THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell R. Scarborough
Charleston County Master-In-Equity

Case No.: 2007-CP-10-3224

Jana Wright, as Guardian *ad Litem* for Travis Milligan, a minor over the age of 14 years,
Plaintiff

v.

Tema Brown, RESPONDENTS

v.

GeoVera Specialty Insurance Co., APPELLANT.

RESPONDENTS' MOTION TO STRIKE & TO STAY THE TIME TO FILE THEIR BRIEF UNTIL THE MOTION TO STRIKE IS DECIDED

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ATTORNEYS FOR RESPONDENT

1. RELIEF REQUESTED BY THIS MOTION

Tema Brown and Jana Wright, as Guardian *ad Litem* for Travis Milligan, a minor over the age of 14 years ("Respondents"), by and through their undersigned counsel, move this Court, pursuant to Rule 240, SCACR, for an order striking an argument advanced by Appellant, GeoVera Specialty Insurance Co. ("GeoVera"). In its initial brief, GeoVera argues that the findings of Tom Wills are not binding on GeoVera because default judgments do not have preclusive effect. This issue is not properly before this Court as (1) the issue was never raised by GeoVera in its argument or summary judgment briefing before the lower court, and (2) the issue was not ruled on by the lower court. Thus, pursuant to the South Carolina Appellate Court Rules, Respondents respectfully request that the Court strike those portions of Appellant's Initial Brief related to the preclusive effect of default judgments. Respondents further request that the time to file their initial brief and designation of matter on appeal be stayed pending the Court's decision on the motion to strike.

2. FACTS

This case is an action against an insurer for the failure to indemnify its insured, Ms. Brown, for liability arising out of a dog bite to a minor child. The claim was tendered to GeoVera, Ms. Brown's insurance carrier, which, after agreeing to defend under a reservation of rights, changed its position and did not defend, file a declaratory judgment action, or indemnify. Ms. Brown was placed into default, and the damages portion of the case was tried before a special referee, Thomas Wills, Esquire, who entered judgment in favor of the Plaintiff in the amount of $100,229.00. Plaintiff received an assignment of Ms. Brown's claims against GeoVera; this claim was referred and heard by the Master-In- Equity. Both Appellant and Respondents sought summary judgment, and the Court ruled in favor of Respondents. In the summary judgment proceedings before the Master-In-Equity, GeoVera failed to preserve an issue for appeal.

3. **An Issue that was not Ruled on by the Lower Court is not Preserved for Appellate Review**

In its initial brief before this Court, GeoVera argues that the findings of Mr. Wills are not binding on GeoVera because default judgments do not have preclusive effect. (Appellant's brief p. 13).[1] This issue is not properly preserved for appellate review as: (1) this defense was not raised in GeoVera's pleading **(EXHIBIT A)**; (2) this defense was not raised in GeoVera's summary judgment briefing **(EXHIBIT B)**; (3) this issue was not argued at summary judgment **(EXHIBIT C)**; and (4) this issue was not ruled on by the lower court.

Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Elam v. S.C. DOT*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) citing *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."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

4. **An Issue Raised for the First Time in a Motion to Reconsider is not Preserved for Appellate review**

The first time GeoVera raised the issue of the preclusive effect of default judgments was

[1] Respondent disagrees on the merits of this issue as Mr. Wills' findings bear specifically on the question of damages. (Order of Tom Wills, p 7).

in its motion to reconsider. (See motion to reconsider p. 16[2]). A party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment. *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). An issue raised for the first time in a Rule 59, SCRCP motion is not preserved for review. *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008).

5. Conclusion

For the reasons set forth above, Respondents respectfully request this Court strike from Appellant's brief all argument related to the preclusive effect of default judgments. (See Appellant's initial brief p. 13).

Respectfully Submitted By:

ANDREW K. EPTING, JR., LLC

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ATTORNEYS FOR RESPONDENTS

On this 5 day of February 2016
Charleston, SC

[2] The Master-In-Equity did understand that GeoVera was contesting whether the breed of the dog was an issue that was determined by the special referee, and this issue was argued and is preserved. This is not the same as the argument raised for the first time that default proceedings cannot have preclusive effect. That the Court did not appreciate this argument was being made for the first time is apparent from the Court's failure to even address the argument when denying the reconsideration.

BAKER RAVENEL BENDER

ATTORNEYS AT LAW

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*OF COUNSEL
**ALSO ADMITTED IN GEORGIA
***ALSO ADMITTED IN VIRGINIA

March 2, 2012

The Honorable Julie J. Armstrong
Clerk of Court – Charleston County
100 Broad Street, #106
Charleston, South Carolina 29401

Re: Jana Wright, as Guardian ad Litem for Travis Milligan v. Tema Brown v. Constitution State Services & GeoVera Specialty Insurance Company
C/A No.: 2007-CP-10-3224
Our File No.: 7746.1857

Dear Ms. Armstrong:

Enclosed for filing in the above-captioned action are the Amended Answer of Third-Party Defendant GeoVera Specialty Insurance Company to Amended Third-Party Complaint and Certificate of Service thereof. By copy hereof, I am serving same upon other counsel of record. I have enclosed an extra copy of each, which I would appreciate your clocking in and returning to me in the enclosed self-addressed, stamped envelope.

Thank you very much.

Sincerely yours,

William P. Davis

William P. Davis
WPD:sr
Enclosure
cc: Andrew K. Epting, Jr., Esquire (w/enclosure)
Michelle N. Endemann, Esquire (w/enclosure)
Roy P. Maybank, Esquire (w/enclosure)
Amanda R. Maybank, Esquire (w/enclosure)
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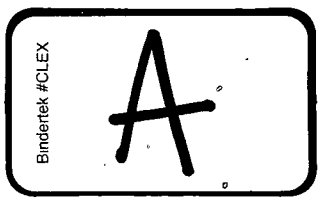

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STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF CHARLESTON	**CASE NO.: 2007-CP-10-3224**
JANA WRIGHT, as Guardian ad Litem Litem for TRAVIS MILLIGAN, a minor over the age of 14 years,	
Plaintiff,	**AMENDED ANSWER OF THIRD-PARTY DEFENDANT GEO VERA SPECIALTY INSURANCE COMPANY TO AMENDED THIRD-PARTY COMPLAINT**
vs.	
TEMA BROWN,	
Defendant/Third-Party Plaintiff,	
vs.	
Constitution State Services & GeoVera Specialty Insurance Co.	
Third-Party Defendants.	

Third-Party Defendant GeoVera Specialty Insurance Company (hereinafter "GeoVera"), improperly named in the Third-Party Complaint as GeoVera Specialty Insurance Co., amends its answer to the Amended Third-Party Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Amended Third-Party Complaint not hereinafter specifically admitted, qualified, or explained is denied.

2. On information and belief, GeoVera denies the allegation contained in paragraph one (1) that this case has been tried and a verdict rendered against Tema Brown. On information and belief, Defendant admits that this case has been referred to the Master-In-Equity for Charleston County for all purposes allowed by the rules pursuant to the consent order of December 24, 2010, a copy of which is attached to the Amended Third-Party Complaint as Exhibit B. GeoVera is without

knowledge or information sufficient to form a belief as to whether Tema Brown has consented to said referral and to submit to supplemental proceedings. GeoVera admits so much of paragraph one (1) as could be construed to allege that Constitution State Services, on behalf GeoVera's predecessor-in-interest, USF&G Specialty Insurance Company, denied coverage to Ms. Brown under her policy number GH20051152 for the claim out of which this action arose.

3. GeoVera admits so much of paragraph two (2) as alleges that Constitution State Services is an entity that is not organized under the laws of South Carolina, but conducted business in South Carolina and administered the Plaintiff's claim against Tema Brown on behalf of GeoVera's predecessor-in-interest, USF&G Specialty Insurance Company, but denies the remaining allegations contained in paragraph two (2), and affirmatively alleges that its predecessor-in-interest, USF&G Specialty Insurance Company, was at all times pertinent hereto authorized to do business in South Carolina.

4. GeoVera admits the allegations contained in paragraph three (3) except that GeoVera Specialty Insurance Company was formerly USF&G Specialty Insurance Company.

5. GeoVera denies the allegations contained in paragraph four (4) but admits that its predecessor-in-interest, USF&G Specialty Insurance Company, issued the policy referenced therein for the policy period referenced therein.

6. GeoVera is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph five (5), and said allegation is therefore denied. On information and belief, GeoVera affirmatively alleges that Tema Brown was the owner of the dog on April 20, 2005.

7. On information and belief, GeoVera denies the allegations contained in paragraph six (6), but admits that, on or about April 20, 2005, Tema Brown's dog escaped from her yard and attacked Plaintiff Travis Milligan, a minor child.

8. On information and belief, GeoVera admits the allegations contained in paragraph seven (7).

9. Answering the allegations contained in paragraph eight (8) as they relate to it, GeoVera admits that it did not accept or pay the Plaintiff's claim. GeoVera also admits so much of paragraph eight (8) as may be construed to allege that its predecessor-in-interest denied coverage for Plaintiff's claim against Tema Brown on the ground that the claim falls within an exclusion in the policy.

10. Responding to paragraph nine (9), GeoVera admits that a judgment against Tema Brown was filed on September 11, 2009.

11. GeoVera denies the allegation contained in paragraph ten (10).

12. Answering paragraph eleven (11), GeoVera admits that Third-Party Plaintiff seeks a declaration of the rights and duties of the parties, but GeoVera denies that it is appropriate to do so and that Third-Party Plaintiff is entitled to do so.

FOR A SECOND DEFENSE

13. Coverage for the Plaintiff's claim against Tema Brown and the default judgment entered in connection therewith is not available under the subject policy because the claimant's injuries and damages arose out of a dog owned by or in the care of Tema Brown that was a Staffordshire Bull Terrier or an American Pit Bull Terrier as defined by the policy, as a result of which the "Vicious Dogs" exclusion applies. A true and correct copy of the Master Endorsement to

the subject policy containing said exclusion is attached hereto as Exhibit A.

FOR A THIRD DEFENSE

14. Third-Party Plaintiff has failed to comply with the conditions precedent in her policy by, among other things, failing to promptly forward to her insurer "every notice, demand, summons or other process" relating to the incident out of which this action arose, substantially prejudicing Third-Party Defendants. A true and correct copy of the applicable "Conditions" portion of said policy is attached hereto as Exhibit B.

FOR A FOURTH DEFENSE

15. The Amended Third-Party Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted.

FOR A FIFTH DEFENSE

16. On information and belief, Third-Party Plaintiff lacks standing to seek the judicial declaration sought in her Amended Third-Party Complaint.

FOR A SIXTH DEFENSE

17. On information and belief, Third-Party Plaintiff is not the real party in interest.

FOR A SEVENTH DEFENSE

18. There is no justiciable controversy appropriate for a declaratory judgment.

FOR AN EIGHTH DEFENSE

19. This action was terminated upon entry of judgment against Third-Party Plaintiff on or about September 11, 2009.

FOR A NINTH DEFENSE

20. On information and belief, Third-Party Plaintiff lacks the capacity to assert the Third-Party Complaint, in that she assigned the right to do so, if any, to Plaintiff.

FOR A TENTH DEFENSE

21. GeoVera has been substantially and unfairly prejudiced by the assertion of the Third-Party Complaint almost four years after the entry of default against Third-Party Plaintiff in this action, in that GeoVera has thereby been deprived of its rights under Rule 14(a), SCRCP.

FOR AN ELEVENTH DEFENSE

22. The Amended Third-Party Complaint is barred by the doctrine of laches.

FOR A TWELFTH DEFENSE

23. The Amended Third-Party Complaint is barred by the applicable statute of limitations.

FOR A THIRTEENTH DEFENSE

24. GeoVera has not been properly named or identified in this action.

FOR A FOURTEENTH DEFENSE

25. This Court lacks personal jurisdiction over GeoVera, in that this action was terminated before GeoVera was added as a Third-Party Defendant.

WHEREFORE, having amended its answer to the Amended Third-Party Complaint, GeoVera prays for its dismissal, for costs, and for such other and further relief as this Court deems just and proper.

(Signature on following Page)

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GeoVera Specialty Insurance Company

Columbia, South Carolina
March 2, 2012

COPY

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF CHARLESTON	**CASE NO.: 2007-CP-10-3224**
JANA WRIGHT, as Guardian ad Litem Litem for TRAVIS MILLIGAN, a minor over the age of 14 years,	
Plaintiff,	**CERTIFICATE OF SERVICE**
vs.	
TEMA BROWN,	
Defendant/Third-Party Plaintiff,	
vs.	
Constitution State Services & GeoVera Specialty Insurance Co.	
Third-Party Defendants.	

