverges depending on the specific type of insurance coverage at issue and its correlating statute. Indeed, a lack of express provisional language within the statute has been a principal distinction considered by this Court when examining the public policy expressed in the State's UM and UIM statutes. *See, e.g., Gloe v. Iowa Mut. Ins. Co.*, 2005 S.D. 29, ¶ 16, 694 N.W.2d 238, 244. Here however, in the context of UIM coverage, this Court has made clear the "owned but not insured" exclusion does not violate public policy and SDCL § 58-11-9.5. As such, the Trial Court properly applied the plain language of SDCL § 58-11-9.5 and the "public policy of this State [as] set forth in [the State's] statutes[.]" *Gloe*, 2005 SD 29, ¶ 17, 694 N.W.2d at 244-45. Because the Legislature has "clear[ly] impli[ed]" in the language of SDCL § 58-11-9.5 "that underinsured motorist coverage may be subject to certain terms and conditions," the Trial Court did not err in granting Farmers Mutual's Motion.

Cimarron Ins. Co., 479 N.W.2d at 886 (emphasis added). Accordingly, the Trial Court should be affirmed.

II. "Owned But Not Insured" Exclusions are Valid Limitations on Underinsured Coverage in the State of South Dakota based on Relevant Precedent of this Court.

Similarly, apart from the plain language of SDCL § 58-11-9.5, this Court's relevant precedent firmly establishes "owned but not insured" exclusions are valid insurance policy limitations in the State of South Dakota concerning UIM coverage. Indeed, the current legal landscape in South Dakota is well-settled: the "owned but not insured" exclusion is a valid condition on UIM coverage which does not violate public policy. *De Smet Ins. Co. of S.D. v. Pourier*, 2011 S.D. 47, ¶ 12, 802 N.W.2d 447, 451-52 (stating that owned but not insured exclusion "is not against public policy."). For this reason, the Trial Court did not err when it properly applied this Court's holdings and granted Farmers Mutual's Motion for Summary Judgment.

The Earlls' Brief highlights various concurrences or dissents that are not binding precedent on the Trial Court, or references decisions concerning UM (not UIM) coverage. As "persuasive" as the Earlls believe such UM decisions, concurrences or dissenting opinions are, such opinions are not the law that was to be applied by the Trial Court. Rather, the Trial Court correctly applied current South Dakota precedent, which makes clear the "owned but not insured" exclusion is valid and enforceable in the context of UIM in this State.

Respectfully, the *Pourier* decision was binding precedent on the Trial Court and its facts are nearly identical to this matter. In *Pourier*, Tabitha Pourier ("Pourier") was a minor who lived with her father as her parents were divorced. *Id.* at ¶ 3, 802 N.W.2d at 448. Her father owned a policy through De Smet Insurance Company of South Dakota

("De Smet"). *Id.* Pourier was an insured under the policy. *Id.* However, at the time of the accident, Pourier's vehicle was insured by GEICO through an insurance policy issued to her mother. *Id.* at ¶ 2. After deducting $25,000 received from the tortfeasor's carrier, GEICO paid $75,000 in UIM benefits. *Id.* at ¶ 2.

The De Smet policy provided UIM coverage at $100,000 per person, like the GEICO policy. *Id.* at ¶ 3. Pourier had uncompensated damages of at least $150,000, so she requested $100,000 in UIM coverage from De Smet. *Id.* De Smet refused to pay, based upon an owned but not insured exclusion. *Id.* That exclusion stated:

> We do not provide Underinsured Motorist Coverage for 'bodily injury' sustained by any person: 1. While 'occupying,' or when struck by, any motor vehicle owned by you or any 'family member; which is not insured for this coverage under this policy.

Id. It was undisputed that Pourier was occupying a vehicle owned by her father, which was not insured for underinsured coverage by De Smet. *Id.* Pourier contended that the exclusion was void against public policy. *Id.* at ¶ 4.

