THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

Case No.: 2007-CP-10-3224

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

v.

Tema Brown, RESPONDENTS

v.

GeoVera Specialty Insurance Co., APPELLANT.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court properly denied GeoVera Specialty Insurance Co.'s ("GeoVera's") motion for summary judgment?

2. Whether GeoVera failed to preserve for appellate review the issue of the preclusive effect of default judgments?

3. Whether GeoVera failed to preserve for appellate review the issue of the applicability of the conflict exception in *Sims v. Nationwide Mut. Ins. Co.*, 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965)?

4. Whether the lower court properly granted Plaintiffs' motion for summary judgment?

STATEMENT OF THE CASE

This case is an action against an insurer for the failure to indemnify its insured, Ms. Brown, for liability arising out of a severe dog bite to a minor child. The claim was tendered to GeoVera, Ms. Brown's insurance carrier, which, after agreeing to defend under a reservation of rights, changed its position and did not defend, file a declaratory judgment action, or indemnify. Ms. Brown was placed into default, and the damages portion of the case was tried before a Special Master, Thomas J. Wills, IV Esquire, who entered judgment in favor of Ms. Wright in the amount of $100, 229.00. Ms. Wright received an assignment of Ms. Brown's claims against GeoVera on November 4, 2010.

Respondents 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 the Master in Equity for Charleston County. 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.

Cross motions for summary judgment were filed, and on March 11, 2105, the Honorable Mikell R. Scarborough entered an order denying GeoVera's motion and granting Plaintiffs'. On March 24, 2015, Judge Scarborough entered a corrected order, correcting a clerical error in the amount of the judgment awarded to Respondents. GeoVera filed a motion to reconsider, which was denied by order dated June 3, 2015. This appeal followed. Respondents have raised by motion in this Court the issue of whether GeoVera properly preserved certain issues for appellate review. Respondents' motion was denied in favor of decision after full briefing.

STATEMENT OF THE FACTS

The issues raised in this appeal are largely legal issues but as aroma might inform taste, facts might inform or alter this Court's application of the law. To this end, Respondents address the factual presentation by GeoVera. (Appellant's Initial Brief, Page(s) 4-11).

I. PITBULL (Appellant's Initial Brief, Page(s) 6-7)

GeoVera cites from a statement of the dog owner, Tema Brown in which Ms. Brown states she was told her dog Jinx was a pitbull. What is omitted is what the Ms. Brown stated at the beginning of her statement:

> 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.

R. p. 325(4), lines 7-21. That an insurer who understands the policy can ultimately lead the uniformed, unrepresented, and unsuspecting down the "primrose path" is not the issue here. The dog's owner did not even know what a pitbull looked like. In refusing to indemnify, GeoVera chose to edit Ms. Brown's statement into what it wanted her to say, rather than a fair appraisal of what she actually said.

II. THE OTHER RECORDS (Appellant's Initial Brief, Page(s) 5-6)

From MUSC, DHEC, and Dr. Devito, the 13 year old states he was bitten by a pitbull. The insurer quoting the policy, assess all of the records relied upon in this appeal as follows:

> "We will consider a canine to be a Staffordshire Bull Terrier,

> American Pit Bull Terrier, Rottweiler, or Doberman Pinscher if its lineage contains at least 50% of that breed."
>
> Based upon the above cited exclusion, there may be no coverage for indemnity or defense if it can be verified that Jinx is, in fact, an American Pit Bull Terrier.
>
> To date we have not received anything in writing from Mr. Vinson [the relative that Ms. Brown purchased the dog from] and we have no veterinary records to support the breed allegation. Without this support and the coverage issues set forth above, we will continue to handle this claim under a full reservation of rights.

R. p. 395, lines 1-12.

III. SPECIAL MASTER'S ORDER (Appellant's Initial Brief, Page(s) 7-11)

From the evidence, the Special Master, Thomas J. Wills, IV, Esquire, held the dog was neither vicious nor a Pitbull:

> In this case, I find that punitive damages are not warranted. Ms. Brown testified that the dog was not a viscous dog and was a mixed breed, but not a pit bull. She also 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.
> 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.

