

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

RECEIVED

AUG 29 2022

S.O. SUPREME COURT

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

**DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendant Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., hereby moves under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings. Judgment on the pleadings is warranted for two reasons.

First, the wreck that gives rise to this underinsured motorist (UIM) coverage dispute was captured on police dashcam video—an exhibit that is authentic and integral to the complaint—such that the operative facts are not reasonably in dispute.

Second, the Court should simply review the dashcam video and then declare Hawthorne is entitled to the benefit of UIM coverage because he was ordered out of his vehicle and was standing next to the police vehicle (just feet from his own vehicle) pursuant to the lawful order of the officer controlling the scene of a traffic stop when he was struck and killed, which falls within the meaning of the term “occupying” as that policy term has been construed by state and federal courts.

For these reasons (explained more fully in her memorandum in support), the Court should declare Hawthorne is entitled to UIM coverage and enter judgment in her favor.

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.

November 3, 2021
Columbia, South Carolina.

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Barbara Hawthorne, as Personal
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Defendant.

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

Memorandum in support of Hawthorne's motion for judgment on the pleadings

Defendant Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., submits this memorandum in support of her motion for judgment on the pleadings and an order declaring she is entitled to the benefit of underinsured motorist (UIM) coverage.

As much as Plaintiff Travelers Property Casualty Company of America (Travelers) might wish otherwise, the facts are not reasonably in dispute: they were caught on the dashcam video of the police officer who detained Decedent during a traffic stop, ordered Decedent out of his vehicle, and directed him to stand next to the officer's passenger-side window, just feet away from Decedent's vehicle and the attached trailer. As Decedent stood next to the police vehicle, the at-fault driver veered across the yellow line and struck the police vehicle at full speed. The parties agree: the impact of that collision pushed Decedent into oncoming traffic, which struck and killed him. Because the dashcam video is authentic and integral to the complaint, the Court need not wait for time-consuming discovery, nor defer to the parallel state proceeding (a proceeding Travelers unsuccessfully attempted to stay). Instead, the Court should answer the question Travelers poses

with this case and hold Hawthorne is entitled to UIM coverage because Decedent was “occupying” the vehicle within the meaning of the UIM policy and federal and state precedents that have construed the term. To hold otherwise (as Travelers requests) invites motorists to make an impossible choice: either disobey the orders of a police officer during a traffic stop and remain in the vehicle to preserve coverage, or obey law enforcement and exit the vehicle, but lose coverage under an occupying exclusion clause. Such a result makes little sense and it is not the law.

FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint in the Hawthorne v. Zack, 2021-CP-23-01754 (the “State Court Action”),¹ Decedent Nathaniel Hawthorne, Jr., (then 49 years old) was pulled over and ordered to step outside his employer’s commercial vehicle by State Transport Police when the State Court Action defendant Allan Lindsey Zack struck the police vehicle at full speed, which launched Decedent into oncoming traffic that struck and killed him. See Ex. A ¶¶ 2, 6–11. Zack fled, but later was arrested for felony driving under the influence resulting in a death, felony driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; and driving on wrong side of road, improper lane, or unsafely shifting lanes. Id. ¶¶ 14–15. Hawthorne filed the State Court Action joining claims for wrongful death and survival, alleging negligence, gross negligence, carelessness, and/or recklessness causing death. Id. ¶¶ 17–30.

It is not disputed that the collision caused Decedent’s death. Traveler’s rendition of the moments prior to the collision makes the following allegations relevant to this motion:

- “On December 2, 2020, a corporal with the South Carolina Department of Public Safety (the ‘Officer’) initiated a traffic stop of a 2015 Ford truck being driven by the Decedent.” Dkt. No. 1 at ¶ 12.

¹ State Court Action complaint attached as **Exhibit A**.

