

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Judge

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Opinion No. 2011-UP-242 Filed May 24, 2011  
Withdrawn, Substituted and Re-filed June 23, 2011

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Joshua Bell ..... Petitioner,

v.

Progressive Direct Insurance Company ..... Respondent.

**AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF  
PETITIONER JOSHUA BELL**

William F. Merlin, Jr. Esq.  
Florida Bar #0364721  
MERLIN LAW GROUP, P.A.  
777 S. Harbour Island Blvd.,  
Suite 950  
Tampa, Florida 33602  
Telephone: (813) 299-1000  
Facsimile: (813) 229-3692  
Attorney for *Amicus Curiae*  
United Policyholders

J. Jackson Thomas, Esq.  
Thomas & Brittain, PA  
1314 Professional Dr  
Myrtle Beach, SC 29577  
(843) 692-2628  
Attorney for *Amicus Curiae*  
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## STATEMENT OF INTEREST

United Policyholders ("UP") is a non-profit charitable organization founded to preserve the integrity of the insurance system by serving as an information resource and a voice for policyholders' interests. Donations, grants, and volunteer labor support the organization's work.

UP has filed over two hundred and thirty-five *amicus* briefs in state and federal appellate courts throughout the United States. The organization has participated by court invitation in briefing and oral argument, and many arguments from UP's *amicus curiae* briefs have been cited with approval by reviewing courts. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP seeks to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."<sup>1</sup> UP hopes to provide assistance in analyzing public policy implications of the issues presented in a way that compliments the arguments raised by counsel for the parties to this appeal.

## STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in failing to recognize the doctrine of reasonable expectations protects insureds in South Carolina?

## STATEMENT OF THE CASE

United Policyholders adopts by reference the Statement of the Case of Petitioner, Joshua Bell. *See* Rule 208(b)(6), SCACR.

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<sup>1</sup> *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

## ARGUMENT

### **THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THE DOCTRINE OF REASONABLE EXPECTATIONS PROTECTS INSUREDS IN SOUTH CAROLINA.**

#### **A. Insurance is a Necessary Part of Modern Life**

The insurance industry may be the most influential industry in America, if not the world. Insurance is the foundation of our economy and a necessity of day-to-day life. It is required to obtain a drivers license,<sup>2</sup> own a car,<sup>3</sup> purchase a home, own a business, and even to receive medical care. While most people think about insurance only at the time of purchase, when accidents happen or disaster strikes, insurance is the only thing that stands between an individual, family, or business and financial ruin.

Insurance is a product that transfers risk and gives people access to resources they would otherwise be unable to afford. Simply stated, insurance is a method of hedging a bet; for the price of the premium, the insurer assumes the financial risk of a potential loss. The insurer pools the premiums of similarly situated insureds, so it has the

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<sup>2</sup> *S.C.Code Ann.* § 56-1-80(c) “Every person who obtains a driver's license or permit for the first time in South Carolina and every person who renews his driver's license or permit in South Carolina must be furnished a written request form for completion and verification of liability insurance coverage.” This requirement is waived only if a “completed and verified form or an affidavit prepared by the department showing that neither [the applicant], nor a resident relative, owns a motor vehicle subject to the provisions of this chapter” is “delivered to the department at the time the license or permit is issued or renewed.”

<sup>3</sup> South Carolina requires liability insurance, or in the alternative, payment of the uninsured motor vehicle fee for a registered motor vehicle. *See S.C.Code Ann.* § 56-10-10 (2012) (every owner of a motor vehicle required to be registered in this South Carolina shall maintain the security required by Section 56-10-20 throughout the effective registration period); *S.C.Code Ann.* § 56-10-20 (2012) (security must be for at least the minimum coverages; the director may approve and accept another form of security in lieu of a liability insurance policy if he finds that such other form of security is adequate and provides the benefits required); *S.C.Code Ann.* § 56-10-510 (every person registering or reregistering an uninsured motor vehicle shall pay an uninsured motor vehicle fee of five hundred and fifty dollars).



funds to pay when covered losses occur. In most cases, individuals and businesses would not be able to afford the loss insured against, so insurance is essential to keep an affluent society afloat. When the risk of loss is assumed by a third party, banks lend money, products are manufactured and purchased, and individual wealth tends to increase.<sup>4</sup> In response, individuals and businesses achieve more affluence and purchase more insurance to protect from unaffordable loss. As society's affluence increases, insurance becomes a necessity, not a luxury.

