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

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Plaintiff, v. BARBARA HAWTHORNE, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., Defendant.	Case No. 6:21-cv-02648-DCC

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, Travelers Property Casualty Company of America ("Travelers"), by and through counsel, and moves pursuant to Rule 12(c) and Rule 56, Fed. R. Civ. P., for judgment on the pleadings, or in the alternative, for summary judgment in favor of Plaintiff and against Defendant. In support of its motion for judgment on the pleadings, Travelers shows the Court that the averments and admissions of the pleadings filed in this matter show that there is no genuine issue of material fact and Travelers is entitled to judgment in its favor as a matter of law. In support of its motion for summary judgment, in the alternative, Travelers shows the Court that the pleadings together with the discovery materials on file with the Court show that there is no genuine issue of material fact and Travelers is entitled to judgment in its favor as a matter of law. In further support of its motions, Plaintiff's Memorandum in support of this motion and in opposition to Defendant's Motion for Judgment on the Pleadings (Doc. 20) is attached and incorporated herein.

WHEREFORE, Travelers respectfully prays that the Court:

1. Grant its motion for judgment on the pleadings, or in the alternative, motion for summary judgment;

2. Enter an order and declaratory judgment providing that Travelers has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Defendant for damages that may be recoverable by the Defendant in connection with the collision that occurred on December 2, 2020 in Greenville, South Carolina on North Pleasantburg Drive;

3. Dismiss the Defendant's counterclaims with prejudice;

4. Tax the costs of this action against the Defendant; and

5. Grant Travelers such other and further relief as the Court deems just and appropriate.

Respectfully submitted this 24th day of November, 2021.

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES Plaintiff, Travelers Property Casualty Company of America ("Travelers"), by and through its undersigned counsel, and for its Memorandum in Support of its Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment, and in Opposition to Defendant's Motion for Judgment on the Pleadings (Doc. 20), shows the Court the following:

UNDISPUTED FACTS

On December 2, 2020, Nathaniel Hawthorne ("Decedent") was pulled over by an officer ("Officer") on North Pleasantburg Drive in Greenville, SC. Compl. ¶ 12 (Doc. 1); Ans. & Countercl. ("Answer") ¶¶ 12-14 (Doc. 11). Both the Decedent and the Officer stopped their vehicles in the center turn lane of North Pleasantburg Drive. Compl.

¶ 14, Answer ¶ 14. The Decedent's vehicle was a 2015 Ford truck ("Truck" or the "Decedent's Truck"). Compl. ¶ 12, Answer ¶ 12.

The traffic stop was captured by a dash mounted camera in the Officer's vehicle. *See* Def.'s Memo. in Supp., Ex. B (Doc. 20-3) ("Dash Cam"). As shown in the video, after being stopped, the Decedent gets out the Truck. *Id.* at 3:26. He walks back and forth several times from the Truck to the passenger side of the Officer's vehicle. *Id.* at 11:08, 12:47, 13:57, 14:36, 15:38. At the 15:38 mark in the video, he again walks from the Truck to the passenger side of the Officer's vehicle. The Decedent and the Officer's conversation can be heard. Nearly two minutes later, at the 17:32 mark in the video, a vehicle driven by Allan Lindsey Zack ("Tortfeasor") collides head-on with the Officer's vehicle ("Accident"). The Decedent was tragically killed as a result of this collision. Compl. ¶ 16, Answer ¶ 16.

The Decedent's Truck was owned by his employer, Terracon Consultants, Inc. ("Terracon") and is principally garaged in the State of South Carolina. Compl. ¶ 13, Answer ¶ 13. Travelers insured Terracon under a commercial auto policy with a policy number of TC2J-CAP-131J3858-TIL-20 ("Policy"). Compl. ¶ 3, Answer ¶ 3. Among other benefits, the Policy includes an endorsement that provides underinsured motorist coverage with respect to insured vehicles principally garaged in South Carolina ("SC UIM Endorsement"). *See* Ex. A to Compl. (Doc. 1-1) p. 37 (using the Court's page numbers). That coverage is subject to the terms of the Policy and the SC UIM Endorsement. The coverage available under the SC UIM Endorsement is subject to a liability limit of $1,000,000 per accident. Compl. ¶ 17, Answer ¶ 17.

PROCEDURAL HISTORY

The Decedent's Estate ("Estate"), made a claim for UIM benefits under the Policy. Travelers denied the Estate's claim and filed its Complaint for Declaratory Judgment (Doc. 1) ("Complaint"). Travelers seeks a declaratory judgment that it has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident. *Id.* at ¶ 32.

The Estate answered the Complaint and counterclaimed seeking various declaratory judgments including a ruling that the Estate is entitled to recover UIM benefits under the Policy. Answer p.7-11 (Doc. 11). The Estate then filed a motion for judgment on the pleadings ("Estate's Motion") (Doc. 20). Travelers has now filed its own motion for judgment on the pleadings, or in the alternative, motion for summary judgment ("Travelers' Motion").

LEGAL STANDARD

I. General Principles of Judgment on the Pleadings

A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6). *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d. 401, 405-06 (4th Cir. 2002). The court assumes the factual allegations in the Complaint to be true and draws all reasonable factual inferences in favor of the nonmovant. *See id.* at 406. The factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct.1965, 167 L. Ed. 2d 929 (2007).

II. Interpretation of Insurance Policies Under South Carolina Law

In an action based on diversity of citizenship, the relevant state law controls. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Under South Carolina law, insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E. 2d 327, 330 (1999). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* "In construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E. 2d 344, 348 (1976). An insurer's obligation under a policy of insurance is defined by the policy itself and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E. 2d 471, 474 (Ct. App. 1990).

ARGUMENT

Travelers' Motion should be granted and the Estate's Motion should be denied because the Decedent was not "occupying" the Truck at the time of the Accident. Because he was not "occupying" the Truck, the Decedent is not an insured under the SC UIM Endorsement of the Policy. Because he was not an insured, the Estate is not entitled to recover UIM benefits from Travelers. Whether the Decedent was complying with the Officer's instructions at the time of the Accident is immaterial to the determination of whether he was "occupying" the Truck.

I. MR. HAWTHORNE WAS NOT "OCCUPYING" THE VEHICLE AT THE TIME OF THE ACCIDENT AND, THEREFORE, HIS ESTATE IS NOT ENTITLED TO UIM BENEFITS.

To be entitled to UIM coverage, a person must be an "insured." This is in the insuring agreement of the SC UIM Endorsement. That insuring agreement provides, in relevant part:

> A. Coverage
>
> We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle".

("Insuring Agreement"). *See* Ex. A to Compl. (Doc. 1-1), p.37 (using the Court's page numbers).

The SC UIM Endorsement defines "insured", in relevant part:

> B. Who Is An Insured
>
> If the Named Insured is designated in the Declarations as:
>
> ...
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto"...

> b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

See Ex. A to Compl. (Doc. 1-1) p.37.

The SC UIM Endorsement defines "occupying", as to UIM benefits available in connection with covered autos licensed or principally garaged in South Carolina as follows:

> F. Additional Definitions
>
> As used in this endorsement:
>
> 2. "Occupying" means in, upon, getting in, on, out or off.

See Ex. A to Compl. (Doc. 1-1) p.39.

The parties agree that the Decedent was not "in" the Truck at the time of the Accident. The Estate argues that the Decedent was either "upon" the Truck or was "getting in, on, out or off" of the vehicle at the time of the Accident. Answer ¶ 37 (Doc. 11). The undisputed facts of the Accident make clear that he was not.

A. The Decedent Was Not "Upon" the Truck at the Time of the Accident Because He Was Not in Physical Contact with It.

Under South Carolina law, to be "upon" an insured vehicle the claimant must be in actual physical contact with that vehicle. *See Cramer v. Nat'l Cas. Co.*, 690 F. App'x 135, 139 (4th Cir. 2017) (unpublished) (citing *Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970), *and S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 866-67 (2012)) (attached hereto as **Exhibit A**). *Cramer* was a case with similar issues to the instant case decided by the Fourth Circuit in 2017. As the *Cramer* Court found, [t]he Supreme Court of South Carolina has been clear, however, that 'upon' requires physical contact with the insured vehicle." 690 F. App'x at 139.

In this case, the parties agree that the Decedent was not in physical contact with the Truck at the time of the Accident. Compl. ¶¶ 15-16, Answer ¶¶ 15-16. Because he was not in physical contact with the Truck, he was not "upon" the Truck.

The Estate relies on *Kennedy* to support its position to the contrary. That case is readily distinguishable from the facts here. *Kennedy* involved a claimant who was in physical contact with the insured vehicle. 398 S.C. 604, 613, 730 S.E.2d 862, 866 (2012). The claimant's hand was on the insured vehicle. *Id.* The claimant only relinquished this physical contact in his effort to avoid being struck by the oncoming tortfeasor. *Id.* The Estate's attempt to stretch *Kennedy* well beyond the bounds of its holding is not justified by the holding itself or the reasoning behind it.

At best for the Estate, *Kennedy* created a narrow exception to the physical contact requirement that does not apply here. The exception created in *Kennedy*, if it created an exception at all, only applies when (1) the claimant was in physical contact with the insured vehicle *immediately prior* to a collision and (2) forced to relinquish that physical contact to avoid an oncoming vehicle.

That is not what happened here. The Decedent's last point of physical contact with the insured vehicle ended nearly two minutes before the Accident. *See* Dash Cam

(Doc. 20-3) at 15:38 to 17:32. This was not *immediately prior* to the collision. It ended because the Decedent walked from the Truck to the passenger side of the Officer's vehicle to deliver the registration of the trailer. It did not end because the Decedent was forced to move away from the Truck to avoid the Tortfeasor's oncoming vehicle. Even if *Kennedy* created an exception to the physical contact requirement, that exception does not apply. Because the Decedent was not in physical contact with the Truck, he was not "upon" the truck.

The *Kennedy* Court did reject the insurer's position that the relevant time included only *the exact moment* of impact. 398 S.C. at 611-12, 730 S.E.2d at 865. The *Kennedy* Court held that the relevant time included what it called the "temporal continuum of an accident." *Id.* The continuum includes events "*immediately* surrounding the initial impact." *Id.* (emphasis added). Many if not most car accidents happen over more than an instant. They have a beginning: a car hydroplanes on a waterlogged road, a driver runs a red light, a car crosses the center-line. They have a middle: driver or pedestrians in the vicinity react, vehicles collide. They have an end: once the involved vehicles come to a stop. This is consistent with the physical contact requirement. In *Kennedy*, the "events immediately surrounding the initial impact" included the point where the claimant saw the tortfeasor's vehicle coming towards him and attempted to flee. At this point, he was touching the insured vehicle and the physical contact requirement was met.

In this case, the earliest point at which it can be said that the Accident began as conceived by the *Kennedy* court is when the Tortfeasor appears in the dash-cam video heading for the Officer's vehicle. *See* Dash Cam (Doc. 20-3) at 17:28-32. This does not happen until the Decedent had been standing at the Officer's vehicle, not in physical contact with the Truck, for nearly two minutes. *See id.* at 15:38-17:32. The Decedent's physical contact with the Truck ended well before the "temporal continuum" of the Accident began. Even under *Kennedy*, the Decedent was not "upon" the Truck at the time of the Accident.

B. The Decedent was not "getting in, on, out or off" of the Truck at the time of the Accident because he had ended the process of getting "out or off" of the Truck and had not begun the process of "getting in [or] on" the Truck.

South Carolina's appellate courts have twice considered whether a particular claimant was "getting in, on, out or off" an insured vehicle or similar language. From those cases several helpful rules are apparent. The first is that the intent of a person to get in a vehicle is not dispositive of the analysis. *See S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 519, 548 S.E.2d 880, 883 (Ct. App. 2001). Not surprisingly, "getting in, on, out or off" of an insured vehicle must involve *the actual process* of "getting in, on, out or off" of an insured vehicle. *Id.* Last, a claimant who is not in physical contact with a vehicle can be in the actual process of "getting . . . out or off" of the vehicle where that person is (1) in close physical proximity to the vehicle, and (2) has yet to reach their immediate intended destination. *See Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191-92, 174 S.E.2d 391, 395 (1970).

Whitmire is an example of a case in which the claimant was in the process of getting out of an insured vehicle. *Id. Whitmire* has similar facts to *Kennedy*. The claimant was a passenger in the insured vehicle getting a ride home. 254 S.C. at 189-90, 174 S.E.2d at 393-94. When they arrived at the claimant's house, the driver stopped the car partially on the roadway and the claimant got out on the side that was still in the road. *Id.* When he got out, he began walking around the car to get to the shoulder of the road. *Id.* He was struck while walking around the car when another vehicle collided with the insured vehicle. *Id.* Like the claimant in *Kennedy*, the claimant in *Whitmire* "was actually attempting to escape the danger from the" tortfeasor's vehicle when he was struck. 254 S.C. at 191, 174 S.E.2d at 395. He had yet to reach his destination, the shoulder of the road, and was thus *still in the process* of "alighting from" the insured vehicle. Under these facts, the court found that the claimant was occupying the insured vehicle. *Id.* The key part of the court's analysis was its finding that the claimant was (1) still in close proximity to the vehicle, and (2) had not yet reached his immediate intended destination of the shoulder of the road.

