IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-1852

POTOMAC INSURANCE CO. OF ILLINOIS — APPELLANT

VERSUS

MARY GAYLE ADAMS, INDIVIDUALLY
AND ON BEHALF OF HER MINOR CHILDREN,
MARY CATHERINE ADAMS AND
ANDREW EDWARDS ADAMS — APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY

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CERTIFICATE OF INTERESTED PERSONS

Mary Gayle Adams respectfully submits that the following individuals have an interest in the outcome of this case. This *Certificate of Interested Persons* is respectfully submitted so that the Court may determine the necessity of recusal or replacement of certain justices due to conflicts of interest:

I. Parties

A. Mary Gayle Adams

B. Potomac Insurance Company of Illinois

II. Attorneys for the Parties

A. Attorneys for Mary Gayle Adams

1. Randall A. Smith, Hiawatha Northington, Tiffany Davis and Michael W. Hill of Smith & Fawer, L.L.C.

2 Edward Gothard of Nowalsky, Bronston & Gothard, L.L.P.

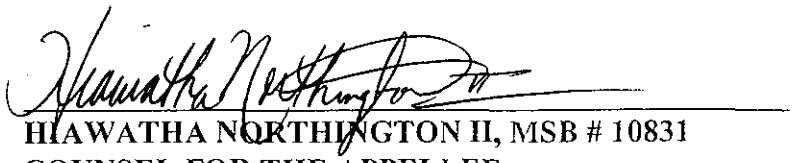
B. Attorneys for Potomac Insurance Company of Illinois

1. Gerald Kucia and Brenda Bethany of Daniel, Coker, Horton & Bell, P.A.

C. Circuit Judge

1. Honorable Ashley Hines

SO CERTIFIED, this the 3 day of March, 2008.



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STATEMENT CONCERNING ORAL ARGUMENT

Mary Gayle Adams submits that oral argument is not necessary in this case. The facts in this case are simple, straightforward and largely undisputed. Furthermore, the legal principles governing the matter *sub judice* derive from longstanding rules of insurance contract interpretation. They involve neither novel issues of law nor compelling issues of public policy important to any but the litigants herein. Nevertheless, to the extent that the Court desires oral argument, the undersigned counsel will present argument at the Court's leisure.

STATEMENT OF ISSUE

Whether UM/UIM coverage exists for an accident occurring in an automobile rented by an employee of a named insured in the course and scope of her employment, where the policy states that coverage will extend to "an 'auto' owned or leased" by the named insured and the policy further states that "any covered 'auto' you hire or borrow is deemed to be a covered 'auto' you own."[1]

[1] In the Court below, and again before this Court, Potomac submits that the factors set forth in *Boardman v. United Services Automobile Association*, 470 So.2d 1024 (Miss. 1985), warrant a finding that Texas law applies to the case *sub judice*. Ms. Adams agrees that the "center of gravity test" set forth in *Boardman* would compel use of either Texas or Mississippi substantive law as the appropriate rule of decision. *Id.* at 1030. The "choice of law" issue raised by Potomac consequently presents a false conflict. *Compare, e.g., Hininger v. Case Corp.*, 23 F.3d 124 (5th Cir. 1994)(citing Scoles & Hay, *Conflict of Laws* 17 (1984) ("'false conflict' exists when the potentially applicable laws do not differ")). Therefore, the Court need not concern itself with deciding which state's substantive law applies to the instant case.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below

Acting on its belief that the insurance coverage provided to it by Potomac Insurance Company of Illinois (hereafter "Potomac") covered its employees when they rented automobiles in the course and scope of their employment, Mary Gayle Adams' employer, Careington International, advised her to reject liability and collision insurance when she rented automobiles on business trips undertaken for the company. Ms. Adams relied on that mandate when she rejected insurance coverage on the automobile she hired on a business trip she undertook for Careington to Greenville, Mississippi. Having suffered a catastrophic accident in the course and scope of that trip, Ms. Adams now finds Careington's insurer rejecting uninsured/underinsured (UM/UIM) coverage for that accident, on the grounds that the policy between Careington and Potomac did not extend coverage to automobiles rented by Careington employees in the course and scope of their employment. The facts demonstrate the contrary to be the case.