I, Suzanne Rodriguez, Legal Assistant to William P. Davis of Baker, Ravenel, & Bender, L.L.P., attorneys for Third-Party Defendant GeoVera Specialty Insurance Company, do hereby certify that on the 2nd day of March, 2012, I served the foregoing **Amended Answer of Third-Party Defendant GeoVera Specialty Insurance Company to Amended Third-Party Complaint** by mailing copies of same by United States Mail, postage prepaid, to counsel at the following addresses:

Andrew K. Epting, Jr., Esquire
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Suzanne Rodriguez

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF CHARLESTON	)	**CASE NO.: 2007-CP-10-3224**
	)	
JANA WRIGHT, as Guardian ad Litem for TRAVIS MILLIGAN, a minor over the age of 14 years,	)	
	)	
Plaintiff,	)	**THIRD-PARTY DEFENDANT GEOVERA SPECIALTY INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
v.	)	
TEMA BROWN,	)	
Defendant/Third-Party Plaintiff,	)	
v.	)	
GeoVera Specialty Insurance Co.	)	
Third-Party Defendant.	)	

INTRODUCTION

A dog belonging to the Third-Party Plaintiff, Tema Brown, bit the Plaintiff's thirteen-year-old son on April 20, 2005. The Plaintiff asserted a claim against Ms. Brown, who seeks a judicial declaration that liability coverage is available to her under a homeowner's insurance policy issued by Third-Party Defendant's predecessor, USF&G Specialty Insurance Company. The policy excludes liability coverage for such incidents if the insured's dog is an American Pit Bull Terrier. Various records of the incident indicate that the dog was a "Pit Bull" and Ms. Brown herself gave a recorded statement nine days after the incident in which she described the dog as an "American Pitbull." The insurer therefore denied coverage and, when Plaintiff brought this suit against Ms. Brown, it went into default. Ms. Brown testified at the damages hearing that the dog is not a Pit Bull. A default judgment was entered on September 11, 2009. About a year and two months later, Ms. Brown assigned all of her rights against her insurer to the Plaintiff.

Notwithstanding the default judgment and the assignment, Ms. Brown filed an "Answer/Third-Party Complaint" against the administrator of the claim, but not the insurer, on July 19, 2011 – almost five years after the claim was denied. She amended her Third-Party Complaint to name the insurer on December 28, 2011 – more than five years after the denial.

By bringing the third-party complaint in the name of the assignor, even though she had already assigned all of her rights against her insurer to the Plaintiff, Third-Party Plaintiff is attempting to (1) avoid the statute of limitations by bootstrapping a request for a judicial declaration of coverage onto an action that was concluded with the default judgment on September 11, 2009; and (2) avoid the exclusion by seeking to bind the insurer to Ms. Brown's testimony at the damages hearing that the dog was not a Pit Bull, notwithstanding overwhelming evidence to the contrary, including her own statement, and notwithstanding South Carolina law to the contrary. For the reasons set forth below, such machinations cannot succeed, and Third-Party Defendant is entitled to summary judgment.

BACKGROUND

There is no dispute that, on April 20, 2005, a dog belonging to Defendant/Third-Party Plaintiff, Tema Brown, escaped from her yard and attacked Plaintiff's son, Travis Milligan, who was thirteen years old at the time. At the time of the incident, Tema Brown was the named insured of a homeowners insurance policy issued by USF&G Specialty Insurance Company ("USF&G"). (Exhibit A) Her policy included the following exclusion:

> **SECTION II – EXCLUSIONS**
>
> * * *
>
> **Vicious Dogs**
>
> **"Bodily injury" or "property damage arising out of any canine owned by or in the care of any**

"insured" that is a:

a. "vicious canine";

* * *

c. American Pit Bull Terrier;

* * *

We will consider a canine to be a . . . , American Pit Bull Terrier . . . if its lineage contains at least 50% of that breed.

* * *

Master Endorsement, p. 1 of 2 (Exhibit A)

Travis sought medical treatment at the emergency room of the Medical University of South Carolina ("MUSC"). MUSC's Children's Hospital's records of that visit include the following:

CHIEF COMPLAINT: riding bike and pit bull bit him

* * *

History of the present illness:

13 yo BM was riding bike & pit bull bit him about 1-2 hours ago.

(Exhibit B)

The South Carolina Department of Health and Environmental Control ("DHEC") Report includes the following:

Animal Information

* * *

Type: dog . . . Breed: Pitbull . . .
Owner: Tema Brown

(Exhibit C)

Travis's attorney, Barry Baker, thereafter referred him to Peter C. deVito, M.D. Dr. DeVito's office note of June 20, 2005 begins, "Travis Milligan is a very pleasant thirteen years old boy who sustained severe injuries when he was attacked by a pit bull dog on May 20, 2005 [sic]." (Exhibit D)

On April 29, 2005, Travis's attorney, Barry Baker, wrote Mr. and Mrs. Lavonne Brown advising them of his representation and asking that they turn his "letter over to the agent who handles your homeowner's insurance . . . ." (Exhibit E) Ms. Brown notified USF&G, which investigated the claim. On May 10, 2005, Stan Hawkins, CPCU of NCA Group, third-party administrator for USF&G, took a recorded statement of Tema Brown in which the following exchange took place:

Q. Are the current pets that you have, the pets that are being alleged to be involved in this incident?

A. Yes.

Q. All right. Tell me about your pets.

A. He is a American Pitbull. He is not quite a year old yet, maybe – nine months old.

* * *

Q. Okay. Were you told that it was a pitbull?

A. Yes.

Q. Were you told that there was another mix of the breed involved?

A. No, I wasn't told.

Q. And is it safe to assume that when this dog was sold to you, it was sold as a full blooded pitbull?

A. Yes.

(Exhibit F) On July 28, 2005, Mr. Hawkins sent a reservation of rights letter to Ms. Brown citing the exclusion quoted above, among other things. (Exhibit G) On September 28, 2006, Brenda Trawick-Smith of another third-party administrator of the claim, Constitution State Services, wrote Ms. Brown on behalf of USF&G advising her that liability coverage was not available to her for the incident in question because her dog was an American Pit Bull Terrier. (Exhibit H) On the same day, she wrote Travis Milligan's attorney, Barry Baker, to the same effect. (Exhibit I)

Barry Baker and Amanda Maybank, as counsel for Plaintiff, filed suit in the name of Jana Wright, as Guardian ad Litem for Travis Milligan on October 17, 2007. (Exhibit J) An affidavit of service indicates that Ms. Brown was served on November 19, 2007. (Exhibit K) On January 7, 2008, Brenda Trawick-Smith sent a second letter to Ms. Brown confirming their telephone conversation and enclosing a copy of the September 28, 2006 denial letter. Affidavit of Brenda Trawick-Smith. (Exhibit L) An order of default was filed on January 10, 2008. Another letter reiterating the denial was sent to Ms. Brown on or about April 7, 2008 by Terence Youngblood of Constitution State Services. (Exhibit M)

On December 5, 2008, Ms. Maybank filed a motion to refer the matter to a Special Referee (Exhibit N), which was granted by order of March 11, 2009 of The Honorable Roger M. Young appointing Thomas J. Wills, IV. (Exhibit O) According to the Order of Judgment filed on September 11, 2009, a hearing was conducted on June 30, 2009, at which Jana Wright, Travis Milligan and their attorneys, Barry Baker and Amanda Maybank, were present, along with Tema Brown and her son, LaRon Brown. (Exhibit P) The order includes a default judgment in the amount of $100,229. Id. It indicates that, "Ms. Brown testified that the dog was not a viscous [sic] dog and was a mixed breed, but not a pit bull." Id., at p. 5, last two lines.

On November 4, 2010, Ms. Brown executed an assignment of "any and all rights and claims for injuries and damages of whatsoever kind sustained by her on account of her insurer's failure to defend and provide coverage in the suit brought by Jana Wright, as Guardian ad Litem for Travis Milligan . . . ." (Exhibit Q)

On January 6, 2011, The Honorable Markley Dennis entered a "Consent Order" "on the Motion of the Plaintiff with the consent of the Defendants . . . allowing the Defendant to refer this matter to the Master In Equity for all purposes allowed by the rules, including, examination of the Defendants in supplemental proceedings." (Exhibit R) It specifically granted Ms. Brown "leave to file a Third Party Complaint against her insurance company." Id. That order was consented to by Barry Baker "As Assignee for Tema Brown" and by Amanda R. Maybank as "Attorney for Plaintiff." Id. On July 14, 2011 a "Consent Order" was entered by The Honorable Kristi Lea Harrington to the effect that "Andrew K. Epting, Jr. is permitted to appear . . . and is authorized to file the third-party complaint within 30 days" and referring the matter to the Master-in-Equity. (Exhibit S) Amanda R. Maybank signed as movant and as the attorney for Plaintiff. Barry Baker also signed as movant "for Tema Brown in her capacity as assignor of claims to Plaintiff." Mr. Epting consented, signing for Third Party Plaintiff. Id.

On July 19, 2011, Third-Party Plaintiff, Tema Brown, filed an "Answer and Third-Party Complaint" against Constitution State Services. On August 17, 2011, she filed a "Motion to Amend Third-Party Complaint" to add GeoVera as a Third-Party Defendant, which was granted by order of this court filed on December 9, 2011. The Amended Third-Party Complaint was filed on December 28, 2011. Constitution State Services and GeoVera filed their answers on January 13, 2012 and February 3, 2012 respectively, after which Constitution State filed an amended answer on February 13, 2012. On December 18, 2012, this court entered a consent

order dismissing Constitution State. On October 14, 2013, Ms. Brown moved to amend her third-party complaint to add a cause of action for "bad faith insurance practices." GeoVera filed a motion for summary judgment on October 28, 2013, which has been withdrawn in favor of the motion for summary judgment filed on May 12, 2014 after receipt of Third-Party Plaintiff's discovery responses. Third-Party Plaintiff filed her motion for summary judgment on or about May 15, 2014.

The following timeline summarizes the significant events described above:

12/23/04 – 12/23/05	Policy Term
04/20/05	Dog Bite/ER records and DHEC Animal Incident/Rabies Investigation Report refer to Pit Bull
04/29/05	Tema Brown gives recorded statement confirming her dog was a Pit Bull
06/20/05	Dr. de Vito's record refers to Pit Bull
07/28/05	Reservation of Rights letter
09/28/06	Denial letter
10/17/07	Complaint against Tema Brown
01/07/08	Letter reiterating denial by enclosing September 28, 2006 denial letter.
01/10/08	Entry of Default
04/07/08	Letter reiterating denial.
03/11/09	Order of Reference to Special Referee
06/30/09	Damages hearing/Tema Brown testifies that dog was not a Pit Bull
09/11/09	Order of Judgment for $100,229
11/04/10	Tema Brown executes assignment of all claims to Plaintiff
01/06/11	Consent Order (Referral to Master/leave to file Third-Party Complaint)
07/14/11	Consent Order (leave to file Third-Party Complaint)

07/19/11	Answer/Third-Party Complaint against Constitution State Services
08/17/11	Motion to Amend Third-Party Complaint
12/09/11	Order Granting Motion to Amend Third-Party Complaint
12/28/11	Amended Third-Party Complaint
01/13/12	Constitution State Services' Answer
02/03/12	GeoVera's Answer
12/18/12	Consent Order Dismissing Constitution State Services
10/14/13	Third-Party Plaintiff's Motion to Amend Third-Party Complaint/Motion to Compel Discovery
05/12/14	GeoVera's Motion for Summary Judgment
05/15/14	Third-Party Plaintiff's Motion for Summary Judgment

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Supporting and opposing affidavits shall be made on personal knowledge, shall set fort such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRCP. The purpose of summary judgment is to expedite disposition of cases not requiring the services of the factfinder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 155 226 S.E.2d 703, 705 (1976). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bradley v. Doe, 374 S.C. 622, 625, 649 S.E.2d 153, 155 (Ct. App. 2007) "With respect to an issue upon which the non-moving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case." Hedgepath v. Am. Tel. &

Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct.App.2001). After the moving party meets its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a genuine issue for trial.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). In meeting its burden, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. Moore v. Weinberg, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Bradley, 374 at 625, 649 at 155. It is not sufficient that a party creates an inference which is not reasonable or an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "The trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case." Harris v. Rose's Stores, Inc., 315 S.C. 344, 346, 433 S.E.2d 905, 906 (Ct. App. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

ARGUMENT

I. The applicable statute of limitations expired before the Third-Party Complaint was filed.

Tema Brown's claim for liability coverage under her homeowner's policy was denied by letter dated September 28, 2006 addressed to her at the address shown on her policy and mailed both by certified mail, return receipt requested, and by regular mail. (Exhibit H) That denial was reiterated in a letter mailed on January 7, 2008, which specifically indicated that it was being sent as "follow up" to a telephone conversation between the Senior Technical Specialist handling the claim and Ms. Brown. Copies of prior correspondence "explaining why coverage was not

afforded" were enclosed. (Affidavit of Brenda Trawick-Smith, ¶ 11) (Exhibit L) On April 7, 2008, still another letter reiterating the denial and the reasons therefor was sent by certified mail, return receipt requested. (Exhibit M) Significantly, counsel for the Plaintiff, to whom Tema Brown assigned her claims on November 4, 2010, and who therefore is the real party in interest, was copied with that letter. However, Ms. Brown's "Answer and Third-Party Complaint" was not filed until July 19, 2011 – almost five years after the original denial letter of September 28, 2006; more than three and a half years after the follow-up letter of January 7, 2008 enclosing the original denial letter; and more than three years, three months after the April 7, 2008 letter reiterating the previous denials. (Exhibits H, L, and M, respectively)

In her Third-Party Complaint, Ms. Brown sought a judicial declaration of "the rights and duties of the parties . . . ." and she prayed "for a declaration of coverage and entitlement . . . ." (Answer and Third-Party Complaint, ¶ 11 and prayer) A declaratory judgment action to determine coverage under an insurance policy is an action at law. State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 237, 530 S.E.2d 896, 899 (Ct.App. 2000), *overruled on other grounds by* Sweetser v. S.C. Dept. of Ins. Reserve Fund, 390 S.C. 632, 703 S.E.2d 509 (2010); *see also* Travelers Indem. Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 140, 511 S.E.2d 692, 694 (Ct.App. 1999) ("An action to determine coverage under an automobile policy is an action at law.")

"Under the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered . . . [and this] discovery rule applies to breach of contract actions." Prince v. Liberty Life Ins. Co., 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010) (applying section 15-3-350(1) to a situation involving a life insurance policy). This discovery rule has been explained as follows:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery is developed.

Royal Ins. Co. of Am. v. Reliance Ins. Co., 140 F.Supp.2d 609, 622 (D.S.C. 2001) (citing to Snell v. Columbia Gun Exchange, 273 S.C. 301, 278 S.E.2d 333 (1981)).

Even if the most recent of the aforementioned letters is considered the date when Ms. Brown first knew or should have known that she may have a claim, the three-year limitations period expired in April 2011 – more than three months before the "Answer and Third-Party Complaint" was filed. In addition, it was not filed until almost seven months after Judge Dennis signed the "Consent Order" granting her "leave to file a Third Party Complaint against her insurance company." Moreover, as set forth above, counsel for the Plaintiff was copied with that letter. Tema Brown assigned her claims against her insurance company to the Plaintiff on November 4, 2010. Thus, the party who ultimately was assigned the right to assert Tema Brown's claims, thereby becoming the real party in interest, was herself on notice of the denial in April of 2008 at the latest. Notwithstanding what appears to be a valid and binding assignment, the Plaintiff has not asserted her claims. Rather, the Defendant, Tema Brown, has attempted to do so. However, even if she had the right to do so, her Third-Party Complaint was too late.

Furthermore, the Third-Party Defendant named in the "Answer and Third-Party Complaint" filed on July 19, 2011, Constitution State Services, is not an insurance company and did not issue the homeowner's policy at issue, or any other policy, to Tema Brown. (See affidavit of Brenda Trawick-Smith, Exhibit L, ¶ 4, 7) As set forth above, that policy was issued by USF&G, to which GeoVera is the successor. (See December 18, 2012 Consent Order Dismissing Constitution State Services With Prejudice, ¶ 1.) An Amended Third-Party

Complaint adding GeoVera as a Third-Party Defendant was not filed until December 28, 2011 – more than three years and eight months after the most recent of the aforementioned letters reiterating the denial of coverage and just short of one year after Judge Dennis's order granting leave to Ms. Brown to file a third-party complaint "against her insurance company."

In its answer thereto, GeoVera admitted that Ms. Brown sought "a declaration of the rights and duties of the parties, but . . . denie[d] that it is appropriate to do so and that Third-Party Plaintiff is entitled to do so." GeoVera's Answer to Third-Party Complaint, ¶ 12. GeoVera's answer also included the following defenses:

FOR A TENTH DEFENSE

21. GeoVera has been substantially and unfairly prejudiced by the assertion of the Third-Party Complaint almost four years after the entry of default against Third-Party Plaintiff in this action, in that GeoVera has thereby been deprived of its rights under Rule 14(a), SCRCP.

FOR AN ELEVENTH DEFENSE

22. The Amended Third-Party Complaint is barred by the doctrine of laches.

FOR A TWELFTH DEFENSE

23. The Amended Third-Party Complaint is barred by the applicable statute of limitations.

II. Third-Party Plaintiff assigned her claims against GeoVera to the Plaintiff and therefore lacks standing to assert her Third-Party claims, and is not the real party in interest.

As set forth above, on November 4, 2010, Third-Party Plaintiff, Tema Brown, assigned "any and all rights and claims for injuries and damages of whatsoever kind sustained by her on account of her insurer's failure to defend and provide coverage in the suit brought by Jana Wright, as Guardian ad Litem for Travis Milligan, a minor over the age of 14 years." (Exhibit Q, ¶ 1) She agreed to "waive any and all rights to any proceeds recovered by Jana Wright, as Guardian ad Litem for Travis Milligan, from Brown's insurer for its failure to defend and indemnify in [said] lawsuit as well as any and all rights for any bad faith action brought against said insurer." Id., ¶ 3. Notwithstanding this unequivocal assignment, Plaintiff has never filed an action, nor sought to add GeoVera as a party to the within action, in order to assert a claim against it. (If she had done so, it would have been barred by the statute of limitations for the same reasons set forth in II. above. It also would have been barred for the reasons set forth in III. below.) Rather, she sought and obtained a consent order "allowing the Defendant to refer this matter to the Master In Equity for all purposes allowed by the rules . . . ." Plaintiff's counsel, Amanda Maybank and Barry Baker, consented to Judge Dennis's order (Exhibit R) granting **Defendant** "leave to file a Third Party Complaint against her insurance company." (Ms. Maybank signed the consent order as "Attorney for Plaintiff", while Mr. Baker signed "As Assignee for Tema Brown.")

Having assigned her rights to the Plaintiff, Ms. Brown had no claims to assert against her insurance company. In South Carolina, it is well established that an "assignee . . . stands in the shoes of its assignor . . . ." Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct.App. 1999) (citing Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199,

201 447 S.E.2d 869, 870 (Ct. App. 1994). No action against GeoVera having been filed by the Plaintiff, and no Third-Party Complaint having been filed by the Defendant, a second consent order was entered on July 14, 2011. (Exhibit S) In that order, Judge Harrington authorized Andrew K. Epting, Jr. to appear and file the Third-Party Complaint within thirty days, and she then referred the case to this court. Again, Ms. Maybank signed the consent order as "Attorney for Plaintiff." Mr. Baker signed "For Tema Brown in her capacity as assignor of claims to Plaintiff." Mr. Epting consented on behalf of Ms. Brown. Thus, not only does the assignment assign all of Ms. Brown's claims against GeoVera to the Plaintiff, but the parties very clearly recognized that such an assignment had occurred. In fact, in their recent responses to GeoVera's ninth request to produce requesting "Any and all documents concerning the dog at issue in this case, including . . . vaccination records, pet licenses, registration records, pedigree information and veterinary records and reports", Third-Party Plaintiff responded that, "As this third-party complaint is filed pursuant to the assignment dated November 4, 2010, Plaintiff is not in possession of documents responsive to this request." (Exhibit T).

"In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable." 5 S.C. Juris. Assignments § 19, citing S.C. Code Ann. § 15-1-40 (Law. Co-op. 1976). "The general rule is that an assignor loses all control over a contract right or chose in action and can do nothing to defeat the rights of the assignee." Id., § 41, citing 6 A C.J.S. Assignments § 85 (1975). "Generally, if a claim has been assigned in full, the assignee is the real party in interest with the right to pursue an action thereon, as the assignor loses control over the action when he or she makes the assignment. This is important because generally only a real party in interest may pursue a cause of action." 6 A C.J.S. Assignments § 135.

Rule 17(a), SCRCP, requires in part that, "Every action shall be prosecuted in the name of the real party in interest." Because Ms. Brown, by virtue of the assignment, is not the real party in interest, she lacks standing to assert the claims included in her Third-Party Complaint.

"Standing to sue is a fundamental requirement in instituting an action." Connor Holdings, LLC v. Cousins, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). It is a part of the concept of justiciability that concerns whether a party may make a legal claim or argument. Powell ex rel. Kelley v. Bank of America, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct.App. 2008). The general rule in South Carolina is that for parties to have standing, they must have (1) a personal stake in the subject matter of the lawsuit and (2) be a real party in interest. Ex Parte Gov't Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). By virtue of the assignment, Ms. Brown can meet neither requirement.

"Where an assignment transfers all interest of the assignor in an insurance policy to the assignee, the assignor no longer has any standing to sue on the policy in his or her own name for his or her own benefit . . . ." 17 Couch on Ins. § 241:18, citing Harris v. Aetna Ins. Co., 32 Ga. App. 48, 123 S.E. 27 (1924). "[A]n insured who assigned his or her claim against his or her insurer for failure to settle within policy limits to the injured person, thereafter had no standing to sue for bad faith or negligent refusal to settle." Id., citing Southern General Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992). Thus, even if the statute of limitations had not expired, Tema Brown does not have standing to assert the claims set forth in her Third-Party Complaint, having unequivocally assigned them to the Plaintiff on November 4, 2010.

Apparently recognizing these issues, Ms. Brown attempts to solve the problem by stating in her interrogatory answers that, "Ms. Brown further agreed to waive[ ] her right to the proceeds, if any, recovered by Ms. Wright and allow this action to proceed in her name."

(Defendant/Third-Party Plaintiff's Answers to GeoVera's Discovery, Interrogatory 9) (Exhibit U). The assignment, however, says nothing about Ms. Brown allowing this action to proceed in her name. Moreover, any such argument cannot succeed because, as set forth above, it is the Plaintiff, as assignee, who is the real party in interest. Ms. Brown, as assignor, lost control over the action when she made the assignment. An assignee stands in the shoes of the assignor, and an innocent assignee receives all the rights of the assignor. BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012); see also Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct.App. 2007). Since Ms. Brown is not the real party in interest by virtue of her unequivocal assignment, she does not have standing to pursue her third-party complaint even if it were not barred by the statute of limitations. Standing is a fundamental requirement for instituting an action, and no justiciable controversy is presented unless the plaintiff had standing to maintain the action, and once it is determined that a plaintiff has no standing to prosecute, the court must dismiss the action. Brock v. Bennett, 313 S.C. 513, 443 S.E.2d 409 (Ct.App. 1994).

III. This Court lacks jurisdiction over Third-Party Defendant because this action was terminated in the form of a final adjudication prior to the filing of the Third-Party Complaint.

The Special Master's Order of Judgment filed on September 11, 2009 awarding the Plaintiff damages in the amount of $100,229 (Exhibit P) was a final judgment, ending the action. See Drennan v. Brown, 114 S.C. 491, 103 S.E. 889 (1920). "A default judgment is a final order terminating the case and establishing liability and damages. It is the same as any other judgment and entered pursuant to Rule 58 [Entry of Judgment]" Flanagan, *South Carolina Civil Procedure*, 2nd ed., p. 437. According to American Jurisprudence (Second):

> "There is authority that the effect of the clerk's entry of default is to cut off the defendant's right to take any further affirmative steps such as pleadings or motions. A defendant against whom a default has been entered is out of court and is not entitled to take any

> further steps in the cause affecting plaintiff's right of action; the defendant cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial or demand notice of subsequent proceedings."

