
EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JANA WRIGHT, as Guardian ad Litem)
for TRAVIS MILLIGAN, a minor over)
the age of 14 years)
)
Plaintiff,)
)
vs.)
)
TEMA BROWN,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-10-3224

COMPLAINT

FILED
2007 OCT 17 AM 9:10
JULIE J. ARMSTRONG
CLERK OF COURT

NOW COMES THE PLAINTIFF, above named, complaining of the
Defendant, above-named, to allege and show this honorable Court as follows:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a resident and citizen of the State of South Carolina,
County of Charleston.
2. On or about August 8, 2007, Plaintiff was appointed by the Court
Guardian ad Litem, for her minor child, Travis Milligan.
3. Plaintiff is authorized to bring this lawsuit on behalf of her minor
child, Travis Milligan.
4. The Defendant, Tema Brown, (hereinafter "Brown"), is upon
information and belief a resident and citizen of the State of South Carolina, County
of Charleston.

5. That on April 20, 2005, and at all times relevant hereto, Defendant Brown was the owner of or was harboring, caring and keeping a dog at her residence.

6. That on April 20, 2005, Travis Milligan, a minor child, was riding his bicycle on Habitat Boulevard, the street on which both he and Defendant Brown reside.

7. That Defendant Brown's dog, which was outside her residence, unrestrained, escaped from the yard.

8. Upon leaving Brown's property, Defendant Brown's dog viscously attacked Milligan, a minor child, without provocation, knocking him off of his bicycle and severely biting him on his leg thereby injuring him as will more fully be set forth hereafter.

9. That under South Carolina law, someone who harbors, cares for and/or controls a dog, and someone who controls the use of property where the dog runs at large, has a duty not to allow the dog to harm other human beings, and if such harm occurs, the Defendant as the controller of the dog, is strictly liable for a person's injuries and damages, such as this Plaintiff suffered, from the dog's attack.

10. As a direct and proximate cause and result of Defendant's aforesaid negligence, and acts regarding the lack of control of the dog, and by allowing this dog to run at large, Milligan, the minor child, suffered the following personal injuries and damages on April 20, 2005:

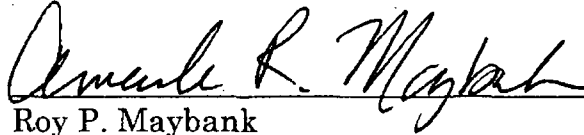
a) suffered severe bites to his leg;

- b) had an area of flesh torn from his leg;
- c) will require corrective plastic surgery;
- d) has suffered and will suffer in the future pain and discomfort;
- e) has incurred medical expenses for emergency medical treatment, follow up medical care and treatment, drugs, medical supplies, and bandages;
- f) is informed and believes that he will require future medical care and treatment, but will still be left with permanent scarring;
- g) that he suffered mental anguish and developed a great fear of dogs;
- h) that the minor child's, enjoyment of life has been adversely affected.

WHEREFORE, the Plaintiff prays for judgment against the Defendant, in a sum that will fully and fairly compensate the minor child for his actual damages, and for punitive damages as a jury may deem appropriate, together with attorney fees and the costs of this action.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

MAYBANK LAW FIRM, LLC
102 Wappoo Creek Drive, Suite 2A
P.O. Box 12579
Charleston, SC 29422
P: (843) 762-4820
F: (843) 762-4889

A handwritten signature in cursive script, reading "Amanda R. Maybank", written over a horizontal line.

Roy P. Maybank
Amanda R. Maybank

Barry I. Baker
P.O. 31265
Charleston, SC 29417

Attorneys for Plaintiff

Charleston, South Carolina
October 15, 2007

EXHIBIT B

Constitution State Services
Terence Youngblood
Suite 15-396
11250 Old St. Augustine Road
Jacksonville, FL 32257
Telephone: (904) 260-2956
FAX: (904) 260-9428

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

04/07/08

Ms. Tema Brown
3368 Habitat Blvd
Johns Island SC 29455

RE:

Account: Tema Brown
Policy Number GCGLUS040299 (Effective 12/23/04 to 12/23/05)
Insurer: USF & G Specialty Insurance Company
CLAIM NUMBER: CGLUS040299
PLANTIFF: Jana Wright, as Guardian ad Litem for Travis
Milligan, a minor filed in the State of South Carolina,
County of Charleston, in the Court of Common Pleas
Case No.: 07-CP-10-3224
Date of Loss: 04/20/05

Dear Ms. Brown:

Constitution States Services was notified by the attorney representing Ms. Wright of a lawsuit that was filed and a default that was taken in the above mention case.

As a follow up to our previous correspondence, USF & G Specialty Insurance Company has no duty to defend and/or any obligation to indemnify you in this matter. Based upon our investigation, the dog involved in this lawsuit was an American Pit Bull breed.

Your policy contains **Master Endorsement US 04 43 (07-05)**, which includes a specific exclusion for "Vicious Dogs":

“ Bodily injury” or “property Damage” arising out of the actions of any canine, owned by or in the care, custody or control of any “insured”, that is a :

- a. “Vicious Canine”,
- b. Staffordshire Bull Terrier;
- c. American Pit Bull Terrier
- d. Rottweiler
- e. Doberman Pincher; or
- f. Chow Chow

We will consider a canine to be a Stafford Bull Terrier, American Pit Bull Terrier, Rottweiler, Doberman Pinscher, or Chow Chow if its lineage contains part of that breed.

Consequently, USF & G Specialty Insurance Company has no duty to defend and/or any obligation to indemnify you in this matter under the policy. If you have received any additional information you believe could cause USF & G Specialty Insurance Company to change its coverage position, please forward it for our review and consideration.

This correspondence is not intended to be, nor shall it be construed as an exhaustive listing or discussion of policy terms, conditions, exclusion or endorsements, facts or circumstances, or principles of insurance law which may further provide a basis to preclude coverage under USF & G Specialty Insurance Company policy in this matter. USF & G Specialty Insurance Company reserves the right to supplement its declination should information, not currently known to USF & G Specialty Insurance Company indicate the applicability of additional grounds. We refer you to the specific insurance policy for a comprehensive review of coverage; including policy terms, conditions, exclusions, and endorsements.

If there are any questions regarding USF & G Specialty Insurance Company position in this matter, please feel free to contact me at (904) 260-2956.

Sincerely,

Terence Youngblood
Senior Technical Specialist

Cc:
Maybank Law Firm
Amanda Maybank
102 Wappoo Creek Drive, suite 2A
Charleston SC 29422

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiff,

vs.

TEMA BROWN,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C/A No. 2007-CP-10-3224

ORDER OF DEFAULT

FILED
2008 JAN 10 PM 2:42
JULIE A. ARMSTRONG
CLERK OF COURT
BY

Defendant Tema Brown, having failed to plead, move or otherwise appear in the above captioned matter, is hereby in default. It further appears that this Defendant is not an infant, minor or incompetent person, nor is this Defendant engaged in the military service of the United States so as to entitle this Defendant to protection from participation in this action.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant Tema Brown is in default in this matter and that the Clerk of Court shall enter such default against Defendant Tema Brown as provided by the South Carolina Rules of Civil Procedure; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiffs shall be granted a damages hearing at a later date to determine the amount of damages owed by this Defendant to the Plaintiffs as a result of the matters alleged in Plaintiffs Complaint.

IT IS SO ORDERED!

S/ Roger Young
Presiding Judge
Charleston County Court of Common Pleas

Charleston, South Carolina
1/3/8, 2007

~~APPEAR A TRUE COPY~~
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
BY [Signature]
DEPUTY CLERK

EXHIBIT D

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,)

vs.)

TEMA BROWN,)

Defendant.)

ORDER OF JUDGMENT

2009 SEP 11 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FILED

This case came before me by way of an Order appointing me as a special master dated March 11, 2009. The complaint was filed on October 17, 2007, and the Defendant was personally served on November 19, 2007. An order of default was entered on January 3, 2008. A hearing was held before me on June 30, 2009. Present at the hearing was Jana Wright, mother of and guardian ad litem for Travis Milligan, Travis Milligan, as well as their attorneys Barry I. Baker, Esq., and Amanda R. Maybank, Esq. The Defendant Tema Brown and her son LaRon Brown were also present. After hearing testimony from the Plaintiffs as well as from Ms. Brown, I hereby make the following findings of fact and conclusions of law.