R. p. 5-6, lines 20-22, 1-3, 5-7.

ARGUMENT

I. GEOVERA'S MOTION FOR SUMMARY JUDGMENT

It is more efficient to consider the GeoVera's defenses (Appellant's Brief, page(s) 17-40) before considering the grant of summary judgment to Respondents. (Appellant's Initial Brief, page(s) 12-17).

GeoVera asserts three procedural defenses to coverage: a) the lower court erred in

substituting Ms. Wright as the third-party plaintiff. (Appellant's Initial Brief, pp. 17-23); b) the statute of limitations bars the claims. (Appellant's Initial Brief, pp. 24-33); and c) the lower court was without jurisdiction. (Appellant's Initial Brief, pp. 34-40). Respondents address GeoVera's arguments in the order briefed by GeoVera.

A. SUBSTITUTION OF THE PARTIES[1]

On November 4, 2010, after the case was tried on damages and a judgment against Ms. Brown was entered, Ms. Brown assigned her claims and any proceeds from such claims against her insurer to Ms. Wright. A motion was filed in the Court of Common Pleas for Charleston County to refer the matter to the Master in Equity for purposes of pursuing the third-party claim for coverage against the insurer. The third-party action was initially brought in the name of the insured, Tema Brown. GeoVera claimed that the action should be prosecuted in the name of the Ms. Wright as assignee, so this motion was made and the lower court granted the motion under Rule 17 SCRCP.[2] GeoVera defends on the grounds that the substitution was not within a reasonable period of time.

Rule 17(a) in part provides that no action shall be dismissed on the ground that it is not prosecuted by 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. The rule further provides that 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. In the case *sub*

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1 GeoVera winds into this argument its other three defenses, the statute of limitations and jurisdiction but the issue of substitution under SCRCP 17 is discrete, and is addressed as such by Respondent.

2 Pages 17-22 of GeoVera's Initial Brief deal generally with assignments, and it is only at page 22 that Appellant reaches the issue: SCRCP 17.

judice, the commencement of the action by Tema Brown against GeoVera was ratified by Ms. Wright on the record before the third-party action was even filed as Ms. Wright's counsel signed both consent orders referring the matter to the Master in Equity for purposes of bringing the third party action against GeoVera – a point that GeoVera itself points out in its brief.[3] Some courts have interpreted the word "ratification" to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability. See Wright & Miller, Federal Practice and Procedure, § 1555 at 709 (West Pub. Co. 1978). Further, as Ms. Wright was and is a party to this action, there would no need for her to be joined. Under the circumstances of this case, there is no risk of multiple liability, and GeoVera's argument of timeliness is an attempt to seek dismissal on a hyper technical interpretation of Rule 17 SCRCP.

As GeoVera notes, 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. In *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64 (D.S.C. 1979), the South Carolina District Court conducted an analysis of Rule 17 and found that "Although Rule 17(a) does not explicitly address the issue of the timeliness of an assignment, courts in construing the rule have held that even when the claim is not assigned until after the action has been instituted the assignee is the real party in interest and can maintain the action." 515 F. Supp. 64 at 84. The *Campus Sweater* Court went on to cite other jurisdictions that have tested the argument of timeliness made under Rule 17. The Court, reviewing the decision of the Tenth Circuit in *Kilbourn v. Western Surety Co.*, 187 F.2d 567 (10th Cir. 1951) noted:

> The court made the telling observation that the then-new rules of federal procedure were adopted to free the courts from the straitjacket

3 See GeoVera's brief p. 18.

> of technical rules of pleading and procedure. The purpose of Rule 17(a), according to the court, was to facilitate a just and speedy adjudication between the interested parties without regard to the technicalities of the rules. The court noted that an adjudication by the present parties would be final, and that there was no danger of harassment by numerous actions by different claimants. Citing the liberal spirit of the new rules which allow substitution of parties to bring in the real party in interest even though an action has already been commenced, the court concluded that justice and the spirit of the new rules required that Kilbourn be allowed to bring the suit even though the assignment postdated the commencement of the action.