[S]ociety suffers any time an individual or a business is unable to continue to be a contributing member due to the financial impact of a property loss or a lawsuit. By indemnifying an individual (restoring him or her to the same financial position as before the loss), insurance enables the individual to continue as a worker, a consumer, and a taxpayer.<sup>5</sup>

The necessity of insurance is most evident with automobiles; they are inherently dangerous, yet they are an integral part of every day life. The South Carolina Legislature recognized public liability insurance not only affords protection to insured motorists, but also serves the public purpose of affording protection to innocent victims of motor vehicle accidents.<sup>6</sup> Before liability and uninsured motorist coverage were compulsory for most drivers, injured victims, their families, and the community at large shouldered the financial loss that resulted from victims' medical bills, loss to property, and inability to

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<sup>4</sup> James J. Markham et al., *The Claims Environment 2* (1st ed. 1993) at 1-4.

“[I]n addition to eliminating or reducing the financial uncertainty of risks to individuals and businesses, insurance benefits society by paying for losses, providing funds for investments, controlling losses, supporting credit, allocating resources, and satisfying legal and business requirements.”

<sup>5</sup> *Id.* at 2. This textbook is published by the Insurance Institute of America, which describes itself as an “independent, nonprofit educational organization” “serving the needs of the property and liability insurance business.”

<sup>6</sup> *Shores v. Weaver*, 315 S.C. 347, 352-53, 433 S.E.2d 913, 915 (S.C. Ct. App. 1993)

work or provide for their families. The South Carolina Legislature shifted this burden to insurers and financially secure individuals who choose to assume the risk. But when losses are not consistently and fully indemnified in accordance with the Legislature's intent, the burden is again borne by the community. South Carolina has a strong public interest in seeing these risks are carried by the parties the Legislature intended.<sup>7</sup>

### **B. Insurance Policies are Contracts of Adhesion**

When it comes to purchasing insurance, the prospective policyholder is caught between a rock and a hard place. Not only do insurers have a captive market, they sell non-negotiable contracts of adhesion.<sup>8</sup>

Such contracts are unique in that they are antithetical to a basic principle of contract law; that is, equal bargaining position. ... Ordinarily there can be no bargaining over the terms of the contract. The buyer either accepts the policy as

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<sup>7</sup> "While an insurance policy does represent a contractual commitment, the attitudes of the general public, the legislatures, and the courts make clear that the insurance agreement is viewed as having broader ramifications than a mere contract. The public has a definite interest in the reliability of the insurance product. Insurance involves an obligation that affects the public interest as well as the policyholder and therefore is necessarily subject to certain restrictions." Lorimer et al., *The Legal Environment of Insurance* 37-38 (3d ed. 1987).

<sup>8</sup> As early as 1942, this Court recognized that policyholders and insurers are not on equal footing when negotiating insurance policies. See *Barnes v. Industrial Life & Health Ins. Co. of Atlanta*, 201 S.C. 188, 22 S.E.2d 1, 4 (S.C. 1942), Fishburne, Justice, (dissenting):

Contracts of insurance are in a somewhat different category from the usual contract which one encounters in ordinary business transactions. Ordinarily it must be presumed that persons are familiar with the terms of written contracts to which they are parties; and in the absence of fraud they are justly bound by the provisions incorporated therein. But this rule should not be too strictly applied to an insurance policy ... These contracts are prepared by the experts of insurance companies. They are highly technical in their phraseology; they are usually complicated and voluminous, and in their numerous conditions and stipulations furnish what sometimes may be veritable traps for the unwary.

written or turns elsewhere where he will usually be confronted with the same dilemma resulting from the same terminology. A layman who actually studies the contract usually becomes bewildered and/or uncertain as to the terminology. He expects that he will be generally insured and does not anticipate these expectations will be upset by an artfully drawn clause that he will be unable to detect or, in the event detected, will be powerless to modify. Indeed, an insured usually never sees the policy until after he has paid his premium and the contract has been formed.<sup>9</sup>