The second is *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*. 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001). In *Yensen*, the claimant's vehicle had broken down. A tow truck arrived, backed in, and the tow truck driver began hooking chains to the claimant's vehicle. While standing beside the claimant vehicle, another vehicle came through and stuck the claimant. The claimant argued that he was occupying the tow truck at the time of the collision. He testified that, at the time of the accident, he intended to get in the tow truck and leave the scene with the tow truck driver. The Court held that the claimant's intent to leave the scene in the tow truck was not sufficient to show that he was "in, upon, getting in, on, out or off" the tow truck. 345 S.C. at 518-19, 548 S.E.2d at 883. Although he may have had that intent, he was not "in the process of getting into it." *Id.* Thus, he was not an insured under the policy covering the tow truck.

The holding of the *Yensen* Court helps clarify the boundaries of the term "alighting from" as described in the *Whitmire* decision. The *Whitmire* Court stated that persons "alighting from" an insured vehicle included persons "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." 254 S.C. at 191, 174 S.E.2d at 394. In *Yensen*, the fact that the claimant was "not in the process of getting into" the tow truck when the accident occurred was sufficient for the Court to find that he was not "getting in" the tow truck. 345 S.C. at 519, 548 S.E.2d at 883. In other words, whatever the boundaries otherwise may be, to be considered "getting in, on, out or off," of an insured vehicle, the claimant must actually be in that process. On this premise, the *Yensen* Court found *Whitmire* distinguishable.

The Fourth Circuit's decision in *Cramer* is also instructive. *See* Ex. A. The Estate's analysis of this case focuses almost entirely on the distance between the claimant in that case and the insured vehicle. Def.'s Memo. in Supp. (Doc. 20-1) p.13. The ultimate result of that decision did not depend on distance alone. Instead, the court found that the claimant "was not yet engaged in action reasonably anticipated from someone actually getting in the vehicle." 690 F. App'x at 139. As in both *Yensen* and *Whitmire*, the result depends on whether the result of the analysis depended on whether or not the claimant was actually in the process of "getting in, on, our of off" the insured vehicle at the time of the accident. The Court further distinguished between a claimant that is "approaching" an insured vehicle and one that is actually "getting in" an insured vehicle. The claimant was attempting to cross a busy road to get to the insured vehicle with the intent to then get in the insured vehicle. The court said that the claimant was at most approaching the insured vehicle which "is beyond the terms of the insurance policy." 690 F. App'x at 138-39.

In the instant case, at the time of the Accident the Decedent was not in the process of "getting in, on, out or off" the Truck. In fact, he had been physically out of the Truck for more than six (6) minutes. *See* Dash Cam (Doc. 20-3) at 11:08-17:32. He had completed getting "out or off" of the Truck. He had reached the passenger side of the Officer's vehicle. This was his destination and the reason he had gotten "out or off" of the Truck. He had not begun to get "in [or] on" the Truck. At the time of the Accident, he was still speaking to the Officer. In its own rendition of the facts the Estate writes, "Decedent walks back to the passenger side of the police vehicle where the men continue speaking for several minutes…While Decedent and The Officer are still speaking, the vehicle driven by Zack veers left across the double yellow line and smashes into the police vehicle at full speed." Def.'s Memo. in Supp. (Doc. 20-1) p.5. Even further removed from the defined term "occupying" than the claimant in *Cramer*, the Decedent was not even approaching the Truck. He was standing at the passenger side of the Officer's vehicle. Under the plain language of the Policy and the relevant authority, the defendant was not "getting in, on, our or off" of the Truck at the time of the Accident.

The Estate argues that the Decedent was "getting in, on, out or off" the Truck because of his proximity to it and because he had exited the Truck in compliance with the Officer's instructions. As detailed below, that the Decedent may have gotten out of the Truck at the instruction of the Officer is not relevant to the analysis. As for the Decedent's proximity to the Truck, the decision in *Yensen* makes clear that proximity by itself is not sufficient. In *Yensen*, the claimant was standing next to his vehicle which was either being hooked up to or already hooked up to the tow truck. The Claimant was in close proximity to the tow truck. Even so, the Court held that the claimant was not "occupying" the tow truck. *Yensen* is similar to the case here. Here, like the claimant in *Yensen*, although the Decedent may have been in close proximity to it, he was not in the process of "getting in, on, out or off" of the Truck.

Similarly, in *Whitmire* the claimant was in close proximity to the vehicle. But the key part of the Court's analysis is that the claimant was also still in the process of getting out of the vehicle. He was still in this process because he had not yet reached his immediate intended destination of the shoulder of the road. That is not the case here because the Decedent was not in the process of "getting in, on, out or off of the Truck."

C. Because the Decedent Was Neither "Upon" Nor "Getting In, On, Out or Off" of the Truck at the Time of the Accident, He Is Not an Insured and the Estate is Not Entitled to Recover UIM Benefits.

As described by the Estate, "After a little more than a minute, Decedent walks back to the passenger side of the police vehicle where the men continue speaking for several minutes…While Decedent and The Officer are still speaking, the vehicle driven by Zack veers left across the double yellow line and smashes into the police vehicle at full speed." Def.'s Memo. in Supp. (Doc. 20-1) p.5. Under these facts, the Decedent was not "upon" the Truck because he was not in physical contact with it at the time of the Accident. Neither was he "getting in, on, out or off" the Truck because he was talking to the Officer while standing at the passenger side of the Officer's vehicle. He had completed the process of "getting out or off" of the Truck and had not yet begun the process of "getting in [or] on" the Truck. The Decedent was not "occupying" the Truck as that term is defined by the Policy and thus his Estate is not entitled to recover UIM benefits from Travelers.

II. WHETHER MR. HAWTHORNE WAS COMPLYING WITH THE OFFICER'S INSTRUCTIONS AT THE TIME OF THE ACCIDENT IS IMMATERIAL TO THE DETERMINATION OF WHETHER HE WAS OCCUPYING AN INSURED VEHICLE.

The Estate invites the Court to reject the plain meaning of "occupying" as defined by the Policy. The Estate urges the Court to instead find that the Decedent was occupying the Truck because "it would be unreasonable, unconscionable, and unlawful to require the Decedent to have disobeyed the officer to maintain coverage." Def. Memo. in Supp. (Doc. 20-1) p.11. South Carolina law dictates that the Court must decline that invitation.

Under South Carolina Law, courts interpreting insurance policies are charged to "enforce, not write, contract of insurance . . .." *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (enforcing dram shop liability exclusion in a liability policy issued to a tavern). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* "The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *Id.* (cleaned up). Thus, even if the Court believes any part of the provision at issue is unreasonable as the Estate contends, it is no justification for departure from the application of the Policy's plain language as set forth in Section I. above.

The Estate fails to explain why it is "unreasonable, unconscionable, and unlawful" to apply the plain language of the Policy's definition in this case. The Estate does not suggest what standard the Court should apply to determine whether application of the policy language is reasonable here. To the extent that the Estate seeks an application consistent with the "reasonable expectations of an insured," South Carolina courts have limited application of this doctrine. It can only apply when the application of the Policy language is ambiguous. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 581, 757 S.E.2d 399, 407 (2014). "[T]he doctrine cannot be used to alter the plain terms of an insured policy." *Id.* To the extent that the Estate contends that the policy should be interpreted to include the Decedent as an insured because to do otherwise would be unreasonable, such an interpretation would violate these longstanding principle.

Unconscionability exists where there is a lack of meaningful choice on the part of the one party to a contract and the terms at issue "are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). The circumstances here fall well short of that standard. In *Kennedy* the claimant only relinquished physical contact with the insured vehicle when another car was barreling towards him. The Decedent here relinquished physical contact with the Truck nearly two minutes before the Accident. *See* Dash Cam (Doc. 20-3) at 15:38-17:32. Finding that the Decedent was not occupying the Truck is not unconscionable and is at least as reasonable as enforcing a dram shop exclusion in a policy issued to a bar as was the case in *B.L.G. Enterprises*. 334 S.C. at 535, 514 S.E.2d at 330.

The Estate asserts that it would be unlawful to require the Decedent to disobey the officer to maintain coverage. It is not clear at all how the Estate contends this would be unlawful. It seems to be that the Estate contends it would have been unlawful for the Decedent to refuse to get out of his Truck given the Officer's instruction. It does not follow that it would also be unlawful to enforce the Policy so that the UIM benefits under the policy no longer apply once the Decedent does so.

Further, the *Kennedy* Court's statements in this regard were not necessary to its holding. The Court had already found that the claimant met the physical contact requirement under its "temporal continuum" analysis set forth above. 398 S.C. at 612, 730 S.E.2d at 865-66. Thus, its comments on the reasonableness or conscionability of the provision are not binding precedent. *See Henderson v. Life Ins. Co.*, 176 S.C. 100, 129-30, 179 S.E. 680, 692 (1935).

The better analysis which applies longstanding principles of insurance policy interpretation under facts on all fours with the case here is illustrated by a 2006 decision from the District Court of Appeals of Florida: *Auto-Owners Ins. Co. v. Above All Roofing, LLC*, 924 So. 2d 842, 843 (Fla. Dist. Ct. App. 2006). In that case, the claimant was involved in a minor accident with another motorist. As required by state law, the claimant got out of their vehicle and went to exchange information with the other driver. *Id.* While standing at the other driver's car, a third car came by and struck the claimant. *Id.* The claimant argued, as the Estate does here, "that common sense suggests most people would believe they would be covered if they were injured while obeying the law." *Id.* at 847-48. The claimant cited the applicable statute requiring him to exchange information with the driver involved in the initial accident. *Id.* The Court rejected this argument and held that the claimant was not occupying his vehicle despite, as the claimant saw it, the conflict between his statutory duty to exchange information and the plain language of the Policy. *Id.*

The same result follows here. Like the claimant in *Above All Roofing, LLC*, the Estate contends that the Decedent was occupying an insured vehicle until required by law to get out of the Truck. As the Florida Court found there, even if this were the case, that fact cannot change the plain language of the Policy. The Decedent was not "occupying" the Truck because he was neither "upon" nor was he "getting in, on, out or off" of the Truck. Thus, he is not an insured and the Estate is not entitled to recover UIM benefits from Travelers.

CONCLUSION

Because the Decedent was not "occupying" an insured vehicle at the time of the Accident, he was not an insured person under the Policy and the Estate is not entitled to recover UIM benefits from Travelers. For these reasons, the Court should deny the Estate's Motion (Doc. 20), grant Travelers' Motion, dismiss the Estate's counterclaims (Doc. 11, p.5-11) and enter an order and declaratory judgment that Travelers has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident.

Respectfully submitted this 24th day of November, 2021.

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EXHIBIT A

Cramer v. Nat'l Cas. Co., 690 Fed. Appx. 135 (4th Cir. May 30, 2017) (unpublished).

Cramer v. Nat'l Cas. Co.

United States Court of Appeals for the Fourth Circuit

May 10, 2017, Argued; May 30, 2017, Decided

No. 16-1770

Reporter
690 Fed. Appx. 135 *; 2017 U.S. App. LEXIS 9375 **; 2017 WL 2333591

MARGARET CRAMER, Plaintiff - Appellee, v. NATIONAL CASUALTY COMPANY, Defendant - Appellant, and MARY ANN WALLEY, Defendant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the District of South Carolina, at Orangeburg. (5:14-cv-03857-JMC). J. Michelle Childs, District Judge.

Cramer v. Nat'l Cas. Co., 190 F. Supp. 3d 510, 2016 U.S. Dist. LEXIS 73703 (D.S.C., June 7, 2016)

Disposition: REVERSED.

Counsel: ARGUED: John Robert Murphy, MURPHY & GRANTLAND, P.A., Columbia, South Carolina, for Appellant.

Robert F. Goings, GOINGS LAW FIRM, LLC, Columbia, South Carolina, for Appellee.

ON BRIEF: Wesley B. Sawyer, Jason P. Luther, MURPHY & GRANTLAND, P.A., Columbia, South Carolina, for Appellant.

Jessica Lee Gooding, GOINGS LAW FIRM, LLC, Columbia, South Carolina, for Appellee.

Judges: Before WILKINSON, KEENAN, and THACKER, Circuit Judges.

Opinion by: WILKINSON

Opinion

[*137] WILKINSON, Circuit Judge:

Margaret Cramer seeks a declaratory judgment against National Casualty Company stating that she was "occupying" her work vehicle when she was hit by an underinsured motorist and is consequently entitled to recover under the terms of her employer's insurance policy. The district court entered summary judgment in her favor. We review the decision of the district court de novo and reverse with instructions to enter judgment in favor of National Casualty.

I.

Cramer presents the following facts. She was employed in South Carolina as an emergency medical technician ("EMT") with a non-emergency [**2] medical transport company, St. Matthews Ambulance Service, LLC. On September 16, 2013, she and her co-worker were sitting in an ambulance waiting for a patient to complete treatment at a cancer center when they noticed a rear-end automobile accident on an adjacent road. Cramer subsequently activated the emergency lights on the ambulance and maneuvered the vehicle onto the road to block the site of the accident from oncoming traffic. With the engine running, she and her partner exited the vehicle to check on the drivers, both of whom were uninjured.

Cramer then crossed the road to the shoulder of the opposite lane to avoid traffic and call highway patrol. After completing the call, she tried to return to the ambulance and waved through a number of cars to clear the road so she could cross. Her stated purpose in returning to the emergency vehicle was to radio dispatch and notify St. Matthews of the accident. Unfortunately, one of the oncoming vehicles, driven by an underinsured motorist, hit her as she stood on the shoulder of the road. Cramer estimates that she was eight feet from the ambulance when the collision occurred.