515 F. Supp. 64 at 85. The *Campus Sweater* Court, adopting the reasoning of the Tenth Circuit, went on to hold that because the defendant was in no way prejudiced by the assignment since all defenses which were available to it against the assignor were also available to it against the assignee and that there was no possibility of multiple liability upheld the judgment, finding that that "the policies of Rule 17(a)" were protected. *Id.* Here, as in *Campus Sweater*, the policies of Rule 17(a) are protected and the lower court should be affirmed.

B. STATUTE OF LIMITATIONS

i. Questions of Fact

GeoVera argues that it sent notice of its denial of coverage to Ms. Brown on September 28, 2006, January 7, 2008, and April 7, 2008, and that suit was not filed until July of 2011. GeoVera proffered 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. First, the reservation of rights letter dated July 28, 2005 actually found that there was coverage as the policy requires proof that a dog's "lineage contains at least 50%" of an excluded breed and no proof in the form of veterinary records or a written statement from the initial owner of the dog was available. (R. p. 395, lines 2-12). Further, as the lower court held, GeoVera's own documents show that the subsequent denial letters

were returned as "undeliverable." (R. p. 238 and p. 245). Thus, there are at least questions of material fact concerning when, if ever, the insured received the denial letters.

However, the claim asserted in the third-party complaint is for indemnity which is distinct from a claim that the insurer has a duty to defend. GeoVera conceded at oral argument that this action is one for indemnity.

> 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?
> MR. DAVIS: True, Your Honor, but the question of whether there is a right to indemnification is partly based on -- is obviously based on the underlying facts, and I strenuously disagree that we're bound by the facts. There weren't any facts that were relevant to this that were found by Mr. Wills.
> THE COURT: That sort of gets to the heart of the whole matter; does it not?
> MR. DAVIS: It does.

(R. pp. 386-87).

ii. Indemnity

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 Ms. Brown, the insured, was entered on August 18, 2009, and the third-party action seeking indemnity under the policy was filed on

July 19, 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. Accordingly, the lower court's denial of GeoVera's summary judgment motion should be affirmed.

iii. Judgment Creditor

Finally, Ms. Wright, as judgment creditor, can bring a suit against the liability carrier of the dog owner only after obtaining a judgment against the dog owner. *See Cooper v. Georgia Casualty & Sur. Co.*, 244 S.C. 286, 289, 136 S.E.2d 774, 776, (S.C. 1964).

C. THE LOWER COURT LACKED JURISDICTION

Originally, GeoVera styled its argument as a lack of subject matter jurisdiction of the lower court. To the extent GeoVera now seeks to make a new argument that was not raised to the lower court, the argument is not preserved for appellate review. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins.* Co., 395 S.C. 40, 67 n.17, 717 S.E.2d 589, 603 (2011). Citing several foreign jurisdictions, GeoVera now argues the Special Master's order is a final order and that the circuit court loses jurisdiction over a case ten days after entry of a final order.

i. Subject matter jurisdiction

As the lower court held, the subject matter jurisdiction of the court is not implicated by

the ten day rule. As the South Carolina Supreme Court noted in *Russell v. Wachovia Bank,* 370 S.C. 563, 3 S.E.2d 722 (2006):

> 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).

Id. at 20.

ii. No Standing

The lower court properly held that the ten day rule referenced in *Russell* and raised by GeoVera contemplates that this rule applies to parties to the action and the trial court's ability to retain the case; GeoVera was not a party at the time and cannot assert the 10 day rule. Further the parties to the action consented to the amendment.

iii. The Master in Equity's Authority

The Master in Equity derives his authority from the order referring the case. See Rule 53 SCRCP. There are two orders of the Circuit Court referring this matter to the Master in Equity, one for the express purpose of bringing a third-party action. GeoVera never sought relief from Judge Dennis or Judge Harrington, rather, it consented to being substituted as the proper third-party defendant and actively participated in the litigation for several years. (R. pp. 18-19).[4] Further, the Master in Equity 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

