THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case Number: 2012-CP-02-00392

Marsha Temples..... Appellant

v.

Neil O. Plush..... Respondent

RECORD ON APPEAL

John W. Carrigg, Jr..
137 East Butler Street, Suite 6
Lexington, South Carolina 29072
Telephone: (803) 785-5511
Attorney for Appellant

Sonja R. Tate, Esquire
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Attorney for Respondent

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)

Marsha L. Temples and Douglas Temples, Jr.)
Plaintiff(s)) CIVIL ACTION COVERSHEET

vs.) 2006 - CP - 02 - 1110

Neal O. Plush)
Defendant(s))

(Please Print)
Submitted By: John W. Carrigg, Jr.
Address: 1492 Lake Murray Blvd., Suite A
Columbia, S.C. 29212

SC Bar #: 015239
Telephone #: (803) 407-5354
Fax #: (803) 407-5754
Other:
E-mail: jcarrigg@carrigglaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

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AIKEN COUNTY
CLERK OF COURT

Submitting Party Signature: _____ **Date:** 7-31-2006

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Case are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Cases which are appellate in nature such as appeals or writs of certiorari;

    c. Post Conviction relief matters;

    d. Contempt of Court proceedings;

    e. Forfeiture proceedings brought by the State;

    f. Cases involving mortgage foreclosures; and

    g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.

4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Marsha L. Temples and Douglas Temples, Jr., Plaintiffs, vs. Neil O. Plush, Defendant.	C/A No.: 2006-CP-02-1110 **SUMMONS** (Jury Trial Requested)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his offices, located at 1492 Lake Murray Blvd, Suite A, Columbia, South Carolina 29212, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer, appear and defend within thirty (30) days after service hereof, exclusive of the date of such service, judgment by default will be rendered against you for the relief demanded in the Complaint.

JOHN W. CARRIGG, JR.
1492 Lake Murray Blvd., Suite A
Columbia, South Carolina 29212
Tel: (803) 407-5354
Fax:(803) 407-5754
S.C. Bar No.: 015239
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina
7-31, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Marsha L. Temples and Douglas Temples, Jr.,	)	C/A No.: 2006-CP-02-1110
Plaintiffs,	)	**COMPLAINT**
vs.	)	(Jury Trial Requested)
Neil O. Plush,	)	
Defendant.	)	

Plaintiffs complaining of Defendant allege:

1. That this court has jurisdiction over the matters contained herein.

2. That Marsha L. Temples and Douglas Temples, Jr. (hereinafter collectively referred to as "Plaintiffs") are citizens and residents of the County of Aiken, State of South Carolina.

3. That Neil O. Plush (hereinafter referred to as "Defendant") is a citizen and resident of the County of Aiken, State of South Carolina.

4. That on or about the 18th day of August, 2003, at or about 4:20 p.m., Plaintiffs Marsha Temples and Douglas Temples, Jr. were the operator and passenger, respectively, of a vehicle traveling in a Southerly direction on S.C. Primary 19, near the intersection of S.C. Primary 19 and S.C. Secondary 938, near the City of Aiken, County of Aiken, State of South Carolina, at which time Plaintiff Marsha Temples began to reduce the speed of Plaintiffs' vehicle as it approached traffic that was lawfully stopped in Plaintiffs' lane of travel.

5. That at the same time and place, Defendant was the operator of a vehicle traveling in a Southerly direction on S.C. Primary 19, near the intersection of S.C. Primary 19 and S.C.

Secondary 938, near the City of Aiken, County of Aiken, State of South Carolina, and was approaching the rear of Plaintiffs' vehicle which was proceeding as stated above.

6. That on or about the aforementioned date, time and place, as the vehicles were proceeding as aforesaid, the Defendant negligently, carelessly, recklessly, and with flagrant disregard for the lawfully stopped traffic in front of him, failed to reduce his speed, thereby causing his vehicle to run into the rear end of the Plaintiffs' vehicle with great force and violence and further causing injuries and damages to the Plaintiff as hereinafter set forth.

7. That the aforementioned collision was directly, solely and proximately caused by the negligence, carelessness and recklessness of the Defendant which included among other acts of negligence the following:

a. failing to keep a proper lookout;
b. failing to stop for lawfully stopped traffic in Defendant's lane of travel;
c. failing to keep the vehicle under proper control;
d. failing to steer or take other evasive action to avoid the collision;
e. failing to apply the brakes and/or maintain them in proper working condition;
f. driving the motor vehicle at a high and reckless rate of speed;
g. driving the motor vehicle at a rate of speed that is too fast for the conditions then and there prevailing;
h. failing to use the degree of care and caution that a reasonably prudent person would have used under the same or similar circumstances then and there prevailing;.
i. operating the automobile with a reckless disregard for the rights and safety of the Plaintiffs; and
j. such other and further acts of negligence as shall be proved at the trial of this matter.

8. That by reason of the negligence, carelessness, recklessness, and/or willfulness of Defendant, and as a direct and proximate result thereof, the Plaintiffs have been injured and have suffered, and will continue to suffer, damages as hereinafter set forth. Plaintiff Marsha Temples has sustained injuries in and about various parts of her body including, but not limited to, her neck, back and bladder, on account of which she has been caused to suffer and endure

considerable pain, discomfort and mental anguish. Plaintiff Douglas Temples, Jr. has sustained injuries in and about various parts of his body including, but not limited to, his neck and back, on account of which he has been caused to suffer and endure considerable pain, discomfort and mental anguish. Plaintiffs have incurred various expenses for medical treatment and rehabilitation and upon information and belief will incur additional expenses; Plaintiffs have been and will continue to be prevented from attending to their ordinary affairs and duties; Plaintiffs have been and will continue to be deprived of the normal enjoyments of life they otherwise would have; Plaintiffs will continue to endure discomforting physical and mental pain and suffering which they otherwise would not have; and Plaintiffs have been otherwise damaged.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual damages in such an amount as shall fairly, justly and adequately compensate them for their losses, for such punitive damages as the Court may deem just and proper, and for the costs of this action, along with such other and further relief that the court deems just and proper.

Respectfully submitted,

By: _____

JOHN W. CARRIGG, JR.
1492 Lake Murray Blvd., Suite A
Columbia, South Carolina 29212
Tel: (803) 407-5354
Fax: (803) 407-5754
S.C. Bar No.: 015239
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina
7-31, 2006

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	CIVIL ACTION NO: 2006-CP-02-1110
Marsha L. Temples and Douglas Temples, Jr., Plaintiffs, vs. Neal O. Plush, Defendant.	**ANSWER ON BEHALF OF DEFENDANT NEAL O. PLUSH**

TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFFS, AND TO THE PLAINTIFFS ABOVE-NAMED:

The Defendant, answering the Plaintiff's Complaint herein, would respectfully show unto the Court that:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.

2. In response to Paragraph 1, the Defendant would show that it states a conclusion of law to which no response is required. However, to the extent that a response is required, this Defendant would show that he is without sufficient information at this time to form a belief as to the truth or falsity of the allegations of Paragraph 1 and therefore denies the same.

3. This Defendant is without sufficient information at this time to form a belief as to the truth or falsity of the allegations of Paragraph 2 and therefore denies the same.

4. Paragraph 3 is admitted upon information and belief.

5. In response to Paragraph 4, this Defendant is without sufficient information to admit or deny the allegations thereof, and, therefore denies the same.

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6. In response to Paragraph 5, this Defendant is without sufficient information to admit or deny the allegations thereof, and, therefore denies the same.

7. In response to Paragraph 6, this Defendant is without sufficient information to admit or deny the allegations thereof, and, therefore denies the same.

8. Paragraphs 7 and 8 are denied.

FOR A SECOND DEFENSE

9. Pursuant to Rule 12(b)(4) and Rule 12(b)(5) of the South Carolina Rules of Civil Procedure, Plaintiff's Complaint should be dismissed for Insufficiency of Process and Insufficiency of Service of Process.

FOR A THIRD DEFENSE

10. The Defendant would show, upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action and, therefore, the Plaintiff's Complaint should be dismissed with costs.

FOR A FOURTH DEFENSE

11. The Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to their own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of the Defendant, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. The Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff and would ask that this court compare the negligence of the Plaintiff and the Defendant and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of the Defendant, which is specifically denied, then the Plaintiff should be totally barred from recovery and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the

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negligence of the Defendant, then the amount of recovery available to the Plaintiff should be reduced by the percentage of the Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A FIFTH DEFENSE

12. The Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff, which are specifically denied, were the result of the acts or omissions of others not in the employ or control of the Defendant and, therefore, the Plaintiff cannot recover from this Defendant in any sum whatsoever.

FOR A SIXTH DEFENSE

13. The incident upon which the Complaint is based was unforeseen and unexpected and accordingly, the Defendant asserts the defense of sudden emergency as a complete bar of this action.

FOR A SEVENTH DEFENSE

14. The Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because the Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates the Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague

and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR AN EIGHTH DEFENSE

15. The Defendant specifically reserves the right to assert any further defenses as may be revealed by additional information acquired during discovery or otherwise from any other party herein. The Defendant further reserves the right to amend this Answer to the Third Party Complaint to assert any other applicable defenses, to assert any applicable cross and/or counterclaims, and to implead any other applicable parties.

WHEREFORE, having fully answered, the Defendant prays that the Plaintiff's Complaint be dismissed with costs.

The Defendant demands a jury trial.

MURPHY & GRANTLAND, P.A.

Adam J. Neil, Esquire
4406-B Forest Drive
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
August 31, 2006

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2006-CP-02-1110

Marsha L. Temples and Douglas Temples, Jr.,

Plaintiffs,

vs.

Neal O. Plush,

Defendant.

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for **Defendant**, do hereby certify that I have served a copy of the foregoing, **Answer,** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

John W. Carrigg, Jr., Esquire
Nicholas C. Steinhaus, Esquire
1494 Lake Murray Blvd., Suite A
Columbia, S.C. 29212

Kelly B Douglas

Kelly Beliveau Douglas

Columbia, South Carolina
August 31, 2006

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Marsha L. Temples and Douglas Temples, Jr.,

Plaintiffs,

vs.

Neal O. Plush,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2006-CP-02-1110

MC 25,560

ORDER OF DISMISSAL

This matter comes before the Court on motion of John W. Carrigg, Jr., Esquire, attorney for the Plaintiffs and by and with the consent of Adam J. Neil, Esquire, attorney for the Defendant, for an Order dismissing the case pursuant to South Carolina Rules of Civil Procedure 40(j). It appearing that the Motion is proper, it is

ORDERED, ADJUDGED AND DECREED that the above entitled action be and it is hereby dismissed pursuant to Rule 40(j).

AND IT IS SO ORDERED.

The Honorable Doyet A. Early, III
Chief Administrative Judge

19th day of Aug, 2007

I SO MOVE:

Adam J. Neil, Esquire
4406-B Forest Drive
PO Box 6648
Columbia, South Carolina 29260
803-782-4100

I CONSENT:

John W. Carrigg, Jr., Esquire
1492 Lake Murray Blvd., Suite A
Columbia, S.C. 29212
803-407-5354

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

AUG 24 2007

Liz Godard
C.C.C.P. & G.S., Aiken County, S.C.
Barbara Gage
Deputy Clerk

Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

FORM 4

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 06-CP-02-1110

MC 25560 JR

Marsha L. Temples
Douglas Temples Jr.

PLAINTIFF(S)

Neal O. Plush

DEFENDANT(S)

CHECK ONE:

[ ] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED *(CHECK REASON)***: [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ] Other-_____

[✓] **ACTION STRICKEN *(CHECK REASON)***: [✓] Rule 40(j), SCRCP; [ ] Bankruptcy; [ ] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other_____

IT IS ORDERED AND ADJUDGED: [✓] See attached order; [ ] Statement of Judgment by the Court:

Dated at _____, South Carolina, this _____ day of _____, 20____.

_____
PRESIDING JUDGE

This judgment/order was entered/filed on the 24 day of August, 2007, and a copy mailed/hand-delivered/boxed this 24 day of August, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

John Carrigg

ATTORNEY(S) FOR THE PLAINTIFF(S)

Adam Neil

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard
CLERK OF COURT

By: Barbara Riggs
DEPUTY CLERK

SCRCP APP-24

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

COVENANT NOT TO EXECUTE

THIS COVENANT is made on this the 12 day of Sept, 2007, by and between **Marsha L. Temples,** individually, hereinafter referred to as "Covenantor" and **Neil O. Plush and Southern United Fire Insurance Company,** hereinafter referred to as "Covenantees".

WHEREAS, on August 18, 2003, in Aiken County, South Carolina, the Covenantor, Marsha L. Temples, was injured in an automobile accident with Neil O. Plush; and

WHEREAS, the automobile involved that was operated by Neil O. Plush and insured by Southern United Fires Insurance Company through a policy issued to Dana Jackson; and

WHEREAS, the automobile being driven by Neil O. Plush had only Fifteen Thousand and No/100 ($15,000.00) Dollars liability coverage with the Covenantee, Southern United Fire Insurance Company, under policy number 000600097001-2, issued to Dana Jackson; and

WHEREAS, the damages sustained by the Covenantor in the automobile accident of August 18, 2003, may exceed the liability limits of the insurance policy of the Covenantee and the Covenantor is desirous of protecting her right to proceed to suit against Covenantee Neil O. Plush for purposes of collecting underinsured motorist benefits that may be available.

NOW, FOR AND IN CONSIDERATION of the payment to the Covenantor of the sum of **FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS** by the Covenantees, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of her claim with the underinsured carrier, the Covenantor shall have the right to bring suit against the Covenantees and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, her subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of **Fifteen Thousand and No/100 ($15,000.00) Dollars,** Covenantor, her subrogees, heirs, or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in the above-mentioned lawsuit except as herein stated. Further, upon reduction to Judgment of the aforementioned lawsuit, the Covenantor, her subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, this agreement or copy hereof shall be considered a satisfaction of any Judgment in any case presented by Covenantor against Covenantees for the accident, dated August 18, 2003, and can be recorded as such should Covenantor, her subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

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3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. Covenantor expressly represents that she has been fully advised of all facts of a potential lawsuit, and all claims arising out of or in relation thereto, and is aware and fully advised that the execution of this instrument will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

5. In executing this agreement, Covenantor represents and warrants that she has relied on her investigation and has not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agrees that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that she will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement, the Covenantees do not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits and the Covenantor expressly acknowledges this disclaimer.

8. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Southern United Fire Insurance Company abreast of developments in their attempts to collect underinsured motorist benefits, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage and whether a settlement of underinsured motorist benefits have been obtained.

9. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

10. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

11. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

12. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

13. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

14. The Covenantor acknowledges that she has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage should this Covenant be executed.

15. The Covenantor agrees and expressly warrants that Covenantor shall be solely responsible for the payment of any and all expenses and any costs incurred by Covenantor as a result of the incidents alleged to have occurred herein. The Covenantor expressly agrees that Covenantor shall be solely responsible for the payment of any claims, which might be asserted by any insurance carrier, or other entity which made the payments on bills or expenses for Covenantor or on Covenantor's behalf and which assert any lien against the proceeds of this settlement. The Covenantor expressly agrees that this is Covenantor's responsibility and Covenantor expressly agrees to hold harmless and indemnify the entities to whom Covenantor gives this Covenant Not To Execute listed above for the payment of such sums.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:

Witness

Marsha L. Temples (L.S.)
Marsha L. Temples

Witness

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	
	)	CA No. 2006-CP-02-1110
MARSHA L. TEMPLES and	)	
DOUGLAS TEMPLES, JR.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
NEIL O. PLUSH,	)	
	)	
Defendant.	)	

NOTICE OF APPEARANCE

TO: Marsha L. Temples and Douglas Temples, Jr., by and through their attorney, John W. Carrigg, Jr., 1492 Lake Murray Blvd., Suite A, Columbia, South Carolina 29212

Pursuant to the provisions of the South Carolina Code of Law § 38-77-160, 1976, as amended, the GEICO Indemnity Co. (hereinafter "GEICO"), the underinsured motorist insurance carrier of the above-named plaintiffs, hereby gives notice of its status and appearance in this action and reserves its right, at its option, to assume the defense of this action as set forth in said statute.

