ALABAMA UNINSURED/UNDERINSURED MOTORIST LAW 2020

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UNINSURED/UNDERINSURED MOTORIST LAW

I. ALABAMA'S UNINSURED MOTORIST STATUTE

Alabama's Uninsured Motorist Statute states that any policy of automobile liability insurance coverage issued to cover a vehicle principally garaged in Alabama must include uninsured motorist ("UM") coverage unless UM coverage is explicitly rejected by the named insured. Uninsured motorist coverage inures to a person and applies to bodily injury caused by the operation, maintenance or use of a motorist that is deemed "uninsured." A motorist or motor vehicle is uninsured if the applicable liability limits for that vehicle do not fully cover the losses incurred for bodily injury, including medical expenses, pain and suffering, mental anguish and lost wages.

The Uninsured/Underinsured Motorist Statute is found at §32-7-23, Code of Alabama, (1975). This Code provision is essentially unchanged since enactment in 1984. However, there is a great deal of case law analyzing and interpreting the language contained in the statute. The statute reads in pertinent part:

> (a) No automobile liability or motor vehicle liability 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 shall be delivered or issued in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subjection (c) of Section 32-7-6. Under provisions approved by the Commissioner of Insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named

insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:

(1) Neither the owner nor the operator carries bodily injury liability insurance;

(2) Any applicable policy liability limits for bodily injury are below the minimum required under Section 32-7-6;

(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the accident; and

(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident is less than the damages which the injured person is legally entitled to recover.

(c) The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.
(Acts 1965, No. 866, p.1614; Acts 1984,, No. 84-301, p. 672, § 4.)

Certain themes run throughout the area of UM law, several of which can be summarized below:

1. The coverage is mandatory and must be included in all automobile liability policies issued in Alabama unless explicitly rejected by the named insured;
2. The coverage is contractual but it must comply with the provisions of the statute and any policy exclusion that is inconsistent with the statute is

enforceable;

3. The insurer's liability is determined solely by reference to the liability of the tortfeasor.

II. SETTLEMENT AND SUBROGATION

A. Subrogation and Settling the Claim

1. Lambert

The preservation of a UM carrier's right to subrogation against the tortfeasor is closely connected to the settlement of the underlying claim against the tortfeasor. As soon as you realize that there is a potential for a UM claim, you should put your client's UM/UIM carrier on notice of the potential claim. The plaintiff has the option of accepting less than the tortfeasor's policy limits without extinguishing the plaintiff's rights to uninsured/underinsured benefits. Scott v. State Farm Mut. Auto. Ins. Co., 707 So.2d 238 (Ala.Civ.App.1997). Once the tortfeasor's carrier tenders its limits or makes an offer the plaintiff wants to accept, the plaintiff must give his UIM carrier notice of this offer. At this point the UIM carrier can consent to the settlement and give up its right of subrogation against the tortfeasor for any amount it subsequently pays, or it can advance the plaintiff the amount offered by the tortfeasor and preserve its right of subrogation. You should be aware of the Alabama Supreme Court's directions in Lambert v. State Farm, 576 So.2d 160 (Ala. 1991). In Lambert, the court laid out the following procedure:

> 1. The insured should give notice to the underinsured carrier of a claim under the policy for underinsured motorist benefits as soon as it appears the insured's damages may exceed the tortfeasor's limits of liability

and coverage.

2. If the tortfeasor's carrier and an insured ultimately enter into a proposed settlement that would release the tortfeasor from all liability, the insured, before agreeing to the settlement, should immediately notify the uninsured carrier of the proposed settlement and the terms of any release.

3. At the time the insured so notifies the underinsured carrier, the insured should also inform the underinsured carrier whether he will seek underinsured motorist benefits in addition to the benefits payable under the settlement proposal, so that the carrier can determine whether it will refuse to consent to the settlement, will waive its right of subrogation against the tortfeasor, or will deny obligation to pay underinsured motorist benefits. If the insured gives the carrier notice of the claim for UIM benefits, the UIM carrier should immediately begin investigating the claim, should conclude such investigation within any reasonable time, and should notify its insured of the action it proposed with regard to the claim for UIM benefits.

4. The insured should not settle with the tortfeasor without allowing the UIM carrier a reasonable time within which to investigate the insured's claim and to notify its insured of its proposed action.

5. If the UIM carrier refuses to consent to a settlement between its insured with the tortfeasor, or if the carrier denies the claim of the insured without a good faith investigation into its merits, or if the carrier does not conduct its investigation within any reasonable time, the carrier would, by any of those actions, waive any right of subrogation against the tortfeasor with the tortfeasor's insurer.

6. If the UIM carrier wants to protect its subrogation rights, it must, with any reasonably time, and in any event before the tortfeasor is released by the carrier's insured, advance to its insured in an amount equal to the tortfeasor's settlement offer.

What is a "reasonable time" within which to conduct an investigation? Absent some compelling circumstances, thirty days is a reasonable period of time. Morgan v. Safeway Ins. Co., 2007 WL1866768 (Ala. Civ. App. 2007). A Lambert letter should state the following:

> Dear Carrier:
>
> I write to put you on notice of a proposed settlement with the tortfeasor for the limits of available bodily injury coverage. I enclose a copy of the carrier's declarations page confirming the amount of the policy limits. Please advise within thirty days as to whether you will allow your insured to accept the policy limits offer and release the tortfeasor or whether you will tender the policy limits to prevent a release.