46 American Jurisprudence 2d, Judgments § 320.

In Arkansas Bankers Life Insurance Company v. Tomerlin, the Arkansas Supreme Court made clear that the inclusion of a third-party complaint post-judgment was in error, requiring reversal. *See* Arkansas Bankers Life Ins. Co. v. Tomerlin, 340 Ark. 701, 13 S.W.3d 581 (2000). In Tomerlin, judgment was entered after a trial in July 1995. In September 1995, a motion for leave to file a third-party complaint was filed and granted. Id., at 702, 13 S.W.3d at 582. The third-party defendant filed a motion to dismiss and strike the third-party complaint, arguing that the case had been finally adjudicated. Id. The third-party defendant's motion was denied. Id., at 703, 13 S.W.3d at 582. On appeal, the Arkansas Supreme Court reversed, relying on Aclin Ford Co. v. Fiat Motors of North America, Inc., 275 Ark. 445, 631 S.W.2d 283 (1982):

> Affirming the trial court, [in *Aclin*] we held that implicit in Rule 14 is the assumption that the third party complaint will be filed before the issues are resolved at trial; otherwise, its provisions allowing the third party defendant to assert defenses against the original plaintiff would have no meaning . . . .
>
> The facts in the present case are not distinguishable from the facts in *Aclin*. Here, Ford filed suit against appellee and recovered judgment. Thereafter, appellee requested and was granted permission to file a third-party complaint against appellant and the trial court denied appellant's motion to strike appellee's third-party complaint. Based on *Aclin*, we conclude that permitting the third-party complaint to be filed after the entry of judgment in the underlying suit was error and requires that the ruling be reversed.

Id. at 705, 13 S.W.3d at 583; *see also* Liberty Ins. Co. v. Milne, 98 So.3d 613 (Fla. Dist. Ct. App. 2012) (finding a lack of subject matter jurisdiction over a third-party complaint which was filed after the entry of final judgment); Travelers Cas. & Sur. Co. of Am. v. Culbreath Isles Prop.

Owners Ass'n, 103 So.3d 896 (Fla. Dist. Ct. App. 2012) (finding that the lower court had exceeded its jurisdiction in allowing a third-party complaint against an insurance carrier after final judgment). (Rule 14 of Arkansas' Rules of Civil Procedure is virtually identical to Rule 14 of both the South Carolina and Federal Rules of Civil Procedure.)

The Third-Party Complaint was filed four and a half years after the complete and final adjudication of the within action in the form of a default judgment. As set forth above, Ms. Brown made no attempt to file any action against her insurer until she filed her "Answer and Third-Party Complaint" on July 19, 2011. Not only was this after the statute of limitations had expired, but it was after she had assigned the right to do so to the Plaintiff. Moreover, the Third-Party Complaint named Constitution State Services, which was neither her insurer (USF&G Specialty) nor its successor (GeoVera), but rather merely the third-party administrator of her claim. She did not file an Amended Third-Party Complaint adding GeoVera as a purported Third-Party Defendant until December 28, 2011.

Neither Plaintiff nor Defendant Tema Brown could bring a separate suit against GeoVera because the statute of limitations had expired by the time the Answer and Third-Party Complaint was filed. For the reasons set forth above, neither the Plaintiff (as assignee) nor the Third-Party Plaintiff can avoid the statute of limitations by asserting the claim in a Third-Party Complaint. Because this action terminated upon entry of the default judgment, the Circuit Court was without subject matter jurisdiction to enter the aforementioned consent orders granting Ms. Brown leave to file a Third-Party Complaint, and this Court is also without subject matter jurisdiction to adjudicate her Third-Party Complaint. "A court, lacking subject matter jurisdiction, cannot enforce its own decrees." Hallums v. Bowens, 318 S.C. 1, 428 S.E.2d 894, 895 (Ct. App. 1993). "Whenever it appears by suggestion of the parties or otherwise, that the court lacks jurisdiction

of the subject matter, the court shall dismiss the action." Rule 12(h)(3), SCRCP. GeoVera is therefore entitled to summary judgment.

IV. There has been no factual finding that the Third-Party Plaintiff's dog was not a Pit Bull, and even if there were, it is not binding on GeoVera.

Third-Party Plaintiff's position is that, because GeoVera did not retain counsel to appear and defend Ms. Brown, it is bound by the factual findings contained in the September 11, 2009 order of default judgment entered after the damages hearing. This argument fails for two reasons.

First, the Special Master's order of judgment contains no finding that the dog in question was a Pit Bull. Rather, in the "FACTS" section, the Special Master indicated that "Ms. Brown also testified that she did not know the breed of the dog, however, she testified that it was not a viscous [sic] dog." Order of Judgment, p. 2, 1st full ¶ (Exhibit P). In the "LAW" section of the order, he said, "Ms. Brown testified that the dog was not a viscous [sic] dog and was a mixed breed, but not a pit bull." Id., p. 5, last sentence. In short, the Special Master merely recited Ms. Brown's testimony (which, as set forth above, is contrary to what is found in the ER records, DHEC's records, the treating physician's records, and in the transcript of her own recorded statement). He did not make any finding that the dog was a pit bull. Nor was it necessary for him to do so, since the issue before him was damages – not the breed of the dog in question nor insurance coverage.

Second, Third-Party Plaintiff argues that there is law to the effect that a liability insurer that declines to defend an action against its insured is bound by the material facts established against its insured at the trial; however, under South Carolina law, any such rule has no

application to the case at bar, by virtue of Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965).

In Sims, Nationwide had issued an automobile insurance policy to Booker T. Sims, but denied liability and declined to defend him in an action brought by Moses Bates. Mr. Bates alleged that he was injured while a passenger in another vehicle as a result of Mr. Sims' actions while operating the insured vehicle. Nationwide alleged that Mr. Sims's actions were intentional, as a result of which liability coverage was not available to him under the policy.

Mr. Bates's suit against Mr. Sims was tried without a jury and resulted in a verdict in favor of Bates. The presiding judge's order, prepared by counsel, indicated that ". . . the defendant was negligent in passing said automobile and colliding with same, but the defendant was not willful." Id., at 84, 524.

In Mr. Sims's action against Nationwide, Nationwide offered evidence that Mr. Sims had intentionally caused his vehicle to collide with the vehicle in which Mr. Bates was a passenger, which was being driven by Mr. Sims's girlfriend, and that, after both vehicles came to a stop, Mr. Sims got out of his car, got a gun and shot her.

The trial court held that Nationwide was precluded from offering evidence that Mr. Sims's actions were intentional and directed a verdict in his favor. The South Carolina Supreme Court reversed, stating in part:

> It is perfectly obvious, we think, that had the insurer here undertaken to defend the insured in the tort action and asserted therein its defense that the injuries sustained by Bates were intentionally caused by its insured, a clear conflict of interest between insurer and insured would have been presented, and the insurer could not in that action have undertaken to assert its defense and at the same time defend the insured against a charge of simple negligence.

The court then quoted the following with approval from Farm Bureau Mutual Ins. Co. v. Hammer et al, 4th C.C.A., 177 F.2d 793:

> It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy. To hold otherwise would be to estop the Insurance Company by the acts of parties in a transaction in which it has no concern and over which it has no control, and to deprive it of its day in court to show that the transaction is foreign to the contract of insurance. 'If it cannot do this,' as was said in the dissenting opinion in Stefus v. London & Lancashire Indemnities Co., 111 N.J.L. 6, 166 A. 339, 341, 'it is at the mercy of every unscrupulous litigant who, regardless of his facts, sees fit to falsely allege a claim on which the insurance company would be liable and thereunder establish another claim on which no liability could attach, and forsooth collect because the insurer cannot show the true facts.'

This issue was also addressed in Ranta v. The Catholic Mut. Relief Soc. of America, 492 Fed.Appx. 373 (4th Cir. 2012). Mr. Ranta brought suit in South Carolina state court against a former priest, the Roman Catholic Diocese of Savannah, Georgia, and others, alleging that the priest had sexually abused him over a period of years. Ranta thereafter reached a settlement with the Diocese and others, not including the priest. He later filed a motion for summary judgment against the priest, which was granted, with the court awarding a total of $100 million in actual and punitive damages. Mr. Ranta then brought a declaratory judgment action against the insurer, Catholic Mutual, arguing that it was obligated to pay the judgment. Catholic Mutual removed the case to federal court. The district court granted Catholic Mutual's motion for summary judgment on the ground that the intentional sexual molestation was not an "occurrence" within the meaning of the policy at issue. On appeal, Mr. Ranta advanced an argument similar to that made by Third-Party Plaintiff in the within action, which the court addressed as follows:

> Ranta next asserts that the district court erroneously awarded Catholic Mutual summary judgment because Catholic Mutual failed to defend [the priest] in the underlying South Carolina litigation, thereby waiving its coverage defense. Because Catholic Mutual elected not to defend [the priest], Ranta advances, Catholic Mutual is estopped from challenging the state court's judgment that [the priest's] negligence was a proximate cause of Ranta's injuries.
>
> The district court properly rejected Ranta's argument, as the elements of collateral estoppel are not present. Under South Carolina law, collateral estoppel precludes only "a party to the prior action or when in privity with a party to the prior action" from relitigating an issue previously litigated. *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 528 S.E.2d 679, 681 (S.C.Ct.App.2000). The term "privy" means "one so identified in interest with another that he represents the same legal right." *Id.* Accordingly, when an insurer elects not to defend a tort suit on the ground that the insured's tortious conduct was outside the scope of the insurance policy, the insured and the insurer do not share an identity of interest regarding the underlying action and, therefore, are not in privity. *See State Farm Fire & Cas. Co. v. Garrity*, 785 F.2d 1225, 1227 (4th Cir. 1986) ("When the insured is sued for negligence and the insurance company believes the injury was intentional, [ ] the interests of the insurer and the insured diverge.").
>
> Moreover, an insurance company "is neither obligated to defend nor bound by the findings of the court if the claim against the insured is not covered by the policy." *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793, 799 (4th Cir. 1949). The district court properly found that the allegations of Ranta's complaint established that there was no duty to defend. **Accordingly, the South Carolina tort judgment does not bar Catholic Mutual from asserting that [the priest's] conduct was intentional and, therefore, outside the scope of insurance coverage.**

Id., at 376-77 (emphasis added).

Third-Party Plaintiff's argument must fail for similar reasons. As in Sims, the insurer had evidence, including Ms. Brown's own recorded statement, that the dog in question was at least fifty percent Pit Bull, as a result of which its exclusion applied. Contrary to her own statement and the overwhelming evidence, Ms. Brown then testified to the contrary at the damages hearing.

For the reasons set forth in the Sims opinion, GeoVera cannot be bound by such testimony, not only because the Special Master made no such finding, but also given the overwhelming evidence to the contrary.

CONCLUSION

For the reasons set forth above, GeoVera respectfully requests that its motion for summary judgment be granted, and that Third-Party Plaintiff's motion for summary judgment be denied.

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Columbia, South Carolina
May 15, 2014

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF CHARLESTON	**CASE NO.: 2007-CP-10-3224**

JANA WRIGHT, as Guardian ad Litem for TRAVIS MILLIGAN, a minor over the age of 14 years,

Plaintiff,

v.

TEMA BROWN,

Defendant/Third-Party Plaintiff,

v.

GeoVera Specialty Insurance Co.

Third-Party Defendant.

CERTIFICATE OF SERVICE

I, Suzanne Rodriguez, Legal Assistant to William P. Davis of Baker, Ravenel, & Bender, L.L.P., attorneys for Third-Party Defendant GeoVera Specialty Insurance Company, do hereby certify that on this 15th day of May 2014, I served the foregoing **Third-Party Defendant GeoVera Specialty Insurance Company's Memorandum in Support of Its Motion for Summary Judgment and in Opposition to Third-Party Plaintiff's Motion for Summary Judgment** by mailing copies of same by United States Mail, postage prepaid, to counsel at the following addresses:

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STATE OF SOUTH CAROLINA)
: IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO. 2007-CP-10-3224

JANA WRIGHT, AS GUARDIAN AD LITEM FOR TRAVIS MILLIGAN,

Plaintiff(s),

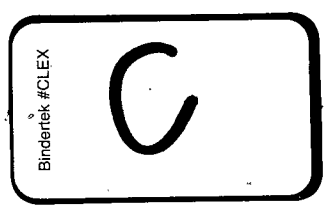
-vs

TEMA BROWN, et al.,

Defendant(s),

HEARING

Given before The Honorable Judge Mikell Scarborough in the Charleston County Courthouse, 100 Broad Street, Suite 269, Charleston, South Carolina on Monday, May the 19, 2014, commencing at 10:30 o'clock a.m.