St. Matthews carries an automobile insurance policy from National [**3] Casualty providing up to $100,000 in coverage for damage caused by underinsured motorists. Although Cramer was on duty at the time of the accident, National Casualty denied her insurance claim because she was not "occupying" an ambulance as required by the terms of the agreement. "Occupying" is defined in the insurance policy as "in, upon, getting in, on, out or off" of an insured vehicle. J.A. 164-65.

Cramer filed suit seeking a declaratory judgment against National Casualty stating that she was "occupying" the ambulance at the time of the accident and was entitled to recover from the insurance company.* Both parties filed motions for summary judgment. The district court granted summary judgment in favor of Cramer, holding that she was "getting in," and therefore "occupying," the ambulance when the collision occurred because she was "engaged in the completion of acts reasonably expected from one 'getting in' the vehicle." *Cramer v. Nat'l Casualty Co.*, [*138] 190 F. Supp. 3d 510, 519 (D.S.C. 2016). The district court reasoned that Cramer intended to return to the ambulance at the time of the accident and that her conduct and attempt to "get in" the vehicle were reasonable considering the normal use of an emergency vehicle. *Id.* at 518-19. This appeal followed.

II.

[**4] In South Carolina, "[i]nsurance policies are subject to the general rules of contract construction." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, 797 (S.C. 2008) (quoting *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (S.C. 1999)). "Courts must enforce, not write, contracts of insurance, and their

* Cramer initially filed suit in the South Carolina Court of Common Pleas against both National Casualty and the underinsured motorist. National Casualty invoked the jurisdiction of the United States District Court for the District of South Carolina by removing the action pursuant to 28 U.S.C. § 1441. The district court then severed the claims against the underinsured motorist and remanded them to state court. Federal diversity jurisdiction is proper because Cramer is a citizen and resident of North Carolina, and National Casualty is incorporated in Wisconsin with a principal place of business in Arizona. *See* 28 U.S.C. 1332(a)(1). Any jurisdictional defects caused by the non-diverse underinsured motorist were cured before final judgment was entered. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74-78, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996).

language must be given its plain, ordinary and popular meaning." *Id.* (quoting *Sloan Constr. Co., Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 236 S.E.2d 818, 819 (S.C. 1977)). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* (quoting *B.L.G. Enters.*, 514 S.E.2d at 330). However, "[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Id.* (quoting *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 456 S.E.2d 912, 915 (S.C. 1995)).

In *Whitmire v. Nationwide Mutual Insurance Co.*, 254 S.C. 184, 174 S.E.2d 391 (S.C. 1970), the Supreme Court of South Carolina construed an insurance provision analogous to the present case. The court held that a passenger who exited and was in the process of walking around an insured vehicle to reach the adjacent shoulder of the road was "alighting from," i.e., "getting out," and therefore "occupying," the insured vehicle. *Id.* at 393-95. The court explained:

> Where the act of alighting is completed is uncertain. It must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must be related to the particular use of the automobile and the hazards to be encountered from such use. 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 . . . is still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions.

Id. at 394. The court then emphasized that the claimant "was struck while within two or three feet of the automobile and while he was proceeding promptly to the [adjacent] shoulder of the highway . . . . to remove himself from [**5] the hazards from passing vehicles." *Id.* at 395. This is the furthest extension of the term "occupying" by the Supreme Court of South Carolina.

Cramer argues that she was "getting in," and therefore "occupying," the ambulance when she was hit by an underinsured motorist. We need not define the specific contours of "getting in" a vehicle to conclude that a person standing on the shoulder of the road across from an insured vehicle is not "getting in" by any reasonable construction of the phrase. The Supreme Court of South Carolina has long recognized that such provisions "must connote some physical relationship" with the insured vehicle. *McAbee v. Nationwide Mut. Ins. Co.*, 249 S.C. 96, 152 S.E.2d 731, 732 (S.C. 1967). Yet Cramer was separated from the ambulance by a lane of traffic and passing cars. She had not even started to cross the street, let alone enter the ambulance. Any latent ambiguity in "getting in" stops short of these facts. At most, Cramer was "getting to" or "approaching" the emergency vehicle, which [*139] is beyond the terms of the insurance policy. *Cf. Jarvis v. Pa. Threshermen & Farmers' Mut. Cas. Ins. Co.*, 244 N.C. 691, 94 S.E.2d 843, 844 (N.C. 1956) (distinguishing between "entering" and "approaching" an insured vehicle). To hold otherwise would impermissibly torture the plain language of the insurance policy and expand coverage in a manner unintended by the [**6] parties. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, 406 (S.C. 2014).

The present case is also well beyond the facts of *Whitmire*. Cramer was separated from the ambulance by a lane of traffic. She was not within two or three feet of the emergency vehicle. She was instead standing on the shoulder of the road in the place of relative safety that *Whitmire* explicitly distinguished. As a result, we conclude that Cramer was not engaged in the completion of acts reasonably expected from one actually getting in a vehicle under similar conditions. *See also* Robert Roy, Annotation, *What Constitutes "Entering" or "Alighting From" a Vehicle Within the Meaning of Insurance Policy, or Statute Mandating Insurance Coverage*, 59 A.L.R.4th 149 (1988 & Supp. 2011).

Cramer urges the court to construe "getting in" to cover persons with the present intent of getting in an insured vehicle coupled with action reasonably anticipated from someone getting in a vehicle under the particular circumstances. As explained above, however, she was not yet engaged in actions reasonably anticipated from someone actually getting in a vehicle. Moreover, South Carolina has already rejected the argument that intent is dispositive of "getting in" a vehicle. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 548 S.E.2d 880, 884 (S.C. Ct. App. 2001).

Cramer also argues that the insurance policy fails to adequately extend coverage as required by statute. South Carolina Code § 38-77-30(7) defines insured persons [**7] to include "any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies." This argument, however, overlooks how the statutory term "use" is interpreted throughout the insurance provisions of the South Carolina Code. A party seeking to establish "use" of a vehicle must show that "the vehicle was being used for transportation purposes at the time of the injury." *See Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475, 478 (S.C. 2006); *cf. Canal Ins. Co. v. Ins. Co. of N. Am.*, 315 S.C. 1, 431 S.E.2d 577, 579 (S.C. 1993) ("We now construe § 38-77-140 and define 'use of a motor vehicle' as limited to transportation uses."). We see no reason to interpret § 38-77-30(7) any differently. It is sufficient to observe that Cramer was not using the ambulance for transportation purposes at the time of the accident, and thus was not "using" the emergency vehicle under South Carolina law.

In the alternative, Cramer lastly argues that she is entitled to recover because she was "upon," "out," or "off," and therefore "occupying," the ambulance. She suggests that "out" and "off" are completely independent from the gerund "getting." In other words, the definition of "occupying" should not be read as "in, upon, getting in, [getting] on, [getting] out or [getting] off" of an insured vehicle. The Supreme Court [**8] of South Carolina has been clear, however, that "upon" requires physical contact with the insured vehicle. *Whitmire*, 174 S.E.2d at 394; *see also S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862, 867-68 (S.C. 2012) (clarifying that a person is still "upon" an insured vehicle if contact is "relinquish[ed] . . . in order to attempt to avoid injury"). And the Supreme Court of South Carolina has not adopted Cramer's proposed interpretation [*140] of "out" or "off." Severing these terms from "getting" would extend coverage to all persons both "in" and "out," or "upon" and "off," of an insured vehicle—meaning everyone. We decline to read the policy so implausibly. Cramer therefore cannot meet her burden of showing she is entitled to coverage. *See Cooper v. Firemen's Fund Ins. Co.*, 252 S.C. 629, 167 S.E.2d 745, 746 (S.C. 1969).

III.

The judgment of the district court is accordingly reversed and remanded with instructions to enter judgment in favor of National Casualty.

REVERSED

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

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Plaintiff, v. BARBARA HAWTHORNE, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., Defendant.	Case No. 6:21-cv-02648-DCC

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

NOW COMES Plaintiff, Travelers Property Casualty Company of America ("Travelers"), by and through its undersigned counsel, and for its Memorandum in Support of its Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment, and in Opposition to Defendant's Motion for Judgment on the Pleadings (Doc. 20), shows the Court the following:

UNDISPUTED FACTS

On December 2, 2020, Nathaniel Hawthorne ("Decedent") was pulled over by an officer ("Officer") on North Pleasantburg Drive in Greenville, SC. Compl. ¶ 12 (Doc. 1); Ans. & Countercl. ("Answer") ¶¶ 12-14 (Doc. 11). Both the Decedent and the Officer stopped their vehicles in the center turn lane of North Pleasantburg Drive. Compl.

¶ 14, Answer ¶ 14. The Decedent's vehicle was a 2015 Ford truck ("Truck" or the "Decedent's Truck"). Compl. ¶ 12, Answer ¶ 12.

The traffic stop was captured by a dash mounted camera in the Officer's vehicle. *See* Def.'s Memo. in Supp., Ex. B (Doc. 20-3) ("Dash Cam"). As shown in the video, after being stopped, the Decedent gets out the Truck. *Id.* at 3:26. He walks back and forth several times from the Truck to the passenger side of the Officer's vehicle. *Id.* at 11:08, 12:47, 13:57, 14:36, 15:38. At the 15:38 mark in the video, he again walks from the Truck to the passenger side of the Officer's vehicle. The Decedent and the Officer's conversation can be heard. Nearly two minutes later, at the 17:32 mark in the video, a vehicle driven by Allan Lindsey Zack ("Tortfeasor") collides head-on with the Officer's vehicle ("Accident"). The Decedent was tragically killed as a result of this collision. Compl. ¶ 16, Answer ¶ 16.

The Decedent's Truck was owned by his employer, Terracon Consultants, Inc. ("Terracon") and is principally garaged in the State of South Carolina. Compl. ¶ 13, Answer ¶ 13. Travelers insured Terracon under a commercial auto policy with a policy number of TC2J-CAP-131J3858-TIL-20 ("Policy"). Compl. ¶ 3, Answer ¶ 3. Among other benefits, the Policy includes an endorsement that provides underinsured motorist coverage with respect to insured vehicles principally garaged in South Carolina ("SC UIM Endorsement"). *See* Ex. A to Compl. (Doc. 1-1) p. 37 (using the Court's page numbers). That coverage is subject to the terms of the Policy and the SC UIM Endorsement. The coverage available under the SC UIM Endorsement is subject to a liability limit of $1,000,000 per accident. Compl. ¶ 17, Answer ¶ 17.

PROCEDURAL HISTORY

The Decedent's Estate ("Estate"), made a claim for UIM benefits under the Policy. Travelers denied the Estate's claim and filed its Complaint for Declaratory Judgment (Doc. 1) ("Complaint"). Travelers seeks a declaratory judgment that it has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident. *Id.* at ¶ 32.

The Estate answered the Complaint and counterclaimed seeking various declaratory judgments including a ruling that the Estate is entitled to recover UIM benefits under the Policy. Answer p.7-11 (Doc. 11). The Estate then filed a motion for judgment on the pleadings ("Estate's Motion") (Doc. 20). Travelers has now filed its own motion for judgment on the pleadings, or in the alternative, motion for summary judgment ("Travelers' Motion").

LEGAL STANDARD

I. General Principles of Judgment on the Pleadings

A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6). *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d. 401, 405-06 (4th Cir. 2002). The court assumes the factual allegations in the Complaint to be true and draws all reasonable factual inferences in favor of the nonmovant. *See id.* at 406. The factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct.1965, 167 L. Ed. 2d 929 (2007).

II. Interpretation of Insurance Policies Under South Carolina Law

In an action based on diversity of citizenship, the relevant state law controls. *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Under South Carolina law, insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E. 2d 327, 330 (1999). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* "In construing an insurance contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E. 2d 344, 348 (1976). An insurer's obligation under a policy of insurance is defined by the policy itself and cannot be enlarged by judicial construction. *S.C. Ins. Co. v. White*, 301 S.C. 133, 390 S.E. 2d 471, 474 (Ct. App. 1990).

ARGUMENT

Travelers' Motion should be granted and the Estate's Motion should be denied because the Decedent was not "occupying" the Truck at the time of the Accident. Because he was not "occupying" the Truck, the Decedent is not an insured under the SC UIM Endorsement of the Policy. Because he was not an insured, the Estate is not entitled to recover UIM benefits from Travelers. Whether the Decedent was complying with the Officer's instructions at the time of the Accident is immaterial to the determination of whether he was "occupying" the Truck.

I. MR. HAWTHORNE WAS NOT "OCCUPYING" THE VEHICLE AT THE TIME OF THE ACCIDENT AND, THEREFORE, HIS ESTATE IS NOT ENTITLED TO UIM BENEFITS.

To be entitled to UIM coverage, a person must be an "insured." This is in the insuring agreement of the SC UIM Endorsement. That insuring agreement provides, in relevant part:

> A. Coverage
>
> We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle".

("Insuring Agreement"). *See* Ex. A to Compl. (Doc. 1-1), p.37 (using the Court's page numbers).

The SC UIM Endorsement defines "insured", in relevant part:

> B. Who Is An Insured
>
> If the Named Insured is designated in the Declarations as:
>
> ...
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto"...

> b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

See Ex. A to Compl. (Doc. 1-1) p.37.