In Turner v. State Farm Mut. Ins. Co., 2020 WL 2781283 (Ala. 2020), the tortfeasor was in a bankruptcy proceeding and the only possible potential recovery was against his liability policy limits. At some point in the litigation the tortfeasor's insurer tendered the policy limits of $25,000 and the insured sought permission to settle, which the UM carrier denied and instead fronted the money. The insured pointed out that there was no possible means of subrogation since the tortfeasor was in bankruptcy and accepted the money, thereby releasing the tortfeasor and leaving the UM carrier as the only Defendant. The Turner court held that the insured had "repudiated" his automobile insurance policy and affirmed the grant of summary judgment for State Farm. In dicta the Turner court noted that a potential recourse against a UM carrier unreasonably withholding consent to

settlement is to pursue a ruling from the trial court or to bring a bad faith action against the carrier.

2. Collateral Sources and Set Offs

Alabama has abrogated the collateral source rule with respect to medicals bills in personal injury cases. However, the collateral source rule prohibits the reduction of an award of damages against the tortfeasor by the amount of UM benefits received. Morales v. Barnett, 978 So.2d 722 (Ala. Civ. App. 2006). An insurers medical payment benefit is a set off against its UM liability unless the medpay set off results in the insured being left with a UM recovery that is less than the statutory minimum. McKinney v. Nationwide Mut. Fire Ins. Co., 33 So. 3d 1203 (Ala. 2009). A worker's compensation carrier has no right of subrogation against uninsured motorist benefits. H&H Wood v. Monticello Ins. Co., 668 So. 2d 38 (Ala. Civ. App. 1995). State Farm v. Cahoon, 252 So. 2d 619 (Ala. 1971), River Gas Corp. v. Sutton, 701 So. 2d 35 (Ala. Civ. App. 1997). UM coverage is pure excess coverage and the UM carrier will have a credit against its liability for the limits of any bodily injury liability limits available to the tortfeasor.

II. DETERMINING COVERAGES & VALUING DAMAGES IN UM/UIM CASES

A. Identify All Available Coverages

As an initial step you must identify all available UM coverages. The focus on available UM coverages will maximize a potential recovery. In addition, it will clarify the priority of coverages which may play a role in exhaustion and other threshold issues which are of crucial importance.

1. What Rejection?

Even if the declarations page shows no UM coverage, and even if a rejection has been signed in connection with the issuance of a policy, there still may be applicable UM coverage. In Nationwide Ins. Co. v. Nicholas, 868 So.2d 457 (Ala. Civ. App. 2003), the Court held that each named insured under a policy must sign a written rejection, otherwise said named insured is entitled to uninsured motorist coverage. Thus, if there are several named insureds on a policy and all named insureds have not signed rejections, there will be available UM coverage. Furthermore, a policy may name a single person as a "named insured" yet have several persons listed as being insured. The Nationwide v. Nicholas decision arguably supports the position that all persons named as insureds should have uninsured motorist coverage under the policy unless there is a written rejection form signed by the specific insured.

Other decisions take a restrictive view of who qualifies as a named insured under a policy. In Progressive Ins. Co. v. Green, So.2d (Ala. 2006), the sole named insured signed a rejection and then was killed in a motor vehicle accident. The named insured's spouse in Green unsuccessfully sought to obtain insurance coverage by arguing that she had been the named insured within the meaning of the policy.

The Green policy had the following definition of an insured which was not deemed sufficient to create named insured status:

> "You" and "Your" meaning a person shown as a named insured on the declaration page, and that person's spouse if residing in the same household.

In Progressive Ins. Co. v. Naramore, So.2d (Ala. 2006), the Court considered

similar language and held that a spouse was not considered named insured by virtue of being a spouse of the named insured in the same household. The spouse in the Naramore case was also a listed driver.

2. Resident Relatives

You should thoroughly investigate all uninsured motorist policies available to persons who arguably "live" or "reside" in the same household as your client.

In the more distant past, Alabama appellate courts have taken a broad view of who qualifies as an insured resident under an omnibus insured clause. In Davis v. State Farm, 583 So.2d 225 (Ala. 1991), the Alabama Supreme Court reviewed a policy which defined an insured under an uninsured motorist coverage as the named insured, his spouse, and "their relatives." "Relatives" is defined as a person related to you or your spouse by blood, marriage, or adoption who "lives with you." The Davis court found that the insureds' divorced adult son, who kept a separate apartment but spent nights with his parents, lived with his father, even though the son received his mail at the apartment.

In Crossett v. St. Louis Fire & Marine Ins. Co., 269 So.2d 869 (Ala. 1972), the Alabama Supreme Court held that the word "reside" was ambiguous. In Crossett, the Court construed the omnibus insured clause of a liability policy and found that a child attending college at Auburn who came home most weekends was a "resident" of the household on the day of the accident.

Recent case law is more restrictive. In BDB v. State Farm, 814 So.2d 877(Ala. Civ. App. 2001), the Alabama Court of Civil Appeals held that a daughter was not a relative entitled to UM coverage under her father's policy. In the BDB case, the daughter

was injured in a motor vehicle accident while she was visiting her father. The subject policy defined a relative as a "person related to you by blood, marriage or adoption who lives primarily with you." The BDB court found that the mother had primary custody of the child and thus, the child could not be considered as living primarily with the father, thereby negating any uninsured motorist coverage.