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Columbia, SC 29204

THE COURT: This is Jana Wright as guardian for Travis Milligan, plaintiff, versus Tema Brown. Looks like December 11th I issued an order to amend the third-party claim to add a GeoVera Specialty Insurance and then December 12 there was a consent order dismissing Constitution States Services. Is that also GeoVera dismissed at that time or just Constitution State?

MR. EPTING: Just Constitution State.

THE COURT: So Ms. Endemann, Mr. Epting for the plaintiffs. Do we have any motions pending today? It's a pre-trial status. Do we have anything we need to cover before we set it for trial?

MS. ENDEMANN: Yes, Judge. You've got cross motions for summary judgment. There's a couple other motions pending, but we've sort of agreed that we can put those off and let you hear the summary judgment motions.

THE COURT: Okay. And then who's representing who?

MR. DAVIS: Your Honor, I'm Bill Davis here for the third-part defendant GeoVera. This is Marilyn Norton with my firm.

THE COURT: Y'all are in agreement, it is a question of law?

MS. ENDEMANN: Yes, sir.

MR. DAVIS: Yes, Your Honor. May it please the

Court. I do agree with Mr. Epting and Ms. Endemann that both sides haven't filed motions for summary judgment. I think we both agree and disagree as to who is entitled to summary judgment, but we agree somebody's entitled to summary judgment. But if the Court would indulge me, and I have to apologize for the length of that memo I just handed up, but this case has been around for a while.

THE COURT: Yes.

MR. DAVIS: And so I felt it necessary to go through the procedural history for this all to make sense. The dog bite in question happened back in April of 2005. Our insured, Tema Brown, who is the defendant in the case had a homeowners policy with USFG Specialty Insurance Company. That policy excluded liability for a dog bite if the dog was one of a certain type of dog including a Pit Bull. And Pit Bull or any of the other breeds were defined as any breed that's at least 50 percent of that breed.

So nine days later a dog bite, a third-party administrator of the claim on behalf of USFG took a recorded statement of the insured, Ms. Brown. And we quote a portion of that recorded statement in our brief, but the bottom line is that she said of course it was a Pit Bull. When asked how she knew that she said she didn't know what a Pit Bull looked like, but she said it was sold to her as a quote, full blooded Pit Bull.

The emergency room records from the young man who was bitten referred to the dog as a Pit Bull. There's a DHEC form that has to be filled out when there's a dog bite that refers to the dog as a Pit Bull. The young man, Travis Milligan's family doctor's records in the history refer to the dog as a Pit Bull.

Based on all that after the third party administrator does the investigation the insurance company denied coverage on the ground that it was a Pit Bull. That was in September of 2006. In October of 2007 the lawsuit was brought. January of 2008 the insurance company through a different third-party administrator -- this is where Constitution State comes in -- they reiterated it was denied with a letter to the insured. Then four months later in April of 2008 a second letter was sent to the insured reiterating denial. The suit was brought in October, 2007. Default was entered in January of 2008 insurance company having denied coverage. And it was after that entry of default that we have the second letter reiterating the denial.

So from the entry of default in January of 2008 until the damages hearing, which took place on June 30, 2009 is about a year and a half. So the dog bite is in 2005. Damages hearing is four years later. And at this damages hearing the defendant, Tema Brown, having said in her recorded statement that it was a Pit Bull, which was

corroborated in the medical records, apparently testified that it was not a Pit Bull.

In September, 2009 the case had been deferred by the way, to the Special Master, Tom Wills, who at the damages hearing in September, 2009 entered a default judgment of $100,229. And the reason we know what the testimony was is that he indicated in his order that Ms. Brown testified that the dog was a quote, mixed breed but not a Pit Bull. He made that observation a couple times in his order.

All right. So by the time this damages hearing in September of 2009 we are now almost exactly three years from the original denial, which was on September 28th, 2006. We're over a year later. On November 4, 2010 there was an assignment. Ms. Brown assigned all of her rights against her insurance company to the plaintiff. Now, of course our position is that by the time that happened in November of 2010 the statute had expired the year previously.

All right. Then months after that in July of 2011 we have a third-party complaint in this case against Constitution States Services, which as I indicated earlier is the third-party administrator or was one of them. And in December, the end of December, 2011 it was amended to add GeoVera. And GeoVera is in there because they were the successor to USFG Specialty. So in other words, they're the insurer basically.

So as I said, Your Honor, our first argument is that the statute of limitations has expired long before this third-party complaint was brought. The claim was denied back in September of 2006. And GeoVera is not sued until December of 2011, over five years later. You know, I mentioned that there were three letters denying coverage, a first one and then two reiterating it. Even if we take the last of those letters it's still three years and three months past the denial. Even then the suit was brought against Constitution State, which is the third-party administrator not the insurer. And so it wasn't until the end of the year that GeoVera was substituted.

Now, the suit was brought as a declaratory judgment action, but we've cited law in our memorandum to the effect that the statute of limitations would be the same as though this were say a suit for breach of contract on the insurance policy, because it's a declaratory judgment action arising out of the interpretation of that policy. And so you have a three year statute. And of course, the three year statute begins to run at the time that the insured either knew or through reasonable diligence should have known that she had a cause of action.

The other problem for the third-party plaintiff is that the suit was brought -- you know, I mentioned that there was an assignment of all rights to the plaintiff, but the suit

was brought in the name of the assignor, Tema Brown. She's not a real party in interest. She assigned everything unequivocally, all rights against her insurance company, all claims to the plaintiff. If there was a cause of action we submit that there's not because it's barred by the statute, but even if there were the third-party defendant is not the real party in interest, which of course is an absolute essential requirement. If you're not a real party in interest you don't have any standing to bring suit.

And we've provided a copy of these documents. There are lots and lots of records in the suit. We tried to pull the ones that we think are particularly relevant to our argument, but you know, in interrogatory answers the third-party plaintiff does contend that Ms. Brown had agreed that the suit could be brought in her name. But there's two problems with that. First of all, the assignment doesn't say that. There's nothing that has been produced in writing to that effect. There's no affidavit from Ms. Brown. But I would submit even if there were it wouldn't matter anyway, because every action according to Rule 17 shall be prosecuted in the name of the real party in interest. You can't get around that.

So Ms. Brown is not the real party in interest. As a result of which she has no standing. As I said, that is an essential element of being able to bring a cause of action.

Under South Carolina law you've got to have a personal stake in the subject matter of the suit in order to have standing. Having assigned all her rights to the plaintiff Ms. Brown doesn't have that anymore. And you must be a real party in interest, which she clearly is not. In fact, we cite a case on page 16 of our memorandum, Brock versus Dennis that says once it's determined that the plaintiff has no standing the Court must dismiss the case.

Our third ground for summary judgment, Your Honor, is that this case was terminated back in September of 2009 when the Special Master, Tom Wills entered the default judgment order. We cite a case by the name of Drennon (ph) in our memorandum on page 16 that says a default judgment is a final order. And we also cite Professor Flannigan to the effect that a default judgment terminates the case.

Now, it's not unusual, as I'm sure Your Honor knows not to find a case right on point on something like this. In South Carolina we just don't have that issue. However, I did find a case out of Arkansas that is very similar. It's the Tomerlin case that's cited on page 17 of our memorandum. And a very similar situation happened in that case. In other words, the case in chief had been resolved against the defendant. And then that defendant became a third-party plaintiff, same situation.

And of course, that's done under Rule 14. And the

Court in Arkansas said you can't do that, because it's implicit under Rule 14 that a third-party complaint when filed before the issues are resolved at trial, otherwise Rule 14 says that the third-party defendant has a right when sued to come in and assert any defenses that it has against the plaintiff. He said that provision wouldn't make any sense if you could then bring in the insurance company after everything is over, after the insurance company or any third-party defendant circumstances against the plaintiff once there's a final judgment.

And I submit that that makes a lot of sense, that this is not the situation that Rule 14 was designed for. And in fact, we cite some cases in our memorandum that indicate that for that reason, you know, once a case is over and terminated anything that happens after that the Court is without subject matter jurisdiction. And of course, subject matter jurisdiction is something that can be raised at any time, but you know, we submit that this case was over before this third-party complaint was brought. There was no subject matter jurisdiction, and of course there's no personal jurisdiction since there's no subject matter jurisdiction.

So Your Honor, we flush that out in the memorandum, but we would submit that for all of those reasons the third-party defendant should be granted summary judgment.

THE COURT: All right. Thank you, Mr. Davis. Ms. Endemann?

MS. ENDEMANN: Thank you, Judge. I'd like to take the argument sort of in reverse order here. The first being that the third-party complaint is untimely and prejudicial as final adjudication took place before it was brought.

Judge, first, there are not one but two orders from circuit court judges referring this matter for you and specifically giving us permission to file the third-party complaint against GeoVera. Judge Dennis entered an order on January 6th, 2011 and Judge Carrington entered an order on July 14, 2011.

So first, Judge, if their argument is that the circuit court didn't have jurisdiction to refer this to you we think that's probably before the circuit court. Second, Judge, in South Carolina the Court has ruled that this issue does not effect subject matter jurisdiction. And that is in Russell versus Wachovia Bank. And I have a copy if you'd like me to hand up to you, Judge. The subject matter jurisdiction is not effected by final adjudication in a case. And as the case discusses the Court's authority to retain jurisdiction over the matter specifically not subject matter jurisdiction.

And what we would argue, Judge, is we have two circuit court judges referring this case to you and authorizing us

to bring this. It does not effect subject matter jurisdiction.

Further, GeoVera has consented to this Court entering orders in the case as you actually mentioned before we really started arguing there have been consent order dismissing parties, adding parties in. Constitution State was the third party administrator as Mr. Davis pointed out. USFG issued the policy. It was long and torturous trying to figure out who they then assigned the policy to, and it turned up it was GeoVera. We have consent order before you where we subbed in that party, relates back to the time of the original filing.

So Judge, we would argue if there is any argument about jurisdiction it's been waived. They've consented to this Court entering orders in the case.

Second, as to the issue of the assignment to the plaintiffs in the underlying action by Ms. Brown. First, Judge, we think that Ms. Brown is the real party in interest. She's the insured. There was an assignment, but even if she's not the real party in interest under Rule 17 the rule explicitly states that no action shall be dismissed on the ground that it's not prosecuted in the name of the real party in interest. That substitution is the property remedy in that it relates also back to the time of the original filing. So Judge, even if there was an issue with

who the real party in interest is a substitution is the property remedy, not summary judgment and dismissing the claim.

Finally, Judge, to get to the statute of limitations argument that was raised. I'd like to talk just really briefly about the notion that this dog is a Pit Bull under the policy and has been excluded for that reason. As Mr. Davis said, the policy exclusion actually states that the dog has to be defined as a vicious dog. The definition of vicious dog in the policy is that it has to have bitten someone prior to the incident in question or the lineage of the dog must be at least 50 percent Pit Bull.

Here, as Mr. Davis did state, there was a statement taken about two weeks after the dog bite in question. And Ms. Brown said a lot of things. First, she was asked is the dog an American Pit Bull. And they're asking you where did you get the dog. She says, we got him from a breeder. She says, is he a breeder. Well, I'm not really sure if he's a breeder. Are there papers on the dog? We didn't get papers from the seller, no. Is this as much as a Pit Bull can be a purebred is it a purebred Pit Bull? She says, I don't know. Well, does it look like a Pit Bull? She says, I don't know. They ask, can you explain to me how you don't know if it looks like a Pit Bull? She says because I don't know what a Pit Bull looks like. And then they say well, did someone

tell you it was a Pit Bull? And she says, yes, someone told me it was a Pit Bull.

Judge, we would argue that that certainly does not meet the definition in the policy as proving an exclusion which is construed against the insured in favor of coverage. And it's their burden of showing that the exclusion applies. This statement certainly, Judge, we don't think meets that definition of 50 percent of the dog's lineage being a Pit Bull.

But in any event, Judge, GeoVera's own documents sort of support our argument. There was a reservation of rights letter written in July of 2005. And the insurance company is discussing their investigation of the dog they think as being an American Pit Bull. First, they talk about this statement that I just read from. And then they talk about other records. All of the other records from DHEC, the medical records that Mr. Davis discussed with you earlier, were actually written before the date of this July, 2005 reservation of rights letter.

