

# The Supreme Court of South Carolina

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March 26, 2012

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Re SC Farm Bureau v Kennedy, Henry

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

|                     |            |
|---------------------|------------|
| Petitioner          | 10 minutes |
| Respondent          | 10 minutes |
| Petitioner in Reply | 5 minutes  |

This case is scheduled for hearing on Tuesday, April 3, 2012 at 10:00 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M. Hopkins  
Administrative Assistant

DES/dmh

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

South Carolina Farm Bureau Mutual Insurance  
Company, Appellant,

v

Henry Kennedy, Respondent

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Appeal From Laurens County  
J Mark Hayes, II, Circuit Court Judge

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Opinion No 4738  
Heard May 18, 2010 – Filed September 15, 2010

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**REVERSED**

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Karl S Brehmer and L Darby Plexico, III, of  
Columbia, for Appellant

Eric H Philpot, of Greenville, for Respondent

**SHORT, J** South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals from the trial court's order finding Henry Kennedy was entitled to underinsured motorist (UIM) coverage, arguing the court erred in finding Kennedy was occupying the manure truck when he was hit by the pickup truck because he was not "upon" the insured vehicle at the time of the accident We reverse

**FACTS**

On October 23, 2002 Kennedy was hurt in a pedestrian-vehicle accident <sup>[1]</sup> Kennedy was employed by Irons Poultry Farms, Inc (Irons Poultry), and at his employer's direction, Kennedy drove the company's manure truck to a restaurant to tell the owner he could pick up some chicken feed at his employer's farm After delivering the message, Kennedy paused in the restaurant parking lot to talk to his half-brother, Teddy Robinson, who worked at the restaurant While Kennedy was talking to Robinson, an accident occurred on the highway adjacent to the parking lot, and one of the vehicles careened into the parking lot, striking Kennedy and Robinson who were standing behind the manure truck The vehicle that struck Kennedy was a pickup truck driven by George Counts Kennedy sustained injuries with medical costs and lost wages totaling more than \$64,000 however, he settled with Counts' insurance company for \$50,000 in exchange for a covenant not to execute Kennedy then made a demand for the full amount of UIM coverage available under Irons Poultry's policy with Farm Bureau The policy provided UIM coverage in the amount of \$50,000 per individual, and \$100,000 per occurrence Farm Bureau denied Kennedy coverage, claiming Kennedy was not entitled to UIM coverage under the policy because he was not occupying Irons Poultry's manure truck at the time of the accident as required by the

policy to qualify for UIM coverage. Farm Bureau's policy defined "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it."

On April 21, 2004, Farm Bureau filed a declaratory judgment action to determine if Kennedy was entitled to UIM coverage under Farm Bureau's commercial auto policy issued to Irons Poultry. Kennedy filed a motion for summary judgment, asserting he was entitled to coverage under the policy because the evidence conclusively proved he was pinned between the manure truck and Counts' truck, thus establishing he was "upon" the truck. The case was set for a non-jury trial on May 11, 2005. Before trial, Kennedy requested Judge Saunders hear his motion for summary judgment. Judge Saunders granted the motion in an order dated June 16, 2005.<sup>[2]</sup> Farm Bureau filed a motion for reconsideration, which was denied. Farm Bureau then filed an appeal with this court. After oral arguments on the case, this court found a genuine issue of material fact existed as to whether Kennedy was pinned or knocked against the manure truck. Therefore, in an unpublished opinion, this court reversed the circuit court's decision granting summary judgment to Kennedy, and remanded the case to the circuit court for a hearing on the merits.<sup>[3]</sup> Kennedy filed a Petition for Rehearing with this court, which was denied.

Upon remand from this court, the non-jury trial was conducted on July 15 and 17, 2008.<sup>[4]</sup> Several months later, Judge Hayes filed his order finding Kennedy was entitled to UIM coverage because he was momentarily pinned against the manure truck during the accident; therefore, he was "upon" the insured vehicle and "occupying" it according to the policy.<sup>[5]</sup> This appeal followed.

### STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable, therefore, the standard of review is determined by the nature of the underlying issue. Hardy v. Aiken, 369 S.C. 160, 164, 631 S.E.2d 539, 541 (2006). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings." Id.

### LAW/ANALYSIS

Farm Bureau argues the trial court erred in finding Kennedy was occupying the manure truck when he was hit by the pickup truck because he was not upon the manure truck at the time of the accident. We agree.

The general rules of contract construction apply to insurance policies. MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999). "[T]he law is clear that in construing an insurance contract, all of its provisions must be considered together." Id. "Therefore, the court must consider the entire contract between the parties to determine the meaning of its provisions, and that construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so." Id. "This court must enforce, not write, contracts of insurance and we must give policy language its plain, ordinary, and popular meaning." Id. at 548-49, 520 S.E.2d at 823. "An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." Id. "[A]mbiguous

or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer " Id "However, if the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties " Id

Farm Bureau's policy defined "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it " In this case, Kennedy was not getting in or out of the manure truck at the time of the accident He was standing near the truck when he was hit Kennedy argues the pickup truck hit him and briefly pinned him against the manure truck The issue now before us is whether the impact of the pickup truck pushing Kennedy into the manure truck was enough for Kennedy to have been "upon" the manure truck so as to fall under the policy Two South Carolina cases have dealt with similar issues, but neither is the exact issue presented in this case

In McAbee v Nationwide Mutual Insurance Co., 249 S C 96, 98-99, 152 S E 2d 731, 732 (1967), our supreme court was presented with the sole question of whether the insured, while standing on the ground with his back against a parked truck in an effort to keep a tractor from rolling against him, was "upon" the truck within the meaning of the policy [6] The court stated it did not think the meaning of the word "upon" is restricted to "on top of," such as a person resting the weight of his or her body upon the vehicle or being supported by the vehicle Id at 100, 152 S E 2d at 732 The court noted that according to Webster's Third New International Dictionary, "[o]ne of the common and ordinary meanings of the word 'upon' is that of 'contact with' " Id see S C Prop & Cas Guar Ass'n v Yensen, 345 S C 512, 518 n 2, 548 S E 2d 880, 883 n 2 (Ct App 2001) (stating that McAbee discussed that the term "upon" was synonymous with "contact with") The court stated that because the policy contained no restrictions as to how or in what manner the insured was to be upon the vehicle, the court thought "it reasonable to conclude that the parties contemplated a construction of the word that would include actual physical contact with the vehicle the insured was using " Id at 100, 152 S E 2d at 732-33 Therefore, the court held the insured was in actual physical contact with the vehicle and was "upon" it within the meaning of the policy provision when he placed his back against the vehicle in an attempt to protect himself from the rolling tractor Id at 100, 152 S E 2d at 733

This case is distinguishable from McAbee because in McAbee, the insured had his back to the truck and was pushing against it when he was crushed to death Therefore, the insured was physically touching the truck when he was killed Here, Kennedy was near the manure truck when he was hit by the other vehicle and asserts he was pushed into the manure truck by the pickup truck Therefore, Kennedy was not physically touching the truck when he was first hit by the pickup truck

In South Carolina Property and Casualty Guaranty Ass'n v Yensen, 345 S C 512, 518 548 S E 2d 880, 883 (Ct App 2001), this court held the owner of a disabled car, Yensen, was not "occupying" a tow truck when a car struck him as he stood alongside his disabled car The court found Yensen was not an "insured" entitled to UIM benefits under the tow truck owner's policy, even though he intended to occupy the tow truck for a ride, because at the time of the accident he was not in, upon, getting in, on, out or off the truck, and no causal connection existed between the truck and the injuries Id at 518-20, 548 S E 2d at 883-84 The tow truck's policy defined "insured" as "anyone else 'occupying' a covered auto " Id at 517, 548 S E 2d at 883 According to the policy, "occupying" was defined as "in, upon, getting in, on, out or off " Id Therefore, this court determined Yensen was not occupying the tow truck as the policy defined that term Id at 518, 548 S E 2d at 883 The court found

that under the plain meaning of the words, Yensen was not "in, upon, getting in, on, out or off" the tow truck at the time of the accident Id. at 518-19, 548 S E 2d at 883. While the court noted there was some testimony Yensen intended to leave the scene in the tow truck, he was not "in or on" or in the process of getting into the truck at the time of the accident Id.

Yensen is also distinguishable from this case because in Yensen the court noted Yensen may or may not have intended to get into the tow truck, which was the insured vehicle from which he was seeking coverage. In this case, Kennedy had driven the manure truck to the restaurant and was intending to leave the restaurant in the manure truck, therefore, there was no question of his intent to depart in the insured vehicle. However, like Yensen, Kennedy was not "in, upon, getting in, on, out or off" the manure truck at the time of the accident. Kennedy had departed the truck, gone inside the restaurant, and then returned to the parking lot to talk to Robinson near the vehicle. Although there was testimony Kennedy was headed back to the manure truck when he was hit, he was not "getting in" the truck when he was struck by Counts' pickup truck.

In Yensen, this court noted that in Whitmire v. Nationwide Mutual Insurance Co., 254 S C 184, 191-92, 174 S E 2d 391, 394-95 (1970),<sup>[7]</sup> our supreme court "held that where a passenger was struck while within two or three feet of the car he had immediately 'alighted from,' that passenger may collect uninsured motorist coverage from the insurer of the car he had been riding in." Yensen, 345 S C at 519, 548 S E 2d at 883-84. Yensen argued Whitmire was controlling because Yensen intended to occupy the tow truck and, thus, he should have been able to collect insurance from the tow truck's insurance provider. Id. This court found Whitmire was distinguishable because there, the plaintiff had unquestionably been occupying the car, whereas in Yensen, at most, Yensen's intent to occupy the tow truck was expressed after the accident and during litigation. Id. at 519, 548 S E 2d at 884. This court stated it was reluctant to extend Whitmire to the facts in Yensen because Yensen was not "still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions." Id. (quoting Whitmire, 254 S C at 191, 174 S E 2d at 394). In Whitmire, the court noted "[t]he words 'in' and 'upon' encompass situations where a person has some physical contact with the vehicle at the time of injury." 254 S C at 191, 174 S E 2d at 394.

Here, if Kennedy had been hit soon after he had alighted from the manure truck, under Whitmire, he would have been deemed to have been "occupying" the truck, however Kennedy had gone inside the restaurant, returned to the parking lot, and was standing near the truck talking when the accident occurred. Therefore, he was not "occupying" the truck as a result of having recently alighted from the truck because of the intervening act of going into the restaurant.

While McAbee and Yensen are helpful, they are not dispositive of the issue in this case. Therefore, we look to other jurisdictions for guidance on this issue. Many states have been faced with a similar issue and some have adopted tests to determine whether a person is "occupying" a vehicle as to have coverage under an insurance policy. In Utica Mutual Insurance Co. v. Contrisciane, 473 A 2d 1005, 1009 (Pa. 1984), the Pennsylvania Supreme Court established a four-part test to determine whether a person engaged in the lawful use of an insured vehicle will be considered to be "occupying"<sup>[8]</sup> that vehicle within the meaning of the policy.

- (1) there is a causal relation or connection between the injury and the use of the insured vehicle,
- (2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it,
- (3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time, and
- (4) the person must also be engaged in a transaction essential to the use of the vehicle at the time

See also Loyd v. State Auto. Prop. & Cas. Co., 265 S.W.3d 901, 905 (Mo. Ct. App. W.D. 2008) (stating the four-part test "does express reasonable and sensible considerations to determine whether a person is occupying a vehicle," but declining to adopt the test), Cuevas v. State Farm Mut. Auto. Ins. Co., 130 N.M. 539, 541 (N.M. Ct. App. 2001) (citing the Utica test, and noting it has been adopted in the majority of jurisdictions and "is broader and is concerned with whether 'the person claiming benefits was performing an act (or acts) which is (are) normally associated with the immediate 'use' of the [vehicle]'" (quoting Utica, 473 A.2d at 1009)), Downing v. Harleysville Ins. Co., 602 A.2d 871, 874 (Pa. 1992) (applying the Utica test), General Accident Ins. Co. of Am. v. Olivier, 574 A.2d 1240, 1241 (R.I. 1990) (finding the Utica test persuasive), Roden v. Gen. Cas. Co. of Wisc., 671 N.W.2d 622, 627-28 (S.D. 2003) (noting a majority of the jurisdictions have adopted the four-part test established in Utica and finding "the four-part test set forth above should be utilized in this jurisdiction when determining whether or not an individual is 'occupying' the insured vehicle under the policy definitions")

In Moherrek v. Tucker, 230 N.W.2d 148, 151-52 (Wis. 1975), the Supreme Court of Wisconsin adopted a different test to determine whether an injured party was "occupying" the vehicle [9]. The test considered whether the party was vehicle-oriented or highway-oriented at the time of the injury. Id., Kreuser by Kreuser v. Heritage Mut. Ins. Co., 461 N.W.2d 806, 808 (Wis. Ct. App. 1990) ("In Moherrek, the supreme court established a test to determine whether or not an injured party was 'occupying' the vehicle. The test considers whether the party was vehicle-oriented or highway-oriented at the time of the injury.") "[A] person has not ceased 'occupying' a vehicle until he has severed his connection with it – i.e., when he is on his own without any reference to it. If he is still vehicle-oriented, as opposed to highway-oriented, he continues to 'occupy' the vehicle." Moherrek, 230 N.W.2d at 151 (quoting Allstate Ins. Co. v. Flaumenbaum, 308 N.Y.S.2d 447, 462 (N.Y. Sup. Ct. 1970)). In Kreuser, the court of appeals noted the "vehicle-orientation" test considers the nature of the act engaged in at the time of the injury and the intent of the person injured, and added a third consideration: whether the injured person was within the reasonable geographical perimeter of the vehicle. 461 N.W.2d at 808.