As part of her position with Careington, Ms. Adams flew to Jackson, Mississippi and rented an automobile from National Rental Car to transport her to Greenville, Mississippi. She was at all relevant times acting within the course and scope of her employment with Careington. It is undisputed that, at the time she rented the automobile, she did not accept National Rental's separate policy of insurance coverage. She had good reason to reject this unnecessary and duplicative coverage. Her employer had in place a policy of insurance coverage with Potomac that afforded coverage, including uninsured/underinsured motorist coverage ("UM/UIM") to hired vehicles. Specifically:

(1) The Policy covers bodily injury and property damage on "Any

Auto" (including automobiles leased, hired, rented, or borrowed). *See* Potomac Policy at Item Two -- Schedule of Converges and Covered Autos, p.1, attached as Exhibit "E" to Potomac's Response to Plaintiff's Statement of Uncontested Facts and Motion for Summary Judgment, a pleading which is attached to Potomac's Petition for Interlocutory Appeal as Exhibit "B."

(2) Item Four of the Policy Declarations is Entitled "Schedule of Hired or Borrowed Covered Auto Coverage and Premiums." *See id.* at p.7. The Policy goes on to provide for coverage for said vehicles, along with premium rates and policy limits. At the bottom of page five is a box, checked with three (3) "x" marks which states that "[i]f this box is checked, PHYSICAL DAMAGE COVERAGE applies on a direct primary basis and for purposes of the condition entitled OTHER INSURANCE, **any covered "auto" you hire or borrow is deemed to be a covered "auto" you own**." *Id.* (emphasis added).

(3) The UM/UIM Declaration provides that the protection extends to "covered autos" and further provides that "[c]overed auto includes autos . . . for which Uninsured/Underinsured Motorists Insurance has not been rejected in writing." *Id.* at TE 04 09D, Section F, Additional Definitions," No. 4.

(4) **Neither Potomac nor Careington have produced <u>any</u> document that purports to reject, in writing, UM/UIM coverage for hired or rented automobiles.** Indeed, on December 19, 1996, Melissa Watkins on behalf of Careington's predecessor in interest, American Dental Benefits Group, Inc., executed a Supplemental Auto Application - Texas, a copy of which is attached hereto as Exhibit "D" to Plaintiff's Statement of Uncontested Facts and Motion for Summary Judgment, a pleading which is attached to Potomac's Petition for Interlocutory Appeal as Exhibit "F." The Application states: "Texas law requires that we offer you Uninsured/Underinsured Motorist Coverage equal to the liability limits of your policy." For the company, Ms. Watkins replied that she "Selected Uninsured/Underinsured Motorist Limits of: Combined Liability Limit $1,000,000."

See, C.P. Supp. Vol. 4:508-509. Ms. Adams thus relied on the existence of this coverage in rejecting the policy of insurance offered to her by the National agent.

Indeed, Ms. Adams had previously been instructed by her employer that the Company insisted that its traveling employees reject the policy of insurance offered on automobiles they rented while traveling on business. *See,* C.P. Supp. Vol. 3:425. Thus the coverage extended to Careington and its employees by the terms of Potomac's policy, coupled with the intent of the insurer in obtaining that coverage, clearly delineated that employees traveling on business were covered for accidents in which they were involved while traveling in automobiles rented in the course of their business excursions.

Ms. Adams unfortunately fell victim to just such an accident during her trip to Northern Mississippi. On or about May 1, 1997, Ms. Adams was driving northbound from Jackson, Mississippi to Greenville on Highway 1. C.P. Vol. 1:10. Suddenly and without warning, Mr. Yarbrough--driving in the opposite direction on Highway 1--abruptly turned across Ms. Adams' lane of travel, crashing into Ms. Adams' vehicle and causing her serious injuries. *Id.* The injuries sustained by Ms. Adams in this automobile crash have rendered her permanently partially disabled, such that her medical costs and pain and suffering far exceed the limits of liability coverage contained in the liability policy covering Mr. Yarborough's automobile.