So they had all this information at the time they're writing this letter. And what they say is there are no papers to verify the breed. And they say that there are no vet records to verify the breed. And based on the exclusion and what they found in the records there may be no coverage or indemnity for defense if it can be verified by these

documents that in fact, that Jinks is an American Pit Bull Terrier. To date we have no received anything in writing from the breeder and we have no veterinary records to support the breed allegation. They go on to say, without support, without this support and the coverage issues set forth above we will continue to handle the claim under a full reservation of rights. So knowing all the information that they knew at the time, having this statement, they're saying it's not enough. We're going to defend under reservation of rights. A new TPA comes in and all the sudden we have a reversal in coverage position and a denial.

There's some question about whether these denial letters even were received by Ms. Brown. There's an affidavit that's been presented to you by GeoVera that says we sent letters, if they would've come back to us as undeliverable we would have envelopes in our file. Well, Judge, if you look at two of their exhibits and I can point them out to you, Exhibits G and H, the last page of both of those exhibits actually show that the letters were returned as undeliverable.

So Judge, there's some question of fact as to whether these letters even were received by Ms. Brown. But in any event, Judge, this is a case about indemnity. We're not suing for a defense cause or their failure to defend or their breech of their duty to defend. What we're suing for

is indemnity under the order entered by Tom Wills, which specifically finds as part of his order that Ms. Brown testified, her son testified that this dog was not a Pit Bull. There's no finding, which is part of Mr. Wills' assessment of whether to award punitive damages or not, that the dog is not a Pit Bull. It was not vicious. And so he's not going to award punitive damages.

So what we're seeking, Judge, is indemnity under that July 19, 2000 --

THE COURT: Let me stop you on that. So the order of Tom Wills, the Special Referee, was that the dog was not a Pit Bull?

MS. ENDEMANN: Not a Pit Bull based on the testimony before him at a hearing.

THE COURT: And therefore, did he define vicious or non-vicious or just say he's not a Pit Bull?

MS. ENDEMANN: Judge, I think we've got a copy of that order. He says it's a mixed breed, not a Pit Bull. And I think he says it's not vicious, because of that he is going to -- he is not going to award the plaintiff punitive damages. But I can certainly had up a copy of the order.

THE COURT: But that part and parcel is rationale for not awarding punitive?

MS. ENDEMANN: That's right, Judge. And so what we would say, that order entered by Tom Wills was on

September 11th, 2009. Our third-party complaint was filed on July 19, 2011, so clearly within any three year statute of limitations. And Judge, there's case law in South Carolina that says as to a claim for indemnity the statute of limitations rums from the date that judgment is entered against the defendant. So we are well within the date that judgment was entered against the defendant, less than two years by the time it's filed. And that case, Judge, is First General Services of Charleston versus Miller.

THE COURT: All right. So that brings you within the time frame. And you've got a finding of fact as to the nature of this dog. And what about the issue of who's the real party in interest here? Tell me about the assignment and what happened there.

MS. ENDEMANN: Judge, there is an assignment that gives the plaintiff in the underlying case, the mother of the child that was bitten by the dog authority to bring the causes of action. And there's some assignment of the proceeds. I think we've also got a copy of that. It was one of the exhibits to Mr. Davis' motion, and rather than re-file all these and re-hand them over we're just relying on those exhibits. It's Exhibit Q.

THE COURT: Okay.

MS. ENDEMANN: Judge, what we would argue is if the argument here is that we're not the real party in

interest we could simply substitute as the real party in interest. And also, Judge, that eliminates one of the concerns that Mr. Davis addressed about this whole issue about there's an order entered in the case. If the problem is that the third-party defendant can't question or cross the original plaintiff and the original plaintiff is subbed in as a party that should alleviate that concern as well. So we would be willing under Rule 17 to sub in parties if Your Honor agrees that the assignment extinguished Ms. Brown's right to bring a claim in her name.

THE COURT: In any event, y'all's position is it's an indemnification claim and therefore it was timely. It was unestablished until the time of the order of Tom Wills, and therefore there's a right to at least bring this claim. That's the basis of your argument, correct?

MS. ENDEMANN: Yes, a claim for indemnity and that even if we're talking about the statute running from the time of the letters there's a question of fact as to whether that statute's run. It appears that many of these letters were not even received by Ms. Brown. They were returned as undeliverable and that those envelopes are in the insurance company's file.

THE COURT: And your indemnification claim, is that in contract or in common law?

MS. ENDEMANN: I think it would be both, Judge.

THE COURT: Thank you.

MR. DAVIS: Your Honor, first of all, there were two orders giving them permission to bring a third-party complaint. The Russell versus Wachovia case and would request that we be allowed some additional time after the hearing today to address that. I haven't had a memorandum from them, so I'm not aware of that case. But I would submit that the issues are complication enough in this that maybe more briefing might be in order at least to respond to that.

But having said that, I haven't seen that case our position is that those two orders, if the case is final at the time of the default judgment then there was no subject matter jurisdiction to enter those two orders. The case is over. And so as far as our consenting to orders in this case we did consent. Again, I don't have it in front of me. I do remember that we entered into a consent order and Constitution State was the wrong defendant. They're the third-party administrator.

THE COURT: Right.

MR. DAVIS: And so we did agree to that. And I believe we may have included some language in that order that may indicate that it's not a waiver. Now, as far as the alleged question about the denial letters, we submitted everything that we have about those letters. Some of them

weren't sent certified mail return receipt requested. But also, my affidavit from the lady who sent two of those letters.

And again, I don't have that in front of me because I handed up my memorandum, but in her affidavit she indicates at least one of those, maybe both was sent not just certified mail return receipt requested but by regular mail. And of course, under South Carolina law it's sent by regular mail then you offer proof of that, which we did in our affidavit. There is a presumption of receipt. And one of the cases that says that is Simmons versus South Carolina Farm Bureau found at 391 Southeastern 7-560.

So not only that, Your Honor, but that initial denial letter was sent to plaintiff's counsel. And so it is the plaintiff who is a real party in interest and who has, if there is a cause of action she has it. So her own lawyer was on notice of this. Even if the letters didn't get to Tema Brown her own lawyer was on notice of this way back in 2006.

THE COURT: That was in July you said?

MR. DAVIS: The original denial letter was in April of 2006 I believe. I'm sorry. September, 2006. And Mr. Baker was actually copied with that letter. I don't think counsel's arguing at this stage that, or maybe they are because this is the basis of their summary judgment

motion so I would like to address the issue that their contention is that it's definitively decided that this was not a Pit Bull.

First of all, counsel indicated at the time of reservation of rights letter we had the medical bills and records. That may be true. I don't know. I'd like to go back and look at that. But what is true is that after doing it's investigation the company did deny the coverage about a year after the dog bite and sent notice to Ms. Brown to that effect. Again, whether or not Ms. Brown received the letter, it was mailed to her. There were three letters that went, some by certified mail and regular mail. And so I would submit that there's a presumption of receipt, even if not by Ms. Brown certainly by the plaintiff's attorney.

With regard to Mr. Wills', Special Master Wills' order it's provided with our memorandum. And I would submit that there actually was no finding of fact that the dog was a Pit Bull. Twice in the order he indicates that that was Ms. Brown's testimony, but the issue before the Special Master was not whether or not the dog was a Pit Bull, it was damages. It was a damages hearing. And he found damages of over a hundred thousand dollars. He just observed that that was her testimony. And I submit that that order does not indicate that there was a finding of fact to that effect.

I do want to address as we did in our memorandum

briefly, Your Honor, this issue that it's third-party plaintiff's position that because GeoVera did not defend Ms. Brown. And that as they contend Special Master Wills found that it was a Pit Bull that we are bound by that.

And we cite a case that's pretty much right on point in our memorandum, the Simms case, South Carolina Supreme Court Case where a very similar situation occurred. In that case it was a auto collision. The insurance company contended that it's insured had intentionally run another car off the road in which his girlfriend was with another man. After they stopped and got out with a gun they shot her with his gun. That was the information the insurance company had. The insurance company declined coverage and did not defend. The case actually goes to trial, not default. There was actually a bench trial in which the judge found, he specifically found that the defendant was negligent.

So in that case we have, the insurance company's got evidence of an intentional act. There's a finding, an actual finding by the judge that it was negligence, not intentional.

In our case we have the insured saying it was a Pit Bull then at the time of the damages hearing saying it's not a Pit Bull, but I would submit no finding to that effect by the Court. The Court in the Simms case said that the same argument was made. Insurance company, you didn't defend so

you're bound by this. The Court said no. There was a conflict of interest in that situation between the insurance company and it's insured. If it had been defending the insured certainly the insurance company could not have taken the position that it was an intentional act. And we cite some pretty strong language that the Court used in that case.

THE COURT: What's the full name of that case, do you know?

MR. DAVIS: Simms versus I think it's Nationwide. It's cited on page 21 of our memorandum. And the Supreme Court in that case cited a federal case, Farm Bureau Mutual versus Hammer which used some strong language, that a similar situation had arisen in that case. And in that case they cited a New Jersey case where the New Jersey court concluded that any other rule other than the one the Supreme Court had adopted in Simms -- and I'm paraphrasing here -- but it would mean that there can be false allegations against the insured that can control coverage in a proceeding in which the insurance company doesn't even appear. And that's not right. That's not appropriate. And I'd submit that that's the situation we have.

And we cite a fairly recent case on page, also on 21 of our memorandum, that case arose -- the plaintiff alleged that he had been sexually abused for years by a priest. And

the diocese was insured by the Catholic Mutual Insurance Company which denied coverage for the priest on the ground that it was an intentional act. There was a settlement pretty much with everybody except the priest. But the plaintiff then pursued the priest in court and filed a motion for summary judgment at which the priest took the Fifth Amendment. The result of that summary judgment motion was a judgment for $100,000,000, but based on negligence, not an intentional act.

And again, the plaintiff in that case tried to take the position as Tema Brown is doing in this case that while the insurance company didn't defend the insurer and so you're bound by the finding of the Court that this was negligence. And once again, the Court rejected that argument for the same reason set forth in Simms.

Finally, Your Honor had asked whether this was a claim for indemnity or basically under the contract, a contract cause of action. Although we've agreed to hold this in abeyance I would point out the third-party plaintiff has filed a motion to add a bad faith cause of action. And so to the extent that that has an impact on the Court in that regard, that's obviously a whole different ball of wax. If nothing else a bad faith cause of action arises out of tort. But I'm not arguing that motion today.

MR. EPTING: Judge, we didn't get a chance to

argue our summary judgment. It's fine with me to deal with it first, but I would ask to be able to address those issues.

(Whereupon an off the record discussion took place.)

THE COURT: All right. Mr. Epting?

MR. EPTING: Judge, just one practical observation. We filed a bad faith claim in order to get the claim filed. This defendant took the position that they didn't have to produce the claim file. We got a claim file. We're not going to pursue a bad faith claim, and so this really is just a legal issue.

Here's the query I have of you, Judge. You know in South Carolina the plaintiff, after the plaintiff gets a verdict can sue the insurance company for declaratory judgment. That's the law. So the corollary is that the statute would run against the plaintiff even before he had a judgment. Therefore, every plaintiff should be allowed even before getting a verdict to bring a cause of action against an insurance company for declaratory judgment. That's how you know that the statute doesn't run until after a judgment goes, otherwise you would have twice the number of cases. And we would have effectively become a direct action state.

Judge, I'll let you read Tom Wills' order. Tom Wills' order says I'm denying punitive damages because I find this

is not a vicious dog and not a Pit Bull. But let me, Judge, just for a moment -- because I think the issue in this case is not then thoroughly thought about by the South Carolina Supreme Court. And I try, Judge, as I did the last time to tell you where I think things are going just so that you have the whole scope in case it might influence what you do.

I suspect this case and this issue is going to wind up in the appellate court because it's an important issue, and it needs to be decided at a policy level. And here's what the question is, Judge, in my mind. I don't think Mr. Davis would disagree that if you don't defend and there's a determination of liability and damages as an insurance company if you're found to have coverage you can't re-litigate that.

I don't know that there's any disagreement about that at all. And if there were, Judge, we wouldn't have all these assignments and bad faith claims. I don't think there's a case in the union in which an insurance company who does not defend or refuses to settle and takes a verdict can all the sudden say, well, it's time to litigate liability, time to litigate damages. That's not the way it works.