The SC UIM Endorsement defines "occupying", as to UIM benefits available in connection with covered autos licensed or principally garaged in South Carolina as follows:

> F. Additional Definitions
>
> As used in this endorsement:
>
> 2. "Occupying" means in, upon, getting in, on, out or off.

See Ex. A to Compl. (Doc. 1-1) p.39.

The parties agree that the Decedent was not "in" the Truck at the time of the Accident. The Estate argues that the Decedent was either "upon" the Truck or was "getting in, on, out or off" of the vehicle at the time of the Accident. Answer ¶ 37 (Doc. 11). The undisputed facts of the Accident make clear that he was not.

A. The Decedent Was Not "Upon" the Truck at the Time of the Accident Because He Was Not in Physical Contact with It.

Under South Carolina law, to be "upon" an insured vehicle the claimant must be in actual physical contact with that vehicle. *See Cramer v. Nat'l Cas. Co.*, 690 F. App'x 135, 139 (4th Cir. 2017) (unpublished) (citing *Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970), *and S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 866-67 (2012)) (attached hereto as **Exhibit A**). *Cramer* was a case with similar issues to the instant case decided by the Fourth Circuit in 2017. As the *Cramer* Court found, [t]he Supreme Court of South Carolina has been clear, however, that 'upon' requires physical contact with the insured vehicle." 690 F. App'x at 139.

In this case, the parties agree that the Decedent was not in physical contact with the Truck at the time of the Accident. Compl. ¶¶ 15-16, Answer ¶¶ 15-16. Because he was not in physical contact with the Truck, he was not "upon" the Truck.

The Estate relies on *Kennedy* to support its position to the contrary. That case is readily distinguishable from the facts here. *Kennedy* involved a claimant who was in physical contact with the insured vehicle. 398 S.C. 604, 613, 730 S.E.2d 862, 866 (2012). The claimant's hand was on the insured vehicle. *Id.* The claimant only relinquished this physical contact in his effort to avoid being struck by the oncoming tortfeasor. *Id.* The Estate's attempt to stretch *Kennedy* well beyond the bounds of its holding is not justified by the holding itself or the reasoning behind it.

At best for the Estate, *Kennedy* created a narrow exception to the physical contact requirement that does not apply here. The exception created in *Kennedy*, if it created an exception at all, only applies when (1) the claimant was in physical contact with the insured vehicle *immediately prior* to a collision and (2) forced to relinquish that physical contact to avoid an oncoming vehicle.

That is not what happened here. The Decedent's last point of physical contact with the insured vehicle ended nearly two minutes before the Accident. *See* Dash Cam

(Doc. 20-3) at 15:38 to 17:32. This was not *immediately prior* to the collision. It ended because the Decedent walked from the Truck to the passenger side of the Officer's vehicle to deliver the registration of the trailer. It did not end because the Decedent was forced to move away from the Truck to avoid the Tortfeasor's oncoming vehicle. Even if *Kennedy* created an exception to the physical contact requirement, that exception does not apply. Because the Decedent was not in physical contact with the Truck, he was not "upon" the truck.

The *Kennedy* Court did reject the insurer's position that the relevant time included only *the exact moment* of impact. 398 S.C. at 611-12, 730 S.E.2d at 865. The *Kennedy* Court held that the relevant time included what it called the "temporal continuum of an accident." *Id.* The continuum includes events "*immediately* surrounding the initial impact." *Id.* (emphasis added). Many if not most car accidents happen over more than an instant. They have a beginning: a car hydroplanes on a waterlogged road, a driver runs a red light, a car crosses the center-line. They have a middle: driver or pedestrians in the vicinity react, vehicles collide. They have an end: once the involved vehicles come to a stop. This is consistent with the physical contact requirement. In *Kennedy*, the "events immediately surrounding the initial impact" included the point where the claimant saw the tortfeasor's vehicle coming towards him and attempted to flee. At this point, he was touching the insured vehicle and the physical contact requirement was met.

In this case, the earliest point at which it can be said that the Accident began as conceived by the *Kennedy* court is when the Tortfeasor appears in the dash-cam video heading for the Officer's vehicle. *See* Dash Cam (Doc. 20-3) at 17:28-32. This does not happen until the Decedent had been standing at the Officer's vehicle, not in physical contact with the Truck, for nearly two minutes. *See id.* at 15:38-17:32. The Decedent's physical contact with the Truck ended well before the "temporal continuum" of the Accident began. Even under *Kennedy*, the Decedent was not "upon" the Truck at the time of the Accident.

B. The Decedent was not "getting in, on, out or off" of the Truck at the time of the Accident because he had ended the process of getting "out or off" of the Truck and had not begun the process of "getting in [or] on" the Truck.

South Carolina's appellate courts have twice considered whether a particular claimant was "getting in, on, out or off" an insured vehicle or similar language. From those cases several helpful rules are apparent. The first is that the intent of a person to get in a vehicle is not dispositive of the analysis. *See S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 519, 548 S.E.2d 880, 883 (Ct. App. 2001). Not surprisingly, "getting in, on, out or off" of an insured vehicle must involve *the actual process* of "getting in, on, out or off" of an insured vehicle. *Id.* Last, a claimant who is not in physical contact with a vehicle can be in the actual process of "getting . . . out or off" of the vehicle where that person is (1) in close physical proximity to the vehicle, and (2) has yet to reach their immediate intended destination. *See Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 191-92, 174 S.E.2d 391, 395 (1970).

Whitmire is an example of a case in which the claimant was in the process of getting out of an insured vehicle. *Id. Whitmire* has similar facts to *Kennedy*. The claimant was a passenger in the insured vehicle getting a ride home. 254 S.C. at 189-90, 174 S.E.2d at 393-94. When they arrived at the claimant's house, the driver stopped the car partially on the roadway and the claimant got out on the side that was still in the road. *Id.* When he got out, he began walking around the car to get to the shoulder of the road. *Id.* He was struck while walking around the car when another vehicle collided with the insured vehicle. *Id.* Like the claimant in *Kennedy*, the claimant in *Whitmire* "was actually attempting to escape the danger from the" tortfeasor's vehicle when he was struck. 254 S.C. at 191, 174 S.E.2d at 395. He had yet to reach his destination, the shoulder of the road, and was thus *still in the process* of "alighting from" the insured vehicle. Under these facts, the court found that the claimant was occupying the insured vehicle. *Id.* The key part of the court's analysis was its finding that the claimant was (1) still in close proximity to the vehicle, and (2) had not yet reached his immediate intended destination of the shoulder of the road.

The second is *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*. 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001). In *Yensen*, the claimant's vehicle had broken down. A tow truck arrived, backed in, and the tow truck driver began hooking chains to the claimant's vehicle. While standing beside the claimant vehicle, another vehicle came through and stuck the claimant. The claimant argued that he was occupying the tow truck at the time of the collision. He testified that, at the time of the accident, he intended to get in the tow truck and leave the scene with the tow truck driver. The Court held that the claimant's intent to leave the scene in the tow truck was not sufficient to show that he was "in, upon, getting in, on, out or off" the tow truck. 345 S.C. at 518-19, 548 S.E.2d at 883. Although he may have had that intent, he was not "in the process of getting into it." *Id.* Thus, he was not an insured under the policy covering the tow truck.

The holding of the *Yensen* Court helps clarify the boundaries of the term "alighting from" as described in the *Whitmire* decision. The *Whitmire* Court stated that persons "alighting from" an insured vehicle included persons "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." 254 S.C. at 191, 174 S.E.2d at 394. In *Yensen*, the fact that the claimant was "not in the process of getting into" the tow truck when the accident occurred was sufficient for the Court to find that he was not "getting in" the tow truck. 345 S.C. at 519, 548 S.E.2d at 883. In other words, whatever the boundaries otherwise may be, to be considered "getting in, on, out or off," of an insured vehicle, the claimant must actually be in that process. On this premise, the *Yensen* Court found *Whitmire* distinguishable.

The Fourth Circuit's decision in *Cramer* is also instructive. *See* Ex. A. The Estate's analysis of this case focuses almost entirely on the distance between the claimant in that case and the insured vehicle. Def.'s Memo. in Supp. (Doc. 20-1) p.13. The ultimate result of that decision did not depend on distance alone. Instead, the court found that the claimant "was not yet engaged in action reasonably anticipated from someone actually getting in the vehicle." 690 F. App'x at 139. As in both *Yensen* and *Whitmire*, the result depends on whether the result of the analysis depended on whether or not the claimant was actually in the process of "getting in, on, our of off" the insured vehicle at the time of the accident. The Court further distinguished between a claimant that is "approaching" an insured vehicle and one that is actually "getting in" an insured vehicle. The claimant was attempting to cross a busy road to get to the insured vehicle with the intent to then get in the insured vehicle. The court said that the claimant was at most approaching the insured vehicle which "is beyond the terms of the insurance policy." 690 F. App'x at 138-39.

In the instant case, at the time of the Accident the Decedent was not in the process of "getting in, on, out or off" the Truck. In fact, he had been physically out of the Truck for more than six (6) minutes. *See* Dash Cam (Doc. 20-3) at 11:08-17:32. He had completed getting "out or off" of the Truck. He had reached the passenger side of the Officer's vehicle. This was his destination and the reason he had gotten "out or off" of the Truck. He had not begun to get "in [or] on" the Truck. At the time of the Accident, he was still speaking to the Officer. In its own rendition of the facts the Estate writes, "Decedent walks back to the passenger side of the police vehicle where the men continue speaking for several minutes…While Decedent and The Officer are still speaking, the vehicle driven by Zack veers left across the double yellow line and smashes into the police vehicle at full speed." Def.'s Memo. in Supp. (Doc. 20-1) p.5. Even further removed from the defined term "occupying" than the claimant in *Cramer*, the Decedent was not even approaching the Truck. He was standing at the passenger side of the Officer's vehicle. Under the plain language of the Policy and the relevant authority, the defendant was not "getting in, on, our or off" of the Truck at the time of the Accident.

The Estate argues that the Decedent was "getting in, on, out or off" the Truck because of his proximity to it and because he had exited the Truck in compliance with the Officer's instructions. As detailed below, that the Decedent may have gotten out of the Truck at the instruction of the Officer is not relevant to the analysis. As for the Decedent's proximity to the Truck, the decision in *Yensen* makes clear that proximity by itself is not sufficient. In *Yensen*, the claimant was standing next to his vehicle which was either being hooked up to or already hooked up to the tow truck. The Claimant was in close proximity to the tow truck. Even so, the Court held that the claimant was not "occupying" the tow truck. *Yensen* is similar to the case here. Here, like the claimant in *Yensen*, although the Decedent may have been in close proximity to it, he was not in the process of "getting in, on, out or off" of the Truck.

Similarly, in *Whitmire* the claimant was in close proximity to the vehicle. But the key part of the Court's analysis is that the claimant was also still in the process of getting out of the vehicle. He was still in this process because he had not yet reached his immediate intended destination of the shoulder of the road. That is not the case here because the Decedent was not in the process of "getting in, on, out or off of the Truck."

C. Because the Decedent Was Neither "Upon" Nor "Getting In, On, Out or Off" of the Truck at the Time of the Accident, He Is Not an Insured and the Estate is Not Entitled to Recover UIM Benefits.

As described by the Estate, "After a little more than a minute, Decedent walks back to the passenger side of the police vehicle where the men continue speaking for several minutes...While Decedent and The Officer are still speaking, the vehicle driven by Zack veers left across the double yellow line and smashes into the police vehicle at full speed." Def.'s Memo. in Supp. (Doc. 20-1) p.5. Under these facts, the Decedent was not "upon" the Truck because he was not in physical contact with it at the time of the Accident. Neither was he "getting in, on, out or off" the Truck because he was talking to the Officer while standing at the passenger side of the Officer's vehicle. He had completed the process of "getting out or off" of the Truck and had not yet begun the process of "getting in [or] on" the Truck. The Decedent was not "occupying" the Truck as that term is defined by the Policy and thus his Estate is not entitled to recover UIM benefits from Travelers.

II. WHETHER MR. HAWTHORNE WAS COMPLYING WITH THE OFFICER'S INSTRUCTIONS AT THE TIME OF THE ACCIDENT IS IMMATERIAL TO THE DETERMINATION OF WHETHER HE WAS OCCUPYING AN INSURED VEHICLE.

The Estate invites the Court to reject the plain meaning of "occupying" as defined by the Policy. The Estate urges the Court to instead find that the Decedent was occupying the Truck because "it would be unreasonable, unconscionable, and unlawful to require the Decedent to have disobeyed the officer to maintain coverage." Def. Memo. in Supp. (Doc. 20-1) p.11. South Carolina law dictates that the Court must decline that invitation.

Under South Carolina Law, courts interpreting insurance policies are charged to "enforce, not write, contract of insurance . . .." *B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (enforcing dram shop liability exclusion in a liability policy issued to a tavern). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* "The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *Id.* (cleaned up). Thus, even if the Court believes any part of the provision at issue is unreasonable as the Estate contends, it is no justification for departure from the application of the Policy's plain language as set forth in Section I. above.

The Estate fails to explain why it is "unreasonable, unconscionable, and unlawful" to apply the plain language of the Policy's definition in this case. The Estate does not suggest what standard the Court should apply to determine whether application of the policy language is reasonable here. To the extent that the Estate seeks an application consistent with the "reasonable expectations of an insured," South Carolina courts have limited application of this doctrine. It can only apply when the application of the Policy language is ambiguous. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 581, 757 S.E.2d 399, 407 (2014). "[T]he doctrine cannot be used to alter the plain terms of an insured policy." *Id.* To the extent that the Estate contends that the policy should be interpreted to include the Decedent as an insured because to do otherwise would be unreasonable, such an interpretation would violate these longstanding principle.