Ms. Yarborough has looked to the UM/UIM policy provided by Potomac to recoup these losses but has been met with the argument that the policy provides no coverage for her individual accident. The Circuit Court disagreed and this Court should affirm that result.

Ms. Adams commenced the instant lawsuit in the Circuit Court of Washington County, Mississippi, by Original Complaint filed on or about April 28, 2000. C.P. Vol. 1:8. The Original Complaint named Careington International, d/b/a The Dental Network d/b/a American Dental

Benefits Group, Inc. (Ms. Adams' employer), Jason Yarborough (the tortfeasor who struck Ms. Adams' rented automobile), American Staff Resources Corporation and Potomac Insurance Company of Illinois (the automobile insurer for Careington International). *Id.* All Defendants have since been dismissed from this lawsuit except for Potomac.

Ms. Adams subsequently moved for summary judgment against Potomac, claiming that the UM/UIM insurance policy issued to Careington provided coverage for Ms. Adams' injuries.C.P. Supp. Vol. 1:313-474. Potomac cross-moved for summary judgment based on the allegation that the policy excluded this accident from the scope of incidents covered by the policy. C.P. Vol. 1:324-364. On October 20, 2004, the Circuit Court, via opinion and order, granted Ms. Adams' Motion and denied that of Potomac. C.P. Vol. 5:744-747. This appeal follows the certification of the summary judgment to Ms. Adams as a final judgment.

SUMMARY OF THE ARGUMENT

Both Texas and Mississippi law regarding UM/UIM coverage is quite clear. Coverage cannot be "read out" of a policy of insurance, and if any coverage exists, then UM/UIM coverage coextensively exists. In this case, the Potomac policy expressly provides for physical damage coverage for the vehicle in question. As a matter of law, UM/UIM coverage coexists on that vehicle, and in turn, was available to Mary Gayle Adams at the time of the accident at issue in this case.

STANDARD OF REVIEW

The Mississippi Supreme Court's position is clear on the standard of review for summary judgments; the Court reviews summary judgments de novo. *Eckman v. Cooper Tire & Rubber Co.*, 893 So. 2d 1049, 1052 (Miss. 2004); *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002). The moving party shall have its motion for summary judgment granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." Miss. R. Civ. P. 56(c).

ARGUMENT

In an attempt to obfuscate the clear coverage provided by its UM/UIM policy in the matter *sub judice*, Potomac has ignored the clear language of its policy and the intent of the parties to that insurance contract. Whether the Court applies Mississippi substantive law or Texas substantive law to the case–the latter of which Potomac requests–the Court will find that the plain language of the Potomac policy warrants a finding of coverage. Therefore, the Circuit Court rested on solid ground in granting Ms. Adams' Motion for Summary Judgment, and this Court should affirm that judgment.

I. MISSISSIPPI LAW COMPELS A FINDING OF UM/UIM COVERAGE FOR THIS ACCIDENT.

The undisputed facts show that neither Careington nor any of its employees **ever** executed a waiver of UM/UIM insurance coverage on the vehicles its employees operated during the course and scope of their duties with Careington. Absent such a waiver, Mississippi law categorically compels a finding that such coverage **of necessity** exists. Just such coverage exists herein.

Mississippi law requires that the scope of UM/UIM coverage under an auto insurance policy be at least as broad as the scope of liability coverage under that policy. *See Crane v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 654, 656 (S.D. Miss. 1998). This rule of law stems from the "strong tendency" of the Mississippi Supreme Court to liberally construe the provisions of the Mississippi Uninsured Motorist Act. *J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So. 2d 550 (Miss. 1998). Mississippi construes any ambiguity in policies of insurance against the insurer and construes exclusions in uninsured motorist policies with similar strictness. *State Farm Mut. Auto. Ins. Co. v. Nester*, 459 So. 2d 787, 790 (Miss. 1984). Additionally, the State of Mississippi requires that uninsured motorist provisions within automobile insurance policies must be interpreted from the standpoint of the injured insured. *Atlanta Cas. Co. v. Payne*, 603 So. 2d 343, 346 (Miss. 1992). Further, if a policy of insurance conflicts with the Mississippi Uninsured Motorists Act, the law trumps the policy. *Boatner v. Atlanta Specialty Ins. Co.*, 115 F.3d 1248, 1253 (5th Cir. 1997). Given these rules of construction, it is little wonder that "the overwhelming number of uninsured motorist insurance policy exclusion provisions that this Court has considered have been found to be void and against public policy." *Payne*, 603 So. 2d at 347.