FACTS

This case stems from a dog bite suffered by Travis Milligan on April 20, 2005. On that date, Travis then 13 years old, was riding his bike in front

of the house he shares with his mother. Ms. Brown lived across the street. At the time, Ms. Brown had possession of a dog. The testimony of Ms. Wright and Mr. Milligan established that as Travis was riding his bike, Ms. Brown's dog ran off of her property and attacked Travis on the back of his leg.

Ms. Brown testified that she did in fact have possession of a dog, that the dog got loose, and bit Travis on the back of the leg. Ms. Brown also testified that she did not know the breed of the dog, however, she testified that it was not a vicious dog.

Following the attack, Travis was taken to the nearest paramedic station and then to the emergency room where he received treatment for the wound. Doctors were unable to stitch the wound closed due to the fact that a section of flesh was missing. As a result, the wound took approximately three months to heal. During the three months Travis was unable to participate in activities such as football in order to allow the wound to heal.

Travis testified that even though the wound has healed, he continues to have problems with the scar breaking open. Travis also testified that he experiences pain and throbbing when he is on his feet for an extended period of time. Currently, Travis is an upcoming senior in high school, and works as a bagger at the Johns Island Piggly Wiggly and at Burger King. Travis also has continued to have a noticeable discolored scar as well as problems of dryness of the skin on and around the scar and severe itching.



Following the dog bite, on June 20, 2005, Travis began treating with Peter de Vito, M.D. Dr. de Vito opined that Travis will require two to three surgeries to improve the functionality of the scar. However, according to Dr. de Vito, nothing can be done to improve the appearance of the scar.

LAW

South Carolina Code Ann. § 47-3-110 provides that "[w]henver any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, the owner of the dog or other person having the dog in his care or keeping is liable for the damages suffered by the person bitten or otherwise attacked."

In personal injury actions the plaintiff may recover for the necessary and reasonable expense caused by the injury such as amounts necessarily paid for medicine, medical attendance, hospital expense and care and nursing. *Sossamon v. Nationwide Mut. Ins. Co.*, 243 S.C. 552, 135 S.E.2d 87 (S.C. 1964). To recover for future medical expenses, the expenses must be established with reasonable certainty. *Campbell v. Pashcal*, 290 S.c. 1, 347 S.E.2d 892 (Ct. App. 1986). A party need not, however, prove future damages in a personal injury case to a mathematical certainty. *Id.*



In this case, the testimony of Ms. Brown established that she had possession of a dog and that the dog attacked Travis. S.C. Code Ann. § 47-3-110.

At the hearing, Plaintiffs entered evidence of actual damages in the following amounts:

• MUSC	\$395.00
• University Medical Associates	\$244.00
• Peter de Vito, M.D. (current expenses)	\$590.00
• Peter de Vito, M.D. (future medical expenses)	\$29,000.00
TOTAL	\$30,229.00

An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). Damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, or hobbies. *Id.*

In this case Plaintiff presented evidence of both pain and suffering following the incident, and the effects the injury has had and continues to have on his life. Travis testified that due to the fact flesh was missing from his leg, the wound took three months to heal. During this time, he was unable to participate in activities of a normal 13 year old. He also testified

that the healing process was very painful and that the wound became infected once.

Travis further testified that even after the wound healed, he has continued to have itching and dryness of the scar, and the area of the scar becomes painful when he is on his feet for an extended period of time. Additionally, Travis testified that due to the instability of the scar tissue, he has to restrict his physical activity to prevent the scar from breaking open. Additionally, the appearance of scar on his calf remains discolored and noticeable. Dr. de Vito opined that very little if anything can be done to improve the appearance of the scar, and that even after surgery Travis will still have noticeable scars from the injury. At the time of the injury, Travis was only 13 years old, and his life expectancy pursuant to S.C. Code Ann. 19-1-150 was 58.60 years. He has and will likely continue to suffer the effects of the injury for the rest of his life.¹ As a result, I find that Plaintiffs are entitled to \$70,000.00 in damages for pain and suffering and loss of enjoyment of life. *See Boan, supra.*



With regard to punitive damages, the purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer from engaging in similar reckless, willful, wanton, or malicious conduct in the future. *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). In this case, I find that punitive damages are not warranted. Ms. Brown testified that the dog was not a vicious dog and was a mixed breed, but not a pit bull. She also

¹

testified that the dog was restrained on her property; however, due to the excitement of her children coming home that day, the dog was able to get loose and run across the street.

CONCLUSION

Having heard the testimony and received evidence I find that Plaintiffs are entitled to actual damages of \$100,229. I deny the request for punitive damages based on the reasoning above.

IT IS SO ORDERED!



Thomas J. Wills, IV
Special Master


July 18, 2009
Charleston, SC

EXHIBIT E

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,	)	
	)	ASSIGNMENT
vs.	)	
	)	
TEMA BROWN,	)	
	)	
Defendant.	)	
	)	

WHEREAS, on April 20, 2005, Tema Brown was insured by Constitutional State Services, when a dog in her care and custody, and bit and caused injury, to Travis Milligan, a minor;

WHEREAS, Jana Wright, as Guardian ad Litem for Travis Milligan, a minor over the age of 14 years, has obtained a judgment against Tema Brown as a result of the dog bite in the amount of \$150,229;

WHEREAS, her insurer has refused to defend or indemnify Tema Brown for the judgment;

NOW THEREFORE, the parties agree as follows:

1. Tema Brown does and hereby assigns 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.
2. Tema Brown agrees to cooperate with counsel for Jana Wright, as Guardian ad Litem for Travis Milligan, a minor over the age of 14 years, in the collection and litigation against her insurer for the failure to defend and provide coverage for the aforesaid judgment.
3. Tema Brown agrees 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 the above lawsuit as well as any and all rights for any bad faith action brought against said insurer.

Tema Brown 11/4/10
Tema Brown

Walter Jones 11/4/10
Witness

EXHIBIT F

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JANA WRIGHT, as Guardian ad Litem)
for TRAVIS MILLIGAN, a minor over)
the age of 14 years)
)
Plaintiff,)
)
vs.)
)
TEMA BROWN,)
)
Defendant/Third-Party Plaintiff,)
)
vs.)
)
Constitution State Services &)
GeoVera Specialty Insurance Co.)
)
Third-Party Defendants.)
)

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-10-3224

AMENDED
THIRD-PARTY COMPLAINT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2011 DEC 28 AM 10:39

FILED

The Third-Party Plaintiff asserts this complaint against Constitution State Services ("CSS") and GeoVera Specialty Insurance Company ("GeoVera") as follows:

1. This case has been tried and a verdict rendered against Tema Brown as will appear from "Exhibit A" and this case has been referred for supplemental proceedings and for this third party complaint which was authorized to be filed (See Exhibit B). Tema Brown has consented to the referral and to submit to supplemental proceedings. This claim is asserted against CSS and GeoVera which have denied coverage.

2. Third-Party Defendant CSS is an entity that is not organized under the laws of the State of South Carolina, but conducted business in the State of South Carolina and provided and/or administered a homeowners' insurance policy to Tema Brown.

3. Third-Party Defendant GeoVera (formerly USF&G Specialty) is an insurance company, organized and existing under the laws of a state other than South Carolina, licensed to do business in South Carolina.

4. GeoVera issued homeowner's insurance policy, policy number GH20051152 effective December 23, 2004 through December 23, 2005, to Tema Brown. (See Exhibit C).

5. On or about August 20, 2005, Tema Brown was the owner of a dog at her residence.

6. On or about August 20, 2005, Tema Brown's dog escaped from her yard and attacked Plaintiff, Travis Milligan, a minor child.

7. The Plaintiff brought suit against Tema Brown seeking damages as a result of the dog bite as more fully set forth in the Complaint attached hereto as "Exhibit D".

8. The Third-Party Defendants have refused to accept and pay this claim.

9. On September 11, 2009, a judgment on behalf of the Plaintiff was entered against Tema Brown in the amount of \$100,229.00 and said judgment recorded as of September 11, 2009.

10. The Third-Party Defendants have coverage.

11. This claim is brought to declare the rights and duties of the parties to this action.

WHEREFORE, the Third-Party Plaintiff prays for a declaration of coverage and entitlement together with such other relief this Court finds just.