In Wickham v. Equity Fire and Casualty Co., 889 P.2d 1258, 1261 (Okla. Ct. App. 1994), the Oklahoma Court of Appeals discussed the Kreuser and Utica tests and declined to adopt a bright-line test. Instead, the court held that "the determination of whether the policy definition of 'occupying' is satisfied should be left to a case-by-case analysis, depending on the circumstances of the accident, the use of the vehicle, the relevant terms of the coverage at issue, and any underlying public policy considerations." Id. Therefore, the court found a

man who was struck by another car while fixing the tire on a car was "occupying" the vehicle [10] Id

Similarly, in United Farm Bureau Mutual Insurance Co v Pierce, 283 N E 2d 788, 791 (Ind Ct App 1972), the Indiana Court of Appeals determined that Pierce was "upon" his vehicle when he cut his hand on the fender of his car because he was pushing on the front fender in an attempt to push it out of the snow [11] The court noted "[t]he majority of 'in or upon' cases appear to rely primarily upon physical support " Id at 790 Almost ten years later, in Michigan Mutual Insurance Co v Combs, 446 N E 2d 1001, 1007 (Ind Ct App 1983), the court of appeals held the claimant, who was working on the insured vehicle's engine and resting his knees on the bumper, was "upon" the insured vehicle when he was hit by another vehicle [12] The court noted the application of the "physical contact" rule relied upon in Pierce could unduly restrict coverage in some factual settings and serve to expand coverage beyond the contemplation of the contracting parties in other settings Id at 1005 The court also noted that in Robson v Lightning Rod Mutual Insurance Co, 393 N E 2d 1053, 1055 (Ohio Ct App 1978), the Ohio Court of Appeals held in cases in which a gray area existed concerning whether a person was "in or upon, entering into or alighting from" an insured vehicle, the determination of whether the vehicle was "occupied" should be based on an analysis of the relationship between the vehicle and the claimant within a reasonable geographic perimeter The Robson court also rejected the physical contact rule Id However, in Combs, the court found that both the physical contact rule and the Robson claimant-vehicle relationship analysis supported coverage for the claimant because he was in physical contact with the car and his actions evidenced a relationship with the vehicle and its operation Combs, 446 N E 2d at 1007

Other courts have declined to find coverage when, as in this case, the injured person was not touching the insured vehicle at the time of the accident In Rednour v Hastings Mutual Insurance Co, 661 N W 2d 562, 567 (Mich 2003), Rednour argued he was "upon" a car when he was pinned against it after being struck by another car Rednour admitted he was not touching his friend's car and was approximately six inches from the car when the other vehicle struck him Id at 563 The Michigan court noted that "physical contact by itself does not, however, establish that a person is 'upon' a vehicle such that the person is 'occupying' the vehicle " Id at 567 The court held that under the policy's definition of "occupying," Rednour was not occupying the insured automobile when he was injured [13] Id at 568

In State Farm Mutual Automobile Insurance Co v Farmers Insurance Co, 569 S W 2d 384, 384-85 (Mo Ct App 1978), the insured was beside his friend's car, walking towards the car door when another car rear-ended the car At the time of the impact, the insured was completely outside the car and was not touching any part of the car, however, the force of the impact moved the car and caused it to collide with the insured Id The court stated it found no cases in which the claimant's reason for being outside the automobile was unrelated to the operation of the vehicle itself that held the "upon" requirement was met when the claimant was not in contact with the vehicle immediately prior to the accident Id at 385-86 Therefore, the court determined the insured was not "occupying" the vehicle at the time of the accident and was not covered by the insurance policy Id

In Kelleher v American Mutual Insurance Co of Boston, 590 N E 2d 1178, 1180 (Mass App Ct 1992), Kelleher argued he was "occupying" the insured vehicle when he was struck by another car because he was "upon" the vehicle he had just exited The court noted

[I]n determining whether a claimant is "upon" an insured vehicle, courts have invariably required some physical contact with the vehicle, or at a minimum, the performance of an act directly related to the vehicle, such as the changing of a tire. Such a requirement is consistent with the commonly understood definition of "upon", that of "on."

Id. The court then determined

[N]o facts indicate[d] that Kelleher was either "in," "upon," "entering into" or "alighting from" the insured motor vehicle at the time he was struck, instead, the uncontroverted facts demonstrate that the operation of the Larson vehicle had come to an end, Kelleher had completed the act of leaving the vehicle, and he was approximately four feet away from it when the accident occurred.

Id. at 1181. Therefore, the court found "Kelleher had completely severed his relationship with the vehicle" and did not qualify as an insured under the policy. Id. at 1180-81.

In Miller v. Mabe, 947 S.W.2d 151, 154 (Tenn. Ct. App. 1997), the Tennessee court found that, at the time of the accident, Miller was neither getting into the van nor getting out of it, and although he was utilizing the lights from the van, he was not using the van itself at the time of the accident. Therefore, the court determined there was no "causal relation" between Miller's use of the van and his being struck by Mabe's vehicle. Id. Miller was standing in the middle of the road three or four feet from his van, closer than the decedent in another case, but far enough away that he could not be considered "upon" the vehicle. Id. Miller's attention was focused on using the limb to work the cable wire through the tree branches and was not focused on his van, therefore, the activity was not "essential" to the use of the van. Id. Consequently, under the criteria established in Utica, Miller was not "occupying" his work van at the time of his accident, and therefore, was not covered under the uninsured motorist provision of his employer's policy. Id.

In reaching our decision in this case, we need not adopt a bright-line test as adopted by some foreign jurisdictions because we can rely on the South Carolina cases of Yensen and McAbee. Therefore, based on Yensen and McAbee, we conclude the trial court in this case erred in finding Kennedy was "upon" the manure truck when he was hit by the pickup truck and momentarily pinned to the manure truck because he was not "in, upon, getting in, on, out or off" the manure truck at the time of the accident. He had departed the truck, gone inside the restaurant, and returned to the parking lot to talk to his half-brother near the vehicle when he was hit by the pickup truck. As a result, there was no causal connection between Kennedy's use of the manure truck and his being struck by Counts' pickup truck. Hence, Kennedy was not occupying his employer's truck at the time of the accident, and is not entitled to UIM coverage from his employer's policy.

## CONCLUSION

Accordingly, the trial court's order is

**REVERSED**

**WILLIAMS and LOCKEMY, JJ , concur**

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- [1] Most of the facts of this case were stipulated in an agreement entered into by the parties in May 2005
- [2] In his order, Judge Saunders stated, "There was irrefutable testimony by eyewitnesses, [Kennedy], and medical documentation that indicated [Kennedy] was momentarily pinned between the rear of the manure truck and the rear of [Counts'] truck [Farm Bureau] presented no evidence to dispute the fact that [Kennedy] was pinned against the manure truck and therefore did not meet the scintilla of the evidence burden to make this a genuine issue of material fact "
- [3] S C Farm Bureau Mut Ins Co v Kennedy, Op No 2006-UP-423 (S C Ct App filed Dec 19, 2006)
- [4] During the trial, Kennedy's counsel stated, "We have never alleged that there was any collision from the Counts truck with the manure truck [T]here was a collision in the Counts truck to [Kennedy's] leg and momentarily pinned him against the manure truck "
- [5] Judge Hayes made the following findings of fact in his order (1) "The engine to the insured vehicle [Kennedy] was driving was running and a dog was inside" (2) "[Kennedy] prior to the collision, rested his hand on the insured vehicle" and (3) "The vehicle driven by George Counts pushed and momentarily pinned [Kennedy] against the insured vehicle causing injury " Kennedy testified the keys were still in the ignition and his dog was in the truck Kennedy also testified that he was leaning on the truck when he saw the pickup truck coming at him Then, he said he took his hand off the truck and ran from the pickup truck before he was pinned to the manure truck by the pickup truck Robinson stated in his deposition that he and Kennedy "took out running" when they saw Counts' truck headed in their direction Robinson said he was hit first by Counts' truck, so he did not see Kennedy get hit, but he did hear Kennedy hollering in pain and saw him lying next to him on the ground Ronald Long, who witnessed the accident, testified that for a second it appeared Kennedy was pinned between the pickup truck and the manure truck
- [6] The Nationwide policy insured against injury "while in or upon, entering or alighting from" the motor vehicle McAbee, 249 S C at 98, 152 S E 2d at 732
- [7] The policy in Whitmire defined "occupying" as "in or upon or entering into or alighting from" the insured vehicle Whitmire, 254 S C at 188, 174 S E 2d at 393
- [8] The Utica policy provided, "'occupying' means in or upon or entering into or alighting from " Utica, 473 A 2d at 1008
- [9] The policy in Moherrek defined "occupying" as "in or upon, entering into or alighting from" the insured vehicle Moherrek, 230 N W 2d at 149
- [10] The Equity policy defined "occupying" as "in, on, getting in or on, or getting off or out of" the insured vehicle Wickham, 889 P 2d at 1260
- [11] The policy defined "occupying" as being "in or upon, entering into or alighting from" the vehicle Pierce, 283 N E 2d at 789
- [12] According to the policy, "occupying" means "in or upon or entering into or alighting from" the insured vehicle Combs, 446 N E 2d at 1007

[13] The policy defined "occupying" as "in, upon, getting in, on, out or off " Rednour, 661 N W 2d at 564



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OF COUNSEL  
O Eugene Powell Jr  
Rebecca Cagle Patrick

February 21, 2012

The Honorable Daniel E Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Case Tracking No 2010-177906

Dear Mr Shearouse

Thank you for your memorandum dated February 17, 2012, advising that this case will likely be reached during the April 2012 term of Court. I have no conflicts. Eric Philpot of Greenville is one of my co-counsel on this case, and I know Mr Philpot would like to attend the argument and has better availability during the first week of the April term. However we will, of course, be pleased to argue the case on whatever date the Court sets for argument.

Yours Sincerely,



Blake A Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO LLC

RECEIVED

FEB 23 2012

SC SUPREME COURT

BAH/awh

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February 21, 2012

Daniel E. Shearouse  
South Carolina Supreme Court  
Post Office Box 11330  
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RE South Carolina Farm Bureau v. Henry Kennedy  
Case Number 2004-CP-30-375  
Claim Number 836780

Dear Mr. Shearouse:

In response to your memo of February 17, 2012, I do not have any conflicts with the proposed dates for the oral arguments in the above-captioned matter during the month of April. All of the proposed dates are fine with me.

With warmest personal regards, I am,

Sincerely yours,

  
Karl S. Brehmer

KSB/ct

cc Steve Newton (via email)  
Scott Wessinger (via email)

**RECEIVED**

FEB 29 2012

SC SUPREME COURT

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ROBERT C BROWN  
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CHAD E POTEAT  
E DALE LANG JR  
J AUSTIN HOOD  
L DARBY PLEXICO III  
ELY O GROTE

E MAIL

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BOB.BROWN@BROWNBREHMER.COM  
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LDP@BROWNBREHMER.COM  
ELY.GROTE@BROWNBREHMER.COM

February 21 2012

The Honorable Daniel E. Shearouse  
Clerk of The South Carolina Supreme Court  
P O Box 11330  
Columbia SC 29211

RE South Carolina Farm Bureau Mutual Insurance Company, Respondent v Henry  
Kennedy, Petitioner  
Case No 2004-CP-30-375  
Case Tracking No 2010-177906

Dear Mr. Shearouse

I am in receipt of your February 9, 2012 letter advising that this case has been placed on the April 2012 preliminary list of cases. Please be advised that I am available on April 3, 4, 5, 17, and 18 during this term.

If you should have any questions or need any further information, please do not hesitate to give me a call. With warmest personal regards, I am

Very truly yours



L. Darby Plexico III

LDPIII sa

c Eric H. Philpot, Esquire  
Philpot Law Firm, PA  
115 Broadus Avenue  
Greenville, SC 29601

Blake A. Hewitt, Esquire  
John S. Nichols  
Bluestein Nichols Thompson & Delgado, LLC  
P O Box 7965  
Columbia, SC 29202

RECEIVED

FEB 23 2012

S.C. SUPREME COURT



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Karl S. Brehmer Esquire  
L. Darby Plexico Esquire  
From Daniel E. Shearouse  
Date February 17, 2012  
RE April Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the April 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of April 3, 4, 5, 17, and 18. Please notify this office in writing prior to February 24, 2012, as to any scheduling conflicts for the April term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SC Farm Bureau v. Kennedy, Henry



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Eric Holcombe Philpot Esquire  
From Daniel E. Shearouse  
Date February 17, 2012  
RE April Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the April 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of April 3, 4, 5, 17, and 18. Please notify this office in writing prior to February 24, 2012, as to any scheduling conflicts for the April term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SC Farm Bureau v. Kennedy, Henry



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Blake A. Hewitt Esquire  
John S. Nichols Esquire  
From Daniel E. Shearouse  
Date February 17, 2012  
RE April Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the April 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of April 3, 4, 5, 17, and 18. Please notify this office in writing prior to February 24, 2012, as to any scheduling conflicts for the April term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SC Farm Bureau v. Kennedy, Henry



**PHILPOT LAW FIRM, PA**  
ATTORNEYS AT LAW

115 BROADUS AVENUE  
GREENVILLE SOUTH CAROLINA 29601

**RECEIVED**

FEB 17 2012

**S.C. SUPREME COURT**

I HENRY PHILPOT JR.  
IRVIN H PHILPOT III  
ELIZABETH H PHILPOT  
ERIC H PHILPOT

February 15, 2012

TELEPHONE (864) 242 1366  
FACSIMILE (864) 242 1566  
www.philpotlawfirm.com

The Honorable Daniel E Shearouse  
The South Carolina Supreme Court  
Clerk of Court  
P O Box 11330  
Columbia SC 29211

Re SC Farm Bureau v Kennedy, Henry

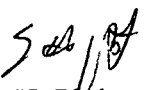
Dear Mr Shearouse

We have and thank you for your letter of February 9, 2012 advising the above case has been placed on the April 2012 preliminary List of Cases Please be advised that Blake Hewitt and I are both available April 3, 4 and 5 I have a case set for a date certain trial in Laurens County Common Pleas the week of April 16 and will not be available the 17<sup>th</sup> and 18<sup>th</sup> Blake Hewitt, however, is available for all of the dates, and if Mr Brehmer's and Mr Plexico's schedules allow only the 17<sup>th</sup> and 18<sup>th</sup> we prefer this case go forward at that time

Thank you for your attention to this matter and we look forward to hearing from you

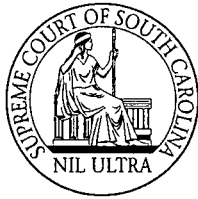
Sincerely,

PHILPOT LAW FIRM, PA

  
Eric H Philpot

EP/mad

cc Blake A Hewitt, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico, Esquire



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

February 9, 2012

Blake A. Hewitt, Esquire  
John S. Nichols, Esquire  
Bluestein, Nichols, Thompson &  
Delgado, LLC  
PO Box 7965  
Columbia, SC 29202

Eric Holcombe Philpot, Esquire  
Philpot Law Firm, PA  
115 Broadus Ave  
Greenville, SC 29601

Karl S. Brehmer, Esquire  
L. Darby Plexico, Esquire  
Brown & Brehmer  
P O Box 7966  
Columbia, SC 29202

Re SC Farm Bureau v. Kennedy, Henry

Dear Counsel,

When the roster for March 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

This case will be placed on the April 2012 Preliminary List of Cases. Court will meet the days of April 3, 4, 5, 17 and 18.