The insurance industry readily accepts the fact that insurance policies differ from traditional contracts:

The insurance product is unusual in that it is a promise rather than an exchange of goods for money. Insurance companies collect premiums and, in exchange, promise to reimburse the policyholder should certain events occur. The insurance contract is a legal contract of adhesion. The insurance company dictates the terms of the policy, and the insurance policy buyer simply “adheres” to them. That is, the policy buyer takes the policy with all its terms, conditions, and exclusions as they are.<sup>10</sup>

Insurance policies are written by insurers or state legislators and administrators over whom the industry wields tremendous influence.<sup>11</sup> With rare exception, policyholders have no power to negotiate terms, and there are no meaningful alternatives.

Insurance policies are not simple contracts of adhesion, they are drafted by the most powerful private industry in the nation and not subject to federal regulation. Congress exempted the insurance industry from federal antitrust regulation by the

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<sup>9</sup> 108 Am. Jur. Proof of Facts 3d 351 §10 (originally published in 2009)

<sup>10</sup> James J. Markham, et al., *The Claims Environment* 2 (1st ed. 1993) at 66.

<sup>11</sup> See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269 (Cal. 1966) (“[E]ntered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a “take it or leave it basis” ... [This situation] carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.”)

McCarran-Ferguson Act,<sup>12</sup> which was enacted after the United States Supreme Court held the insurance industry was subject to federal antitrust statutes.

This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies, particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners. The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act, which provided a three year moratorium on federal regulation of the insurance industry. At the expiration of the moratorium the federal regulators could then assert their authority only over those aspects of the insurance industry not regulated by the states. This moratorium gave the insurance commissioners the opportunity, through the National Association of Insurance Commissioners (NAIC), to draft model legislation intended to preempt the entire field of insurance industry regulation and thus protect the commissioners' turf from Federal Trade Commission encroachment.<sup>13</sup>

Because it is exempt from antitrust regulation, the insurance industry has tremendous power to exchange vast amounts of allegedly confidential insurance industry information and documents.<sup>14</sup> Insurance is a business, and the industry uses lawyers and economists to draft highly technical boilerplate contracts designed to earn maximum profit while complying with the letter, if not the spirit, of regulatory law. As a result, the industry uses only a few standard forms for each type of coverage, with minor variations to comply with various state laws. While consumers can choose among various insurers

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<sup>12</sup> 15 U.S.C. §§1011-1015 (1945)

<sup>13</sup> Eugene R. Anderson and James J. Fournier *Why Courts Enforce Insurance Policyholders' Objectively Reasonably Expectations of Insurance Coverage*, 5 CTILJ 335, 401-402 (Fall, 1998) citing Stephen S. Ashley, *Bad Faith Actions: Liability and Damages* § 9:02 at 4 (1996). Both discussed *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

<sup>14</sup> *Id.*

and deductibles, there is little choice regarding terms, conditions, and exclusions. Moreover, the industry uses this power and the tremendous resources at its disposal to hire an army of lawyers and lobbyists to influence state laws and regulations. Often, the state laws that regulate insurance policies are drafted by the insurance industry.<sup>15</sup>

### **C. The Doctrine of Reasonable Expectations is a Judicial Response to Contracts of Adhesion**

Though Professor Keeton coined the doctrine of reasonable expectations, it was not a new method of interpreting insurance contracts when he discussed the principle forty-two years ago.<sup>16 17</sup> Indeed, Justice Cardozo used the reasonable expectations

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<sup>15</sup> Even terms drafted by the best intentioned lawmakers can have results at odds with the intended purpose and public policy. *See Corgatelli v. Globe Life & Accident Ins. Co.*, 96 Idaho 616, 619, 533 P.2d 737, 740 (1975) “In Idaho, as in most states, the consuming public and the public interest is to be guarded by a state insurance commissioner. The policy in question herein is an example that the efforts of the state authority have at times fallen short of adequately discharging that responsibility.”

<sup>16</sup> Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970)

<sup>17</sup> Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 Calif. L. Rev. 1247, 1273 (1967) available at [librarysource.uchastings.edu/repository/Grodin/55CalLRev1247.pdf](http://librarysource.uchastings.edu/repository/Grodin/55CalLRev1247.pdf).

