

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Travelers Property Casualty Company)
of America,)
)
Plaintiff/Counter Defendant,)
)
v.)
)
Barbara Hawthorne, as personal)
representative of the Estate of Nathaniel)
Hawthorne, Jr.,)
)
Defendant/Counter Claimant.)
_____)

C/A No. 6:21-cv-02648-DCC

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ORDER



This action is before the Court on Defendant's Motion for Judgment on the Pleadings; Plaintiff's Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment; and Defendant's Motion to Certify Question. ECF Nos. 20, 28, 35. All Motions have been fully briefed. ECF Nos. 29, 30, 31, 33, 36, 37. In addressing the merits of the Motions for Judgment on the Pleadings, the issue for the Court's consideration is whether a motorist is an "insured" for purposes of underinsured motorists ("UIM") coverage when he complies with a direction by law enforcement to exit his vehicle and approach the officer's adjacent vehicle and is struck by a passing vehicle on the highway. This issue has not been adequately addressed by controlling precedent of South Carolina's appellate courts. Therefore, the Court must certify this question to the Supreme Court of South Carolina.

APPLICABLE LAW

Federal courts in diversity cases apply the law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In situations in which "there is no case law from the

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forum state which is directly on point, the district court attempts to do as the state court would do if confronted with the same fact pattern.” *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (internal citations omitted). The United States Court of Appeals for the Fourth Circuit has noted that “[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court.” *Id.* (citing *Smith v. FCX, Inc.*, 744 F.2d 1378, 1379 (4th Cir. 1984)).

South Carolina Appellate Court Rule 244 provides that the Supreme Court of South Carolina

in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

Rule 244(a), SCACR. The certification order shall set forth: (1) “the questions of law to be answered”; (2) “all findings of fact relevant to the questions certified”; and (3) “a statement showing fully the nature of the controversy in which the questions arose.” Rule 244(b), SCACR.

DISCUSSION

Background

On December 2, 2020, Nathaniel Hawthorne, Jr., (“Decedent”) was pulled over by an officer on North Pleasantburg Drive in Greenville, South Carolina. ECF No. 1 ¶ 12. Decedent and the officer stopped their vehicles in the center turn lane of North Pleasantburg Drive. *Id.* ¶ 14. Decedent was driving a 2015 Ford truck owned by Terracon

Consultants, Inc. ("Terracon"). *Id.* ¶¶ 12, 13. Plaintiff does not appear to contest that Decedent was operating the truck with Terracon's permission and within the scope of his employment.

The traffic stop was captured by a dashcam video in the officer's vehicle. See ECF No. 20-3. As shown in the video, after being stopped, Decedent got out of the truck at the officer's request. *Id.* at 3:26. Following a series of interactions, Decedent walked from the truck to the passenger side of the officer's vehicle to give the officer the trailer's VIN number and registration card. *Id.* at 15:40. While Decedent was standing at the passenger-side window of the patrol car, a car hit the patrol car at a high speed. *Id.* at 17:31. The collision forced Decedent into oncoming traffic where he was hit and killed by a passing motorist. ECF No. 1 ¶ 16.

Defendant asserts that Decedent's personal representative sued the driver for wrongful death on April 15, 2021, in the Greenville County Court of Common Pleas, and his liability carrier tendered its limits of \$25,000. Defendant contends, and Plaintiff does not appear to dispute, that he is otherwise judgment proof.

As stated above, Decedent's truck was owned by his employer, Terracon. It is principally garaged in the State of South Carolina. *Id.* ¶ 13. Plaintiff insured Terracon under a commercial auto policy with a policy number of TC2J-CAP-131J3858-TIL-20 ("the Policy"). *Id.* ¶ 3. The Policy includes an endorsement that provides UIM coverage with respect to insured vehicles principally garaged in South Carolina ("the Endorsement"). ECF No. 1-1 at 37. The coverage available under the Endorsement is subject to a liability limit of \$1,000,000 per accident. ECF No. 1 ¶ 17. The Endorsement defines an insured

as anyone “occupying’ a covered ‘auto.’” ECF No. 1-1 at 37. It defines “occupying” as “in, upon, getting in, on, out or off.” *Id.* at 39.

The Court’s Review

In its Motion for Judgment on the Pleadings, Plaintiff contends that Defendant is not entitled to UIM coverage because Decedent was not occupying the truck as defined by the Policy because he was not in physical contact with the truck at the time of the accident. ECF No. 28-1 . Defendant argues it would be unconscionable or otherwise contrary to public policy to deny UIM coverage while operating a covered vehicle because Decedent complied with a law enforcement officer’s directive to approach the patrol car. ECF No. 20-1. Defendant relies on the Supreme Court of South Carolina’s decision in *South Carolina Farm Bureau Mutual Insurance Company v. Kennedy*, 730 S.E.2d 862 (S.C. 2012).

Kennedy involved a question of whether a plaintiff had physical contact¹ with an insured truck when he took his hand off the truck to try to get out of the way of an oncoming car. The Supreme Court of South Carolina found that “[t]he temporal continuum of an accident necessarily includes more than the point in time of initial impact. It also includes the events immediately surrounding the initial impact and the point in time that the last injury was inflicted.” 730 S.E.2d at 865 (citing *Whitmire v. Nationwide Mut. Ins. Co.*, 174 S.E.2d 391, 394 (S.C. 1970)). The court determined that “requiring Kennedy

¹ In *McAbee v. Nationwide Mutual Insurance Company*, 152 S.E.2d 731, 733 (1967), the Supreme Court of South Carolina found that policy language requiring that an insured be “upon” an insured vehicle to trigger UIM coverage was satisfied by actual physical contact with the insured vehicle.

to keep his hand upon the vehicle, remain in the path of Counts's oncoming vehicle, and risk being crushed is unreasonable, unconscionable, and not in accordance with the legislative purposes behind enactment of the UIM statute." *Id.* at 866.