This 25 day of August, 2008.

Sonja R. Tate
South Carolina Bar No. 16206
Attorney of GEICO Indemnity Company

OF COUNSEL:

FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing NOTICE OF APPEARANCE was served by U.S. Mail, postage prepaid, upon the following counsel of record, this 25 day of August, 2008.

John W. Carrigg, Jr.
1492 Lake Murray Blvd.
Suite A
Columbia, SC 29212

Sonja R. Tate

SONJA R. TATE

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Aiken County EMS, Attention: Medical Records Custodian
828 Richland Avenue West, Aiken, SC 29801

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY — COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION — DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477)
One 10th Street, Suite 700, Augusta, GA 30901

Date and Time
Tuesday, March 10, 2009 at 9:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES — DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — **Attorney for GEICO Indemnity Company**

ISSUING OFFICER'S SIGNATURE AND TITLE. (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
828 Richland Avenue West, Aiken, SC 29801

SERVED ON (PRINT NAME)
Aiken County EMS

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO AIKEN COUNTY EMS

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Augusta Medical Associates, Attention: Medical Records Custodian
818 St. Sebastian Way #403, Augusta, GA 30901

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place	Date and Time
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477) One 10th Street, Suite 700, Augusta, GA 30901	Tuesday, March 10, 2009 at 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonya R. Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
818 St. Sebastian Way #403

SERVED ON (PRINT NAME)
Augusta Medical Associates

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER
ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO AUGUSTA MEDICAL ASSOCIATES

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Augusta Surgical Group, P.C., Attention: Medical Records Custodian
1430 B. Harper Street, Augusta, GA 30901

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place	Date and Time
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477) One 10th Street, Suite 700, Augusta, GA 30901	Tuesday, March 10, 2009 at 10:30 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE. (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
1430 B. Harper Street, Augusta, GA 30901

SERVED ON (PRINT NAME)
Augusta Surgical Group, PC

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

Anna C. Fry
SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

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(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

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(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO AUGUSTA SURGICAL GROUP

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Carolina Musculoskeletal Institute, P.A., Attention: Medical Records Custodian
410 University Parkway, Suite 1000, Aiken, SC 29801

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place	Date and Time
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477) One 10th Street, Suite 700, Augusta, GA 30901	Tuesday, March 10, 2009 at 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE. (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
410 University Parkway, Suite 1000, Aiken, SC 29801

SERVED ON (PRINT NAME)
Carolina Musculoskeletal Institute, P.A.

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER
ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

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(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO CAROLINA MUSCULOSKELETAL INSTITUTE, P.A.

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Hammond-Beyer Health Center, P.A., Attention: Medical Records Custodian
2680 Whiskey Road, Aiken, SC 29803

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place	Date and Time
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477) One 10th Street, Suite 700, Augusta, GA 30901	Tuesday, March 10, 2009 at 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
2680 Whiskey Road, Aiken, SC 29803

SERVED ON (PRINT NAME)
Hammond-Beyer Health Center, P.A.

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER
ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO HAMMOND-BEYER HEALTH CENTER, P.A.

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Hitchcock Healthcare, Inc., Attention: Medical Records Custodian
690 Medical Park Drive, Aiken, SC 29803

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY — COURTROOM
DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION — DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477)
One 10th Street, Suite 700, Augusta, GA 30901

Date and Time
Tuesday, March 10, 2009 at 11:30 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES — DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — **Attorney for GEICO Indemnity Company**

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

SERVED PLACE
690 Medical Park Drive, Aiken, SC 29801

☐ YES ☐ NO AMOUNT $_____

SERVED ON (PRINT NAME)
Hitchcock Healthcare, Inc.

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

Anna C. Fry
SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person; except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
Plaintiffs,	)	
v.	)	
NEAL O. PLUSH,	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO HITCHCOCK HEALTHCARE, INC.
THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: David K. Carter, M.D., Attention: Medical Records Custodian
Post Office Box 532780, Atlanta, GA 30353

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY — COURTROOM
DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION — DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477)
One 10th Street, Suite 700, Augusta, GA 30901

Date and Time
Tuesday, March 10, 2009 at 12:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES — DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

Attorney for GEICO Indemnity Company

DATE 2-24-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

SERVED PLACE
Post Office Box 532780, Atlanta, GA 30353

☐ YES ☐ NO AMOUNT $_____

SERVED ON (PRINT NAME)
David K. Carter, M.D.

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45. South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
Plaintiffs,	)	
v.	)	
NEAL O. PLUSH,	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO DAVID L. CARTER, M.D.
THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Hitchcock Healthcare, Inc., Attention: Medical Records Custodian
690 Medical Park Drive, Aiken, SC 29803

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY — COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION — DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477)
One 10th Street, Suite 700, Augusta, GA 30901

Date and Time
Tuesday, March 10, 2009 at 11:30 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES — DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja R. Tate — **Attorney for GEICO Indemnity Company**

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

SERVED PLACE
690 Medical Park Drive, Aiken, SC 29801

☐ YES ☐ NO AMOUNT $____

SERVED ON (PRINT NAME)
Hitchcock Healthcare, Inc.

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

Anna C. Fry
SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO HITCHCOCK HEALTHCARE, INC.
THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: University Hosptial, Attention: Medical Records Custodian
1350 Walton Way, Augusta, GA 30901-2629

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY — COURTROOM
DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION — DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):
See Addendum A attached hereto.
In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477)
One 10th Street, Suite 700, Augusta, GA 30901

Date and Time
Tuesday, March 10, 2009 at 1:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES — DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER:
Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Sonja Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE, (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

SERVED PLACE
1350 Walton Way, Augusta, GA 30901-2629

☐ YES ☐ NO AMOUNT $_____

SERVED ON (PRINT NAME)
University Hospital

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(C) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of the rule, a person commanded to produce and permit inspection and copying, may within 14 days, after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying or any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

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(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed, or regularly transacts business in person.

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(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)

MARSHA L. TEMPLES and)
DOUGLAS TEMPLES, Jr.) Case No. 2008-CP-02-1698

Plaintiffs,

v.

NEAL O. PLUSH,

Defendant.

ADDENDUM A
TO SUBPOENA TO UNIVERSITY HOSPITAL
THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT IN THE COUNTY OF AIKEN

MARSHA L. TEMPLES AND
DOUGLAS TEMPLES JR.

Plaintiffs

V.

SUBPOENA IN A CIVIL CASE
CASE NO: 2006-CP-02-1110

NEAL O. PLUSH

Defendants

TO: Aiken Regional Medical Center, Attention: Medical Records Custodian
202 University Parkway, Aiken, SC 29801

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

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In lieu of appearing at the date and time below, please forward copies of the requested records to the attention of Sonja R. Tate, Fulcher Hagler,LLP, P.O. Box 1477, Augusta, GA 30903 on or before the date listed below.

Place	Date and Time
Fulcher Hagler LLP, P.O. Box 1477 (30903-1477) One 10th Street, Suite 700, Augusta, GA 30901	Tuesday, March 10, 2009 at 9:30 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

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Sonja R. Tate, Esq., Fulcher Hagler LLP, P.O. Box 1477, Augusta, Georgia 30903-1477 (706) 724-0171

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Sonja R. Tate — Attorney for GEICO Indemnity Company

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE 2-26-09

PROOF OF SERVICE

DATE: February 26, 2009

FEES AND MILEAGE TENDERED TO WITNESS

☐ YES ☐ NO AMOUNT $_____

SERVED PLACE
202 University Parkway, Aiken, SC 29801

SERVED ON (PRINT NAME)
Aiken Regional Medical Centers

MANNER OF SERVICE
Certified Mail Return Receipt Requested

SERVED BY (PRINT NAME)
Anna C. Fry

TITLE
Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2-26-09

SIGNATURE OF SERVER

ADDRESS OF SERVER: One 10th Street, Suite 700
Augusta, GA 30901

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(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter; and no exception or waiver applies; or

(iv) subjects a person to undue burden.

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(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not upon request of any party, or

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
MARSHA L. TEMPLES and DOUGLAS TEMPLES, Jr.	)	Case No. 2008-CP-02-1698
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
NEAL O. PLUSH,	)	
	)	
Defendant.	)	

ADDENDUM A
TO SUBPOENA TO AIKEN REGIONAL MEDIAL CENTERS

THE DOCUMENTS HEREBY REQUESTED ARE:

A certified copy of any and all healthcare/pharmaceutical records in your possession *including, but not limited to*, in-patient records, out-patient records, clinic records, correspondence, bills or statements for services rendered, notes, electronic documents/images , reports of any kind including but not limited to x-ray, laboratory, pathology studies/slide and diagnostic studies/films, graphs, consultations, and any and all other documents which are a part of any file you may have accumulated on:

PATIENT: MARSHA L. TEMPLES
SOCIAL SECURITY NO.: 256-92-6877
DATE OF BIRTH: 3-3-1959

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)
) CASE NO.: 2006 -CP-02-1110
)
Marsha Temples,) **MOTION AND ORDER INFORMATION**
Plaintiff,) **FORM AND COVERSHEET**
vs.)
)
Neil O. Plush)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
John Carrigg, Bar No. 0015239	_____, Bar No. _____
Address:	Address:
137 E. Butler St., #6, Lexington, SC 29072	_____
Phone: 803-785-5511 Fax 803-785-5513	Phone: _____ Fax_____
E-mail: jcarrigg@carrigglaw.com Other: _____	E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Restore
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 125.00
☐ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

COPY
ORIGINAL FILED

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

FEB 14 2012

AIKEN COUNTY
CLERK OF COURT

300 3at

SCCA 233 (11/2003)

50

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Marsha L. Temples and	)	CIVIL ACTION NO: 2006-CP-02-1110
Plaintiff,	)	**MOTION TO RESTORE CASE**
vs.	)	
Neil O. Plush,	)	
Defendant.	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiff hereby moves in accordance with Rule 40 of the South Carolina Rules of Civil Procedure, for an Order of this Court restoring this matter to the docket after being previously stricken from the docket pursuant to Rule 40 (j) to allow plaintiff to pursue underinsured motorist coverage only. This motion is may be further supported by briefs.

WHEREFORE, the Plaintiff prays that this Court grant him the relief Requested in this Motion.

Respectfully submitted,

John Carrigg, Esquire
137 E. Butler Street, Suite 6
Lexington, South Carolina 29072
(803) 785-5511

5, 2012
Lexington, South Carolina

COPY
ORIGINAL FILED

FEB 14 2012 3:00

AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Marsha L. Temples and Plaintiff, vs. Neil O. Plush, Defendant.	)	CIVIL ACTION NO: ~~2006-CP-02-1110~~ 2012-CP-0200392 **ORDER RESTORING CASE TO DOCKET**

This matter comes before me upon motion of the Plaintiffs who, having previously stricken their case from the docket pursuant to SCRCP Rule 40(j), now moves to restore this case to the docket pursuant to the same Rule.

IT IS ORDERED, ADJUDGED, and DECREED that the above-captioned matter should be and the same is hereby restored to the general docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure.

AND IT IS SO ORDERED.

Chief Administrative Judge
Second Judicial Circuit

Aiken, South Carolina
Feb 14, 2012

2.14.12
C.C.P.&G.S.
Deputy Clerk

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

FEB 14 2012

C.C.C.P. & G. S., Aiken County, S.C.
Deputy Clerk

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP0200392

Marsha L Temples *vs.* **Neal O Plush**

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Aiken, South Carolina, this 14th day of February, 2012.

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 14th day of February, 2012, and a copy mailed first class this 14th day of February, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

John W. Carrigg Jr. Carrigg Law Firm 1492 Lake Murray Blvd., Ste. A Columbia, SC 29212

ATTORNEY(S) FOR THE PLAINTIFF(S)

Adam J. Neil Murphy & Grantland, PA P.O. Box 6648 Columbia, SC 29260

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	
	)	CA No. 2012-CP-02-00392
MARSHA L. TEMPLES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
NEIL O. PLUSH,	)	
	)	
Defendant.	)	

NOTICE OF MOTION AND MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that Defendant Plush, through his undersigned attorney, will move at a date and time to be set by the court, but not sooner than ten days after service hereof, at the Aiken County Courthouse, for a hearing on Defendant Plush's Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12 and Rule 40 of the South Carolina Rules of Civil Procedure.

Defendant Plush prays for an Order dismissing Plaintiff's Complaint on the grounds that Plaintiff's action is barred by the statute of limitations, as the incident occurred on August 18, 2003. Although the matter was filed on August 2, 2006, it was stricken from the docket on August 24, 2007. A Motion to Restore and Order Restoring the matter to the docket were not filed until February 14, 2012. As the Motion to Restore was not filed within one year of the Order striking the matter from the docket, the remaining portion of the statute of limitation began to run one year from the date it was stricken and expired approximately 16 days later on September 9, 2008.

Defendant requests that oral arguments on the motion be heard by the court.

Respectfully Submitted,

SONJA R. TATE
South Carolina Bar No: 16206
Attorney for Defendant

OF COUNSEL:

FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

Augusta, GA
March 13, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by U.S. Mail, postage prepaid, upon the following counsel of record, this 13 day of March, 2012.

John W. Carrigg, Jr.
137 E. Butler Street, Suite 6
Lexington, SC 29072

Sonja R. Tate
SONJA R. TATE

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)
) CASE NO.: 2012-CP-02-00392
MARSHA L. TEMPLES,)
Plaintiff,) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.)
)
NEIL O. PLUSH,)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
John Carrigg, Bar No. 0015239 Address: 137 E. Butler St., #6, Lexington, SC 29072 Phone: 803-785-5511Fax 803-785-5513 E-mail: jcarrigg@carrigglaw.comOther: ____	Sonja R. Tate, Bar No. 16206 Address: P.O. Box 1477, Augusta, GA 30903 Phone: 706-724-0171 Fax706-3963625 E-mail: state@fulcherlaw.comOther: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — March 13, 2012 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by: ____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

State of South Carolina	)	
	)	Court of Common Pleas
County of Aiken	)	2012-CP-02-00392
Marsha Temples	)	
Plaintiff	)	
vs.	)	Transcript of Record
	)	
Neil O. Plush	)	
Defendant	)	

April 9, 2012
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

John Carrigg, Esq.
Attorney for the Plaintiff

Sonja R. Tate, Esq.
Attorney for the Defendant

Lisa H. Davenport, RPR
Official Court Reporter

INDEX OF WITNESSES

EXHIBITS

NO.	DESCRIPTION	ID	EV

(None offered)

(Whereupon, on April 9, 2012 the following proceedings were held:)

THE COURT: All right. What we have here -- a defendant's motion to dismiss?

Ms. Tate, it is your motion?

MS. TATE: Yes, sir. Your Honor, this case arises out of an incident that occurred in August 18 of 2003 and a suit was subsequently filed August 2 of 2006; so just prior to the running of the statute of limitations. That suit was then dismissed by way of Rule 40(j) on August 24, 2007 and then earlier this year February 14 of 2012 Your Honor signed an order restoring that case to the docket and it has since was filed subsequently and a new action created -- new civil action opened with the court.

Now, Your Honor, just for the purposes of full disclosure, I do represent Geico who is the UIM carrier in this case and Geico was served through the Department of Insurance with the 2006 action in July of 2008 which would have been not quite a year after the 40(j) dismissal was entered and then actually filed a notice of appearance and served discovery and we at some point later found out that the case had been dismissed pursuant to Rule 40(j) and had never been restored to the docket.

THE COURT: Isn't there a tolling provision in 40(j)?