The *Pourier* decision was binding precedent on the Trial Court and remains the law. First, in *Pourier*, this Court recognized that "the majority of [states] have found the [owned but not insured] exclusion valid and enforceable." *Id.* at ¶ 7, 802 N.W.2d at 449. Indeed, the exclusion has been "upheld as a way to prevent insureds from purchasing insurance for one car only, and then attempting to apply the underinsured coverage from that insured vehicle to an accident occurring in an uninsured vehicle or from a vehicle insured by a different company." *Id.* (internal citations omitted). Said another way, as explained by this Court, " '[i]t is scarcely the purpose of any insurer to write a single [underinsured] coverage upon one of a number of vehicles owned by an insured, or by others in the household, and extend the benefits of such coverage gratis upon all other

vehicles - any more than it would write liability, collision, or comprehensive coverages upon one such vehicle and indemnify for such losses as to any other vehicle involved.'" *Id.* at ¶ 7, 802 N.W.2d at 450 (quoting *IDS Prop. Cas. Ins. Co. v. Kalberer*, 661 N.E.2d 881, 884-85 (Ind. Ct. App. 1996) (quoting John A. Appleman & Jean Appleman, 8C Insurance Law and Practice § 5078.15 at 179 (1981))). Thus, "invalidating the [owned but not insured] exclusion would 'permit an owner to buy excess coverage under one policy for one vehicle at a relatively small premium and coverage under a separate policy for his other vehicles at a lesser cost and have the excess coverage of the first policy apply to the vehicles covered under the subsequent policies.'" *Id.* (quoting *Powell v. State Farm Mut. Auto. Ins. Co.*, 585 A.2d 286, 291 (Md. Ct. Spec. App. 1991)). For these reasons, "it is up to insured to decide which vehicles they want to insure and at what limits: if they want greater protection, then they can pay for it." *Id.*

This Court in *Pourier* further recognized it had previously upheld an insurance company's family-member exclusion on similar grounds in *Cimarron Ins. Co. v. Croyle.* 479 N.W.2d 881, 886 (S.D.1992) (superseded by statute, SDCL § 32-35-70). In upholding said exclusion, this Court concluded that a family-member policy exclusion excluding the insured's vehicle from underinsured motorist benefits was not void as against public policy. *Cimarron Ins. Co.*, 479 N.W.2d at 885. There, this Court noted the language of SDCL § 58-11-9.5 is "legislative recognition of the right of insurance companies to place conditions on underinsured motorist coverage." *Id.* at 886. Because "[t]he clear implication of this language [in SDCL § 58-11-9.5] is that underinsured motorist coverage may be subject to certain terms and conditions," the Court held such exclusion was not inconsistent with South Dakota public policy. *Id.*

Thus, similar to *Cimarron*, the *Pourier* Court relied on SDCL § 58-11-9.5, noting that nothing in South Dakota public policy or SDCL § 58-11-9.5 "requires an insurer to pay underinsured motorist benefits in every circumstance." *Pourier*, 2011 S.D. 47, ¶ 12, 802 N.W.2d at 451. The Court found that "[t]o mandate that Pourier recover underinsured motorist benefits from De Smet would allow her (or her parent) to increase the underinsured coverage on a vehicle not insured by De Smet without purchasing additional underinsured coverage." *Id.* at ¶ 12, 802 N.W.2d at 451-52. To the Court, an insurance company's "prohibition of such an arrangement is not against public policy." *Id.* For these reasons, the *Pourier* Court concluded "owned but not insured exclusion" are not void against public policy. *Id.*

The factual scenario in *Pourier* is identical to this matter, again highlighting its applicability to the case at hand. The Estate of Rebecca A. Earll recovered $75,000.00 in UIM benefits under Rebecca's own automobile insurance policy purchased from Farmers Mutual. To mandate the Estate of Rebecca A. Earll recover additional underinsured motorist benefits from Farmers Mutual under a separate policy would allow the Estate of Rebecca A. Earll to increase the underinsured coverage on a different insured vehicle without purchasing additional underinsured coverage for said vehicle. As this Court in *Pourier* made clear: "the public policy expressed in SDCL § 58-11-9.5 is not violated by owned-but-not-insured clauses because the statute contemplates that mandated UIM coverage is limited to the coverage purchased for the insured vehicle." *Id.* 2011 S.D. 47, ¶12 n.1, 802 N.W.2d at 452 (emphasis in the original).