B. Who Pays When There are Multiple Policies?

Each policy of insurance will have a coordination of benefits clause which generally provides that the insurance provided by the subject policy shall be over and above any other valid, collectible insurance. In Barnwell v. Allstate Insurance Co., 316 So.2d 696 (Ala.Civ.App.1975), the court reviewed a fact situation where a UM insured was injured in an accident while a passenger in a non-owned vehicle. The passenger had a UM policy which provided that UM coverage from the non-owned vehicle's insurer would be primary. The Barnwell court approved this language in the passenger's policy and stated as follows:

> We therefore conclude that the insured is bound by the provision in his policy which provides that if the insured is injured by an uninsured motorist while in an automobile other than the owned automobile and such automobile has uninsured motorist insurance available to the insured, such coverage shall be primary and coverage provided to the named insured shall be secondary and only as excess over the first. Thus, the insured's first right of recovery is against the insurer of the non-owned automobile.
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> Barnwell, 316 So.2d at 449.

Typically, the excess, co-insurance or other insurance, omnibus, or coordination of benefits language in a UM policy limits UM coverage. The court in Safeco Ins. Co. v.

Jones, 243 So.2d 746 (Ala. 1970), found the excess insurance clause to be unenforceable because it limited the amount of coverage to which the insured was entitled. The court held that "our statute sets a minimum for recovery, but it does not place a limit on the total amount of recovery so long as that amount does not exceed the amount of actual loss; that where the loss exceeds the limits of one policy, the insured may proceed under other available policies; that where the premiums have been paid for uninsured motorist coverage, we cannot permit an insured to avoid a statutorily imposed liability by its insertion into the policy via liability limiting clause which restricts the insured from receiving that coverage for which the premium has been paid." Id at 614. The offending portion of the policy language in the Safeco v. Jones case was the part limiting the damages of the insured.

Extreme caution must be paid in making sure that the policy limits available under the primary UIM coverage are exhausted. After the primary coverage is exhausted, the secondary insurers pay a pro rata share of the total damages. However, failure to exhaust the primary UIM coverage will forfeit the right to proceeds against secondary coverage. In Gaught v. Evans, 361 So.2d 1027, 1030 (Ala. 1978), the Court stated as follows:

> Secondary coverage may be reached after the exhaustion of primary coverage if the damages exceed the policy limits of the primary coverage. This construction gives effect to the contract provision, the primary-secondary coverage doctrine and does no violence to the Uninsured Motorist Statute.

Thus, the primary UIM coverage must be exhausted before the secondary carrier has any liability.

C. Claims Against Joint Tortfeasors

The Alabama Supreme Court recognized that policy limits available to joint tortfeasors are not "available" for setoff purposes to a UIM carrier. See, State Farm v. Motley, 909 So.2d 806 (Ala. 2005)(holding that UIM carrier is not entitled to a setoff for the limits of a CGL policy held by a joint tortfeasor). In Motley, a wrongful death claim arose out of a collision between a motorist and a log truck. The estate of the motorist settled for the liability limits available to the owner and operator of the log truck and then settled for $225,000.00 of $2,000,000.00 in limits of a CGL policy available to a contractor responsible for loading logs on the trailer. The Motley plaintiff alleged that the longs had been improperly loaded, thereby proximately causing the wreck. The Motley court allowed the plaintiff to pursue a UIM claim and not suffer a setoff of $2,000,000.00 for the CGL policy limits:

> Mindful that the purpose of the Act is to provide protection for persons "legally entitled to recover damages from owners or operators of uninsured motor vehicle," and given that the phrase constituting subsubparagraph (4) "relates back" to subparagraph (b), so as to define an "uninsured motor vehicle," we conclude that the descriptive language "all bodily injury liability bonds and insurance policies available to an injured person" refers only to such bonds and insurance policies as pertain to the uninsured/underinsured motor vehicle or vehicles and, more specifically in this case, given the language in the State Farm policy, only those policies that apply to insure or bond for bodily injury "the ownership, maintenance, or use" of the uninsured/underinsured motor vehicle.
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> 909 So.2d at 821.

Notwithstanding the Motley decision, take great care in crafting the allegations and

defendants named in the complaint.

D. UIM Representation of the Uninsured Motorist

From a defense standpoint, the greatest potential for a conflict of interest exists where a UM carrier has a subrogation interest against the person for whom it is providing a defense in a suit by its own insured. In this situation, there is not even a policy which specifies how the lawyer defending the uninsured tortfeasor will be chosen. The analysis in this fact situation appears most similar to the situation where an insurer defends under a reservation of rights.

In L & S Roofing v. St. Paul Fire & Marine, 521 So.2d 1298 (Ala. 1987), the court set forth the requirements of an enhanced duty of good faith for both the insurer and defense counsel. The enhanced obligation of good faith is fulfilled by meeting four tests: (1) a thorough investigation of the insured's accident including the nature and severity of the damages and injury; (2) the retention of competent defense counsel for the [uninsured tortfeasor/at fault party] with the understanding that counsel represents only that person; (3) the insurance company fully informs the insured of the reservation of rights defense and all developments relative to his policy coverage and the progress of the lawsuit[1]; and (4) the company refrains from engaging in any conduct that would demonstrate a greater concern for the insurers monetary interest than for the financial risk of the uninsured motorist.