- “On information and belief, the 2015 Ford truck is owned by Terracon Consultants, Inc. and is principally garaged in the State of South Carolina.” Id. ¶ 13.
- “Decedent and the Officer both stopped their vehicles in the center turn lane of North Pleasantburg Drive between its intersection with North Garden Circle and Crescent Ridge Drive.” Id. ¶ 14.
- “At some point during the traffic stop, the Decedent approached the passenger side of the Officer’s vehicle to provide the Officer with the registration for a trailer being pulled by the Decedent’s vehicle.” Id. ¶ 15.
- While the Decedent leaned into the passenger side of the Officer’s vehicle, the Officer’s vehicle was struck by a vehicle driven by Allan Lindsey Zack (the “Tortfeasor”). The collision of the Tortfeasor’s vehicle with the Officer’s vehicle forced the Decedent into traffic and he was hit and killed by a passing motorist. Id. ¶ 16.

Hawthorne’s counterclaim makes the following allegations:

5. At approximately 12:10 p.m., Mr. Hawthorne was pulled over in the median by the State Transport Police and was ordered to step out of the vehicle to speak with the officer about securing equipment being transported on a trailer attached to his commercial vehicle.
6. The officer ordered Decedent to come around and stand next to his vehicle on the passenger side window to speak. While Decedent was standing in the median speaking to the officer, Zack was driving his vehicle north on Pleasantburg Drive.

Dkt. No. 11 at 5, ¶¶ 5–6. Notwithstanding its own allegations and the dashcam video depicting the events in question, Travelers disclaims knowledge of some of these facts, answering:

5. Upon information and belief, Travelers admits that Mr. Hawthorne was pulled over in the median by State Transport Police and at some point left his vehicle and walked to the side of the officer’s vehicle. *Travelers is without knowledge and therefore denies the remaining allegations.*
6. Upon information and belief, Travelers admits Decedent exited his vehicle and walked some distance to the passenger side of the officer’s vehicle. Upon further information and belief, Travelers admits that while Decedent was standing in the median next to the officer’s vehicle, Zack was driving a vehicle north on Pleasantburg Drive. *Travelers is without knowledge and therefore denies the remaining allegations in paragraph 6.*

Dkt. No. 17 ¶¶ 5–6 (emphasis added). Thus, Travelers appears to dispute whether Decedent was acting at the officer’s direction when he stood next to the police vehicle and, as Travelers pled it, “leaned into the passenger side of the Officer’s vehicle.”

**Uncontradicted video evidence establishes
Decedent was outside the vehicle pursuant to the orders
of a sworn law enforcement officer with control over the scene.**

The dashboard camera footage (SCDPS_000025 (**Exhibit B**)) taken from the officer’s patrol vehicle is unimpeachable evidence of what occurred on the day in question.

As soon as the officer activates his lights, Decedent pulls his vehicle into the middle lane between double yellow lines on the six-lane road. Ex. A at 00:40. The officer approaches Decedent’s driver-side door and introduces himself as State Transport Police and asks for Decedent’s driver’s license and registration. Id. at 02:15.

After asking Decedent several questions, the officer says, “Come here and look at this,” whereupon Decedent exits the vehicle and follows the officer back to the trailer attached to the vehicle. Id. at 03:20. While standing adjacent to the trailer, the officer asks about the machinery loaded on the trailer and has a conversation with Decedent about whether the machinery is secured to the trailer. Id. at 03:30. After establishing the machinery is not secured on the trailer, the officer points to a place on the trailer that can be used to secure the machinery, whereupon Decedent states he has a chain, and the officer tells him he is going to write him a ticket before sending him on his way. Id. at 04:40. The officer follows Decedent back to the driver-side door to get the truck number and then follows Decedent back to the trailer where the two men inspect the trailer looking for the trailer plate number. Id. at 5:30. The officer states, “I’m going to start doing this,” meaning writing Decedent a ticket, “you start doing that,” meaning secure the machinery to the trailer, “*then you come back here, ok?*” Id. at 06:50 (emphasis added). The officer then walks to his vehicle and

reorients the police vehicle in the lane to make room for Decedent to stand on the passenger side while Decedent briefly returns to his cab, exits again, and walks back to the trailer and climbs onto the machinery. Id. at 07:00. Decedent jumps down off the trailer and begins securing the machinery to the trailer. Id. at 09:05. Once he finishes, he paces back and forth along the side of the trailer, periodically touching the trailer, while waiting for the officer. Id. at 10:50.