Potomac's attempt to impose a "definitional exclusion" of UM/UIM coverage in this matter

should likewise be found void by this Court. *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So. 2d 767 (Miss. 1973), demonstrates beyond peradventure the invalidity of Potomac's attempt. The facts of *Lowery* are similar to those of the instant case – the issue before the Court was whether "the insurance policy cover[s] an insured owner of an automobile and the members of his family who are injured while riding in or on another motor vehicle not mentioned in the insurance policy?" *Id.* at 769. After considering a legion of cases from many jurisdictions, the Mississippi Supreme Court held that an exclusionary clause that frustrated UM/UIM coverage for an accident that occurred on a motorcycle not listed in the declarations of the policy "violates the public policy of this state as manifested by the Mississippi Uninsured Motorist Act." *Id.* at 777. Concurring with this ruling, the Fifth Circuit has likewise stated that, "**covered insureds 'may be pedestrians at the time of . . . injury, they may be riding in motor vehicles of others or in public conveyances and they may occupy motor vehicles (including Honda motorcycles) owned by but which are not 'insured automobiles' of [the] named insured.**'" *Boatner*, 115 F.3d at 1258 (quoting *Lowery*, 285 So.2d at 773 (emphasis added)(citations omitted)). Coverage was nevertheless mandated and found in *Boatner*, an opinion that should guide this Court's adjudication of the instant matter.

Putting aside this on-point jurisprudence, it is likewise clear that the Potomac policy conflicts with the terms of the Mississippi Uninsured Motorist Act. The Act provides that:

> The term "insured" shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies, or the personal representative of any of the above. The definition of the term "insured" given in this section shall apply only to the uninsured motorist portion of the policy.

Miss. Code Ann. § 83-11-103(b). Notably, this portion of the Act mandates coverage **regardless of the automobile used by the insured**. This provision trumps any UM/UIM policy definitions that seek to limit coverage through the definition of "insured" or "covered auto," such as the Potomac Policy. *See, e.g. Owen v. Universal Underwriters Ins. Co.*, 252 F. Supp. 2d 324, 327-328 (S.D. Miss. 2003). This is so simply by operation of law, since policy provisions that conflict with Mississippi's statutory definitions are *per se* void. *Id. See also Guardianship of Lacy v. Allstate Ins. Co.*, 649 So. 2d 195 (Miss. 1995).

A similar holding is found in *Crane v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 654, 656 (S.D. Miss. 1998). In *Crane*, an auto mechanic was injured while riding in a customer's vehicle. The parties stipulated that the customer's vehicle was covered under the liability provisions of the employer's policy, as has occurred in this case. *Id.* at 656. However, the defendant contended that the uninsured motorist benefits of the policy flowed only to the named insured (the business owner) and not to the employees of the business. Thus, the issue at bar was whether the plaintiff was an "insured" under the UM/UIM coverage.

The *Crane* court noted that there are two classes of "insureds" for the purposes of UM/UIM coverage: (1) those designated as "named insureds," and (2) those who, while not named insureds, occupy a vehicle "to which the policy applies." *Id.* at 658. Analyzing the statutory language, the court ultimately held that "the Mississippi Supreme Court would find and require uninsured motorist coverage where there is liability coverage. . . the vehicle in which the plaintiff's decedent was riding was a 'covered vehicle' because it was a vehicle insured under the liability provisions of the subject

policy." *Id.*

This is precisely the situation with the case at bar. Potomac's policy affords liability coverage to the "hired auto" in question. Yet Potomac denies UM/UIM coverage for precisely the same auto. This interpretation ignores the fact that the parties clearly bargained for such coverage. More importantly, the denial violates the basic tenets of Mississippi law regarding the length and breadth of UM/UIM coverage, as well as the statutory edicts of the Mississippi Uninsured Motorists Act. In short, the issue is not terribly vexing: if there is liability coverage, then there must be UM/UIM coverage as a matter of law. The latter is coextensive with the former, and any attempt to "read out" such coverage is contrary to crystal clear Mississippi law and jurisprudence.