MS. TATE: The tolling provision being that if a

motion to restore is filed within one year that the statute of limitations will be tolled for that time period. Obviously, the motion to restore was not filed until February of 2012, some five years later; so, Your Honor, our contention would be that the case is barred by the statute of limitations. If a Rule 40(j) was going to be restored, a motion should have been filed prior to August 24 of 2008 which is five years ago almost. Anything that took place after the service of the 2006 action on Geico would have been a nullity because they were served with an action that was no longer pending.

THE COURT: All right. Mr. Carrigg?

MR. CARRIGG: Your Honor, I certainly understand this is an unusual situation and I don't want to go through all what happened in my office that led to this situation; however, I do want to point out some things and I did look at this very carefully before filing the motion. First, I do want the court to know that we filed -- actually filed a motion so that this could be heard as a matter of a motion to restore the case. Somehow -- however it occurred -- the order was signed and sent. I did file along with the check the order. Nonetheless, that does have some import here as I will get back to in a moment.

The question becomes, Your Honor, is the underinsured carrier entitled to assert the statute of limitations

defense in this situation. There are several cases on point that deal with uninsured motorists and underinsured motorist cases being brought after the statute of limitations for whatever reason and the court consistently says that these cases are brought pursuant to the underinsured, uninsured motorist provision which is 38-77-180 and it's a notice provision. Once notice is given, then they can't avail themselves of the statute of limitations.

Secondly, from a technical standpoint the statute of limitations must be plead to be asserted. It has never been plead. I mean, you look at ---

THE COURT: It is just an affirmative defense under Rule 12.

MR. CARRIGG: Under 8(c) it has to be plead.

THE COURT: 8(c)?

MR. CARRIGG: It's Rule 8(c) and the case of Dunbar versus Cross and I have handed you up all the authorities I've cited in my memorandum, but suffice it to say there are several cases that deal with -- one is Franklin versus Devoe. That was the case involving I believe underinsured motorist -- excuse me, uninsured but under and uninsured are the same basically because of the same statute. It says, "The uninsured motorist legislation is remedial in nature enacted for the benefit of injured persons and is

to be liberally construed so that the purpose intended may be accomplished." There is another case called Ex-parte: The South Carolina Farm Bureau Mutual Insurance Company and it again deals with that same situation citing -- actually, I believe it cites the Gunnells case, but however it -- Let me quote this to you. It says, "Nothing in 38-77-160" -- which is just the uninsured provision versus the underinsured -- "creates a statute of limitations. Indeed the statute does not reference 15-3-530. The language in the manner provided by law modifies the manner of service requiring that the insured serve the insurance carrier through the insurance commissioner as provided by 15-9-27."

Every time you see a situation where the -- and there is another case called Gunnells versus American Liberty Insurance. As I say, I have included these cases in the memorandum. The court goes back to that it is a remedial statute and it is a notice statute; so the question becomes, one, since the statute has not -- the statute of limitations defense has not been plead, the motion to dismiss today cannot be granted I would submit to you.

Secondly, if it is -- if they amend successfully and plead it, the question becomes can they avail themselves of the statute of limitations.

THE COURT: Have you settled the underlying case?

MR. CARRIGG: Yes and a covenant --

THE COURT: And a covenant not to sue.

MR. CARRIGG: Right. So the defendant has agreed for suit to be brought against him for collection of underinsured motorist coverage to -- and, you know, there is the Crawford case I believe that says there is no attorney-client privilege between an underinsured and underinsured defendant -- underinsured attorney and an underinsured defendant. That was a case out of Columbia and I cite that and it's attached as well.

As far as the amount of time I know it's exorbitant, but the Maxwell case which is also cited says you can bring it back any time. You just can't -- I would submit to you if I was faced with a named defendant, not uninsured motorist carrier, I would be sunk. I would be down the tubes, but I have done a lot of research on this.

One, there is no case in South Carolina dealing with this situation. There is -- there are cases -- the Maxwell case specifically dealt with a named defendant who the case was restored after the one year and after the statute had expired and the named defendant claimed the statute. The Court of Appeals actually opined that the defendant's attorneys demonstrated good cause and that Rule 6 allowing enlargement of time applied. The Supreme Court then reversed that and says, no, it doesn't, but

that's the closest case, but it doesn't address all of the other issues involved in uninsured and underinsured motorists.

It is very clear that our court has repeatedly said -- and I've included the cases -- that these are remedial statutes; that it is a notice-provision statute, not a statute of limitations statute because in one case that I cite which is -- it may be Gunnells. I am confusing myself a tiny bit. It was an uninsured motorist where you have to actually serve the uninsured carrier prior to the statute and it was served afterwards for reasons and they said, you know, it's remedial statute; we're not going to dismiss it for that.

I mean, and I included the cases, but from a technical standpoint, Your Honor, and I think this is important as well from a procedural standpoint -- and, like I said, we filed a motion with a motion sheet and paid the 25-dollar motion fee and asked for 15 minutes and a court reporter when we filed a motion to restore thinking this would come up at that time. Instead we got back the order which we served. I think at that point in time it was tantamount upon the underinsured carrier to file a Rule 59(e) motion which they did not file because otherwise the order restoring the case now becomes the law of the case.

They did not file a Rule 59(e). They filed a motion to dismiss based on the statute of limitations which was not plead in the original pleadings.

Excuse me, Your Honor. May I get some water?

THE COURT: Ms. Tate, it is sort of interesting, I mean, but have you got any cases that say anything different from what Mr. Carrigg is telling me?

MS. TATE: Well ---

THE COURT: I mean, I read his memo.

MS. TATE: Well, Your Honor, I just received the memo and I have to say I think it's a little interesting that he says they filed the motion with the expectation of getting a specific response when I have had no contact with Mr. Carrigg whatsoever since July of 2009 when I sent Mr. Carrigg a letter saying we have learned that the prior -- the 2006 case was dismissed pursuant to 40(j). No motion or order has ever been filed and, therefore, it's never been restored. That was in July of 2009. I have heard nothing from Mr. Carrigg since then.

Now, specifically I believe that section 15-3-530 does have a three-year statute of limitations for the insurance carrier, but getting deeper into the procedural aspects the only action of which Geico was ever -- with which Geico was ever served was the 2006 action and at the time they were served with that action the action was

closed. Geico to my knowledge has not been served with this newly-restored action -- the 2012 action -- and specifically with regard to the motion and order that was filed based on what was served on me the order was sent to Your Honor after it was signed. It was filed along with the motion and the motion was served on me two days after the order was signed which in and of itself specifically flies in the face of Rule 40(j) which requires that the adverse parties be given 10 days notice.

So, we had no notice of the motion and the order until after the order was signed and entered. There has -- since that time there has been an order substituting me as counsel for the named defendant. Statute of limitations wasn't raised in an answer because at the time the 2006 action was filed statute of limitations was not an issue and Geico has not been served the 2012 action at all. The only defendant in the action at this point is the named defendant who is Neil Plush and since the motion to restore was not filed within a year after the time of the order the statute of limitations -- the tolling ended and the statute of limitations has run.

This should be a matter where the 2006 case was the end of it. We have received no other notice of anything else.

THE COURT: So if you're right how do you get around

to remedying your position?

MS. TATE: Which position would that be?

THE COURT: Well, that position is that he's outside of the statute of limitation and that he didn't give you notice of the motion to restore and all that sort of stuff.

MS. TATE: Your Honor, I think -- I think, first of all, we should have been given notice.

THE COURT: I agree you should have been and I don't know why I would have signed it without there being a hearing. Normally I require hearings on 40(j)'s that are outside of the year. I don't know how it got by me.

MR. CARRIGG: The court -- I expected to get the motion back and serve that motion. Instead I got an order back.

THE COURT: Well, it may be just on my own motion vacate that and allow you to serve the Notice of Motion so she has the proper amount of time and we start it anew -- probably the best way to do it.

All right. Mr. Carrigg, do me a proposed order setting forth your position.

Ms. Tate, do me a proposed order stating that you didn't get notice of the 40(j) restoring. The court signed it without any type of hearing. The court acknowledges that should not have been done and on my own

motion I vacate that order and set up a time for Mr. Carrigg to order his motion to restore under 40(j). I'll sign one or the other.

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Aiken County, South Carolina, on the 9th day of April, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 8, 2012

Lisa H. Davenport, Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	
	)	CA No. 2012-CP-02-00392
MARSHA L. TEMPLES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
NEIL O. PLUSH,	)	
	)	
Defendant.	)	

JUN 19 2012

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant in the above matter having filed his motion to dismiss and after careful consideration of the record and arguments of counsel, the Court finds for the following reasons that Defendant's Motion should be and is hereby GRANTED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering Defendant's motion, the question is "whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Cole Vision Corp. v. Hobbs, 394 S.C. 144, 148 (2011).

Plaintiff's claim was subject to a three-year statute of limitations. See S.C. Code Ann. § 15-3-530. The underlying accident occurred on August 18, 2003. While Plaintiff filed her complaint on August 2, 2006, it was stricken from the docket on August 24, 2007 pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure and a Covenant Not to Execute was executed in favor of Defendant Plush. Plaintiff had one year under Rule 40(j) to move to restore her claim in order to toll the limitations period. See SCRCP 40(j); Maxwell v. Genez, 356 S.C. 617, 621 (2003); Graham v. Dorchester County Sch. Dist., 339 S.C. 121, 125 (Ct. App. 2000). However, Plaintiff took no action

FILED 6-19 2012
C.C.C.P.&G.S. 11:30AM
Deputy Clerk

DAE #1

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to restore the case until 2012. The three-year limitations period thus expired in the interim, and her claim is barred. See Rink v. Richland Mem'l Hosp., 310 S.C. 193, 197 (1992); City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232 (Ct. App. 2004).

While Plaintiff has argued there is no statute of limitations on her alleged UIM claim, Plaintiff was required under the UIM statute to preserve her claim against Defendant Plush so long as the UIM carrier did not agree to pay UIM benefits. See S.C. Code Ann. § 38-77-160; Williams v. Selective Ins. Co., 315 S.C. 532, 534–35 (1994). By failing to timely move to restore the case to the docket and thereby toll the statute of limitations as to the named defendant, she failed to do so.

Moreover, Rule 8(c) of the South Carolina Rules of Civil Procedure does not prevent Defendant from raising the statute of limitations at this time. The defense was not available to Defendant until Plaintiff moved to restore her claim in February of 2012 and Defendant's motion was filed promptly at that time. See SCRCP 8(c); Spence v. Spence, 368 S.C. 106, 124 (2006); see also Plyler v. Burns, 373 S.C. 637, 648 (2007). Neither was Defendant required by Rule 59(e) of the South Carolina Rules of Civil Procedure to move to alter or amend the Order restoring the case to the docket as it was not a judgment and "did not go to the legal merits of the claim." City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 234, 235 (Ct. App. 2004; See also SCRCP 59(e), 54(a); Godfrey v. Heller, 311 S.C. 516, 520 (Ct. App. 1993).

The underlying accident in this case occurred almost 10 years ago. Plaintiff failed to move to restore her claim for nearly five years after it was voluntarily dismissed. Under any set of facts and inferences, the statute of limitations expired years ago and in no event later than September of 2008. Therefore, viewed in the light most favorable to

DAE #2

Plaintiff, there is no theory of the case on which Plaintiff is entitled to relief, and Plaintiff's claim is barred by the statute of limitations.

IT IS ORDERED, ADJUDGED, and DECREED that the above-captioned matter should be and the same is hereby dismissed.

AND IT IS SO ORDERED.

The Honorable Doyet A. Early III
Chief Administrative Judge
Second Judicial Circuit

Bamberg, South Carolina

June 14, 2012

Respectfully Submitted,

SONJA R. TATE
South Carolina Bar No: 16206
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by U.S. Mail, postage prepaid, upon the following counsel of record, this 18 day of June, 2012.

John W. Carrigg, Jr.
137 E. Butler Street, Suite 6
Lexington, SC 29072

SONJA R. TATE

FILED 6.19 2012
C.C.C.P.&G.S. 11:30am
Deputy Clerk

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0200392

Marsha L Temples Douglas Temples JR	Neal O Plush
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

_____

_____

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	6/19/2012 Date

For Clerk of Court Office Use Only

This judgment was entered on **June 19, 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **June 19, 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

John W. Carrigg Jr. 137 E. Butler St., Ste. 6 Lexington, SC 29072

ATTORNEY(S) FOR THE PLAINTIFF(S)

Sonja Renee Tate PO Box 1477 Augusta, GA 309031477

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by

Liz Godard - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)
) CASE NO.: 12 -CP-02-00392
)
MARSHA TEMPLES)
Plaintiff,) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.)
)
NEIL PLUSH)
Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
John Carrigg, Bar No. 015239	Sonjya Tate, Bar No. _____
Address:	Address:
137 E. Butler Street, #6, Lexington, SC 29072	PO Box 1477, Augusta, GA 30903
Phone: 803-785-5511Fax 803-785-5513	Phone: 706-828-2625 Fax_____
E-mail: jcarrigg@carrigglaw.comOther: _____	E-mail: _____Other: _____

COPY
JUL 13 2012
09830

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsderation
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒Written motion attached
☐Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant 7-2-12 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Marsha Temples,	)	Docket No.: 12-CP-02-00392
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION FOR RECONSIDERATION**
	)	
Neil Plush,	)	
	)	
Defendant.	)	
	)	

TO: SONJY R. TATE, ESQUIRE, ATTORNEY FOR DEFENDANT

YOU WILL PLEASE TAKE NOTICE, that pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure the Plaintiff, by and through her undersigned counsel, will move before the Court on the tenth day after service hereof, or at such time and place as the Court may set, for reconsideration of and amendment to the Court's decision and Order issued and filed on June 19, 2012 which was received by the Plaintiff on June 28, 2012. Specifically, Plaintiff seeks reconsideration of the Court's decision to grant the Defendant's Motion to Dismiss.

This motion is respectfully based upon the following grounds;

1. The Court did not consider the issue of equitable tolling of the statute of limitations and whether the same would apply in this case. Specifically, Plaintiff does not seek a finding that the Defendant is not ultimately entitled to have judgment granted in their favor on the issue of statute of limitations, Plaintiff asserts that she is at least entitled to have the issues heard. By granting Defendants motion to dismiss the Court deprives the Plaintiff of having the issue heard before the Court. And further, deprives the Plaintiff of obtaining the factual support for said hearing.

2. The Court determined that under any scenario the statute of limitations had long since run on this case. That finding erroneously excludes the issue of the Defendants residence and the effect the same would have on the statute of limitations. Plaintiff's counsel had information prior to the case being dismissed under Rule 40(j) that the Defendant had moved out of the State of South Carolina. Plaintiff has never been able to confirm said information but if that is the case then the statute of limitations would have been tolled pursuant to S.C. Code Section 15-3-30. Plaintiff asserts that she should be entitled to at least raise the issue and have the matter determined. If the Court were to deny Defendants Motion to Dismiss and require that they amend and plead the statute of limitations then Plaintiff could assert the issue and discovery could be obtained so that the Court could determine the issue.

3. This motion may also be supported by such other and further grounds as may be submitted to the Court at the hearing on this matter.

Plaintiff's motion is further based upon the record of this case.

AND IT IS SO MOVED.

By: _____

JOHN W. CARRIGG, JR.
137 E. Butler Street, Suite 6
Lexington, South Carolina 29072
S.C. Bar No.: 015239
ATTORNEY FOR THE PLAINTIFF

Lexington, South Carolina
7-2, 2012

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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Marsha Temples, Plaintiff, vs. Neil Plush, Defendant.	Docket No.: 2012-CP-02-00392 **CERTIFICATE OF SERVICE**

I, Rhonda S. Railing, a Paralegal of Carrigg Law Firm, hereby certify that I served a copy of the **Plaintiff's Motion for Reconsideration** in the above-captioned matter upon counsel for the Defendant and/or other parties listed below, by depositing a copy of the same in the U.S. Mail, with proper postage affixed thereto, this 2nd day of July, 2012, addressed as follows:

Fulcher Hagler, LLP
Sonja R. Tate, Attorney at Law
Post Office Box 1477
Augusta, Georgia 30903-1477

Rhonda S. Railing

Lexington, South Carolina

Plaintiffs

Defendant

CHECK ONE:

[ ] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.