Very truly yours,

*Daniel E. Shearouse*  
CLERK

DES/lda





**PHILPOT LAW FIRM, PA**  
ATTORNEYS AT LAW

115 BROADUS AVENUE  
GREENVILLE SOUTH CAROLINA 29601

I HENRY PHILPOT JR.  
IRVIN H PHILPOT III  
ELIZABETH H PHILPOT  
ERIC H PHILPOT

January 27, 2012

TELEPHONE (864) 242 1366  
FACSIMILE (864) 242 1566  
www.philpotlawfirm.com

The Honorable Daniel E Shearouse  
The South Carolina Supreme Court  
Clerk of Court  
P O Box 11330  
Columbia, SC 29211

Re South Carolina Farm Bureau Insurance Company vs Henry Kennedy

Dear Mr Shearouse

I have received your notice of hearing in the above matter for the March, 2012 term of court. Please be advised that I have a family vacation scheduled the week of March 5<sup>th</sup>, and would greatly appreciate the Court's protection for that week. I am available for March 20<sup>th</sup> and 21<sup>st</sup>.

Thank you for your consideration and understanding and I look forward to hearing from you.

Sincerely,

PHILPOT LAW FIRM, PA

  
Eric H Philpot

EP/mad  
cc Karl S Brehmer, Esquire  
Blake Hewitt, Esquire

**RECEIVED**

JAN 30 2012

**S.C. SUPREME COURT**

# BROWN & BREHMER

Attorneys at Law

1720 MAIN STREET SUITE 201  
POST OFFICE BOX 7966  
COLUMBIA SOUTH CAROLINA 29202  
TELEPHONE (803) 771 6600  
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ROBERT C BROWN  
KARL S BREHMER  
CHAD E POTEAT  
E DALE LANG JR  
J AUSTIN HOOD  
L DARBY PLEXICO III  
ELY O GROTE

OF COUNSEL  
MICHAEL M LUMPKIN

January 26 2012

E MAIL  
LAWFIRM@BROWNNANDBREHMER.COM  
BOB BROWN@BROWNNANDBREHMER.COM  
KARL BREHMER@BROWNNANDBREHMER.COM  
CHAD POTEAT@BROWNNANDBREHMER.COM  
DALE LANG@BROWNNANDBREHMER.COM  
AUSTIN HOOD@BROWNNANDBREHMER.COM  
LDP@BROWNNANDBREHMER.COM  
ELY GROTE@BROWNNANDBREHMER.COM

The Honorable Daniel E Shearouse  
Clerk of The South Carolina Supreme Court  
P O Box 11330  
Columbia SC 29211

RE South Carolina Farm Bureau Mutual Insurance Company, Respondent v Henry  
Kennedy, Petitioner  
Case No 2004-CP-30-375  
Case Tracking No 2010-177906

Dear Mr Shearouse

We are in receipt of your January 24 2012 letter advising that this case will probably be reached for hearing at the March 2012 term of The South Carolina Supreme Court

Karl S Brehmer and I are available for a hearing on this matter on March 6 7 20 and 21 Mr Brehmer is not available on March 8 2012 because of 7 depositions already scheduled on that date in a federal court case We would both like to attend oral argument in this case so we respectfully request that the hearing in this matter not be set for March 8 2012 Thank you very much for your help with this request

If you should have any questions or need any further information please do not hesitate to give me a call With warmest personal regards I am

Very truly yours



L Darby Plexico III

LDPIII sa

c Eric H Philpot Esquire  
Philpot Law Firm PA  
115 Broadus Avenue  
Greenville SC 29601

Blake A Hewitt Esquire  
John S Nichols  
Bluestein Nichols Thompson & Delgado LLC  
P O Box 7965  
Columbia SC 29202

**RECEIVED**

JAN 30 2012

**SC SUPREME COURT**



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt

OF COUNSEL  
O Eugene Powell Jr  
Rebecca Cagle Patrick

January 26 2012

The Honorable Daniel E Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia South Carolina 29211

RECEIVED  
JAN 27 2012  
S.C. SUPREME COURT

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Case Tracking No 2010-177906

Dear Mr Shearouse

Thank you for your memorandum dated January 24, 2012, advising that this case will likely be reached during the March 2012 term of Court. I have no conflicts.

I also received notice from your office indicating that the *Milliken & Co v Morin* case will likely be reached during the March 2012 term. If I could make a request, it would be that these two cases not be scheduled during the same week of argument. That said, I will of course be glad to present argument according to whatever schedule the Court sets.

Yours sincerely,

Blake A Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

BAH/awh

cc Eric H Philpot, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico III, Esquire



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

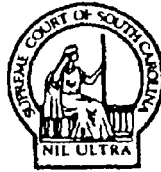
P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Karl S. Brehmer, Esquire  
L. Darby Plexico, Esquire  
From Daniel E. Shearouse  
Date January 24, 2012  
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20, and 21. Please notify this office in writing prior to January 31, 2012, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

SC Farm Bureau v. Kennedy, Henry



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Eric Holcombe Philpot Esquire  
From Daniel E. Shearouse  
Date January 24, 2012  
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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SC Farm Bureau v. Kennedy, Henry



## The South Carolina Supreme Court

DANIEL E. SHEAROUSE  
CLERK OF COURT  
BRENDA F. SHEALY  
DEPUTY CLERK

P.O. BOX 11330  
COLUMBIA, S.C. 29211  
PHONE NO. 734 1080

To Blake A. Hewitt Esquire  
John S. Nichols Esquire  
From Daniel E. Shearouse  
Date January 24, 2012  
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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SC Farm Bureau v. Kennedy, Henry



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt

December 29 2011

OF COUNSEL

O Eugene Powell Jr

RECEIVED

DEC 29 2011

S C Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Case Tracking No 2010-177906

Dear Mr Shearouse

Please find enclosed for filing the original unbound and sixteen (16) bound copies of the *Reply Brief* in regards to this case I have also enclosed a proof of service of this document on opposing counsel of record Please return the additional filed copy to me via our courier

Thank you for your assistance with this matter If you need any additional information please do not hesitate to contact me

Sincerely

Ashleigh W. Hair  
Paralegal to Blake A Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO LLC

/awh

Enclosures

cc Eric H Philpot, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico III Esquire

# The Supreme Court of South Carolina

South Carolina Farm Bureau  
Mutual Insurance Company,                      Respondent,

v

Henry Kennedy,                                      Petitioner

The Honorable J Mark Hayes, II  
Laurens County  
Trial Court Case No    2004-CP-30-00375

---

## ORDER

---

For good cause having been shown, the time for serving and filing the  
Reply Brief of Petitioner in the above entitled matter is hereby extended until  
December 29, 2011

IT IS SO ORDERED

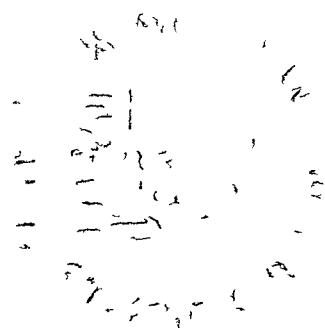
JEAN H TOAL, CHIEF JUSTICE

BY Dwenda I Shealy  
Chief Deputy Clerk

Columbia, South Carolina

December 6, 2011

cc    Blake A Hewitt, Esquire  
      John S Nichols, Esquire  
      Eric Holcombe Philpot, Esquire  
      Karl S Brehmer, Esquire  
      L Darby Plexico, Esquire



**RECEIVED**

DEC 5 2011

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

**S C Supreme Court**

APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

---

Opinion No 4378 (S C Ct App filed Sept 15, 2010)

---

South Carolina Farm Bureau  
Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

---

**PETITIONER'S MOTION FOR AN EXTENSION OF TIME**

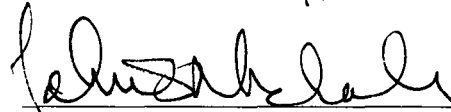
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Pursuant to Rule 240, SCACR, Petitioner requests a three week extension of the deadline for filing and serving his reply brief. The current deadline is December 8, 2011. The new deadline would be Thursday, December 29, 2011. This is Petitioner's first extension request for this deadline.

/Signature page attached

December 5, 2010

Respectfully submitted,



Blake A. Hewitt

John S. Nichols

BLUESTEIN, NICHOLS,

THOMPSON & DELGADO

P O Box 7965

Columbia, South Carolina 29202

(803) 779-7599

(803) 779-8995 (facsimile)

bhewitt@bntdlaw.com

jsnichols@bntdlaw.com

Eric H. Philpot

PHILPOT LAW FIRM

115 Broadus Avenue

Greenville, South Carolina 29601

(864) 242-1366

(864) 242-1566 (facsimile)

eric@philpotlawfirm.com

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

DEC 5 2011

APPEAL FROM LAURENS COUNTY

**S C Supreme Court**

J Mark Hayes, Circuit Court Judge

Opinion No 4378 (S C Ct App filed Sept 15, 2010)

South Carolina Farm Bureau  
Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

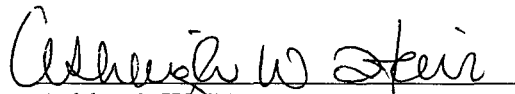
Petitioner

**PROOF OF SERVICE**

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Motion for Extension* by depositing a copy in the United States Mail, postage prepaid to the following address

Karl S Brehmer, Esquire  
L Darby Plexico, III, Esquire  
Brown & Brehmer  
P O Box 7966  
Columbia, SC 29202

December 5, 2011

  
Ashleigh W Hair  
Paralegal  
BLUESTEIN, NICHOLS, THOMPSON  
& DELGADO, LLC



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson

December 5, 2011

RECEIVED

DEC 5 2011

S.C. Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v. Henry Kennedy  
Case Tracking No. 2010-177906

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of *Petitioner's Motion for an Extension of Time* in regards to the above matter. I have also enclosed a proof of service of this document on counsel for the Respondent and a check in the amount of \$25.00 for filing this motion. Please return the additional filed copy to me via our courier.

If you need any additional information please let me know. Thank you in advance for your attention to this matter.

Sincerely,

Ashleigh W. Hair

Paralegal to Blake A. Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

/awh

Enclosures

cc Eric H. Philpot, Esquire  
Karl S. Brehmer, Esquire  
L. Darby Plexico III, Esquire

Check #16702  
\$25.00

# BROWN & BREHMER

Attorneys at Law

1720 MAIN STREET SUITE 201  
POST OFFICE BOX 7966  
COLUMBIA SOUTH CAROLINA 29202  
TELEPHONE (803) 771 6600  
FACSIMILE (803) 252-1620

ROBERT C BROWN  
KARL S BREHMER  
CHAD E POTEAT  
E DALE LANG JR  
J AUSTIN HOOD  
L DARBY PLEXICO III  
ELY O GROTE

OF COUNSEL  
MICHAEL M LUMPKIN

E MAIL

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KARL BREHMER@BROWNNANDBREHMER.COM  
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DALE LANG@BROWNNANDBREHMER.COM  
AUSTIN HOOD@BROWNNANDBREHMER.COM  
LDP@BROWNNANDBREHMER.COM  
ELY GROTE@BROWNNANDBREHMER.COM

November 28, 2011

Eric H Philpot  
PHILPOT LAW FIRM, PA  
115 Broadus Avenue  
Greenville, South Carolina 29601

Blake A Hewitt  
John S Nichols  
BLUESTEIN NICHOLS THOMPSON &  
DELGADO, LLC  
Post Office Box 7965  
Columbia, South Carolina 29202

RE South Carolina Farm Bureau Mutual Insurance Company, Respondent v Henry  
Kennedy, Petitioner  
Case No 2004-CP-30-375  
Case Tracking No 2010-177906

Dear Eric and Blake

Enclosed please find the Brief of Respondent in connection with the above-referenced matter, which is hereby served upon you

By copy of this letter to the Supreme Court, I am filing the original, unbound Brief, fifteen (15) bound Briefs, and the original Proof of Service with the Court

Should you have any questions or need any further information, please do not hesitate to contact me

With warmest personal regards, I am

Sincerely,



Karl S Brehmer  
L Darby Plexico, III  
BROWN & BREHMER  
Post Office Box 7966  
Columbia, South Carolina 29201  
(803) 771-6600  
Attorneys for Respondent

**RECEIVED**

NOV 28 2011

**SC Supreme Court**

LDP

Enclosures

Cc Clerk, South Carolina Supreme Court **VIA HAND DELIVERY**



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson

October 28, 2011

RECEIVED

OCT 28 2011

SC Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v. Henry Kennedy  
Case Tracking No. 2010-177906

Dear Mr. Shearouse:

Please find enclosed for filing the original unbound and fifteen (15) bound copies of the *Brief of Petitioner* along with thirteen (13) additional bound copies of the *Appendix* in regards to this case. I have also enclosed a proof of service of the brief on opposing counsel of record. Please return the additional copy of the brief to me via our courier.