This Court concluded in *Pourier* that "owned but not insured" exclusions are valid and enforceable under SDCL § 58-11-9.5 and it remains binding precedent. Indeed,

like "the minor in *Pourier*, [the Estate of Rebecca A. Earll is] precluded from recovering under the insurance policy that cover[s] the minor as an insured but [does] not cover the car she was driving." *Wheeler*, 2012 S.D. 83, ¶ 13, 824 N.W.2d at 106. Applying *Pourier* to the facts here, the Trial Court properly reached the same conclusion and found the "owned but not insured" policy exclusion is valid and enforceable, granting Farmers Mutual's Motion for Summary Judgment. Thus, the Trial Court's Order should be affirmed.

III. The Legislature Has Not Altered SDCL § 58-11-9.5, Such That "Owned But Not Insured" Exclusions Remain Valid Limitations on Underinsured Coverage in the State of South Dakota.

Finally, this Court in *Pourier* explained that the South Dakota State Legislature, in enacting SDCL § 58-11-9.5, has expressly allowed insurers to place terms and conditions on UIM coverage. The exclusion in the UIM endorsement "protects [insurers like Farmers Mutual] from having to 'insure against risk of an undesignated but owned vehicle, or a different or more dangerous type of vehicle of which it is unaware, unable to underwrite, and unable to charge a premium therefor.' " *Id.* at ¶ 12, 802 N.W.2d at 451 (quoting *Lefler v. Gen. Cas. Co.*, 260 F.3d 942, 945 (8th Cir. 2001)). As set forth in footnote 4 of *Pourier*, the "owned but not insured" exclusion is consistent with what is mandated by SDCL § 58-11-9.5 because the statute is written in a way that mandates UIM coverage based on what coverage is actually purchased for the insured vehicle. That footnote states:

> [T]he public policy expressed in SDCL 58-11-9.5 is not violated by owned-but-not-insured clauses because the statute contemplates that mandated UIM coverage is limited to the coverage purchased for the insured vehicle. Although the statute requires the insurance companies to provide UIM insurance, it specifically limits coverage 'to the underinsured motorist's *coverage limits* on the vehicle of the party recovering . . .' (Emphasis added.) In this case, there were no

> coverage limits on the vehicle of the party seeking to recover because no coverage of any kind was purchased. Therefore, the language of SDCL § 58-11-9.5 itself reflects that owned-but-not-insured clauses do not violate the public policy expressed in the statute.

Id. at ¶ 12 n. 4, 802 N.W.2d at 451. (emphasis added). Respectfully, this exact same public policy and rationale apply here.

To that end, the Legislature has not altered—and the South Dakota Supreme Court has not overruled—this Court's interpretation in *Pourier*. Indeed, in *Wheeler*, this Court specifically proclaimed to the South Dakota Legislature that "[i]f this Court has misinterpreted the Legislature's intent in determining that Farmers' 'owned-but-not-insured' exclusion is void under SDCL § 58-11-9, the Legislature is free to clarify its intent." *Id.* at ¶ 24, n.4, 824 N.W.2d at 109. Even more so, in a special concurrence Justice Zinter observed that it would greatly benefit the State if the Legislature would express South Dakota's policy with respect to the inconsistencies between SDCL §§ 58-11-9 and 58-11-9.5, including clarifying what terms and conditions are allowable with respect to UIM coverage. *See id.* at ¶ 35, 824 N.W.2d at 112. Justice Zinter noted the explicit statutory language of SDCL § 58-11-9.5 caused the Court "to conclude that insurers may not exclude 'owned-but-not-insured' autos from the mandated uninsured motorist coverage, but they may exclude such autos from the mandated underinsured motorist coverage," and then plainly asked the South Dakota Legislature, "[i]s this really what the Legislature intended?" *Id.* at ¶ 31, 824 N.W.2d at 110.

The Legislature's lack of change in legislation and silence since codifying SDCL § 58-11-9.5 is a deafening answer to Justice Zinter's posed question. Indeed, in the nearly twelve years since *Wheeler* and Justice Zinter's question, the South Dakota

Legislature has not altered SDCL §§ 58-11-9 or 58-11-9.5. Instead, throughout the last thirteen years since *Pourier* and this Court's explicit pronouncement that "the language of SDCL § 58-11-9.5 itself reflects that owned-but-not-insured clauses do not violate the public policy expressed in the statute," SDCL § 58-11-9.5 has remained exactly the same. 2011 S.D. 47, ¶ 12, n.4, 802 N.W.2d at 451.