[X] DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED (CHECK REASON): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. nonsuit) [ ] Rule 43(k), SCRCP(Settled); [ ] Other - _____

[ ] ACTION STRICKEN (CHECK REASON): [ ] Rule 40(j),SCRCP; [ ] Bankruptcy; [ ] Binding Arbitration, Subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other: _____

IT IS ORDERED AND ADJUDGED: [ ] See attached order; [X] Statement of Judgment by Court

After carefully reviewing all evidence before me, the Plaintiff's Motion for Reconsideration is DENIED.

Dated at Bamberg, South Carolina, Date July 10, 2012 Judge J. Mark Early III

This judgment was entered on the 16 Day of July, 2012, and a copy mailed this 16 Day of July, 2012, to attorneys of record or to parties as follows:

Attorney for Plaintiff
John Carrigg

Attorney for Defendant
Sonja Tate

Liz Hodard by (Annette)
Clerk of Court

7.16.12

Liz Hodard
C.C.,C.P.,&O.S.

Anita Knoepfle
Deputy Clerk

SCRP Form 4(Rev. 2/96)

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Marsha L. Temples and Douglas Temples, Jr.,

Plaintiffs,

vs.

Neal O. Plush,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: ~~2006-CP-02-1110~~ 2012-CP-02-00392

ORDER SUBSTITUTING COUNSEL

This matter is before me upon motion of Adam J. Neil of the law firm of Murphy & Grantland, P.A., attorneys for the Defendant, Neal O. Plush, seeking an Order to be relieved as counsel and substituting as counsel, Sonja R. Tate, for the Defendant Neal O. Plush. It appears that all parties consent to this Motion.

Therefore, it is hereby ordered that Adam J. Neil and the law firm of Murphy & Grantland, P.A., be relieved as counsel for the Defendant and that Sonja R. Tate be substituted as counsel for the Defendant.

The Honorable Doyet A. Early III
2nd Judicial Circuit

22 day of March, 2012

I SO MOVE:

Adam J. Neil, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100

I CONSENT:

Sonja R. Tate, Esquire
Fulcher Hagler, LLP
PO Box 1477
Augusta, GA 30903-1477
(706) 828-2625

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 28 day of March 20 12
Liz Godard
C.C.C.P. & G.A., Aiken County, S.C.
Angel Miles am
Deputy Clerk

Time: 28 March 12
12:10 Angel Miles am pm

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN)

Marsha L. Temples and Douglas Temples, Jr.,) CASE NO.
☐ Plaintiff) 2012-CP-02-00392

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Neil O. Plush,)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
John W. Carrigg, Jr., Esquire 1494 Lake Murray Blvd., Suite A Columbia, S.C. 29212s	Adam J. Neil, Esquire Address: P.O. Box 6648 Columbia, SC 29260

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Order Substituting Counsel
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — March 27, 2012 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE
CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:
☐ MOTION FEE COLLECTED: $25 CK # 036450
☐ CONTESTED – AMOUNT DUE: Rec # 27941 28 March 12

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN)	
	CIVIL ACTION NO: 2012-CP-02-00392
Marsha L. Temples and)	
)	
)	
Plaintiff,)	
)	**MEMORANDUM IN OPPOSITION TO**
vs.)	
)	**DEFENDANT'S MOTION TO DISMISS**
Neil O. Plush,)	
)	
Defendant.)	
)	

Plaintiff files this motion and attached authorities in opposition to defendant's motion to dismiss.

I. Statute of Limitations Defense is not available to Carrier

The statute of limitations defense is not available to the defendant underinsured motorist carrier in this case. First, a defendant carrier may only assert the defenses available to the actual defendant. In this particular case the defendant while represented by his liability carrier entered into a Covenant Not to Execute based upon payment of the liability coverage. In that agreement the defendant specifically allowed plaintiff to pursue a case against him to collect underinsured motorist coverage. It is absolute in the law of the state of South Carolina that every contract has a covenant of good faith and fair dealing.

Cullen v. McNeal, 390 S.C. 470, 702 S.E.2d 378 (S.C.App. 2010). Based upon that the defendant carrier should not be allowed to assert a statute of limitations defense

because assertion of the same would deprive the plaintiff of the benefit of her bargain by entering into the Covenant Not to Execute with defendant.

Further, it is a clear rule that the defense of stature limitations must be pled for it to be available to any defendant. *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000). Rule 8(c) SCRCP. The underinsured motor vehicle carrier cannot assert the statute of limitations in this case because the same was not pled and further the statute of limitations defense is not available to an underinsured carrier. Our Supreme Court has held that an uninsured claim (similar to the underinsured claim) is remedial in nature and should be construed in favor of coverage. The failure to serve an uninsured carrier within the statute of limitations has been held by our Supreme Court to not foreclose the ability for the individual to collect underinsured motorist coverage. Our court stated in *Gunnels* that "the uninsured motorist legislation is remedial in nature, and enacted for the benefit of injured persons and is to be liberally construed so that the purpose intended may be accomplished." *Gunnels v. American Liberty Ins.* Co., 251 S.C. 242, 161 S.E.2d 822 (S.C. 1968). Further, the court has held that the requirements under the underinsured motorist carrier statute are notice provisions. See S.C. Code Section 38-77-180. *Franklin v. Devore*, 327 S.C. 418, 489 S.E.2d 651 (S.C.App. 1997)

Our Supreme Court has ruled that once the notice provisions of S.C. Code Section 38- 77-180 have been performed the defense of statute limitations is not available to the carrier. *Ex parte South Carolina Farm Bureau Mut. Ins. Co.*, 314 S.C. 487,

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431 S.E.2d 252 (S.C. 1993). Further, as has been ruled by our South Carolina Supreme Court the underinsured motorist carrier attorney has a different relationship with the actual named defendant than an attorney-client relationship. Based upon that the defendant carrier should not be able to assert the statute of limitations defense because the defendant has entered into a covenant not to execute specifically authorizing the plaintiff to pursue a lawsuit against defendant for the sole purpose of collecting underinsured motorist coverage. See *Crawford v. Henderson,* 356 S.C. 389, 589 S.E.2d 204 (S.C.App. 2003).

II. Statute of Limitations is not Procedurally Available to Carrier

In this matter plaintiff filed the motion with the appropriate motion filing fee and motion coversheet requesting a hearing which was mailed to the Clerk of Court for Aiken County in this matter. Pursuant to requirements an order restoring the case along with the filing fee check was also mailed with the motion. Plaintiff's counsel expected to receive a filed motion back from the Clerk's office to serve upon the defendant's attorney in this case. Somehow unknown to plaintiff's counsel the Court entered the Order Restoring the case on February 14, 2012 and assigned the case a new case number. Upon receiving the order plaintiff's counsel on February 16th served the order on defendant's counsel as required by the rules. At that point the proper procedure which defendant should have pursued would have been a motion pursuant to rule 59(e) SCRCP, for the court to reconsider/alter or amend the order entered by the court restoring the case. Instead defendant chose

to file a motion to dismiss and based upon that the order restoring the case is now the law of the case. Since defendant waived or opportunity to file a motion to alter and amend pursuant to rule 59 defendants counsel has waived her argument that the case should be dismissed because it was improperly restored. Further as mentioned earlier the statute of limitations defense is only available to a defendant who has pled the statute of limitations as a defense pursuant to SCRCP 8, and as set forth in *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000). Based upon the same defendant's motion to dismiss should not be granted by the court.

III. Conclusion

Wherefore based upon the foregoing the court should deny defendants motion to dismiss.

JOHN CARRIGG
137 E. Butler Street, Suite 6
Lexington, South Carolina 29072
803-785-5511
ATTORNEY FOR DEFENDANT

April 9, 2012
Lexington, South Carolina

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Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000)

533 S.E.2d 913 (S.C.App. 2000)
341 S.C. 261
Frances DUNBAR, Appellant/Respondent,
v.
Paul H. CARLSON, D.M.D., Respondent/Appellant.
No. 3194.
Court of Appeals of South Carolina
June 19, 2000.

Heard May 8, 2000.

Rehearing Denied Sept. 2, 2000.

Henry Hammer, Howard Hammer, G. Randall McKay and Arthur A. Aiken, all of Hammer, Hammer, Carrigg & Potterfield, of Columbia, for Appellant/Respondent.

Daniel R. Settana, Jr., and John R. Delmore, both of McKay & McKay; and Ruskin C. Foster, of McCutchen, Blanton, Rhodes & Johnson, all of Columbia, for Respondent/Appellant.

HEARN, Chief Judge:

This is a cross-appeal in a dental malpractice action. We affirm the trial judge's denial of Dr. Paul Carlson's motion to amend his answer to assert the statute of repose, and reverse his grant of Carlson's motion to amend to assert the statute of limitations and his grant of a directed verdict on that basis.

FACTUAL/PROCEDURAL BACKGROUND

Frances Dunbar began seeing Carlson in 1983 or 1984. He was her only dentist until 1994. Dunbar saw Carlson many times during this period, and on one of her visits he advised her to have all of her lower teeth crowned. However, Carlson only cleaned her teeth a couple of times during the ten years she was his patient, and he never informed Dunbar she was suffering from periodontal disease. During one two-year period, Carlson placed Dunbar on twenty regimens of antibiotics due to the infections she was having, and her face became badly swollen and painful. Nevertheless, Dunbar liked Carlson and never questioned his treatment.

After noticing Dunbar was constantly on antibiotics, her daughter, Rose Taylor, accompanied her on her last visit to Carlson on June 24, 1994. At that visit, Carlson announced that he had called the Medical University of South Carolina in Charleston and arranged for Dunbar to have all of her teeth extracted. He did not tell her she had periodontal disease. Taylor requested her mother's

records and Dunbar was subsequently treated by Dr. Harold Jablon. Jablon found she had severe periodontal abscesses (infections of the teeth) and diagnosed her with "severe advanced periodontal disease."

Dunbar filed this medical malpractice action against Carlson on September 26, 1995, alleging he failed to diagnose and/or treat her periodontal disease, which ultimately resulted in severe bone loss and the extraction of all her teeth. Dunbar averred that in June 1994 she first became aware and was informed that she had severe bone loss and periodontal disease caused by Carlson's failure to diagnose and/or treat the condition during the time she was his regular patient.

At trial, Jablon was qualified as an expert in dentistry. He testified Dunbar's periodontal disease was the type of disease a general dentist would be expected to identify, and that it would be the obligation of the general dentist to inform the patient of the condition and provide treatment or to refer the patient to a specialist, such as a periodontist. He further testified that due to Carlson's failure to treat Dunbar, he ultimately had to extract all of her teeth due to severe advanced periodontal disease. Jablon found no indication in Carlson's notes that he had recognized this problem. He stated Dunbar should have been informed that she had a condition that needed treatment. Jablon estimated that when Dunbar came to him in 1994, her condition had been progressing for "six, seven years." When Jablon reviewed x-rays Carlson had taken of Dunbar, he could see some bone loss in one from September 1987 that would indicate the beginning stages of periodontal disease.

Rose Taylor, Dunbar's daughter, testified that she accompanied her mother on her last visit to Carlson, at which he announced he had made arrangements for Dunbar to have all of her teeth extracted at the Medical University in Charleston. She stated Carlson still did not inform her mother that she had periodontal disease, even at this last visit. On cross-examination, defense counsel asked Taylor whether when she first started going with her mother to see Carlson she thought anything was wrong. Taylor stated she supported her mother's decision, and that her mother had liked Carlson. Taylor then testified she had encouraged her mother to leave Carlson's care between 1992 and 1994. Upon further questioning from defense counsel, Taylor stated she could not be specific but thought she first advised her mother to leave Carlson in early 1992. Defense counsel stated, "Like February, March, April?" and Taylor stated that she became "very concerned" about her mother around that time.

Dunbar rested her case after this testimony. Carlson then moved to amend his answer to allege the defenses of the statute of repose and statute of limitations and for a directed verdict on those grounds. The trial judge denied the motion to amend as to the statute of repose. However, the trial judge granted Carlson's motion as to the statute of limitations and granted a directed verdict to Carlson on that ground. Both parties appeal.

LAW/ANALYSIS

I. Dunbar's Appeal

A. Statute of Limitations

Dunbar contends the trial judge erred in allowing Carlson to amend his pleadings to assert the affirmative defense of the statute of limitations. We agree.

After Dunbar rested her case at trial, defense counsel argued Carlson should be allowed to amend his pleadings to assert the three-year statute of limitations based on Taylor's testimony on cross-examination that she first advised her mother to leave Carlson in February, March, or April of 1992. Since this action was not filed until September 1995, defense counsel contended the three-year statute of limitations had run on Dunbar's claim and Carlson was entitled to a directed verdict on this basis. The trial judge agreed and allowed Carlson to amend his pleadings to conform to the evidence under Rule 15(b), SCRCP, and then granted his motion for a directed verdict based on the three-year statute of limitations.

Section 15-3-545(A) contains the statute of limitations governing medical malpractice actions. It provides a three-year limitations

period for such claims, employing the discovery rule for determining the accrual date. S.C.Code Ann. § 15-3-545(A) (Supp.1999). The three-year statute of limitations begins to run when the facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of hers has been invaded or that some claim against a party might exist. *Johnston v. Bowen,* 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

Carlson did not plead the affirmative defense of the statute of limitations in his answer. *See* Rule 8(c), SCRCP. However, Rule 15(b), SCRCP, allows for amendments of pleadings to conform to the evidence presented at trial. It provides in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. *Kelly v. South Carolina Farm Bureau Mut. Ins. Co.,* 316 S.C. 319, 323, 450 S.E.2d 59, 61 (Ct.App.1994). Amendments should be allowed if no prejudice occurs to the opposing party. Rule 15(b), SCRCP; *Soil & Material Eng'rs, Inc. v. Folly Assoc.,* 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987).

Rule 15(b) covers two situations involving amendments to conform to the evidence. "First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary." *Sunvillas Homeowners Ass'n, Inc. v. Square D Co.,* 301 S.C. 330, 334, 391 S.E.2d 868, 871 (Ct.App.1990). "Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial." *Id.* at 335, 391 S.E.2d at 871.

In this case, no objection was made to the evidence; therefore, the second part of the rule is not applicable. Further, there was no express consent. Thus, the question before us is whether the parties tried the issue by implied consent.

Carlson asserts Dunbar impliedly consented to the amendment based on her failure to object to her daughter's testimony. To the contrary, we find the failure to object in this case is evidence that Dunbar did not recognize the purpose for which Carlson sought to elicit this testimony. Carlson further argues Dunbar cannot claim the amendment prejudiced her since she did not object to the testimony. *See Woods v. Rabon,* 295 S.C. 343, 348, 368 S.E.2d 471, 474 (Ct.App.1988). We disagree. The prejudice to Dunbar is patent in that the trial judge granted a directed verdict against Dunbar immediately after permitting Carlson's amendment. Unaware this was an issue in the case, Dunbar had not offered any evidence regarding the statute of limitations.

Just prior to eliciting the testimony at issue, defense counsel repeatedly asked Taylor about her mother's health during the time she was being treated by Carlson. Counsel asked Taylor whether her mother's health "was bad" from 1992 to 1994, which Taylor confirmed. In a series of questions, defense counsel thereafter asked Taylor about her mother's hypertension, back surgery, knee problems, and neurological problems. He also asked about the fact that in 1993 to 1994, her mother's glucose levels "skyrocketed." He then asked her about taking toxic levels of medication. Counsel then stated, "When you first started going with your mother to Carlson, you never thought anything was wrong, did you? You were happy with his care; correct?" Dunbar responded, "I personally, between 1992 and 1994, encouraged my mother to leave Carlson's care. When you speak of her blood sugar as going up as you did just, you know, infectious states can drive the blood sugar up as well, and I felt that was a primary factor in the diabetes...." Upon further questioning about when she became concerned, Taylor stated she couldn't be specific about the time frame, but thought it was in early 1992.