REC
August 12 2011

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., SC Bar #01908
Michelle N. Endemann, SC Bar #78894
3 State Street
Charleston, SC 29401
843-377-1871; Fax: 843-377-1310

Attorneys for the Third-Party Plaintiff

EXHIBIT G

 COPY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) 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,

vs.

TEMA BROWN,

Defendant/Third-Party Plaintiff,

vs.

Constitution State Services & GeoVera
Specialty Insurance Co.

Third-Party Defendants.

) AMENDED ANSWER OF THIRD-PARTY
) DEFENDANT GEO VERA SPECIALTY
) INSURANCE COMPANY TO AMENDED
) THIRD-PARTY COMPLAINT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 MAR -5 PM 12:49

FILED

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

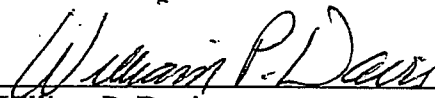
24. GeoVera has not been properly named or identified in this action.

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)



William P. Davis

BAKER, RAVENEL & BENDER, L.L.P.

3710 Landmark Drive, Suite 400

Post Office Box 8057

Columbia, South Carolina 29202

Phone: (803) 799-9091; Fax (803) 779-3423

File No.: 7746.1857 wdavis@brblegal.com

Attorneys for Third-Party Defendant

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,)

vs.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

vs.)

Constitution State Services & GeoVera)
Specialty Insurance Co.)

Third-Party Defendants.)

CERTIFICATE OF SERVICE

FILED
2012 MAR -5 PM 12:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
3 State Street
Charleston, SC 29401

Roy P. Maybank, Esquire
Amanda R. Maybank, Esquire
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422

Barry I. Baker, Esquire
P.O. Box 31265
Charleston, SC 29417

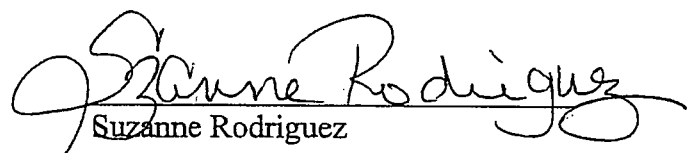

Suzanne Rodriguez

EXHIBIT H

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JANA WRIGHT, as Guardian ad Litem
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.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007-CP-10-3224

THIRD-PARTY DEFENDANT GEOVERA
SPECIALTY INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT

FILED
2014 MAY 12 PM 3:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

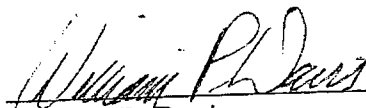
TO: ANDREW K. EPTING, JR., ESQUIRE AND MICHELLE N. ENDEMANN, ESQUIRE,
ATTORNEYS FOR DEFENDANT/THIRD-PARTY PLAINTIFF:

Pursuant to Rule 56 of the SCRCP, Third-Party Defendant GeoVera Specialty Insurance Company (hereinafter "GeoVera") hereby withdraws its motion for summary judgment filed on October 28, 2013 and, in its stead, hereby moves for order granting summary judgment against Third-Party Plaintiff on the grounds that there is no genuine issue as to any material fact and Third-Party Defendant is entitled to a judgment as a matter of law because (1) the time period within which to bring the third-party complaint for declaratory judgment has expired and is barred by the applicable statute of limitations; (2) the time period within which to bring a bad faith cause of action, which Third-Party Plaintiff seeks to do by means of her motion filed October 14, 2013, has expired and is thereby barred under the applicable statute of limitations; (3) Third-Party Plaintiff assigned her

claims against GeoVera to the Plaintiff, and therefore is not the real party in interest with regard to said claims, and therefore lacks standing to assert them; (4) under Rule 14, SCRPC, the third-party complaint is untimely and prejudicial to Third-Party Defendant because this action was terminated in the form of a final adjudication prior to the filing of the Third-Party Complaint; and this Court therefore lacks personal jurisdiction over Third-Party Defendant.

This motion is further made upon the pleadings, affidavits, and discovery, applicable case law and a memorandum of law to be filed at a later time.

Columbia, South Carolina
May 7, 2014


William P. Davis
Mariel D. Norton
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax (803) 779-3423
File No.: 7746.1857 wdavis@brblegal.com
Attorneys for Third-Party Defendant
GeoVera Specialty Insurance Company

 COPY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) 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,)

v.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

v.)

GeoVera Specialty Insurance Co.)

Third-Party Defendant.)

STATE OF FLORIDA)

COUNTY OF ORANGE)

AFFIDAVIT OF
BRENDA TRAWICK-SMITH

FILED
2014 MAY 12 PM 3:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

COMES NOW BEFORE ME, Brenda Trawick-Smith, who, being first duly sworn,
deposes and says that:

1. I am over the age of twenty-one years;
2. I am currently employed as Senior Technical Specialist for The Travelers Indemnity Company (hereinafter "Travelers") in Orlando, Florida.
3. I have been employed by Travelers for approximately thirty-nine (39) years.
4. Constitution State Services was at all times pertinent hereto, and continues to be, the third-party administrator arm of Travelers.

5. In my capacity as Senior Technical Specialist for Travelers, I am one of the persons with responsibility for and familiarity with Constitution State Services' records concerning the aforementioned claim, including those attached as exhibits hereto.

6. At all times pertinent to the facts set forth in this affidavit, USF&G Specialty Insurance Company was under the umbrella of Travelers insurance companies.

7. In my capacity as Senior Technical Specialist for Travelers, I was assigned and handled a claim of a USF&G Specialty Insurance Company insured named Tema Brown, which claim had been asserted on behalf of Travis Milligan, a minor, as a result of a dog bite alleged to have occurred on April 20, 2005.

8. In connection with my handling of the aforementioned claim and in the ordinary course of business at Travelers, I wrote a letter on September 28, 2006 to Tema Brown at the address shown on her policy (Exhibit A).

9. The document attached hereto as Exhibit A is a true and correct copy of the aforementioned letter, two copies of which I put in the outgoing mail at Travelers in accordance with its normal and usual business practices and procedures concerning such matters, with one copy of said letter being mailed by certified mail, return receipt requested, and the other being mailed by regular U.S. mail.

10. In the event that the aforementioned letter (Exhibit A) had been returned as undeliverable, it would have been directed to my file for the claim in question in accordance with Travelers' normal and usual business practices and procedures concerning such matters, but neither the letter nor the envelopes were returned to me or to my file as undeliverable.

11. On January 7, 2008, I mailed another letter, a true and correct copy of which is attached hereto as Exhibit B, by regular U.S. mail to Tema Brown at the address shown on her policy. Enclosed with my letter of January 7, 2008 (Exhibit B) was a copy of my letter of September 28, 2006 (Exhibit A).

12. In the event that the aforementioned letter (Exhibit B) had been returned as undeliverable, it would have been directed to my file for the claim in question in accordance with Travelers' normal and usual business practices and procedures concerning such matters, but neither the letter nor the envelope was returned to me or to my file as undeliverable.

13. At all times pertinent to the matters contained in this affidavit, it was the regular practice of Travelers and Constitution State Services to prepare and generate records such as and including those attached hereto as Exhibits A and B, and said documents were prepared at or near the times of the transactions and matters described and depicted therein, and they are kept in the normal course of business at Travelers.

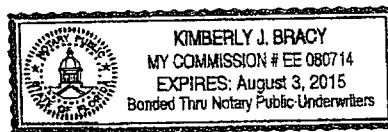
Brenda Trawick-Smith
Brenda Trawick-Smith

SWORN to and subscribed before me,

this 6th day of MAY, 2014.

Kimberly J. Bracy
Notary Public for the State of Florida

My Commission Expires: 8-3-15



Constitution State Services

Commercial Lines Claim Department
P.O. Box 4960
Orlando, FL 32802-4960
(407) 388-2573
FAX: (877) 266-1419

September 28, 2006

Terna Brown
3368 Habitat Blvd
Johns Island, SC 29455

CERTIFIED RETURN RECEIPT REQUESTED

Account: Terna Brown
Claim Number: GCGLUS040299
Date of Loss: 4-20-05
Claimant: Travis Milligan, a minor

Dear Ms. Brown:

This letter is a follow up to the letter of July 28, 2005 advising you of the possibility that there may not be any liability coverage under the homeowner's policy issued by USF&G Specialty Insurance Company under the policy number of GH20051152 for the incident involving Travis Milligan.