4 The third-party action was initially brought against the third party administrator Constitution State Services as it was the party identified in all of the correspondence. Once the policy was received, the complaint was amended to bring in the insurer. However, the original insurer, USF&G Specialty is no longer in existence as it was bought out by GeoVera Specialty Insurance Co. When the corporate history was finally determined and the correct party identified, Plaintiff attempted to add Geovera. GeoVera consented to be added in exchange for dropping the suit against the third party administrator.

has the authority to allow the claim to be brought. Allowing it within this action furthers judicial efficiency. GeoVera never asked for a jury trial and never sought to remove this case to federal court contending the third-party action was a new action.

iv. GeoVera's Consent

GeoVera is correct that by pleading jurisdiction or preserving a defense it does not waive that defense by participating in discovery. (Appellant's Initial Brief, page(s) 37-39). However, GeoVera affirmatively entered into a Consent Order substituting itself as the third-party defendant. It did so without reservation. Our Court has held that affirmative acts by parties inconsistent with defenses waive these defenses. *See Stearns Bank Nat'l Ass'n v. Glenwood Falls*, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007); *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009)("By appearing and arguing the merits of the action multiple times before the circuit court, we find Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction."). As the lower court held, GeoVera has made a general appearance in this case, answering the pleadings, participating in hearings and motions, entering into consent orders, and participating in discovery.

II. GEOVERA FAILED TO PRESERVE THE ISSUES OF THE PRECLUSIVE EFFECT OF DEFAULT JUDGMENTS FOR APPELLATE REVIEW

In its initial brief, GeoVera argues for the first time that the findings of the Special Master are not binding on GeoVera because default judgments do not have preclusive effect. (Appellant's brief p. 13). This issue is not properly before this Court as: 1) this defense was not raised in GeoVera's pleading (see GeoVera's Amended Answer); 2) this defense was not raised in GeoVera's summary judgment briefing (R. pp. 149-71); 3) this issue was not argued at summary judgment (R. pp. 330-62); and 4) this issue was not ruled on by the lower court. (R. pp. 23-31 and

R. pp. 32-34). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 67 n.17, 717 S.E.2d 589, 603 (2011) citing *Great Games, Inc. v. South Carolina Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (holding where the trial court fails to address a nonprevailing party's argument, and the party fails to bring the omission to the court's attention, the argument is not preserved for appellate review).

GeoVera concedes it did not specifically argue that default judgments have no preclusive effect (GeoVera's Response to Motion to Strike p.7). Rather, GeoVera claims that when it generally challenged the effect of the underlying judgment in the declaratory judgment action, this general challenged preserved the issue for appeal. A reference to GeoVera's exchange with the lower court illustrates GeoVera's argument below:

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 [sic] says and Leranta case.

(R. p. 360, lines 3-11). GeoVera's argument has consistently been that nothing in the underlying trial is binding in a subsequent declaratory judgment action concerning coverage. Respondents have consistently met this argument by responding that in these circumstances the underlying result may influence coverage determinations in a declaratory judgment action. At no point during the summary judgment proceeding did GeoVera argue the underlying judgment was a default judgment, and therefore, of no preclusive effect. The words "default judgment" are nowhere in any of the lower court's orders.

State v. Stone, 376 S.C. 32, 665 S.E.2d 487 (2007) is instructive on this issue. In *State v. Stone*, the court found that an issue was not preserved where the appellant argued to exclude the evidence on the basis of the relevance of the testimony at trial, but then argued the effect of testimony on the jury in the appeal. Appellant challenged the evidence generally, but the grounds were different. In this case, GeoVera did not claim the judgment was not preclusive because it was a default judgment. Rather, GeoVera claimed the issues tried before Mr. Wills were not a determination in the coverage action pursuant to *Sims v. Nationwaide Mut. Ins. Co.*, 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965). The issues raised on appeal must be the same as the issues raised below. *Appellate Practice in South Carolina,* third edition, Jean Hoefer Toal, Amelia Waring Walker, Margaret E. Baker (2016). Where the appellant argument differs from the ground for a party's trial objection, the issue is not preserved. *Id.* citing *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997); *State v. Ward*, 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007).