Unconscionability exists where there is a lack of meaningful choice on the part of the one party to a contract and the terms at issue "are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). The circumstances here fall well short of that standard. In *Kennedy* the claimant only relinquished physical contact with the insured vehicle when another car was barreling towards him. The Decedent here relinquished physical contact with the Truck nearly two minutes before the Accident. *See* Dash Cam (Doc. 20-3) at 15:38-17:32. Finding that the Decedent was not occupying the Truck is not unconscionable and is at least as reasonable as enforcing a dram shop exclusion in a policy issued to a bar as was the case in *B.L.G. Enterprises*. 334 S.C. at 535, 514 S.E.2d at 330.

The Estate asserts that it would be unlawful to require the Decedent to disobey the officer to maintain coverage. It is not clear at all how the Estate contends this would be unlawful. It seems to be that the Estate contends it would have been unlawful for the Decedent to refuse to get out of his Truck given the Officer's instruction. It does not follow that it would also be unlawful to enforce the Policy so that the UIM benefits under the policy no longer apply once the Decedent does so.

Further, the *Kennedy* Court's statements in this regard were not necessary to its holding. The Court had already found that the claimant met the physical contact requirement under its "temporal continuum" analysis set forth above. 398 S.C. at 612, 730 S.E.2d at 865-66. Thus, its comments on the reasonableness or conscionability of the provision are not binding precedent. *See Henderson v. Life Ins. Co.*, 176 S.C. 100, 129-30, 179 S.E. 680, 692 (1935).

The better analysis which applies longstanding principles of insurance policy interpretation under facts on all fours with the case here is illustrated by a 2006 decision from the District Court of Appeals of Florida: *Auto-Owners Ins. Co. v. Above All Roofing, LLC*, 924 So. 2d 842, 843 (Fla. Dist. Ct. App. 2006). In that case, the claimant was involved in a minor accident with another motorist. As required by state law, the claimant got out of their vehicle and went to exchange information with the other driver. *Id.* While standing at the other driver's car, a third car came by and struck the claimant. *Id.* The claimant argued, as the Estate does here, "that common sense suggests most people would believe they would be covered if they were injured while obeying the law." *Id.* at 847-48. The claimant cited the applicable statute requiring him to exchange information with the driver involved in the initial accident. *Id.* The Court rejected this argument and held that the claimant was not occupying his vehicle despite, as the claimant saw it, the conflict between his statutory duty to exchange information and the plain language of the Policy. *Id.*

The same result follows here. Like the claimant in *Above All Roofing, LLC*, the Estate contends that the Decedent was occupying an insured vehicle until required by law to get out of the Truck. As the Florida Court found there, even if this were the case, that fact cannot change the plain language of the Policy. The Decedent was not "occupying" the Truck because he was neither "upon" nor was he "getting in, on, out or off" of the Truck. Thus, he is not an insured and the Estate is not entitled to recover UIM benefits from Travelers.

CONCLUSION

Because the Decedent was not "occupying" an insured vehicle at the time of the Accident, he was not an insured person under the Policy and the Estate is not entitled to recover UIM benefits from Travelers. For these reasons, the Court should deny the Estate's Motion (Doc. 20), grant Travelers' Motion, dismiss the Estate's counterclaims (Doc. 11, p.5-11) and enter an order and declaratory judgment that Travelers has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident.

Respectfully submitted this 24th day of November, 2021.

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EXHIBIT A

Cramer v. Nat'l Cas. Co., 690 Fed. Appx. 135 (4th Cir. May 30, 2017) (unpublished).

Cramer v. Nat'l Cas. Co.

United States Court of Appeals for the Fourth Circuit

May 10, 2017, Argued; May 30, 2017, Decided

No. 16-1770

Reporter

690 Fed. Appx. 135 *; 2017 U.S. App. LEXIS 9375 **; 2017 WL 2333591

MARGARET CRAMER, Plaintiff - Appellee, v. NATIONAL CASUALTY COMPANY, Defendant - Appellant, and MARY ANN WALLEY, Defendant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the District of South Carolina, at Orangeburg. (5:14-cv-03857-JMC). J. Michelle Childs, District Judge.

Cramer v. Nat'l Cas. Co., 190 F. Supp. 3d 510, 2016 U.S. Dist. LEXIS 73703 (D.S.C., June 7, 2016)

Disposition: REVERSED.

Counsel: ARGUED: John Robert Murphy, MURPHY & GRANTLAND, P.A., Columbia, South Carolina, for Appellant.

Robert F. Goings, GOINGS LAW FIRM, LLC, Columbia, South Carolina, for Appellee.

ON BRIEF: Wesley B. Sawyer, Jason P. Luther, MURPHY & GRANTLAND, P.A., Columbia, South Carolina, for Appellant.

Jessica Lee Gooding, GOINGS LAW FIRM, LLC, Columbia, South Carolina, for Appellee.

Judges: Before WILKINSON, KEENAN, and THACKER, Circuit Judges.

Opinion by: WILKINSON

Opinion

[*137] WILKINSON, Circuit Judge:

Margaret Cramer seeks a declaratory judgment against National Casualty Company stating that she was "occupying" her work vehicle when she was hit by an underinsured motorist and is consequently entitled to recover under the terms of her employer's insurance policy. The district court entered summary judgment in her favor. We review the decision of the district court de novo and reverse with instructions to enter judgment in favor of National Casualty.

I.

Cramer presents the following facts. She was employed in South Carolina as an emergency medical technician ("EMT") with a non-emergency [**2] medical transport company, St. Matthews Ambulance Service, LLC. On September 16, 2013, she and her co-worker were sitting in an ambulance waiting for a patient to complete treatment at a cancer center when they noticed a rear-end automobile accident on an adjacent road. Cramer subsequently activated the emergency lights on the ambulance and maneuvered the vehicle onto the road to block the site of the accident from oncoming traffic. With the engine running, she and her partner exited the vehicle to check on the drivers, both of whom were uninjured.

Cramer then crossed the road to the shoulder of the opposite lane to avoid traffic and call highway patrol. After completing the call, she tried to return to the ambulance and waved through a number of cars to clear the road so she could cross. Her stated purpose in returning to the emergency vehicle was to radio dispatch and notify St. Matthews of the accident. Unfortunately, one of the oncoming vehicles, driven by an underinsured motorist, hit her as she stood on the shoulder of the road. Cramer estimates that she was eight feet from the ambulance when the collision occurred.

St. Matthews carries an automobile insurance policy from National [**3] Casualty providing up to $100,000 in coverage for damage caused by underinsured motorists. Although Cramer was on duty at the time of the accident, National Casualty denied her insurance claim because she was not "occupying" an ambulance as required by the terms of the agreement. "Occupying" is defined in the insurance policy as "in, upon, getting in, on, out or off" of an insured vehicle. J.A. 164-65.

Cramer filed suit seeking a declaratory judgment against National Casualty stating that she was "occupying" the ambulance at the time of the accident and was entitled to recover from the insurance company.* Both parties filed motions for summary judgment. The district court granted summary judgment in favor of Cramer, holding that she was "getting in," and therefore "occupying," the ambulance when the collision occurred because she was "engaged in the completion of acts reasonably expected from one 'getting in' the vehicle." *Cramer v. Nat'l Casualty Co.*, [*138] 190 F. Supp. 3d 510, 519 (D.S.C. 2016). The district court reasoned that Cramer intended to return to the ambulance at the time of the accident and that her conduct and attempt to "get in" the vehicle were reasonable considering the normal use of an emergency vehicle. *Id.* at 518-19. This appeal followed.

II.

[**4] In South Carolina, "[i]nsurance policies are subject to the general rules of contract construction." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, 797 (S.C. 2008) (quoting *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 514 S.E.2d 327, 330 (S.C. 1999)). "Courts must enforce, not write, contracts of insurance, and their

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* Cramer initially filed suit in the South Carolina Court of Common Pleas against both National Casualty and the underinsured motorist. National Casualty invoked the jurisdiction of the United States District Court for the District of South Carolina by removing the action pursuant to 28 U.S.C. § 1441. The district court then severed the claims against the underinsured motorist and remanded them to state court. Federal diversity jurisdiction is proper because Cramer is a citizen and resident of North Carolina, and National Casualty is incorporated in Wisconsin with a principal place of business in Arizona. *See* 28 U.S.C. 1332(a)(1). Any jurisdictional defects caused by the non-diverse underinsured motorist were cured before final judgment was entered. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74-78, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996).

language must be given its plain, ordinary and popular meaning." *Id.* (quoting *Sloan Constr. Co., Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 236 S.E.2d 818, 819 (S.C. 1977)). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* (quoting *B.L.G. Enters.*, 514 S.E.2d at 330). However, "[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Id.* (quoting *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 456 S.E.2d 912, 915 (S.C. 1995)).

In *Whitmire v. Nationwide Mutual Insurance Co.*, 254 S.C. 184, 174 S.E.2d 391 (S.C. 1970), the Supreme Court of South Carolina construed an insurance provision analogous to the present case. The court held that a passenger who exited and was in the process of walking around an insured vehicle to reach the adjacent shoulder of the road was "alighting from," i.e., "getting out," and therefore "occupying," the insured vehicle. *Id.* at 393-95. The court explained:

> Where the act of alighting is completed is uncertain. It must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must be related to the particular use of the automobile and the hazards to be encountered from such use. 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 . . . is still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions.

Id. at 394. The court then emphasized that the claimant "was struck while within two or three feet of the automobile and while he was proceeding promptly to the [adjacent] shoulder of the highway . . . . to remove himself from [**5] the hazards from passing vehicles." *Id.* at 395. This is the furthest extension of the term "occupying" by the Supreme Court of South Carolina.

Cramer argues that she was "getting in," and therefore "occupying," the ambulance when she was hit by an underinsured motorist. We need not define the specific contours of "getting in" a vehicle to conclude that a person standing on the shoulder of the road across from an insured vehicle is not "getting in" by any reasonable construction of the phrase. The Supreme Court of South Carolina has long recognized that such provisions "must connote some physical relationship" with the insured vehicle. *McAbee v. Nationwide Mut. Ins. Co.*, 249 S.C. 96, 152 S.E.2d 731, 732 (S.C. 1967). Yet Cramer was separated from the ambulance by a lane of traffic and passing cars. She had not even started to cross the street, let alone enter the ambulance. Any latent ambiguity in "getting in" stops short of these facts. At most, Cramer was "getting to" or "approaching" the emergency vehicle, which [*139] is beyond the terms of the insurance policy. *Cf. Jarvis v. Pa. Threshermen & Farmers' Mut. Cas. Ins. Co.*, 244 N.C. 691, 94 S.E.2d 843, 844 (N.C. 1956) (distinguishing between "entering" and "approaching" an insured vehicle). To hold otherwise would impermissibly torture the plain language of the insurance policy and expand coverage in a manner unintended by the [**6] parties. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, 406 (S.C. 2014).

The present case is also well beyond the facts of *Whitmire*. Cramer was separated from the ambulance by a lane of traffic. She was not within two or three feet of the emergency vehicle. She was instead standing on the shoulder of the road in the place of relative safety that *Whitmire* explicitly distinguished. As a result, we conclude that Cramer was not engaged in the completion of acts reasonably expected from one actually getting in a vehicle under similar conditions. *See also* Robert Roy, Annotation, *What Constitutes "Entering" or "Alighting From" a Vehicle Within the Meaning of Insurance Policy, or Statute Mandating Insurance Coverage*, 59 A.L.R.4th 149 (1988 & Supp. 2011).

Cramer urges the court to construe "getting in" to cover persons with the present intent of getting in an insured vehicle coupled with action reasonably anticipated from someone getting in a vehicle under the particular circumstances. As explained above, however, she was not yet engaged in actions reasonably anticipated from someone actually getting in a vehicle. Moreover, South Carolina has already rejected the argument that intent is dispositive of "getting in" a vehicle. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 548 S.E.2d 880, 884 (S.C. Ct. App. 2001).

Cramer also argues that the insurance policy fails to adequately extend coverage as required by statute. South Carolina Code § 38-77-30(7) defines insured persons [**7] to include "any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies." This argument, however, overlooks how the statutory term "use" is interpreted throughout the insurance provisions of the South Carolina Code. A party seeking to establish "use" of a vehicle must show that "the vehicle was being used for transportation purposes at the time of the injury." *See Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475, 478 (S.C. 2006); *cf. Canal Ins. Co. v. Ins. Co. of N. Am.*, 315 S.C. 1, 431 S.E.2d 577, 579 (S.C. 1993) ("We now construe § 38-77-140 and define 'use of a motor vehicle' as limited to transportation uses."). We see no reason to interpret § 38-77-30(7) any differently. It is sufficient to observe that Cramer was not using the ambulance for transportation purposes at the time of the accident, and thus was not "using" the emergency vehicle under South Carolina law.