Thank you for your assistance with this matter. If you need any additional information, please do not hesitate to contact me.

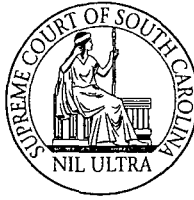
Sincerely,

Ashleigh W. Hair  
Paralegal to Blake A. Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

/awh

Enclosures

cc Eric H. Philpot, Esquire  
Karl S. Brehmer, Esquire  
L. Darby Plexico, III, Esquire



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

October 5, 2011

Blake A. Hewitt, Esquire  
John S. Nichols, Esquire  
Bluestein, Nichols, Thompson &  
Delgado, LLC  
PO Box 7965  
Columbia, SC 29202

Re SC Farm Bureau v. Kennedy, Henry

Dear Counsel,

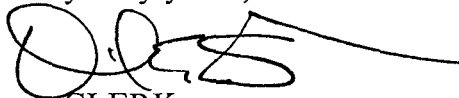
Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before November 4, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/lda

cc Eric Holcombe Philpot, Esquire  
Karl S. Brehmer, Esquire  
L. Darby Plexico, Esquire  
The Honorable Tanya Gee

# The Supreme Court of South Carolina

South Carolina Farm Bureau  
Mutual Insurance Company,                      Respondent,

v

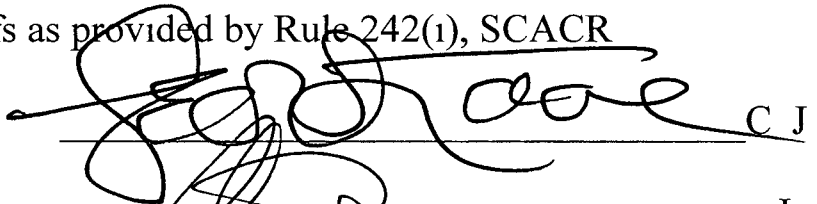
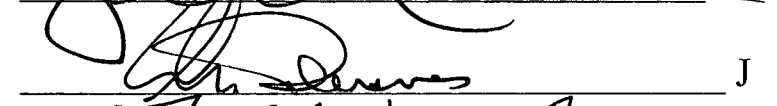
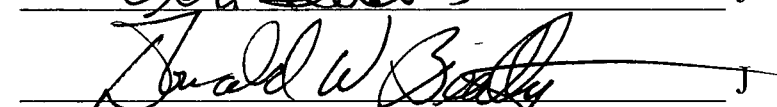
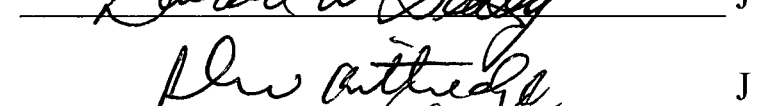
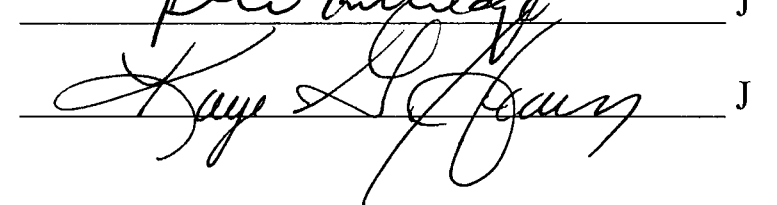
Henry Kennedy,                      Petitioner

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## ORDER

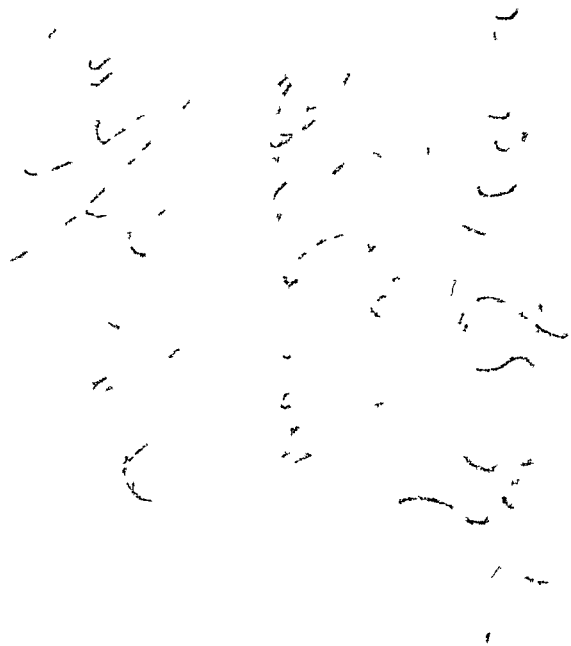
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We grant the petition for a writ of certiorari to review the Court of Appeals' decision in S C Farm Bureau Mut Ins Co v Kennedy, 390 S C 125, 700 S E 2d 258 (Ct App 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(1), SCACR.

 C J  
 J  
 J  
 J  
 J

Columbia, South Carolina

October 15, 2011



THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

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Opinion No 4378 (S C Ct App filed Sept 15, 2010)

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South Carolina Farm Bureau  
Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

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**PETITION FOR A WRIT OF CERTIORARI**

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**RECEIVED**

DEC 14 2010

**S C Supreme Court**

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## **CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 28, 2010 See (App p 1)

## **QUESTION PRESENTED**

Did the Court of Appeals err when it held that a permissive user of a vehicle who was preparing to enter the vehicle but was accidentally pinned between his vehicle and another was not “upon” his vehicle, and was therefore not “occupying” the vehicle under the vehicle’s insurance policy?

## **STATEMENT OF THE CASE**

This case concerns underinsured motorist coverage The vehicle with the insurance policy at issue is a manure truck owned by Petitioner Henry Kennedy’s employer and insured by South Carolina Farm Bureau Mutual Insurance Company, the Respondent

Mr Kennedy was injured in an unusual automobile accident He was struck by another automobile as he was standing beside the manure truck in a parking lot outside a restaurant See (App pp 111-12) The automobile that struck Mr Kennedy actually pinned him between that automobile and the manure truck *Id* Mr Kennedy had driven the manure truck to the restaurant *Id* At the time of the accident, the manure truck was running and Mr Kennedy was preparing to enter the truck and return to work *Id*

The policy’s underinsured motorist provision instructs that underinsured motorist coverage is available to any person “occupying” the covered vehicle (App p 184) This case revolves around the policy’s definition of “occupying ” The policy defines “occupying” as

“having actual physical contact with an auto while in, upon, entering, or alighting from it ”  
(App p 180)

The underlying accident occurred in October of 2002, and Farm Bureau brought the case as a declaratory judgment in April of 2004 (App p 117)

The trial court granted summary judgment to Mr Kennedy in an order issued in June of 2005, (App pp 103-07), but the Court of Appeals reversed based on the existence of a genuine dispute of material fact as to whether Mr Kennedy was ever pinned between the manure truck and the other vehicle involved in the accident See *S C Farm Bureau Mut Ins Co v Kennedy*, Op No 2006-UP-423 (S C Ct App filed Dec 19, 2006)

The trial on remand was conducted in July of 2008, and it was conducted without a jury (App pp 110-11) In an order signed September 2, 2008, and filed the next day, the trial court found that Mr Kennedy was indeed pinned against the manure truck during the accident (App pp 109-116) The trial court found that by being pinned against the manure truck, Mr Kennedy was in physical contact with the manure truck and was “upon” the truck as “upon” is used in the insurance policy’s definition of “occupying ” (App p 115) The trial court accordingly found that Mr Kennedy was entitled to underinsured motorist benefits under the policy (App p 116)

Farm Bureau appealed and argued that Mr Kennedy’s being thrust against the manure truck and pinned there did not amount to Mr Kennedy’s being “upon” the manure truck See (App p 44) (arguing that the policy’s “actual physical contact” requirement “can mean nothing short of a person actually touching the vehicle with his body right as an accident occurs”) Not surprisingly, Mr Kennedy argued the opposite See (App pp 72-73)

In addition to South Carolina authority, both parties cited several cases from other jurisdictions that, according to them, supported their respective positions. See (App pp 55-58) (from Farm Bureau's briefs), (App pp 82-84) (from Mr. Kennedy's brief).

On September 15, 2010, the Court of Appeals reversed the trial court's decision *S C Farm Bureau Mut Ins Co v Kennedy*, Op No 4738 (S C Ct App filed Sept 15, 2010) (Shearouse Adv Sh No 38 at 19) (reproduced in the Appendix, pp 2-15). The Court of Appeals found that the case was distinguishable from the three South Carolina cases that were closest in relevance, see (App pp 7-9), conducted an extensive examination of persuasive authority from other jurisdictions, (App pp 10-14), and at the end, returned to one of the South Carolina cases and concluded that Mr. Kennedy was not "upon" the manure truck when he was hit by the other vehicle and pinned to the manure truck. (App pp 14-15). In the Court of Appeals's view, there was no coverage because at the time of the accident

[Mr. Kennedy] had departed the truck, gone inside the restaurant, and returned to the parking lot to talk to his half-brother near the vehicle when he was hit by the [other automobile]. As a result, there was no causal connection between Kennedy's use of the manure truck and his being struck by [the other vehicle]. Hence, Kennedy was not occupying his employer's truck at the time of the accident."

(App p 15)

## ARGUMENT

A grant of certiorari is appropriate in this case for two reasons. First, the Court of Appeals's opinion conflicts with this Court's decisions in *Whitmire v. Nationwide Mutual Insurance Co.*, 254 S. C. 184, 174 S. E. 2d 391 (1970) and *McAbee v. Nationwide Mut. Ins. Co.*, 249 S. C. 96, 152 S. E. 2d 731 (1967), both of which require a broad construction of how an automobile insurance policy defines what it means to "occupy" a vehicle. Second, the rule of the Court of Appeals's decision is quite unreasonable. There is no reason to limit the definition of "upon" to having actual physical contact with the covered automobile immediately prior to an accident. That rule would provide coverage for a permissive user who is pinned against a vehicle while still leaning up against it, but deny coverage to the same user if he is pinned against the vehicle after apprehending approaching danger and unsuccessfully attempting to flee from it. Such a rule is not justified in law or logic.

**A      This Court's Decision in *McAbee v. Nationwide Mutual Insurance Co.* Provides That a Person Is "Upon" a Vehicle When That Person Is in Physical Contact with the Vehicle They Are Using**

This is not the first time South Carolina courts have been asked to construe this sort of definition in an automobile insurance policy. The insurance policy at issue in *McAbee v. Nationwide Mutual Insurance Co.*, provided coverage for injuries sustained "while in or upon, [or] entering or alighting from" the covered vehicle. 249 S. C. at 97-98, 152 S. E. 2d at 731. Like this case, the injury in *McAbee* was unusual.

The decedent in *McAbee* was driving his employer's truck when he came upon his employer's brother who was trying to start the engine of a tractor. The two men chained the tractor to the truck and towed the tractor to a service station. At the service station, they

parked the vehicles on a downgrade, with the tractor being further up the hill than the truck

This Court's opinion describes the accident that followed

After the tractor had been started, the insured, preparatory to his leaving in the truck, went to the rear of the truck to unloose the chain. At that time the tractor began rolling forward down the slight grade toward the rear of the truck where the insured, stooped with his back turned, was engaged in disconnecting the vehicles. When his attention was attracted to the oncoming tractor by those standing nearby, the insured straightened up, turned, and placed his hands on the tractor with his back against the truck as if trying to stop the tractor and keep it from striking him. He was unable to do so and was crushed to death between the rear of the truck and the front of the tractor

*Id.* at 98-99, 152 S E 2d at 732

The case turned on whether the decedent was "upon" the parked truck when he was standing on the ground with his arms outstretched against the tractor and his back propped against the truck. See *Id.* at 99, 152 S E 2d at 732 ("The sole question is whether the insured, while standing on the ground with his back against the parked truck in an effort to keep the tractor from rolling against him, was [u]pon the truck within the meaning of the policy.") This Court resolved the question by looking to secondary authority (an A L R section), citing that the rule appears to be that the words "in or upon" require a broad and liberal construction in favor of the insured, and observing that "the weight of authority" indicated that "actual physical contact with the insured's automobile is sufficient to establish that the insured was [u]pon the vehicle." *Id.* at 99, 152 S E 2d at 732. The court explained

[T]he word 'upon' is included in a clause which refers to other positions in relation to the vehicle, that is, 'in,' 'entering' or 'alighting from.' [Other cases] correctly reason that the terms are not synonymous, and the use of the word 'upon' was clearly intended to cover a class of persons and situations not necessarily included in the other terms used. While no attempt is here made to prescribe the exact limits of coverage provided in all cases by the present policy provision, we do not think that the meaning of the word 'upon'

is restricted to ‘on top of,’ as when the weight of a person’s body is resting upon or supported by the vehicle. As stated in *Wolf v American Casualty Co of Reading Pa*, it must connote some physical relationship between himself and the car that enlarged the area defined by the words ‘entering or alighting’ and the word ‘in’.

*Id* at 99-100, 152 S E 2d at 732-33 (internal citation and some quotation marks omitted)

Noting that a dictionary defined “upon” as having “contact with,” the court found that the parties contemplated a construction of “upon” that would include “actual physical contact with the vehicle the insured was using.” *Id* at 100, 152 S E 2d at 732-33. Because the decedent was in actual physical contact with the truck when his back was against it, the court held that he was “upon” the truck.

**B The Court of Appeals’s Decision Did Not Faithfully Apply *McAbee*, Because it Distinguished the Case Despite the Fact That Mr Kennedy Was in Physical Contact with the Vehicle He Was Using**

The Court of Appeals distinguished Mr Kennedy’s case from *McAbee* by observing that where the decedent in *McAbee* had his back to the truck and was pushing against it when he was crushed to death, Mr Kennedy was merely “near” the manure truck when he was hit by the other vehicle and pushed into the manure truck. (App p 7). This is not a meaningful distinction. In fact, it is no distinction at all.