II. TEXAS LAW LIKEWISE FINDS COVERAGE UNDER POTOMAC'S UM/UIM POLICY.

Given Texas' equally uncompromising stance concerning the scope of UM/UIM coverage, Texas law would likewise find UM/UIM coverage under the policy at issue. Even in the absence of the presumption of coverage, the plain language of Careington's policy with Potomac would compel a finding of coverage. Using either tool of analysis, summary judgment in Ms. Adams' favor was and remains appropriate.

A. The Texas UM/UIM Statute Compels a Finding of UM/UIM Coverage in the Instant Case.

Like many states, Texas requires strict construction of insurance policies in favor of the insured. When in doubt, coverage is presumed:

> Under Texas law, the words and clauses of insurance contracts are strictly construed against the insurer. If a word or clause has more than one meaning, then the meaning favoring the insured must be applied. If the clause may be interpreted as a limiting term or as an exclusionary clause, the insured's reasonable construction of the

> clause must be adopted, even if the insurer's construction is more reasonable.

Adams v. John Hancock Mutual Life Ins. Co., 797 F. Supp. 563, 567 (W.D. Tex. 1992). *See also Toops v. Gulf Coast Marine, Inc.*, 72 F.3d 483, 486 (5th Cir. 1996). Consequently, any analysis of the Potomac policy begins with this rule of interpretation.

In this case, Careington paid a premium for the coverage prayed for in this litigation. Pursuant to the Texas Uninsured Motorists Statute, absent a clear, affirmative **written** rejection of such coverage, UM/UIM coverage exists as a matter of law. Tex. Ins. Code Art. 5.06-1; C.P. Supp. Vol. 3:428-430. The fact that the Texas Uninsured Motorists Statute must be construed broadly is well-documented--in point of fact, it makes such coverage **absolutely mandatory** absent a written rejection. Speaking on this issue, the Texas Court of Appeals has noted that "[b]y the enactment of article 5.06-1, **the Legislature declared it to be the public policy of this state to make uninsured motorist coverage a part of every liability insurance policy issued**, with certain limited exceptions. . . it has been held that article 5.06-1 should be interpreted liberally to give effect to [this] public policy. . ." *Employers Cas. Co. v. Sloan*, 565 S.W.2d 580, 583 (Tex. App. - Austin 1978)(emphasis added). The rule requiring a written rejection of UM/UIM coverage is not subject to any flexibility. Texas law requires that attempt to vindicate such a written rejection must be strictly construed against the insurer, both to protect the rights of the insured and to insure that the strong public policy embodied in the Texas Uninsured Motorist Statute be given full effect. *Howard v. INA County Mutual Ins. Co.*, 933 S.W.2d 212, 218 (Tex. App. - Dallas 1996). As another Texas Court of Appeals has explained,

> As we read Texas cases, **there is one key to determining whether a particular exclusionary provision in an uninsured motorist policy is valid or invalid. This**

> **is whether the invocation of the exclusion would, under the circumstances of the particular case under consideration, operate to deprive an insured of the protection required by the Texas Uninsured Motorists Statute. . .In our view . . . exclusionary clauses are invalid when they excuse the policy for which a premium has been paid from providing the minimum coverage required [by statute]** . . . The question is whether the exclusion . . .if invoked, would cause the coverage of that policy to be less than the minimum $10,000/$20,000.

Briones v. State Farm Mutual Automobile Ins. Co., 790 S.W.2d 70, 74 (Tex. App. – San Antonio 1990) (emphasis added). *Accord, Stephens v. State Farm Mut. Auto. Ins. Co.*, 508 F.2d 1363 (5th Cir. 1975).