The concept that a contract is to be interpreted in the light of the parties' reasonable expectations lies deep in contract law. Basically courts have long looked to the language of the contract to find the meaning which the parties reasonably expected from the use of the words. Applying the concepts somewhat differently, courts may derive the reasonable expectation of the parties from their relationship or status rather than from the consensual transaction itself. When the public service enterprise is an insurance company dealing with an insurance purchaser who is obviously the weaker party to the transaction, many courts in determining contractual obligations have examined the reasonable expectation of the average insured. Thus, courts have stricken from insurance contracts unclear, unexpected, inconspicuous, or unconscionable limitations of liability which would frustrate the reasonable expectations of the

method to interpret an insurance contract in favor of the insurer in 1918.<sup>18</sup> In that case, an insured boat owner sought coverage under his policy which covered his boat for damage caused by “sounds, harbors, bays, rivers, canals and fires.”<sup>19</sup> A fire broke out beneath freight cars in the harbor of New York. The cars contained explosives and exploded. This explosion caused another fire, which in turn caused another, larger explosion of dynamite and other explosives stored in the freight yard. The second explosion caused a concussion of the air, which damaged the insured's boat, located about 1,000 feet away. An intermediate appellate court held the damages were covered, but the Court of Appeals reversed. Explaining, “[t]he inquiry for us is how far the parties to this contract intended us to go,” and “[t]he causes within their contemplation are the only causes that concern us,” Justice Cardozo wrote an extensive discussion on the doctrine of proximate causation.<sup>20</sup> Though the damage resulted from fire, Justice Cardozo held the loss was too distant to be “within the contemplation of the contract.”<sup>21</sup> “In last analysis, therefore, it is something in the minds of men, in the will of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation. In all this, there is nothing anomalous.”<sup>22 23</sup>

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insured. Courts have also refused to enforce clauses which would negate the principal protection which the insured would reasonably expect.

<sup>18</sup> See John Dwight Ingram, *The Insured's Reasonable Expectations Should Be Honored Only If They Are Reasonable*, 23 WMLR 813, 816-817 (1997) discussing *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 120 N.E. 86 N.Y. 1918.

<sup>19</sup> *Bird*, at 86; 49.

<sup>20</sup> *Id.* at 86-87; 51.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 87; 54.

<sup>23</sup> See also *Korman v. Carpenter*, 216 Va. 86, 88, 216 S.E.2d 195, 196 (Va. 1975) citing *Smith v. Kauffman*, Adm'r, 212 Va. 181, 188-189 S.E.2d 190, 196 (1971) (The Virginia Supreme Court abrogated the rules of parental and interspousal immunity in automobile

Based on traditional principles of contract construction, including unconscionability,<sup>24</sup> detrimental reliance, proximate causation, and estoppel, the doctrine of reasonable expectations is simply another instrument of contract interpretation courts can use when enforcing the literal terms of an insurance contract would cause an unjust result. Significantly, if the rule is properly followed, there is little room for judicial overreaching. The doctrine can be used only when literal interpretation of an adhesion contract fails to honor the “objectively reasonable expectations of applicants and intended beneficiaries.”<sup>25</sup> Applying only in contracts of adhesion, the doctrine transcends traditional means of contract interpretation, including *contra proferentem*,<sup>26</sup> <sup>27</sup>

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accident litigation because “the rule could no longer be supported as promotive of the peace and tranquility of the home, and that, because of almost universal liability insurance coverage, a rule adopted and followed for the common good no longer served its purpose and in fact prejudiced the great majority.” ***“[I]t is doubtful that this void in insurance coverage would comport with the reasonable expectations of the insured that this Court has so often sought to protect.”***(*emphasis added*)

<sup>24</sup> *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (S.C. Ct. App.2005) (if a court finds a contract clause was unconscionable at the time it was made, the court may refuse to enforce the clause or limit its application to avoid an unconscionable result; what is unconscionable depends upon all the facts and circumstances in a particular case).

<sup>25</sup> Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970).