In the Motion to Certify Question, Defendant argues that it would be unreasonable and unconscionable, or at least contrary to public policy, to read the physical contact requirement to require a driver to commit a crime rather than relinquish physical contact with the insured vehicle. ECF No. 35 at 5 (citing S.C. Code Ann. §§ 56-5-740 ("No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer, fireman or uniformed adult school crossing guard invested by law with authority to direct, control or regulate traffic."); 56-5-730 (classifying a violation of § 56-5-740 as a misdemeanor)). Defendant further contends that Decedent had been in contact with the insured truck less than two minutes before the collision and never exited the immediate vicinity of the truck, that he was standing in the road immediately adjacent to the truck when the collision occurred, and that he was going to enter the truck and drive away as soon as he was permitted. ECF No. 35 at 6. Defendant also raises an additional issue that the Supreme Court of South Carolina reserved ruling upon in *Kennedy*—whether an insurer can modify the statutory definition of an insured under a UIM policy to require that the insured is "occupying" the vehicle. *Id.* at 7. Thus, Defendant argues that what matters is not whether Decedent was occupying the truck at the time of the collision but whether he was using or operating the vehicle with the consent of the named insured. *Id.* at 8. Defendant contends that he was. Therefore, Defendant asserts that this case squarely raises the issue that was noted but not decided by the court in *Kennedy*.

Plaintiff raises three arguments against certification. The Court will address each in turn.

First, Plaintiff argues that the question presented by Defendant was not raised in the parties' dispositive Motions. ECF No. 36 at 5–8. Plaintiff maintains that, in Defendant's Motion for Judgment on the Pleadings, she identified the issue as whether Decedent was "getting in, on, out, or off" of an insured vehicle at the time of the accident. Plaintiff asserts that Defendant has waived the argument presented in the Motion to Certify Question by failing to raise it before when given the opportunity. Plaintiff contends that allowing Defendant to proceed with its current argument would be grossly unfair.

Defendant argues that she has not waived this issue. ECF No. 37 at 1–4. Defendant contends that there is no legal support for Plaintiff's position. Upon review, the Court agrees. As an initial matter, the Court notes that the cases cited by Plaintiff do not represent the same procedural posture that exists in this case.² Moreover, as noted by Defendant, Plaintiff has had an opportunity to respond to the arguments raised in Defendant's Motion to Certify Question.² Therefore, the Court finds Plaintiff's arguments on this point unpersuasive.

² With respect to Plaintiff's citation to *McWhite v. ACE American Insurance Company*, C/A No. 4:07-cv-1551-RBH, 2010 WL 1027872 (D.S.C. Mar. 17, 2010), for the proposition that it is established law that the statutory definition of "insured" in S.C. Code Ann. § 38-77-30(7) does not apply to a UIM policy with a different definition of "insured," the Court agrees with Defendant that *McWhite* is distinguishable from the present action in that it predates the Supreme Court of South Carolina's ruling in *Kennedy*, which expressed concern for "the ultimate validity of such definitional provisions and whether they alter, or conflict with, the statutory definition of an insured" 730 S.E2d at 867–68.

Second, Plaintiff asserts that there is state law sufficient to decide the issue without certification. ECF No. 36 at 8–10. The Court disagrees. As both South Carolina cases cited by Plaintiff predate *Kennedy*, the Court agrees with Defendant’s point that they cannot speak on what was expressly reserved by the Supreme Court of South Carolina. In *Cramer v. National Casualty Insurance Company*, 690 F. App’x 135 (4th Cir. 2017), the Fourth Circuit discusses the definition of “occupying” with respect to UIM coverage; however, the facts of that case are easily distinguishable from the facts in the present action. Moreover, none of the cases cited by Plaintiff address the unconscionability issue raised here.

Third, Plaintiff argues that the proposed question presents a fact specific question inappropriate for certification. ECF No. 36 at 10–11. The Court disagrees. The Court finds that the question presented by Defendant has the potential to inform cases beyond the current action. Traffic stops and subsequent directions to drivers by law enforcement are not uncommon. Therefore, the potential insurance liability stemming from accidents arising from such interactions are certainly capable of repetition.

Accordingly, upon review of the relevant case law and statutes and the arguments of the parties, the Court finds that whether Defendant is entitled to UIM coverage is an unsettled issue of state law. Moreover, the answer to this question has broad implications for both insurance carriers and consumers. Given the wide-ranging implications, the Court concludes that it should defer to the Supreme Court of South Carolina.

CONCLUSION

Therefore, Defendant's Motion to Certify Question [35] is **GRANTED** and the Court certifies the question set forth below to the Supreme Court of South Carolina for consideration in its discretion. The Court certifies the following question of law:

If a law enforcement officer stops a motorist on a public highway, and during that traffic stop directs the motorist to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card, is the motorist an "insured" for purposes of Underinsured Motorist Coverage when he is struck by a passing vehicle on the public highway while standing at the officer's vehicle?

The Court further finds that the Supreme Court of South Carolina's decision will be outcome determinative to the issues in the parties' dispositive Motions. Accordingly, Plaintiff's Motion for Judgment on the Pleadings [20] and Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment [28] are **DENIED** without prejudice and with leave to refile once the Supreme Court of South Carolina has conferred its ruling.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

June 13, 2022
Spartanburg, South Carolina

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