Speaking on this issue, the Texas Supreme Court has likewise held, in no uncertain terms, that any clauses in an insurance policy that are inconsistent with the goals of the Texas Uninsured Motorist Statute are invalid. In *Stracener v. United Services Automobile Association*, 777 S.W.2d 378 (Tex. 1989), the Texas Supreme Court held that:

> By purchasing this coverage along with basic liability coverage, the insured has expressed an intent not only to protect others from his or her own negligence, but also to protect that person's own family and guests from the negligence of others. . . **Those clauses in insurance policies which are not consistent with and do not further the purpose of article 5.06-1 are invalid.**

Id. at 384(emphasis added). Thus, to the extent that Potomac's denial of coverage is grounded in a "definitional exclusion," the clear instruction of Texas Supreme Court invalidates that alleged exclusion as a matter of law. Potomac's denial of coverage is grounded in its argument that the rental car driven by Ms. Adams was not a "covered auto." Specific Texas jurisprudence rejects this argument. In *Bilbrey v. American Automobile Ins. Co.*, 495 S.W.2d 375 (Tex. App. - Eastland 1973), the plaintiff was injured in a rear-end collision. At the time, he was not driving his insured vehicle, but was instead operating an automobile regularly furnished to him by the City of Abilene.

Id. at 375-376. Like Potomac, his insurance company denied coverage on the basis of a "covered auto" definitional exclusion. *Id.* Although an issue of first impression for the Texas Court of Appeals, the Court looked to a similar case from the State of Ohio for guidance. Adopting and quoting from that decision, the Texas Court of Appeals held that arguments such as those advanced herein by Potomac are grossly misplaced.

> **Thus, the uninsured motorist coverage was applicable if, at the time of sustaining injury, [the Plaintiff], a named insured, was occupying the Ford described in his policy, or was on foot, or on horseback, or while sitting in his rocking chair on his front porch or while occupying a non-owned automobile furnished for his regular use, including the Plymouth occupied by him on November 20, 1961. This so-called uninsured protection is limited personal accident insurance chiefly for the benefit of the named insured.**

Id. (emphasis added). Quite clearly, Texas courts do not share Potomac's view of its "definitional exclusion."

Perhaps the most shocking aspect of Potomac's denial of coverage is that it makes its denial without submitting any evidence of a written rejection of UM/UIM coverage. This fact is the death knell for Potomac's denial of coverage. Texas law simply could not be any more clear on this subject. "Because of its remedial purpose, and as a corollary to the court's liberal interpretation effecting UM/UIM coverage, the written rejection exception to article 5.06-1's general rule should be strictly construed to protect the insured. **Thus, absent a written rejection, every automobile liability policy of insurance delivered in this State includes UM/UIM coverage by operation of law."** *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 218 (Tex. App. - Dallas, 1996) (emphasis added).

In this case, there exists a written **acceptance** of UM/UIM coverage that does not distinguish between types of vehicles. There are, in contrast, **no documents that constitute a written rejection of the coverage**. Under Texas law, UM/UIM coverage exists in this case. There is simply no alternative.

B. The Language of the Potomac Policy Compels a Finding of UM/UM Coverage.

1. Texas law strictly construes insurance policies in favor of coverage.

Stripped of the presumption in favor of finding UM/UIM coverage, the explicit language of the Potomac policy would nevertheless compel a finding of UM/UIM coverage. Regardless of whether the individual driver is a "named insured" under the policy, the policy states that coverage will extend to any "covered auto", including within the scope of "covered auto" those automobiles "hired or borrowed" by Careington or any of its agents or employees. Ms. Adams clearly hired or borrowed the National Rental car at issue in this case while acting in the course and scope of her employment with Careington. Therefore, the plain language of the policy before the Court provides UM/UIM coverage for the injuries sustained by Ms. Adams as a result of the accident she sustained while driving that covered automobile.