<sup>26</sup> Indeed, if the doctrine of reasonable expectations could only apply if there was an ambiguity in the policy language, it would be nothing more than *contra proferentem*. As professor Keeton explained, the doctrine of reasonable expectations may be less expansive than *contra proferentem*, “even though the contractual language was ambiguous, there might be no expectation at all, or the expectation might be unreasonable, thus defeating a claimed expansion of coverage beyond the letter of the contract.” *Id.* at 969.

<sup>27</sup> As R. Anderson and James J. Fournier noted in *Why Courts Enforce Insurance Policyholder’s Objectively Reasonably Expectations of Insurance Coverage*, 5 CTILJ 335,357-358 (Fall, 1998), the Florida Supreme Court appears to have misunderstood the doctrine of reasonable expectations when rejecting it in *Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998). The Florida Supreme Court held:

recognizing a judicial response is necessary to protect insureds, intended beneficiaries, and society at large from the particular problems caused by insurance contracts of adhesion. Objectively reasonable expectations are “created by policy language and structure and by marketing patterns and general practices.”<sup>28</sup> Insurers alone create an objectively reasonable expectation of coverage. If honoring an insured’s objectively reasonable expectations leads to a result an insurer did not expect, the insurer is solely to blame, as it alone has the power to clarify terms and coverages.

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We decline to adopt the doctrine of reasonable expectations....There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged ... ‘The reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the contract.

Anderson and Fournier explained:

it appears that the *Deni* court assumed (there being no discussion on the point) that policyholders and insurance companies actually “bargain” over the terms of the standard form insurance policies. It also appears that the *Deni* court misunderstood whether the reasonable expectations doctrine is an objective or subjective rule. The court first correctly noted that “[u]nder this doctrine, the insured’s expectations as to the scope of coverage is upheld provided that such expectations are objectively reasonable.” Two paragraphs later, the court stated that “[c]onstruing insurance policies upon a determination as to whether the insured’s subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.” The *Deni* court does not clarify nor reconcile these conflicting understandings of the doctrine.

<sup>28</sup> Anderson and James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonably Expectations of Insurance Coverage*, 5 CTILJ at 357-358.



**D. Using the Doctrine of Reasonable Expectations in This Case Is Not An Unreasonable Expansion of South Carolina Law**

In the seventy-four years since this Court adopted the principle of *contra proferentem*,<sup>29</sup> the pervasiveness of insurance products into all aspects of America's economy and our reliance upon them have increased exponentially.<sup>30</sup> Insurance no longer serves only the interests of the individual insured. Instead, it provides a financial foundation for virtually all economic activity. Insurance claims are not merely individual business transactions, they affect the public interest and trust. As the insurance product's role has changed and expanded, the public interest in an insurance product that is honestly marketed and transparently administered demands an expansion of the legal rules and tools this Court uses to ensure the reasonable expectations of insureds, intended beneficiaries, and society at large are met.

The insurance industry recognizes the necessity of meeting objectively reasonable expectations; as explained in an insurance industry treatise, *The Legal Environment of Insurance*:

Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, **and must honor reasonable expectations** . . . .

Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance

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<sup>29</sup> *Walker v. Commercial Cas. Ins. Co.*, 45 S.E. 2d 248, 249-250 (S.C. 1939)

<sup>30</sup> In 1939, there were a total of 320,560 automobiles, trucks, busses, and motorcycles registered in South Carolina. See United States Department of Transportation Federal Highway Administration, *Highway Statistics Summary to 1995*, available at <http://www.fhwa.dot.gov/ohim/summary95/section2.html>. In 2010, there were 3,767,877 vehicles registered in South Carolina, nearly one registered vehicle for every two South Carolinians. See United States Department of Transportation Federal Highway Administration, *Highway Statistics 2010*, available at <http://www.fhwa.dot.gov/policyinformation/statistics/2010/mv1.cfm>.

is a business affected with a public interest, as reflected in legislative and judicial decisions.<sup>31</sup>

Yet the industry rejects the concept in practice, arguing that honoring reasonable expectations would negatively impact the market by creating uncertainty. But this argument rings false. The industry's actions, products, and marketing create uncertainties, not a method of interpreting adhesion contracts according to the *objectively reasonable* expectations of insureds.