The court discussed the selection of independent counsel for the tortfeasor in Ex

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[1] In the Uninsured setting this would require that the information regarding the progress of the lawsuit be conveyed to the at fault party.

parte: State Farm v. Tate, 674 So.2d 75 (Ala. 1995). In Tate, a UM carrier sought trial court approval to appoint legal counsel to defend the UM driver in a suit by its insured. State Farm also chose to opt out of the litigation pursuant to the Lowe v. Nationwide Insurance Co., 521 So.2d 1309 (Ala. 1988). After opting out, State Farm sought to retain counsel for the UM driver in reliance upon Driver v. National Security Fire & Casualty Co., 658 So.2d 390 (Ala. 1995). The trial court denied State Farm's motion and State Farm filed a petition for writ of mandamus, which was granted. The court in Tate stated the issue as follows:

> The single issue presented by this petition is whether an uninsured motorist insurance carrier, in this case State Farm, has the right under Alabama law to hire additional counsel to help assist an uninsured motorist defendant like Tate at trial in order to protect its interests in the fair and just adjudication of the underlying tort claim.

The Tate court reiterated its analysis in the case of Driver v. National Security Fire & Casualty Co., *supra*, stating the following:

> [T]his court recognized that liability insurance carriers facing the uninsured motorist situation are placed in a much more precarious position than are liability insurance carriers faced with the underinsured motorist situation. Recognizing this more precarious position, this court held in Driver that insurance carriers in the uninsured situation should be allowed to opt out of the underlying tort case and still be given the opportunity to elect to hire an attorney to help represent the uninsured motorist.[2]

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[2] In Driver, *supra*, the attorney representing the estate of the UM driver was representing the UM driver in the pending auto litigation before asking for the carrier to retain legal counsel to assist him in litigation.

> [W]here the defendant motorist has liability insurance but the limits may not be sufficient to fully satisfy the potential judgment against him, the defendant motorist has an attorney retained by [his] carrier to defend him. When the underinsured carrier is named as a defendant, and chooses to opt out of the trial of the case, there is an attorney defending the interest of the underinsured motorist [and consequently the interests of the underinsured coverage carrier as well.] A different situation is created when the defendant motorist has no liability coverage.

Tate, 674 So.2d at 76-77, quoting Driver, 658 So.2d at 394-395.

The Tate court opined further:

> Even when an uninsured motorist can afford to hire a defense attorney, the interests of the insurance company providing uninsured motorist benefits may not always be adequately represented at trial by that attorney, because the uninsured motorist's interests may not always be squarely aligned with those of the insurance carrier. Obviously, there are also potential collusion problems. "Understanding the need for the *uninsured motorist insurance carrier* to protect *its* interests," we held in Driver, *supra*, "that once the carrier opts out of the trial under Lowe, it may, in its discretion, hire an [additional] attorney to represent the uninsured motorist defendant." 658 So.2d at 395 (emphasis added).

Tate, 674 So.2d at 76-77, quoting Driver, 658 So.2d at 394-395.

Therefore, the selection of independent counsel may be made by the UM carrier to assist in the defense and represent the UM driver. The fact that the uninsured motorist can hire an attorney does not obviate the right of the UM carrier to select independent counsel and bear the cost for same. The court has noted that one purpose for this is to avoid collusion. However, there remains the chance for collusion between the tortfeasor

and the UM carrier. The UM carrier may agree to waive its subrogation interest if the tortfeasor cooperates with the defense. In this case, there is a sham defendant, the tortfeasor, and the UM carrier would be guilty of champerty.

III. TRIAL STIPULATION, VOIR DIRE, AND JURY CHARGES, SEE EXHIBIT "A" AND "EXHIBIT B".

IV. BAD FAITH IN UNINSURED MOTORIST CONTEXT

In LeFevre v. Westberry, 590 So. 2d 154 (Ala. 1991), the Ala. S. Ct. noted the following standards that were intended to "allow the [UIM] insurer to aggressively defend the claim and attempt to defeat the claim, or at least to minimize the size of the award, while concomitantly fulfilling the duties imposed on it by law and the obligations imposed on it by its contract with the insured." 590 So. 2d at 160-61. Specifically, the LeFevre Court held:

> "1. When a claim is filed by its insured, the uninsured motorist carrier has an obligation to diligently investigate the facts, fairly evaluate the claim, and act promptly and reasonably.
>
> "2. The uninsured motorist carrier should conclude its investigation within a reasonable time and should notify its insured of the action it proposes with regard to the claim for uninsured motorist benefits.
>
> "3. Mere delay does not constitute vexatious or unreasonable delay in the investigation of a claim if there is a bona fide dispute on the issue of liability.
>
> "4. Likewise, mere delay in payment does not rise to the level of bad faith if there is a bona fide dispute on the issue of damages.
>
> "5. If the uninsured motorist carrier refuses to settle with its insured, its refusal to settle must be reasonable."