Decedent then walks off camera to the passenger side of the officer's vehicle where he was instructed by the officer where to stand while the two men converse for several minutes. Id. at 11:05. Decedent then walks back along the left side of the trailer to obtain numbers from the trailer license plate and returns to the passenger-side of the officer's vehicle. Id. at 13:40. The two men discuss that the trailer registration does not match, and the officer instructs Decedent to check the trailer for a VIN number, whereupon Decedent walks back to the trailer and does as instructed. Id. at 14:00. 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. Id. at 15:35.

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. Id. at 17:30. It is undisputed that the force of the collision sent Decedent flying into oncoming traffic that struck and killed him. Compare Dkt. No. 11 at p. 6 ¶ 9, with Dkt. No. 17 ¶ 9.

Travelers attempted and failed to stay the State Court Action

On April 15, 2021, Hawthorne filed the State Court Action in the Greenville County Court of Common Pleas. See Ex. A. Zack never answered. On June 29, 2021, Travelers' counsel filed an appearance purporting to reserve its rights under the policy and enter a general denial "[t]o the extent" one was required. On August 10, 2021, Hawthorne resolved her claims with Zack's liability carrier with a covenant not to execute in exchange for minimum policy limits. Through

counsel, Hawthorne furnished the dashcam video to Travelers and then made a demand (also through counsel) on August 16, 2021 referring to the dashcam video. This action was filed two days later, on August 18, 2021. See Dkt. No. 1. On August 23, 2021, Travelers filed an answer in the State Court Action, purporting to reserve its rights under the UIM policy. That same day, Travelers moved to stay the State Court Action, citing the pendency of this case and Zack's pending criminal charges. By Form 4 Order filed on October 20, 2021, the Honorable Eugene C. Griffith, Jr., Circuit Court Judge, denied Travelers' motion to stay. This motion followed.

STANDARD OF REVIEW

A motion for judgment on the pleadings is decided under the same standard as a motion to dismiss under Rule 12(b)(6). Deutsche Bank Nat'l Trust Co. v. IRS, 361 F. App'x 527, 529 (4th Cir. 2010); Van Connor v. One Life Am., Inc., No. 6:19-CV-03283-DCC, 2021 WL 2667063, at *1 (D.S.C. June 29, 2021), motion to certify appeal denied sub nom: Connor v. One Life Am., Inc., No. 6:19-CV-03283-DCC, 2021 WL 4272614 (D.S.C. Sept. 21, 2021). This means the court assumes the truth of all well-pled facts, E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000), and, to survive, the non-moving party must state enough facts to state a claim to relief that is plausible on its face without crediting as true unwarranted inferences, unreasonable conclusions, or arguments. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Van Connor, 2021 WL at, at *2.

The key difference is that on a Rule 12(c) motion, a court can also consider (1) exhibits attached to the complaint, see Wolfington v. Reconstructive Orthopaedic Assocs., II PC, 935 F.3d 187, 195 (3rd Cir. 2019); Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp., 933 F.3d 751, 760 (D.C. Cir. 2019) or incorporated by reference, see Velarde v. GW GJ, Inc., 914 F.3d 779, 781 n.1 (2d Cir. 2019); Milwaukee Police Ass'n v. Flynn,

863 F.3d 636, 640 (7th Cir. 2017); Van Connor, 2021 WL at, at *1 (citing Fitchett v. Cty. of Horry, S.C., C/A No. 4:10-cv-1648-TLW-TER, 2011 WL 4435756, at *3 (D.S.C. Aug. 10, 2011)), and (2) motion exhibits that are integral to the complaint and are authentic. See Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016); Wolfington, 935 F.3d at 195; MyMail, Ltd. v. ooVoo, LLC, 934 F.3d 1373, 1378–79 (Fed. Cir. 2019).