Accordingly, because the Legislature has not altered SDCL § 58-11-9.5, its language controls. In South Dakota, "the courts need only look to the statutes themselves to discern public policy." *Stratmeyer v. Stratmeyer*, 1997 S.D. 97, ¶ 20, 567 N.W.2d 220, 224. This is because "[t]he Legislature is the final arbiter of public policy[.]" *Id.* Following *Pourier*, *Wheeler*, and even most recently *Larimer v. Am. Family Mut. Ins. Co.*, 2019 S.D. 21, 926 N.W.2d 472, the South Dakota Legislature has not altered its public policy decree in SDCL § 58-11-9.5. For these reasons, *Pourier* and its interpretation of SDCL § 58-11-9.5 continues to control the outcome of this matter. Applying *Pourier* to the facts here, the Trial Court properly found the "owned but not insured" policy exclusion is valid and enforceable. Thus, the Trial Court's Order should be affirmed.

CONCLUSION

The Trial Court correctly granted Farmers Mutual's Motion for Summary Judgment and denied the Earlls' competing Motion for Summary Judgment by applying applicable, relevant precedent of this Court. The applicable "owned but not insured" exclusion is a valid limitation on underinsured coverage in the State of South Dakota under the plain language of SDCL § 58-11-9.5 and this Court's binding precedent. This Court has specifically held that "the language of SDCL § 58-11-9.5. itself reflects that

owned-but-not-insured clauses do not violate the public policy expressed in the statute." *Pourier*, 2011 S.D. 47, ¶ 12, n. 4, 802 N.W.2d at 451 (emphasis added). And since *Pourier*, the South Dakota Legislature has made no changes that abrogate the Court's interpretation of SDCL § 58-11-9.5. As such, in applying SDCL § 58-11-9.5 and this Court's prior rulings, the Trial court properly granted Farmers Mutual's Motion for Summary Judgment. The Trial Court's Order on Summary Judgment Motions should be affirmed.

Dated at Sioux Falls, South Dakota, this 15th day of August, 2024.

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REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument.

Dated at Sioux Falls, South Dakota, this 15th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 4,329 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 15th day of August, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellee" was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on 15th August, 2024.

The undersigned further certifies that an electronic copy of "Brief of Appellee" was emailed to the attorneys set forth below, on 15th August, 2024:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30732

DAVID H. EARLL and MARCIA R. EARLL, individually and as co-personal representatives of the ESTATE OF REBECCA A. EARLL,

Plaintiffs and Appellants,

VS.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA,

Defendant and Appellee.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL R. RASMUSSEN
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANTS

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Notice of Appeal filed on June 12, 2024

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REPLY ARGUMENT

I. THE "OWNED BUT NOT INSURED" EXCLUSION VIOLATES SOUTH DAKOTA PUBLIC POLICY FOR BOTH UNINSURED MOTORIST (UM) AND UNDERINSURED MOTORIST (UIM) BENEFITS.

The question of law raised by this appeal based on stipulated facts has been comprehensively briefed by the parties. The Earlls respectfully rely on the legal analysis set forth in their opening brief, save for a few additional points that may be helpful in considering the matters raised.

1. The Earlls certainly agree with the appellee that the *Pourier* decision was binding on the circuit court below. However, where the facts of a case clearly are distinguishable and also implicate subsequent Supreme Court decisions, such as the *Streff* decision, the Earlls respectfully suggest that the lower courts must apply the force of *all* of the higher court's binding precedent by reconciling them, keeping in mind that the most recent decision of the higher court should be followed. *See* Bryan A. Garner et al, *The Law of Judicial Precedent*, § 2 (Vertical Precedents) at p. 27 (Thomson Reuters 2016); *see also id.* at § 8 (Distinguishing Cases), § 15 (Binding Decisions) § (Choosing Between Discordant Decisions).

The *Streff* decision altered the landscape—and in the Earlls' view reflected a return to this Court's original analysis of the UM and UIM statutes set forth in the *Gloe* decision—because the same legal argument that the slight difference in the wording of the two statutes should be considered determinative was rejected in *Streff*. (R. 95-97; App. 8-10).