LeFevre, 590 So. 2d at 161 (footnotes omitted). The foregoing standards were set out to better define the duties owed by a UIM insurance carrier to its insured regarding the payment of UIM benefits for the purposes of establishing the UIM insurance carrier's tort liability for acting in bad faith. See LeFevre, 590 So. 2d at 160-61 (expounding upon principles set out in Quick v. State Farm Mutual Automobile Insurance Co., 429 So. 2d 1033, 1034 (Ala. 1983), which had discussed "whether the tort of bad faith should be extended to the uninsured motorist claim in th[at] case").

Other cases have examined bad faith claims in the uninsured motorist insurance context. In National Assurance Ass'n v. Sockwell, 829 So.2d 111 (Ala. 2002) the Alabama Supreme Court affirmed an award of compensatory damages and punitive damages in favor of an insured arising out of the investigation and delayed payment of underinsured motorist benefits. In Sockwell, the insureds suffered serious bodily injury in a motor vehicle accident and the negligence of an underinsured driver was undisputed. At the time of the accident Sockwell was working within the line and scope of her employment. The underinsured motorist carrier denied payment of the UIM claim on two occasions on the basis that the underinsured motorist coverage excluded payment for any loss covered under a worker's compensation law. However, the specific exclusion forming the sole basis for denial, the worker's compensation limit of liability provision, had been declared void in a 1971 Alabama Supreme Court case. See, State Farm v. Cahoon, 287 Ala. 462, 252 So.2d 619 (1971).

The Sockwell court affirmed the plaintiff's verdict on the basis that the denial of UIM coverage was made on a specific basis, to wit, the admittedly void exclusion. The

Sockwell court further found that there was evidence of bad faith as a result of the fact that the insurer took no action to delete provisions from its standard policy that it knew was void. The Sockwell case is one of the few cases wherein a bad faith cause of action was found to exist in the uninsured motorist context.

In State Farm v. Smith, 956 So.2d 1164 (Ala.Civ.App.2006), the Alabama Supreme Court reversed a jury verdict in favor of an insured against an uninsured motorist carrier. In Smith, a State Farm insured was severely injured in an accident caused by the negligence of a driver whose policy limits were $25,000.00. The State Farm UIM limits provided a combined total of $50,000.00 in UIM coverage. Notwithstanding the clear liability, significant injury and low underlying limits, State Farm refused to pay the UIM benefits. Smith then argued that State Farm's refused to pay benefits amounted to "abnormal" bad faith because State Farm failed to adequately investigate the claim or to submit the results of the investigation to cognitive evaluation and review. Because there was evidence that State Farm had actually reviewed the medical records and pointed out several discrepancies, including a brief four day delay in the insured initially seeking treatment and because of evidence of some pre-existing complaints, the Smith court found that the insured had not established legal entitlement to payment of the benefits. The Smith court stated as follows:

> Because Smith had not established the extent of his damages and because State Farm disputed whether all of the damages claimed by Smith were attributable to the May 1997 accident, State Farm's decision not to authorize payment of all or part of Smith's UM/UIM benefits could not have amounted to bad faith. 956 So.2d at 1170.

A UIM bad faith claim is available in instances where the UIM carrier denies the claim on an illegal or void basis. If the insurer appropriately acknowledges available coverages and defends, a bad faith claim will be rare.

EXHIBIT A

PLAINTIFFS' REQUESTED VOIR DIRE

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1. The function of questioning by the Court and the attorneys is to discover any bias or prejudice, conscious or unconscious, that any of you prospective jurors may have regarding the type of case involved here today which is essentially a refusal to pay an insurance claim based on underinsured motorist coverage as a result of an automobile accident.

2. The nature of the case requires me to ask certain personal questions of you that are necessary to aid all of us in selecting a fair and impartial jury to both sides in the case. It is not our intention in any way to invade your privacy, embarrass you or to be unduly inquisitive. It is vitally necessary that the questions be asked and that they be openly answered by you.

- Family means relatives and also those people close enough to you that you consider them family.

3. David Parks was identified a few minutes ago, but I want to introduce him to you. David is from Semmes, Alabama, went to high school at Mary G. Montgomery and was a truck driver.

- Mr. Parks is married to Aimee Parks for 22 years and they raised three boys. David worked for Kerry Cannon and American Carbonics. Do you know Mr. Parks or Mrs. Parks?

- Do any of you know Mr. Parks' former employer, Kerry Cannon?

4. You have generally heard the case described to you by the Court. I want to tell you a little more of the facts now as we expect them to come out during trial:

- Mr. Parks was injured in a terrible wreck on July 10, 2016 when he was run off the road on Interstate 10.

- Mr. Parks is making a claim for benefits under the underinsured motorist provision of insurance policies State Farm and Alfa, that they accepted premiums for, and that State Farm and Alfa admit was in full force and effect at the time he was in the wreck on July 10, 2016.

- The issue those of you selected for this jury will have to answer is whether Mr. Parks is entitled to the coverage benefits he paid for – that is, if Mr. Parks was hurt in this wreck that was caused by a phantom motorist, is he entitled to the underinsured motorist benefits he paid for for decades?

- Does everyone understand what we are here about today?