ARGUMENT

This motion should be granted, and judgment should be entered for Hawthorne because there is no good-faith factual dispute as to why Decedent was standing at the passenger window of the police vehicle when he was killed, and South Carolina law requires a finding that a motorist killed just feet from the insured vehicle after being ordered out of it by a police officer is entitled to UIM coverage. Travelers must concede the facts as portrayed on the police officer's dashboard camera are what they purport to be and are not reasonably in dispute such that the Court should forego unnecessary, wasteful, and time-consuming discovery and reach the coverage question. A finding of UIM coverage in Hawthorne's favor is warranted.

I. The uncontradicted evidence shows Decedent was standing at the passenger window of the police vehicle at the time of his death because of a lawful order of the officer in charge of the traffic scene.

The Court should find based on the dashcam video evidence that Decedent was standing next to the police vehicle, just feet away from his work vehicle, because of the verbal direction of the officer, which Decedent was legally obligated to heed.

When the officer stopped Decedent in his vehicle, Decedent was no longer at liberty with his movement. "In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light." S.C. Code Ann. § 56-5-750(A).

Decedent did, in fact, stop when signaled, as required by law. Once stopped, Decedent was subject to the authority of the officer controlling the scene. “No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer ... invested by law with authority to direct, control or regulate traffic.” S.C. Code Ann. § 56-5-740; see also id. § 56-5-730 (making it “unlawful ... to do any act forbidden or to fail to perform any act required in this chapter.”). For example, a motorist can be ordered out of the vehicle, Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977), frisked, Arizona v. Johnson, 555 U.S. 323, 327 (2009), or even physically restrained. E.g., United States v. Smith, 396 F.3d 579, 582 (4th Cir. 2005).

Decedent had no lawful right to do anything other than what the officer ordered. The officer ordered him out of the vehicle, and he complied. He was told to follow the officer back to the trailer so they could discuss whether the machinery was properly secured, and he complied. He was instructed to secure the machinery while the officer worked on writing him a ticket, which he did. In the final minutes of the traffic stop, the officer is seen moving his patrol car to the left to make room for Decedent to stand at the passenger window, which he does. Decedent walks back to the trailer to retrieve a number from the trailer plate for the officer and returns to the passenger-side window where he is struck and killed. These facts are not reasonably in dispute.

Travelers seeks to interject ambiguity where there is none. Above-quoted paragraphs 5 and 6 from Hawthorne’s counterclaim and Travelers’ reply *suggest* a factual dispute over Hawthorne’s allegations that Decedent was (a) ordered to step out of the vehicle and (b) ordered to stand next to the officer’s window to speak. Compare Dkt. No. 11 at p. 5 ¶¶ 5–6, with Dkt. No. 17 ¶¶ 5–6. The Court should not permit this bit of slippery pleading to pose an obstacle to resolving this case for two reasons. First, the dashcam video is authentic, unimpeachable evidence of what happened that the Court can and should rely on. It is “integral to the complaint” (or in this case, the

Counterclaim), because the allegations track the events depicted in the dashcam. Cf. Goines, 822 F.3d at 166 (incident report arguably *not* integral where there were discrepancies with complaint allegations). Second, while Travelers purports to be “without knowledge” as to whether Decedent was acting at the direction of law enforcement, that demurrer is inconsistent with Travelers’ pleading elsewhere, where it states “that Mr. Hawthorne was pulled over in the median by State Transport Police[.]” Dkt. No. 17 at ¶ 5. Put differently, Travelers has *conceded* Decedent was stopped by the police. Notwithstanding whatever fact of which Travelers purports to lack knowledge, the notion that Decedent was somehow stopped by the officer but was nevertheless permitted to wander about the scene of the traffic stop (or even leave) is a fanciful effort to resist facts detrimental to Travelers’ coverage theory.

