THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No.: 2007-CP-10-3224
Appellate Case No.: 2015-001383

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

v.

Tema Brown. . . . . Respondent,

v.

GeoVera Specialty Insurance Co. . . . . Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. **THIS ACTION WAS NOT BROUGHT WITHIN THE APPLICABLE LIMITATIONS PERIOD, NOR DID THE REAL PARTY IN INTEREST JOIN AND RATIFY THE ACTION SHORTLY THEREAFTER.** 1

II. **THE THIRD-PARTY COMPLAINT IS FOR DECLARATORY JUDGMENT, FOR WHICH THE STATUTE OF LIMITATIONS HAD ALREADY EXPIRED.** 4

III. **THE MASTER-IN-EQUITY LACKED JURISDICTION OVER GEOVERA.** 6

IV. **GEOVERA PRESERVED ITS ARGUMENTS THAT THE DEFAULT JUDGMENT AGAINST RESPONDENT DOES NOT HAVE PRECLUSIVE EFFECT AND THAT SIMS V. NATIONWIDE MUT. INS. CO. APPLIES.** 9

V. **THE DOG'S LINEAGE WAS NOT LITIGATED.** 21

Conclusion 22

TABLE OF AUTHORITIES

CASES **PAGE**

Bakala v. Bakala, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) 3

Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F.Supp. 64 (D.S.C. 1979) 2

Drennan v. Brown, 114 S.C. 491, 103 S.E. 889 (1920) 7

Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) 8

Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949) 12, 20

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) 16

Kunst v. Loree, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013), cert. denied (Aug. 21, 2014) 9-10, 13, 15,16

Prince v. Liberty Life Ins. Co., 390 S.C. 166, 700 S.E.2d 280 (Ct. App. 2010) 5

Ranta v. Catholic Mut. Relief Soc. of America, 492 Fed. Appx. 373 (4th Cir. 2012) 12, 15, 18, 21

S.C. Dept. of Motor Vehicles and Columbia Police Dep't. v. Tighe 17, 18

Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965) 11-12,15-21

State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010) 16

State v. Nelson, 331S.C. 1, 501 S.E.2d 716 (1998) 17

State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) 16

Stearns Bank National Association, 373 S.C. 331, 644 S.E.2d 793 (2007) 8

Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995) 1, 2, 3

Travelers Indem. Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) 5

Weir v. CitiCorp Natl. Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993) 3

RULES **PAGE**

Rule 407 SCACR, Rule 3.3(a)(2) cmt. 2. 18

ARGUMENT

I. THIS ACTION WAS NOT BROUGHT WITHIN THE APPLICABLE LIMITATIONS PERIOD, NOR DID THE REAL PARTY IN INTEREST JOIN AND RATIFY THE ACTION SHORTLY THEREAFTER.

Respondent's brief does not attempt to distinguish nor does it even cite Thomas v. Grayson in which the South Carolina Supreme Court observed that, under the *South Carolina Rules of Civil Procedure*, "[a] reasonable time must be allowed after objection for ratification of commencement of the action" for it to have "the same effect as if the action had been commenced in the name of the real party in interest." Thomas v. Grayson, 318 S.C. 82, 87, 456 S.E.2d 377, 380 (1995) (citing SCRCP, Rule 17(a)). The Court specifically found 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. (emphasis added). (Respondent's failure to bring the action within the applicable statute of limitations is addressed below.)

Tema Brown assigned her claims to the Plaintiff on November 4, 2010. (R. pp. 411-412) (Assignment). On February 3, 2012, GeoVera objected that Tema Brown was not the real party in interest, having assigned her right, if any, to assert the third-party claim to the Plaintiff. (R. pp. 123-124) (Answer of GeoVera to Amended Third-Party Complaint, Sixth and Ninth Defenses). Nevertheless, Respondent did not move to substitute Plaintiff as the real party in interest until the May 19, 2014 hearing, and the order granting that motion was not entered until March 11, 2015. Thus, not only was the action not commenced within the applicable statute of limitations, but the substitution did

not occur within "a reasonable time" nor did Tema Brown "join[] and ratif[y] the action shortly thereafter. . . ." Thomas v. Grayson, 318 S.C. 82, 87, 456 S.E.2d 377, 380 (1995).