But here's the fine line, Judge. And I believe it's a line that is held very close since just to distinguish the case. The question is intentional act. The question is

what is intentional for purposes of an underlying case at common law. Is it a different question of whether or not under insurance policy this was an intentional act. And so it makes perfect sense that you would allow any coverage defense that the insurance company has to be re-litigated.

However, Judge, there is one huge exception, and it's recognized in every state that is clearly heard it. And we'll quote a couple cases to you. In the determination in the underlying case was necessary to the disposition of the underlying case and it decides the issue of coverage you can't re-litigate that issue.

In this case, and I think, Judge, you've got a feel for it, and I'm going to digress in just a second. What this case is about is some later slicker adjuster deciding that well, we're going to take a different position, never mind the original adjuster thought that there might be coverage here. And we're going to defend under reservation of rights. And they maybe they talked this woman who doesn't have a clue what a Pit Bull is into saying it was a Pit Bull so they can deny coverage.

The point of that is only this, Judge, whatever existed then about was it or wasn't it the die was cast then. At best for the insurance company it was a factual issue, and they elected not to defend it. They just elected to let it go, and it went into default.

What happened, Judge, and back to my original point is it just so happened we asked for punitive damages. This is a bad injury, Judge. We thought we were entitled to punitive damage. Tom Wills denied us punitive damages on the ground that this was not a vicious and not a Pit Bull. And so what happens, Judge, is inadvertently if you will, back-handedly the question of coverage is determined in the underlying case. This is not like an intentional act being one in the common law and a different definition for intentional act in an insurance policy. This is Tom Wills saying I'm just finding this is neither a vicious dog nor a Pit Bull, because we were arguing that this was a horrible dog. And fortunately this dog hadn't bitten anybody before or at the time.

So here's Wills on the issue. And I suspect, Judge, you may well ask us to provide orders rather than turning all this stuff up. The general rule of estoppel provides that an insurer takes the position that a complaint potentially effects coverage is not covered under a policy that includes a duty to pay it, may not simply refuse to defend the insured. Rather the insured has two options, defend the suit under reservation of rights or seek a declaratory judgment. If the insurer takes neither of these steps and is found to have wrongfully denied coverage the insurer is estopped from raising policy defenses to

coverage.

This is a California case. And I went to the fourth circuit on this, Judge. And in my usual fashion I lost in front of David Norton, who I think I got this right in the same issue of underlying trial and what was covered under the insurance policy. And so Judge Norton says that the underlying trial determined the defense obligation and they had to pay for the defense. But as to the indemnity it was a huge verdict, he found the other way.

Well, we go to the fourth circuit. And the fourth circuit finds yes, some issue was determined but it was indemnity, not the defense. And so there's a good bit of case law out on it, but here is a California case, Whit versus Monterey (ph). An insurer who breeches a duty to defend may contest coverage in a subsequent action where the issues upon which coverage depend were not necessarily adjudicated in the underlying action. That in one statement is the law as best I know it. There's no holding in South Carolina that specifically says that.

THE COURT: Thank you, sir. Mr. Davis?

MR. DAVIS: Just briefly, Your Honor. The first thing I want to do is clear something up. I do want to correct any misapprehension that we have actually not produced the whole claim file.

MR. EPTING: I believe that. I don't think we got

it, which is what we intended to do. And so there's no dispute about that.

MR. DAVIS: We gave you some correspondence, things where we felt like --

MR. EPTING: We don't have any objection by that.

MR. DAVIS: Great. And Your Honor, on this question about being bound by what happens in the underlying suit, you know, it's definitely the root of this case. We do disagree based on the Simms case and the Leranta (ph) case that are cited in our memorandum. I think that the Court used very strong language in those cases making it very clear the Court did not approve of the kind of situation that I described happened in both Simms and Leranta. The insurance company denies coverage. The case moves forward and there's some sort of a finding.

Like I said, the judge in both cases found there was negligence. And essentially what the Court in these cases we cite is saying is we're not going to tolerate that where the insurance company has grounds to deny coverage, and when it's not participating in the suit then to allow there to be a finding similar to what happened in this case where all evidence indicates that this was a Pit Bull and all of the sudden at the default hearing is not a Pit Bull. The insurance company is not bound by that. It's not fair. They have a conflict of interest as the Court said in these

cases to take any other position if they had been participating.

THE COURT: Well, let me just ask that question. Don't they have the right to bring a future action or to defend under a reservation of rights?

MR. DAVIS: They do, but by the same token it doesn't mean that they have to.

THE COURT: And so if they fail to do so it's your argument that they're not bound by those factual findings?

MR. DAVIS: Yes, sir. And I believe that's what Simms says and Leranta case.

THE COURT: I'll take a look at that. Here's what I'd like to do. We've been going for a while. Can y'all get me proposed orders within 30 days? I know that you wanted to supplement some of your information. It's a lot to digest and I've got a lot to look at. If y'all can file your memoranda and you've got your own exhibits with the Court they can get to me. Mr. Davis, I can give you this back if you'd like, but I want to make sure I do get that. And my typical rule of thumb is about 30 days for submission and orders if that's sufficient time for you.

(Hearing concluded at 11:20 o'clock a.m.)

STATE OF SOUTH CAROLINA)

: C-E-R-T-I-F-I-C-A-T-E

COUNTY OF DORCHESTER)

I, Stacey L. Scoggan, Court Reporter and Notary Public, certify that I did have The Honorable Mikell Scarborough to appear before me at 10:30 o'clock a.m. on Monday, May 19, 2014, at the Charleston County Courthouse, 100 Broad Street, Suite 269, Charleston, South Carolina; that the witness was sworn and cautioned to tell the truth, the pages constitute a true and accurate transcript of the testimony given at that time and place.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 22nd day of July, 2015.

_____

Stacey L. Scoggan

Notary Public for South Carolina

My Commission Expires: February 23, 2021

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2007 CP-10-3224

JANNA WRIGHT, as Guardian ad Litem for TRAVIS MILLIGAN, a minor over the age of 14 years	GeoVera Specialty Insurance Co
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ 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 : See attached Corrected Order

INFORMATION FOR THE PUBLIC 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)
Tema Brown	GeoVera Specialty Insurance Co.	$100,229.00
		$
		$

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

3062
Judge Code

3/20/15
Date

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO: 2007-CP-10-3224
JANA WRIGHT, as Guardian *ad Litem* for TRAVIS MILLIGAN, a minor over the age of 14 years Plaintiff,	)	**CORRECTED ORDER**
vs.	)	
TEMA BROWN, Defendant/Third-Party Plaintiff,	)	
vs.	)	
GeoVera Specialty Insurance Co., Third-Party Defendant,	)	

THIS MATTER comes before me on cross-motions for Summary Judgment. I deny the Third-Party Defendant's motion and grant the motion of the Third-Party Plaintiff.

I. PROCEDURAL HISTORY

Plaintiff filed suit on behalf of a minor against the Defendant Tema Brown. The Defendant's dog bit a minor child and this suit followed. The claim was tendered to the Defendant's homeowner's insurance carrier which failed to defend. The case was tried before Special Referee, Tom Wills, Esquire, who entered judgment in favor of the Plaintiff on August 18, 2009 in the amount of $100,229.00.

Plaintiff sought and received permission to refer this case for all purposes, including supplemental proceedings, which permission was granted by the Honorable Markley Dennis on November 24, 2010. On July 13, 2011, Judge Harrington permitted the filing of a third-party complaint and likewise referred this matter to this Court. The Third-Party Complaint was filed

against Constitution State Services on July 19, 2011 and GeoVera Specialty Insurance Co. ("GeoVera") by consent was substituted on December 18, 2012 as the proper Third-Party Defendant.

II. MOTION TO AMEND BY PLAINTIFF AND THIRD-PARTY PLAINTIFF

A motion to amend the Third-Party Complaint to assert a bad faith claim was filed on October 14, 2013. At the hearing on June 3, 2014, this motion was withdrawn. Remaining in the Third-Party Complaint is a declaratory judgment action seeking a declaration of the rights and duties of the parties.

III. THE THIRD-PARTY DEFENDANT, GEOVERA'S MOTION FOR SUMMARY JUDGMENT

The Third-Party Defendant's motion asserts three grounds:

A) Brown as the Defendant and Third-Party Plaintiff is not the proper party to bring this claim in light of assignment of the claim to the Plaintiff Jana Wright on November 4, 2010;

B) The Third-Party Complaint is untimely and this Court has no subject matter jurisdiction; and

C) The Statute of Limitations has run.

A. The Defendant is not the real party of interest

First, this is a declaratory judgment action to declare the rights and duties of all parties. The Third-Party Complaint specifically asserts the judgment of Plaintiff against the Defendant and specifically alleges that GeoVera has coverage for the judgment.

Second, the claim against the carrier resides in one or both, the Plaintiff or the Third-Party Plaintiff. GeoVera does not dispute the assignment of the claim and /or the proceeds collected from it in the pursuit of the judgment. Rule 17 SCRCP expressly directs that no action

shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest and that the substitution relates back to the time of filing of the suit.[1]

As motion was made at the June 3 hearing to allow the claim to be pursued in the name of the Plaintiff, and GeoVera claims the Plaintiff is the real party in interest, I grant the motion and substitute the assignee Plaintiff as the real party in interest. In accord with Rule 17 SCRCP, the substitution relates back to the initial filing.

B. <u>This Court lacks jurisdiction</u>

GeoVera's second ground is that a judgment was rendered in favor of the Plaintiff against Tema Brown and that bringing a Third-Party Complaint more than 10 days after that judgment was untimely, resulting in this Court having no jurisdiction. There are numerous reasons that this argument fails.

1. <u>Subject matter jurisdiction</u>

The Third-Party Defendant argues that after 10 days of the entry of a judgment the Court no longer has subject matter jurisdiction.. As is clear from *Russell v. Wachovia Bank* 633 SE2d 722 (2006), the 10 days is a time limitation and not a matter of subject matter jurisdiction. In *Russell*, the Supreme Court held:

> Jurisdiction refers to the trial court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction. *See Ex parte Beard,* 359 S.C. at 358, 597 S.E.2d 835. (explaining that the ten day rule is a time limitation on the court's ability to retain the case not the power of the trial court to hear cases of that nature).

Russell v. Wachovia Bank, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006).

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1 Rule 17, SCRCP: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

2. No Standing

First, the 10 day rule referenced in *Russel* and raised by GeoVera contemplates that this rule applies to parties to the action; GeoVera was not a party at the time and cannot assert the 10 day rule. Further, as both then parties consented to the amendment, the 10 day rule does not apply.

3. This Court's Authority

There are two orders of Circuit Court judges referring this matter to me, one for the express purpose of bringing a Third-Party action. This Court has no authority to overrule a Circuit Court. The Third-Party Defendant should have sought relief from either or both Judge Dennis or Judge Harrington. It did neither.

4. Timeliness

Assuming this issue is properly before me and not the Circuit Court, I would reject any timeliness argument as certainly this Court has authority to conduct supplemental proceedings. If in the process of such proceedings, it became apparent that an asset existed or a judgment debtor had a claim, the Master-In-Equity has the authority to allow the claim to be brought. Allowing it within this action furthers judicial efficiency. The Third-Party Defendant has not asked for a jury trial and never sought to remove this case to Federal Court contending the Third-Party action was a new action. The Third-Party Defendant's assertions lack substance. It is as if the Third-Party Defendant is asking for a new case number to be assigned.

5. Third-Party Defendant's Consent to substitute GeoVera

Assuming this Court and not the Circuit Court can entertain the Third-Party Defendant's motion, the Third-Party Defendant asked this Court to enter an order substituting GeoVera as the proper Third-Party Defendant. This Order was entered on December 18, 2012. Further, counsel

has made a general appearance on behalf of GeoVera, answering the pleadings, participating in hearings and motions, entering into consent orders, and participating in discovery. Having made a general appearance and having recognized this Court's authority and the validity of this proceeding, the Third-Party Defendant cannot now assert otherwise. *See Connell v. Connell*, 249 S.C. 162, 167-68, 153 S.E.2d 396, 399 (1967) (Since we have concluded that the appellant filed an answer going to the merits of the controversy here involved, he waived his objection to the jurisdiction of the court.); *Triangle Auto Spring Co. v. Gromlovitz*, 270 S.C. 386, 389, 242 S.E.2d 430, 431 (1978)(Although the respondents are correct that consent has no bearing on the question of subject matter jurisdiction since such jurisdiction is not waivable, consent does have a bearing on the question of jurisdiction over the person.)