In *Williams v. Addison,* 314 S.C. 35, 443 S.E.2d 582 (Ct.App.1994), we observed that implied consent will not be found if all of the parties did not recognize it as an issue at trial:

Where issues are not raised by the pleadings but are tried by consent, amendments to the pleadings are desirable because they bring the pleadings in line with the issues actually developed at the trial. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result. The decision to permit an amendment is within the trial court's discretion. Nevertheless, *this Court will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record--introduced*

as relevant to some other issue--which would support the amendment. This is so because the opposing party may not be conscious of the relevance of the evidence to issues not raised by the pleadings if the relevance is not otherwise made clear.

314 S.C. at 38, 443 S.E.2d at 584 (citations omitted) (emphasis added).

Here, defense counsel questioned Taylor extensively about her mother's health and the time frame for her various illnesses, the obvious implication being that her mother's infections and poor condition were attributable, at least in some part, to her overall medical condition, especially her diabetes. Questions about the timing of these illnesses were pertinent to establishing proximate cause. Since the evidence was admissible for another purpose and it appears Dunbar did not recognize counsel intended to assert the statute of limitations, we conclude she did not impliedly consent to try that issue. *See Id.* Moreover, the prejudice to Dunbar is obvious. Accordingly, we reverse the trial court's decision to grant the amendment.

B. Directed Verdict

Because we find the trial judge improvidently granted the motion to amend, we necessarily reverse his decision to grant a directed verdict on the very ground asserted by that amendment. Dunbar argued in her brief and at oral argument that if this court affirmed the trial judge's decision to grant the amendment, the decision to grant a directed verdict was nonetheless error. While our decision on the propriety of the amendment resolves this appeal, we note for purposes of remand that generally, statute of limitations issues are for the jury, rather than the court, to resolve. *See Arant v. Kressler,* 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating when there is conflicting testimony regarding time of discovery of facts giving notice of a medical malpractice claim, the date on which discovery should have been made becomes an issue for the jury to decide); *Brown v. Finger,* 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (same).

C. Lack of Court Reporter for Rule 59 Hearing

Dunbar asserts the trial judge erred in holding a hearing without a court reporter on her motion to alter or amend the judgment. In light of our disposition of Dunbar's other issues on appeal, we need not reach this issue.

II. Carlson's Appeal

Statute of Repose

Carlson contends the trial judge erred in denying his motions to amend his answer to assert the statute of repose and for a directed verdict on this ground. We disagree.

After the plaintiff had rested her case at trial, Carlson moved to amend his answer to assert the six-year statute of repose. The statute of repose is contained in § 15-3-545(A)'s provision that the action must be commenced not more than "six years from date of occurrence." Thus, the statute of repose imposes an outer limit for filing a medical malpractice action, regardless of when it is discovered. *O'Tuel v. Villani,* 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct.App.1995), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000).

At trial, defense counsel argued there was testimony from Jablon based on his review of Dunbar's x-rays that Carlson deviated from the standard of care in 1987. As noted

above, Jablon testified he thought there was some bone loss visible in an x-ray Carlson took of Dunbar in late 1987 which would indicate the beginning stages of periodontal disease. Dunbar brought this action in 1995. Defense counsel asserted the six-year statute of repose would bar Dunbar's action because it was brought more than six

years after the condition could have been diagnosed, and South Carolina does not recognize the continuous treatment rule.[1]

Dunbar first argued that defense counsel took Jablon's deposition and "[t]hey had all the information that they have here [at trial] at the time of the deposition[.]" Dunbar noted Carlson had the opportunity to move for an amendment of his answer after the deposition but failed to do so. Second, Dunbar argued that, while Jablon's testimony could fairly be interpreted to state there might have been some negligence in 1987, "there certainly was negligence in '92 and continuing on until '94 when [Dunbar] found out about it." The trial judge denied the motion to amend the pleadings to assert the statute of repose.

Amendments to pleadings may properly be denied where "there are circumstances such as inexcusable delay, or the taking of the adverse party by surprise, or the like, which might justify a refusal to amend." *Braudie v. Richland County,* 217 S.C. 57, 59-60, 59 S.E.2d 548, 549 (1950); *see also Crowley v. Spivey,* 285 S.C. 397, 414, 329 S.E.2d 774, 784 (Ct.App.1985) (stating the decision to amend the pleadings is within the trial court's discretion, and circumstances such as inexcusable delay and surprise to the adverse party justify a refusal to amend).

The trial judge did not abuse his discretion in denying the amendment under the circumstances present here. Although Carlson already had deposition testimony from Jablon establishing that he believed Carlson should have diagnosed Dunbar's condition as early as 1987, he did not move to amend his answer until after the plaintiff rested her case at trial. Jablon testified during his deposition that Carlson deviated from the standard of care many times during the period that Dunbar was his patient by not documenting her periodontal disease and by giving her inappropriate treatment. He also stated that he could tell periodontal disease was present in 1987 based on Carlson's file indicating Dunbar had swollen tissue and painful abscesses, and that Carlson should have treated her then for periodontal disease. Thus, the defense was well aware of this potential ground prior to trial. *See Alamance Indus. v. Chesterfield Hosiery Mill,* 239 S.C. 287, 290-91, 122 S.E.2d 648, 649 (1961) (finding no abuse of discretion to deny request to amend answer five days before trial where defendant was aware of the factual matter that was the subject of the proposed amendment from the time the suit was commenced eight months earlier). Accordingly, we conclude the trial judge did not abuse his discretion in denying Carlson's motions to amend his answer and for a directed verdict based on the six-year statute of repose.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STILWELL, J., and MOREHEAD, Acting Judge, concur.

Notes:

[1] Under the continuous treatment rule, "if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated." *Anderson v. Short,* 323 S.C. 522, 524, 476 S.E.2d 475, 476 (1996) (quoting Davis W. Louisell & Harold Williams, *Medical Malpractice,* ¶ 13.02[3] (1995)). Our supreme court noted in *Short* that "most courts will not apply the rule to toll the running of a statute of limitations if before treatment ends the patient discovers or should have discovered the injury giving rise to the cause of action." *Id.* at 525, 476 S.E.2d at 476. The court expressly declined to decide whether South Carolina would adopt the continuous treatment rule, finding the claim in that case would be time-barred even if the rule were applied. *Id.*

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589 S.E.2d 204 (S.C.App. 2003)
356 S.C. 389

Johnny CRAWFORD and Joan Wilson, Plaintiffs, Of whom Johnny Crawford is, Appellant,
v.
Janice HENDERSON, Respondent.

No. 3694.
Court of Appeals of South Carolina
Nov. 17, 2003.

Heard April 9, 2003.

[Copyrighted Material Omitted]

Samuel Darryl Harms, of Greenville, for appellant.

Karl S. Brehmer and J. Austin Hood, both of Columbia, for respondent.

CONNOR, J:

Johnny Crawford brought suit against Janice Henderson and his underinsured motorist carrier ("UIM"), Southern Heritage Insurance Company, seeking to recover damages from injuries suffered in an automobile accident. The jury awarded Crawford $1,099.38 in actual damages. On appeal, Crawford asserts the circuit court erred in quashing Crawford's subpoena to depose Henderson a second time. He contends the UIM carrier's attorney should not have been able to claim an attorney-client privilege to limit the first deposition based on the following reasons: (1) an attorney-client privilege did not exist between Henderson and the UIM carrier's attorney; and (2) any alleged attorney-client privilege was waived by counsel's failure to file a motion for a protective order pursuant to Rule 30(j)(3), SCRCP. Finally, Crawford contends the circuit court erred in permitting a nurse practitioner to give an opinion regarding the cause of Crawford's injuries. We affirm in part, reverse in part, and remand.

FACTS

This case arose out of an automobile accident between Janice Henderson and Johnny Crawford. While leaving a gas station, Henderson pulled out into traffic on Highway 290 in Duncan and was struck by Crawford. Henderson testified she did not immediately see Crawford's vehicle because a truck that was entering the gas station blocked her line of sight.

Crawford sued Henderson seeking to recover damages for injuries both he and his passenger, Joan Wilson, suffered in the accident. After Crawford and Wilson settled the liability limits of Henderson's policy and entered into a covenant not to execute any judgment against Henderson, they sought to recover damages from Southern Heritage Insurance Company ("Southern"), the UIM carrier.

Crawford attempted to take Henderson's deposition four times. Each time, Crawford served Southern's attorney, Karl Brehmer, with the notices of the depositions. Henderson failed to appear. Ultimately, Crawford filed a motion in circuit court seeking an order to compel Henderson to appear for her deposition or be held in contempt.

At the hearing, Brehmer appeared and informed the court that he represented the UIM carrier and had no control over Henderson. Counsel claimed he had attempted to find Henderson in order to get her to appear for a deposition.

After hearing arguments, the circuit court found Brehmer represented Henderson in name only and, therefore, Crawford would have to personally serve Henderson with the notice of deposition. The court reasoned, "[Counsel] does represent [Henderson], ... for purposes of litigating liability and damages. But for purposes of paying money, ... it's very clear that he represents the insurance carrier and he made that clear."

Crawford served Henderson and she appeared for a deposition on February 21, 2001. During the deposition, Crawford's counsel asked Henderson if she had discussed the case with Brehmer prior to the deposition

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and asked her to relate the substance of the conversations. Brehmer instructed Henderson not to answer the question asserting the answer would violate the attorney-client privilege. Henderson did not answer the question and the deposition was concluded.

Crawford served Henderson with a second subpoena and notice of deposition scheduled for June 19, 2001. On June 4, 2001, Brehmer filed a motion for a protective order pursuant to Rules 26(c) and 30(a)(2) of the South Carolina Rules of Civil Procedure.[1] Counsel contended Crawford had already taken Henderson's deposition, the parties had not agreed to multiple depositions, and good cause did not exist to compel an additional deposition. In response, Crawford moved to quash the motion for a protective order on the following grounds: (1) Henderson had not been served with the motion; (2) Brehmer could not assert the attorney-client privilege because he had previously stated he was not Henderson's attorney; and (3) even if the attorney-client privilege existed, it was waived because the procedural requirements of Rule 30(j)(3) of the South Carolina Rules of Civil Procedure, which permit a witness not to answer a deposition question, had not been met.

The circuit court granted Brehmer's motion for a protective order. As a result, Henderson's deposition was never reconvened and the case proceeded to trial. The jury returned a verdict in favor of the plaintiffs and awarded $1,099.38 to Crawford and $30,413.61 to Wilson. Crawford appeals.[2]

DISCUSSION

I. Existence of Attorney-Client Privilege

Crawford argues the circuit court erred when it granted Brehmer's motion for a protective order because, as a matter of law, an attorney-client relationship does not exist between a UIM carrier's attorney and an underinsured motorist, *i.e.,* the named defendant. Even if this relationship can be established, Crawford contends the conversations between Henderson and Brehmer were not protected by the attorney-client privilege.

A.

Although this case presents several related issues, the threshold matter is to define the relationship created between a UIM carrier's attorney and the named defendant.

The attorney-client privilege protects against disclosure of confidential communications by a client to his or her attorney. *State v. Owens,* 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "The privilege is strictly construed to protect only confidences disclosed within the relationship." *Id.* at 407, 424 S.E.2d at 477. To establish an attorney-client privilege, the person asserting the privilege must show that the relationship between the parties was that of attorney and client and that the communications were confidential in nature. *Marshall v. Marshall,* 282 S.C. 534, 538-

39, 320 S.E.2d 44, 47 (Ct.App.1984). In order to obtain the status of a client, the person must communicate in confidence with an attorney for the purpose of obtaining legal advice. *Id.* at 539, 320 S.E.2d at 47. The advice or assistance must be

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sought with a view to employing the attorney professionally whether or not actual employment occurs. *Id.*

Initially, we note there is no contractual relationship between the UIM carrier's attorney and the named defendant. As conceded by Southern, a contract did not exist between Henderson and Southern. Instead, Crawford through his premium payment directly contracted with Southern.

Significantly, our Supreme Court has held the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting. Even though our Supreme Court has not directly addressed the issue in the instant case, we our guided by the analysis in *Broome v. Watts,* 319 S.C. 337, 461 S.E.2d 46 (1995). In *Broome,* Carol and John Broome sued Watts for injuries sustained in an automobile accident. Nationwide Mutual Insurance Company (Nationwide) insured Watts for policy limits in the amount of $50,000/$100,000. The Broomes had underinsured motorist coverage with United Services Automobile Association (USAA). As required by section 38-77-160 of the South Carolina Code of Laws, the Broomes served USAA with the complaints.[3] USAA filed notices of appearance and motions for intervention in both cases. Shortly thereafter, the Broomes, Watts, and Nationwide entered into a settlement agreement in which Nationwide agreed to pay its $50,000 liability limits to the Broomes. Pursuant to the agreement, Watts waived her right to a jury trial and the Broomes agreed not to execute against Watts or Nationwide any judgment obtained against Watts. The Broomes, however, decided to proceed with an action to determine damages for purposes of UIM coverage. USAA was not a party to the agreement. USAA assumed the defense of the action under section 38-77-160, filed answers, and requested a jury trial. Over the Broomes' objections, the judge ordered a jury trial.

On appeal, the Broomes asserted USAA was bound by the settlement agreement. Because Watts is the named defendant, the Broomes contended the named defendant's waiver of a jury trial bound USAA even though it was not a party to the settlement agreement. Our Supreme Court rejected the Broomes' argument, finding that Watts could not give up USAA's right to a jury trial. *Broome,* 319 S.C. at 340, 461 S.E.2d at 48.

Citing section 38-77-160 and a case interpreting this statute, the Court found that a waiver by Watts was not "tantamount to a waiver by USAA, because it blurs the distinction between the named defendant (Watts) and the actual defendant (USAA) which must pay damages on behalf of the named defendant in the event of liability." *Broome,* 319 S.C. at 340, 461 S.E.2d at 48; *see Williams v. Selective Ins. Co. of the Southeast,* 315 S.C. 532, 534-35, 446 S.E.2d 402, 404 (1994) (holding that a UIM carrier is entitled to assume control of the defense on an action even if the insured chooses to settle with the at-fault driver's liability carrier). The Court concluded, "[a]lthough the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." *Broome,* 319 S.C. at 340, 461 S.E.2d at 48; *see also Ex parte Allstate Ins. Co.,* 339 S.C. 202, 528 S.E.2d 679 (Ct.App.2000) (holding in action to recover underinsured motorist benefits, the plaintiff was required to serve UIM carrier with action against underinsured motorist

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prior to trial; recognizing UIM carrier had rights that were separate and distinct from the underinsured motorist and was not in privity with underinsured motorist or his liability carrier).

Despite the Supreme Court's discussions in *Broome,* Southern[4] contends section 38-77-160 supports a "quasi attorney-client" relationship. Specifically, Southern claims the UIM carrier's attorney essentially becomes the attorney for the named defendant because he has stepped into the shoes of the defendant's original attorney who was retained by the liability insurance carrier. We disagree for several reasons. First, Southern has not cited nor have we found any authority that South Carolina recognizes a "quasi attorney-client relationship." Secondly, and most significantly, the Supreme Court established in *Broome* and *Williams* that the interests of a UIM carrier and a named

defendant are separate and distinct. Clearly, once the named defendant has settled for his liability policy limits, he no longer has a stake in the outcome of the litigation. The UIM carrier, on the other hand, still has a viable, financial interest in the case. As a result, the attorney for the UIM carrier represents the carrier and not the named defendant. Even though the UIM carrier "steps into the shoes" of the named defendant, the procedure is not in totality but merely to the point of coverage. Thus, there is no direct relationship between the UIM carrier's attorney and the named defendant.