Respondent cites Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co., 515 F.Supp. 64 (D.S.C. 1979) in support of her position. However, in that case, the Court determined that, because Rule 17 is procedural in nature and the "timeliness" issue falls within the scope of that rule, federal law must be applied. In the case at bar, South Carolina state law controls the procedural and timeliness issues, and the South Carolina Supreme Court's Thomas v. Grayson decision (decided sixteen years after Campus Sweater) is clear in its requirement that "[a] reasonable time must be allowed after objection for ratification . . . ." Thomas v. Grayson, 318 S.C. 82, 87, 456 S.E.2d 377, 380 (1995). Such a requirement cannot, by definition, be unreasonable or hyper-technical, as argued by Respondent. It is controlling authority, and it cannot be seriously argued that a motion made two years and four months after Appellant GeoVera's objection was within a reasonable time.

Respondent also argues that Plaintiff ratified the action before it was even filed. (Resp. Br., p. 6, l. 1-2). However, Thomas requires that "[a] reasonable time must be allowed after objection for ratification of commencement of the action . . . ." Thomas v. Grayson, 318 S.C. 82, 87, 456 S.E.2d 377, 380 (1995). Even if Plaintiff could be said to have "ratified" the commencement of the action when her attorneys signed "consent orders" to which Appellant GeoVera was not party, any such ratification occurred before, not after, GeoVera raised its objections in its answer.

Finally, Thomas requires not only that the action have been brought within the applicable limitations period but that the real party in interest both join and ratify the

action "shortly thereafter." Id. Plaintiff Jana Wright, to whom Respondent Tema Brown had assigned her claims six years earlier, was not substituted as real party in interest until March 11, 2015 – five years after the assignment from Respondent Tema Brown; four years after the third-party complaint was filed against Appellant GeoVera; and three years after Appellant GeoVera answered and included the defense that "Third-Party Plaintiff is not the real party in interest . . . ."

Respondent continues to argue that denial letters were returned as "undeliverable." (Resp. Br., p. 7, last line – p. 8, l. 3). As set forth in Appellant's memorandum in support of its motion for summary judgment, three denial letters were mailed to the insured, Tema Brown – some by regular mail and some by certified mail, return receipt requested. (R. pp. 157-158; pp. 459-463) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, pp. 9 at I. – p. 10; Affidavit of Brenda Trawick-Smith). The uncontroverted affidavit of Brenda Trawick-Smith establishes that, although one or more of the letters sent certified mail, return receipt requested, may have been returned as "undeliverable," at least one was received, since Ms. Trawick-Smith's affidavit proves they were mailed, no affidavits nor other evidence of non-receipt have been submitted, and Ms. Trawick-Smith's affidavit indicates that, if her letter of January 7, 2008 had been returned as "undeliverable," it would have been directed to her file, which did not occur. (R. p. 461) (Affidavit of Brenda Trawick-Smith, ¶¶ 11-12; see Bakala v. Bakala, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("Evidence of mailing establishes a rebuttable presumption of receipt."); Weir v. CitiCorp Nat'l Servs., Inc., 312 S.C. 511, 516, 435 S.E.2d 864, 868 (1993) (noting that under South Carolina law, if a

letter is properly addressed and mailed, it is presumed to have been received by the addressee)).

II. THE THIRD-PARTY COMPLAINT IS FOR DECLARATORY JUDGMENT, FOR WHICH THE STATUTE OF LIMITATIONS HAD ALREADY EXPIRED.

Respondent argues that the claim asserted in her third-party complaint is for indemnity, quoting a colloquy between the Court and Appellant's counsel, in which counsel responded in the affirmative to the following:

> THE COURT: So the underlying case has been decided, so now we're here to decide whether or not there is a right to indemnify, correct? Isn't that what this case is really all about?

(Resp. Br., p. 8, quoting from Transcript of Motion to Reconsider, pp. 25-26).