The Court should simply review the video and conclude the facts are what is clearly shown, namely, that Decedent’s movements adjacent to his vehicle on a public road were directed by the lawful orders of the officer in control of the traffic stop.

II. A motorist killed after being ordered out of his vehicle by a police officer, but still in proximity to the vehicle, is “occupying” the vehicle as a matter of law.

A motorist who is ordered out of his vehicle by a police officer during a traffic stop, who follows the officer’s commands, and who remains just feet from the insured vehicle is still “occupying” the vehicle within the meaning of the Policy language as it has been construed under South Carolina law. Any other conclusion leads to the absurd result whereby a motorist that complies with police commands and exits his vehicle thereby loses coverage under an exclusion like the one Travelers relies on here. Such a conclusion is inconsistent with precedents construing that same Policy term and the general proposition that “Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.” Hallett v. Gov’t Emp. Ins. Co., No. CV 9:19-2319-RMG, 2020 WL 6580407 (D.S.C. Nov. 10, 2020) (quoting M and M Corp.

of S.C. v. Auto-Owners Ins. Co., 701 S.E.2d 33, 35 (S.C. 2010)). The Court should hold the occupying exclusion is no bar to UIM coverage here.

Travelers' theory is that Decedent is not an "insured" within the meaning of the UIM coverage because he was not "occupying" the vehicle, which is defined by the Policy as "in, upon, getting in, on, out or off" a "covered auto." Dkt. No. 1 ¶¶ 21–23. In the parlance of Travelers' coverage theory, "At the time of the Accident, the Decedent was not 'in, upon, getting in, on, out or off' a 'covered auto' within the meaning of the UIM coverage available under the Policy in connection with covered autos licensed or principally garaged in South Carolina." Id. ¶ 22. Travelers argues that because Decedent was not "occupying" the vehicle, "With respect to the Accident, the Decedent is not an Insured within the meaning of the UIM coverage available under the policy in connection with covered autos licensed or principally garaged in South Carolina." Id. ¶ 23. Thus, were the Court to find Decedent was "occupying" the vehicle as that term has been construed, then Decedent is also an "insured" under the Policy and judgment on the pleadings should be entered in Hawthorne's favor.

Precedent supports concluding *either* that Decedent was "upon" the insured vehicle within the meaning of the Policy *or* that he was getting in, out or off the vehicle. Hawthorne prevails here under either theory. They are considered in turn.

A. Decedent was "upon" the vehicle based on the circumstances surrounding the traffic stop and collision.

First, the Court should conclude Decedent was "upon" the vehicle based on the circumstances of the traffic stop and collision. Physical contact with the vehicle is not essential; what matters is the circumstances surrounding the accident.

In South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy, 730 S.E.2d 862 (S.C. 2012), the state supreme court reinstated a trial court finding the claimant was entitled to UIM

coverage because he was “upon” and thus “occupying” the insured vehicle at the time of the accident. The claimant drove his employer’s truck to deliver a message to someone in a restaurant, parked the vehicle, left it running, went into the restaurant, and engaged his brother in conversation while walking back near the rear of the truck. Id. at 863. Similar to this case, a collision on a nearby highway knocked a vehicle into the restaurant parking lot and struck the claimant and pinned him against the truck. Id. The UIM insurer disputed coverage arguing (in relevant part) the claimant was not “occupying” the truck when he was standing near it but not in physical contact. Id. The supreme court rejected that argument, reasoning the insurer “erroneously assumes that this accident begins and ends at the exact moment of contact between the [tortfeasor] vehicle and Kennedy. This assumption is flawed because it ignores the unfolding events surrounding the accident.” Id. at 865. The court considered the plaintiff’s physical contact with the vehicle *until he was forced to relinquish it* while attempting to escape injury and “events immediately surrounding” the accident. Id. (emphasis added).