*McAbee* was not sensitive to the exact moment in an accident at which physical contact with the insured vehicle occurs. It said that “upon” means more than being on top of a vehicle, sitting on its roof, or standing on the running boards. *Id* at 100, 152 S E 2d at 732. The court said “upon” must mean having “some physical relationship” between the injured person and the automobile that was broader than the area covered by “entering or

alighting” the car and being “in” the vehicle *Id* at 100, 152 S E 2d at 732 This Court said that having “actual physical contact with the vehicle the insured was using” was a reasonable construction of the type of situation the term “upon” was intended to cover *Id* at 100, 152 S E 2d at 733

The circumstances of Mr Kennedy’s accident fall into this same area – the area of contact with the insured vehicle beyond being “in” the manure truck or “entering or alighting” the manure truck Mr Kennedy was “using” the manure truck He had driven it to the restaurant, and at the time of the accident, he was preparing to drive it back to work (App pp 111-12) The trial court found that Mr Kennedy was hit by another automobile and pinned between that vehicle and the manure truck as he stood beside the manure truck and prepared to enter it (App p 112) The Court of Appeals was right to cite *McAbee*, but it did not give a faithful application of *McAbee*’s rule If the precise moment of physical contact was crucial, the *McAbee* court would have been concerned with whether the decedent had first put his hands on the tractor and then been pushed into the truck, or whether he had leaned up against the truck first and put his hands on the tractor second Only in the second scenario would the decedent be “upon” the truck under the Court of Appeals’s rule

The Court of Appeals’s decision relies on a distinguishing of *McAbee* that should not be persuasive This Court should grant certiorari to correct this misconception

**C The Remaining South Carolina Cases Cited by the Court of Appeals Help Make the Point, and the View Set Forth by the Court of Appeals Would Lead to an Arbitrary Rule**

Two South Carolina cases since *McAbee* have tested what it means to be “occupying” a vehicle The first was *Whitmire v Nationwide Mutual Insurance Co* , 254 S C 184, 174

S E 2d 391 (1970) The second was *South Carolina Property & Casualty Guaranty Association v Yensen*, 345 S C 512, 548 S E 2d 880 (Ct App 2001) These cases are instructive here because the Court of Appeals tried to distinguish both in its decision, but in truth, the cases embody the same rule set forth in *McAbee* They also show that the result reached by the Court of Appeals is unreasonable

**1        *Whitmire v Nationwide Mutual Insurance Co*  
             **Applies the Rule of *McAbee* and Supports the Trial  
             Court’s Decision That Mr Kennedy Was “Upon”  
             the Manure Truck When He Was Pinned Against  
             It****

*Whitmire* focused on the part of the “occupying” definition which covered a person “alighting from” the insured vehicle 254 S C at 190, 174 S E 2d at 394 The plaintiff in the case had just stepped out of a parked car and was walking behind the car when “he heard the noise of an approaching vehicle ” *Id* at 190, 174 S E 2d at 394 The opinion instructs that “[h]e realized that a collision between the two vehicles was imminent and started running,” that the oncoming car hit the parked car, and that the plaintiff “was struck by one of the two vehicles when he reached a point about two or three feet west of the rear bumper of [the car he had exited] ” *Id* at 190, 174 S E 2d at 394

Though the case turned on the meaning of “alighting from,” this Court looked at the policy’s entire definition of “occupying ” It said that each of the terms in this definition had a particular meaning, that the terms were to be interpreted broadly, and that if “alighting from” was limited to the physical act of descending from the automobile, the term would be meaningless because the person would still be in physical contact with the vehicle and would be “in” or “upon” it *Id* at 190-91, 174 S E 2d at 394 This Court expressed uncertainty as

to the precise point at which the act of alighting was completed, but instructed that the meaning of the term “must be related to the particular use of the automobile and the hazards to be encountered from such use ” *Id* at 191, 174 S E 2d at 394 It observed

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 [i]n or [u]pon 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 191, 174 S E 2d at 394 The Court listed that the plaintiff was struck while he was within two or three feet of the automobile, that he was proceeding promptly around the vehicle when he was struck, and that at the time of the accident, he was attempting to escape the danger from the oncoming vehicle *Id* at 254 S C 191, 174 S E 2d at 395

In Mr Kennedy’s case, the Court of Appeals distinguished *Whitmire* on the basis that where the plaintiff in *Whitmire* was hit right after he had exited the vehicle, Mr Kennedy was hit after he had exited the manure truck and gone into the restaurant (App p 9) That is a correct characterization of the facts, but it misses the point

The point of *Whitmire* is two-fold First, the case reiterates that “upon” is to be given a broad construction See 254 S C at 190-91, 174 S E 2d at 394 Second, in construing the term, its meaning should be related to the use of the automobile and the hazards to be encountered from such use *Id* at 191, 174 S E 2d at 394 Where it was reasonable to construe “alighting from” to include a person who had just exited the vehicle and was struck as he walked around from the vehicle and ran from danger, it is reasonable to construe “upon” as including a person who was struck by another automobile and pinned to his own vehicle as he stood next to his vehicle and prepared to enter it

ii      **The Same Is True for *South Carolina Property & Casualty Guaranty Association v Yensen***

The Court of Appeals's decision in *Yensen* follows the same logic. That case involved a person who was struck by a passing automobile as he stood on the side of the road while his car was being hoisted onto a tow truck. See 345 S.C. at 518, 548 S.E.2d at 883. Part of the case centered on whether the owner of the disabled car was "occupying" the tow truck, and he argued that he was occupying the tow truck because he was planning to leave the scene in it. *Id.* at 518, 548 S.E.2d at 883.

The Court of Appeals rejected this assertion without much analysis, observing that "[w]hile 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.* at 519, 548 S.E.2d at 883. In Mr. Kennedy's case, the Court of Appeals discussed *Yensen*, but it never gave or applied a rule from the decision. See (App pp 8-9).

The rule of *Yensen* is the same rule this Court announced in *McAbee* and applied in *Whitmire*. The rule is that when an automobile policy defines "occupying" as including being "in, upon, entering, or alighting" the vehicle, these terms are to be construed broadly, in favor of the insured, and with the risks associated with using an automobile in mind.

*McAbee* passes scrutiny because a reasonable construction of "upon" is broad enough to encompass a person who braced his back against the vehicle he had used to tow a tractor to a service station in an attempt to prevent being crushed by the tractor. So too does *Whitmire*, because "alighting" must mean something more than having actual physical contact with the vehicle, and the plaintiff in that case was injured as the result of a collision

that happened immediately after he exited the insured automobile and walked around it Mr Yensen was found not to have been occupying the tow truck because he never had any physical contact with the tow truck and his testimony about *intending* to occupy the truck was “expressed after the accident and during litigation ” 345 S C at 519, 548 S E 2d at 884

Here, Mr Kennedy’s employer sent him to the restaurant to deliver a message to the restaurant’s owner (App p 111) When Mr Kennedy arrived at the restaurant, he left the manure truck running (App p 112) After delivering this message, Mr Kennedy had a conversation with his half-brother, who worked at the restaurant (App pp 213-214) The two talked for about seven or eight minutes, and Mr Kennedy’s brother walked out to the manure truck with Mr Kennedy (App p 215) The two men continued speaking while standing directly behind and in close proximity to the manure truck, and Mr Kennedy rested his hand on the manure truck (App p 112) (from the trial court’s order) (App p 378) (from Mr Kennedy’s trial testimony) The men then saw a wreck happen on the adjacent road and ran in opposite directions (App pp 378-79) Mr Kennedy ran behind the manure truck *Id* The trial court found that this collision occurred after the two men ended their conversation and when Mr Kennedy was about to enter the manure truck (App p 112) The accident pinned Mr Kennedy between the manure truck and the other vehicle involved (App p 112)

Mr Kennedy’s case is meaningfully distinguishable from *Yensen*, and the distinction works in his favor The Court of Appeals erred in finding to the contrary

### **iii The Court of Appeals’s Approach Overlooks the Guiding Principles of These Cases and Leads to Arbitrary and Unreasonable Applications**

*McAbee* contained no temporal limit on precisely when during an accident the user

of a vehicle must have physical contact with the vehicle, and the better application of this rule would not distinguish cases where the physical contact occurs immediately prior to the accident from cases where the physical contact occurs as a result of the accident. The reason this distinction is not needed is that a prerequisite to coverage in these cases is that the injured party must have been using the vehicle, either as a passenger or operator. Combined with the requirement that the terms listed in the definition of “occurrence” be construed to relate to the use of an automobile and the hazards to be encountered from such use, these requirements ensure that the vehicle has a connection to the accident so the accident is one which can be reasonably said to have been in contemplation for coverage.

The risks associated with automobile use do not change depending on whether the person preparing to enter the vehicle apprehends coming danger and attempts to flee versus whether he leaned against the vehicle and was ignorant of the coming accident. The risk is that the user of a vehicle will be struck by a passing vehicle and pinned against his own. “Upon” means more than simply “on top of,” *McAbee*, 349 S. C. at 100, 152 S. E. 2d at 732, and it is reasonable to construe “upon” as extending coverage to the user of a vehicle who is pinned against the side of the vehicle by another automobile. This Court should grant certiorari to reverse the Court of Appeals’s decision which holds to the contrary.

### **CONCLUSION**

The decision of the Court of Appeals conflicts with two of this Court’s previous decisions in that it reads “upon” rather narrowly while this Court’s previous decisions require a broad construction of how an automobile insurance policy defines what it means to “occupy” a vehicle. These decisions also require consideration of how the facts of a case

relate to the hazards encountered from the use of an automobile, and the Court of Appeals's decision does not account for this consideration. The rule of the Court of Appeals would provide coverage for a permissive user who is pinned against a vehicle while still leaning up against it, but deny coverage to the same user if he is pinned against the vehicle after apprehending approaching danger and unsuccessfully attempting to flee from it. That would be an arbitrary distinction, and if the Court of Appeals's decision is left alone to stand, it has the possibility of creating confusion as litigants and lower courts attempt to reconcile these precedents. This Court should accordingly grant certiorari and review this case.

December 14, 2010

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**RECEIVED**

DEC 14 2010

APPEAL FROM LAURENS COUNTY

**S C Supreme Court**

J Mark Hayes, Circuit Court Judge

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Opinion No 4378 (S C Ct App filed Sept 15, 2010)

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South Carolina Farm Bureau  
Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

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**PROOF OF SERVICE**

---

The undersigned hereby certifies that on the date indicated below, she served counsel for the Respondent with a copy of the *Petition for Writ of Certiorari* and *Appendix* by depositing a copy in the United States Mail, postage prepaid to the following address

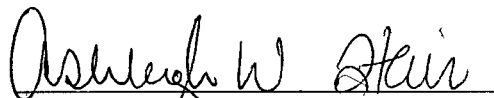
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The undersigned also certifies that on the date indicated below, she served the South Carolina Court of Appeals Clerk of Court with a copy of the *Petition for Writ of Certiorari* by depositing a copy in the United States Mail, postage prepaid to the

following address

The Honorable Tanya Gee  
South Carolina Court of Appeals  
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December 14, 2010

  
Ashleigh W. Hair

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

APPEAL FROM LAURENS COUNTY  
Court of Common Pleas

JAN 13 2011

J Mark Hayes, Circuit Court Judge **S.C. Supreme Court**

Opinion No 4738 (S C Ct App filed September 15, 2010)

South Carolina Farm Bureau Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

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## QUESTION PRESENTED

- 1 DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT AND IN HOLDING THAT KENNEDY WAS NOT ENTITLED TO UIM COVERAGE BECAUSE HE WAS NOT “UPON” THE INSURED VEHICLE, AND THEREFORE NOT “OCCUPYING” IT, WHEN HE WAS HIT BY A PICKUP TRUCK WHILE STANDING IN A PARKING LOT NEAR THE REAR OF THE INSURED VEHICLE AND WAS THEN MOMENTARILY PINNED TO THE INSURED VEHICLE BY THE PICKUP TRUCK?

## STATEMENT OF THE CASE

This declaratory judgment action was filed by Respondent/Plaintiff South Carolina Farm Bureau Mutual Insurance Company [SCFB] on April 21, 2004. The purpose of the DJ action was to determine whether Petitioner/Defendant Henry Kennedy [Kennedy] was entitled to underinsured motorist [UIM] coverage under SCFB's commercial auto policy number AU07022872 [the policy] issued to Kennedy's employer, Irons Poultry Farms, Inc. [Irons Poultry], as a result of an October 23, 2002 pedestrian-vehicle accident. SCFB asserted that Kennedy was not entitled to UIM coverage because he was not “occupying” the Irons Poultry manure truck [insured vehicle] at the time of the accident as required by the policy to qualify for UIM coverage.

Kennedy filed an answer on May 17, 2004. He asserted that he was “occupying” the insured vehicle, and therefore entitled to UIM coverage, because he was pinned against the insured vehicle after he was hit by another vehicle while standing in a parking lot near the rear of the insured vehicle.

The case was set for a non-jury trial on May 11, 2005 before the Honorable Wyatt T. Saunders, Jr. [Judge Saunders]. On November 1, 2004, Kennedy filed a motion for summary judgment with supporting affidavits. Prior to the start of the non-jury trial on

May 11, 2005, Kennedy requested that Judge Saunders hear his motion for summary judgment before proceeding with the trial on the merits. Judge Saunders granted the request to hear this motion before the trial.

Kennedy argued that there were no genuine issues of material fact and the circuit court should rule as a matter of law that Kennedy was entitled to UIM coverage. The parties presented depositions, affidavits, pleadings, stipulations, requests for admissions, admissions, and various other exhibits in support of the positions on the motion. Judge Saunders granted Kennedy's motion for summary judgment immediately after the parties argued the motion. The trial court filed the Order granting summary judgment to Kennedy on June 16, 2005. SCFB then filed a motion for reconsideration on June 23, 2005. This motion was denied on August 19, 2005.