Counsel's affirmation that the issue in the third-party complaint seeking a declaratory judgment is whether or not there is a right to indemnity does not constitute an admission that the action was for indemnity. Respondent overlooks the following portion of Appellant's counsel's argument:

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

(R. p. 336, lines 13-22) (Transcript of May 19, 2014 Hearing, p. 7, ll. 13 – 22).

Moreover, Respondent's Amended Third-Party Complaint concludes with the following:

> 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.

(R. p. 59) (Amended Third-Party Complaint, p. 2). In addition, the Master-In-Equity's March 24, 2015 order specifically states that, "this is a declaratory judgment action to declare the rights and duties of all parties." (R. p. 24) (March 24, 2015 Corrected Order, p. 2 at III. A).

An acknowledgment that the subject of the declaratory judgment action is the availability of indemnification on an insurance policy does not make the action one for indemnification. Respondent sought a declaratory judgment of "coverage and entitlement." A declaratory judgment to determine coverage under an insurance policy is an action at law. Travelers Indem. Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 140, 511 S.E.2d 692, 694 (Ct. App. 1999). The applicable statute of limitations therefore began to run, at the latest, when Respondent first knew or should have known that she might have a claim. Prince v. Liberty Life Ins. Co., 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010).

Finally, Respondent argues that Plaintiff can bring an action against Appellant GeoVera, as judgment creditor, only after obtaining a judgment against Respondent Tema Brown. (Resp. Br., p. 9, at iii). However, not only did Plaintiff not sue Appellant GeoVera for the amount of the judgment, she did not bring an action against GeoVera pursuant to the assignment from Respondent Tema Brown. Plaintiff, as assignee, was substituted as the real party in interest pursuant to the Master-In-Equity's March 24, 2015 Corrected Order. Thus, Plaintiff was substituted for Respondent as the party asserting the declaratory judgment action. She did not sue on her judgment against Respondent nor did she sue pursuant to the assignment.

III. THE MASTER-IN-EQUITY LACKED JURISDICTION OVER GEOVERA.

Respondent contends that, "Originally, GeoVera styled its argument as a lack of subject matter jurisdiction of the lower court." (Resp. Br., p. 9 at C). Respondent further argues that Appellant asserts a "new" argument that the Circuit Court lost jurisdiction over the case ten days after entry of the Special Master's order. (Id.)

In response, Appellant notes that, in its amended answer to the amended third-party complaint, GeoVera included as an eighth defense that, "This action was terminated upon entry of judgment against Third-Party Plaintiff on or about September 11, 2009." Its fourteenth defense provides that, "This Court lacks personal jurisdiction over GeoVera, in that this action was terminated before GeoVera was added as a Third-Party Defendant." (R. pp. 137-138) (Amended Answer of GeoVera to Amended Third-Party Complaint, Eighth and Fourteenth Defenses).

Moreover, Appellant's argument concerning jurisdiction appears in section III of its memorandum in support of its motion for summary judgment and in opposition to

Respondent's motion for summary judgment. The heading of that section indicates that this is not a new argument, but was one of Appellant's arguments at the summary judgment stage:

> **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.**

(R. p. 164) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, Section III). The very first paragraph thereafter cites Drennan v. Brown, 114 S.C. 491, 103 S.E. 889 (1920) for the proposition that the Special Master's Order of Judgment was a final judgment ending the action. (R. p. 164) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 16). The same arguments were made orally at the May 19, 2014 hearing. (R. p. 338, line 9 – p. 339, line 22) (Transcript of May 19, 2014 Hearing, p. 9, l. 9 – p. 10, l. 22). Moreover, Appellant's Motion for Reconsideration and to Alter or Amend Judgment specifically said that, "The corrected order does not address GeoVera's argument . . . 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." (R. p. 308) (Motion for Reconsideration and to Alter or Amend Judgment, p. 2 at (2)).

Thus, the argument in question is not new, having been raised repeatedly. It has been Appellant's position in its pleadings, motions and arguments that this action was terminated before the assertion of the third-party complaint. Appellant GeoVera did not consent to be added as the third-party defendant. Appellant properly preserved its defenses in its amended answer, as set forth above.