These considerations weigh heavily in favor of Hawthorne here because (as explained above) the circumstances of the traffic stop were such that Decedent was forced to relinquish contact with his vehicle—he was ordered out of the truck by the officer and told where to stand. In Kennedy, the court rejected the insurer’s argument that the inquiry should turn on physical contact alone because crediting such a view “would require Kennedy to succumb to the approaching danger rather than relinquish physical contact[,]” a result the court described as “unreasonable and unconscionable.” Id. The same reasoning applies to Hawthorne because it would be unreasonable, unconscionable, and unlawful to require Decedent to have disobeyed the officer to maintain coverage. Accordingly, Decedent had physical contact with the vehicle until he legally no longer could and the circumstances surrounding the accident warrant coverage.

B. Decedent was getting in, on or off the vehicle based his proximity and purpose in standing where he was when struck.

Alternatively, the Court should conclude Decedent was getting in, on or off the vehicle based on his proximity to it and the purpose for which he had exited and was standing where he was at the time of the collision, namely, complying with law enforcement instruction.

In Whitmire v. Nationwide Mutual Insurance Co., 174 S.E.2d 391 (S.C. 1970), the state supreme court construed the term “alighting from,” i.e., “getting out,” and therefore “occupying,” to include a passenger who exited and was in the process of walking around an insured vehicle to reach the adjacent shoulder when an uninsured motorist struck the parked vehicle and the passenger. The Whitmire Court reasoned:

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.

Id. at 394. The court then emphasized the passenger was struck “within two or three feet of the automobile and while he was proceeding promptly to the shoulder of the highway.... to remove himself from the hazards from passing vehicles.” Id. at 395.

More recently, in Cramer v. National Casualty Co., 690 F. App’x 135 (4th Cir. 2017), the Fourth Circuit looked to Whitmire and held an emergency medical technician (EMT) was not “occupying” her work vehicle when she was struck by an underinsured motorist. The EMT was sitting in the ambulance waiting for a patient to complete treatment at a cancer center when she and her co-worker noticed an automobile accident nearby. Id. at 137. The EMT moved the

ambulance to the nearby collision and, with the engine running, she and her partner exited the vehicle to check on the drivers. Id.

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.

Id. The UIM carrier denied coverage based on policy language that defined “occupying” as “in, upon, getting in, on, out of” an insured vehicle. Id.

The Fourth Circuit agreed, rejecting the theory she was “getting in” and therefore “occupying” the ambulance. The court pointed to evidence the EMT was “separate from the ambulance by a lane of traffic and passing cars” and “had not even started to cross the street”, reasoning: “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.” Id. at 138; cf. Hite v. Hartford Acc. & Indemnity Co., 344 S.E.2d 173, 177 (S.C. 1986) (“It cannot be said that being struck fifty feet from the insured automobile by another vehicle while answering a call for assistance of the night watchman is foreseeably identifiable with normal use, maintenance and ownership of the vehicle.”). The Cramer Court distinguished the EMT’s case from Whitmire due to the far greater physical distance between the EMT and the ambulance and the fact that, prior to being struck, she was in a place of relative safety, not attempting to reach safety as in Whitmire. See Cramer, 690 F. App’x at 139 (“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.”).

Proximity and purpose matter, and here, the facts are analogous to Whitmire, not Cramer or Hite. Decedent exited the vehicle when ordered during a traffic stop and at all times remained within feet of his vehicle and the trailer attached to it, and at times climbing back in the vehicle or on the trailer. At the officer's direction, Decedent was standing next to the police vehicle as a location of relative safety once he secured the machinery and retrieved the trailer number, as instructed. He did not cross the road. He did not even cross the double yellow lines. Instead, Decedent moved within the median lane adjacent to the truck and trailer before coming to rest next to the police vehicle, which was supposed to be a place of greater safety. Decedents' movement flowed from the officer's direction to exit the vehicle. Based on these facts, the Court should conclude Decedent was getting in, out or on the vehicle when struck.