In addition to the lack of case law and statutory support for the creation of an attorney-client relationship in this situation, we find there are ethical considerations that would also prohibit it. These issues may be illustrated by comparing an established attorney-client relationship with the facts of the instant case.

First, if a relationship exists, the attorney has some degree of control over the client and the client, in turn, has some input in the outcome of the litigation. *See* Rule 1.2(a), RPC, Rule 407, SCACR ("A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."). Here, the UIM carrier's attorney has no control over the named defendant because the attorney represents the insurance company and the named defendant no longer has an interest once a covenant not to execute is entered into with the defendant's liability carrier.

Secondly, under the normal situation, a plaintiff's attorney is not permitted to have direct contact with the defendant, but instead, must serve all pleadings and motions upon the defendant's attorney. *See* Rule 4.2, RPC, Rule 407, SCACR ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."). In the case at bar, the named defendant and the UIM carrier must both be served with the pleadings. *See* S.C.Code Ann. § 38-77-160 (2002) ("No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision."); *Louden v. Moragne,* 327 S.C. 465, 486 S.E.2d 525 (Ct.App.1997) (holding named defendant in an action for benefits under a plaintiff's underinsured motorist policy must be properly served with summons and complaint).

Moreover, if an attorney-client relationship were permitted in this instance, there exists a problem with dual representation. Specifically, the question becomes whether the UIM carrier's attorney can simultaneously represent the insurance company and a named defendant who has no direct relationship with the UIM carrier and whose interests are separate and distinct. *See McNair v. Rainsford,* 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct.App.1998) ("An attorney who represents

more than one client must be cognizant of the vicissitudes of dual representation. Dual representation is not *per se* unethical, but raises a spectre of a violation of Rules 1.7 and 2.2 of the South Carolina Rules of Professional Conduct (RPC), Rule 407, SCACR."); *see* Rule 1.7, RPC, Rule 407, SCACR (outlining rules prohibiting attorney from representing client where there exists a conflict of interest).

B.

Assuming arguendo that an attorney-client relationship can be created between a UIM carrier's attorney and the named defendant, Crawford asserts the attorney-client privilege could not be asserted under the facts of this case.

Brehmer specifically disclaimed the existence of an attorney-client relationship. He maintained Southern retained him to represent its interest pursuant to section 38-77-160. He also stated he had no right to control Henderson. Furthermore, other than Brehmer's appearance at Henderson's deposition and his claim that he conferred with Henderson prior to the deposition, there is no evidence that Brehmer acted as Henderson's legal advisor. From all indications, it seems that Brehmer appeared at the deposition in order to represent Southern's interests. Based on our review of the record, Brehmer has not demonstrated that Henderson was his client. *See State v. Love,* 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) (stating burden of establishing attorney-client privilege is upon the person

asserting it). Even viewing the situation from Henderson's perspective, as Brehmer urges this Court to do, we find no evidence that she had a reasonable belief or expectation that Brehmer directly represented her.

Based on the foregoing, we hold the circuit court erred in quashing Crawford's subpoena to reconvene Henderson's deposition. Because any communications between Brehmer and Henderson were not protected by the attorney-client privilege, Crawford should have been permitted to question her in this regard. Accordingly, we remand for Crawford to take Henderson's deposition and, as a result, remand for a new trial.

C.

Given our conclusion, we are cognizant of the policy concerns presented by Southern. Specifically, Southern asserts an attorney-client privilege should necessarily be created because there must be some level of confidentiality between an attorney for a UIM carrier and the named defendant. Without this protection, Southern claims a UIM carrier's attorney's ability to defend the case will be adversely affected.

As previously discussed, case law, statutes, and ethical rules compel our holding that an attorney-client relationship is not established between a UIM carrier's attorney and a named defendant. Moreover, to hold otherwise would effectively limit the benefits a plaintiff receives from purchasing UIM coverage.

To avoid the predicament alleged by Southern, it is incumbent upon a UIM carrier's attorney to inform the named defendant of the parameters of his or her representation. Specifically, the attorney should emphasize that he or she directly represents the carrier and treat the named defendant essentially as a witness. We note that this procedure does not leave the named defendant without direct representation. Contractually, the named defendant's liability carrier remains obligated to the insured even after the liability limits have been paid. *See Cobb v. Benjamin,* 325 S.C. 573, 584, 482 S.E.2d 589, 594 (Ct.App.1997) (finding the language of section 38-77-160 "giving the UIM carrier the right to assume control of the defense for its own benefit is ... consistent with the recognition that the liability carrier who has paid its limits no longer has the same stake in the outcome, even though the contractual obligation to its insured to defend is ongoing").

II. Waiver of Attorney-Client Privilege

Even assuming that Brehmer could assert the attorney-client privilege, Crawford argues it was waived because he failed to comply with the procedural requirements of Rule 30(j) of the South Carolina Rules of Civil

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Procedure .[5]

Rule 30(j), which governs the conduct of counsel during depositions, provides in relevant part:

Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform a witness that, unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds ***shall*** *move the court for a protective order under Rule 26(c), SCRCP, or 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened.*

Rule 30(j)(3), SCRCP (emphasis added).

Neither Brehmer nor Henderson filed a motion for a protective order within five business days of the termination of the deposition. Because the language of Rule 30(j)(3) is mandatory, any assertion of the attorney-client privilege during the deposition was waived. *See Collins v. Doe,* 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the

rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

Despite the requirements of Rule 30(j)(3), Brehmer argues and the circuit court agreed that Crawford failed to sustain his burden to obtain a second deposition under Rule 30(a)(2), which provides in relevant part, "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Rule 30(a)(2), SCRCP. Additionally, Brehmer contends Rules 30(a)(2) and 30(j)(3) are in conflict, thus, Crawford still needed to comply with the requirements of Rule 30(a)(2).

However, according to the language of Rule 30(j)(3), Crawford was not required to subpoena the court for a second deposition but was instead permitted to reconvene the first deposition. Given the language of Rule 30(j)(3) allows for the reconvening of the first deposition, it does not conflict with the rules governing the procedure to obtain a second deposition as specified under Rule 30(a)(2).

Finally, Brehmer asserts Henderson's deposition should not be reconvened because Crawford allowed the first deposition to proceed after the objection and did not call the trial judge to obtain an immediate ruling. Crawford, however, was not required to do so. Rule 30(j)(3) requires the party asserting the privilege to file the motion for a protective order within five business days of either the suspension or termination of the deposition. The language of Rule 30(j)(3) specifying termination of the proceedings permits the deposition to be concluded after its normal course. Therefore, we find the circuit court erred when it denied Crawford the right to reconvene Henderson's deposition. Accordingly, we remand the case for a new trial after the conclusion of the deposition.

III. Expert Witness Testimony of Nurse Practitioner

Crawford argues the circuit court erred when it permitted a nurse practitioner who treated Crawford to testify regarding causation given Southern failed to establish the nurse was an expert for purposes of rendering medical diagnoses.[6]

At trial, the parties disputed whether Crawford's injuries were caused by the accident or if the injuries were pre-existing from an accident Crawford suffered at work. Crawford testified his right shoulder began to hurt approximately fifteen to twenty minutes after the accident on April 3, 1998. That night, Crawford went to the emergency room where he was given a prescription for pain medication and a muscle relaxant. Nine days later, Crawford sought treatment for his shoulder at an urgent care center. A few days later, Crawford went to an orthopedic specialist, Dr. Postma. Dr. Postma prescribed physical therapy for Crawford's shoulder. Shortly after his last physical therapy appointment, Dr. Postma performed a shoulder manipulation while Crawford was under anesthesia. After the procedure, Crawford went to a pain management center where Dr. Haasis gave Crawford cortisone shots. In his deposition, Dr. Haasis testified he believed Crawford's injuries were secondary to the automobile accident. Crawford submitted medical bills in the amount of $25,849.21.

During his testimony, Crawford relayed that on March 17, 1998, he was injured at work when his shirt got caught in a "mixer machine." As a result of the work-related accident, Crawford sustained injuries that included abrasion burns on his right arm. He testified he planned to return to work on Monday when the accident happened on the previous Friday.

In contrast, Henderson testified Crawford did not show any signs of injuries. She stated Crawford was upset and moving around after the accident.

Southern presented the testimony of Victoria Smith, a family nurse practitioner who treated Crawford. Smith testified she saw Crawford on July 29, 1997. On that day, Crawford complained of pain in his right shoulder. When questioned about the results of her physical examination of Crawford, Smith opined that Crawford suffered from bursitis in his right shoulder. Based on this assessment, Smith prescribed medication and physical therapy.

On April 6, 1998, three days after the automobile accident, Smith again saw Crawford. On that day, Crawford complained of pain in his right shoulder and upper arm. Smith testified Crawford also told her about the injuries he had sustained in the work-related accident. Counsel then asked Smith whether Crawford was suffering from bursitis that day. Crawford's counsel objected to the question on the grounds that Smith was not a medical doctor and, therefore, was not qualified to give a medical diagnosis. The judge overruled the objection. Smith testified Crawford was not suffering from bursitis, thus, implying Crawford was still experiencing the effects of the work-related injury on that day.

"For a court to find a witness competent to testify as an expert, the witness must be better qualified than the jury to form an opinion on the particular subject of the testimony." *Mizell v. Glover,* 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002); *see* Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

Whether to qualify a witness as an expert and admit the expert's testimony is left to the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Payton v. Kearse,* 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998). An abuse of discretion occurs when the trial court commits an error of law or makes a factual conclusion without evidentiary support. *Lee v. Suess,* 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995).

In support of his argument, Crawford cites a case in which this Court held a physical therapist was not qualified to testify regarding causation of the plaintiff's injuries. *Nelson v. Taylor,* 347 S.C. 210, 553 S.E.2d 488 (Ct.App.2001). Based on *Nelson,* Crawford argues that nurse practitioners are also not statutorily authorized to make medical diagnoses and should not be qualified as experts regarding medical diagnoses.

In *Nelson,* Pamela Nelson (Nelson) and her husband brought a negligence action

against Taylor for personal injuries resulting from an automobile accident. As a result of the accident, Nelson complained of pain in her back, neck, head, and shoulder. Nelson was treated by her family physician, an orthopedic surgeon, a neurosurgeon, a shoulder specialist, a chiropractor, and a physical therapist. At trial, contradicting theories emerged concerning the cause of Nelson's injuries. The physical therapist concluded that Nelson's injuries stemmed from her use of a mouse at her computer workstation, resulting in rotator cuff tendonitis. The shoulder specialist disagreed finding Nelson's injuries were caused by the automobile accident. He also ruled out rotator cuff tendonitis. In a deposition, the orthopedic surgeon found no evidence of shoulder impingement. The jury awarded Nelson significantly less than what she offered as her medical expenses.

On appeal, Nelson argued the trial judge erred in admitting the physical therapist's deposition concerning the medical cause of her injuries. *Nelson,* 347 S.C. at 213, 553 S.E.2d at 489. During the physical therapist's deposition, Nelson had objected to the physical therapist's diagnosis of her injuries because he was not a medical doctor and had not reviewed Nelson's medical records or diagnostic test results. This Court reversed the judge's decision to admit the testimony. *Id.* at 216-17, 553 S.E.2d at 491. In reaching this conclusion, we reviewed the statutory scheme created by the General Assembly to define and regulate the practice of physical therapy. Based on the controlling statutes, we determined that a physical therapist is limited in terms of methods of treatment and is not authorized to practice medicine, prescribe medications, or order medical laboratory tests. *Id.* at 215-16, 553 S.E.2d at 490-91. In view of these statutory restrictions, we held the physical therapist was not qualified to testify regarding causation. *Id.* at 216-17, 553 S.E.2d at 491.

Nelson is distinguishable from the instant case. First, as will be discussed, the statutory and regulatory provisions governing the practice of nursing are significantly different from those defining the parameters of physical therapy. Secondly, the statute that prohibits a physical therapist from practicing medicine specifically excludes nurse practitioners from this limitation. *See* S.C.Code Ann. § 40-45-310 (2001) ("Nothing in this chapter shall be construed to restrict, inhibit, or limit the practice of licensed nurse practitioners....").

Although the holding in *Nelson* is not dispositive, it is, nevertheless, instructive for our analysis of the issue presented in the instant case. As in *Nelson,* we must review the General Assembly's statutory scheme regulating nurse practitioners.

Section 40-33-10 defines several aspects of nursing. S.C.Code Ann. § 40-33-10 (2001 & Supp.2002). Relevant to this case are subsections (f) and (g), which define the practice of nursing and the practice of professional nursing. As provided in these subsections, the process of nursing includes direct care and treatment services, which includes the implementation of a physician-prescribed regimen as well as the assessment and nursing diagnosis of health problems. S.C.Code Ann. § 40-33-10(f), (g) (2001). In addition to these responsibilities, a professional nurse "may perform additional acts in the extended role requiring special education and training which are agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Those additional acts agreed to by both boards must be promulgated by the Board of Nursing in its regulations." S.C.Code Ann. § 40-33-10(g) (2001).[7]

Turning to the specifics of this case, the role of a nurse practitioner is described in the regulations governing the practice of nursing as follows:

"Nurse Practitioner" means a registered nurse who has completed a post-basic or advanced formal education program acceptable to the Board, and who demonstrates advanced knowledge and skill in assessment and management of physical and psychosocial health-illness status of individuals, and/or families, and/or groups. Nurse practitioners who manage delegated medical aspects of care must have a supervising physician and operate within the "approved written protocols."

26 S.C.Code Ann. Regs. 91-2(d) (Supp.2002); *see* 26 S.C.Code Ann. Regs. 91-6(h)(1) (Supp.2002) ("A Nurse Practitioner or Clinical Nurse Specialist practicing in an extended role shall perform delegated medical acts pursuant to an approved written protocol between the nurse and the physician.").

The regulations define the terms "delegated medical acts" and "approved written protocols." " 'Delegated Medical Acts' means those additional acts delegated by the physician that include formulating a *medical diagnosis* and initiating, continuing, and modifying therapies, including prescribing drug therapy, under approved written protocols." 26 S.C.Code Ann. Regs. 91-1(c) (Supp.2002) (emphasis added); *see* 26 S.C.Code Ann. Regs. 91-6(h)(2)(b) (Supp.2002) (outlining at minimum information that should be included as "delegated medical acts"). " 'Approved Written Protocols' means specific statements developed collaboratively by the physician or the medical staff and the nurse that establish physician delegation for medical aspects of care, including the prescription of medications." 26 S.C.Code Ann. Regs. 91-2(g) (Supp.2002).

Reading these statutory provisions and regulations together, we find the General Assembly has authorized a nurse practitioner to diagnose and treat medical conditions if a supervising physician has delegated those acts pursuant to an approved written protocol. Significantly, these provisions expand the role of a nurse practitioner to provide a medical diagnosis in addition to a nursing diagnosis. *See* S.C.Code Ann. § 40-33-10(n) (2001) (defining "nursing diagnosis" as "a clinical judgment about an individual, family, or community which is derived through a nursing assessment"); *Flanagan v. Labe,* 547 Pa. 254, 690 A.2d 183 (1997) (recognizing distinction between a nursing diagnosis and medical diagnosis); *Id.* at 186 ("[A] nursing diagnosis identifies signs and symptoms to the extent necessary to carry out the nursing regime. It does not, however, make final conclusions about the identity and cause of the underlying disease."); *cf. Newbern v. State,* No. 02-C-01-9106-CR00143, 1992 WL 124459 at *3 (Tenn.Crim.App. June 10, 1992) (holding a nurse practitioner could testify as expert in rape trial given "a nurse practitioner, unlike the average nurse, can make diagnoses like a doctor and can prescribe non-narcotic medication").

Turning to the instant case, we must examine the record to see if there is any evidence supporting Smith's ability to conduct medical diagnoses of patients. Southern's attorney asked Smith to describe the duties of a nurse practitioner. She responded:

Nurse practitioners are performing delegated medical acts, and that is a collaborative agreement between the physician and the nurse practitioner as to what she can perform, what she feels comfortable in doing, what she's been educated to do, and what [the physician] feels comfortable delegating to her. So, it varies from one practice to another what services nurse practitioners performs [sic].