Approximately one year after its addition as a third-party defendant, Appellant consented to the dismissal of its co-third-party defendant, Constitution State Services, acknowledging that it is liable for any acts or omissions of the latter to the same extent that USF&G Specialty would have been so liable, but it never agreed to waive or withdraw the aforementioned defenses. (R. pp. 18-21) (Dec. 18, 2012 Consent Order).

The cases cited by Respondent for the opposite proposition do not indicate that Appellant waived the aforementioned defenses. In Stearns Bank National Association, 373 S.C. 331, 644 S.E.2d 793 (2007), this Court held that a defendant had made a voluntary appearance by writing a letter to another party's attorney. However, the party held to have made an appearance did not answer and a default judgment was entered against it. In the case at bar, Appellant filed an answer in which it preserved its defenses, including those described above, in accordance with the *South Carolina Rules of Civil Procedure*. (See argument and cases set forth in Brief of Appellant at pp. 44, 1st full ¶ - 46).

Similarly, Ex Parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), also relied upon by Respondent, is inapposite. Cannon argued on appeal that the court lacked personal jurisdiction over him to find him in contempt of court, in that he had never been made a party in his capacity as trustee, but was only before the court in his capacity as personal representative. This Court rejected that argument on the ground that he had made a voluntary appearance by accepting the appointment as personal representative of the subject estate. Again, that situation bears no resemblance to that presented in the case at bar, in which Appellant properly preserved and repeatedly asserted its defenses, including lack of personal jurisdiction.

IV. GEOVERA PRESERVED ITS ARGUMENT THAT THE DEFAULT JUDGMENT AGAINST RESPONDENT DOES NOT HAVE PRECLUSIVE EFFECT AND THAT SIMS V. NATIONWIDE MUT. INS. CO. APPLIES.

Among Appellant's grounds for summary judgment were that (1) under Rule 14, SCRCP, the third-party complaint was untimely and prejudicial to third-party defendant because the case had previously been adjudicated, without appeal, in the form of a default judgment; and (2) the court lacked personal jurisdiction over third-party defendant because the action had been terminated in the form of a final adjudication prior to the filing of the third-party complaint. (R. pp. 142-143) (GeoVera's Motion for Summary Judgment, at (4)). Among Respondent's grounds for summary judgment were that (1) the issue upon which coverage depends was raised before the Special Master and necessarily adjudicated in the underlying action and (2) third-party defendant could not, after failing to defend the underlying action, raise issues or present defenses inconsistent with the judgment against its insured. (R. p. 305) (Tema Brown's Motion for Summary Judgment, at (2), (3)).

In short, Respondent contended, among other things, that the default judgment included a finding that is binding on Appellant, about which it cannot complain because it declined to defend. Appellant contended, among other things, that there was no such finding and that, in any case, the third-party complaint was improper, the original action having been adjudicated, without appeal, in the form of a default judgment, and the action was thereby terminated prior to the filing of the third-party complaint.

Respondent contends that Appellant did not preserve its argument that the alleged findings of the Special Master are not binding on it because default judgments do not have preclusive effect. See Kunst v. Loree, 404 S.C. 649, 655, 746 S.E.2d 360, 363 (Ct.

App. 2013), cert. denied (2014). She argues that this issue was not raised in Appellant's pleading, summary judgment briefing and argument, nor ruled on by the lower court. However, Appellant's amended answer to Respondent Tema Brown's third-party complaint includes the following:

> **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 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.

(R. pp. 137-138) (Amended Answer of GeoVera to Amended Third-Party Complaint).

It was thus clear from the outset that Appellant denied that it was bound by the default judgment that had been entered against its insured, Respondent Tema Brown, because (1) entry of the default judgment terminated the action; and (2) assertion of the claim as a third-party complaint four years after the default unfairly deprived GeoVera of its rights under Rule 14. Additionally, Appellant's motion for summary judgment included the following ground:

> (4) under Rule 14, SCRCP, 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.