CONCLUSION

For these reasons, the motion should be granted, and the Court should enter judgment in Hawthorne's favor accompanied by an order holding that Hawthorne is entitled to UIM benefits because when Decedent was ordered out of his vehicle by a police officer during a lawful traffic stop, he was not free to disobey the officer and he always remained in close physical proximity to the insured vehicle, such that he was upon and getting in, out and on and thus "occupying" the vehicle within the meaning of the Policy.

[signature page follows]

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.

November 3, 2021
Columbia, South Carolina.

RECEIVED
AUG 29 2022
SIC: SUPREME COURT

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

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

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

EXHIBIT A

(State Court Action Complaint)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

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

C/A No.: _____

Plaintiff,

v.

SUMMONS
(Jury Trial Demanded)

Allan Lindsey Zack,

Defendant.

TO: ALLAN LINDSEY ZACK, THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, as the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

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ATTORNEY FOR THE PLAINTIFF

April 15, 2021
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

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

C/A No.: _____

Plaintiff,

v.

COMPLAINT
(Jury Trial Demanded)

Allan Lindsey Zack,

Defendant.

Plaintiff Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., by and through her undersigned counsel, brings this wrongful death and survival claim for negligence, gross negligence, carelessness, and/or recklessness resulting in the death of Nathaniel Hawthorne, Jr. and would respectfully show this Court the following:

PARTIES AND JURISDICTION

1. Plaintiff Barbara Hawthorne is the duly appointed representative of the estate of her son, Nathaniel Hawthorne, Jr. She is a resident of Greenville County and brings this action on behalf of the estate pursuant to South Carolina Code § 15-5-90, and on behalf of statutory beneficiaries pursuant to South Carolina Code §§ 15-51-10, et seq.

2. Decedent Nathaniel Hawthorne, Jr. was a resident of Greenville, South Carolina. At the time of his death, Mr. Hawthorne was just 49 years old.

3. Defendant Allan Lindsey Zack is believed to be a citizen of South Carolina and resident of Greenville County.

4. The Court has jurisdiction over the parties and the subject matter herein pursuant to Article V, Section 11 of the South Carolina Constitution.

5. Venue is proper in Greenville County pursuant to South Carolina Code § 15-7-30(C) as the most substantial part of the alleged acts or omissions giving rise to this cause of action occurred in Greenville County, South Carolina.

FACTUAL ALLEGATIONS

6. On December 2, 2020, Mr. Hawthorne was driving his commercial vehicle on Pleasantburg Drive in Greenville, South Carolina.

7. At approximately 12:10 p.m., Mr. Hawthorne was pulled over by the State Transport Police, stopped his vehicle in the median, and stepped out to speak to the officer while securing the equipment on his commercial vehicle.

8. While Mr. Hawthorne was standing in the median speaking to the officer, Defendant was driving his own vehicle north on Pleasantburg Drive.

9. As Defendant approached the Mr. Hawthorne and the officer, he suddenly veered into the median, striking the rear end of the State Transport Police vehicle.

10. As a result of the collision, the State Transport Officer was temporarily trapped in his vehicle before being rescued and taken to the hospital.

11. Meanwhile, Mr. Hawthorne was hit by one of the vehicles, which hurled him into oncoming traffic where he was struck by another vehicle.

12. Mr. Hawthorne died from blunt force trauma as a result of the collision.

13. Upon information and belief, Defendant did not apply his brakes but struck the officer's vehicle at full speed.

14. Following the collision, Defendant exited his vehicle and fled the scene on foot before he was later arrested and taken to the hospital.

15. Defendant was charged with felony driving under the influence resulting in death;

felony driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; and driving on wrong side of road, improper lane, or unsafely shifting lanes.

16. Mr. Hawthorne was at all times conducting himself in a lawful and prudent manner in responding to a routine traffic stop.