The first time GeoVera raised the issue of the preclusive effect of default judgments was in its motion to reconsider. (R. p. 307, lines 8-10). A party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment. *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). An issue raised for the first time in a Rule 59, SCRCP motion is not preserved for review. *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008). That the Court did not appreciate this argument was being made for the first time is apparent from the Court's failure to even address the argument when denying the reconsideration.

Even if the issue had been preserved for appellate review, GeoVera's argument fails as the

damages portion of this case was actually litigated.[5] As appears from Mr. Wills' order, the damages portion of the case was tried on June 30, 2009. Ms. Wright and the minor child Travis Milligan were present at the hearing to offer evidence and give testimony regarding the damages sustained by Travis, and Ms. Brown and her son LaRon Brown were present to offer evidence in Ms. Brown's defense. After taking testimony and weighing the evidence, Mr. Wills awarded Ms. Wright on behalf of Travis $100, 229.00 in actual damages. Punitive damages were denied.

III. SUMMARY JUDGMENT FOR RESPONDENT SHOULD BE SUSTAINED

A. GEOVERA FAILED TO PRESERVE THE *SIMS* CONFLICT EXCEPTION FOR APPELLATE REVIEW

As an initial matter, GeoVera has again failed to preserve an issue for appellate review. The unpreserved issue arises out of an exception to the general rule of law articulate in *Sims v. Nationwaide Mut. Ins. Co.*, 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965). The *Sims* conflict exception requires some background and further explanation, which will be more fully articulated, *infra*.

B. THE UNDISPUTED FACTS

GeoVera claims that the insured admitted Jinx was a pitbull, and the policy excludes coverage for pitbulls. GeoVera's assertions are belied by the facts. First, GeoVera's initial adjuster prepared a reservation of rights letter that accepted the defense obligation, stating that until they received veterinary records or a breeders' record of the dog's lineage, the case against the insured would be defended. (R. p. 395, lines 9-12). 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% pitbull. (R. p. 88). GeoVera reversed its

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5 Ms. Brown was in default, but as Mr. Wills holds in his order, the testimony established that Mr. Brown had possession of the dog and the dog attacked Travis in satisfaction of S.C. Code Ann. § 47-3-110.

coverage position even though it never received the information its own adjuster deemed necessary to deny coverage – the veterinary records and a breeder's record of the dog's lineage.

Second, though Ms. Brown at one point stated that someone had told her Jinx was a pitbull, in the same statement, she stated that 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. (R. p. 325(4), lines 7-21). Importantly, the initial reservation of rights letter accepting coverage is dated July 28, 2005, several months after the recorded statement of Ms. Brown which now forms the basis of the denial of coverage.

C. THE DOG'S LINEAGE WAS ACTUALLY LITIGATED

Finally, the issue of the dog's lineage was actually tried, testimony received, and decided by Mr. Wills. As the lower court stated:

> 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 pitbull. 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.

(R. p. 33, lines 16-19). The nature and character of the dog and its propensity for viciousness bear upon the extent of emotional distress and the availability of punitive damages. These were issues at the damages trial, and Mr. Wills actually decided this issue in favor of the insured.

If an insurer fails to defend a suit under a reservation of rights or seek a declaratory judgment that there is no coverage, the 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.* 195 F Supp. 659 (1961, DC Pa)(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).

D. SIMS V. NATIONWIDE MUT. INS. CO.

i. The *Sims* Conflict Exception

GeoVera argues that *Sims v. Nationwide Mut. Ins. Co.*, 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965) is controlling on this issue. *Sims* was argued below and supports Respondents' position. 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 reversed finding the acts were intentional torts and therefore excluded despite the trial court's finding of negligence, reasoning:

> ...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.

Id. at 85. In its May 18, 2015 order, the lower court conducted an analysis of *Sims*. The lower court held: "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." (R. p. 33, lines 20-23). The lower court went on to articulate the conflict exception to this general rule reasoning, "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.**" (R. pp. 33-34)(emphasis added).

ii. GeoVera failed to preserve for Appellate Review the Issue of the Applicability of the *Sims* Conflict Exception

As the lower court specifically held, GeoVera never argued that the conflict exception in *Sims* is applicable to this case. Id. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 67 n.17, 717 S.E.2d 589, 603 (2011).