(R. p. 143) (GeoVera's Motion for Summary Judgment, p. 2).

Finally, Appellant GeoVera's memorandum of law in support of its motion for summary judgment includes the following:

> **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.
>
> * * *
>
> 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).

(R. pp. 167-168) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 19-20).

Appellant GeoVera's memorandum then goes on to discuss the Sims case, in which the South Carolina Supreme Court held that an insurer that had declined to defend its insured in a tort action on the ground that his actions were intentional and not negligent was not bound by the finding of the court that the insured's conduct was negligent and not intentional. GeoVera's memorandum included the following quote from Farm Bureau Mutual Ins. Co. v. Hammer, et al., 177 F.2d 793 (4th Cir. 1949), which was quoted with approval by the South Carolina Supreme Court in Sims:

> 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 . . . .

(R. p. 169) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 21) (emphasis added). GeoVera also quoted the following from Ranta v. The Catholic Mutual Relief Society of America, 492 Fed.Appx. 373 (4th Cir. 2012):

> **[T]he South Carolina tort judgment does not bar [insurer] from asserting that [insured's] conduct was intentional and, therefore, outside the scope of insurance coverage**.

(R. p. 170) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 22) (emphasis added in memorandum of law).

Thus, Appellant's position from the beginning has been that, under South Carolina law, it is not bound by the judgment entered against its insured. The fact that Sims and other cases cited and quoted by Appellant in its memorandum in support of summary judgment and argued before the Master-in-Equity involved judgments entered

after a trial or summary judgment motion shows that Appellant preserved this argument. The fact that the cases did not involve judgments entered as a result of a default is no indication that Appellant failed to make such an argument. There is no reason that the rule that a liability insurer is not bound by a judgment under these circumstances would be any different if the judgment were by default, rather than as a result of a trial or summary judgment. Indeed, in Kunst v. Loree, this Court held that "South Carolina jurisprudence overwhelmingly supports the position that the doctrine of collateral estoppel cannot be applied to default judgments to preclude subsequent litigation." 404 S.C. 649, 655, 746 S.E.2d 360, 363 (Ct. App. 2013), cert. denied (2014).

Respondent complains that Kunst was not cited by Appellant until it filed its motion for reconsideration and to alter or amend the judgment. (Resp. Br., p. 13, last ¶). However, whether the judgment was by default or as a result of a trial, Appellant's position has always been that it is not bound by the judgment. Moreover, Appellant GeoVera specifically referenced the default judgment in its amended answer:

> **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 . . . .

(R. p. 136) (GeoVera's Amended Answer to Amended Third-Party Complaint, p. 3) (emphasis added). Respondent's own motion for summary judgment included the following ground:

> (3) GeoVera cannot now, after failing to defend in the underlying action, raise issues or present defenses inconsistent with the judgment against its insured . . . .

(R. p. 305) (Tema Brown's Motion for Summary Judgment, p. 1).

In short, Respondent's position was, and continues to be, that Appellant is bound by the default judgment, in response to Appellant's position, which was, and continues to be, that it is not. Respondent did not file a memorandum of law in support of her motion for summary judgment, but, at the May 19, 2014 hearing, her counsel argued in part as follows:

> Rather the insured [sic] has two options, defend the suit under reservation of rights or seek a declaratory judgment. If the insurer takes neither of these steps and is found to have wrongfully denied coverage the insurer is estopped from raising policy defenses to coverage.

(R. p. 357, line 21 - p. 358, line 1) (Transcript of May 19, 2014 hearing, p. 28, l. 21–p. 29, l. 1).

The following exchange later took place between the Court and undersigned counsel arguing on behalf of Appellant:

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

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

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

MR. DAVIS: Yes, Sir. And I believe that's what Simms says and Leranta [sic] case.

(R. p. 360, lines 3-11) (Id., p. 31, ll. 3-11).

It was therefore clear during the oral argument, as in the pleadings, motions and memorandum, that Respondent took the position that Appellant was bound by the "findings" in the default judgment and, while Appellant denied that there was any "finding" as to the breed of the dog, it contended that, under South Carolina law, it would not be bound by any such finding anyway.