5. You are going to here a term here throughout the trial called "UNDERINSURED MOTORIST COVERAGE." For those of you who are unfamiliar with this coverage, it is a type of insurance coverage to cover yourself if you or someone in your car is injured by someone else who either doesn't have insurance or doesn't have enough insurance. Underinsured motorist coverage means that an insurance company stands in the shoes of the phantom motorist to provide additional limits of insurance over and above what Mr. Parks had at the time of the wreck. It covers all forms of damage for

Mr. Parks – lost wages, for pain and suffering, for mental anguish – all of the things that a phantom motorist should be responsible for causing Mr. Parks' wreck. Does everyone understand the type of coverage that I am talking about?

- Underinsured motorist coverage is different from liability coverage or medical payments coverage. The Alabama Legislature ordered that every automobile insurance company provide underinsured motorist coverage – and if someone doesn't want the coverage, that person must specifically decline the coverage in writing. Does everyone understand the type of coverage I am talking about that this case is about?

6. Have any of you had to make an underinsured motorist claim against your insurance company?

- Have any of you ever had to sue your insurance company for not providing underinsured motorist benefits when you or a member of your family was hurt in a wreck?

- Have any of you had an underinsured motorist claim and decided for whatever reason not to file the claim?

- Have any of you ever declined underinsured motorist coverage under your policy?

7. Now that you know a little bit about this case, I want to know if any of you would have a problem rendering a verdict against State Farm and Alfa and in favor of Mr. Parks for fear that doing so would cause your own insurance premiums to go up even though insurance companies like State Farm and Alfa factor in risk payment when setting rates? Do any of you have such a concern?

8. Have any of you or your immediate family members been hurt and had to file a claim against an insurance company? Explain.

9. Have any of you had to file a claim of any other type with an insurance company? Property damage, hurricane damage, etc?

10. Have any of you filed a claim with an insurance company and have that claim denied? Explain.

11. Have any of you had to file a lawsuit against an insurance company because the company wouldn't pay a valid claim?

12. Have any of you or your immediate family members ever been hurt by someone else and for whatever reason decided not to file a claim or a lawsuit?

13. Have any of you or your family members ever been a party to a lawsuit? That is, ever sued or been sued?

14. Have any of you or your family ever had back surgery?

15. Has anyone ever had a CDL or worked as a truck driver?

16. Has any member of the jury or your immediate family, either presently or in the past, ever been employed as an agent, employee, claims adjuster or in any other capacity for an insurance agency or company?

17. Has anyone ever been run off the road by another driver?

18. Would anyone fault Mr. Parks for losing control?

19. Would anyone fault Mr. Parks for working after a prior back surgery?

20. Have any of you or your immediate family ever been employed as an investigator for either a law enforcement agency or private business.

21. Has investigation ever been a part of the job duties of any of you or your immediate family?

22. Have any of you or your immediate family ever been employed in a job that required you to investigate accidents or take photographs of an accident scene?

23. Have any of you or your immediate family ever been a party to any litigation in which our firm Tobias, McCormick & Comer was involved?

24. Have any of you or your immediate family ever been a witness in any litigation in which our firm Tobias, McCormick & Comer was involved?

25. Does anyone know Mark Ulmer?

26. Does anyone know Aaron Wiley and the law firm of Carr Allison?

27. Does anyone know Trooper Greg Eubanks, Dennis Gaddy or Larry Dewberry?

28. Serving on a jury is a very high honor. It is the only time most laymen can participate in the functioning of their government. Many people are never called to serve on a jury during their entire lifetime. Have any of you ever served on a jury before? Did anything happen in your prior service that has left you with mixed feelings or which would make it difficult for you to be absolutely impartial in this case as you enter into your service as a juror? Explain service – foreman? Results?

29. Are there any of you who has any objection to or fixed opinion against people seeking money damages in a court of law?

30. Do any of you, because of a religious, moral or other conviction, believe that it is generally wrong or improper to sue another person or insurance company like State Farm or Alfa Insurance for personal injuries or death alleged to have been caused by the fault of another?

31. Are there any of you who have already formed an opinion about the amount of any verdict you might render if called on to serve as a juror in this case? That is, did you say to yourself before you came down here for jury duty that if you ever get on a jury you will never render a verdict in excess of "X" dollars?

32. Do any of you think, no matter the facts of the case or the law as Judge Stankoski instructs you at the end of the case, that there should be arbitrary caps on damages?

33. Are any of you members of any tort reform groups such as the Business Council of Alabama or other similar groups?

34. I have done a lot of talking. Now, is there anything that any of you would like to tell me that is on your mind that might even in the slightest way affect your ability to be completely impartial in this case?

35. This is my last question, and I appreciate your patience. Are there any of you who are sitting there thinking – this lawyer should know this about me that would affect my ability to serve, but he just hasn't asked the right question yet?

EXHIBIT B

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 1

APJI 11-10
LOSS OF EARNINGS

In determining the amount of damages for loss of earnings, you should consider any evidence of the Plaintiff's earning capacity, his earnings, the manner in which he ordinarily occupied his time before the injury, his inability to pursue his occupation, and determine what he was reasonably certain to have earned during the time so lost, had he not been disabled.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
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FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 2

APJI 11-09
PERSONAL INJURY--MEDICAL EXPENSES

The measure of damages for medical expenses is all reasonable expenses necessarily incurred for doctors' and medical bills which the Plaintiff has paid, or become obligated to pay, and the amount of the reasonable expenses of medical care, treatment, and services reasonably certain to be required in the future. The reasonableness of, and the necessity for, such expenses are matters for your determination from the evidence.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 3

APJI 11-06
PERMANENT INJURIES

It is for you to determine from the evidence the nature, extent and duration of the Plaintiff's injuries. If you are reasonably satisfied from the evidence that the Plaintiff has suffered permanent injuries, and that such injuries proximately resulted from the wrongs complained of, then you should include in your verdict such sum as you determine to be reasonable compensation for such injuries.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 4

APJI 11-05
PERSONAL INJURY--PHYSICAL PAIN AND MENTAL ANGUISH

The law has no fixed monetary standard to compensate for physical pain and mental anguish. This element of damage is left to your good sound judgment and discretion as to what amount would reasonably and fairly compensate the Plaintiff for such physical pain and mental anguish as you find from the evidence the Plaintiff did suffer.