SCFB filed a notice of appeal of Judge Saunders' June 16, 2005 Order on September 2, 2005. The Court of Appeals heard oral arguments on September 14, 2006 and filed an unpublished opinion<sup>1</sup> on December 19, 2006. The Court of Appeals reversed the trial court, ruling that Kennedy was not entitled to summary judgment because there were genuine issues of material fact as to whether Kennedy was knocked or pinned against the insured vehicle. The case was remanded to the trial court for a full hearing on the merits.

The evidence portion of this non-jury trial was conducted before the Honorable J Mark Hayes [Judge Hayes] on July 15, 2008 in Laurens County. The parties consented to participate in closing arguments on July 17, 2008 via teleconference while Judge Hayes was in his chambers. Judge Hayes issued an Order ruling that Kennedy was

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<sup>1</sup> SCFB v Kennedy, Op No 2006 UP-423 (S C Ct App filed December 19, 2006)

entitled to UIM coverage because he was pinned against the insured vehicle during the accident, and was therefore “upon” the insured vehicle and “occupying” it according to the policy and South Carolina law. Judge Hayes signed this Order on September 2, 2008, and it was filed on September 3, 2008.

SCFB served the notice of appeal on Kennedy on September 15, 2008. The Court of Appeals filed its Opinion on September 15, 2010 [the Opinion], reversing the Order of the trial court in favor of Kennedy. Kennedy’s petition for rehearing was denied by the Court of Appeals on October 28, 2010. Kennedy served his Petition for Writ of Certiorari [the Petition] on December 14, 2010.

#### STATEMENT OF FACTS

Kennedy was employed by Irons Poultry (App. p. 233). On October 23, 2002, Kennedy was sent by his employer to Wise Barbecue, which is located on Highway 76, to tell Johnny Wise that his employer had some feed for him to pick up at Irons’ farm (App. p. 233). Kennedy traveled to Wise Barbeque in his employer’s manure truck [insured vehicle] (App. p. 233).

Upon his arrival at Wise Barbeque, Kennedy left his keys in the insured vehicle and entered the restaurant to deliver his employer’s message (App. p. 233). Kennedy then visited with his half brother Teddie Robinson [Robinson] at the pit behind Wise Barbeque (App. p. 137, lines 21-25). They walked from the pit to the Wise Barbeque parking lot near the insured vehicle (App. p. 137, line 25, p. 138, lines 1-2). Kennedy and Robinson then held a conversation toward the rear of the insured vehicle (App. p. 233).

During this conversation in the parking lot, a collision occurred on Highway 76 between a pickup truck driven by George Counts [Counts], who was heading west, and another pickup truck driven by Chelsey Minick [Minick], who was heading east, as Counts attempted to turn left into the Wise Barbeque parking lot (App p 233) Kennedy realized something weird was happening on Highway 76, so he told Robinson they better run and both began moving away from the road (App p 138, lines 7-23) The impact of this collision on Highway 76 knocked Counts' pickup truck into the parking lot at Wise Barbeque (App p 233)

The Counts' vehicle then struck Kennedy and Robinson, who had been standing behind the insured vehicle in the parking lot (App p 233) Kennedy claimed that he was momentarily pinned between the insured vehicle and Counts' vehicle after being struck by Counts' vehicle (App p 139, lines 2-20) Kennedy fell to the ground after being pinned and was laying in the parking lot in the spot where he landed when EMS arrived (App p 137, lines 21-25, p 203) It was undisputed that Counts' vehicle did not make contact with the insured vehicle at any point in time during this accident <sup>2</sup>

Kennedy sustained a broken right femur, multiple abrasions, and head, neck, and back injuries with medicals and lost wages combined in excess of \$64,000 00 (App p 233) Kennedy settled with Counts' liability carrier for \$50,000 00 on a Covenant Not to Execute (App p 234)

SCFB issued a policy to Irons Poultry for the insured vehicle for UIM coverage in the amount of \$50,000 00 per individual and \$100,000 00 per occurrence (App p 234)

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<sup>2</sup> This undisputed fact was not in the stipulation of the parties

Part II – UM/UIM Coverage, Coverage M – UIM Coverage, Page 6, of the policy provides

[SCFB] will pay damages for **bodily injury** or **property damage** a **covered person** is legally entitled to collect from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** or **property damage** must be caused by an accident arising out of the operation or ownership of the **underinsured motor vehicle**.

(App p 184) Part II – UM/UIM Coverage, Coverage M – UIM Coverage, Additional Definitions – As Used for Part II, Page 6, provides

- 2 **Covered person** means
  - b any other person **occupying your covered auto**,

(App p 184) The Definitions, Page 2, provides

- 18 **Occupying** means having actual physical contact with an **auto** while in, upon, entering, or alighting from it

(App p 180) Kennedy made a demand for the full amount of UIM coverage, but SCFB denied coverage because Kennedy was not “occupying” the insured vehicle according to the policy when the accident occurred (App p 234)

## ARGUMENT

The Court of Appeals’ Opinion correctly framed the sole issue before it as “whether the impact of the pickup truck pushing Kennedy into the manure truck was enough for Kennedy to have been ‘upon’ the manure truck [and therefore to have been occupying the manure truck] so as to fall under the [SCFB UIM] policy [covering the manure truck]” (App p 6). This issue was the only one that was raised and argued by either party at trial or before the Court of Appeals in briefs and oral arguments. The Court of Appeals correctly relied upon, outlined, and analyzed McAbee v Nationwide Mut Ins Co, 249 S C 96, 152 S E 2d 731 (1967), Whitmire v Nationwide Mut Ins

Co. 254 S C 184, 174 S E 2d 391 (1970) and South Carolina Prop. and Cas. Guaranty Assoc. v. Yensen, 345 S C 512, 548 S E 2d 880 (Ct. App. 2001) in reaching its decision in this case. These three (3) cases were the main cases argued by both parties at trial and in briefs and oral arguments before the Court of Appeals.

The Opinion of the Court of Appeals is based upon sound legal principles, it contains a correct evaluation and interpretation of existing case law, and it provides a proper comparison and application of that existing law with the facts of this case. The decision of the Court of Appeals does not conflict with the Supreme Court's prior decisions in McAbee or Whitmire. The Opinion is not unreasonable as it follows the provisions of the UIM policy in question and the existing law applicable to that policy. Kennedy's Petition does not raise any special or important reasons that are required for the Supreme Court to accept this case pursuant to Rule 226, SCACR. Therefore, the Petition must be respectfully denied.

I THE COURT OF APPEALS DID NOT ERR IN REVERSING THE TRIAL COURT AND IN HOLDING THAT KENNEDY WAS NOT ENTITLED TO UIM COVERAGE BECAUSE HE WAS NOT "UPON" THE INSURED VEHICLE, AND THEREFORE NOT "OCCUPYING" IT, WHEN HE WAS HIT BY A PICKUP TRUCK WHILE STANDING IN A PARKING LOT NEAR THE REAR OF THE INSURED VEHICLE AND WAS THEN MOMENTARILY PINNED TO THE INSURED VEHICLE BY THE PICKUP TRUCK.

The SCFB UIM policy requires a claimant to have actual physical contact with the insured vehicle while in, upon, entering, or alighting from it for the claimant to be considered "occupying" the insured vehicle under the policy. It was undisputed that Kennedy was standing in the parking lot near the rear of the insured vehicle and carrying on a personal conversation with Robison when he was struck by the Counts' vehicle.

SCFB asserted that Kennedy was not “occupying” the insured vehicle according to the plain, ordinary, and popular meaning of the UIM policy where Kennedy was standing at the rear of the insured vehicle in a parking lot and having a conversation with his brother-in-law when he was pinned against the insured vehicle by the Counts’ vehicle after the Counts’ vehicle collided with the Minnick vehicle and left Highway 76

SCFB argued that a person who is having a conversation while standing near the rear of an insured vehicle and who is then pinned against the insured vehicle by another vehicle that has just been involved in an unrelated accident and come off the roadway does not equate to the person being “upon” or “occupying” the insured vehicle as contemplated by the plain, ordinary, and popular meaning of those terms in the UIM policy. In short, the facts of this case did not show Kennedy was “occupying” the insured vehicle in this accident. The connection between the accident and Kennedy’s touching of the insured vehicle was merely coincidental.

Kennedy never alleged or argued that he was “in,” “entering,” or “alighting from” the insured vehicle in this accident. Instead, Kennedy’s sole argument at trial, and the sole basis of the verdict for Kennedy,<sup>3</sup> was that he was “upon” the insured vehicle in this accident. Therefore, the sole issue in this appeal was whether Kennedy was “upon” the insured vehicle in this accident according to the meaning of “upon” as used in the policy.

The parties could not find any reported South Carolina cases directly on point to the issue of what constitutes “upon” an insured vehicle for purposes of UIM coverage.

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<sup>3</sup> While Judge Hayes’ Order briefly addressed some evidence that he believed could show that Kennedy was “entering” the insured vehicle when the accident occurred, the Order did not make any finding on the issue. Judge Hayes’ ruling of UIM coverage in favor of Kennedy was based solely on his finding that Kennedy was “upon” the insured vehicle. Accordingly, the issue of whether Kennedy was “entering” the insured vehicle was not preserved for appellate review.

However, McAbee, Whitmire, and Yensen provided compelling authority in support of SCFB's position and the Court of Appeals' Opinion finding that Kennedy was not "upon," and therefore not "occupying," the insured vehicle in the accident

In McAbee, McAbee stopped his truck to help his employer's brother, who was trying to start the engine of a tractor. The two men decided to pull the tractor behind the truck to a nearby service station. McAbee parked his truck in the service station and got out to begin to unhook the tractor after it was started. McAbee was leaning against the side of his parked truck when he was crushed by the tractor as it rolled forward.

The Nationwide policy provided indemnity in case of bodily injury or death sustained "while in or upon, entering or alighting from" a described motor vehicle.

The sole issue in the case was whether McAbee, while standing on the ground with his back against the parked truck in an effort to keep the tractor from rolling against him, was Upon the truck within the meaning of the policy. McAbee, 249 S C at 99, 152 S E 2d at 732. Our Supreme Court ruled that McAbee was "upon" the truck within the meaning of the policy. The Court noted

We think it reasonable to conclude that the parties contemplated a construction of the word that would include actual physical contact with the vehicle the insured was using. The insured was in actual physical contact with the vehicle and was "upon" is within the meaning of the policy provision when his back was against it while attempting to protect himself from the oncoming tractor.

McAbee, 249 S C at 100, 152 S E 2d at 733

In the language quoted in the preceding paragraph, the Court in McAbee emphasized that McAbee was both 1) actually physically "upon"<sup>4</sup> his parked truck, and 2) that he was *using* it, when he was crushed by the tractor. McAbee had placed his back

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<sup>4</sup> In Yensen 345 S C at 519, 548 S E 2d at 883, fn. 2, the Court of Appeals stated that McAbee held that upon was synonymous with contact with.

physically against the truck and was using the truck in an attempt to protect himself from the oncoming tractor Kennedy repeatedly fails to appreciate and address these two (2) key points of emphasis in McAbee in his Petition Additionally, the instant case is factually distinguishable from McAbee on both of these dual requirements of having actual physical contact with the insured vehicle and of actually *using* it in some way, during the accident to qualify for coverage under the term “upon” in the definition of “occupying” in the policy

Kennedy admitted that he was not touching the insured vehicle when he was struck by Counts’ pickup In fact, Kennedy admitted that he was standing a few feet away from the rear of the insured vehicle and was engaged in conversation with Robinson when they were struck by the Counts’ vehicle Kennedy incorrectly focuses on his location *after* he was hit by Counts’ vehicle to argue that he was “upon” the insured vehicle McAbee requires the focus to be on Kennedy’s location *when* he was hit by Counts’ vehicle to determine whether Kennedy was “upon” the insured vehicle, and therefore “occupying” it, for purposes of UIM coverage

Kennedy was not *using* the insured vehicle in any way at any point during the accident according to his own testimony Kennedy was either standing by the rear of the insured vehicle in conversation and/or trying to run away from it when he was struck by Counts’ vehicle Therefore, Kennedy does not satisfy the *using* requirement that the court in McAbee emphasized when finding coverage for McAbee under the term “upon” in the policy The Petition ignores the language in McAbee that emphasized the significant fact that McAbee was *using* the insured vehicle during the accident in determining that he was “occupying” it for purposes of insurance coverage Kennedy

glosses over the language in McAbee emphasizing that McAbee was *using* the insured vehicle when the contact occurred. Kennedy also fails to accept the undisputed evidence in the instant case showing that Kennedy was not using the insured vehicle in any way at any point in time during the accident.

Kennedy's assertion that he was "upon" the insured vehicle, and therefore "occupying" it, contradicts the holding of McAbee. The Opinion's review of McAbee led the Court of Appeals to the proper conclusion to deny UIM coverage for Kennedy.

McAbee was the only South Carolina case that the parties could find where the appellate courts had construed the word "upon" in the context of "occupying" a motor vehicle for purposes of automobile insurance coverage. The Opinion properly noted that while McAbee was not directly on point with the instant case, it did deal with this similar issue. The Court of Appeals correctly outlined the facts and legal principles in McAbee in its Opinion. The Opinion properly applied the facts and legal principles in McAbee to those in the instant case.

The Supreme Court held in McAbee that there was coverage for the injured party. However, the Court of Appeals in the instant case correctly noted that McAbee was distinguishable from this case. The Court of Appeals stated in its Opinion that

This case is distinguishable from McAbee because in McAbee, the insured had his back to the truck and was pushing against it when he was crushed to death. Therefore, the insured was physically touching the truck when he was killed. Here, Kennedy was near the manure truck when he was hit by the other vehicle and asserts he was pushed into the manure truck by the pickup truck. Therefore, Kennedy was not physically touching the truck when he was first hit by the pickup truck.