Indeed, this Court recently honored the reasonable expectations of an insured beneficiary when a technical reading of an underinsured motorist provision could have precluded coverage. In *South Carolina Farm Bureau Mut. Ins. Co. v. Kennedy*,<sup>32</sup> an employee drove his employer's truck to a restaurant, where he left the keys in the truck with the engine running and a dog inside while he went inside the building to talk to the restaurant's owner. He returned to the parking lot, where he was standing with his hand on the back of the truck, when he saw another truck careening towards him and attempted to flee before being struck and injured by the truck.<sup>33</sup> The employee's damages exceeded the liability of the truck that hit him, so the employee sought coverage under his employer's underinsured motorist provision. The policy provided UIM benefits to a "covered person."<sup>34</sup> A "covered person" included a "person occupying your [the insured's] covered auto."<sup>35</sup> "Occupying," defined in the General Definitions portion of

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<sup>31</sup> James J. Lorimar, *The Legal Environment of Insurance* 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993)(emphasis added).

<sup>32</sup> 398 S.C. 604, 730 S.E.2d 862 (S.C. 2012).

<sup>33</sup> *Id.* at 613; 866.

<sup>34</sup> *Id.* at 611; 865.

<sup>35</sup> *Id.*

the policy, “means having actual physical contact with an auto while in, upon, entering, or alighting from it.”

Citing precedent explaining “[t]he central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist,” and “[t]he UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature,”<sup>36</sup> this Court held denying coverage was “unreasonable, unconscionable, and not in accordance with the legislative purpose behind enactment of the UIM statute.”<sup>37</sup> Accordingly, this Court extended “upon” to cover the employee because his hand rested on the rear of the truck immediately before he was struck. “The fact that Kennedy had engaged in a conversation at the rear of the truck is not important. Holding a conversation outside of an automobile is commonplace and is to be expected in the ordinary use of a vehicle.”<sup>38</sup>

As this Court noted in *Kennedy*, this Court had previously used a broad interpretation of policy terms to honor the reasonable expectations of an insured or beneficiary. In *Whitmire v. Nationwide Mut. Ins. Co.*,<sup>39</sup> this Court held the terms of an uninsured motorist provision “must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must

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<sup>36</sup> *Id. citing Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) (“The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist. The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons; therefore, they should be construed liberally to effect the purpose intended by the Legislature.” (citation omitted)); *see also O'Neill v. Smith*, 388 S.C. 246, 254–55, 695 S.E.2d 531, 535–36 (2010).

<sup>37</sup> *Id.* at 613; 866.

<sup>38</sup> *Id.*

<sup>39</sup> 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970)

be related to the particular use of the automobile and the hazards to be encountered from such use.”<sup>40</sup> Under the particular facts, this Court found coverage after a passenger exited the insured car and was struck within two or three feet of the car.

*It is reasonable to conclude* that coverage was intended to protect a guest against the hazards from passing automobiles in the vicinity, while the guest, although not In or Upon the vehicle, is still engaged in the completion of those acts *reasonably to be expected* from one getting out of an automobile under similar conditions.<sup>41</sup>

Using a broad interpretation of policy terms to honor Joshua Bell’s objectively reasonable expectation of coverage would similarly give effect to the purpose intended by the South Carolina Legislature.<sup>42</sup> When Sarah Severn applied for and purchased the policy, she and Joshua Bell were a family. Though not technically married, they lived as spouses in the same household, had a child, and Joshua Bell supported his family, paying all the bills, including the insurance premiums.<sup>43 44</sup> By listing Joshua Bell as a household

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<sup>40</sup> *Id.* at 191; 394.

<sup>41</sup> *Id.* Also, *Crossmann Communities of N C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40,717 S.E.2d 589 (S.C. 2011)(in determining what constitutes an occurrence, courts consider the parties’ “objectively reasonable expectations.”)

<sup>42</sup> Kennedy, at 611: 865

<sup>43</sup> See R. p. 83-84, 108-109.

<sup>44</sup> See R. p. 26,

Except as otherwise defined in this policy, terms appearing in boldface will have the following meaning:

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**11. "Relative" means "a person residing in the same household as you, and related to you by blood, marriage, or adoption, including a ward, stepchild, or foster child.** Your unmarried dependent children temporarily away from home will be considered residents if they intend to continue to reside in your household.