Streff involved a "government-owned vehicle" exclusion purporting to negate UIM coverage for Jody Streff, an insured under the policy, just as the "owned but not insured" exclusion purports to negate UIM coverage here for Rebecca Earll and her parents, also insureds under the policy at issue. In *Streff*, the insurer had argued that such an exclusion was an acceptable "term and condition" by which UIM coverage may be withdrawn under the "subject to the terms and conditions" language in SDCL 58-11-9.5. Under the *Pourier* rationale, such an argument might have been accepted. The rejection of that argument in *Streff*—consistent with *Gloe*—appears to have been a welcome restoration of the original understanding of the UM and UIM statutes, one that appears to have substantially eroded the unsatisfying *Pourier-Wheeler* dichotomy on which the appellee brief relies.

2. The appellee brief also relies heavily on its assertion that the fact that the UM and UIM statutes have not been overhauled by the South Dakota Legislature in the dozen or so years since Justice Zinter's thoughtful concurrence in *Wheeler* should be accorded controlling significance in this appeal. Such legislative inaction has been persuasively described as an extremely weak reed on which to try to anchor the interpretation of statutes:

> The premises undergirding the doctrine of legislative acquiescence make any reliance on it a dubious proposition.
>
> One must first believe that legislators in later legislative sessions were even aware of the particular court ruling interpreting a statute.

> One must then accept that a later legislature—through *silence*—has the ability to interpret the meaning of statutory text that an earlier legislature passed into law. One must believe, for instance, that the 2022 legislature possesses some insight for us—indeed, a *conclusive* insight—about how statutory text enacted by the 1976 legislature should be interpreted, and that it communicates that insight by doing nothing.
>
> From there, one must further accept that the later legislature's failure to act must be viewed as agreement with the court's statutory interpretation in the earlier case.
>
> Despite potentially innumerable reasons for a legislature's failure to amend a particular statute, the legislative acquiescence doctrine assumes and assigns one, and only one, reason for it: wholehearted approval of the court's prior interpretation.
>
> Justice Scalia excoriated the legislative acquiescence justification that the majority relies on today. He maintained that a legislative-inaction-confirms-we-got-it-right assumption "haunts" judicial opinions and "should be put to rest."
>
> "It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current [legislature] desires, rather than by what the law as enacted meant." Worse, it draws conclusions about the current legislature's "desires *with respect to the particular provision in isolation*," ignoring the legislative process's give-and-take required to create the "total legislative package" in which the isolated provision happens to reside.
>
> The Constitution "creates an inertia" through its "complicated check on legislation" that, Justice Scalia argues, "makes it impossible to assert with any degree of assurance" that inaction "represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."
>
> .

State v. Lee, 6 N.W.2d 703, 710-13 (Iowa 2024) (McDermott, J., dissenting) (quoting *Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J.,

dissenting)); *see also Clark v. Martinez*, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) (explaining that the mere fact that a legislature *could* take action "is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong, for the realities of the legislative process often preclude readopting the original meaning of a statute that we have upset"); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 426–27 (1988) (explaining that Legislative acquiescence assumes "that as soon as the judges have spoken, the decision of the past ceases to matter, and the only question is what the sitting Congress wishes. This simply denies the purpose of the enterprise: to enforce the decisions of a prior Congress"); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 275 (1982) ("The deal is struck when the statute is enacted. If courts paid attention to subsequent expressions of legislative intent not embodied in any statute, they would be unraveling the deal that had been made; they would be breaking rather than enforcing the legislative contract").

CONCLUSION

The Earlls, individually and as Co-Personal Representatives of the Estate of Rebecca A. Earll, should be entitled to available benefits under the UIM coverage of the policy Farmers Mutual sold to them for uncompensated damages sustained in the fateful collision on the final day of 2022.

WHEREFORE, David and Marcia Earll respectfully request that this Honorable Court reverse the order granting summary judgment in favor of the defendant and remand with instructions to grant their motion for summary judgment and enter declaratory relief that:

1. The Farmers Mutual policy provides available UIM coverage for the claims arising out of the accident under the policy it sold to the Earlls up to its $250,000 UIM coverage policy limits; and

2. The Farmers Mutual policy's purported "owned but not insured" exclusion seeking to negate mandatory UIM coverage for uncompensated damages suffered by an insured that were caused by an underinsured driver violates South Dakota law and public policy and is therefore unenforceable.

Respectfully submitted this 20th day of August, 2024.

JOHNSON JANKLOW & ABDALLAH LLP

BY: *<u>/s/ Ronald A. Parsons, Jr.</u>*

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,162 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS was served via Odyssey File and Serve upon the following:

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on this 20th day of August, 2024.

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