In the proposed order submitted by Respondent's counsel, and which was ultimately signed by the Master-In-Equity, Respondent's counsel stated that, "[I]t 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." (R. pp. 28-29) (Mar. 24, 2015 Corrected Order, last line of p. 6 – first line of p. 7). After quoting from Williston on Contracts, that proposed order provides that, "I find persuasive those cases that hold an insurer is bound by the underlying trial as to issues and facts actually litigated." (R. p. 30) (Id., last para. of p. 8). Cases from Georgia, California and Pennsylvania are cited thereafter. (R. pp. 30-31) (Id., p. 8–9). Neither of the controlling South Carolina cases[1] is cited. In its motion for reconsideration and to alter or amend judgment, Appellant cited

[1] Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965); Kunst v. Loree, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013), cert. denied (2014).

both Sims and Kunst. (R. p. 307; pp. 321-322; p. 324) (Motion for Reconsideration and to Alter or Amend Judgment, pp. 1, 15, 16, 18).

In short, Appellant has maintained from the beginning that (1) the default judgment against Tema Brown does not contain any "finding" that her dog was not a pit bull; and (2) even if there had been such a finding, it is not binding on GeoVera. Appellant cited controlling South Carolina authority, Sims v. Nationwide Mutual Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965), as well as other authority. Appellant's arguments reflected its position that, under South Carolina law, an insurer that declines to defend its insured on the ground that the allegations against her are not covered is not bound by the findings of the court as contained in the judgment against the insured. That is, the judgment does not have preclusive effect. Thus, Appellant properly preserved for appellate review the issue and the argument that the default judgment did not have preclusive effect on it because "a party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011); see also State v. Brannon, 388 S.C. 498, 501-02, 697 S.E.2d 593, 595-96 (2010) (finding that defendant preserved his argument even if he never used the terms "seizure" or "Fourth Amendment" by arguing an arrest was not being made when he ran from police); State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding it was clear from the argument presented in the record that defendant's motion for a directed verdict was based on the ground the State failed to establish the "corpus delicti" even if he did not use these exact words).

Further, Respondent cited out-of-state authority for the opposite proposition in her proposed order requested by the Master-In-Equity after the hearing on both sides'

motions for summary judgment. (R. pp. 30-31) (Mar. 24, 2015 Corrected Order, pp. 8-9). When Respondent's proposed order was adopted by the Court, Appellant located additional, recent South Carolina authority further supporting the authority previously cited, and brought it to the Master's attention in its motion to reconsider and to alter or amend the judgment. (R. p. 322) (Motion for Reconsideration and to Alter or Amend Judgment, p. 16). The Sims court held that a judgment entered after a trial in which the defendant's liability insurer did not participate is not binding on the insurer. Similarly, the Kunst court held that collateral estoppel does not apply to a default judgment. Since the proposed order submitted by Respondent did not cite either case, but rather cited cases from other jurisdictions for the opposite holding, and that order was ultimately adopted by the Master, it was incumbent on Appellant to not only reiterate the controlling South Carolina Supreme Court case, but to also call to the Master's attention in its motion to reconsider that the South Carolina Court of Appeals had recently come to a similar conclusion. Appellant's having fulfilled that duty is not an indication that the issue of the preclusive effect of a judgment had not previously and repeatedly been presented and therefore preserved. Appellant merely offered additional authority in support of its position.

"[T]he ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to and ruled on by the trial court." S.C. Dept. of Motor Vehicles and Columbia Police Dep't. v. Tighe, 2008 WL 2362842, at *8 (S.C. Admin. Law Judge Div.) (citing State v. Nelson, 331 S.C. 1, 6 n. 6, 501 S.E.2d 716, 718 n. 6 (1998)). As shown above, the issue of whether or not Appellant is bound by the default judgment entered against Respondent was presented in various forms and argued

by both sides. Respondent's argument is essentially that, although this issue was contested from the beginning and even though she presented, and the Master-In-Equity adopted, an order citing out-of-state authority that is contrary to controlling South Carolina authority, this Court should not consider a more recent case, even though it is supportive of precedent previously cited and even though Appellant brought it to the attention of the Master-In-Equity in its motion to reconsider. Such an argument "offend[s] 'the integrity of the adjudicative process.'" Id. at *9 (quoting from Rule 407 SCACR, Rule 3.3(a)(2) cmt. 2).