If you are reasonably satisfied from the evidence that the Plaintiff has undergone pain and suffering or mental anguish as a proximate result of the injury in question, you should award a sum which will reasonably and fairly compensate him for such pain, suffering, or mental anguish [already] suffered by him [and for any pain, suffering or mental anguish which you are reasonably satisfied from the evidence that he is reasonably certain to suffer in the future].

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 5

APJI 11-04
PERSONAL INJURY--ELEMENTS

The Plaintiff, FRANK W. SHEPARD, JR., claims compensation for the following items or elements of damages:

- past and future medical expenses
- past and future loss of earnings
- past and future loss of ability to earn
- physical pain and suffering
- mental anguish
- permanent injuries, impairment, and disabilities

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
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FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 6

APJI 11-02
COMPENSATORY

The purpose of awarding compensatory damages is to fairly and reasonably compensate the injured party for the loss or injury sustained. Compensatory damages are intended as money compensation to the party wronged, and to compensate him for his injury and other damages which have been inflicted upon him as a proximate result of the wrong complained of.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
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FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 7

APJI 11-01
GENERAL

Compensatory or actual damages are allowed and should be awarded where the Plaintiff reasonably satisfies the jury from the evidence that the Plaintiff has been injured or damaged as a proximate result of an act of negligence on the part of the Defendant, or where the Plaintiff reasonably satisfies the jury from the evidence that the Plaintiff has been willfully or wantonly injured by the Defendant.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 8

APJI 26-00
DUTY OWED BY OPERATOR OF MOTOR VEHICLE

The driver of a motor vehicle upon a public highway is under a duty to exercise reasonable care to avoid inflicting injury upon others who may be lawfully using the same public highway.

Reasonable care means such care as a reasonably prudent person would exercise under the same or similar circumstances.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 9

APJI 28-00
DEFINITION

Negligence is the failure to discharge or perform a legal duty owed to the other party.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 10

APJI 28-01
NEGLIGENCE AND ORDINARY CARE

Negligence means the failure to exercise reasonable and/or ordinary care; that is, such care as a reasonably prudent person would have exercised under the same or similar circumstances.

Therefore, "negligence" is the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or the doing of something which a reasonably prudent person would not have done under the same or similar circumstances.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 11

APJI 28-02
DUTY OWED--NEGLIGENCE AND ORDINARY CARE

The duty owed by the Defendant to the Plaintiff was to exercise reasonable care not to injure or damage the Plaintiff; that is, to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 12

APJI 26-11
VIOLATION OF RULES OF THE ROAD--NEGLIGENCE PER SE

The Alabama Rules of the Road consist of a number of statutes enacted into law by your legislature regulating the flow of traffic upon the highways of this State.

The violation of certain of these Rules of the Road by persons using the public highways is negligence as a matter of law. Such negligence, however, in order to be actionable on the part of the Plaintiff or a defense on the part of the Defendant must proximately cause or proximately contribute to the injury complained of by the Plaintiff.

I will now read to you certain of these Rules of the Road, the violation of which is negligence as a matter of law. The fact that I read these statutes is no indication that any of these statutes have been violated or that any such violation proximately caused or proximately contributed to the injury complained of by the Plaintiff. It is for you to decide whether or not the statutes have been violated and whether or not any such violation proximately caused or proximately contributed to the injury complained of by

the Plaintiff, depending on what you find the facts to be.

Alabama Code §32-5A-89(a):

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
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FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 13

APJI 11-11
LOSS OF FUTURE EARNINGS OR FUTURE EARNING CAPACITY

In arriving at the amount of your award for any loss of future earnings and/or future earning capacity, if you are satisfied that the Plaintiff will sustain such a loss you should consider what the Plaintiff's health, physical ability, and earning power or capacity were before the accident and what they are now, the nature and extent of his injuries, and whether or not they are reasonably certain to be permanent, or, if not permanent, the extent of their duration, all to the end of determining the effect, if any, of his injury upon his future earnings and/or earning capacity. After you determine the nature and the extent of his future loss of earnings and/or earning capacity, you would then determine the amount of money which would reasonably and fairly compensate him for such future loss.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 14

APJI 33-00
PROXIMATE CAUSE - DEFINITION

The proximate cause of an injury is that cause which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury and without which such injury would not have occurred.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 15

APJI 11-19
MORTALITY TABLES

"Mortality Tables" are a means of ascertaining the probable number of years a person of a given age and of ordinary health will live, and the Mortality Table may be used by you as an aid in computing damages if you are reasonably satisfied from the evidence that the injuries sustained by the Plaintiff are permanent. Such tables are not binding upon you, and are not conclusive.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 16

APJI 11-03
PUNITIVE

The purpose of awarding punitive or exemplary damages is to allow money recovery to the Plaintiff by way of punishment to the Defendant, and for the added purpose of protecting the public by deterring the Defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.