It is well-settled that, as with any other contract, insurance policies are to be read to determine the intent of the parties to the insurance policy. "A reviewing court generally interprets an insurance policy under the same rules of construction as any other contract, reading all parts of a contract together and viewing the contract in its entirety to give effect to the written expression of the parties' intent." *Justice v. State Farm Lloyds Ins. Co.*, 2008 WL 123857 at *3 (Jan. 15, 2008 Tex. App. - Houston)(Frost, J. concurring). *See also Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.2d 200, 205 (Tex. App. – Houston 2006). Because the insurer drafts the contract of insurance, and ultimately controls the amount of insurance for which the insurer bargains, any ambiguities in the contract are to be strictly construed **in favor of** finding insurance coverage. *See generally, Evanston Ins. Co. v. ATOFINA Petrochemcial, Inc.*, 2008 WL 400394, *5(Tex. Feb. 15, 2008)("we must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent."'); *Utica Nat. Ins. Co. v. Amer. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004). This rule of Texas substantive law states one of the most stringent concerning the manner in which courts must interpret insurance policies. If **any** reasonable interpretation favors coverage–regardless of whether a more plausible interpretation **may** exist–the Court must follow that interpretation most liberally favoring the insurer.

2. The language of the Potomac policy compels a finding of coverage.

In this case, one need not stretch the plain language of the Potomac policy at issue to find UM/UIM coverage for the injuries sustained by Ms. Adams. Potomac itself admits that coverage will exist for this accident if "she was occupying a 'covered auto.'" Two definitions of "covered

auto" within the context of the Potomac policy delineate rental cars as "covered autos" within the meaning of the policy. First, the UIM/UIM insurance endorsement states that "covered autos" will include "an auto owned or leased by you" the insured. Furthermore, under the physical damage coverage section contained in the policy, the policy states that "any covered 'auto' you hire or borrow is deemed to be a covered 'auto' you own." C.P. Supp. Vol. 3:360. Either of these two (2) provisions would extend coverage to the current situation, in which an employee of the insured rented a vehicle in the course and scope of her employment with the company, for the benefit of her employer and exclusively to carry out that employer's business, and sustained injuries while operating that motor vehicle.

At the outset, it is clear that Ms. Adams "leased" the automobile in which she was injured in the course and scope of her employment, even if that "lease" was for the short interval of her rental contract with National Rental Car. The term "lease" is classically defined as the act by which an individual or entity enters into "a contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent." *Merriam-Webster's Online Dictionary* (2008)[2]. Conversely, the term "rent" is defined as the action "to take and hold under an agreement to pay rent." *Id.* These words are clearly defined with respect to one another and have an interconnected meaning in that they both imply the taking of possession of something for a fixed term in exchange for a specified sum. In this case, Ms. Adams leased the automobile in which she sustained the accident on behalf of her employer–the insured–and used that automobile in the course and scope of her employment with that insured. Therefore, the policy provides UM/UIM coverage for the injuries

[2] *Allstate Ins. Co. v. Moulton*, 464 So.2d 507 (Miss. 1985)("in construing the language of an insurance policy, the words used "are to be given their customary and normal meanings.")

she sustained while operating that vehicle.

In addition to the UM definition in the policy, the definition contained in the "physical damage" coverage section likewise defines "covered auto" to include situations where employees of the named insured rent automobiles in the course and scope of their employment with the company. Because the Potomac policy does not have a single unified definition of "covered auto," nor does it have different definitions of that term in each and every coverage section or endorsement contained in the policy, a determination of the meaning of "covered auto" has meaning within the policy requires a reading of the various sections of the policy *in pari materia* to extrapolate the meaning of the term "covered auto" within the policy as a whole. *See, e.g., Diogenes Editions, Inc. v. State of Miss.*, 700 So. 2d 316, 320 (Miss. 1997); *Brown v. Hartford Life Ins. Co.*, 606 So. 2d 122, 124 (Miss. 1992). In this case, the "physical damages" provision of the insurance contract states that, as to "covered autos", any automobile "you hire or borrow is deemed to be a 'covered auto' you own." C.P. Supp. Vol. 3:360. Therefore, because Adams rented the National Rental automobile at issue in this case for the express purpose of furthering Careington's business affairs, that automobile is deemed to be a "covered auto," and she is covered under the UM/UIM provisions extending to that automobile.

Potomac may attempt to avoid this construction of the contract by arguing that "you" means the named insured, and the only named insured under the insurance policy at issue is Careington and not its employees. However, this argument would mean that the insurance sold to Careington would insure absolutely nothing, for Potomac's construction would mean--as the circuit court properly noted--that:

> . . .Potomac claims that Ms. Adams was not a named insured under

> the policy, therefore neither she nor the vehicle she was driving were covered by the policy. Having reviewed the policy in question, this Court finds that no individuals are named in the policy and that only corporations are named. Therefore the employees, including Ms. Adams, working within the course and scope of their employment were intended to be covered by the policy. To find otherwise would be to find that no humans were covered under the insurance policy.