The incident that gives rise to this claim took place on 4-20-05. You advised that your dog, Jinx, was an American Pit Bull Terrier. Travis Milligan sustained injuries when he was bitten by Jinx.

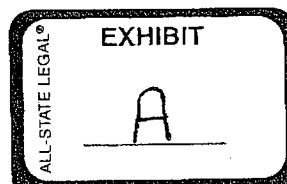
The policy issued to you has a specific exclusion for "Vicious Dogs". Under the terms of the policy, an American Pit Bull Terrier is considered a vicious dog. Therefore, based on your representation that Jinx is an American Pit Bull Terrier, we will not provide liability coverage for any events of 4-20-05.

If you have any questions or comments, please feel free to contact me at the number shown above.

Sincerely,

Brenda Trawick-Smith
Sr. Technical Specialist
407-388-2573

CC: Cliff Heath Insurance Inc.



Constitution State Services

Commercial Lines Claim Department
P.O. Box 4960
Orlando, FL 32802-4960
(407) 388-2573
FAX: (877) 266-1419

January 7, 2008

Ms. Tema Brown
3368 Habitat Blvd.
Johns Island, SC 29455

Account: Tema Brown
Claim Number: GCGLUS040299
Date of Loss: 04/20/2005
Claimant: Travis Milligan

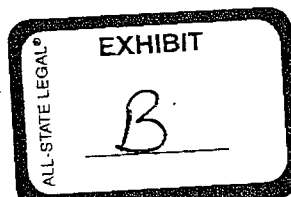
Dear Ms. Brown:

This letter will serve as a follow up to our telephone conversation.

I have enclosed correspondence that was previously sent to you explaining why coverage was not afforded under the policy issued to you by USP&G under policy number GH20051152.

Sincerely,

Brenda Trawick-Smith
Sr. Technical Specialist
407-388-2573



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,)

v.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

v.)

GeoVera Specialty Insurance Co.)

Third-Party Defendant.)

CERTIFICATE OF SERVICE

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAY 12 PM 3:06

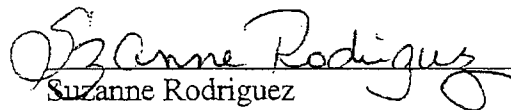
FILED

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 7th day of May 2014, I served the foregoing **Third-Party Defendant GeoVera Specialty Insurance Company's Motion for Summary Judgment; Motion and Order Information Form and Cover Sheet and Affidavit of Brenda Trawick-Smith** by mailing copies of same by United States Mail, postage prepaid, to counsel at the following addresses:

Andrew K. Epting, Jr., Esquire
Michelle N. Endemann, Esquire
ANDREW K. EPTING, JR., LLC
46A State Street
Charleston, SC 29401

Roy P. Maybank, Esquire
Amanda R. Maybank, Esquire
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, SC 29422

Barry I. Baker, Esquire
P.O. Box 31265
Charleston, SC 29417


Suzanne Rodriguez

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,	)	THIRD-PARTY DEFENDANT GEOVERA
	)	SPECIALTY INSURANCE COMPANY'S
v.	)	MEMORANDUM IN SUPPORT OF ITS
	)	MOTION FOR SUMMARY JUDGMENT
TEMA BROWN,	)	AND IN OPPOSITION TO THIRD-PARTY
	)	PLAINTIFF'S MOTION FOR SUMMARY
Defendant/Third-Party Plaintiff,	)	JUDGMENT
	)	
v.	)	
	)	
GeoVera Specialty Insurance Co.	)	
	)	
Third-Party Defendant.	)	

FILED
2014 MAY 19 AM 11:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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 forth 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), SCRCF, 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), SCRPC. 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 "privity" 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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Our File No.: 7746.1857
Attorneys for Third-Party Defendant

Columbia, South Carolina
May 15, 2014

COPY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) 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,)

v.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

v.)

GeoVera Specialty Insurance Co.)

Third-Party Defendant.)

CERTIFICATE OF SERVICE

BY

JULIA A. MITCHELL
CLERK OF COURT

2014 MAY 19 AM 11:36

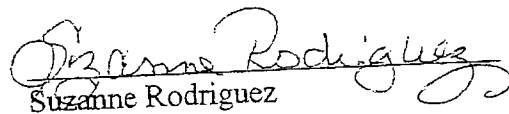
FILED

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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Suzanne Rodriguez

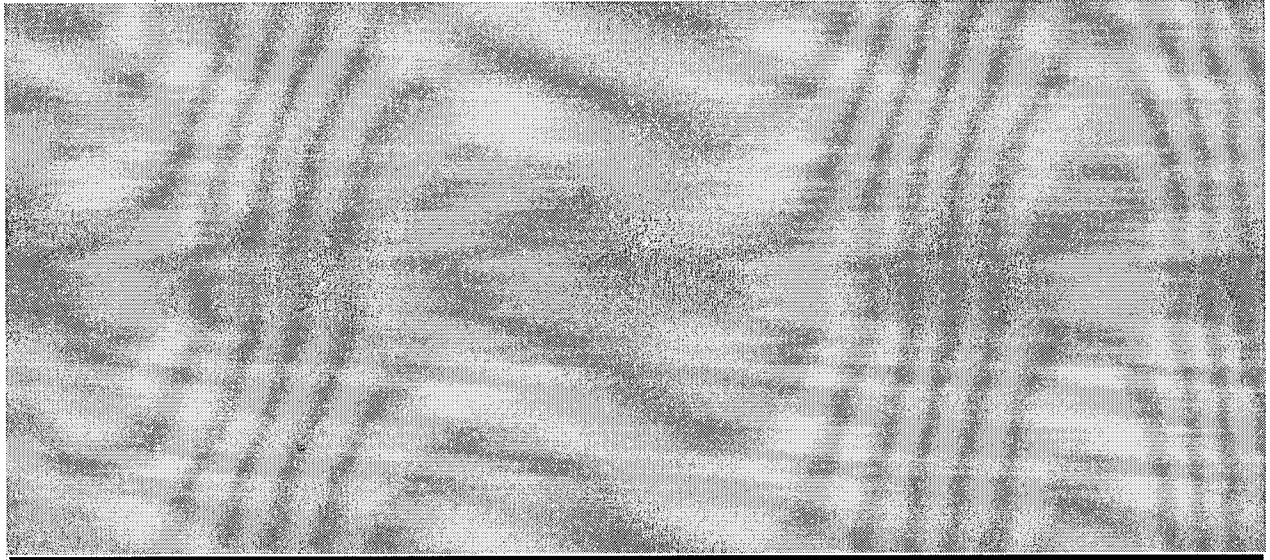
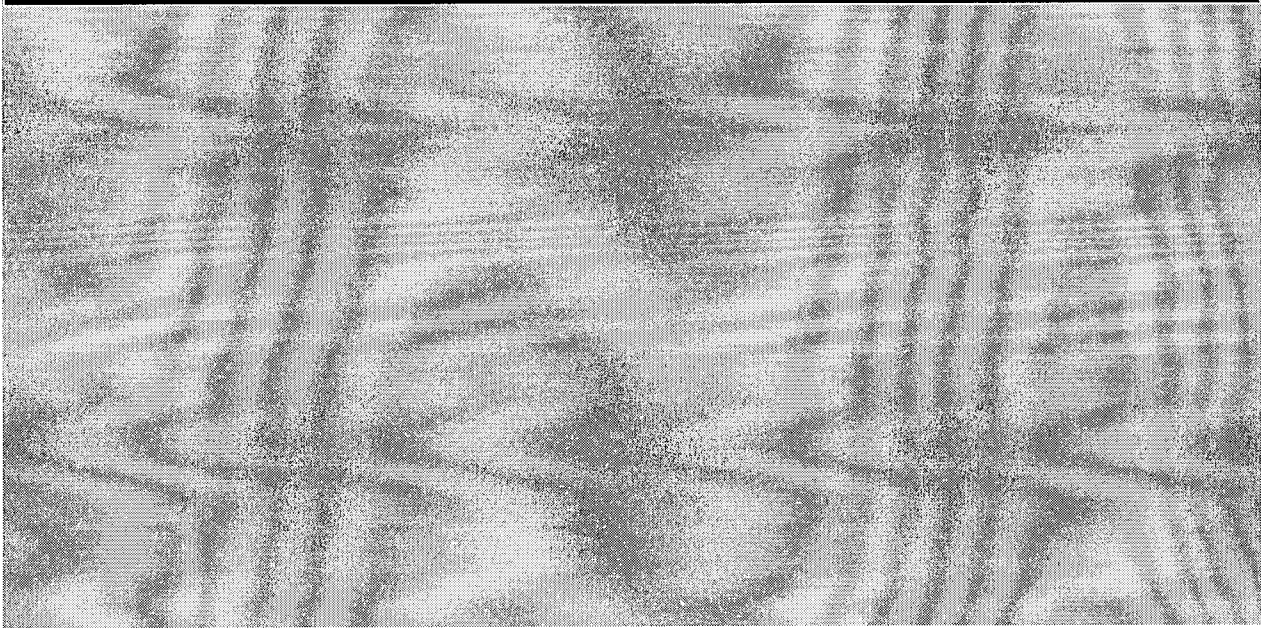