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**14. "You" and "Your" mean:** (a) a person or persons shown as a named insured on the Declarations Page; and (b) the

resident, Severn surely expected the father of her child and sole family provider would be entitled to all the coverage they purchased.<sup>45</sup> Joshua Bell had the same reasonable expectation. Using the doctrine of reasonable expectations to find Joshua Bell is entitled to underinsured motorist coverage furthers public policy; it protects Sarah Severn's family from financial injury caused by an underinsured driver, allowing Bell to recover physically and financially so he can continue to support his child and be a productive member of society.<sup>46 47</sup>

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**spouse of a named insured if residing in the same household. (emphasis added)**

<sup>45</sup> See *Moniz v. Daverede*, 40 So.3d 1027 (La.App. 4 Cir. 2010)(reversing summary judgment in favor of an insurer holding there was a genuine issue of material fact as to whether the insured's roommate, who was listed on the declarations page of the policy was entitled to uninsured motorist benefits. "Why is the plaintiff's name shown on the declarations page of the policy if she is to be treated as a third party stranger to the policy? We have reviewed the policy in depth and can find nothing that would explain why the plaintiff's name would appear on the declarations page if she was not intended to be an insured.")

<sup>46</sup> See *Ott v. American Fidelity & Casualty Co.*, 161 S.C. 314, 159 S.E. 635 (S.C. 1931)("We must assume that the policy was intended, not to evade, but to effectuate the purposes of the statute in compliance with which it was filed, and it must be construed in the light of such statute. The manifest purpose of the statute is the protection of passengers and members of the public who may be injured by negligence of bus operators, and a policy issued for such purpose must be construed most strongly against the insurer."); see also *McAllister v. State Farm Mut. Auto. Ins. Co.*, 301 S.C. 113, 390 S.E.2d 383 (S.C. Ct. App. 1990) (noting this Court "adopted a policy of construing the Financial Responsibility Act strictly against insurers and liberally in favor of the insured in order to accomplish the purposes underlying the statute.")

<sup>47</sup> Moreover, honoring Joshua Bell's reasonable expectations of coverage would not affect Progressive's certainty in the risks it assumed. Underinsured motorist coverage does not insure the risks taken by specific drivers, it insures innocent victims against the wrongful or negligent acts of other drivers. *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206, 208 (S.C. 1964); *Gunnels v. American Liberty Ins. Co.*, 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968). The insurer's risk follows both the insured's relationships and the insured automobile and cannot be quantified based on an intended beneficiary's particular risk factors. *S.C.Code Ann.* § 38-77-160. If Bell and Severn had simply applied for a marriage license, coverage would not be at issue.


The doctrine of reasonable expectations is an important tool in cases such as this because the judiciary is often the last and most effective line of protection for the public interest and the interests of innocent claimants and insureds. The doctrine of reasonable expectations is not an aberration of traditional contract law, it is a method of construction used in response to immersion of insurance contracts of adhesion into every aspect of modern life. The beneficiaries of most insurance policies are not merely the insured. Insurance protects policyholders, injured parties, their families, neighbors, creditors, employers, and employees. When courts use the doctrine of reasonable expectations to resolve inequity created by contracts of adhesion, fulfillment of a policyholder's objectively reasonable expectations also promotes societal, governmental and corporate interests.<sup>48</sup> Honoring Joshua Bell's objectively reasonable expectation of coverage in this case furthers the reasonable expectations of his fiancé, the insured, as well as the public policy considerations underpinning South Carolina's statutorily created underinsured motorist coverage.

## CONCLUSION


By enacting the Underinsured Motorist statute, the South Carolina Legislature intended to protect injured victims of automobile accidents and their families. Using the doctrine of reasonable expectations to fulfill Joshua Bell's objectively reasonable expectation of coverage is a natural extension of this Court's law interpreting insurance contracts of adhesion and furthers the Legislature's goal. The Court of Appeals' decision should be reversed.

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<sup>48</sup> See Eugene R. Anderson and James J. Fournier *Why Courts Enforce Insurance Policyholders' Objectively Reasonably Expectations of Insurance Coverage*, 5 CTILJ 335, 368-369 (Fall, 1998).