Respondent also argues that Appellant has failed to preserve the "conflict exception" in Sims v. Nationwide Mutual Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). (Resp. Br., p. 14). Respondent contends that "Sims was argued below and supports Respondents' position." (Id. at p. 16 at D. i). However, it was Appellant who argued Sims, devoting about three and a half pages of its memorandum in support of summary judgment to it and to another case with a similar holding, Ranta v. The Catholic Mutual Relief Society of America, 492 Fed.Appx. 373 (4th Cir. 2012). (R. pp. 167-171) (GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 19, last ¶ - p. 23). Appellant's argument at the summary judgment hearing concerning those cases spans about three pages of the transcript of that hearing. (R. p. 351, line 5 – p. 353, line 24) (Transcript of May 19, 2014 hearing, p. 22, l. 5 – p. 24, l. 24). At the same hearing, counsel for Respondent attempted to distinguish Sims:

> But here's the fine line, Judge. And I believe it's a line that is held very close since just to distinguish the case. The question is intentional act. The question is what is intentional for purposes of an underlying case a common law. Is it a different question of whether or not under insurance policy this was an intentional act. And so it makes perfect sense that you

> would allow any coverage defense that the insurance company has to be re-litigated.
>
> However, Judge, there is one huge exception, and it's recognized in every state that [ha]s clearly heard it. And we'll quote a couple of cases to you. I[f] the determination in the underlying case was necessary to the disposition of the underlying case and it decides the issue of coverage you can't re-litigate that issue.

(R. p. 355, line 23 - p. 356, line 11) (Id., p. 26, l. 23 – p. 27, l. 11).

In Sims, Mr. Sims' automobile insurer, Nationwide, had denied liability and declined to defend him in an action brought by Mr. Bates, who alleged that he had been injured while a passenger in another vehicle as a result of Sims' actions while operating the insured vehicle. A bench trial resulted in a verdict in favor of Bates, with the order specifically providing that ". . . the defendant was negligent in passing said automobile and colliding with same, but the defendant was not willful." Sims v. Nationwide Mutual Ins. Co., 247 S.C. 82, 84, 145 S.E.2d 523, 524 (1965). Sims then sued Nationwide, which contended that he had intentionally caused his vehicle to collide with the vehicle in which Bates was a passenger, and which was being driven by Sims' girlfriend, and that, after both vehicles came to a stop, Sims got out of his car, got a gun and shot her. The trial court held that Nationwide was precluded from offering evidence that Sims' actions were intentional and directed a verdict in his favor, but the South Carolina Supreme Court reversed on the ground that, had the insurer defended the tort action and asserted that its insured's acts were intentional, there would have been a "clear conflict of interest" between the insurer and the insured. Id. at 85, 145 S.E.2d at 524. The court then quoted with approval from a federal case in which the court held that, under such circumstances, the insurer "'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.'" Id. at 86, 145

S.E.2d at 525 (quoting Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949)). Otherwise, according to the court, the insurer would be deprived "'of its day in court to show that the transaction is foreign to the contract of insurance.'" Id. at 87, 145 S.E.2d at 525 (quoting Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949)).

In short, Sims is controlling South Carolina authority that supports Appellant's position, and which Respondent sought to distinguish.

Respondent has attempted to fashion a "conflict exception" in Sims. (Resp. Br., p. 16 at D. i). The Supreme Court did not find that Sims' "acts were intentional torts and therefore excluded despite the trial court's finding of negligence", as Respondent asserts. (Id.) Rather, it held that the trial court erred in excluding Nationwide's proffered evidence in directing a verdict against it. In short, the Court held that, even though Nationwide declined to defend, it was not bound by the court's determination in the first action that the insured's actions were negligent and not intentional. In the case at bar, Appellant contended that Respondent'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.