EXHIBIT I



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,)

vs.)

**MOTION FOR SUMMARY
JUDGMENT**

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

vs.)

GeoVera Specialty Insurance Co.,)

Third-Party Defendant,)

FILED
2014 MAY 16 PM 2:22
JULIE J. ARMSTRONG
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant/Third-Party Plaintiff, Tema Brown, hereby move this honorable Court, pursuant to Rule 56 SCRPC, for an order granting Defendant/Third-Party Plaintiff, Tema Brown summary judgment against Third-Party Defendant GeoVera Specialty Insurance Co. ("GeoVera").

The grounds for this motion are as follows: (1) the facts as determined by special master Tom Wills, Esq. establish there is coverage under the homeowners insurance policy issued to Ms. Brown by GeoVera for the dog bite at issue; (2) the issue upon which coverage depends was raised before Mr. Wills and necessarily adjudicated in the underlying action; (3) GeoVera cannot now, after failing to defend in the underlying action, raise issues or present defenses inconsistent with the judgment against its insured; and (4) there is no genuine issue of material fact with regard to the foregoing and Third-Party Plaintiff is entitled to judgment as a matter of law.

[signature on following page]

ANDREW K. EPTING, JR., LLC



Andrew K. Epting Jr., Esq.

Michelle N. Endemann, Esq.

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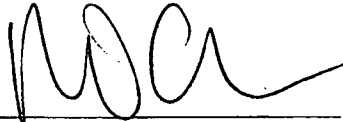
ATTORNEYS FOR TEMA BROWN

On this 13 day of May, 2014
Charleston, South Carolina

07-3224

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13 day of May 2014 a copy of the foregoing was served via email to counsel listed below at the following addresses:



William P. Davis, Esq.
Baker Ravenel & bender, LLP
3710 Landmark Drive, Ste 400
Columbia, SC 29202
wdavis@brblegal.com

FILED

2014 MAY 16 PM 2:22
JULIE J. ARMSTRONG
CLERK OF COURT

EXHIBIT J

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

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

Plaintiff,)

vs.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

vs.)

GeoVera Specialty Insurance Co.,)

Third-Party Defendant,)

IN THE COURT OF COMMON PLEAS

CASE NO: 2007-CP-10-3224

CORRECTED ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2015 MAR 24 PM 2:29

FILED

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 SCRCF 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. This Court lacks jurisdiction

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. Subject matter jurisdiction

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).

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?

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

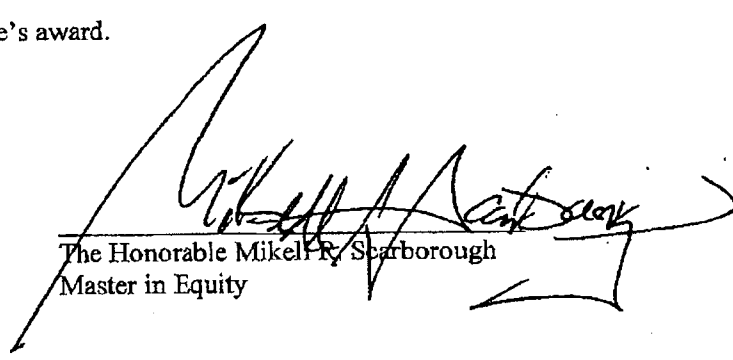
depends are not raised or necessarily adjudicated in the underlying action.”); *Wilhide v Keystone Ins. Co.* (1961, DC Pa) 195 F Supp 659)(Having had notice to come in and defend the prior action brought against the insured by the administrator of a person killed when struck by a tractor-trailer owned 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 Mikel R. Scarborough
Master in Equity

On this 20 day of March, 2015
Charleston, South Carolina

EXHIBIT K

in the trial of an action against its insured, which it declined to defend on the ground that the allegations were not covered by the policy. Relying instead on Williston on Contracts and cases from Georgia, California and Pennsylvania, the corrected order reaches the opposite conclusion.

(2) The corrected order does not address GeoVera's argument set forth on pages 16 through 19 of its memorandum that the default judgment terminated this action, precluding the third-party complaint or, to the extent this argument was addressed, assumed that it was solely and necessarily based on lack of subject matter jurisdiction, which is not the case. The excerpt from American Jurisprudence (Second) on pages 16 and 17 of GeoVera's memorandum indicates that, under some authority, "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" That is, once the case has been finally adjudicated, additional activity in the case is forbidden – not due to a lack of subject matter jurisdiction but because the case has been finally adjudicated. Moreover, as the Arkansas Supreme Court observed in Arkansas Bankers Life Ins. Co. v. Tomerlin, 340 Ark. 701 13 S.W.3d 581 (2000), Rule 14 (which is virtually identical to South Carolina's comparable rule) implies that a third-party complaint will be filed before the issues are resolved at trial, and permitting it to be filed after the entry of judgment was error.

(3) The corrected order erroneously assumes that this Court does not have the authority to grant GeoVera's motion, since the Circuit Court orders authorized the filing of the third-party complaint. The referral was "for all purposes allowed by the rules, including, examination of the Defendants in supplemental proceedings" and pursuant to Rule 53(b). The first order was consented to by both Mr. Baker and Ms. Maybank, both of whom represented the Plaintiff, with Mr. Baker consenting "As Assignee for Tema Brown" and Ms. Maybank consenting as "Attorney for Plaintiff." Similarly, Mr. Baker and Ms. Maybank both moved for

the second order, with Mr. Baker signing “for Tema Brown in her capacity as assignor of claims to Plaintiff” and Ms. Maybank signing as “Attorney for Plaintiff.” Under these circumstances, the case having been referred by the Circuit Court “for all purposes allowed by the rules,” this Court has the authority to grant GeoVera’s motion for summary judgment on the ground that this action was finally adjudicated upon entry of the default judgment.

The two Circuit Court orders, by consent, granted leave to file a third-party complaint. The issues raised in GeoVera’s motion for summary judgment and memorandum in support were not before either court. The situation presented is similar to that in Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct.App. 1985), in which a Family Court Judge vacated a default judgment previously entered by another Family Court Judge in which he ordered adoption of a child by the plaintiffs. The court rejected plaintiffs’ argument that the second judge did not have authority to vacate the first judge’s default judgment, since “[t]he threshold questions decided by the two judges were different.”

Similarly, in the case at bar, Judge Dennis and Judge Harrington, when presented with proposed consent orders, authorized the filing of the third-party complaint. Undoubtedly, they were not presented with law or arguments to the contrary. This court has been presented with a different issue: whether, after the third-party complaint was filed pursuant to said orders, the third-party defendant is entitled to summary judgment on the grounds set forth in its motion and memorandum, i.e., that the action was terminated by means of a default judgment; that the third-party plaintiff lacks standing by virtue of the assignment; and that the statute of limitations had expired, among others.