(App p. 7)

Kennedy claims that there is no reason to limit the definition of “upon” to having actual physical contact with the covered automobile immediately prior to an accident (Petition, pg 4) As an initial matter, the Court of Appeals’ decision does not make that blanket assertion The Court of Appeals merely compared the factual scenario in the instant case with the factual scenario in McAbee to show the differences between the facts of the two cases The Court of Appeals pointed out that Kennedy was not in physical contact with the insured vehicle when the accident occurred whereas McAbee had his back pressed up against the insured vehicle when his accident happened

Kennedy cannot accept that this limitation of needing actual physical contact to be upon and occupying the insured vehicle is precisely what the SCFB policy in question imposes in its definition of “upon” and “occupying” Kennedy repeatedly fails to recognize that the SCFB policy<sup>5</sup> specifically requires actual physical contact with the insured vehicle in its definition of “occupying” the insured vehicle Therefore, any actual physical contact requirement in this case comes first from the SCFB policy, and then second from McAbee

Kennedy argues that such a rule limiting the definition of “upon” to having actual physical contact with the covered automobile immediately prior to an accident would provide coverage for a permissive user who is pinned against a vehicle while still leaning up against it, but deny coverage to the same user if he is pinned against the vehicle after apprehending approaching danger and unsuccessfully attempting to flee from it In the first scenario, the user would be “occupying” the vehicle according to the SCFB policy because he would have actual physical contact with the vehicle and be “upon” the

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<sup>5</sup> 18 **Occupying** means having actual physical contact with an **auto** while in upon entering or alighting from it (App p 180)

vehicle. In the second scenario, the user would not be “occupying” the vehicle according to the SCFB policy because he did not have actual physical contact with the vehicle, and he would not be “upon” the vehicle according to McAbee since he was not *using* the vehicle.

Other than McAbee, our appellate courts have not construed the word “upon” in the context of automobile insurance coverage. SCFB is not aware of any South Carolina case holding that a person who does not have actual physical contact with an insured vehicle as the accident occurs or when they are struck by another vehicle would be considered “upon” the insured vehicle merely because the other vehicle pinned the person against the insured vehicle as a result of the impact. McAbee does not hold that a person is “upon” an insured vehicle if he is simply pinned against the insured vehicle after being struck by another vehicle while standing outside the insured vehicle.

In Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 174 S.E.2d 391 (1970), our Supreme Court affirmed a finding that Whitmire was entitled to uninsured [UM] coverage where he was “alighting from” the insured vehicle. Whitmire was a passenger in a car insured by Nationwide. He exited the vehicle when it was parked half on and half off the highway. He had to walk around the vehicle to get off the highway. While he was doing so, a car quickly approached and hit the insured vehicle. Whitmire was then hit by the approaching vehicle immediately after getting out of his vehicle.

The UM endorsement in the Nationwide policy defined “insured” as “any other person while occupying an insured automobile,” and it defined “occupying” as “in or upon or entering into or alighting from” the insured vehicle. Whitmire argued that he

was “alighting from” the vehicle at the time of the accident. Nationwide claimed that since he had left the vehicle, he was not “alighting from” it any longer.

The Supreme Court stated that “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 necessary to be expected from one getting out of an automobile under similar conditions.” Whitmire, 254 S. C. at 191, 174 S. E. 2d at 394. The Supreme Court affirmed the ruling for Whitmire, reasoning that he was struck while in the act of “alighting from” the insured vehicle because it was necessary for him to walk around the insured vehicle to keep out of harm’s way after he immediately exited the vehicle. Whitmire, 254 S. C. at 191-92, 174 S. E. 2d at 395.

While the analysis in Whitmire concerned “alighting from” an insured vehicle, and not “upon,” the reasoning used by the Supreme Court in finding UM coverage in Whitmire did not support a finding of UIM coverage for Kennedy in the instant case. When Whitmire was struck, he had just exited the vehicle and was engaged in an activity clearly related to “occupying” the vehicle under the policy. Kennedy was merely standing in a private parking lot having a personal conversation with Robison at the rear of the insured vehicle when he was struck by Counts’ vehicle. The vehicle that struck Whitmire also came into contact with the insured vehicle. In the instant case, the Counts’ vehicle never touched the insured vehicle. Since Kennedy was not “engaged in an activity clearly related to occupying a vehicle” when he was struck, and the insured vehicle was not struck in the accident, a finding that Kennedy was entitled to UIM coverage would contradict the reasoning in Whitmire.

Whitmire forced the Court of Appeals in the instant case to find that Kennedy was not “occupying” the insured vehicle in the instant case. The Court of Appeals correctly pointed out that

Here, if Kennedy had been hit soon after he had alighted from the manure truck, under Whitmire, he would have been deemed to have been “occupying” the truck, however, Kennedy had gone inside the restaurant, returned to the parking lot, and was standing near the truck talking when the accident occurred. Therefore, he was not “occupying” the truck as a result of having recently alighted from the truck because of the intervening act of going into the restaurant.

(App p 9)

Kennedy asserts in his Petition that it would be reasonable to construe “upon” as including a person who was struck by another automobile and pinned to his own vehicle as he stood next to his vehicle and prepared to enter it since Whitmire construed “alighting from” to include a person who had just exited the vehicle and was struck as he walked around from the vehicle and ran from danger. (Petition, pg 9). However, Kennedy’s argument fails for two (2) reasons. First, Kennedy again does not recognize that the requirement of actual physical contact with the insured vehicle is based on the plain language of the SCFB policy definition of “occupying.”

Second, and most importantly, Kennedy’s analogy misses the distinction in the law and the SCFB policy between “occupying” a vehicle because you are “upon” the vehicle with “occupying” a vehicle because you are “entering” the vehicle. The law and the SCFB policy view “upon” and “entering” as two (2) separate and distinct ways one can be “occupying” the insured vehicle. The instant case concerns whether Kennedy was “upon” the insured vehicle, not whether Kennedy was “entering” the insured vehicle, or

even preparing to enter the vehicle Kennedy's analogy may be correct if this case was about whether Kennedy was "entering" the insured vehicle

In Yensen, Yensen's vehicle broke down on the shoulder of the interstate He called the highway patrol to pick him up and call a tow truck The tow truck arrived and parked in front of Yensen's vehicle While the tow truck was hooking up Yensen's vehicle, an uninsured vehicle struck Yensen and the highway patrolman while they were standing at the driver's side rearview mirror of Yensen's vehicle

Yensen and the patrolman made a demand for either UM or UIM coverage under the tow truck's policy The policy defined "insured" as "anyone else 'occupying' a covered auto," and it defined "occupying" as "in, upon, getting in, on, out or off"

The trial court granted summary judgment to the insurance carrier for the tow truck on the grounds that Yensen and the patrolman were not "occupying" the tow truck as the policy defined that term since they were not "in, upon, getting in, on, out or off" the tow truck Yensen, 345 S C at 517, 548 S E 2d at 883 The trial court ruled that Yensen and the patrolman were not "insureds" since they were not "occupying" the tow truck when they were struck while standing on the side of the road beside the tow truck, and they were therefore not entitled to either UM or UIM coverage Id

The Court of Appeals affirmed the lower court's grant of summary judgment to Yensen and the patrolman Yensen, 345 S C at 518-19, 548 S E 2d at 883 The Court of Appeals agreed that neither Yensen, nor the patrolman, were occupying the tow truck as that term [was] defined in the policy Yensen, 345 S C at 521, 548 S E 2d at 884 The Court of Appeals reviewed the holding and reasoning of the Supreme Court in Whitmire in determining that Yensen was not entitled to either UM or UIM coverage because he

was not “occupying” the tow truck. The Court of Appeals decided not to extend its finding of UM coverage in Whitmire to the facts of Yensen, noting that “Yensen was not ‘still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions.’” Yensen, 345 S.C. at 519, 548 S.E.2d at 884 *citing* Whitmire, 254 S.C. at 191, 174 S.E.2d at 394. The Court of Appeals concluded that, at most, Yensen only had an intent to occupy the tow truck to go back to his house and was not engaged in acts necessary for occupation. Yensen, 345 S.C. at 519, 548 S.E.2d at 884.

The key facts in the instant case are very similar to the facts in Yensen. When Kennedy and Yensen were struck by the other vehicle, they were in a nearly identical location with respect to the insured vehicle and were engaged in the similar activity of conversation. Both men were standing near, but not touching, the insured vehicle when they were struck. Both men were not engaged in any activity related to the use of the insured vehicle. Since the key facts in both cases are similar, the outcomes regarding coverage in both cases should be similar. Not surprisingly, the Court of Appeals properly denied UM and/or UIM coverage in both Yensen and the instant case.

Yensen did deal with the broader issue of “occupying” a motor vehicle for purposes of UIM coverage. The Court of Appeals’ Opinion in the instant case properly noted that while Yensen was not directly on point with the instant case, it did deal with this similar broad issue. The Court of Appeals correctly outlined the facts and legal principles in Yensen in its Opinion. The Opinion properly applied the facts and legal principles in Yensen to those in the instant case.

The Court of Appeals held in Yensen that there was not UM or UIM coverage for either injured party under the tow truck's policy. While the Court of Appeals stated that Yensen was distinguishable from the instant case in its Opinion, it correctly noted the important factual similarities between the instant case and Yensen.

Yensen is also distinguishable from this case because in Yensen the court noted Yensen may or may not have intended to get into the tow truck, which was the insured vehicle from which he was seeking coverage. In this case, Kennedy had driven the manure truck to the restaurant and was intending to leave the restaurant in the manure truck, therefore, there was no question of his intent to depart the insured vehicle. *However like Yensen Kennedy was not 'in upon getting in, on out or off the manure truck at the time of the accident. Kennedy had departed the truck, gone inside the restaurant, and then returned to the parking lot to talk to Robinson near the vehicle*

(App p 8) (emphasis added)

Kennedy has asserted in his Petition that he was preparing to enter the insured vehicle just before the collision between the vehicles driven by Minick and Counts. However, Kennedy's intent alone to get back into the insured vehicle is not enough to satisfy the "occupying" requirement in the SCFB policy and case law. Applying the analysis in Yensen, any intent that Kennedy had to eventually be "upon" or to get into the insured vehicle after his conversation in the parking lot ended with Robinson does not satisfy the requirement of the policy and the holding in McAbee that Kennedy have actual physical contact as the accident occurs to be "upon" the vehicle, and therefore to be "occupying" it, for purposes of insurance coverage. Kennedy simply did not have any contact with the insured vehicle when he was struck by Counts' vehicle, regardless of his intent to eventually have such contact. Therefore, Kennedy's intent to eventually occupy the insured vehicle is not enough to qualify him for UIM coverage according to the policy and the case law.

## CONCLUSION

The Court of Appeals' decision in the instant case, and the legal and factual bases for its decision, were supported by the record and the law. In its Opinion in the instant case, the Court of Appeals properly found that

Therefore, based on Yensen and McAbee, we conclude the trial court in this case erred in finding Kennedy was 'upon' the manure truck when he was hit by the pickup truck and momentarily pinned to the manure truck because he was not 'in, upon, getting in, on, out or off' the manure truck at the time of the accident. He had departed the truck, gone inside the restaurant, and returned to the parking lot to talk to his half-brother near the vehicle when he was hit by the pickup truck. As a result, there was no causal connection between Kennedy's use of the manure truck and his being struck by Counts' pickup truck. Hence, Kennedy was not occupying his employer's truck at the time of the accident, and is not entitled to UIM coverage from his employer's policy.

(App p 14-15) For the reasons set forth herein, SCFB respectfully submits that the Supreme Court must deny Kennedy's Petition and conclude Kennedy's appeal in this matter.

January 13, 2011

  
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In The Supreme Court

APPEAL FROM LAURENS COUNTY  
Court of Common Pleas

J Mark Hayes, Circuit Court Judge

**RECEIVED**

JAN 13 2011

Opinion No 4738 (S C Ct App filed September 15, 2010) **Supreme Court**

South Carolina Farm Bureau Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Henry Kennedy by depositing a copy of it in the United States Mail, postage prepaid, on January 13, 2011, addressed to his attorneys of record

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

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Opinion No 4378 (S C Ct App filed Sept 15, 2010)

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South Carolina Farm Bureau  
Mutual Insurance Company,

Respondent,

v

Henry Kennedy,

Petitioner

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**REPLY SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI**

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JAN 24 2011

S C Supreme Court

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| Conclusion                                                                                                                                                                                                                | 4 |

## ARGUMENT

Henry Kennedy's petition for a writ of certiorari argued that certiorari is appropriate in this case for two reasons. First, it argued that the Court of Appeals's opinion conflicts with this Court's decisions in *Whitmire v. Nationwide Mutual Insurance Co.*, 254 S. C. 184, 174 S. E. 2d 391 (1970) and *McAbee v. Nationwide Mut. Ins. Co.*, 249 S. C. 96, 152 S. E. 2d 731 (1967) because both of these cases require a broad construction of how an automobile insurance policy defines what it means to "occupy" a vehicle. Second, it argued that the rule adopted by the Court of Appeals was nonsensical. That rule denied coverage to the permissive user of a vehicle who was leaning against the vehicle, apprehended oncoming danger, attempted to run, and was pinned to his vehicle.<sup>1</sup>

In its return to the petition, South Carolina Farm Bureau Mutual Insurance Company argues that certiorari is not appropriate because (it says) the Court of Appeals decided the case correctly. Farm Bureau primarily argues that Mr. Kennedy's petition fails to ascertain the key points of the three relevant precedents, and that the Court of Appeals reached the correct result after giving those precedents the appropriate treatment.

These reasons should not be persuasive, and the facts of the case put the point simply. An accident pinned Henry Kennedy to the manure truck that he had driven to where he was, and this was the same truck he was preparing to drive away. If "occupying" a vehicle and being "upon" a vehicle must be broadly construed – and this Court's decisions say that they must – Mr. Kennedy has to qualify. Under any but the narrowest of constructions, being pinned to the vehicle you are getting ready to drive away meets the definition of being "upon" the vehicle.