FIRST CAUSE OF ACTION
(Wrongful Death – Negligence/Negligence *per se*/Gross Negligence/Recklessness)

17. Plaintiff incorporates each of the foregoing paragraphs as if set forth verbatim.

18. Drivers of motor vehicles on public roads owe a duty to exercise ordinary care at all times to avoid placing pedestrians and other motorists in danger and to use like care to avoid collisions.

19. Defendant breached his duty of care and was negligent, negligent *per se*, grossly negligent, and/or reckless in one or more of the following ways:

- a. In failing to maintain his lane by entering the median where Mr. Hawthorne and the officer were parked;
- b. In crashing full speed into a parked vehicle while failing to maintain his lane;
- c. Failing to maintain a proper lookout;
- d. Failing to stop or otherwise avoid the officer's vehicle, which, at all relevant times, was lawfully stopped;
- e. Driving while under the influence of alcohol or other drugs; and
- f. In such other particulars as may be ascertained through discovery.

20. Defendant's conduct was negligent *per se* because his conduct violated South Carolina Code §§ 56-5-1210, 56-5-1220, 56-5-1230, 56-5-1260, 56-5-1920, 56-5-2930, and 56-5-3230.

21. Defendant's conduct was grossly negligent because he failed to take even slight care to operate his vehicle in a safe and lawful manner by paying attention to his surroundings and remaining in his lane while driving at full speed on a public roadway.

22. Defendant's conduct was reckless in that he was conscious of his failure to exercise due care and he knew, or should have known, that his failure to exercise due care placed others, like Mr. Hawthorne, in mortal peril.

23. Mr. Hawthorne Hawthorne's wrongful death was the direct and proximate result of Defendant's negligence, negligence *per se*, gross negligence, and recklessness.

24. As a result of the above-described acts and omissions of the Defendant, Plaintiff and Mr. Hawthorne's other statutory beneficiaries have suffered and continue to suffer grief, shock, sorrow, wounded feelings, loss of companionship, emotional distress, pecuniary loss in funeral expenses, and loss of the deceased's financial support.

25. Plaintiff, on behalf of Mr. Hawthorne's statutory beneficiaries, is entitled to recover all damages, present and prospective, suffered as a result of Defendant's conduct, including an award of punitive damages sufficient to punish Defendant for the wrongfulness of his actions.

SECOND CAUSE OF ACTION
(Survival – Negligence/Negligence *per se*/Gross Negligence/Recklessness)

26. Plaintiff incorporates each of the foregoing paragraphs as if set forth verbatim.

27. As a result of the above-described acts and omissions of the Defendant, Mr. Hawthorne was severely injured and died.

28. Between the time Mr. Hawthorne saw Defendant's vehicle approaching and the time of his death, Mr. Hawthorne suffered extreme conscious pain and suffering, mental anguish, emotional distress, and shock from the impending collision and from the collision.

29. Plaintiff, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., is

entitled to judgment against Defendant, in an amount sufficient to compensate the estate for damages suffered during Mr. Hawthorne's survival.

30. By reason of the recklessness of Defendant as set forth above, Plaintiff is also entitled to an award of punitive damages.

JURY TRIAL DEMANDED

Plaintiff respectfully demands a trial by jury on all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant in this matter in a sum sufficient to adequately compensate the estate and the statutory beneficiaries for damages suffered, for punitive damages sufficient to impress upon Defendant the seriousness of his conduct, for attorneys' fees and costs incurred in this action, and for such other and further relief as the Court may deem just and proper.

[signature page follows]

Respectfully submitted,

s/Richard A. Harpootlian

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April 15, 2021
Columbia, South Carolina.

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

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

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

EXHIBIT B

(Dashboard Camera Footage, SCDPS_000025)

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

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

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

PLACECARD HOLDER

(Traffic stop badge cam from South Carolina
State Transport Corporal J.D. Hand, December
2, 2020)