In the alternative, Cramer lastly argues that she is entitled to recover because she was "upon," "out," or "off," and therefore "occupying," the ambulance. She suggests that "out" and "off" are completely independent from the gerund "getting." In other words, the definition of "occupying" should not be read as "in, upon, getting in, [getting] on, [getting] out or [getting] off" of an insured vehicle. The Supreme Court [**8] of South Carolina has been clear, however, that "upon" requires physical contact with the insured vehicle. *Whitmire*, 174 S.E.2d at 394; *see also S.C. Farm Bureau Mut. Ins. Co v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862, 867-68 (S.C. 2012) (clarifying that a person is still "upon" an insured vehicle if contact is "relinquish[ed] . . . in order to attempt to avoid injury"). And the Supreme Court of South Carolina has not adopted Cramer's proposed interpretation [*140] of "out" or "off." Severing these terms from "getting" would extend coverage to all persons both "in" and "out," or "upon" and "off," of an insured vehicle—meaning everyone. We decline to read the policy so implausibly. Cramer therefore cannot meet her burden of showing she is entitled to coverage. *See Cooper v. Firemen's Fund Ins. Co.*, 252 S.C. 629, 167 S.E.2d 745, 746 (S.C. 1969).

III.

The judgment of the district court is accordingly reversed and remanded with instructions to enter judgment in favor of National Casualty.

REVERSED

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

Travelers Property Casualty Company of America, Plaintiff, v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., Defendant.	C/A No.: 6:21-cv-02648-DCC

Reply to Plaintiff's response in opposition to Defendant's motion for judgment on the pleadings and response in opposition to Plaintiff's motion for judgment on the pleadings, or in the alternative, motion for summary judgement

Defendant Barbara Hawthorne moved for judgment on the pleadings (Dkt. No. 20) and Plaintiff Travelers Property Casualty Company of America (Travelers) filed a response (Dkt. No. 29) and its own motion for judgment on the pleadings or, in the alternative, motion for summary judgment (Dkt. No. 28).[1] Hawthorne herein responds in opposition to Travelers' motion and replies to the insurer's response in opposition to her motion.

The issues in this case are (a) whether Decedent was getting in, on, out, or off the vehicle at the time of the collision and (b) whether an insured motorist leaves his UIM coverage in the front seat of the vehicle when he complies with the lawful instruction of a police officer. The Court should answer the first question "yes" and the second question "no." Hawthorne's motion should be granted, and Travelers' motion should be denied. If the Court considers Traveler's motion as a

[1] Travelers' memoranda (Dkt. Nos. 28-1 & 29) are identical.

motion for summary judgment, it should be denied without prejudice under Rule 56(d) of the Federal Rules of Civil Procedure so discovery can proceed.

ARGUMENT IN REPLY/RESPONSE

The parties disagree over whether Decedent Nathaniel Hawthorne, Jr. was "occupying" the vehicle within the meaning of the underinsured motorist (UIM) Policy, with Travelers contending Decedent was neither "upon" the vehicle, nor in the process of "getting in, on, out, or off the vehicle." Having considered Travelers' argument, Hawthorne is persuaded that the "upon" clause is not the proper framework to analyze this claim. Coverage here should turn on whether Decedent was getting in, on, out, or off the vehicle as that clause has been construed (he was). Accordingly, Hawthorne abandons her argument concerning the upon clause, having been persuaded is does not apply on these facts.

Travelers reads precedent to foreclose application of the in, on, out, or off clause to the facts of this case. See Dkt. No. 28-1 at 9–13. Hawthorne takes exception to that assertion below but offers three additional observations at the outset.

First, Hawthorne's motion sought to highlight a pleading discrepancy, whereby she alleged Decedent was ordered out of the vehicle by the police officer, while Travelers sought to skirt the issue. See Dkt. No. 20-1 at 3 (quoting relevant allegations). The dashboard camera video depicts what happened and corroborates Hawthorne's allegation Decedent was ordered out of the vehicle and to stand next to the police vehicle. Travelers does not dispute that this is what, in fact, happened and the video speaks for itself.

Similarly, Travelers does not dispute that South Carolina law obligated Decedent to follow the instructions of the police officer when told to exit the vehicle and stand next to the police vehicle; Travelers maintains it is "immaterial." Compare Dkt. No. 20-1 at 8 ("Decedent had no lawful right to do anything other than what the officer ordered."), with Dkt. No. 28-1 at 5 (claiming it is immaterial). As explained below, this is not correct.

Further, Travelers does not dispute Decedent was just feet from the insured vehicle when he was killed. Under the fact-specific nature of claims like this, Whitmire v. Nationwide Mut. Ins. Co., 174 S.E.2d 391, 394 (S.C. 1970), this is a meaningful fact that weighs in Hawthorne's favor.

I. Decedent was engaged in acts reasonably expected of a motorist at a traffic stop, therefore he was getting in or out of the vehicle at the time of the collision.

Travelers maintains the in, on, out, or off clause of the Policy does not apply because Decedent had ended the process of getting out or off the vehicle but had not yet begun the process of getting in or on the vehicle. In Travelers' view, Decedent was stuck in a legal purgatory, just moments from having lost coverage and moments away from regaining it, because he followed the lawful orders of a police officer. According to Travelers, a claimant must be "(1) in close physical proximity to the vehicle, and (2) has yet to reach their immediate intended destination." Dkt. No. 28-1 at 9 (citing Whitmire, 174 S.E.2d at 395). That is not the rule in Whitmire.

The correct question here is whether the coverage was intended to protect against the type of injury suffered. Consider again the scope of "alighting" (i.e., getting out) as explained by the state Supreme Court in Whitmire:

> Where the act of alighting is completed is uncertain. It must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must be related to the particular use of the automobile and the hazards to be encountered from such use. 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.

Whitmire, 174 S.E.2d at 394. In the parlance of Whitmire, was Decedent engaging reasonably anticipated hazards related to the particular use of the automobile? Yes, he was struck by passing traffic during at a traffic stop. Was Decedent's movement necessary to remove himself from the hazard? Yes, he was standing feet away from the vehicle next to the passenger-side window of the police vehicle where the officer had made room for him to safely stand. Was Decedent, while not in the vehicle, still engaging in the completion of acts reasonably expected from one getting out of an automobile under similar conditions? Yes, his movement was ordered by the officer and the Court should expect all motorists to similarly abide the instruction of law enforcement. Thus, all the fact-specific considerations in Whitmire's alighting analysis weigh in Hawthorne's favor such that the Court should conclude the injury suffered is precisely the sort to which UIM benefits were intended to apply. Moreover, while Whitmire's analysis turned on alighting (i.e., getting out), the same analysis applies equally to Decedent getting in the automobile and would allow the Court to reach the same result.

Moreover, while Travelers is keen to point out that "intent of a person to get in a vehicle is not dispositive of the analysis" (Dkt. No. 29-1 at 9–11), it is not irrelevant either. In South Carolina Property & Casualty Guarantee Association v. Yensen, 548 S.E.2d 880 (S.C. Ct. App. 2001), which is cited by Travelers for this proposition, the court of appeals sought to distinguish the case before it from Whitmire, explaining:

> Appellants argue that Whitmire is controlling in this case because Yensen intended to occupy the tow truck and should therefore be able to collect insurance from the tow truck's insurance provider. Whitmire is distinguishable because there, *the plaintiff had unquestionably been occupying the car*, whereas this case involves, at most, Yensen's intent to occupy the tow truck, expressed after the accident and during litigation.

Yensen, 548 S.E.2d at 883–84 (emphasis added). In Yensen, the motorist's car was disabled on the highway and he was standing outside the vehicle while a tow truck hooked chains onto the vehicle when the tortfeasor struck the motorist, tow truck driver, and a police officer. Id. at 882. The motorist's UIM claim against the tow truck's insurer failed because he never entered the tow truck and, while he testified at trial that he planned to leave the scene with the tow truck driver, at the time of the collision he was still standing next to his disabled vehicle and at a deposition "testified he had called a friend to come pick him up." Id. at 883. The court of appeals explained, "While there was some testimony that Yensen intended to leave the scene in the tow truck, at the time of the accident, he was not in or on the tow truck, nor was he in the process of getting into it." Id. This was distinguishable from Whitmire where the motorist was struck two or three feet from his vehicle while proceeding to the shoulder and an adjacent yard to remove himself from the hazards of passing vehicles. Cf. 174 S.E.2d at 395.

Properly read, Yensen stands for the proposition that a self-serving statement of intent, by itself and contradicted by other more credible evidence, is insufficient to create a genuine issue of material fact. Hawthorne takes no issue with this proposition. Of course, here Decedent cannot testify to his intent, but his intent is still evident from the circumstances of the traffic stop. Stated differently, there is no reasonable dispute he exited the vehicle and moved to the side of the police vehicle *because of* the traffic stop. Nor is it reasonably disputable that, once he was released by the officer, Decedent was returning to the vehicle to leave the scene of the traffic stop. In Yensen, the motorist's intent vis-à-vis the tow truck was very much an open question because he had never entered the tow truck, called a friend for a ride from the scene, and only claimed an intent to get in the tow truck after the collision. Travelers contends that Yensen "helps clarify the boundaries of the term 'alighting from' as described in the Whitmire decision" (Dkt. No. 28-1 at 11), but this is simply not correct. The Court should apply the fact-specific analysis in Whitmire with an eye fixed on the purpose for which coverage is afforded. Travelers' gloss re-writes that standard altogether by taking language from a factually distinguishable case to graft some sort of perpetual motion requirement onto Whitmire as an additional, unstated condition of coverage. Cf. Dkt. No.

28-1 at 11 ("In other words, whatever the boundaries otherwise may be, to be considered 'getting in, on, out or off,' of an insured vehicle, the claimant must actually be in that process."). That is not what Whitmire or Yensen say.

II. Forcing Decedent to choose between obeying law enforcement and maintaining coverage is unreasonable, unconscionable, and unlawful.

Travelers gives no weight whatsoever to the fact that Decedent was physically outside the vehicle because he was ordered out by the officer. In the insurance company's view, Decedent reached his "destination" while standing next to the police car just feet from his vehicle. See Dkt. No. 28-1 at 12. Factually, this is not correct—it was a place he was forced to pause, while remaining in the zone of danger. But here again, Travelers relies on Yensen (see Dkt. No. 28-1 at 13), which is not instructive here for the reasons already explained. The insurance company also argues that Hawthorne's claims of unreasonableness, unconscionability, and unlawfulness have no impact on the analysis. Hawthorne disagrees.

First, Decedent had no legal option other than to follow the instructions of the police officer. Travelers does not challenge this proposition; it merely claims the officer's instructions are immaterial. Accordingly, the parties seem to agree that it would have been unlawful for Decedent to refuse the officer's commands to exit the vehicle or move next to the police vehicle.

Second, it would also be unreasonable to force an insured to chose between following the law and maintaining coverage. Travelers argues the reasonable expectation of an insured doctrine is limited to "only apply" when the application of policy language is ambiguous. Dkt. No. 28-1 at 15. As an initial matter, the Policy language *is* ambiguous—as evidenced by this declaratory judgment action and the precedents having to define the contours of what does and does not fall within the scope of an in, on, out, or off clause. When ambiguity exists, South Carolina courts will "look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print." Bell v. Progressive Direct Ins. Co., 757 S.E.2d 399, 407 (S.C. 2014) (quoting Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del.1982)); see also Canopius US Ins., Inc. v. Middleton, 202 F. Supp. 3d 540, 550–51 (D.S.C. 2016) (discussing cases and concluding, "the simple fact that policy terms can be read together in a straightforward manner does not preclude the application of the reasonable expectations doctrine when this reading produces an absurd result." (underline original)). Applying that standard here, the Court need only ask whether a reasonable policyholder would assume he would lose UIM benefits by following the orders of a police officer and exiting his vehicle and moving as directed at the scene of a traffic stop. Anything other than an unqualified "no," penalizes policyholders with precisely the sort of hidden trap the doctrine is designed to prevent.

Finally, as to unconscionability, Hawthorne's view of the doctrine's applicability here is taken directly from S.C. Farm Bureau Mutual Insurance Co. v. Kennedy: "To interpret the physical contact requirement in a manner that would require Kennedy to succumb to the approaching danger rather than relinquish physical contact would be unreasonable and unconscionable." 730 S.E.2d 862, 866–67 (S.C. 2012). The Kennedy Court reasoned the motorist's conduct "was reasonably to be expected from one acting under similar circumstances when faced with a hazard encountered in the ordinary use of a vehicle." Id. It would frustrate the rule of law and, like Kennedy, legislative intent to require an insurer to offer UIM coverage and collect premium for it, but then allow the insurer to deny a motorist coverage for obeying law enforcement as required by state law.

For all of these reasons, the fact that Decedent was following the instructions of the officer at the time of the collision cannot be ignored and supports a declaration in Hawthorne's favor.

III. Summary judgment is premature.

Finally, while Hawthorne maintains this case should be resolved by granting her motion for judgment on the pleadings, if the Court concludes the case cannot be resolved by a motion for judgment on the pleadings—i.e., there is some aspect of the factual record that warrants development—then the Court should deny Travelers' motion for summary judgment as premature and allow discovery to proceed.

If a nonmovant shows by affidavit or declaration that, for specific reasons, it cannot present facts essential to justify its opposition, a court may defer consider the motion or deny it. Fed. R. Civ. P. 56(d)(1). As indicated in the attached declaration of counsel (**Exhibit A**), Hawthorne served interrogatories, document requests, and requests to admit on Travelers on November 4, 2021. Ex. A ¶ 2. Travelers asked to extend its deadline to respond by 30 days and Hawthorne agreed to extend the deadline 14 days until December 21, 2021. Id. ¶ 3. Depending on Travelers' responses, Hawthorne may seek additional written discovery and/or depositions. Id. ¶ 4. To date, no depositions have been taken in this case. Id.