For a Plaintiff to be entitled to recover punitive damages, the Plaintiff must prove by clear and convincing evidence that the Defendant consciously or deliberately engaged in wantonness with regard to the Plaintiff.

Clear and convincing evidence means evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. (Proof by clear and convincing evidence requires a

level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt).

Wantonness means conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 17

APJI 29-00
WANTONNESS - DEFINITION

Wantonness is the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that, from the doing of such act or omission of such duty, an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that, with reckless indifference to the consequences, he either consciously and intentionally did some wrongful act or consciously omitted some known duty which produced the injury.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 18

APJI 20.59
INSURANCE
UNDERINSURED MOTORIST INSURANCE COVERAGE
ELEMENTS OF PLAINTIFF'S CASE

This case is based on a policy of insurance in which the Defendant insurance company, Auto-Owners Insurance, issued a policy of automobile liability insurance which contained a provision affording what is commonly known as underinsured motorist coverage. The Plaintiff's complaint contains the following averments, namely:

1. That Auto-Owners Insurance issued a policy of automobile liability insurance coverage which afforded underinsured motorist coverage and that said policy was in full force and effect on December 3, 2008, the date of the alleged accident.
2. That on said date the Plaintiff was injured by the operation of the motor vehicle owned or operated by Beverly King Johnson.
3. That the said Beverly King Johnson on the occasion of the accident had liability insurance coverage but the Plaintiff claims that the amount of the liability insurance carried by the said Beverly King Johnson was

inadequate to fully compensate the Plaintiff for his injuries and damages.

4. That the Plaintiff is legally entitled to recover damages of the said Beverly King Johnson. The term "legally entitled to recover damages of the said Beverly King Johnson" means: the Plaintiff must establish fault of the Defendant which gives rise to damages and must prove the extent of those damages.

The specific charge of "fault" as alleged by the Plaintiff against Beverly King Johnson is: Beverly King Johnson is guilty of negligence or wantonness in the operation of her motor vehicle.

It is stipulated and agreed between the parties that:

(1) Auto-Owners Insurance Co. issued a policy of insurance that provided uninsured/underinsured motorist coverage to Frank Shepard, Jr. The policy of insurance was in full force and effect on the date of the motor vehicle accident of December 3, 2008 wherein Frank Shepard, Jr. was injured.

(2) That Frank Shepard, Jr. was injured by the operation of the vehicle by Beverly King Johnson, who had some liability insurance.

Since the Defendant has denied certain averments of the complaint, the burden is on the Plaintiff to reasonably satisfy you of the truthfulness of each of those

averments, namely:

(1) The extent of Plaintiff's injury and damages.

(2) The amount of punitive damages that Plaintiff is legally entitled to recover.

If the Plaintiff has proved to your reasonable satisfaction the truth of each of those averments he is entitled to a verdict unless the Defendant has proved one of its affirmative defenses in which case the Defendant is entitled to a verdict.

In determining the amount of damages to be awarded, if you find in favor of the Plaintiff, you are not to be concerned with the amount of liability insurance carried by Beverly King Johnson nor the amount of insurance afforded by Defendant's policy.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 19

APJI 20.55
DAMAGES - INSURANCE COMPANY

If the Plaintiff in this case is entitled to recover, he is entitled to recover damages for the personal injuries and damages sustained as the proximate consequence of the (negligence) (wantonness) of the underinsured motorist plus interest at the rate of ____% per annum from the date of notice of the accident up to the present time.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 20

The parties have agreed to certain stipulated facts which you will consider in this case:

1. That Auto-Owners issued a policy of insurance to Gulf Shred d/b/a Shred It, policy number 49-228-932-00, that provided underinsured motorist insurance to Frank Shepard, Jr. The policy of insurance was in full force and effect on the date of the motor vehicle accident, wherein Frank Shepard, Jr. was injured on December 3, 2008.
2. The subject Auto-Owners policy insured the 2006 Chevrolet Silverado that Frank Shepard, Jr. was operating at th time of the accident.
3. The 2006 Chevrolet Silverado Mr. Shepard was operating was owned by Gulf Shred d/b/a Shred It.
4. That Frank Shepard, Jr. was injured by the operation of the vehicle by Beverly King Johnson, who had some liability insurance.
5. That Beverly King Johnson is legally responsible for Frank Shepard, Jr.'s injuries and damages.

GIVEN _____

REFUSED _____

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ALABAMA
CIVIL ACTION NO: CV-09-900029

FRANK W. SHEPARD, JR. V. AUTO-OWNERS INSURANCE, et al

PLAINTIFF'S REQUESTED JURY CHARGE

NUMBER 21
Based on APJI 20.55
Damages - Insurance Company - Modified

If the Plaintiff in this case is entitled to recover on his underinsured motorist claim, he is entitled to recover damages for the personal injuries and damages sustained as the proximate consequence of the negligence of Beverly King Johnson. Damages include compensatory damages and punitive damages as will be explained to you.

GIVEN _____

REFUSED _____