Rather, GeoVera's position has been and remains to this date that the insurer's investigation determined Jinx was a pitbull and therefore GeoVera was relieved of all obligations to its insured. In its brief, GeoVera summarizes its *Sims* argument as follows:

> 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, Tema Brown then testified to the contrary at the damages hearing.

(Appellant's Brief, p. 17). *State v. Stone*, 376 S.C. 32, 665 S.E.2d 487 (2007) is again instructive. In *State v. Stone*, the court found that an issue was not preserved where the appellant argued to exclude the evidence on the basis of the relevance of the testimony at trial, but then argued the effect of testimony on the jury in the appeal. In this case, GeoVera argues that the issues tried before Mr. Wills were not a determination in the coverage action pursuant to *Sims*. GeoVera never argued that it would have had a conflict in representing Ms. Brown in the underlying proceeding.

The issues raised on appeal must be the same as the issues raised below. *Appellate Practice in South Carolina,* third edition, Jean Hoefer Toal, Amelia Waring Walker, Margaret E. Baker (2016). Where the appellant argument differs from the ground for a party's trial objection, the issue is not preserved. *Id* citing *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997); *State v. Ward*, 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007).

In addition, as GeoVera failed to argue the *Sims* conflict exception in its initial brief before this Court, this issue should not be considered on appeal because all issues must be argued in the initial briefs. *State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832, (S.C. Ct. App. 1996) citing Rule 207(b)(1)(B), (D), SCACR; Rule 210(b), SCACR; see also *First State Sav. and Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989); *Sloan Constr. Co. v. South Carolina Bd. of Health and Envtl. Control*, 285 S.C. 523, 331 S.E.2d 345 (1985).

Even if this issue had been properly preserved, the Sims conflict exception is inapplicable in this case as, "[h]ere, 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."(R. p. 34, lines 3-4). In *Sims*, the court held the insurer was not bound by the legal conclusion regarding the acts of the insured because a conflict would have arisen. Here, there was never any allegation that the insured maintained a vicious dog[6] on her property or that she was irresponsible in her ownership of the dog.[7] As the lower court reasoned, "[i]n this case, the pivotal

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6 The policy defines "vicious" dog as "a canine of any breed which any 'Insured' knows has attacked, bitten, or has otherwise caused 'bodily injury' to any person." (R. p. 88). There was never any evidence or allegation that Jinx had ever bitten or caused injury prior to the attack of Travis Milligan. The only issue relevant to coverage was the breed of the dog.

7 The Special Master specifically found that the dog was usually restrained on the property but that it escaped in the excitement of her children's arrival home on the day of the attack. (R. pp. 11, lines 1-3).

issue is the nature and breed of the dog and not the actions of the dog or its owners."(R. p. 33, lines 16-17). GeoVera's representation of Ms. Brown would not have resulted in the "clear conflict" contemplated by *Sims*.

iii. The General Rule

Finding the Sims conflict exception inapplicable to this case, the lower court held: "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." (R. p. 33, lines 20-23). It is not Respondent's position that an insurer cannot contest coverage, it can, but not where the question of coverage turns upon an issue decided in the underlying case.[8] The Lower Court asked GeoVera's counsel if it was GeoVera's position that an insurer could refuse to defend and indemnify and after an adverse result retry liability and damages. GeoVera's counsel stated this was GeoVera's position. (R. p. 360, lines 3-7). First, this is contrary to established precedent, and second, as a policy matter, this is not sound as there would be no reason for the insurer to defend or indemnify in even cases of clear coverage as the insurer could seek a "redo" and urge contradictory results.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, the order of the lower court below should be affirmed.

[signatures on following page]

8 E.g. If an insurer fails to defend a case of clear liability, and the case is tried on damages, then the damages as determined in the trial cannot be relitigated.

Respectfully Submitted By:

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CERTIFICATION

The undersigned certifies that Respondents' Final Reply Brief complies with Rule 211(b) SCRAP.

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