(4) The corrected order concludes that GeoVera has waived its defenses relating to the propriety of the third-party complaint, and perhaps other defenses, by making a “general

appearance” and participating in the action. It relies on two cases that pre-date the adoption of the South Carolina Rules of Civil Procedure. However, the adoption of those rules dispensed with the special appearance for challenging jurisdiction, and the pre-adoption cases are no longer controlling. In Smalls v. Weed, 291 S.C. 258, 353 S.E.2d 154 (1987), the defendant had been served shortly before the adoption of the rules, after which the defendant made a special appearance, putting forth four grounds for dismissal: improper service; lack of personal jurisdiction; and two grounds addressing the merits. The South Carolina Court of Appeals held that, by asserting arguments on the merits, which under code pleading could have been raised only through a general appearance, the defendant implicitly acknowledged the jurisdiction of the court. Significantly, the court noted that, under the new rules, although the special appearance had been eliminated, the defendant still would not have prevailed because the grounds addressing the merits must be presented in a responsive pleading.

GeoVera, however, did preserve its defenses by presenting them in its answer, including the following: third-party plaintiff lacks standing to seek the judicial declarations sought in her amended third party complaint; third-party plaintiff is not the real party in interest; there is no judicable controversy appropriate for a declaratory judgment; the action was terminated upon entry of judgment against third-party plaintiff on or about September 11, 2009; 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; 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), SCRCPP; the amended third-party complaint is barred by the doctrine of laches; and the amended third-party complaint is barred by the applicable statute of limitations.

GeoVera has found no South Carolina cases holding that a defendant's participation in the action waives such defenses. On the contrary, in Dunbar v. Vandermore, 295 S.C. 493 (1988), the South Carolina Court of Appeals reversed the Circuit Court's decision to deny a motion to dismiss for lack of personal jurisdiction because the defendant obtained an extension of time to move or file responsive pleadings. In so doing, the Court quoted *Moore's Federal Practice* for the proposition that "Obtaining extensions of time and taking depositions before answering have been held not to constitute a waiver of the defenses of lack of jurisdiction of the person and improper venue." Cases from other jurisdictions support GeoVera's position. See Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565 568 (3rd Cir. 1996) ("The court properly rejected the plaintiff's argument that the defendants have waived their [service and process] defenses by engaging in discovery and attending scheduling conferences."); Clark v. City of Zebulon, 156 F.R.D. 684, 694 (N.D. Ga. 1993) ("This court concludes that the fact that the City continued to participate in discovery and in the process of moving the case toward trial does not constitute waiver of the defenses."); Toler v. City of Cookeville, 952 S.W.2d 831, 835 (Tenn. Ct. App. 1997) (Once the defense of insufficient service of process has been properly raised in the answer to the complaint, the defendant's participation at depositions in the case or in providing answers to written discovery does not constitute waiver); Ryals v. Hall-Lane Moving & Storage Co., Inc., 122 N.C.App. 242, 247-48, 468 S.E.2d 600, 604 (1996) ("When a defendant promptly alleges a jurisdictional defense as his initial step in an action, he fulfills his obligation to inform the court and his opponent of possible jurisdictional defects" and it does not make any difference if the defendant engages in discovery afterwards.)

(5) The corrected order indicates that the statute of limitations did not begin to run until entry of the default judgment, since the third-party complaint was for indemnity; however,

the denial letters unequivocally deny all coverage, including “any obligation to indemnify . . . ,” and third-party plaintiff, Tema Brown, was therefore on notice more than three years before the third-party complaint was filed, not only that this suit against her would not be defended, but that, in the event of a judgment, she would not be indemnified. “Under the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered” Prince v. Liberty Life Ins. Co., 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct.App. 2010). Ms. Brown brought her third-party complaint as a declaratory judgment action. She was on notice that she could bring a declaratory judgment action when she received the denial letter, denying all coverage under the policy for the claim that had been asserted against her. Because the denial letters unequivocally denied coverage, Ms. Brown was on notice when she received them not only that GeoVera would not provide a defense, but that it would not indemnify.

A similar situation arose in Adamski v. Allstate Ins. Co., 1999 PA Super 241, 738 A.2d 1033 (1999). In that case, Allstate denied coverage and declined to defend Miller in a suit brought against him arising out of an automobile accident. The April 2, 1986 denial letter indicated that the ground was that Miller was not a permissive driver of the insured vehicle. The jury returned a verdict against Miller for \$305,000 and judgment was entered on January 14, 1991. On August 19, 1992, Miller verbally assigned his rights against Allstate to the plaintiffs in the suit, Mr. and Mr. Adamski.

The Adamskis began a garnishment proceeding against Allstate, in which the court ruled that Miller was indeed a permissive user. That ruling was ultimately upheld on appeal, after which Allstate paid the Adamskis the \$50,000 policy limit, plus interest. The Adamskis filed a summons on November 9, 1993, followed on January 17, 1997 by a complaint alleging that

Allstate acted in bad faith by failing to defend, indemnify or otherwise protect Miller's interests. Allstate moved for summary judgment on the ground that the statute of limitations had run and for failure to state a cause of action. Allstate's motion was granted on the ground that the cause of action asserted arose on the date that Allstate denied coverage to Miller – April 2, 1986. On appeal, the Adamskis argued that actions premised on a refusal to defend or indemnify do not arise until termination of the litigation, which was on January 14, 1991, the date judgment was entered. The court observed that there was no factual issue that Allstate's denial of coverage occurred on April 2, 1986; that judgment was entered on January 14, 1991; and that the suit was commenced on November 9, 1993. As in the case at bar, the question was when the cause of action arose. Noting that the Adamskis alleged, among other things, that Allstate wrongfully failed to defend or indemnify Miller, the court said:

In light of [Allstate's] denial of coverage to Miller, which denial was communicated by letter on April 2, 1986, it should have been obvious to all that [Allstate] would not protect, defend, or indemnify Miller.

* * *

Here, [Allstate's] 1986 letter clearly put Miller on notice that he would not be covered, defended or indemnified in existing or future actions under the policy issued by [Allstate] to [the named insured]. [The Adamskis], who stand in Miller's shoes, . . . cannot now avoid an applicable statute of limitations by asserting that the continuing refusal to cover Miller was a separate act of bad faith.

Id., at 1038, 1042-43.

While Adamski involved bad faith claims, the case is nevertheless instructive because the bad faith claims challenged Allstate's refusal not only to defend, but to indemnify, and the statute of limitations on said claim was deemed to begin to run on the date of the denial – not the date of the judgment. *See also Wiseman Oil Co., Inc. v. TIG Ins. Co.*, 878 F.Supp.2d 597 (W.D.Pa. 2012) (holding that the statute of limitations for claims for bad faith denial of coverage

begins to run when 'an insurer clearly and unequivocally puts an insured on notice that he or she will not be covered under a particular policy for a particular occurrence. Id., at 604 (citation omitted.)

In the case at bar, Ms. Brown chose to challenge GeoVera's denial of coverage and refusal to indemnify by means of a declaratory judgment claim, which could have been brought within three years after she received any of the denial letters – the first of which was mailed on September 28, 2006 and, pursuant to the unrebutted presumption afforded under South Carolina law, as discussed in section (6) below, was received by Ms. Brown. Ms. Brown's Answer and Third-Party Complaint was not filed until July 19, 2011 – almost five years later.

The cases that the corrected order relies upon are all distinguishable, as none addresses a situation similar to that presented in the case at bar, i.e., the purported indemnitor, an insurance company, unequivocally denies liability coverage for a judgment that may result from the claim asserted against the insured, and did so years in advance of the ultimate judgment based on that claim. In Ellett Brothers, Inc. v. United States Fid. & Guar. Co., 275 F.3d 384 (4th Cir. 2001), the statute of limitations was not an issue. The insured, Ellett Brothers, sought a declaratory judgment that its insurers were required to defend and indemnify it in connection with four suits that had been brought against it. The issues were (1) whether the summary judgment that had been granted to the insurers sanctioning their denial of a defense should be upheld; and (2) whether the insured should have been allowed to voluntarily dismiss its indemnity claim against the insurers. The court held that the district court did not abuse its discretion in that regard, noting that, because the indemnity claim was not ripe, the insurers would not be irreparably harmed by the voluntary dismissal. Neither the opinion nor the concurring opinion indicates that the statute of limitations was an issue.

The case of First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994) is likewise unhelpful. That case involved an indemnity claim by a contractor against a subcontractor – not an insurer. The court cited a federal case out of Oklahoma for the proposition that the statute of limitations “generally” runs from the time judgment is entered. There was no issue involving an insurer’s unequivocal denial of coverage.