C. Statute of Limitations

The Third-Party Defendant argues that it sent notice of the denial of coverage for this claim on September 28, 2006, January 7, 2008, and April 7, 2008, and that suit was not filed until July of 2011. The Defendant proffers the affidavit of Brenda Trawick Smith stating that the reservation of rights letter dated July 28, 2005, the denial letter dated September 26, 2006, and a further denial letter dated April 7, 2008, commenced the time for the insured to bring this claim. While it is apparent from GeoVera's Exhibits G and H, that the letters were returned as "undeliverable, it is unnecessary, and would be improper at Summary Judgment, for this Court to conduct this factual inquiry. The claim asserted here is for indemnity which is distinct from a claim that the insurer has a duty to defend. An insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured. *City of Hartsville v. S. Carolina Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). Under South Carolina law, while the duty to defend is based on the allegations in the complaint, the

duty to indemnify is based on evidence found by the fact finder. *Ellett Brothers, Inc. v. United States Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001). Courts have often found that when "no findings of fact have been made ... [an] indemnity claim is not ripe" for adjudication. *Id.* The judgment entered against the Defendant and Third-Party Plaintiff insured was entered on August 18, 2009, and suit was filed seeking a declaration of coverage in July of 2011. As to indemnity claims, the statute of limitations does not commence until there is a judgment. *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439 (1994)("As to claim for indemnity, statute of limitations runs from the time judgment is entered against the defendant."); see also *Madigan v. Yballe*, 336 Ill. Dec. 522, 920 N.E.2d 1112 (App. Ct. 1st Dist. 2009); 41 Am. Jur. 2d Indemnity § 38, holding a cause of action for a contract of indemnity does not accrue until the defendant has a judgment entered against him or until he settles the claim made against him; only at that point does the cause of action for indemnity accrue and the statute of limitations begin to run.

Indeed, in the context of insurance and a suit brought by a Plaintiff who has a judgment against an insured, suit cannot be brought until after a judgment is obtained. It is a tautology to say that no right exists to make a claim on the policy until the Plaintiff has a judgment and then hold there is no claim as the statute of limitations ran before the judgment was entered.

D. Conclusion

As to the Third-Party Defendant's Motion, for the reasons stated above, the motion is denied.

IV. PLAINTIFF AND THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. The issue presented by the motion

The Movant does not take the position that the insurer is not entitled to raise coverage defenses, rather it is movant's position that the insurer may not raise as a coverage defense an

issue of fact that was determined by the trial of the underlying action.

B. Facts

GeoVera claims that the insured admitted the dog was a pitbull, and the policy excludes coverage for pitbulls. The exclusion relied on by GeoVera requires the insurer to establish that the dog either had previously bitten someone else, which is not at issue in this case, or that the dog's lineage contains at least 50% pit bull. (See Master Endorsement). It is true that at one point, in a recorded statement that the insured was coaxed into saying someone told her the dog was a pitbull. This does not ring true as in the same statement, the insured states she did not know if the dog was a pitbull, did not know what a pitbull looked like, and that she had no papers indicating whether the dog's lineage was that of a pitbull. (Recorded Statement of Tema Brown p. 4). GeoVera's first adjuster prepared a Reservation of Rights letter that actually accepted the defense obligation and prepared a letter to the insured stating until they received veterinary records or a breeders' record of the dog's lineage, the case against the insured would be defended. (Exh G to GeoVera's Motion, Reservation of Rights). The Third-Party Defendant's reservation of rights letter is after the recorded statement referenced above and after receipt of medical records.[2] However, this Court is not called upon to weigh the facts as the issue of the dogs lineage was actually tried, testimony received, and decided. The Special Referee after hearing the testimony refused to award punitive damages on the grounds that the dog was neither a vicious dog nor a pitbull. (See September 9, 2011 Order of Tom Wills, Esquire). What is the effect of the Special Referees determination of facts?

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2 The insurer assumes the risk that witnesses change their testimony or that facts evolve that place a claim within the coverage when the insurer prematurely decides that it has no defense obligation. Fact witnesses are free to change their testimony. In this case, from the statement it is difficult to conclude that the insured really knew if this was a pitbull or not. The insurer chose to believe what it wanted to believe, not examine the facts with a desire to find the truth, nor did the insurer ever obtain the veterinary records or information on the dog's lineage that it deemed necessary in its Reservation of Rights letter to deny coverage. (See Exh G to GeoVera's Motion, Reservation of Rights).

C. Law

Williston states the law this way:

> The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insurer has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage.
>
> If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage....

16 Williston on Contracts § 49:103 (4th ed.).

The Third-Party Defendant had the opportunity to file a Declaratory Judgment action; the Third-Party Defendant contemplated defending under a reservation of rights. The Third-Party Defendant did neither. When counsel for the Third-party Defendant was asked at oral argument if it was the Third-Party Defendant's position that the underlying facts could be retried on liability and damages, he stated it was. If this were true, then there would be no reason for an insurer ever to defend as the underlying determination would be of no consequence and the insurer could try the case to a separate finding of facts and obtains a different result. I reject this. I know of no jurisdiction in which this is true.

I find persuasive those cases that hold an insurer is bound by the underlying trial as to issues and facts actually litigated. *See e.g. Pub. Nat. Ins. Co. v. Wheat*, 100 Ga. App. 695, 112 S.E.2d 194 (1959)(Liability insurer who has right to defend actions against insured and has timely notice of an action but elects not to defend is bound by the judgment as to issues litigated, with respect to subsequent action against insurer by injured person.); *DeWitt v. Monterey Ins. Co.*, 204 Cal. App. 4th 233, 246, 138 Cal. Rptr. 3d 705, 715 (2012)(An insurer who fails to defend may contest coverage in a subsequent action only "where the issues upon which coverage

depends are not raised or necessarily adjudicated in the underlying action."); *Wilhide v Keystone Ins. Co.* (1961, DC Pa) 195 F Supp 659)(Having had notice to come in and defend the prior action brought against the insured by the administrator of a person killed when struck by a tractor-trailer owned and operated in behalf of the insured, and having refused to appear and defend, the liability insurance company was concluded by the judgment in that suit, so far as it determined the cause of the injury, the amount of damages sustained, and the liability of the insured corporation).

In the trial before the Special Referee, punitive damages were denied on the ground that the dog was a mixed breed, not vicious, and usually restrained. If the Plaintiff attempted to retry their claim for punitive damages, certainly the insurer would advance, that the issue was determined in the underlying case, and Plaintiff would be bound by the underlying result.

D. CONCLUSION

As the issue of the dog's lineage has been actually litigated as well as the extent of the damages suffered by the Plaintiff, this Court grants the Plaintiffs' Motion for Summary Judgment and enters an award of $100,229.00 together with interest at the statutory judgment rate since the date of the Special Referee's award.

AND IT IS SO ORDERED.

The Honorable Mikell R. Scarborough
Master in Equity

On this 10 day of March, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO: 2007-CP-10-3224
JANA WRIGHT, as Guardian *ad Litem* for TRAVIS MILLIGAN, a minor over the age of 14 years Plaintiff,	)	**ORDER DENYING THIRD-PARTY DEFENDANT'S MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT**
vs.	)	
TEMA BROWN, Defendant/Third-Party Plaintiff,	)	
vs.	)	
GeoVera Specialty Insurance Co., Third-Party Defendant,	)	

THIS MATTER comes before this court upon Third-Party Defendant GeoVera Specialty Insurance Co.'s ("Defendant" or "GeoVera") Motion for Reconsideration and to Alter or Amend Judgment. Present for the Third-Party Plaintiff, Tema Brown ("Plaintiff" or "Brown"), was Andrew K. Epting, Jr., Esq. and present for Defendant was William P. Davis, Esq. I deny Defendant's motion for reconsideration and to alter or amend judgment.

DEFENDANT'S MOTION TO RECONSIDER AND TO ALTER OR AMEND JUDGMENT OF THE CORRECTED ORDER FROM MARCH 24, 2015 IS DENIED.

This is an action for contractual indemnification. Judgment was rendered on September 11, 2009. This matter was referred to me by order of Judge R. Markley Dennis, Jr. on December 24, 2010, for supplemental proceeding, and by Judge Kristi Lea Harrington on July 13, 2011, on the third-party complaint of Tema Brown. As stated in this Court's Corrected Order of March 24,

2015, this Court has subject matter jurisdiction, and the Plaintiff is the real party in interest, and the Third Party Plaintiff is proper.

The substance of this dispute lies in whether or not the Defendant insurance company is liable under the contractual indemnification provisions of its insurance policy. The policy has an exclusion for vicious animals, which includes a dog with at least fifty percent (50%) "American Pit-bull Terrier." This classification is the gravamen of Defendant's argument, which is premised upon the case of Sims v. Nationwide Mut. Ins. Co., 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965).

Since I find Defendant's interpretation of Sims not applicable to this fact situation, I find that the motion should be denied.

ANALYSIS

In Sims, the trial court directed a verdict against the insurer after finding that the actions of the Defendant in pursuing the Plaintiff in her automobile, running her off the road, and shooting her constituted acts of negligence, not an intentional tort. The Supreme Court in Sims ruled that the acts were intentional torts and therefore excluded from the insurance policy despite the trial court's finding of negligence.

In this case, the pivotal issue is the nature and breed of the dog and not the actions of the dog or its owners. The "Special Master" found that the dog was not a "vicious dog" nor a pit bull. Based upon that ruling, the Special Master declined to award punitive damages. I find this factual determination, made after testimony at trial, to be dispositive on this issue.

Further, this Court's reading of Sims indicates that the general rule in South Carolina is that an insurer has either a duty to defend under a reservation of rights or it may bring a declaratory judgment action to determine coverage. Here, the insurer did neither. The Sims Court finds the exception applies when the insurer is in a conflict of interest and therefore cannot

adequately represent its interests. No such conflict was argued in this instance and the Court does not find such a conflict exists under these facts.

Here, the status of the dog (neither vicious nor pit bull) determined whether or not the insurance policy would apply. I conclude this is distinguishable from the acts of the insured. The finding by the Special Master that the dog was not a vicious animal is one in which the insurer had the opportunity to contest or determine in the underlying action. This it did not do. It is therefore bound by this finding of fact which was relevant to the Special Master's determination. Therefore the motion is DENIED.

AND IT IS THEREFORE ORDERED!

The Honorable Mikell R. Scarborough
Master in Equity for Charleston County

On this 28 day of May, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 08 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell R. Scarborough
Charleston County Master-In-Equity

Case No.: 2007-CP-10-3224

Jana Wright, as Guardian *ad Litem* for Travis Milligan, a minor over the age of 14 years,
Plaintiff

v.

Tema Brown, RESPONDENT

v.

GeoVera Specialty Insurance Co., APPELLANT.

PROOF OF SERVICE

I certify that I have served Appellant with the Respondent's Motion to Strike by delivering a copy via regular U.S. Mail on February 5, 2016, addressed to their attorneys of record as follows:

William P. Davis
Baker Ravenel & Bender, LLP
3710 Landmark Drive, Ste 400
Columbia, SC 29202

ANDREW K. EPTING, JR., LLC

By _____
Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street, Charleston, SC 29401
843-377-1871; Fax: 843-377-1310
Attorneys for Appellant

ANDREW K. EPTING, JR., L.L.C.
ATTORNEYS AT LAW

February 5, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: Jana Wright, etc v. Brown v. Geovera Specialty Insurance Co.
Appellate No.: 2015-01383

Dear Ms. Abbott Kitchings:

Enclosed please find the original and seven copies of Respondents' Motion to Strike an argument that is not properly preserved for appellate review and to stay the deadline for filing Respondents' initial brief and designation of matter on appeal pending a ruling by this Court on the Motion to Strike. Also enclosed is the Proof of Service on Appellant and the checks for the two $25.00 motion fees.

I would greatly appreciate your filing the originals and returning file-stamped copies to me in the self-addressed, stamped envelope provided. Thank you.

With kind regards,

ANDREW K. EPTING, JR., LLC

Andrew K. Epting, Jr.

AKE,Jr./agg

Enclosures
cc: William P. Davis, Esq.
Amanda Maybank, Esq.
Barry Baker, Esq.

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