In addition to this testimony, we note Smith had diagnosed Crawford prior to the accident as having bursitis in his shoulder. She treated him and prescribed medication and physical therapy. From this testimony, the judge could reasonably infer that a physician had delegated to Smith the power to diagnose.

Crawford, however, asserts that because the requisite "written protocol" was not offered into evidence by Southern it was error to permit Smith to testify regarding causation. We find this argument is not preserved for our review. First, it was not presented to the trial judge when Crawford objected to Smith's testimony. *See Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *see also State v. Bailey,* 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (stating a party may not argue one ground at trial and then an alternative ground on appeal). Secondly, Crawford raised this specific argument for the first time in his reply brief. *See Glasscock, Inc. v. United States Fidelity & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct.App.2001), *cert. denied* (July 10, 2002) (finding that appellant could not raise additional arguments in reply brief because it was not addressed in initial brief); *Lister v. NationsBank,* 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct.App.1997) (stating a point raised for the first time in a reply brief will not be considered by appellate court). Accordingly, we find the judge did not abuse his discretion in permitting Smith to testify regarding her diagnosis of Crawford's injury.

In the future, we believe the party presenting a nurse practitioner as a witness should offer a copy of the "approved written protocol" into evidence in order to clarify the exact medical acts the physician delegated to the nurse practitioner.

CONCLUSION

An attorney-client relationship is not created between a UIM carrier's attorney and the named defendant. In the absence of this relationship, a UIM carrier's attorney may not assert the attorney-client privilege to protect communications between he and the named insured. Even if an attorney-client privilege could be asserted, this privilege may be waived if the attorney fails to file for a motion for a protective order pursuant to Rule 30(j)(3) of the South Carolina Rules of Civil Procedure. Finally, a nurse practitioner may testify regarding causation if a physician has delegated the requisite medical acts to the nurse practitioner in "approved written protocol."

Accordingly, we reverse the court's decision quashing Crawford's motion to reconvene Henderson's deposition and remand the case for a new trial. We affirm the decision of the court permitting the nurse practitioner to testify regarding the cause of Crawford's injuries.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

ANDERSON and HUFF, JJ., concur.

Notes:

[1] Rule 26(c) of the South Carolina Rules of Civil Procedure provides in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the

party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court....

Rule 26(c), SCRCP.

Rule 30(a)(2) states in relevant part, "The deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Rule 30(a)(2), SCRCP.

[2] Wilson is not a party to this appeal.

[3] Section 38-77-160 provides in pertinent part:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

S.C.Code Ann. § 38-77-160 (2002). Because there have been no substantive amendments made to this statute since the *Broome* decision, we cite to the most current version of the statute.

[4] We note that although Henderson is the named Respondent, the Respondent's brief was filed on behalf of Southern's interests. Therefore, we refer to Southern and Brehmer, Southern's attorney, throughout our discussion.

[5] In light of our holding that an attorney-client relationship is not created, we need not address this argument. However, because Rule 30(j) is relatively new with limited application, we decide to analyze this issue. Moreover, it provides additional support for our conclusion that the circuit court erred in denying Crawford's right to thoroughly depose Henderson.

[6] Based on our decision to reconvene Henderson's deposition, which will inevitably precipitate a new trial, we need not address Crawford's remaining issue. However, because this issue may arise during a second trial, we decide it for the benefit of the parties.

[7] Subsection (f) provides:

"Practice of nursing" means the provision of services for compensation that assist individuals and groups to obtain or maintain optimal health. Nursing practice is commensurate with the educational preparation and demonstrated competencies of the individual who is accountable to the public for the quality of nursing care. Nursing practice includes the provision of direct care and treatment services including the implementation of a medical regimen as authorized and prescribed by a licensed physician, dentist, or other person authorized by law, teaching, counseling, administration, research, consultation, supervision, delegation, and evaluation of practice. Nursing process includes the assessment and nursing diagnosis of human responses to actual or potential health problems and the planning, intervention, and evaluation of care in the promotion and maintenance of health, the casefinding and nursing management of illness, injury, or infirmity, the restoration of optimum function, or the achievement of a dignified death.

S.C.Code Ann. § 40-33-10(f) (2001).

Subsection (g) provides:

"Practice of professional nursing" means the performance for compensation of any acts in the health care process involving the process of assessment, intervention, and evaluation. This process includes observation, care, and counsel of the ill, injured, infirm, the promotion and maintenance of health, the administration of medications, and treatments as authorized and prescribed by a licensed physician or a licensed dentist. The application of the nursing process requires substantial specialized independent judgment and skill and is based on knowledge and application of the principles of biophysical and social sciences. The practice of professional nursing includes the teaching and administration, supervision, delegation, and evaluation of nursing practice. A professional nurse may perform additional acts in the extended

role requiring special education and training which are agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Those additional acts agreed to by both boards must be promulgated by the Board of Nursing in its regulations.

S.C.Code Ann. § 40-33-10(g) (2001).

Franklin v. Devore, 327 S.C. 418, 489 S.E.2d 651 (S.C.App. 1997)

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489 S.E.2d 651 (S.C.App. 1997)
327 S.C. 418
James E. FRANKLIN, Appellant,
v.
Edward R. DEVORE and John Doe,
of whom John Doe is, Respondent.
No. 2680.
Court of Appeals of South Carolina.
June 16, 1997

Submitted May 6, 1997.

Rehearing Denied Sept. 4, 1997.

Certiorari Denied Apr. 10, 1998.

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[327 S.C. 419] Stephen H. Cook, Koon & Cook, Columbia, for appellant.

William O. Sweeny, III and William R. Calhoun, Jr., Sweeny, Wingate, Murphy & Barrow, Columbia, for respondent.

[327 S.C. 420] STILWELL, Judge:

James E. Franklin brought this automobile negligence action against Edward R. Devore and unknown driver John Doe. Doe moved for and was granted summary judgment on the ground that the action was barred by the applicable statute of limitations. Franklin appeals. We reverse and remand. [1]

FACTS

On May 29, 1992, Franklin was driving a vehicle owned by his employer, Midlands Technical College. American Southern Insurance Company ("American Southern") provided primary uninsured motorist coverage on the vehicle. Franklin contends that he and Devore were both driving west on U.S. Highway 1, when unknown driver Doe swerved left in front of Devore, causing Devore to swerve left and strike Franklin's vehicle. Franklin contends he suffered numerous injuries as a result of the accident.

On March 31, 1995, the Chief Insurance Commissioner of South Carolina accepted service of the summons and complaint on behalf of American Southern. American Southern tendered its full uninsured motorist limits of $15,000 on or about April 30, 1995.

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Franklin had excess uninsured motorist coverage on his personal policy with State Farm Mutual Automobile Insurance Co. ("State Farm"). The Chief Insurance Commissioner accepted service of the summons and complaint on State Farm's behalf on July 20, 1995.

Defendant John Doe filed an answer dated August 18, 1995. Doe then moved for summary judgment, alleging the action was barred by the applicable statute of limitations because State Farm was not correctly served pursuant to S.C.Code Ann. § 38-77-150 (1989). Franklin argued that he had timely commenced his action under S.C.Code Ann. § 38-77-180 (1989), which does not require service on the insurer within the statute of limitations period. The trial court granted Doe's motion for summary judgment, holding that Franklin failed to serve State Farm within the time required by the **[327 S.C. 421]** general statute of limitations statute, S.C.Code Ann. § 15-3-530.

LAW/DISCUSSION

I.

Franklin first argues that the trial court erred in holding that § 38-77-180 did not allow service upon the clerk of court for defendant Doe. The trial court found the statute inapplicable for two reasons: first, because it only applies in cases where the plaintiff's injuries are the result of physical contact with the unknown vehicle and, second, because the statute "does not have the authority of ... S.C.Code Ann. §§ 15-9-270 (Supp.1995) (effective July 1, 1995), 38-77-150 (Supp.1995) (effective July 1, 1995), or 38-77-170 (Supp.1995)," all of which had been enacted or substantially amended since § 38-77-180 was enacted and recodified. We agree with Franklin that § 38-77-180 applied to the facts of this case.

The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Green v. Thornton,* 265 S.C. 436, 219 S.E.2d 827 (1975). In ascertaining the legislature's intent, statutes that are part of the same act must be read together. *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 377 S.E.2d 569 (1989). The uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished. *Gunnels v. American Liberty Ins. Co.,* 251 S.C. 242, 161 S.E.2d 822 (1968).

S.C.Code Ann. § 38-77-180 provides as follows:

If the owner or operator of any vehicle causing injury or damages by physical contact is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivery of a copy of the summons and complaint or other pleadings to the clerk of the court in which the action is brought.

Here, Franklin asserted his injury was the result of physical contact and was caused by the unknown driver. The question before us is whether the statute requires the "physical **[327 S.C. 422]** contact" to be with the unknown vehicle in order for this statute to apply.

We note that, prior to its repeal in 1987, S.C.Code Ann. § 56-9-850 (1976) required that, in order to maintain a John Doe action under an uninsured motorist provision, the plaintiff's injury had to be caused by "physical contact with the unknown vehicle." Act No. 312, § 6, 1963 S.C. Acts 526. Now, under S.C.Code Ann. § 38-77-170 (Supp.1996), physical contact with the unknown vehicle is not necessary where the accident was witnessed by "someone other than the owner or operator of the insured vehicle."

It is apparent that the legislature, in recodifying our state's uninsured motorist law in 1987, merely failed to alter the language of its John Doe service statute, § 38-77-180 (formerly § 56-9-860 (1976)), to reflect the loosening of the conditions necessary to support a John Doe action under an uninsured motorist provision. Because we do not believe the legislature intended to expand the class of plaintiffs who can maintain a John Doe action but leave those plaintiffs with no method with which to serve their defendants, we find the "physical contact" referred to in § 38-77-180 need not be with the unknown vehicle.

We also disagree with the trial court's ruling that § 38-77-180 does not apply in this case because it does not have the force of more recent authority.

Two of the three changes in statutory law cited by the trial court concerning this ruling, namely, an amendment to S.C.Code Ann. § 15-9-270 (Supp.1996) (amendment effective July 1, 1995) and the enactment of S.C.Code Ann. § 38-77-150 (Supp.1996) (effective July 1, 1995), were not in effect at the time the accident that is the subject of this action occurred. Because we do not discern any clear intent on the part of the legislature that these statutes should be applied retroactively, we find they do not apply to this case. *Hercules Inc. v. South Carolina Tax Comm'n,* 274 S.C. 137, 262 S.E.2d 45 (1980).

The other statute cited by the trial court, § 38-77-170, does not mention service of process. Although the legislature did amend several statutes in the uninsured motorist area, it chose not to amend § 38-77-180. We therefore find that the **[327 S.C. 423]** changes in the statutes, which took effect on July 1, 1995, do not supersede § 38-77-180 and cannot apply in this action.

II.

Franklin also argues the trial court erred in holding Doe was entitled to summary judgment because he was not properly served within three years of the accident. We agree.

The relevant portion of S.C.Code Ann. § 38-77-150 states the following:

No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

In Ex parte South Carolina Farm Bureau Mut. Ins. Co., 314 S.C. 487, 431 S.E.2d 252 (1993), our supreme court interpreted this language in regard to an underinsured motorist statute with identical wording. See S.C.Code Ann. § 38-77-160 (Supp.1992). The language interpreted in that case is identical to the language cited above except that the word "underinsured" is substituted for "uninsured." In that case, the underlying tort action involving an automobile accident was commenced within the three-year statute of limitations, but the underinsured motorist carrier was not served through the Chief Insurance Commissioner within the three-year period. The underinsured motorist carrier argued that the language "in the manner provided by law" of § 38-77-160 mandated that the carrier be served within three years, as must a party defendant.

The supreme court disagreed, stating, "The language 'in the manner provided by law' modifies the manner of service, requiring that the insured serve the insurance carrier through the Insurance Commissioner as provided in § 15-9-270 (Supp.1992) and Rule 4, SCRCP. Clearly, the purpose of the statute is to provide notice to the insurance company." Id. at 489, 431 S.E.2d at 253. The court further indicated that the language did not establish a statute of limitations because a statute of **[327 S.C. 424]** limitations must contain within itself a specific statement limiting the time within which the action is to be brought.

Because the relevant statutory language here is identical to that interpreted in Farm Bureau, we find the supreme court's analysis mandates reversal of the trial court in this case. It is undisputed that Franklin completed the requirements of § 38-77-180 within the three-year statute of limitations period. The trial court's ruling that Franklin did not commence his action within the applicable statute of limitations was therefore in error. Accordingly, we reverse the trial court's grant of summary judgment against Franklin and remand this case for trial.

REVERSED AND REMANDED.

CURETON and HEARN, JJ., concur.

Notes:

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Ex parte South Carolina Farm Bureau Mut. Ins. Co., 314 S.C. 487, 431 S.E.2d 252 (S.C. 1993)

431 S.E.2d 252 (S.C. 1993)
314 S.C. 487
Ex parte The SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Appellant,
In re Pamela PARRISH, Respondent,
v.
Linda Starnes KOONTZ, Defendant.
Steven W. PARRISH, Respondent,
v.
Linda Starnes KOONTZ, Defendant.
No. 23862.
Supreme Court of South Carolina.
May 17, 1993

Submitted April 20, 1993.

Rehearing Denied June 29, 1993.

[314 S.C. 488] Jack D. Griffeth, of Love, Thornton, Arnold & Thomason, P.A., Greenville, for appellant.

Constantine Christophillis, of Culbertson, Christophillis & Sauvain, P.A., Greenville, for respondents.

CHANDLER, Justice.

Appellant South Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) appeals the denial of summary judgment based upon a statute of limitations defense.

We affirm.

FACTS

On January 21, 1989, Respondent Pamela Parrish was involved in a car wreck with Defendant Linda Starnes Koontz. Subsequently, Parrish and her husband, Respondent Steven Parrish sued Koontz. This

action was filed January 17, 1992, prior to the three year statute of limitations. [1]

The Parrishes carried underinsured motorist coverage with Farm Bureau, which was served with notice of the above action through the Insurance Commissioner on January 29, 1992.

Farm Bureau moved for summary judgment, contending that, pursuant to S.C.Code Ann. § 38-77-160 (Supp.1992), the three year statute of limitations barred its liability. Trial Court denied summary judgment, [2] holding that § 38-77-160 is not a statute of limitations but, rather, a notice statute.

ISSUE

Is § 38-77-160 a notice statute or a statute of limitations?

[314 S.C. 489] DISCUSSION

Section 38-77-160 provides in pertinent part:

§ 38-77-160. Additional uninsured motorist coverage; underinsured motorist coverage. [See parent volume for first undesignated paragraph].

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party. (Emphasis supplied).

Farm Bureau argues that the language "in the manner provided by law" of § 38-77-160 mandates that it be served within three years, as must a party-defendant pursuant to § 15-3-530 (Supp.1992). We disagree.

"In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *First Baptist Church v. City of Mauldin,* 308 S.C. 226, 417 S.E.2d 592, 593 (1992). Moreover, a statute of limitations "must contain within itself a specific statement limiting the time within which an action is to be brought." *Hardee v. Lynch,* 212 S.C. 6, 16-17, 46 S.E.2d 179, 183 (1948).

Nothing in § 38-77-160 creates a statute of limitations; indeed, the statute does not reference § 15-3-530. The language "in the manner provided by law" modifies the manner of service, requiring that the insured serve the insurance carrier through the Insurance Commissioner as provided in § 15-9-270 (Supp.1992) and Rule 4, SCRCP. Clearly, the purpose of the statute is to provide notice to the insurance company.

Accordingly, the Trial Court was correct in holding that § 38-77-160 is not a statute of limitations.

AFFIRMED.