The third case cited, Madigan v. Yballe, 336 Ill. Dec. 522, 920 N.E.2d 1112 (App. Ct. 1st Dist. 2009), is inapposite for the same reasons, i.e., it did not involve an indemnity claim against a liability insurer that had unequivocally denied all coverage years previously.

(6) The corrected order erroneously suggests that it would be improper for this Court to consider the affidavit of Brenda Trawick Smith, not only because “it is apparent” that the letters were returned as “undeliverable,” but also because it is improper for the Court to conduct a factual inquiry. However, according to Ms. Smith’s uncontroverted affidavit, she mailed the denial letter dated September 28, 2006 to Tema Brown by both regular mail and certified mail, return receipt requested. Moreover, her affidavit indicates that, on January 7, 2008, she mailed a second letter, which says that it was “a follow up” to her telephone conversation with Ms. Brown, and with which she enclosed a copy of her original denial letter of September 28, 2006. While GeoVera’s Exhibit G indicates that the July 28, 2005 **reservation of rights** letter was returned and that the copy of her September 28, 2006 denial letter **that was sent by certified mail** was also returned, there is no evidence that the copy of that letter **that was sent by regular mail** was returned as undeliverable. There is a presumption that Ms. Brown received it since, under South Carolina law, such proof of mailing creates a rebuttable presumption of receipt. Weir v. Citicorp Nat’l Servs. Inc., 312 S.C. 511, 516, 435 S.E.2d 864, 868 (1993); see also Bakala v. Bakala, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) (“Evidence of mailing establishes a rebuttable

presumption of receipt.”). This presumption also applies to the January 7, 2008 letter, with which a copy of the original September 28, 2006 denial letter was enclosed, according to Ms. Trawick-Smith’s affidavit. There is no evidence that this letter was returned as undeliverable.¹ It was incumbent upon Ms. Brown or Plaintiff to come forward with evidence rebutting this presumption no fewer than two days before the hearing. Rule 56(c), SCRCp. No such evidence was submitted, and receipt of the denial letters is therefore presumed.²

Thus, no factual inquiry is necessary nor sought. The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts establishing a genuine issue for trial. Id. GeoVera has established that Ms. Brown received its denial letters, at the latest, more than three years and eight months before GeoVera was added as Third-Party Defendant. Moreover, counsel for the plaintiff, to whom Ms. Brown assigned her claims on November 4, 2010, and who has been substituted as the real party in interest, was copied with the April 7, 2008 letter reiterating

¹ A third letter, dated April 7, 2008 (Exhibit M) reiterating the denial was sent by certified mail, return receipt requested to Ms. Brown at the address shown on her policy. The return receipt was signed on April 9, 2008 by someone whose first name is “Jeff” and whose last name is illegible. GeoVera has therefore established that no fewer than three denial letters were mailed to Ms. Brown at the address shown on her policy. (References to exhibits are to the exhibits attached to GeoVera’s memorandum of law in support of its motion for summary judgment and in opposition to third-party plaintiff’s motion for summary judgment.)

² 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.’” Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct.App.2001), quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

the denial of coverage. (Exhibit M) Not only was the assignor, Tema Brown, on notice that coverage had been denied and that she could institute her declaratory judgment action in April 2008, but the assignee -- the plaintiff herself -- was on notice because her attorney was sent a letter on September 28, 2006 to that effect (Exhibit I) and another of her attorneys was copied with the April 7, 2008 denial letter. (Exhibit M) No affidavit denying receipt of either of those letters has been submitted.

(7) Rule 17, cited in footnote 1 of the corrected order, requires that "a reasonable time" be allowed, after objection, for substitution of the real party in interest before the action may be dismissed. The South Carolina Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, and federal cases interpreting the latter are therefore instructive where there is no South Carolina law on point. Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991). According to *Moore's Federal Practice*:

Some courts have determined that Rule 17(a)(3) should not be applied to allow substitution of the real party in interest in every case. **It would be unreasonable to permit an action filed by a party who knows that he or she is not the real party in interest to toll the statute of limitations.** Therefore, after the limitations period has expired, the substitution provision of Rule 17(a)(3) should apply only when the failure to bring the action originally in the name of the correct party was the result of an "honest and understandable mistake." **When determination of the correct party to bring an action is not difficult, and when no excusable mistake has been made, these courts rule that substitution will not be allowed and that the suit should be dismissed.**

(emphasis added.) MOORE'S FEDERAL PRACTICE 3D, § 17.12 [1] [a] at p. 17-56.

Our state appellate courts have apparently not yet weighed in on this specific issue; however, in Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995), addressing a certified question from the United States District Court for the District of South Carolina, our Supreme Court held that:

The real party in interest is no longer precluded from being named a plaintiff, after the statute of limitations has run on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest. Instead a reasonable time must be allowed after objection for ratification of commencement of the action and it has the same effect as if the action had been commenced in the name of the real party in interest. We find that the current Rule 17(a) changes existing State law where the action was brought within the applicable limitations and the real party in interest joined and ratified the action **shortly thereafter** in accordance with the requirements of Rule 17(a).

Id., at 87, 380. (emphasis added.) (internal citation omitted.)

This case, however, does not support third-party plaintiff's position. First, regardless of whether it was third-party plaintiff or plaintiff who initially commenced the third-party complaint, it was not timely, as set forth above. Second, in Thomas, the plaintiff commenced her action within the statute of limitations, but sued in her capacity as personal representative of her husband's estate as established by the Michigan Probate Court. When the defendants claimed that she lacked capacity to sue because she failed to allege her qualification as personal representative in South Carolina, she, after the expiration of the statute of limitations, submitted an authenticated copy of her Michigan appointment to the Charleston County Probate Court and, a month later, moved to amend her complaint to include allegations concerning her appointment as personal representative in South Carolina. As set forth above, the Supreme Court allowed the substitution "where the action was brought within the applicable limitations and the real party in interest joined and ratified the action shortly thereafter in accordance with the requirements of Rule 17(a)." In the case at bar, the third-party complaint was not commenced within the applicable statute of limitation, nor did plaintiff seek to be substituted as real party in interest "shortly thereafter." On the contrary, no such motion was filed and the corrected order substituting plaintiff as the real party in interest was not entered until March 24, 2015 – more than three years after GeoVera included in its answer that, "On information and belief, Third-

Party Plaintiff is not the real party in interest.” It is respectfully submitted that this is per se an unreasonable period of time, especially considering that plaintiff and her counsel and third-party plaintiff were all aware of the assignment. No steps whatsoever were taken to correct the error, notwithstanding the aforementioned defense, until the issue was addressed in the proposed order. No citation of authority is necessary for the proposition that one who has assigned her cause of action to another cannot then assert the cause of action that she had assigned.

(8) The corrected order erroneously concludes that the special referee found as a fact that the dog in question was not a Pit Bull. The special referee’s order contains about one and a half pages of “Facts.” The only reference therein to the breed of the dog is the statement 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.” In the “Law” section of the order, the special referee indicated that punitive damages were not warranted and observed that “Ms. Brown testified that the dog was not a viscous [sic] dog and was a mixed breed, but not a pit bull.” First, this statement is not a factual finding that the dog was not a Pit Bull. Rather, it is merely a recitation of Ms. Brown’s testimony, and does not constitute a factual finding. Second, for the purposes of assessing punitive damages, the critical inquiry was whether or not there was reason to believe that the dog may attack, i.e., whether it was vicious – not whether it was a Pit Bull.

Thus, the only reference to the dog’s breed in the Order of Judgment is the reference to Ms. Brown’s testimony at the hearing. GeoVera, however, submitted the emergency room record in which the victim of the dog bite, Travis Milligan, gave a history of having been riding his bike and being bitten by a “pit bull.” The South Carolina Department of Health and Environmental Control Report referred to the dog as a “Pitbull.” The office note of the treating physician indicates that Travis “was attacked by a pit bull dog” Finally, GeoVera submitted the entire

transcript of a recorded statement of Tema Brown taken on May 5, 2005. This Court's corrected order entered March 24, 2015 indicates that, "In a recorded statement . . . the insured was coaxed into saying someone told her the dog was a pitbull"; however, it is respectfully submitted that a review of the transcript of that statement reveals just the opposite. In fact, the questioning could have hardly been less leading:

Q. And do you have any pets?

A. Yes.

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. Where did you get him?