---

<sup>1</sup>This factual narrative is supported full-square by the findings of fact in trial court's order. See (App p 112)

**The Decision of the Court of Appeals Is Not Correct, for One, it Never Stated or Applied the Rule from the McAbee and Whitmire Cases, Which Is That this Policy Provision must Be Liberally Construed**

*McAbee* was a case where the operator of a truck was crushed to death between the tractor he had towed to a service station and the truck he used for the towing. The deceased was crushed as he unhooked the tractor from the truck. Just like Mr. Kennedy's case, the question presented was whether the deceased was "occupying" the truck at the time of the accident, and this Court focused on whether the term "upon" in the definition of occupying applied. See 349 S. C. at 98, 152 S. E. 2d at 732. This Court said

the rule seems to be generally recognized that the words 'in or upon' as used in such policy provisions require a broad and liberal construction in favor of the insured and that by the weight of authority actual physical contact with the insured's automobile is sufficient to establish that the insured was Upon the vehicle as contemplated by such policies

*Id.* at 98, 152 S. E. 2d at 732. It instructed that "upon" "must connote some physical relationship between [a person] and the car that enlarged the area defined by the words 'entering or alighting' and the word 'in' ". *Id.* at 100, 152 S. E. 2d at 732 (quoting *Wolf v. Am. Cas. Co. of Reading, Pa.*, 118 N. E. 2d 777, 780 (Ind. App. 1954)).

*Whitmire* looked at a different term in the definition of "occupying". It examined whether the plaintiff qualified as "alighting" from a car when he exited the car, saw an imminent collision coming, tried to run, and was struck by one of the vehicles. This Court observed that it had "considered a similar policy provision in the McAbee case" and had "concluded there that the words 'in or upon' were not free from ambiguity and required a broad and liberal construction in favor of the insured". 254 S. C. at 190-91, 174 S. E. 2d at 394. This Court applied "the same rule of liberal construction" to the provision at issue in *Whitmire*. *Id.* at 191, 174 S. E. 2d at 394.

This rule is nowhere in the opinion from the Court of Appeals, and nowhere in Farm Bureau's return to the petition for certiorari. The Court of Appeals did recite that ambiguous terms in an insurance contract should be construed liberally, see *S C Farm Bureau Mut Ins Co v Kennedy*, 390 S C 125, 131, 700 S E 2d 258, 261 (Ct App 2010), but the Court of Appeals paid no mind to *Whitmire*'s observation that the terms "in or upon" are ambiguous. See 254 S C at 190, 174 S E 2d at 394. The Court of Appeals simply ticked off the factual differences between the cases. It noted that in *McAbee*, the deceased turned to face the oncoming tractor and braced himself against his truck as he was crushed, and that in *this* case, Mr. Kennedy apparently ran from his vehicle when he saw the other car involved approaching. *Id.* at 132, 700 S E 2d at 262 (also at App p 7). For *Whitmire*, it noted that where the deceased there had recently alighted from the car, Mr. Kennedy had alighted, gone in the restaurant, and come back out. *Id.* at 134, 700 S E 2d at 263 (App p 9).

Factual distinctions are fine, but almost all cases are distinguishable from one another *factually*. The question is how to apply the *rules* from other cases. The rule of *McAbee* and *Whitmire* is the same: this policy provision is construed broadly. To determine whether someone was "upon" a vehicle, the court looks at whether the injured person had "some physical relationship" with his or her car "that enlarged the area defined by the words 'entering or alighting' and the word 'in'." *McAbee*, 249 S C at 100, 152 S E 2d at 732 (citing *Wolf*, 118 N E 2d at 780).

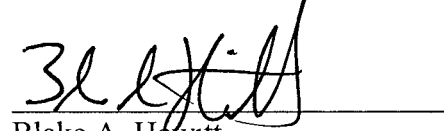
Mr. McAbee had this physical relationship; he was crushed to death between his car and a tractor. Mr. Kennedy had the same. He drove his employer's truck to the parking lot where he was injured, and he was standing by the truck because he was getting ready to drive it away. Although Mr. Kennedy tried to flee when he saw another car approaching, the accident that ensued pinned him to the truck. Under any reasonable construction, this is "physical contact with the insured vehicle."

## CONCLUSION

Although the decision of the Court of Appeals cited the relevant cases, it did not give those cases a faithful application. In fact, it did not even recite the rule of those cases. That decision creates the potential for confusion in how this Court's past decisions are applied, and if the arguments outlined in the petition for certiorari are correct, the decision of the Court of Appeals conflicts with this Court's previous decisions. Henry Kennedy submits that a grant of certiorari is all-the-more appropriate in light of the fact that the natural result of the decision below is absurd. There is no reason that his being "upon" the manure truck should ride on whether he (1) turned and ran before he was pinned to his truck, or (2) continued leaning on the truck and was pinned in that position. He therefore requests that this Court grant certiorari.

January 24, 2011

Respectfully submitted,



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Attorneys for Petitioner



THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

---

Opinion No 4378 (S C Ct App filed Sept 15, 2010)

---

South Carolina Farm Bureau  
Mutual Insurance Copmany,

Respondent,

v

Henry Kennedy,

Petitioner

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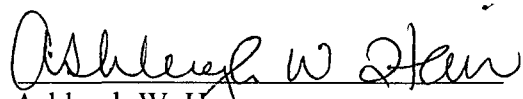
**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below, she served counsel for the Respondent with a copy of the *Reply Supporting the Petition for Writ of Certiorari* by depositing a copy in the United States Mail, postage prepaid to the following address

Karl S Brehmer, Esquire  
L Darby Plexico, III, Esquire  
Brown & Brehmer  
P O Box 7966  
Columbia, SC 29202

January 24, 2011

  
Ashleigh W Hair

RECEIVED

JAN 24 2011

SC Supreme Court



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt

OF COUNSEL  
O Eugene Powell Jr

January 24, 2011

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JAN 24 2011

S C Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Opinion No 4378 (S C Ct App filed Sept 15, 2010)

Dear Mr Shearouse

Please find enclosed for filing the original and seven (7) copies of the Reply Supporting the Petition for Writ of Certiorari in this case. I have also enclosed a proof of service of the reply on opposing counsel of record. Please return the additional copy to me via our courier.

Thank you for your assistance with this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,

Ashleigh W. Hair  
Paralegal to Blake A. Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

/awh

Enclosures

cc Eric H. Philpot, Esquire  
Karl S. Brehmer, Esquire  
L. Darby Plexico, III, Esquire

# BROWN & BREHMER

Attorneys at Law

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OF COUNSEL  
MICHAEL M. LUMPKIN

January 13, 2011

Eric H. Philpot  
PHILPOT LAW FIRM, PA  
115 Broadus Avenue  
Greenville, South Carolina 29601

Blake A. Hewitt  
John S. Nichols  
BLUESTEIN NICHOLS THOMPSON &  
DELGADO, LLC  
Post Office Box 7965  
Columbia, South Carolina 29202

RE South Carolina Farm Bureau Mutual Insurance Company, Respondent v. Henry  
Kennedy, Petitioner

Case No. 2004-CP-30-375

Case Tracking No. 2010-177906

**RECEIVED**

JAN 13 2011

Dear Eric and Blake

**S C Supreme Court**

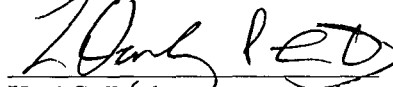
Enclosed please find the Return to Petition for Writ of Certiorari in connection with the above-referenced matter, which is hereby served upon you

By copy of this letter to the Supreme Court, I am filing the original, unbound Return, six (6) copies of the Return, and the original Proof of Service with the Court

Should you have any questions or need any further information, please do not hesitate to contact me

With warmest personal regards, I am

Sincerely,



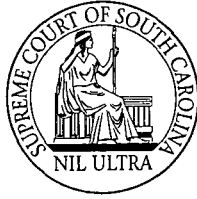
Karl S. Brehmer

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Post Office Box 7966  
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(803) 771-6600  
Attorneys for Petitioner

LDP

Enclosures

Cc Clerk South Carolina Supreme Court **VIA HAND DELIVERY**



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

December 15, 2010

Blake A. Hewitt, Esquire  
John S. Nichols, Esquire  
Bluestein, Nichols, Thompson &  
Delgado, LLC  
PO Box 7965  
Columbia, SC 29202

Re SC Farm Bureau v. Kennedy, Henry  
Case Tracking No. 2010-177906

Dear Counsel,

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



CLERK

SC Farm Bureau v Kennedy, Henry  
Page Two  
December 15, 2010

DES/lda

Enclosure

cc Eric Holcombe Philpot, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico, Esquire  
The Honorable Tanya Gee



**BLUESTEIN NICHOLS THOMPSON DELGADO LLC**  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt

**OF COUNSEL**

O Eugene Powell Jr

December 14, 2010

**RECEIVED**

DEC 14 2010

**VIA HAND DELIVERY**

The Honorable Daniel E Shearouse  
Clerk  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**S C Supreme Court**

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Opinion No 4378 (S C Ct App filed Sept 15, 2010)

Dear Mr Shearouse

Please find enclosed for filing the original and seven (7) copies of the Petition for Writ of Certiorari in this case, together with three (3) copies of the Appendix I have also enclosed a Proof of Service of the Petition on opposing counsel of record, and a check in the amount of \$100.00 for filing the Petition I have also filed a copy of the Petition and Proof of Service with the South Carolina Court of Appeals Please return the additional copies to me via our courier

Thank you for your assistance with this matter If you need any additional information, please do not hesitate to contact me

Yours sincerely,

Blake A. Hewitt

BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

BAH/awh

Enclosures

cc The Honorable Tanya Gee  
Eric H Philpot, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico, III, Esquire

# The Supreme Court of South Carolina

South Carolina Farm Bureau  
Mutual Insurance Company,                      Respondent,

v

Henry Kennedy,                      Petitioner

The Honorable J Mark Hayes, II  
Laurens County  
Trial Court Case No 2004-CP-30-00375

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## ORDER

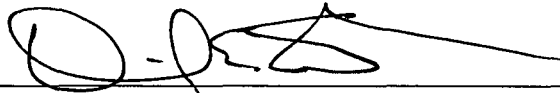
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For good cause having been shown, the time for serving and filing the  
Petition for Writ of Certiorari and Appendix in the above entitled matter is  
hereby extended until December 14, 2010

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

November 23, 2010

cc    Blake A Hewitt, Esquire  
      John S Nichols, Esquire  
      Eric Holcombe Philpot, Esquire  
      Karl S Brehmer, Esquire  
      L Darby Plexico, Esquire  
      The Honorable Tanya Gee

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

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**NOV 23 2010**

APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

---

**S.C. Supreme Court**

Opinion No 4378 (S C Ct App filed Sept 15, 2010)

---

South Carolina Farm Bureau  
Mutual Insurance Copmany,

Respondent,

v

Henry Kennedy,

Petitioner

---

**PETITIONER'S MOTION FOR AN EXTENSION OF TIME**

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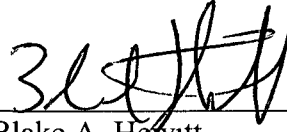
Pursuant to Rule 240, SCACR, Petitioner Henry Kennedy moves the Court for an extension of time to file and serve the Petition for Writ of Certiorari and Appendix, which are currently due November 27, 2010. Petitioner's attorney requests the Court extend the deadline for fifteen (15) days making the Petition for Writ of Certiorari and Appendix due Monday, December 13, 2010.

The undersigned would inform the Court that he has consulted with counsel for the Respondent, who has graciously consented to this request.

/Signature page attached

November 23, 2010

Respectfully submitted,



Blake A. Hewitt  
John S. Nichols  
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Attorneys for Petitioner

Other Counsel of Record  
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(803) 771-6600

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

**RECEIVED**

**NOV 23 2010**

APPEAL FROM LAURENS COUNTY

J Mark Hayes, Circuit Court Judge

---

**S.C Supreme Court**

Opinion No 4378 (S C Ct App filed Sept 15, 2010)

---

South Carolina Farm Bureau  
Mutual Insurance Copmany,

Respondent,

v

Henry Kennedy,

Petitioner

---

**PROOF OF SERVICE**

---

The undersigned hereby certifies that on the date indicated below, she served counsel for the Respondent and the Court of Appeals Clerk of Court with a copy of the *Petitioner s Motion for an Extension of Time* by depositing a copy in the United States Mail, postage prepaid to the following addresses

Karl S Brehmer, Esquire  
L Darby Plexico, III, Esquire  
Brown & Brehmer  
P O Box 7966  
Columbia, SC 29202

The Honorable Tanya Gee  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, SC 29211

November 23, 2010

  
Ashleigh W Hair

1000

1000

1000



BLUESTEIN NICHOLS THOMPSON DELGADO LLC  
ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt

OF COUNSEL

O Eugene Powell Jr

November 23, 2010

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NOV 23 2010

S.C. Supreme Court

**VIA HAND DELIVERY**

The Honorable Daniel E Shearouse  
Clerk  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RE South Carolina Farm Bureau Mutual Insurance Company v Henry Kennedy  
Opinion No 4378 (S C Ct App filed Sept 15, 2010)

Dear Mr Shearouse

John Nichols and I have been engaged to assist Eric H Philpot in the representation of Henry Kennedy in this matter Please note our appearance for the Court's records

Also, please find enclosed for filing the original and seven (7) copies of *Petitioner's Motion for an Extension of Time* in regards to the above matter, together with proof of service upon counsel for the Respondent I have also enclosed a check in the amount of \$25 00 for filing this motion

If you need any additional information please let me know Thank you in advance for your attention to this matter

Sincerely,

Blake A Hewitt  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

BAH/awh

Enclosures

cc The Honorable Tanya Gee  
Eric H Philpot, Esquire  
Karl S Brehmer, Esquire  
L Darby Plexico, III, Esquire