By:   
William F. Merlin, Jr. Esq.  
Florida Bar #0364721  
MERLIN LAW GROUP, P.A.  
777 S. Harbour Island Blvd., Suite 950  
Tampa, Florida 33602  
Telephone: (813) 299-1000  
Facsimile: (813) 229-3692  
Attorney for *Amicus Curiae*  
United Policyholders

Tampa, Florida  
February 5, 2013

  
J. Jackson Thomas, Esq.  
Thomas & Brittain, PA  
1314 Professional Dr  
Myrtle Beach, SC 29577  
(843) 692-2628  
Attorney for *Amicus Curiae*  
United Policyholders

Myrtle Beach, South Carolina  
February 4, 2013

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Judge

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Opinion No. 2011-UP-242 Filed May 24, 2011  
Withdrawn, Substituted and Re-filed June 23, 2011

Joshua Bell ..... Petitioner,

v.

Progressive Direct Insurance Company ..... Respondent.

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**CERTIFICATE OF COUNSEL**

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The undersigned certify that United Policyholder's Amicus Brief in Support of Petitioner  
Joshua Bell complies with Rule 211(b), SCACR.



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William F. Merlin, Jr. Esq.  
Florida Bar #0364721  
MERLIN LAW GROUP, P.A.  
777 S. Harbour Island Blvd., Suite 950  
Tampa, Florida 33602  
Telephone: (813) 299-1000  
Facsimile: (813) 229-3692  
Attorney for *Amicus Curiae*  
United Policyholders

Tampa, Florida  
February 5, 2013



---

J. Jackson Thomas, Esq.  
Thomas & Brittain, PA  
1314 Professional Dr  
Myrtle Beach, SC 29577  
843.692.2628  
Attorney for *Amicus Curiae*  
United Policyholders

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**PROOF OF SERVICE**

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I, the undersigned attorney for United Policyholders, do hereby certify that on February 5, 2013, I served all counsel of record in this action with a copy of the pleading(s) specified below by mailing a copy of the same by United States Mail, postage paid, to the following:

Pleadings: Motion for Leave to File Brief as *Amicus Curiae*

*Amicus Curiae* Brief of United Policyholders in Support of Petitioner  
Joshua Bell

Counsel Served: J.R. Murphy, Esquire  
Murphy & Grantland, P .A.  
Post Office Box 6648  
Columbia, SC 29260  
Attorneys for Respondent

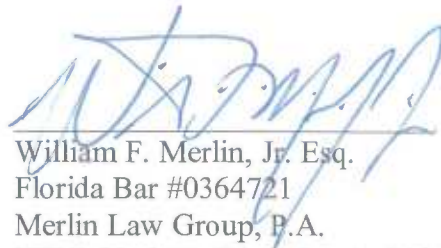
Counsel Served: Gene M. Connell, Jr., Esquire  
Kelahe Connell & Connor, PC  
P.O. Drawer 14547  
Surfside Beach, SC 19487  
Attorneys for Petitioner

Counsel Served: A. Johnston Cox, Esquire  
Jennifer E. Johnsen, Esquire  
Jennifer D. Eubanks, Esquire  
Gallivan, White & Boyd, P.A.

55 Beattie Place, Suite 1200  
P.O. Box 10589  
Greenville, South Carolina 29603  
Attorney for *Amicus Curiae*  
Allstate property and Casualty

Counsel Served: Susan F. Campbell, Esquire  
McGowan, Hood & Felder, LLC  
1517 Hampton Street  
Columbia, South Carolina 29201  
Attorney for *Amicus Curiae*  
South Carolina Association for Justice

Counsel Served: C. Mitchell Brown, Esquire  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street, 17<sup>th</sup> Floor  
P.O. Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
Attorney for *Amicus Curiae*  
Property and Casualty Insurers Association of America



William F. Merlin, Jr. Esq.  
Florida Bar #0364721  
Merlin Law Group, P.A.  
777 S. Harbour Island Blvd., Suite 950  
Tampa, Florida 33602  
Telephone: (813) 299-1000  
Facsimile: (813) 229-3692  
Attorney for *Amicus Curiae*  
United Policyholders

Tampa, Florida  
February 5, 2013