No one contests that the dashboard camera footage is authentic and integral to the Complaint such that it can properly be considered as part of a judgment on the pleadings. If the Court cannot decide this case on the pleadings, Hawthorne submits it would be inappropriate to then do so on a motion for summary judgment without discovery addressing whatever factual dispute(s) foreclosed the Court's ability to grant judgment on the pleadings. This case is still in the early stages of discovery and, as indicated, Hawthorne is yet to receive Travelers' initial responses to discovery. Accordingly, the Court should defer consideration of the motion for summary judgment or deny it without prejudice under Rule 56(d)(1).

CONCLUSION

For these reasons, Hawthorne's motion (Dkt. No. 20) should be granted, and Travelers' motion (Dkt. No. 29) should be denied. If the Court considers Traveler's motion as a motion for summary judgment, it should be denied without prejudice under Rule 56(d) of the Federal Rules of Civil Procedure so discovery can proceed.

Respectfully submitted,

s/Christopher P. Kenney
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ATTORNEYS FOR DEFENDANT
BARBARA HAWTHORNE AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
NATHANIEL HAWTHORNE, JR.

December 8, 2021
Columbia, South Carolina.

Travelers v. Hawthorne, C/A No.: 6:21-cv-02648-DCC (D.S.C.).
Reply to Plaintiff's response in opposition to Defendant's motion for judgment on the pleadings and response in opposition to Plaintiff's motion for judgment on the pleadings, or in the alternative, motion for summary judgement

Exhibit A

(Declaration of Counsel)

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

Travelers Property Casualty Company of America, Plaintiff, v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., Defendant.	C/A No.: 6:21-cv-02648-DCC **DECLARATION OF COUNSEL**

I, Christopher P. Kenney, hereby state as follows:

1. I am counsel of record for Barbara Hawthorne in the above-captioned matter.

2. On November 4, 2021, Hawthorne served interrogatories, document requests, and requests to admit on Plaintiff Travelers Property Casualty Company of America (Travelers). That discovery was due on or before December 7, 2021.

3. On December 3, 2021, Travelers sought a 30-day extension of time to respond to Hawthorne's discovery. After conferring with Travelers' counsel, the undersigned agreed to extend Travelers' deadline by 14 days, making the new deadline December 21, 2021.

4. Depending on Travelers' responses, Hawthorne may seek additional written discovery and/or depositions. To date, no depositions have been taken in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

December 8, 2021
Columbia, South Carolina.

Christopher P. Kenney

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

Travelers Property Casualty Company of America,

Plaintiff,

v.

Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.,

Defendant.

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

Reply to Plaintiff's response in opposition to Defendant's motion for judgment on the pleadings and response in opposition to Plaintiff's motion for judgment on the pleadings, or in the alternative, motion for summary judgement

Defendant Barbara Hawthorne moved for judgment on the pleadings (Dkt. No. 20) and Plaintiff Travelers Property Casualty Company of America (Travelers) filed a response (Dkt. No. 29) and its own motion for judgment on the pleadings or, in the alternative, motion for summary judgment (Dkt. No. 28).[1] Hawthorne herein responds in opposition to Travelers' motion and replies to the insurer's response in opposition to her motion.

The issues in this case are (a) whether Decedent was getting in, on, out, or off the vehicle at the time of the collision and (b) whether an insured motorist leaves his UIM coverage in the front seat of the vehicle when he complies with the lawful instruction of a police officer. The Court should answer the first question "yes" and the second question "no." Hawthorne's motion should be granted, and Travelers' motion should be denied. If the Court considers Traveler's motion as a

[1] Travelers' memoranda (Dkt. Nos. 28-1 & 29) are identical.

motion for summary judgment, it should be denied without prejudice under Rule 56(d) of the Federal Rules of Civil Procedure so discovery can proceed.

ARGUMENT IN REPLY/RESPONSE

The parties disagree over whether Decedent Nathaniel Hawthorne, Jr. was "occupying" the vehicle within the meaning of the underinsured motorist (UIM) Policy, with Travelers contending Decedent was neither "upon" the vehicle, nor in the process of "getting in, on, out, or off the vehicle." Having considered Travelers' argument, Hawthorne is persuaded that the "upon" clause is not the proper framework to analyze this claim. Coverage here should turn on whether Decedent was getting in, on, out, or off the vehicle as that clause has been construed (he was). Accordingly, Hawthorne abandons her argument concerning the upon clause, having been persuaded is does not apply on these facts.

Travelers reads precedent to foreclose application of the in, on, out, or off clause to the facts of this case. See Dkt. No. 28-1 at 9–13. Hawthorne takes exception to that assertion below but offers three additional observations at the outset.

First, Hawthorne's motion sought to highlight a pleading discrepancy, whereby she alleged Decedent was ordered out of the vehicle by the police officer, while Travelers sought to skirt the issue. See Dkt. No. 20-1 at 3 (quoting relevant allegations). The dashboard camera video depicts what happened and corroborates Hawthorne's allegation Decedent was ordered out of the vehicle and to stand next to the police vehicle. Travelers does not dispute that this is what, in fact, happened and the video speaks for itself.

Similarly, Travelers does not dispute that South Carolina law obligated Decedent to follow the instructions of the police officer when told to exit the vehicle and stand next to the police vehicle; Travelers maintains it is "immaterial." Compare Dkt. No. 20-1 at 8 ("Decedent had no lawful right to do anything other than what the officer ordered."), with Dkt. No. 28-1 at 5 (claiming it is immaterial). As explained below, this is not correct.

Further, Travelers does not dispute Decedent was just feet from the insured vehicle when he was killed. Under the fact-specific nature of claims like this, Whitmire v. Nationwide Mut. Ins. Co., 174 S.E.2d 391, 394 (S.C. 1970), this is a meaningful fact that weighs in Hawthorne's favor.

I. Decedent was engaged in acts reasonably expected of a motorist at a traffic stop, therefore he was getting in or out of the vehicle at the time of the collision.

Travelers maintains the in, on, out, or off clause of the Policy does not apply because Decedent had ended the process of getting out or off the vehicle but had not yet begun the process of getting in or on the vehicle. In Travelers' view, Decedent was stuck in a legal purgatory, just moments from having lost coverage and moments away from regaining it, because he followed the lawful orders of a police officer. According to Travelers, a claimant must be "(1) in close physical proximity to the vehicle, and (2) has yet to reach their immediate intended destination." Dkt. No. 28-1 at 9 (citing Whitmire, 174 S.E.2d at 395). That is not the rule in Whitmire.

The correct question here is whether the coverage was intended to protect against the type of injury suffered. Consider again the scope of "alighting" (i.e., getting out) as explained by the state Supreme Court in Whitmire:

> Where the act of alighting is completed is uncertain. It must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must be related to the particular use of the automobile and the hazards to be encountered from such use. 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.

Whitmire, 174 S.E.2d at 394. In the parlance of Whitmire, was Decedent engaging reasonably anticipated hazards related to the particular use of the automobile? Yes, he was struck by passing traffic during at a traffic stop. Was Decedent's movement necessary to remove himself from the hazard? Yes, he was standing feet away from the vehicle next to the passenger-side window of the police vehicle where the officer had made room for him to safely stand. Was Decedent, while not in the vehicle, still engaging in the completion of acts reasonably expected from one getting out of an automobile under similar conditions? Yes, his movement was ordered by the officer and the Court should expect all motorists to similarly abide the instruction of law enforcement. Thus, all the fact-specific considerations in Whitmire's alighting analysis weigh in Hawthorne's favor such that the Court should conclude the injury suffered is precisely the sort to which UIM benefits were intended to apply. Moreover, while Whitmire's analysis turned on alighting (i.e., getting out), the same analysis applies equally to Decedent getting in the automobile and would allow the Court to reach the same result.

Moreover, while Travelers is keen to point out that "intent of a person to get in a vehicle is not dispositive of the analysis" (Dkt. No. 29-1 at 9–11), it is not irrelevant either. In South Carolina Property & Casualty Guarantee Association v. Yensen, 548 S.E.2d 880 (S.C. Ct. App. 2001), which is cited by Travelers for this proposition, the court of appeals sought to distinguish the case before it from Whitmire, explaining:

> Appellants argue that Whitmire is controlling in this case because Yensen intended to occupy the tow truck and should therefore be able to collect insurance from the tow truck's insurance provider. Whitmire is distinguishable because there, *the plaintiff had unquestionably been occupying the car*, whereas this case involves, at most, Yensen's intent to occupy the tow truck, expressed after the accident and during litigation.

Yensen, 548 S.E.2d at 883–84 (emphasis added). In Yensen, the motorist's car was disabled on the highway and he was standing outside the vehicle while a tow truck hooked chains onto the vehicle when the tortfeasor struck the motorist, tow truck driver, and a police officer. Id. at 882. The motorist's UIM claim against the tow truck's insurer failed because he never entered the tow truck and, while he testified at trial that he planned to leave the scene with the tow truck driver, at the time of the collision he was still standing next to his disabled vehicle and at a deposition "testified he had called a friend to come pick him up." Id. at 883. The court of appeals explained, "While there was some testimony that Yensen intended to leave the scene in the tow truck, at the time of the accident, he was not in or on the tow truck, nor was he in the process of getting into it." Id. This was distinguishable from Whitmire where the motorist was struck two or three feet from his vehicle while proceeding to the shoulder and an adjacent yard to remove himself from the hazards of passing vehicles. Cf. 174 S.E.2d at 395.

Properly read, Yensen stands for the proposition that a self-serving statement of intent, by itself and contradicted by other more credible evidence, is insufficient to create a genuine issue of material fact. Hawthorne takes no issue with this proposition. Of course, here Decedent cannot testify to his intent, but his intent is still evident from the circumstances of the traffic stop. Stated differently, there is no reasonable dispute he exited the vehicle and moved to the side of the police vehicle *because of* the traffic stop. Nor is it reasonably disputable that, once he was released by the officer, Decedent was returning to the vehicle to leave the scene of the traffic stop. In Yensen, the motorist's intent vis-à-vis the tow truck was very much an open question because he had never entered the tow truck, called a friend for a ride from the scene, and only claimed an intent to get in the tow truck after the collision. Travelers contends that Yensen "helps clarify the boundaries of the term 'alighting from' as described in the Whitmire decision" (Dkt. No. 28-1 at 11), but this is simply not correct. The Court should apply the fact-specific analysis in Whitmire with an eye fixed on the purpose for which coverage is afforded. Travelers' gloss re-writes that standard altogether by taking language from a factually distinguishable case to graft some sort of perpetual motion requirement onto Whitmire as an additional, unstated condition of coverage. Cf. Dkt. No.

28-1 at 11 ("In other words, whatever the boundaries otherwise may be, to be considered 'getting in, on, out or off,' of an insured vehicle, the claimant must actually be in that process."). That is not what Whitmire or Yensen say.

II. Forcing Decedent to choose between obeying law enforcement and maintaining coverage is unreasonable, unconscionable, and unlawful.

Travelers gives no weight whatsoever to the fact that Decedent was physically outside the vehicle because he was ordered out by the officer. In the insurance company's view, Decedent reached his "destination" while standing next to the police car just feet from his vehicle. See Dkt. No. 28-1 at 12. Factually, this is not correct—it was a place he was forced to pause, while remaining in the zone of danger. But here again, Travelers relies on Yensen (see Dkt. No. 28-1 at 13), which is not instructive here for the reasons already explained. The insurance company also argues that Hawthorne's claims of unreasonableness, unconscionability, and unlawfulness have no impact on the analysis. Hawthorne disagrees.

First, Decedent had no legal option other than to follow the instructions of the police officer. Travelers does not challenge this proposition; it merely claims the officer's instructions are immaterial. Accordingly, the parties seem to agree that it would have been unlawful for Decedent to refuse the officer's commands to exit the vehicle or move next to the police vehicle.

Second, it would also be unreasonable to force an insured to chose between following the law and maintaining coverage. Travelers argues the reasonable expectation of an insured doctrine is limited to "only apply" when the application of policy language is ambiguous. Dkt. No. 28-1 at 15. As an initial matter, the Policy language *is* ambiguous—as evidenced by this declaratory judgment action and the precedents having to define the contours of what does and does not fall within the scope of an in, on, out, or off clause. When ambiguity exists, South Carolina courts will "look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print." Bell v. Progressive Direct Ins. Co., 757 S.E.2d 399, 407 (S.C. 2014) (quoting Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del.1982)); see also Canopius US Ins., Inc. v. Middleton, 202 F. Supp. 3d 540, 550–51 (D.S.C. 2016) (discussing cases and concluding, "the simple fact that policy terms can be read together in a straightforward manner does not preclude the application of the reasonable expectations doctrine when this reading produces an absurd result." (underline original)). Applying that standard here, the Court need only ask whether a reasonable policyholder would assume he would lose UIM benefits by following the orders of a police officer and exiting his vehicle and moving as directed at the scene of a traffic stop. Anything other than an unqualified "no," penalizes policyholders with precisely the sort of hidden trap the doctrine is designed to prevent.