C.P. Vol. 5:746. *Compare, e.g., Continental Cas. Co. v. Hester*, 360 So.2d 695, 697 (Miss. 1978)("It is axiomatic that all provisions of an insurance policy must be so construed, if possible, to give effect to each. *Southern Home Ins. Co. v. Wall*, 156 Miss. 865, 127 So. 298 (1930). To construe the policy as urged by appellees, would both be contrary to the ordinary meaning of the words used, and would render part of the definition of "ultimate net loss" meaningless. We decline to do that."). Corporations are animated by their officers and employees and cannot act except through their agents and employees. *See Steinwinder v. Aetna Cas. & Sur. Co.*, 742 So.2d 1150, 1156 (Miss. 1999)(McRae J., dissenting). In this case, Potomac admits that Adams "rented the car [at issue] for business purposes after flying from New Orleans, Louisiana to Jackson, Mississippi to visit with potential and/or existing clients of Careington." *Original Brief of Potomac Insurance Company* at p. 11. Thus Adams rented the automobile on behalf of the named insured and not for any personal reasons.[3] The rental should therefore be imputed to Careington, the named insured, and UM/UIM coverage found for the injuries sustained during the accident involving that rental car.

That this was the clear and unmistakable intent of the named insured in this case–

[3]This distinguishes the case *sub judice* from *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997), heavily relied on by Potomac. In *McKee*, the plaintiff was seeking coverage for a vehicle not owned by the corporation for injuries sustained by a non-employee family member of the corporation, which injuries were sustained in the course of a non-business related excursion. *Id.* at 456. The instant case presents a situation where the plaintiff is an employee of the named insured who rented the subject vehicle in the course and scope of her employment with the named insured and solely to forward the objectives of that named insured. Given this distinction between *McKee* and the instant matter, any holding *McKee* may offer is nugatory.

Careington–is beyond dispute. In a Careington memorandum dated November 17, 1997, Careington advised its employees that:

> Effective immediately, if you have been electing the insurance coverage offered when renting a car for business purposes, please begin declining this coverage.
>
> CAREINGTON International maintains insurance coverage for the company that includes car rentals, which makes the insurance coverage the rental agencies offer unnecessary.

C.P. Supp. Vol. 3:425. When Ms. Wilkins (married name, Burke) was later deposed, she testified that this was not a new coverage acquisition, and that Careington maintained the same coverage for rental cars in the years previous, including the time frame relevant to this case. C.P. Vol. 3:427. This memorandum, and the subsequent elaboration of its intent by Ms. Wilkins, demonstrates that the intent of Careington was that its employees have liability, collision and UM/UIM insurance through its policy with Potomac. It indeed paid an additional premium to Potomac and executed an acceptance of UM/UIM coverage so as to insure the placement of that coverage for its employees. For Potomac to now deny coverage is to renege on the promise it made in exchange for the payment of that premium by Careington.

With or without the presumption of UM/UIM coverage afforded by the Texas Uninsured Motorists Act, the clear language of the Potomac policy–undergirded by the intent of the insured and the premiums paid by that insured–delineates that its coverage extends to employees of Careington operating rental vehicles in the course and scope of their employment with Careington. Ms. Adams is just such an employee. Therefore, the court below correctly found the existence of UM/UIM insurance for the catastrophic injuries she as the result of an accident incurred in the course and

scope of that employment.

CONCLUSION

For the foregoing reasons, Mary Gayle Adams respectfully prays that the Court affirm the decision of the Circuit Court, granting summary judgment to Mary Gayle Adams.

RESPECTFULLY SUBMITTED on this 3 day of March 2008.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this day served a copy of the foregoing pleading on the presiding Circuit Court Judge and all counsel of record in this matter, listed below, by mailing the same by United States Mail, properly addressed and first-class postage pre-paid:

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This 3 day of March 2008.

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