(Brief of Appellant, p. 20, 1st ¶).

The order submitted by Respondent as a proposed order after the May 19, 2014 hearing, and adopted and entered by the Master-In-Equity on March 24, 2015, does not mention Sims. Therefore, in its motion for reconsideration, Appellant argued in part that:

> The corrected order does not address what are arguably the two most important cases addressing the issue of whether a liability insurer is bound by factual findings in the underlying tort action, both arising out of South Carolina and discussed in GeoVera's memorandum of law on pages 19 and 23. Under South Carolina law, the insurer that declines to defend is not bound by the court's findings when the claim against its insured is not covered by the policy, and GeoVera is therefore not estopped to rely on applicable policy defenses. In particular, please see Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965), in which our Supreme Court specifically held that a liability insurer is not bound by factual findings 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.

(R. pp. 307-308) (Motion for Reconsideration and to Alter or Amend Judgment, p. 1 at (1) – (2)).

Thus, Appellant accurately and repeatedly argued the applicability of the reasoning and holding in Sims.

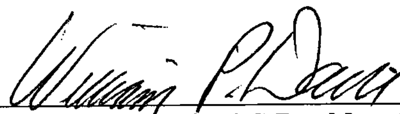
Respondent also argues that "GeoVera failed to argue the *Sims* conflict exception in its initial brief . . . ." (Resp. Br., p. 18, 1st full ¶). However, Appellant's initial brief contains an approximately four and one-half page discussion of Sims and Ranta, including quotes set forth in its memorandum in support of summary judgment. (Brief of Appellant, pp. 15 – 20). In its memoranda submitted to the lower court, and in its initial brief, Appellant quotes extensively from Sims and other cases to advance its argument that, for the reasons set forth in those opinions, it is not bound by any factual determination made at the Special Master's damages hearing, even if such a determination had been made as to the breed of the dog (which Appellant strenuously denies).

V. THE DOG'S LINEAGE WAS NOT LITIGATED.

Respondent argues that the dog's lineage was actually litigated during the damages hearing before the Special Master. (Resp. Br., pp. 15–16). For the reasons previously argued by Appellant, this is not the case. (R. p. 167; pp. 319-322) (See GeoVera's Memorandum in Support of its Motion for Summary Judgment, p. 19; Motion for Reconsideration and Alter or Amend Judgment, pp. 13-16 at (8)); (Brief of Appellant, pp. 14 – 16 at I). In short, the Special Master merely said in the "FACTS" section of his order that Tema Brown had testified that she did not know the dog's breed, but that it was not vicious. In the "LAW" section of that order, he observed that she had testified that the dog was a mixed breed, but not a pit bull. That is, the Special Master documented Tema Brown's testimony, but his order contains no "finding" that the dog was not a pit bull. It was not necessary to make such a finding, since his task was to determine damages, not the dog's breed nor the availability of insurance coverage.

CONCLUSION

For the reasons stated, the order of the court below should be reversed and judgment should be entered in Appellant's favor.



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July 19, 2016
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
JUL 20 2016
SC Court of Appeals

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

Case No.: 2007-CP-10-3224
Appellate Case No.: 2015-001383

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

v.

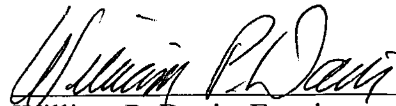
Tema Brown. . . . . Respondent,

v.

GeoVera Specialty Insurance Co. . . . . Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I, William P. Davis, an employee of Baker, Ravenel & Bender, L.L.P., Attorneys for GeoVera Specialty Insurance Company, Appellant, hereby certify that I have, on this 20th day of July 2016, served Final Reply Brief of Appellant and Certificate of Counsel by mailing copies of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel of record at the following addresses:

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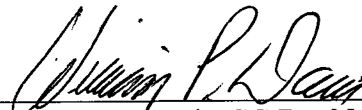

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