HARWELL, C.J., and FINNEY, TOAL and MOORE, JJ., concur.

Notes:

[1] South Carolina Code Ann. § 15-3-530 (Supp.1992).

[2] An Order denying summary judgment is interlocutory and not generally appealable. Willis v. Bishop, 276 S.C. 156, 276 S.E.2d 310 (1981). However, the Order on appeal here, in effect, strikes a portion of Farm Bureau's Answer and, therefore, is appealable pursuant to S.C.Code Ann. § 14-3-330(2)(c) (1976).

Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (S.C. 1968)

161 S.E.2d 822 (S.C. 1968)
251 S.C. 242
Frampton GUNNELS, Respondent,
v.
AMERICAN LIBERTY INSURANCE COMPANY, Appellant.
No. 18798.
Supreme Court of South Carolina.
June 4, 1968

[251 S.C. 243] Fulmer, Barnes, Berry & Austin, Columbia, for appellant.

[251 S.C. 244] Blatt, Fales & Peeples, Barnwell, for respondent.

BUSSEY, Justice.

In this action, arising under the South Carolina Uninsured Motorist Law, the plaintiff Gunnels seeks to recover from his liability insurer, American Liberty Insurance Company (hereinafter referred to simply as American), to the extent of his uninsured motorist coverage, a judgment obtained by Gunnels against one Hewitt in the State of North Carolina. Appeal is from an order of the circuit court overruling a demurrer to plaintiff's complaint.

The facts necessary to an understanding of the single issue are as follows. A collision between vehicles of Gunnels [251 S.C. 245] and Hewitt occurred in North Carolina in February 1965, and American was notified. Hewitt had liability coverage with Republic Casualty Company. Gunnels brought action against Hewitt, but Hewitt being then an insured Motorist, copies of the pleadings were not served upon American. Hewitt counterclaimed and American participated in the trial of the case in defense of such counterclaim, Hewitt being represented by counsel retained by Republic. Shortly after a verdict and judgment in favor of gunnels, Hewitt became an uninsured motorist by virtue of Republic becoming insolvent, and involved in delinquency proceedings, suspension and receivership. Sec. 46--750.31, 1967 Code Supplement. Payment of Gunnels' judgment, to the extent of his uninsured motorist coverage, was then demanded of American who refused payment, and this action followed.

American demurred to the complaint on the ground that it was not served with a copy of the summons and complaint in the tort action against Hewitt in accordance with Code Section 46--750.33, 1967 Code Supplement, which, in part, reads as follows:

'* * * No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision. * * *'

American contends that literal compliance with the cited Code provision is a condition precedent to any liability on its part under the uninsured motorist endorsement issued by it to Gunnels in compliance with the statute; that the language of the statute is mandatory, clear and unambiguous and not open to construction by the court.

The question raised by American is apparently one of novel impression and no case directly in point has been cited by counsel or come to our attention through independent research. A case somewhat, but not precisely, in point is the decision of the Supreme Court of Virginia in the case **[251 S.C. 246]** of McDaniel v. State Farm Mutual, 205 Va. 815, 139 S.E.2d 806. That decision is persuasive not only because of its logic, but because the South Carolina Uninsured Motorist Act is modeled after the *Virginia Act. Laird v. Nationwide Ins. Co.,* 243 S.C. 388, 134 S.E.2d 206. The section of the Virginia Act requiring service of process in the tort action upon plaintiff's liability carrier is quite similar to our Code Section. In the McDaniel case, plaintiff's insurer was not served with process at the commencement of the tort action, the defendant being at the time, as here, an insured motorist. The defendant in the tort action, however, forfeited his coverage for lack of co-operation with his insurer prior to the trial of the tort action, and plaintiff's insurer was notfied of such fact by letter and the service of a motion for judgment in the tort action. It was held that plaintiff's failure to serve his insurer with process at

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the commencement of the action did not forfeit his uninsured motorist coverage. The court said:

'The uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons and is to be liberally construed so that the purpose intended may be accomplished.'

The court then went on to point out that it would place a difficult, if not impossible, burden upon a plaintiff to require him to ascertain in advance of bringing his tort action, the fact that the defendant therein would subsequently become an uninsured motorist.

It is, of course, a correct proposition of law that when the terms of a statute are clear and not ambiguous there is no room for construction and the courts are required to apply such according to their literal meaning. Nevertheless, however clear and unambiguous the Code provision relied on by American might appear to be, when such is read alone, it is elementary that such provision has to be considered and construed in connection with the other provisions of the South Carolina Uninsured Motorist **[251 S.C. 247]** Law. When so considered and construed, we are satisfied that the legislature did not intend the result contended for by American.

The policy and purpose of the entire Act have to be considered and courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words. See various cases collected under Statutes, k184, West's South Carolina Digest.

The purpose of the South Carolina Uninsured Motorist Law was to provide protection against the peril of injury by an uninsured motorist to an insured motorist, his family and the permissive users of his vehicle. *Laird v. Nationwide Ins. Co.,* 243 S.C. 388, 134 S.E.2d 206; *Vernon v. Harleysville Mutual Casualty Co.,* 244 S.C. 152, 135 S.E.2d 841. The entire act is remedial in nature and is entitled to a liberal construction to effectuate the purpose thereof. An uninsured motorist endorsement becomes operative when it is ascertained that the responsible operator was uninsured. *Squires v. National Grange Mutual Ins. Co.,* 247 S.C. 58, 145 S.E.2d 673. Here the endorsement did not become operative until after judgment against the tort defendant, and promptly after it was ascertained that such had become operative, American was notified. Under these circumstances and considering the Act as a whole, together with its purpose, we see nothing therein evincing an intent on the part of the legislature to require any more of Gunnels.

We, of course, are fully aware of the purposes of the statutory provision requiring service of pleadings in the tort action upon the carrier writing the uninsured motorist coverage, but are convinced that it was never intended to be applicable to the instant factual situation. Moreover, we think the insurer has suffered no prejudice. It was notified of the accident, and had full opportunity to investigate the same. Had it been served with a copy of the pleadings in **[251 S.C. 248]** the tort action, it is not suggested, nor is there any logical reason to believe, that American would have undertaken the defense of Hewitt or attempted to negotiate a settlement of Gunnels' claim against Hewitt, prior to it being ascertained that Hewitt was an uninsured motorist and the endorsement operative.

For the foregoing reasons, we conclude that the demurrer of American was properly overruled. Having so concluded, we do not reach or consider any issue of waiver by American, dealt with in the order of the lower court and argued on appeal.

The judgment of the lower court is, in result,

Affirmed.

MOSS, C.J., and LEWIS, BRAILSFORD and LITTLEJOHN, JJ., concur.

591 S.E.2d 26 (S.C. 2003)
356 S.C. 617
ReDonna MAXWELL and George Maxwell, Respondents,
v.
Beverly M. GENEZ and John Doe, Petitioners.
No. 25761.
Supreme Court of South Carolina
Dec. 22, 2003.

Heard Nov. 4, 2003.

Rehearing Denied Jan. 23, 2004.

Charles H. Gibbs, Jr., of Haynsworth Sinkler Boyd, P.A., for Petitioner Beverly M. Genez; Max G. Mahaffee, of Grimball & Cabaniss, L.L.C., for Petitioner John Doe; both of Charleston.

Jeffrey Scott Weathers, of Peagler & Weathers, P.A., of Moncks Corner, for respondents.

Justice BURNETT:

The Court granted a writ of certiorari to review the decision of *Maxwell v. Genez,* 350 S.C. 563, 567 S.E.2d 496 (Ct.App.2002), in which the Court of Appeals held a motion to restore to the docket must be filed within one year of the order striking the case pursuant to Rule 40(j), SCRCP, but that the motion can be extended for good cause pursuant to Rule 6(b), SCRCP. We reverse.

FACTS

On March 17, 1995, Respondent ReDonna Maxwell was involved in an automobile accident with Petitioners Beverly Genez and John Doe. Mrs. Maxwell and her husband, Respondent George Maxwell, filed suit against Genez and Doe. With Genez's and Doe's consent, the Maxwells moved to have their case stricken from the docket pursuant to Rule 40(j). On April 13, 1999, a circuit court judge granted the motion to strike.

On May 1, 2000, the Maxwells moved to restore the case to the docket. On May 15, 2000, the Maxwells filed a Motion for Enlargement of Time pursuant to Rule 6(b) asserting good cause existed to extend the time in which to file the motion to restore.

Another circuit court judge denied the Maxwells' motions to restore and for an enlargement of time. The order stated the motion to restore was not filed within the one year period provided by Rule 40(j) and the judge lacked authority to extend the time period established by the initial judge's order granting the motion to strike.

The Court of Appeals concluded, if good cause exists, Rule 6(b) permits an extension of time in which to file a Rule 40(j) motion to restore and, further, found the Maxwells established good cause for requesting an extension. *Id.* The Court of Appeals reversed the order denying the motions to restore and for enlargement of time and remanded the matter to the circuit court with instructions to restore the case to the docket. *Id.* The Court granted both Genez's and Doe's petitions for a writ of certiorari.

ISSUES

I. Did the Court of Appeals err by holding a motion to restore under Rule 40(j) must be filed within one year of the order striking the claim?

II. Did the Court of Appeals err by holding a motion to restore under Rule 40(j) may be extended for good cause pursuant to Rule 6(b)?

DISCUSSION

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.,* 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. *See Knotts v. S.C. Dept. of Natural Resources,* 348 S.C. 1, 558 S.E.2d 511 (2002).

I.

Genez and Doe argue the Court of Appeals erred by holding a motion to restore to the docket pursuant to Rule 40(j) must be filed within one year of the order granting the motion to strike. We agree.

Rule 40(j), SCRCP, provides:

Case Stricken from Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party

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claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

(Underline added).

Rule 40(j) does not **require** that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, **if** the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period.[1] This conclusion is supported by the Notes to Rule 40 ("Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party.") and language in *Graham v. Dorchester County School Dist.,* 339 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct.App.2000) (Rule 40(j) requires motions to restore within one year of case being stricken "to take advantage of the tolling of the statute of limitations."). A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule. Accordingly, the Court of Appeals erred by holding the Maxwells were required to file their motion to restore within one year of April 13, 1999.

II.

Genez and Doe argue the Court of Appeals erred by holding the one year deadline established by Rule 40(j) may be extended for good cause pursuant to Rule 6(b). We agree.

Rule 6(b), SCRCP, provides:

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, orthe court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefore is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. ...

(Underline added).

Rule 6(b) is not applicable to Rule 40(j). The language of Rule 6(b) specifies it applies when there is a deadline. As explained above,Rule 40(j) does not have a deadline during which a motion to restore must be filed. Accordingly, Rule 6(b) is inapplicable.[2]

For the reasons stated above, the decision of the Court of Appeals is **REVERSED.**

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

Notes:

[1] The order striking the Maxwells' complaint from the docket tracks the language of Rule 40(j).

[2] We note the Maxwells assert that, since Genez and Doe agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree. Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year. One year after the Maxwells' complaint was stricken from the docket pursuant to Rule 40(j), Genez and Doe were no longer bound by their agreement not to challenge the Maxwells' action on statute of limitations grounds.

RULE 59
NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

(f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

Note:

This Rule 59 is substantially the Federal Rule. It is consistent with Code § 15-27-150. Rule 59(b) provides that if the motions are not made and heard during the term, the more precise and definite Federal practice of allowing 10 days after the entry of judgment to make the motion is more equitable. Rule 59(f) is added to provide that departure from the circuit does not deprive the trial judge of jurisdiction to rule on motions under this Rule and Rules 50, 52 and 60. It also provides flexibility for the trial judge to determine the motions on briefs without oral argument.

Note to 1986 Amendment:

In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them. These amendments to Rules 59(b) and (e) and (f) conform the language to that of Rules 50 and 52, and provide that the time for appeal commences upon the receipt of written notice of entry of the order disposing of such motions which was prior state practice, rather than the date when the court signed the order which is the practice in the federal courts.

Note to 1998 Amendment:

This amendment adds Rule 59(g). It is intended to help insure that the judge is promptly notified that the motion has been filed.

SECTION 38-77-160. Additional uninsured motorist coverage; underinsured motorist coverage.

Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage. Benefits paid pursuant to this section are not subject to subrogation and assignment.

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

HISTORY: Former 1976 Code Section 56-9-831 [1978 Act No. 569, Section 1; 1987 Act No. 166, Section 22; repealed by 1987 Act No. 155, Section 25] recodified as Section 38-77-160 by 1987 Act No. 155, Section 1 [amendment to former 1976 Code Section 56-9-831 by 1987 Act No. 166, Section 22, transferred to Section 38-77-160 by 1987 Act No. 155, Section 24]; 1989 Act No. 148, Section 21; 1994 Act No. 461, Section 7.

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

COVENANT NOT TO EXECUTE

THIS COVENANT is made on this the 12 day of Sept, 2007, by and between **Marsha L. Temples, individually, hereinafter referred to as "Covenantor" and Neil O. Plush and Southern United Fire Insurance Company,** hereinafter referred to as "Covenantees".

WHEREAS, on August 18, 2003, in Aiken County, South Carolina, the Covenantor, Marsha L. Temples, was injured in an automobile accident with Neil O. Plush; and

WHEREAS, the automobile involved that was operated by Neil O. Plush and insured by Southern United Fires Insurance Company through a policy issued to Dana Jackson; and

WHEREAS, the automobile being driven by Neil O. Plush had only Fifteen Thousand and No/100 ($15,000.00) Dollars liability coverage with the Covenantee, Southern United Fire Insurance Company, under policy number 0006000970O1-2, issued to Dana Jackson; and

WHEREAS, the damages sustained by the Covenantor in the automobile accident of August 18, 2003, may exceed the liability limits of the insurance policy of the Covenantee and the Covenantor is desirous of protecting her right to proceed to suit against Covenantee Neil O. Plush for purposes of collecting underinsured motorist benefits that may be available.

NOW, FOR AND IN CONSIDERATION of the payment to the Covenantor of the sum of FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS by the Covenantees, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of her claim with the underinsured carrier, the Covenantor shall have the right to bring suit against the Covenantees and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, her subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of **Fifteen Thousand and No/100 ($15,000.00) Dollars,** Covenantor, her subrogees, heirs, or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in the above-mentioned lawsuit except as herein stated. Further, upon reduction to Judgment of the aforementioned lawsuit, the Covenantor, her subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, this agreement or copy hereof shall be considered a satisfaction of any Judgment in any case presented by Covenantor against Covenantees for the accident, dated August 18, 2003, and can be recorded as such should Covenantor, her subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. Covenantor expressly represents that she has been fully advised of all facts of a potential lawsuit, and all claims arising out of or in relation thereto, and is aware and fully advised that the execution of this instrument will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

5. In executing this agreement, Covenantor represents and warrants that she has relied on her investigation and has not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agrees that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that she will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement, the Covenantees do not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits and the Covenantor expressly acknowledges this disclaimer.

8. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Southern United Fire Insurance Company abreast of developments in their attempts to collect underinsured motorist benefits, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage and whether a settlement of underinsured motorist benefits have been obtained.

9. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

10. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

11. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

12. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

13. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

14. The Covenantor acknowledges that she has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage should this Covenant be executed.

15. The Covenantor agrees and expressly warrants that Covenantor shall be solely responsible for the payment of any and all expenses and any costs incurred by Covenantor as a result of the incidents alleged to have occurred herein. The Covenantor expressly agrees that Covenantor shall be solely responsible for the payment of any claims, which might be asserted by any insurance carrier, or other entity which made the payments on bills or expenses for Covenantor or on Covenantor's behalf and which assert any lien against the proceeds of this settlement. The Covenantor expressly agrees that this is Covenantor's responsibility and Covenantor expressly agrees to hold harmless and indemnify the entities to whom Covenantor gives this Covenant Not To Execute listed above for the payment of such sums.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:

Witness

Witness

Marsha L. Temples (L.S.)

Marsha L. Temples