Finally, as to unconscionability, Hawthorne's view of the doctrine's applicability here is taken directly from S.C. Farm Bureau Mutual Insurance Co. v. Kennedy: "To interpret the physical contact requirement in a manner that would require Kennedy to succumb to the approaching danger rather than relinquish physical contact would be unreasonable and unconscionable." 730 S.E.2d 862, 866–67 (S.C. 2012). The Kennedy Court reasoned the motorist's conduct "was reasonably to be expected from one acting under similar circumstances when faced with a hazard encountered in the ordinary use of a vehicle." Id. It would frustrate the rule of law and, like Kennedy, legislative intent to require an insurer to offer UIM coverage and collect premium for it, but then allow the insurer to deny a motorist coverage for obeying law enforcement as required by state law.

For all of these reasons, the fact that Decedent was following the instructions of the officer at the time of the collision cannot be ignored and supports a declaration in Hawthorne's favor.

III. Summary judgment is premature.

Finally, while Hawthorne maintains this case should be resolved by granting her motion for judgment on the pleadings, if the Court concludes the case cannot be resolved by a motion for judgment on the pleadings—i.e., there is some aspect of the factual record that warrants development—then the Court should deny Travelers' motion for summary judgment as premature and allow discovery to proceed.

If a nonmovant shows by affidavit or declaration that, for specific reasons, it cannot present facts essential to justify its opposition, a court may defer consider the motion or deny it. Fed. R. Civ. P. 56(d)(1). As indicated in the attached declaration of counsel (**Exhibit A**), Hawthorne served interrogatories, document requests, and requests to admit on Travelers on November 4, 2021. Ex. A ¶ 2. Travelers asked to extend its deadline to respond by 30 days and Hawthorne agreed to extend the deadline 14 days until December 21, 2021. Id. ¶ 3. Depending on Travelers' responses, Hawthorne may seek additional written discovery and/or depositions. Id. ¶ 4. To date, no depositions have been taken in this case. Id.

No one contests that the dashboard camera footage is authentic and integral to the Complaint such that it can properly be considered as part of a judgment on the pleadings. If the Court cannot decide this case on the pleadings, Hawthorne submits it would be inappropriate to then do so on a motion for summary judgment without discovery addressing whatever factual dispute(s) foreclosed the Court's ability to grant judgment on the pleadings. This case is still in the early stages of discovery and, as indicated, Hawthorne is yet to receive Travelers' initial responses to discovery. Accordingly, the Court should defer consideration of the motion for summary judgment or deny it without prejudice under Rule 56(d)(1).

CONCLUSION

For these reasons, Hawthorne's motion (Dkt. No. 20) should be granted, and Travelers' motion (Dkt. No. 29) should be denied. If the Court considers Traveler's motion as a motion for summary judgment, it should be denied without prejudice under Rule 56(d) of the Federal Rules of Civil Procedure so discovery can proceed.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
BARBARA HAWTHORNE AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
NATHANIEL HAWTHORNE, JR.

December 8, 2021
Columbia, South Carolina.

Exhibit A

(Declaration of Counsel)

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

Travelers Property Casualty Company of America, Plaintiff, v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., Defendant.	C/A No.: 6:21-cv-02648-DCC **DECLARATION OF COUNSEL**

I, Christopher P. Kenney, hereby state as follows:

1. I am counsel of record for Barbara Hawthorne in the above-captioned matter.

2. On November 4, 2021, Hawthorne served interrogatories, document requests, and requests to admit on Plaintiff Travelers Property Casualty Company of America (Travelers). That discovery was due on or before December 7, 2021.

3. On December 3, 2021, Travelers sought a 30-day extension of time to respond to Hawthorne's discovery. After conferring with Travelers' counsel, the undersigned agreed to extend Travelers' deadline by 14 days, making the new deadline December 21, 2021.

4. Depending on Travelers' responses, Hawthorne may seek additional written discovery and/or depositions. To date, no depositions have been taken in this case.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

December 8, 2021
Columbia, South Carolina.

Christopher P. Kenney

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK
BY: Angela Lewis
DEPUTY CLERK

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

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Plaintiff,

v.

BARBARA HAWTHORNE, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.,

Defendant.

Case No. 6:21-cv-02648-DCC

UNITED STATES DISTRICT COURT ★ DISTRICT OF SOUTH CAROLINA ★

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

NOW COMES Plaintiff, Travelers Property Casualty Company of America ("Travelers"), by and through its undersigned counsel, and for its Reply in Support of its Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment, shows the Court the following:

In its Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment (Doc. 31) (the "Estate's Response"), the Estate asserts that there are two issues for the Court to decide to resolve the parties' competing dispositive motions. The Estate concedes that the Decedent was not "upon" the insured vehicle at the time of the Accident. Estate's

Resp. p 2. Thus, the first issue, correctly stated by the Estate, is whether the Decedent was "getting in, on, out or off" of the insured vehicle at the time of the Accident.

This is the only issue for the Court to decide. Under the appropriate analysis and, even under the Estate's preferred analysis, the Decedent was not "getting in, on, out or off" of the insured vehicle at the time of the Accident. Therefore, he is not an insured and the Estate is not entitled to recover from Travelers.

The Estate proposes a second issue. Estate's Resp. p 1. Resolution of the second issue is not only unnecessary to the resolution of this case but is also contrary to the analysis South Carolina courts have set out for resolution of the first issue.

I. EVEN UNDER THE ESTATE'S ANALYSIS, THE DECEDENT WAS NOT "GETTING IN, ON, OUT OR OFF" OF THE TRUCK.

The Estate relies heavily on the *Whitmire* decision to support its position. *See* Estate's Resp. pp 3-4. In doing so, the Estate misconstrues the analysis performed by the *Whitmire* Court. Even so, under the Estate's proposed analysis the Decedent was not "getting in, on, out or off" of the Truck.

The question the *Whitmire* Court resolved to answer was "whether . . . [the claimant] was engaged in alighting from the [insured vehicle] at the time of injury . . . ." *Whitmire v. Nationwide Mut. Ins. Co.*, 254 S.C. 184, 190, 174 S.E.2d 391, 394 (1970). In answering that question, the Estate would have the Court understand that *Whitmire* abandoned longstanding principles of contract interpretation and ignored the applicable policy language in favor of a different test. This is not what the

Whitmire Court did. *See* Pl.'s Mem. in Supp. of its Mtn. for J. on the Pleadings ("Travelers' Mem. in Supp.") (Doc. 28-1) pp 9-10 (discussing holding of *Whitmire*).

As the Estate understands *Whitmire*, the Court looked at whether the claimant was "engaging reasonably anticipated hazards," moving to "remove himself from the hazard," and "still engaged in acts reasonably expected from one getting out of an automobile under similar conditions." Estate's Resp. pp 3-4. Even if this were the appropriate test, which it is not, the test is not met here.

First, the Estate tries to interject circumstances that occurred well before the Accident to show that its test is met. *Id.* True, at some point in the traffic stop the Decedent may have been moving to remove himself from the hazards of traffic. He also engaged in acts reasonably expected from one getting out of an automobile because he got out of his Truck. However, the only relevant time is the time of the Accident. *See* Travelers' Mem. in Supp. pp 8-9 (discussing "temporal continuum" concept from *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 612, 730 S.E.2d 862, 865 (2012)). At the time of the Accident, the Decedent was neither removing himself from the hazard of traffic nor was he engaged in acts reasonably expected from one getting out of a vehicle. *See* Travelers' Mem. in Supp. p 12 (noting Decedent had been physically out of the Truck for nearly six minutes at the time of the Accident); *see also* Dash Cam at 11:08-17:32.

The Decedent was not moving to remove himself from any hazard at the time of the Accident. In fact, he was not moving in any relevant way. He was standing at the passenger side of the officer's vehicle having a conversation as he had been for several minutes. Dash Cam at 15:38-17:32. There is no dispute that this is what he was doing. Estate's Mem. in Supp. (Doc. 20-1) p 5. Compare this with the claimant in *Whitmire*. That claimant, while walking around the insured vehicle to get to the shoulder of the road, started running away from it when he saw another car coming towards him. 254 S.C. at 189-90, 174 S.E.2d at 394. The Court found, "At the time of injury, [the claimant] was actually attempting to escape the danger from the oncoming vehicle to which he was subjected before clearing the rear of the insured automobile." *Id.* at 191, 174 S.E.2d at 395. At the time of the Accident here, the Decedent was not moving in any direction. He was standing at the passenger side of the Officer's vehicle. Dash Cam at 15:38-17:32; Estate's Mem. in Supp. p 5.

The Decedent was not "still engaged in the completion of acts reasonably expected from one getting out of an automobile under similar conditions." *Whitmire*, 254 S.C. at 189-90, 174 S.E.2d at 394. The Decedent was not "getting" anywhere at the time of the Accident. Again, He was standing at the passenger side of the Officer's vehicle having a conversation. Dash Cam at 15:38-17:32; Estate's Mem. in Supp. p 5. He had completed the act of getting out of the Truck well before the Accident. None of his actions were "acts reasonably expected from one getting out of an automobile" because he was not a person who was "getting out of an automobile" at the time of the Accident. *Id.* Thus, even under the Estate's proposed analysis, the Decedent was not "getting in, on, out or off" of the insured vehicle.

II. THE ESTATE'S ANALYSIS CONTRADICTS THE PLAIN LANGUAGE OF "GETTING IN, ON, OUT OR OFF."

Courts are charged to "enforce, not write, contract of insurance, and their language must be given its plain, ordinary, and popular meaning." *Sloan Constr. Co. v. Cent. Nat'l Ins. Co.*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). The plain language of the phrase "getting in, on, out or off" of an insured vehicle means just what it says. It means, as found by the *Whitmire* Court under the similar phrase "alighting from," actually in the process of getting, in, out or off" an insured vehicle. *See Whitmire*, 254 S.C. at 191, 174 S.E.2d at 394. The Decedent was standing next to the Officer's vehicle having a conversation after having already gotten out of the Truck. *See* Dash Cam at 15:38-17:32; Estate's Mem. in Supp. p 5. He was not "getting in, on, out or off" of the Truck.

The Estate contends that the fact that this lawsuit exists and "the precedents having to define the contours of what does and does not fall within the scope of an in, on, out, or off clause is evidence of ambiguity. Estate's Resp. p 6. However, to show ambiguity, the Estate must show that there is more than one reasonable interpretation of the applicable language and that one of those reasonable interpretations would trigger coverage. *Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366-67, 858 S.E.2d 407, 410 (2021). The Estate cited *Bell v. Progressive Direct Inc. Co.* for the proposition that courts are to "look to the reasonable expectations of the insured" to interpret ambiguous provisions. Estate's Resp. pp 6-7. Omitted by the Estate is that the rule adopted in *Bell* includes the proviso that this rule only applies "so far as [the policy's] language will permit." 407 S.C. at 580, 757 S.E.2d at 406-07.

The Estate has not put forth a reasonable interpretation of the phrase "getting in, on, out or off" that would include a person, like the Decedent, who, after having already gotten out of their vehicle nearly six minutes prior, is standing next to another vehicle having a conversation. *See* Dash Cam at 15:38-17:32. The Estate's interpretation is well beyond what the policy's language will permit. Thus, there is no ambiguity for the Court to resolve.

South Carolina's Supreme Court has made clear that courts must not "rewrite [policy language] or torture the meaning of a policy to extend coverage never intended by the parties." *Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); *see also Schulmeyer v. State Farm Fire & Cas. Co.,* 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage"); *and Gambrell v. Travelers Ins. Cos.*, 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983) ("We should not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties."). For the Estate to prevail it must necessarily ask the Court to rewrite or torture policy language, or both. This the Court should not and cannot do.

III. THERE ARE NO GROUNDS TO DELAY CONSIDERATION OF TRAVELERS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE OPERATIVE FACTS ARE NOT IN DISPUTE.

In the last section of its Response, the Estate contends that if the Court cannot resolve the issues on a motion for judgment on the pleadings, the Court should deny the motion and permit discovery to proceed. Estate's Resp. p 8. Travelers filed its dispositive motion as a motion for judgment on the pleadings, or in the alternative, for summary judgment because it is unclear whether the Court can consider the dash-cam video as part of a motion for judgment on the pleadings. *See Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013).

The Estate and Travelers do not agree on much but they do agree that the dash-cam video and the applicable policy are all the Court needs to decide the issues in this case. Def.'s Mtn. for J. on the Pleadings (Doc. 20) p 1 ("the wreck that gives rise to the underinsured motorist (UIM) coverage dispute was captured on police dashcam video . . . such that the operatives facts are not reasonably in dispute").

The Estate's Response does not suggest what additional information it would need to respond to Travelers' motion for summary judgment. The Estate merely states that it has written discovery outstanding and that it might seek more. Estate's Resp. p 8; *and* Decl. of Counsel (Doc. 31-1). But Rule 56(d) requires a non-moving party opposing summary judgment on these grounds to show (1) why the non-movant cannot currently present essential facts, (2) identify specific information to be obtain by additional discovery, and (3) that the information identified is material to the resolution of the motion. *See* 11 Moore's Federal Practice - Civil § 56.102 (2021). The

Estate has not met this standard. Thus, the Court should deny the Estate's request in the alternative to delay its resolution of Traveler's motion for summary judgment.

CONCLUSION

The Decedent was not "occupying" an insured vehicle at the time of the Accident. Therefore, he was not an insured person under the Policy and the Estate is not entitled to recover UIM benefits from Travelers. For these reasons, the Court should deny the Estate's Motion (Doc. 20), grant Travelers' Motion (Doc. 28), dismiss the Estate's counterclaims (Doc. 11, p 5-11) and enter an order and declaratory judgment that Travelers has no obligation to provide underinsured motorist benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident.

Respectfully submitted this 15th day of December, 2021.

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