A. We bought him.

Q. From a breeder?

A. I'm not sure if he is a breeder or not.

Q. So you bought him from an individual?

A. Yes.

Q. Are there papers?

A. We didn't get papers from the seller, no.

Q. Is this a – as much as a pitbull can be a pure blood, is it a pure blood pitbull as far as you know?

A. I don't know.

Q. Does it look like a pitbull?

A. I don't know.

Q. Explain to me how you don't know if it looks like a pitbull.

A. Because I don't know how a pitbull looks.

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.

It is submitted that these questions reveal no "coaxing" whatsoever. It is apparent from the questions and answers that Ms. Brown was not familiar with what a Pit Bull looks like and therefore could not confirm that the dog looked like a Pit Bull; however, she could and did confirm that the dog was sold as an Pit Bull. In fact, in response to, "Tell me about your pets," Ms. Brown said, "He is a American Pitbull."

In a footnote, the corrected order indicates that, "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." On the contrary, our Supreme Court, in Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965), held that the liability insurer was not bound by the conclusion of the presiding judge after trial that the defendant's acts were "not willful." When the insured, Mr. Sims, sued his insurer, Nationwide,

the trial court held that Nationwide was precluded by the prior order from offering evidence that Mr. Sims's actions were intentional, but the Supreme Court disagreed, as described in GeoVera's memorandum of law on pages 20 and 21. Thus, even if the special referee held that the dog was not a Pit Bull (which is denied), that holding is not binding in this action. Moreover, given the extensive evidence submitted that the dog was in fact a Pit Bull, GeoVera respectfully submits that, at a minimum, there is a genuine issue of material fact on this issue and that summary judgment in favor of plaintiff was therefore inappropriate.

(9) The corrected order erroneously concludes that the issue of the dog's breed was actually "litigated" and that GeoVera is bound by the special referee's purported determination that the dog was a Pit Bull when, in fact, the issue was not litigated nor was there any such finding. The corrected order cites cases from Georgia, California and Pennsylvania as persuasive for the proposition that "an insurer is bound by the underlying trial as to issues and facts actually litigated." Order, p. 8, last para. However, there was no "trial" of the original action. Ms. Brown was in default, and a special referee was appointed to determine damages, after which a default judgment was entered. However, "South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated." Kunst v. Loree, 404 S.C. 649, 746 S.E.2d 360 (Ct.App. 2013), *cert. denied* August 21, 2014, quoting from In re Springhart, 450 B.R. 725, 727 (Bankr. S.D. Ohio 2011).

CONCLUSION

In conclusion, GeoVera respectfully submits that the corrected order entered on March 24, 2015 granting Plaintiff's motion for summary judgment and denying GeoVera's motion for summary judgment should be withdrawn and that GeoVera's motion for summary judgment should be granted, on the grounds discussed above, including that (1) in granting plaintiff's and

third-party plaintiff's motion, the Court erroneously ruled that the special referee found as a fact that third-party plaintiff's dog was not a Pit Bull, in that there was no such finding in the Order of Judgment; that, even if the special referee had so ruled, the Court erroneously concluded that (a) the issue had been litigated during the damages hearing before the special referee and (b) the special referee's purported factual finding is binding on GeoVera. Those conclusions are contrary to South Carolina law.

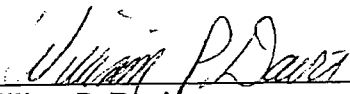
Moreover, GeoVera's motion for summary judgment should be granted, in that the within action was terminated before the third-party complaint was filed; it is implicit in Rule 14 that a third-party complaint is to be filed before the action has been concluded; and this Court, to which this case was referred for all purposes allowed by the rules, has not only the authority, but the obligation, to grant GeoVera's motion for summary judgment under these circumstances. Having assigned "any and all rights and claims for injuries and damages" in the matter on November 4, 2010, third-party plaintiff had no standing to assert the third-party complaint, a fact of which the two Circuit Court judges who granted leave to the defendant to file the third-party complaint were presumably unaware. The lack of standing was raised by GeoVera in its answer, and substituting plaintiff as the real party in interest three years later is per se not within a "reasonable time," as required by Rule 17.

GeoVera submitted uncontroverted evidence that third-party plaintiff received its denial letters more than three years before the third-party complaint was filed. Third-party plaintiff was therefore on notice that GeoVera had denied all coverage under her policy, which necessarily includes indemnification, more than three years before she brought her third-party complaint for declaratory judgment. Having met its initial burden as to summary judgment, it was incumbent upon third-party plaintiff to "do more than simply show there is some metaphysical doubt as to

the material facts” and “come forward with specific facts showing that there is a genuine issue for trial.” Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 354, 559, S.E.2d 327, 335 (Ct.App. 2001). “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 (Ct.App. 1993).

It is respectfully submitted that summary judgment in favor of plaintiff or third-party plaintiff essentially sanctions a result that our Supreme Court rejected in Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). *See also* GeoVera’s discussion of Ranta v. The Catholic Mut. Relief Soc. of America, 492 Fed.Appx. 373 (4th Cir. 2012), a federal case arising out of South Carolina, on pages 21 and 22 of GeoVera’s memorandum of law. GeoVera therefore respectfully seeks alteration, amendment and reconsideration of this Court’s corrected order entered on March 24, 2015 for the reasons set forth above.

Undersigned counsel hereby affirms that, given the nature of this motion and the current posture of this case, consultation with opposing counsel would have served no useful purpose.



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Attorneys for Third-Party Defendant
GeoVera Specialty Insurance Company

Columbia, South Carolina
April 3, 2015

CC Y

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,)

v.)

TEMA BROWN,)

Defendant/Third-Party Plaintiff,)

v.)

GeoVera Specialty Insurance Co.)

Third-Party Defendant.)

CERTIFICATE OF SERVICE

BY _____
CLERK OF COURT
2015 APR -2 AM 11:10
ED

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 30th day of March 2015, I served the foregoing **Third-Party Defendant GeoVera Specialty Insurance Company's Motion for Reconsideration and to Alter or Amend Judgment** by mailing copies of same by United States Mail, postage prepaid, to counsel at the following addresses:

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EXHIBIT L

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
JANA WRIGHT, as Guardian *ad Litem*
for TRAVIS MILLIGAN, a minor over
the age of 14 years
Plaintiff,

vs.

TEMA BROWN,
Defendant/Third-Party Plaintiff,

vs.

GeoVera Specialty Insurance Co.,
Third-Party Defendant,

IN THE COURT OF COMMON PLEAS
CASE NO: 2007-CP-10-3224

**ORDER DENYING THIRD-PARTY
DEFENDANT'S MOTION FOR
RECONSIDERATION AND TO ALTER
OR AMEND JUDGMENT**

FILED
2015 JUN -3 AM 10:03
JULIE J. ARMSTRONG
CLERK OF COURT

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!

On this 18 day of May, 2015
Charleston, South Carolina

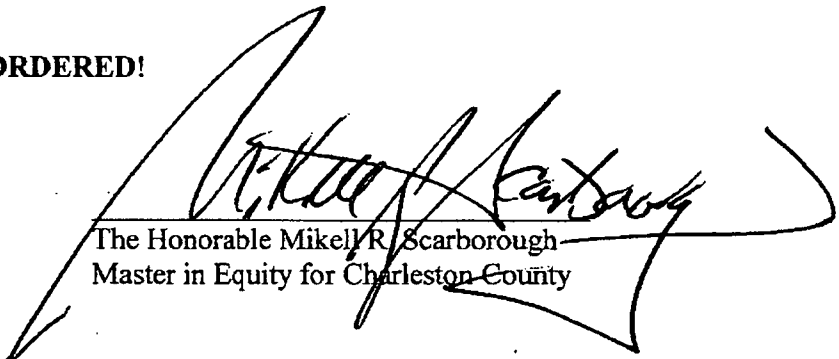

The Honorable Mikell R. Scarborough
Master in Equity for Charleston County

EXHIBIT M

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

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

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

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

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

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

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

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

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

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

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

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

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

22 (Hearing concluded at 11:20 o'clock a.m.)
23
24
25